

1993

Michael John Anderson v. Charleen Ann Anderson : Brief of Appellant

Utah Court of Appeals

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Recommended Citation

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IN THE UTAH COURT OF APPEALS

Michael John Anderson,
PLAINTIFF/APPELLEE,

vs.

Case No. 940322-CA
Argument Priority 10

Charleen Ann Anderson,
DEFENDANT/APPELLANT.

BRIEF OF APPELLANT

INTERLOCUTORY APPEAL FROM THE ORDER OF
THE THIRD DISTRICT COURT OF SUMMIT COUNTY, STATE OF UTAH
HONORABLE DAVID YOUNG, THIRD DISTRICT COURT JUDGE

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FILED
Utah Court of Appeals

OCT 05 1994

Marilyn M. Branch

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IN THE UTAH COURT OF APPEALS

Michael John Anderson,

PLAINTIFF/APPELLEE,

BRIEF OF APPELLANT

vs.

Case No. 940322-CA

Charleen Ann Anderson,

DEFENDANT/APPELLANT.

BRIEF OF APPELLANT

STATEMENT OF JURISDICTION

This is an Interlocutory Appeal from an Order on Motion to Dismiss, signed and entered on May 9th, 1994, by the Honorable Judge David Young, of the Third District Court, Summit County, State of Utah.

Jurisdiction is based on Title 78-2a-3(2)(i), and Rule 5 of the Utah Rules of Appellate Procedure.

ISSUES PRESENTED FOR REVIEW

1. Can the State of Utah properly assert personal jurisdiction over Defendant, Charleen Anderson, who, along with her children, has never resided in the State of Utah, nor otherwise availed herself of the protection of the laws of the State of Utah?

STANDARD OF REVIEW

The issues presented for appeal are questions of law and as such, this court should not accord deference to the trial court's legal conclusions, but should review those conclusions for correctness. See Arquello v. Industrial Woodworking Machine Co., 839 P.2d 1121, at 1121.

DETERMINATIVE STATUTES

Utah Code, Section 78-27-24;

STATEMENT OF THE CASE

1. Nature of the Case.

This is an appeal of the trial court's denial of Defendant's Motion to Dismiss for lack of jurisdiction over the parties.

2. Course of the Proceedings.

Plaintiff filed for Divorce in Summit County, Utah, requesting the Third District Court to take jurisdiction over the

parties, and to enter orders incident to a divorce/custody proceeding. Defendant responded to Plaintiff's divorce Complaint by filing a Motion to Dismiss, based upon the grounds that she and the minor children had never resided in the state of Utah. Defendant asserted that she had never availed herself of the laws of the state of Utah, and that therefore jurisdiction was lacking.

Defendant's Motion to Dismiss was never noticed for hearing, but was heard sua sponte by Judge David Young during and incident to a hearing on Plaintiff's Motion for Temporary Visitation.

3. Disposition in the District Court.

Defendant's Motion to Dismiss was denied, and Plaintiff's Motion for Temporary Visitation was granted.

4. Statement of Relevant Facts.

Plaintiff and Defendant were married in Rochester Minnesota on May 17, 1976. The parties have two minor daughters, both living with the Defendant, their mother, in the area of Vancouver Washington. The parties have never lived in the state of Utah during any part of their marriage, nor have the minor children ever lived in the state of Utah.

Sometime after separation of the parties, approximately two years ago, Plaintiff moved to Summit County, Utah, where he filed for Divorce, requesting that the Utah court address other issues as

well, including, child custody/visitation, property division, medical insurance, alimony, life insurance, and debt allocation.

Defendant moved to dismiss the Plaintiff's Complaint, asserting that the State of Utah had insufficient personal jurisdiction over the Defendant; and, that she and the children had never resided in the State of Utah.

Plaintiff moved the court for an award of Temporary Visitation on April 26th, 1994, at the hour of 1:30 p.m., before the Honorable Judge David Young.

Judge David Young, sua sponte, and without notice, heard argument on the previously filed Motion to Dismiss, and denied the same from the bench, ruling that Plaintiff was entitled to have the Divorce and other matters heard in the State of Utah. Judge David Young next heard the argument on Plaintiff's Motion for Award of Temporary Visitation, and awarded Plaintiff visitation as requested, ordering the Defendant to produce the minor children for six weeks in the summer, and any other time that the Plaintiff travels to Washington for visitation.

5. Summary of Arguments.

Defendant does not have any contacts with the state of Utah, which would qualify as "minimum contacts" under Utah Code, Section 78-27-24, and prevailing caselaw. She has not availed herself of this jurisdiction, and could not reasonably foresee

being haled into the Third District Court to litigate her divorce action.

To assume jurisdiction of the nonresident-defendant, without minimum contacts, would be contrary to prevailing caselaw, and violative of the 14th Amendment to the Constitution of the United States, and Utah Code, Section 78-27-24.

ARGUMENT

POINT I

DEFENDANT/APPELLANT HAS NO MINIMUM CONTACTS WITH THE STATE OF UTAH

It has been uncontested throughout this proceeding that the Defendant/Appellant and the minor children have never resided within the state of Utah. It has also not been demonstrated that the Defendant/Appellant has availed herself of the laws and benefits of the state of Utah. This being the case, there are no minimum contacts upon which the state of Utah may properly assume jurisdiction over the person of the Defendant/Appellant, and/or the minor children herein, pursuant to Title 78-27-24, of the Utah Code, which provides that nonresidents may submit themselves to the jurisdiction of the courts of the state of Utah upon certain criteria, enumerated within Section 78-27-24(6), as follows:

Any person, notwithstanding Section 16-10a-1501, whether or not a citizen or resident of this state, who in person or through an agent does any of the following enumerated acts, submits himself, and if an individual, his personal representative, to the jurisdiction of the courts of this state as to any claim arising from:

- (1) the transaction of any business within this state;
- (2) contracting to supply services or goods in this state;
- (3) the causing of any injury within this state whether tortious or by breach of warranty;
- (4) the ownership, use, or possession of any real estate situated in this state;
- (5) contracting to insure any person, property, or risk located within this state at the time of contracting;
- (6) with respect to actions of divorce, separate maintenance, or child support, having resided, in the marital relationship, within this state notwithstanding subsequent departure from the state; or the commission in this state of the act of giving rise to the claim, so long as that act is not a mere omission, failure to act, or occurrence over which defendant had no control; or,
- (7) the commission of sexual intercourse within this state which gives rise to a paternity suit under Title 78-Chapter 45a, to determine paternity for the purpose of establishing responsibility for child support.

None of the enumerated acts above have even been alleged by Plaintiff. Defendant/Appellant has affirmatively asserted that she has never resided in the state of Utah, nor have the minor children.

The Utah court cannot properly assume personal jurisdiction of a nonresident defendant without minimum contacts with the state of Utah on the part of a nonresident defendant. Defendant/Appellant maintains that the "Long Arm Statute" above, is an attempt to codify the doctrine that "minimum contacts" with the forum state must be shown before personal jurisdiction of a nonresident defendant may be assumed. The prevailing caselaw in the state of

Utah recognizes the well-known precept that a nonresident defendant must have minimum contacts with the forum state before that state may assume personal jurisdiction. See Bradford v. Nagle, 763 P.2d 791 (Utah 1988); Nunley v. Nunley, 757 P.2d 473 (Utah Ct. App. 1988);

POINT II

DEFENDANT/APPELLANT HAS NEVER AVAILED HERSELF OF THE PROTECTION
OF THE LAWS AND BENEFITS OF THE STATE OF UTAH; AND COULD NOT
REASONABLY ANTICIPATE BEING HALED INTO A UTAH COURT TO
LITIGATE HER DIVORCE/CUSTODY PROCEEDING

In Anderson v. American Society of Plastic and Reconstructive Surgeons, 807 p.2d 825 (Utah 1990), the Supreme Court of Utah visits the issue of minimum contacts of nonresident-defendants, as it relates to due process requirements. The Court reiterated its earlier holding in Parry v. Ernst Home Center, 779 P.2d 659 (Utah 1989), stating, "Defendants' contacts with Utah must be 'such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'"

The Anderson decision explains at p. 828, that "Defendants must have 'reasonably anticipated being haled into court' here, World-wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297, 100 S.Ct. 559, 567, 62 L.Ed.2d 490 (1980), and they must have 'purposefully availed themselves of the privilege of conducting

activities here.'" Hanson v. Denckla, 357 U.S. 235, 253. 78 S.Ct. 1228, 1239, 2L.Ed.2d 1283 (1958).

The Anderson decision at p. 828 further states, "The trial court must also balance 'the convenience of the parties' and weigh this forum's interest in asserting jurisdiction. Mallory Eng'g Inc. v. Ted R. Brown & Assoc. 618 P.2d 1004, 1008 (Utah 1980);"

Having no minimum contacts with the state of Utah, Defendant/Appellant cannot be said to have availed herself of the protection of the laws of the state of Utah. Her only arguable connection to the state of Utah is the fact that the Plaintiff has moved here and filed for divorce; an action over which she has no control whatsoever. Since neither the Defendant/Appellant, nor the minor children live in the state of Utah, but rather the state of Washington, it is obviously inconvenient for them to travel here to participate in a divorce proceeding. Such considerations were not balanced nor weighed in Judge Young's Order denying Defendant's Motion to Dismiss.

POINT III

TO ASSUME JURISDICTION WITHOUT MINIMUM CONTACTS VIOLATES

THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT

In Arguello v. Industrial Woodworking Machine Co., 839 P.2d 1121, at 1123, the Supreme Court of Utah again revisited the issue

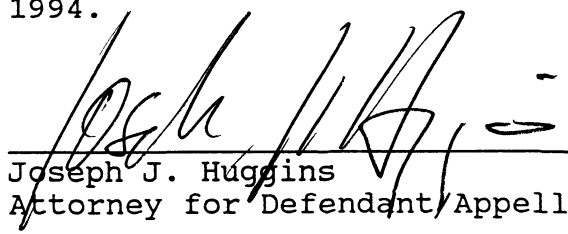
of minimum contacts and due process. The Court stated that "[t]o exercise jurisdiction consistent with due process, the nonresident defendant must have 'minimum contacts with the forum state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'" See also, International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945).

CONCLUSION

There are no facts asserted which would give rise to jurisdiction over the Defendant/Appellant based upon the requirement of "minimum contacts" with the state of Utah. To assume jurisdiction absent "minimum contacts" would violate notions of fair play and substantial justice, and consequently the due process clause of the 14th Amendment to the United States Constitution.

The trial court should be reversed, and Plaintiff's Complaint should be dismissed for lack of personal jurisdiction over the Defendant/Appellant, as requested below.

DATED THIS September 29, 1994.



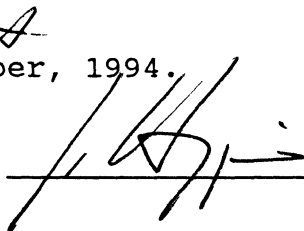
Joseph J. Huggins
Attorney for Defendant/Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that I did cause to be served by HAND DELIVERY a 2 copies of the foregoing Brief of Appellant to:

Stanford Nielson, Esq.
3760 Highland Dr., Ste. 200
SLC, Ut. 84106

DATED THIS 5 day of ^{ed}September, 1994.



A handwritten signature in black ink, appearing to be "J. H. [unclear]", is written over a horizontal line.

ADDENDUM

EXHIBIT A: Order on Motion to Dismiss;

EXHIBIT B: Utah Code 78-27-24;

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No.

FILED

MAY 9 1994

Clerk of Summit County

By Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT FOR SUMMIT COUNTY

STATE OF UTAH

MICHAEL JOHN ANDERSON,	:	
	:	ORDER ON MOTION TO DISMISS
Plaintiff,	:	
	:	
v.	:	
	:	Civil No. 94-43-00036
CHARLEEN ANN ANDERSON	:	
	:	Judge David S. Young
Defendant.	:	

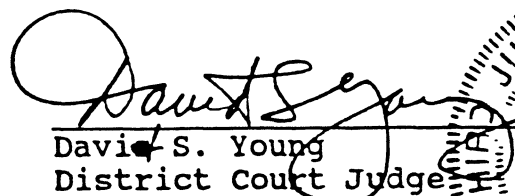
The above-entitled matter came on for hearing on the 26th day of April, 1994 pursuant to defendant's Motion to Dismiss plaintiff's complaint. Plaintiff was present and represented by counsel. Defendant was not present but was represented by counsel of record. The court having considered the proffer of evidence and the argument of counsel now enters the following:

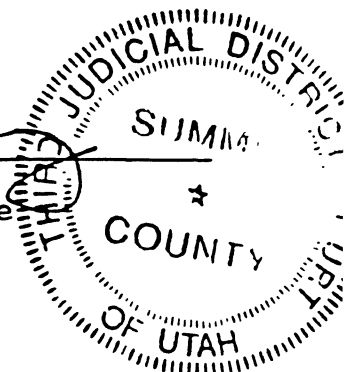
ORDER

1. This court finds that it has both subject matter and personal jurisdiction in this matter.

1. Defendant's motion is denied.

Dated this 9th day of May, 1994.


David S. Young
District Court Judge



78-27-24. Jurisdiction over nonresidents — Acts submitting person to jurisdiction.

Any person, notwithstanding Section 16-10a-1501, whether or not a citizen or resident of this state, who in person or through an agent does any of the following enumerated acts, submits himself, and if an individual, his personal representative, to the jurisdiction of the courts of this state as to any claim arising from

(1) the transaction of any business within this state;

(2) contracting to supply services or goods in this state;

(3) the causing of any injury within this state whether tortious or by breach of warranty;

(4) the ownership, use, or possession of any real estate situated in this state;

(5) contracting to insure any person, property, or risk located within this state at the time of contracting;

(6) with respect to actions of divorce, separate maintenance, or child support, having resided, in the marital relationship, within this state notwithstanding subsequent departure from the state; or the commission in this state of the act giving rise to the claim, so long as that act is not a mere omission, failure to act, or occurrence over which the defendant had no control; or

(7) the commission of sexual intercourse within this state which gives rise to a paternity suit under Title 78, Chapter 45a, to determine paternity for the purpose of establishing responsibility for child support.