

1992

Ginger E. Rowe v. Norman H. Rowe : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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

REPLY BRIEF OF APPELLANT
NORMAN H. ROWE

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

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Appeals

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Mary E. Noone
Mary E. Noone, Clerk

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PRELIMINARY STATEMENT

Plaintiff raises several issues on appeal which were not raised at the Trial Court level. In addition, in the Brief of Appellee, Ginger E. Rowe, her "Statement of Case" is only partially correct and omits certain crucial facts; for example, plaintiff omits that at the time of the plaintiff's Order to Show Cause hearing on March 17, 1992, defendant had already filed his own action to modify the Texas Decree (Case #92-4400164; (R Pg. 25); which was consolidated before the Trial Court (R Pg. 199, Addendum, Exhibit 1) at the said hearing. Therefore the Trial Court had not only the plaintiff's request for enforcement of child support payments, but also defendant's request for modification based upon his change of material circumstances at the hearing held on March 17, 1992. Defendant made it clear in his pro se appearance that he was unemployed and was before the Court for a modification (R. Pg 703, Lines 22-24; Addendum, Exhibit 2). The Commissioner acknowledged this by stating, "Well, you have a right to come in on your modification." (R. Pg. 704, Lines 1-2; Addendum, Exhibit 2). But the Commissioner completely failed to address the issue of the changed circumstances of the parties and simply enforced the Stipulation, without obtaining any additional evidence. Defendant contends this was error. Plaintiff contends that this was harmless error--but it was not harmless to defendant since it made him

liable for excessive child support payments from the date of the Stipulation and made the same amounts enforceable against him progressively, without taking into account the material changes in circumstances of the parties. All of this was done without compliance to the applicable statutes and in violation of defendant's right to due process of the law. Further, the plaintiff claims that if the Stipulation is not enforceable, then the Satisfaction of Judgment signed by plaintiff is not valid. However, the facts show that plaintiff received \$11,000.00 for her Satisfaction of Judgment and therefore has received consideration and made the satisfaction binding.

ARGUMENT

I. PLAINTIFF'S ISSUES NOT RAISED IN TRIAL COURT; THEREFORE CANNOT BE RAISED NOW.

The plaintiff, in her reply brief, raises for the first time the issues covering the following:

- a. Binding nature of the Stipulation on the Court;
- b. Statutory requirements were satisfied;
- c. Harmless error;
- d. Court's adoption of Stipulation supported by fact;
- e. Non-Waiver of Stipulation;
- f. Failure to marshall evidence;
- g. Meeting of the minds on the Stipulation; and

h. No improper execution of the Order on Order to Show Cause.

In fact, the plaintiff in the Court below never filed any formal documents opposing the documents, affidavits, motions and objection to the Commissioner's Order on Order to Show Cause filed by defendant. The only document filed by plaintiff was the submittal request for a ruling to Judge Christensen (R Pg. 367; Addendum, Exhibit 3). She thereby waived her right to raise any issues thereafter. Since none of the items (a) through (h) above were raised at the Trial Court level, they cannot now be raised on Appeal. Wurst v. Dept. of Employment, 818 P.2d 1036 (Utah App. 1991). Further, a look at the transcript of the oral argument before the Commissioner plainly shows that not only did plaintiff not argue any of items (a) through (h) above, but that her sole argument was that the Stipulation (R Pg. 108) either be enforced or not be enforced (R Pg. 680; Addendum, Exhibit 2).

II. PLAINTIFF'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. But plaintiff did nothing; but why should she, she was living in Colorado.

III. HARMLESS ERROR

To argue that the actions of the Trial Court were harmless error is to mistake the term. Harmless is if no injustice is done, and there is no reasonable likelihood that the error effected the outcome. Crookston v. Fire Ins. Exchange, 817 P.2d 789 (Utah 1991). While the defendant supports the proposition that adequate child support needs to be paid, it needs to be assessed based upon the guidelines passed by the Legislature and the Trial Court cannot substitute its judgment for that of the Legislature. The plaintiff bases her theory of harmless error on speculation and not facts stated under oath before the Court. The record is devoid of any compliance with the applicable statutes. Further, to say that defendant is not harmed by the Court's actions is to ignore the actualities of the case and facts as they exist before the Court. Clearly defendant thought the Stipulation had been voided by the Trial Court. He wrote to plaintiff and told her so (R pg 191; Addendum, Exhibit 4) in his letter of September 10, 1990, reminding her of their earlier discussions on the subject, also reminding

plaintiff that she could not expect the \$900.00 per month agreed to in the Stipulation, as he was only bound by the \$700.00 per month Ordered by the Texas Divorce Decree. Plaintiff accepted the lesser amount (R pgs. 173-189; Addendum, Exhibit 6). The plaintiff made no attempt to change the Court's actions on the 1988 case until 1992 when the defendant brought his action for modification (case #92-4400164) (R pgs. 1-49), at which time she reasserted the Stipulation. By asserting that the Trial Court committed harmless error in adopting the Stipulation nunc-pro-tune, without complying with § 78-45-7.3(3) or § 78-45-7, the plaintiff misses the vital and cardinal fact that the defendant only raised this argument with respect to the Order to Show Cause Hearing held on March 17, 1992. The defendant accepts the actions of the Commissioner to be in keeping with the statutes in what he did in 1988-89, in rejecting the Stipulation, denying the Order, and dismissing the case. But it is his complete reversal on the March 17, 1992 Order to Show Cause hearing -- without any additional documents or facts, and in contravention of the statutes, that defendant claims as error. Further, the action of the Commissioner was harmful because:

(a) Commissioner Substituted His Own Wisdom for That of the Legislature. 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.)

(b) Decisions Must be Based Upon Facts Before Court.

In her attempts to call the error harmless, the plaintiff has cited allegations from pleadings filed by the defendant which were not made under oath. Plaintiff has then speculated as to what the defendant's income may have been in 1986, 1987, and 1988 to produce a child support guideline which is not part of the record, and is therefore objected to as speculative and irrelevant. This is exactly what the Legislature did not want judges to do. Plaintiff then cites the Law Review Article by Judge Billings - which appropriately enough was entitled "From Guesswork to Guidelines." But the plaintiff's argument is simply just that -- "guesswork," since the Trial Court had failed to obtain the current evidence on the parties' financial status, and material changed circumstances, if any, to give it some evidence to comply with the guidelines.

(c) Commissioner Violated Due Process.

In both the 1988 hearing and the 1992 hearing, the Commissioner had before him the modification of the Texas decree. In one instance, he applied the statutes, in the second, he did not, without any further evidence before him. This provides for an unpredictable, uneven, and personalized standard of justice that the Legislature has tried to avoid and Courts must not allow to happen. Perhaps the greatest harm was that the defendant was not allowed his day in Court. By not following the statutes, the Court deprived him of due process by not allowing him to state his material change of circumstances upon which the Court could have then made an informed decision. It does not matter what the parties agreed to in 1988 in the Stipulation if the circumstances have materially changed--the Trial Court must listen to the evidence on the change. **THIS THE COURT FAILED TO DO.** Defendant has essentially been denied due process of the law by the Commissioner's actions. Because the defendant signed a Stipulation in 1988 based upon his circumstances and ability to pay child support at that time, does not mean that he is bound by it for the rest of his life. *Utah Code Ann.* § 78-45-7(1) allows for the modification and case law allows for voidance and repudiation of a Stipulation, Kline v. Kline, 544 P.2d 472, 476 (Utah 1975) and they are not binding upon the Courts, Clawson v. Clawson, 675 P.2d

562 (Utah 1983). Therefore, the Commissioner, based upon a reading of the Stipulation only, and without any supporting evidence, and upon the false premise that the Stipulation had not been filed with him in the 1988 case, adopted the Stipulation. This was also based upon the false premise that the Stipulation was binding upon the parties because plaintiff had given a Satisfaction of Judgment in a Utah Administrative Law suit. However, the record clearly shows the payment of \$11,000.00 to plaintiff as consideration for the same (R Pg. 136; Addendum, Exhibit 11). In addition, since the Stipulation was never adopted in 1988, it does not follow that if the Commissioner's Order, on Order to Show Cause is set aside, that the Satisfaction of Judgment must also be set aside. The law provides for changes in conditions of the parties which would permit the reduction of child support and therefore upon a proper showing, the child support part of the Stipulation may be modified without the Satisfaction of Judgment also being set aside since the modification is based upon material changed conditions. But the Court must hear evidence to determine if the changed conditions are in fact material and would in fact allow for a modification to the Texas decree. It is clear that Commissioner Maetani was sidetracked by the arguments of plaintiff's attorney at the oral presentation of March 17, 1992. But it was only argument and the Commissioner should not have been persuaded that he only had two

decisions before him, i.e., the enforcement or the non-enforcement of the Stipulation (R Pg. 680; Addendum, Exhibit 2) nor that the only thing he had before him was the question of the Stipulation (R Pg. 691, lines 10-12; Addendum, Exhibit 2) and that it was controlling (R Pg. 687, lines 7-8; Addendum, Exhibit 2). As the record shows, the Commissioner, upon the urging of plaintiff's attorney, was convinced that the entire question of the enforcement of the Stipulation evolved around the failure of defendant's attorney to file the same in 1988. He states this seventeen (17) times in the transcript (R Pgs. 679, 683 (twice), 684, 685 (thrice), 692, 695 (twice) 696, 704, 705 & 708; Addendum, Exhibit 2). That this belief was plain error is evidenced by his clerk's letter (R Pg. 121; Addendum, Exhibit 10) indicating that the Stipulation had been filed and rejected by him in 1988. Surely the holding of the Utah Supreme Court in 1983 is applicable to the case at bar when it held:

An error is reversible if there is a reasonable likelihood that more a favorable result would have been obtained by complaining party, in absence of error.

Harris v. Utah Transit Authority, 671 P.2d 217-222. Had the Trial Court taken evidence on the parties' income and financial status as required by the statutes cited above, a different, more favorable result must occur since the defendant was unemployed at the time (R Pg. 703, Lines 22-24; Addendum, Exhibit 2) and he told

the Commissioner so at the March 17, 1992 Order to Show Cause hearing. But the Commissioner imposed upon him the 1988 Stipulation on the theory that he was bound by it because his lawyer had failed to file it. At the March 17, 1992 Order to Show Cause hearing, the Commissioner failed to take sufficient evidence on the parties' financial status and thus prevented defendant from fully stating his case. Defendant was not given the opportunity by the Trial Court to state his case for modification. In a similar case, the Supreme Court held:

Cumulative error in exclusion of evidence offered by manufacturers of vehicle in products liability action required reversal of judgment in favor of injured passenger; manufacturer was unable to present to jury his theory of case and was deprived of fair trial.

Whitehead v. American Motors Sales Corp., 801 P.2d 920, 928. By not following the statutory guidelines as evidenced above, and by omitting evidence which would have been provided thereby, the Court committed harmful error which prejudiced the Court's decision and the defendant's rights to a fair hearing.

IV. IMPROPER EXECUTION.

Defendant acknowledges that its claim to improper execution of the Order on Order to Show Cause is moot. When the District Court gave defendant the record for its appeal brief, it never gave him file #924400164. Therefore, defendant never had any knowledge

of the original signature of Commissioner Maetani on the Order until the file was given to him by the District Court recently.

V. ESTOPPEL.

Finally, the plaintiff has argued that defendant's estoppel argument is barred because it was not raised at the Trial Court level. But the transcript of the March 17, 1992 Order to Show Cause hearing indicates that the defendant acting pro se did attempt to raise this issue with Commissioner Maetani when he said:

MR. ROWE: Well, we've agreed for all this time until now, until the point when I became in a hard position. She's been taking all these monies that I've been paying for a year and a half and never made any issue out of anything. I've got all my checks --

(R Pg. 691, Lines 4-9; Addendum, Exhibit 2). While this was not stated as an attorney would state it, it is sufficient to indicate to the Commissioner that plaintiff had done nothing for 1 1/2 years. In fact, the record shows she did nothing from October of 1988 until February of 1992 (almost 3 1/2 years). It must be remembered that due to his unemployed state, defendant appeared at the March 17 Order to Show Cause Hearing pro se. What he said and presented to the Commissioner did not become a part of the record until October 30, 1992, long after the final Order by Judge Christensen dated June 4, 1992. Therefore, and for the above stated reasons, the claim for estoppel was not refined in the objection documents, although it was argued to and ignored by the

Commissioner. However, there are recognizable exceptions to the hard and fast rule barring issues on appeal that were not raised on the Trial Court level. LMV Leasing, Inc. v. Conlin, 804 P.2d 189, 198 (Utah App. 1991). These exceptions include plain error committed at the Trial Court level and when the interests of justice require it. Defendant submits that the case at bar is just such a case.

CONCLUSION

Due to the plaintiff's failure to file any formal arguments opposing the documents, motions, affidavits, and objections, or to make any arguments on oral argument, the arguments raised in her reply brief (a) through (h) above should not be considered by the Court. Essentially, all the plaintiff did at the Trial Court level was to file the Stipulation at the March 17, 1992 Order to Show Cause hearing, and ask the Court to enforce it. Thereafter, they did nothing. But since the Trial Court clearly had before it the claims of the parties with respect to material changes of circumstances, and request for modification of the Texas decree, the Trial Court should have gone further and followed the applicable statutes and obtained information under oath from the parties. By not doing so, the Trial Court committed plain error, violated the defendant's rights and rendered an uninformed decision. To state that the foregoing is harmless error is to make

mockery of the concept. This Court should vacate both the Commissioner's and Judge Christensen's Orders and remand the case back to the Commissioner to take further evidence and render a decision in compliance with the applicable statutes and facts which would then be before the Court.

DATED this 27th day of May, 1993.

KIRTON, McCONKIE & POELMAN

By: 

Graham Dodd
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of May, 1993, I mailed a true and correct copy of the foregoing **REPLY BRIEF OF APPELLANT NORMAN H. ROWE** first class postage prepaid to the following:

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