

1992

Michael Poulsen v. Lynn Poulsen : Reply Brief

Utah Court of Appeals

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Renee M. Jimenez; Attorney for Appellee.

Lynn Poulsen.

Recommended Citation

Reply Brief, *Poulsen v. Poulsen*, No. 920701 (Utah Court of Appeals, 1992).

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IN THE UTAH COURT OF APPEALS
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MICHAEL POULSEN)	
PLAINTIFF/RESPONDENT)	
)	
vs.)	CASE NO. 920701-CA
)	
LYNN POULSEN)	
DEFENDANT/APPELLANT,)	
)	PRIORITY 15
<hr/>		
STATE OF UTAH, by and through)	
Department of Human Services,)	
Intervenor, Appellee,)	

REPLY BRIEF OF APPELLANT

Appeal from Order denying Defendant's
Motion for Relief 60(b) from Ex-Parte Order
Granting Intervenor's right to collect child support,
Order issued in the Third District Court,
by the Honorable David S. Young
presiding,
minute order signed September 22, 1992
Notice of Appeal filed October 22, 1992

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COURT OF APPEALS

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REPLY BRIEF OF APPELLANT

RESPONSE TO STATE'S STATEMENT OF THE ISSUES

AND STANDARDS OF REVIEW

The Appellant Appeals a Rule 60(b) Motion requesting Relief from the Final Judgment of Honorable David S. Young on 21 October 1992. The Court of Appeals has appellate jurisdiction over final orders of other agencies as well as the Third District Court pursuant to the Utah Code Annotated 78-2a-3(2)(a).

The trial Court clearly abused it's discretion by not having any substantial evidence before it to allow ORS to Intervene and set Aside Appellant's Withhold and Deliver Order. There was no Notice sent to Appellant and no arguments allowed before the Court and therefore denied Appellant due process and violated Article 1

sec. 7 of the Utah State Constitution.

The Court did not act correctly in allowing the ORS to Intervene. Intervention has conditions and certain rules and regulations and standards that were not present. The ORS also was acting in violation of it's own Rules and Regulations for case closures. see CFR 303.11(a)(9) & Human Services, Recovery Services, R527-273-1 B.1.3.

The Court should not have allowed the Setting Aside of the Appellant's Withhold and Deliver as a matter of res judicata. The Appellant already had adjudicated the collection of her support monies and was receiving her support monies.

The Utah Statute 62A-11-404 (1989 & Supp. 1992) & 62A-11-414 is facially unconstitutional and vague as to terms and conditions and has been used arbitrarily and capriciously, without any standard for reasonableness being applied in this case.

All matters presently before this Court are proper before this Court, timely, and have been raised in the lower Court.

STATEMENT OF THE FACTS

The Appellant responds and hereby objects to the State's Statement of the Facts.

1. The Plaintiff and the Appellant separated on 14 November 1990.

The Plaintiff then filed for Divorce on 26 March 1991. For eighteen months previous to the State's intervention, both agreed to allow Plaintiff to pay his Child Support and Alimony voluntarily - without interference by the State.

2. On 27 March 1992, the Plaintiff was granted a Default Divorce Decree which the Appellant appealed to this Court from said Decree, and this Court summarily reversed on 3 March 1993 for fraud and duress (Case No. 92-0523CA). The District Court granted Appellant a Extra Ordinary Writ of Relief and there is only in place a temporary support order at this time (Case No. 910491255).

3. The Plaintiff had become behind in his support monies \$776.00 within less than 3 months after the Decree was granted and stopped sending any support monies to Appellant completely by June of 1992.

4. Sometime during June of 1992, the Plaintiff's fifteen year old daughter contacted the Plaintiff whom she had not seen for over eighteen months to inquire why he was making things so difficult. The Plaintiff told his daughter that he "had a new life and that the family would just have to go on Welfare".

5. On 30 June 1992, the Appellant sought the help of the District Court to collect her support monies from Plaintiff. The Honorable David S. Young granted the Appellant her Withhold and Deliver on 30 June 1992, as the Appellant had already brought an Order to Show Cause Hearing on her own and reduced the arrearages to judgment.

6. The day that Appellant received her remedy through the District Court, 30 June 1992, Commissioner Michael Evans told the Plaintiff that the voluntary choice to send support monies was now "out of his hands" and in the Courts.

7. The next day, 1 July 1992, the Plaintiff applied for assistance to collect the Appellant's support obligations, which he had refused to send voluntarily.

8. The Appellant was told by one of the Clerks at Third District Court on 16 July 1992, that ORS had filed a Ex-parte Motion to Intervene.

9. The Appellant went to ORS and talked with Shanna Hair and Renee Jimenez and told them both that Plaintiff had just applied to delay and defraud the Appellant of her support monies.

10. The Appellant gave ORS a letter in writing that she did not want her child support collected through the State as she feared she would not receive the full amount.

11. Since the Intervention of the ORS, the Plaintiff is \$4,197.00 in arrears to the Appellant and her children's detriment as Appellant is not receiving any form of assistance from the State, nor is she employed.

12. The Appellant received by mail a copy of an Ex-parte Motion to Intervene, but no Notice of Hearing as now appears in the Appellee's Brief. Furthermore, Commissioner Thomas Arnett stated on

19 August 1992, that "there was no Notice in the Courts file" (Appellant's Exhibit J).

13. The Commissioner was in full agreement with the Appellant that the State had no right to Intervene when Appellant and her five minor children neither receive, nor want State Welfare.

14. The Appellant had argued the State's right to Intervene, and also at that time stated that she had not received Notice of what the hearing was for, nor had she received the State's Motion to Set Aside Defendant's Withhold and Deliver.

15. The Appellant brought forward the issues of privacy, previous conduct of parties and intent of Plaintiff to evade his support obligations. Issues of right to contract, standing of the State's right to Intervene and due process violation, as well as the Open Court's Clause.

16. Commissioner Arnett then stated that the State had already been granted the right to Intervene and only the Setting Aside was at issue for this Hearing. This Motion for Setting Aside Withhold and Deliver was never received by the Appellant.

17. The Appellant then filed a Motion for Relief Rule 60(b) from State's Intervention, and Judge Young denied the Appellant her request for a Hearing on this Motion 22 September 1992.

18. The Plaintiff is now \$4,197.00 in arrears and the Appellant and her children have been irreparably injured as a result of the

collusion of the State and Plaintiff, and has never received the Court ordered amount of \$900.00 per month since the Intervention. Barlow v. Collins, 397 U.S. 159 (1970).

RESPONSE TO SUMMARY OF ARGUMENT

The Appellant is appealing from a Rule 60(b) Motion for Relief which is timely and proper before this Court.

A Rule 60(b) can be made up to three months after a final order. The Appellant filed timely in the lower Court.

A Rule 60(b)(3) states that "relief may be obtained if the judgment was obtained by fraud or misrepresentation or other misconduct of an adverse party".

Rule 60(b)(6) "if it is no longer equitable that judgment should have application".

Rule 60(b)(7) "any other reason justifying relief from operation of judgement".

The trial Court abused it's discretion by not allowing the Appellant to have her side heard. To explain the previous conduct of the parties and the fraudulent reasons for Plaintiff's application to the State.

The Court abused it's discretion by acting arbitrarily and capriciously with no substantial evidence ever submitted to the

Court to allow the State Standing or to determine an "injury in fact" and "zone of interests" of the State.

The only ones who have suffered as a result of the Intervention are the persons whose interests the State contends to be protecting, but the fact remains that the Plaintiff has been allowed to advance \$4,197.00 in arrearages, with the State's assistance.

The Court asked for no proffers of proof and no testimony was given in support of State's Intervention and the Appellant moves this Court to reverse the lower Courts decision and grant a reversal on Appellant's Rule 60(b) Motion and Order the State to pay the \$4,197.00 in arrearages that Appellant and her children have suffered.

ARGUMENT

RESPONSE TO POINT I OF APPELLEE

The Court has jurisdiction to hear cases from a final appealable Order. A rule 60(b), of which the lower Court denied to Appellant, is a final appealable Order from which an appeal may be taken. Amica Mut. Ins. Co. v. Schettler, 768 P.2d 950 (Utah Ct. App. 1989). The Appellant filed her appeal timely and has shown an obvious abuse of discretion by the lower Court in which the

Appellant has proven that if all evidence would have been heard before the lower Court at a Hearing or trial, would have resulted in a different judgment than the one that was entered. State ex rel Utah State Dept. of Social Services v. Musselman, 667 P.2d 1053 (Utah 1983). The trial Court made an erroneous assumption on absolutely no substantial evidence before it that the State could Intervene and Set Aside an Order.

Furthermore, the judgment by the trial Court was clearly an abuse of discretion as the State should have been estopped when a substantial injustice would result from the State's involvement under these unusual circumstances and there would be no adverse effect on public welfare. Utah State University v. Sutro & Co., 646 P.2d 715 (Utah 1982).

RESPONSE TO POINT II

The Court clearly abused it's discretion by not granting Appellant's Rule 60(b) Motion. The results have been unjust and abusive to the very persons the Legislature and the Courts are supposed to protect. The State cannot deny that there was no need to Set Aside Appellant's Withhold and Deliver, if it's interest is to lessen cost to public welfare and dependency, and ensure that child support be enforced.

The State has only allowed Mr. Poulsen, who neither contacts

nor cares for his children, to achieve arrearages to the children's detriment. Mr. Poulsen also has a working spouse and two other people in the home currently employed and has been able to take trips this summer to Hawaii and Disneyland, all while the State supports the robbing of Appellant's child support monies.

The State has denied the Appellant the right to a remedy through the Court's as Constitutionally guaranteed to her and yet has shown no standing or "injury in fact".

The Court should reverse the lower Court's decision and allow the Appellant to collect her child support and alimony monies, according to her Court Order, totaling \$900.00 per month.

The Court acted improperly in denying the Rule 60(b) Motion for Relief. The results have been unjust and abusive to the very persons the Legislature and the Courts are Aside supposed to protect. The State cannot deny that there was no to Set Aside Appellant's Withhold and Deliver, if it's interest to lessen cost to public welfare and dependency and ensure child support be enforced.

Setting Aside the Appellant's Withhold and Deliver Order has irreparably injured the Appellant to collect her child support monies according to common-law rights and remedies, one of those being a restoration the Judicial Order that would allow the Appellant to have support monies of \$900.00 per month sent directly

to her and children.

RESPONSE TO POINT III A, B, & C and IV

The Court did not inquire as to the proper notice requirements that govern all agency adjudicative actions, and to determine if proper notice was given and also establish necessary standing in the Court.

The Court should have allowed evidence and argument, neither of which the State shows any proffers of, only a statute that is quoted in part.

Title IV-D 651 et seq. section 666(a)(8) states that "when there is an availability of other remedies and other relevant considerations and that application would not carry out the purposes of either the Congress or the State Legislature that 654(6) would be inappropriate".

The facts supporting this very clause are:

(A) That the Appellant had a very viable and workable Withhold and Deliver in place and was receiving her child support.

(B) That the previous conduct of the parties had been one of not going to the State for any kind of assistance.

(C) That Mr. Poulsen only sought refuge in the State's Intervention and has successfully achieved an arrearage

accumulation, in an amount in excess of \$4,197.00.

(D) It was neither the intent of the Congress nor of the Legislature to hinder and impede independence and self reliance of the Appellant in her efforts to actively pursue collection of her child support through her own honest efforts.

(E) The Military does not send it's child support monies through the State but instead the Department of Treasury sends payments directly to the Obligee.

(F) The Appellant simply achieved the same results through a Judicial Order, signed by Judge Young, to have Mr. Poulsen's support obligations sent directly to the Appellant, as there was no debt of public assistance owed by neither the Appellant, her children, nor Mr. Poulsen.

The Social Security Title IV-D program was not enacted to abuse women and children and protect dead-beat Dads and yet that is the very result of the State's Intervention and Setting Aside of Appellant's withhold and Deliver. The State can marshall no evidence before this Court that their "assistance" they have benefitted anyone but Mr. Poulsen, as he has been "relieved" of \$4,197.00 with that amount accruing to the detriment and not benefit of the five Poulsen children.

To state that anyone for any reason, even with the intent to evade and defraud the very persons the State claims to protect, has

a right to cause such injustice, shows the State acted arbitrarily and capriciously in this case Sisco Hilte v. Industrial Comm'n., 766 P.2d 1089, 1091 (Utah Ct. App. 1988).

Mr. Poulsen did not apply to the State to enforce his child support. It was already being collected, but to hinder and defraud the Appellant and her children. Mr. Poulsen's 15 year old daughter contacted her father, for the first time in over a year and a half, to inquire why he was refusing to pay child support. Mr. Poulsen told his daughter that it was time to go on to welfare as he had a new life now.

The procedural safe guards throughout the ORS have been invoked by the Appellant. The Appellant's not only objected to the State's interference in writing, but also in person (R527-273-1 B.1). There was a written judicial order in place and the State intervened in bad faith as the Appellant had shown that the State's intervention was not needed (R527-300-1(2)(b)(iii)). The Appellant placed in writing that she wanted NO interference from ORS and to terminate any further proceedings (R527-300-8(1).b). The Obligor does not owe the State as the Appellant has received no assistance.

The State further does not comply with the CFR 303.11(9) as Appellant notified ORS in writing and also filed a Notice of a claim against them for interfering with the Appellant's child support collection.

The State claims that they must provide this "service" to the Plaintiff but discriminates against the custodial parent, the Appellant and her children and refuse to close this case as pursuant to Congressional Federal Regulations.

The State has not marshalled forth any evidence as real party in interest or right to join.

The State neither had to establish, modify or enforce a Court Order pursuant to 62-A-11-106(1). The State furthermore entered into a matter of which there is no evidence that the ORS had a right to recover anything from the judgement Order. Therefore, it was erroneous for the lower Court to have allowed the State to Intervene and not require evidence as condition of Intervention as is required in Utah Rules of Civil Procedure, Rules 17 and 19 to be strictly followed. The State provided no evidence that by not joining it would impair or impede its ability to protect any interest, as the State can show none.

The State did not have to help Mr. Poulsen enforce the child support. The Appellant effectively and adequately was enforcing collection of her support obligations.

The State failed to follow proper procedural requirements. The Appellant would like Court to take Judicial Notice that the State's Ex-parte Motion to Intervene was not filed with the trial Court on 23 July 1992 as stated in Appellee's brief (Page 7). The

Appellant was not sent by U.S. mail a Notice of State's Motion to Set Aside Withhold and Deliver as evidenced by the Notice of Objections to State's Ex-parte Motion to Intervene filed 31 July 1992. The Appellant never received any Notice of Hearings as stated by Commissioner Arnett and as evidenced by exhibit in Appellant's brief transcript of proceedings and therefore did not have an opportunity to be heard on the issue of the Setting Aside of Appellant's Withhold and Deliver.

RESPONSE TO POINT V

The Appellee continuously has evaded the issues of right to contract.

The Appellant's Divorce Decree specifically stated that both the child support of \$700.00 and the alimony of \$200.00 were to be paid by wage assignment. A wage assignment is contractual in nature. Western v. Hodgson C.A.W., (VA 1974) 494 F.2d 379.

The State helped support Mr. Poulsen in completing a fraudulent transfer, of which all essential elements of fraud exist:

1. The parties entered into an agreement to voluntarily comply.
2. When Mr. Poulsen realized that he could run to the State to fraudulently transfer any right to Appellant's child support to be

paid by Wage Assignment.

3. The risk to the Obligor has harmed the Appellant and her five minor children and has saved Mr. Poulsen \$4,197.00. The State does not help to collect these arrearages, only allows them to accrue - therefore the transfer was made with the intent to hinder and delay. This was addressed in Appellant's Motion as well as oral argument, on 19 August 1992 before Commissioner Thomas Arnett.

The Appellant further claims a right to petition the Court's for an injury done to her person and for relief from a debtor.

CONCLUSION

The State's intervention and Setting Aside of Appellant's Withhold and Deliver and because of the State's policy of 50% Garnishment, has not helped the very persons, the children they have purported to be helping.

The Plaintiff is now over \$4,197.00 in arrearages to the advantage of the Plaintiff and not the children. The Court should look to the intent of the Legislature and determine if the State has helped, or hindered, the rightful collection of the Appellant's Support monies.

When any statute's rigid application defeats the higher purpose that of doing justice, then the "unusual circumstances" of

the case must be applied. There is no substantial adverse effect on public policy and the only one's injured by the State's intervention have been the children, who have already suffered great emotional and physical abuse by the Plaintiff.

The Appellee raises the argument that the Appellant has not shown an abuse of the trial Courts discretion Katz v. Piece, 732 P.2d 92,93 (Utah 1984); Baker v. Western Sur. Co, 757 P.2d 878, 881 (Ut. Ct. App 1988). However, when a Motion for Relief from a Order or Judgment is based on a claim of lack of jurisdiction, the District Court has no discretion; if jurisdiction is lacking, the Order cannot stand without denying due process to the one against whom it runs. See In Re Marriage of Stroud, 631 P.2d 168, 170 n.5 (colo. 1981); 11 C. Wright & A. Miller, Federal Practice and Procedure 2862 (1973). Therefore, the propriety of the jurisdictional determination, and hence the decision to grant relief, becomes a question of law upon which we do not defer to District Court. See Ron Case Roofing & Asphalt Paving, Inc. v. Blomquist, 773 P.2d 1382, 1385 (Utah 1989) Madsen v. Borthick, 769 P.2d 245, 247 (Ut. 1988).

The Appellant nowhere cites as her authority for her Withhold and Deliver as the Statute cited by Appellee, but instead chose to exercise her common-law right to obtain her support monies (see Withhold and Deliver dated 30 June 1992 in Appellant's Brief,

signed by Judge Young), the Statute being cited as the authority for the intervention and subsequent Setting Aside by ORS was not even invoked by the Appellant, but her Common-law right and constitutional right to the Court, the matter was adjudicated and Ordered by Judge Young and the ORS should be estopped because of res judicata.

The Trial Court had made a Order to grant Appellant's Withhold and Deliver and therefore the Court lacked in rem jurisdiction to allow the Intervention of ORS, who entered Ex-parte under a Statute that did not apply in this matter. Furthermore, the Court lacked in personam jurisdiction, as the ORS entered without Notice to the Appellant.

This appeal stems from a fraudulently obtained Divorce Decree by Plaintiff. To further add insult to injury, Plaintiff perpetuated another fraud action by applying for ORS' help in getting out of his obligation with the intervention of ORS and their subsequent setting aside of the Appellant's withhold and deliver. Trial court abused its discretion by denying 60(b) motion without giving Appellant due process.

PRAYER FOR RELIEF

Based upon the following facts and evidence before the

Appellant Court, the Appellant prays this court for a reversal of the lower Courts order. Grant the Appellant the right to collect her support monies through her own efforts or remand this for trial of a declaratory judgment.

Award the Appellant the \$4,197.00 that the States' Intervention has allowed the Plaintiff to obtain to be paid to her and collected, by the ORS from the Plaintiff and award the Appellant the costs of this Appeal and any other relief this Court deems just and proper.

Respectfully submitted this day July 20, 1993.



LYNN POULSEN, DEFENDANT/APPELLANT

CERTIFICATE OF MAILING

I hereby certify that 20 July 1993, I mailed a true and correct copy of the foregoing Reply Brief of Appellant was served upon the opposing counsel via U.S. Mail, first class postage prepaid and addressed to:

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LYNN POULSEN, DEFENDANT/APPELLANT

ADDENDUM

Social Security Act, 42 USCS sec. 666(a)(8):

Procedures under which all child support orders which are issued or modified in the State will include provision for withholding from wages, in order to assure that withholding as a means of collecting child support is available if arrearages occur without the necessity of filing application for services under this part [42 USCS, sec. 651 et seq.].

Notwithstanding section 454(20)(B) [42 USCS sec. 654(20)(B)], the procedures which are required under paragraphs (3), (4), (6), and (7) need not be used or applied in cases where the State determines (using guidelines which are generally available within the State and which take into account the payment record of the absent parent, the availability of other remedies, and other relevant considerations) that such use or application would not carry out the purposes of this part [42 USCS sec. 651 et seq.] or would be otherwise inappropriate in the circumstances.

Human Services, Recovery Services, R527-273-1(B) Administrative Process, Non-AFDC Services.

The bureau may limit future Non-AFDC services to enforcement of current support only or terminate the contract when the obligee:

1. Objects to the results of the assessment; or
2. Negotiates a payment schedule with the obligor without the knowledge or involvement of the team; or
3. Does not comply with other terms of the Non-AFDC contract.

Human Services, Recovery Services, R527-300-1-3 Income Withholding.

1. Income withholding is defined as withholding child support from an obligor's income. The payor of income forwards the amount withheld to the Office of Recovery Services (ORS).

2. Income withholding is divided into two categories:

- a. Immediate income withholding applies to all orders issued or modified after October 13, 1990, which do not provide that immediate withholding will not occur.
- b. Initiated income withholding applies to:
 - i. orders issued prior to October 13, 1990, which have not been modified since October 13, 1990, and
 - ii. to those orders issued after October 1990, which had a finding

of good cause not to require immediate withholding, or
iii. to orders issued after October 13, 1990, which had a finding that a written agreement between the Non-AFDC parties was sufficient and immediate withholding was not needed.

3. In addition, income withholding may be initiated by service of an advance notice in a case which has an order issued prior to October 13, 1990, which has not been modified since October 13, 1990, even though the obligor is not delinquent as defined in R527-300-2, if:

a. the obligor and the obligee have signed a subsequent agreement which the obligor has failed to meet (for example, while the order does not require payment by a specific date, there is a written agreement that payment will be made on the first day of each month), and

b. the obligee request that income withholding be initiated.

Human Services, Recovery Services, R527-300-8-1(b) Income Withholding Suspension and Termination.

1. Income withholding should be terminated if:

b. the Non-AFDC obligee terminates in writing authorization for ORS to collect support on her behalf, income withholding was administratively implemented and the obligor no longer owes child support to Utah or other state on whose behalf Utah is acting, and the obligee does not want withholding to continue.

45 CFR Ch. III (10-1-92 Ed.) sec. 303.11(b)(9)&(12) Case closure criteria.

(9) The non-AFDC custodial parent requests closure of a case and there is no assignment to the State of medical support under 42 CFR 433.146 or of arrearages which accrued under a support order;

(12) In a non-AFDC case receiving services under Sec. 302.33(a)(1)(i) or (iii), the IV-D agency document the circumstances of the custodial parent's noncooperation and an action by the custodial parent is essential for the next step in providing IV-D services.

(c) In cases meeting the criteria in paragraphs (b)(1) through (7) and (11) and (12) of this section, the State must notify the custodial parent in writing 60 calendar days prior to closure of the case of the State's intent to close the case.