

1992

Ginger E. Rowe v. Norman H. Rowe : Petition for Rehearing

Utah Court of Appeals

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GINGER E. ROWE,)
)
 Plaintiff and Appellee,)
) Case No. 920507-CA
 v.)
)
 NORMAN H. ROWE,) Priority #15
)
 Defendant and Appellant.)

APPEAL OF ORDERS OF THE
FOURTH JUDICIAL DISTRICT COURT
JUDGE CHRISTENSEN AND COMMISSIONER MAETANI

**Attorneys for Defendant/
Appellant**

Mary Noonan
Mary T. Noonan
Clerk of the Court

IN THE UTAH COURT OF APPEALS

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Plaintiff and Appellee,)	
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PETITION FOR REHEARING

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FOURTH JUDICIAL DISTRICT COURT
JUDGE CHRISTENSEN AND COMMISSIONER MAETANI

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PETITION FOR REHEARING

Pursuant to Rule 35 of the Utah Rules of Appellate Procedure, Defendant and Appellant, Norman H. Rowe respectfully petitions the Utah Court of Appeals for rehearing with respect to the Court's decision in the above captioned matter entered November 19, 1993.

BACKGROUND

The case arises from the orders of Commissioner Maetani and Judge Christensen of the Fourth District Court. The orders essentially adopted a stipulation of the parties dated September 10, 1989, in the order to show cause hearing held March 17, 1992. The stipulation had been rejected by the Court in 1989 for failure to comply with the applicable child support guideline statutes. Without taking any further evidence to show compliance with the applicable statutes, the Fourth District Court adopted the stipulation.

ISSUE ON REHEARING

Does a District Court Commissioner have to comply with statutory requirements in ruling on a modification petition?

SUMMARY OF ARGUMENT

The Court misapprehends the failure of the Commissioner to comply with the governing statutes pertaining to the modification of an existing decree. The Court overlooks the facts in the record indicating that Mrs. Rowe had in effect nothing upon which to bring

an order to show cause and that in law a stipulation of the parties cannot bind the Trial Court and is only binding upon the parties once it has been incorporated into an order of the Trial Court. That this had not been done prior to the hearing that gave rise to this action is not in doubt. Therefore, the Commissioner had before him a disputed petition to modify an existing divorce decree, not the enforcement of an ancient stipulation in noncompliance with the applicable statutes. Lastly, neither the findings in the Commissioner's Order nor Mrs. Rowe's arguments comply with the facts in the record - a matter which Mr. Rowe submits this Court has overlooked.

ARGUMENT

I. Compliance With Statute Required. The Legislature has clearly said that when the Commissioner has before him a modification request, he must obey the following:

UTAH CODE ANN. § 78-45-7.

**Determination of amount of support
Rebuttable guidelines.**

(1) Prospective support shall be equal to the amount granted by prior Court Order unless there has been a material change of circumstances on the part of the obligor or obligee.

(2) If no prior Court Order exists, or a material change in circumstances has occurred, the Court determining the amount of prospective support shall require each party to file a proposed award of child support using the guidelines before an Order awarding child support or modifying an existing award may be granted.

(3) If the Court finds sufficient evidence to rebut the guidelines, the Court shall establish support after considering all relevant factors, including but not limited to:

(a) the standard of living and situation of the parties;

(b) the relative wealth and income of the parties;

(c) the ability of the obligor to earn;

(d) the ability of the obligee to earn;

(e) the needs of the obligee, the obligor, and the child;

(f) the ages of the parties; and

(g) the responsibilities of the obligor and the obligee for the support of others.

If the matter is uncontested, the Court then has to follow the following:

Utah Code Ann. § 78-45-7.3 **Procedure -- Documentation -
Stipulation**

(1) In a default or uncontested proceeding, the moving party shall submit:

(a) a completed child support worksheet;

(b) the financial verification required by Subsection 78-45-7.5(5); and

(c) a written statement indicating whether or not the amount of child support requested is consistent with the guidelines.

(2) (a) If the documentation of income required under Subsection (1) is not available, a verified representation of the defaulting party's income by the

moving party, based on the best evidence available, may be submitted.

(b) The evidence shall be in affidavit form and may only be offered after a copy has been provided to the defaulting party in accordance with Utah Rules of Civil Procedure or Title 63, Chapter 46b, the Administrative Procedures Act, in an administrative proceeding.

(3) (a) In a stipulated proceeding, one of the moving parties shall submit:

(i) a completed child support worksheet;

(ii) the financial verification required by Subsection 78-45-7.5(5); and

(iii) a written statement indicating whether or not the amount of child support requested is consistent with the guidelines.

(b) A hearing is not required, but the guidelines shall be used to review the adequacy of a child support Order negotiated by the parents.

(c) A stipulated amount for child support or combined child support and alimony is adequate under the guidelines if the stipulated child support amount or combined amount exceeds the total child support award required by the guidelines. When the stipulated amount exceeds the guidelines, it may be awarded without a finding under Section 78-45-7.2.

Whether the matter is contested or uncontested, it is obvious that the Legislature wanted some documentation under oath from the parties to indicate that the guidelines had been substantially met. That the Commissioner did not do this on the March 17 Order to Show Cause hearing is not argued. (See page 10 of Appellee's Brief where it is admitted.) With both parties agreeing to the non-

compliance and the record devoid of any compliance, how can this Court sustain the actions taken by the Court below?

II. The Stipulation of the Parties Not Binding on the Court.

The Stipulation heretofore submitted by the parties is not binding upon the Court, and the Trial Court has complete discretion to set it aside if it so chooses. See Kline vs. Kline, 544 P.2d 472 (Utah 1975); and as the Utah Supreme Court said in Clawson vs. Clawson, 675 P.2d 562 (Utah 1983), "Stipulations of the parties to an action are only advisory to the Court and the Court is not bound by them."

In the instant case, the Stipulation was submitted to the Court, together with a proposed Order (R Pg. 166, Paragraph 17: Addendum #11, Paragraph 17). However, the Court feeling that the Stipulation did not meet the requirements of the Child Support Guidelines Statutes of the State, requested further documentation from both parties (R Pg. 116, Paragraph 18: Addendum #11, Paragraph 18). When they both failed to supply it, the Stipulation was rejected and the case dismissed.

The record in this case is devoid of any child support worksheets, financial verification or written statements indicating that the child support in the Stipulation was consistent with the Guidelines. Clearly, in signing the Order the Trial Court violated this statute. Further, the Commissioner failed to follow Rule 4-504 of the Code of Judicial Administration which states:

(8) No orders, judgments, or decrees based upon stipulation shall be signed or entered unless the stipulation is in writing, signed by the attorneys of record for the respective parties and filed with the clerk or the stipulation was made on the record.

A careful review of the record indicates that the Stipulation was neither signed by respective counsel, nor read into the record. Thus, by adopting it, the Court violated this rule, and renders its Order unenforceable.

In 1989, when the documentation was not forthcoming, the Court quite correctly rejected both the Stipulation and the proposed Order, and both documents were returned by the Court through its clerk to the defendant's attorney, who had mailed them to the Court (R Pg. 165, Paragraph 20; R Pg. 87: Addendum #5).

Further, based upon the failure of either party to provide the necessary documentation, the Court on its own motion, dismissed the case on April 15, 1991 (R Pg. 96; Addendum #7). Therefore, since the Stipulation had been rejected by the Court, it was not a valid document upon which Mrs. Rowe could bring an order to show cause and not a document which the Court could adopt without complying with the statute.

III. Findings of the Order Not Supported by Facts:

(a) In Paragraph 2 of the Order, it states that the parties entered into a Stipulation on September 10, 1989, prepared by Norman Rowe's attorney, and that the Stipulation was never filed

by his attorney. This finding in the Order is manifestly incorrect since the documents and Affidavits filed with the Court on March 25, 1992, clearly indicate that the Stipulation was filed with the Court, and was rejected. (See Affidavit of Graham Dodd and accompanying documents from the Clerk of the Court returning the Stipulation and Order, Addendum #'s 5 and 11). That the Commissioner committed error, there can be no doubt; for in the transcript of the hearing held on March 17, 1991, the Commissioner concluded in ten (10) difference places that the Stipulation was never filed. (R Pgs. 492, 495, 496, 497, 498, 499, 501, and 502; Addendum #10) This could have been avoided had he read the file before him and his own clerk's letter (R Pg. 87: Addendum #5).

IV. Plaintiff & Appellee's Arguments Not Based Upon the Record.

Plaintiff alleges that she sent the Stipulation to the Court on September 26, 1989 along with a cover letter indicating that she was not represented by counsel; however, the record does not show the original of this letter, nor is this statement supported. In fact, a copy of it does not show up in the record until March 17, 1992, 2 1/2 years later, submitted by plaintiff's attorney at the Order to Show Cause Hearing held March 17, 1992 (R 103 and 109). Contrary to this, the letter from the Commissioner's clerk to defendant's attorney rejecting the Stipulation and Order was

mailed on January 18, 1990, indicating that he was the one who in fact filed the documents (R Pg. 87). The foregoing shows the confusion in the mind of the plaintiff in remembering the facts. However, it is clear from the defendant's letter of September 10, 1990 that the parties had earlier discussed the matter and plaintiff knew that the Stipulation had not been accepted by the Court (R Pg. 191; Addendum, Exhibit 4) and in his affidavit, defendant further states "he advised her (plaintiff) of the same" (R Pg. 193, ¶7; Addendum, Exhibit 5). In addition, the plaintiff was not being paid the \$900.00 per month required by the Stipulation (see R Pgs. 173-189; Addendum, Exhibit 6) and defendant told her this in early 1990 (R Pg. 191 Addendum, Exhibit 4). Further, the statements in plaintiff's letter pertaining to her being not represented by counsel are not correct since plaintiff's attorney did not withdraw until October 20, 1989, well after September 26 of the same year (R Pg. 86; Addendum, Exhibit 7). In addition, contrary to plaintiff's statements of fact that she was not notified, both the Court's Order to Show Cause (R Pg. 88; Addendum, Exhibit 8) and its Order of Dismissal (R Pg. 96; Addendum, Exhibit 9) show that plaintiff was copied by the Court. In addition, the defendant notified plaintiff himself (R Pg. 193 ¶7; Addendum, Exhibit 5). Therefore, the record shows that the

plaintiff was well notified that the Stipulation had been rejected by the Court.

The only part of the Trial Court's Order which is on all fours with the facts in the record is that Mr. Rowe paid to Mrs. Rowe the sum of \$12,600.00 which represented two months child support at \$800.00 per month, and \$11,000.00 to satisfy arrearages to obtain a satisfaction of judgment from an administrative court of the State. But this exchange of money for the judgment release was done on October 6, 1989, before the stipulation had been submitted to the Trial Court, and at a time when both parties thought the Court would accept it. (See record page 136 for copy of receipt.) By rejecting the stipulation submitted in 1989, the Court rejected all of its parts--including the exchange of money for the satisfaction of judgment upon which the Commissioner now claims to rely. Besides which, Mrs. Rowe received full consideration for the satisfaction. There is nothing in the record to show otherwise, or that she has been prejudiced or damaged by the exchange. For the Commissioner to conclude that the satisfaction of judgment in exchange for the \$11,000.00 was grounds for enforcement of the Stipulation without taking additional evidence was simply error. This Court should not condone that error by affirming the action. Even if the Stipulation had been adopted by the Commissioner in 1989, Mr. Rowe would still have had the right to challenge it due

to material change of circumstances. This is his right by law. This has effectively been denied him by the Commissioner.

CONCLUSION

Mr. Rowe submits that the record in this case is clear. The Commissioner had before him on March 17, 1991 a petition for modification. The law in Utah is clear on the procedure and duties of the Trial Court in adjudicating modifications. The Commissioner did not follow the statutes and did not follow the rules of court. In addition, by its prior acts, the Trial Court had rejected and rendered void the Stipulation. Neither the findings in the Commissioner's order, nor the arguments of Mrs. Rowe are supported by the record.

For the foregoing reasons, this Court should prevent a miscarriage of justice and strike its prior order affirming the lower court's orders entered on the 19th day of November 1993 and reverse the lower court's actions as being in contravention of the applicable statutes and not in keeping with the facts of the case.

Respectfully submitted on the 3rd day of December, 1993.

KIRTON, McCONKIE & POELMAN

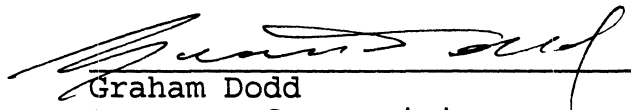
By: 

Graham Dodd
Attorney for Norman H. Rowe
Defendant & Appellant

CERTIFICATION

The undersigned certifies that the Petition for Rehearing is presented in good faith and not for delay.

Dated on this the 3rd day of December, 1993.

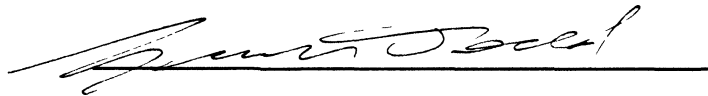


Graham Dodd
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of December, 1993, I mailed two true and correct copies of the foregoing **PETITION FOR REHEARING**, first class postage, prepaid to the following:

Reid E. Lewis (1951)
Mark W. May (5512)
MOYLE & DRAPER, P.C.
600 Deseret Plaza
No. 15 East First South
Salt Lake City, Utah 84111

A handwritten signature in cursive script, appearing to read "Reid E. Lewis", is written over a horizontal line.