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IN THE SUPREME COURT

OF THE STATE OF UTAH

DIXIE WHITAKER, aka DIXIE D'OLIVER

Plaintiff and Respondent,

vs.

JAMES WHITAKER,

Defendant and Appellant.

Case No. 14329

BRIEF OF APPELLANT

Appeal from an Order and Judgment of the Third District Court for Salt Lake County, State of Utah, the Honorable Stewart M. Hanson, Jr., Judge, presiding.

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FILED

JAN 9 - 1976

Clerk, Supreme Court, Utah

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Appeal from an Order and Judgment of the Third District Court for Salt Lake County, State of Utah, the Honorable Stewart M. Hanson, Jr., Judge, presiding.

STATEMENT OF THE KIND OF CASE

This is an action seeking reversal of Judge Stewart M. Hanson, Jr.'s Order and Judgment pursuant to Respondent's Order to Show Cause for child support.

DISPOSITION IN LOWER COURT

Respondent's Order to Show Cause was heard before the Honorable Stewart M. Hanson, Jr., Judge presiding on October 28,

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1975. Judgment was entered against the Defendant in the sum of $840.00 and Defendant was ordered to pay the sum of $150.00 per month for child support to the Plaintiff. Defendant appeals.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the Judgment and Order below to the extent it requires a child support obligation from Appellant in excess of $120.00 per month after June 10, 1972.

STATEMENT OF FACTS

Appellant and Respondent were married in Salt Lake City, Utah, on September 14, 1966. On October 21, 1971, Appellant was served with summons in Colorado, in Respondent's Utah divorce action. He made no responsive pleading or appearance and a default divorce was granted on February 10, 1972, in the Third District Court of Utah. The Decree awarded Respondent $75.00 per month child support per child, plus $100.00 alimony per month.

Respondent remarried in March, 1972. On May 15, 1972, Respondent executed an Affidavit for Order to Show Cause in re contempt. Said Affidavit stated, interalia: "I further aver that the defendant is in default in payments as follows: He was to pay $120.00 per month as support ($60.00 for each child)". After a hearing on May 31st, 1972, Judge Emmett Brown signed an Order on June 10, 1972, which reads, in pertinent part:

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1. Plaintiff is given judgment against the defendant for the sum of $350.00 in unpaid support money.

2. Defenant (sic) is found in contempt of court and sentenced to five days in jail.

3. Defendant is ordered to pay $60.00 on the 10th and $60.00 on the 25th day of each month beginning with the 10th of June, 1972.

4. If he fails to make any payments from June to November of 1972, he shall serve the five day jail term.

Appellant remarried on June 12th, 1975, in Las Vegas, Nevada. Shortly thereafter Respondent denied him visitation. Appellant instituted proceedings to rectify the situation. On August 13, 1975, Judge Stewart M. Hanson, Jr., ordered that Mr. Whitaker could take the children every other weekend to his home. However, visitation still did not proceed smoothly. On October 20, 1975, another hearing was held by Judge Hanson, Jr., this time instituted by Respondent. At issue was the level of child support fixed by prior proceedings. Respondent urged that the June 10, 1972, order requiring $60.00 per month child support per child expired of its own force in November of 1972, thus reviving the $75.00 per month per child obligation in the original decree. Appellant maintained his obligation was $60.00 per month as per the June 10, 1972, Order. It was undisputed that Appellant had made $60.00 payments twice a month since

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November of 1972, and that Respondent had accepted them. Appellant was two payments behind at the time of the hearing. Appellant was ordered to pay $840.00 in child support arrearages although execution was stayed on payment of at least $10.00 a month. A $75.00 per month per child support obligation was expressly reinstated for the future.

ARGUMENT

ISSUE:

Whether the June 10, 1972, Order modified the child support obligation, or was a temporary measure expiring of its own force on November 1, 1972. Construction of the June 10, 1972, Order is a question of law appropriate for decision by this court.

POINT I

THE ORDER DOES NOT STATE THAT IT IS TEMPORARY.

The June 10, 1972, Order required Appellant to make $60.00 payments on the 10th and 25th of "each month beginning with the 10th of June, 1972". It does not state that the $75.00 requirement would later be reinstated. Nothing in the Order implies reinstatement. Appellant was found in contempt for failing to make support payments due as of May 31, 1972. He was sentenced to five days in jail, suspended on condition that he make the required support payments through November. If he should default thereafter, he might be subject to later

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contempt proceedings, but not to the five day sentence imposed for the arrearages as of May 31st. Thus, the child support provisions and jail sentence liability operate independently under the Order.

Child support payments are theoretically linked to the actual needs of the child and the ability of the parent to pay. The court must have been prescient to automatically adjust payments six months in the future as respondent contends. Further, if reinstatement of the $75.00 per month per child obligation was actually intended, the Judge would have insisted that an explicit statement to that effect be included in the Order. Sound judicial policy requires that orders be presumed to operate indefinitely unless specifically stated otherwise. The interested parties should not have to speculate as to implications, particularly when monetary obligations hinge on the proper interpretation.

Paragraph 3 of Judge Brown's June 10, 1972, Order states: "Defendant is ordered to pay $60.00 on the 10th and $60.00 on the 25th of each month beginning with the 10th of June, 1972." This is the only statement in the Order prepared by Respondent's counsel which relates to Appellant's child support obligation for paragraphs 2 and 4 deal with contempt punishment and paragraph 1 deals with a judgment for past due support. Paragraph 3 must be given its plain meaning since "... the same rules of interpretation apply in ascertaining

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the meaning of a court Order or judgment as in ascertaining the meaning of any other writing,..." Ex parte Ambrose, 72 Cal. 398, 14 P. 22, 35; Rinaldo v. Board of Medical Examiners, 123 Cal. App. 712, 715, 12 P.2d 32; Bailey v. Superior Court, 297 P.2d 795, 801. Furthermore, "...parole evidence is not admissible to change the legal effect of a judgment or the record of it in any material respect." Kilpatrick v. Harvey, 51 Cal. App. 2d 170, 172-173, 124 P.2d 367, 368; Bailey v. Superior Court, 297 P.2d 795; In Re Estate and Guardianship of Purton, 7 Ariz. App. 526, 441 P.2d 561. Therefore, paragraph 3 of Judge Brown's June 10, 1972, Order must be given its plain meaning regardless of Respondent's testimony on October 28, 1975.

POINT II.

RESPONDENT'S AFFIDAVIT STATED THAT APPELLANT'S CHILD SUPPORT OBLIGATION WAS $120.00 PER MONTH.

A judgment which is ambiguous may be read with the entire record and construed accordingly. Thus, in Huber v. Newman, 106 Utah 363, 145 P.2d 780, 783, (1944), the Court construed an ambiguously worded judgment in light of the Conclusions of Law. Under the same rule, the June 10, 1972, Order should be read in view of Respondent's Affidavit stating: He (Appellant James Whitaker) was to pay me $120.00 a month as support ($60.00

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per month for each child). On June 10, 1972, both parties believed $120.00 was the legal support obligation.

POINT III.

THE FORMAL WRITTEN ORDER SUPERSEDES A MINUTE ENTRY IF THEY ARE INCONSISTANT.

The Minute Order from the May 31st hearing reads as follows: "P (Respondent) is granted judgment of $350.00 through May 31, 1972. D (Appellant) found in contempt, sentenced to five days, suspended on payment of $60.00 on the 10th and 25th of each month through 11-25-72". Since Respondent's Affidavit stated that Appellant's obligation was $120.00, perhaps the judge did not recognize that a modification was taking place. Moreover, the minute order does not state that the $75.00 payment would be reinstated in November. As to the jail sentence liability, the final order requires payments "to November" while the minute order states "through 11-25-72."

Arizona and Nevada courts have ruled that where a minute Order is inconsistent with a final Order, the final Order controls, In Re Estate and Guardianship of Purton, 7 Ariz. App. 526, 441 P.2d 561, 566 (1968), and Mortimer v. Pacific State Saving and Loan Company, 62 Nev. 147, 145 P.2d 733, 735 (1944). This result is sound because:

1. The final order is the work product of law trained individuals familiar with the facts of the case whereas a minute entry are the clerk's notations.

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2. The interested parties presume the final order to be the resolution of the ligitation.

3. The Judge carefully inspects the final Order before affixing his signature whereas he does not sign and may never see the clerk's notes on the minute Order.

4. Copies of the final Order are given to parties and are carefully inspected by counsel whereas few people ever inspect minute Orders.

POINT IV.

COURTS SHOULD NOT DISTURB THE PARTIES' CONSTRUCTION OF THE ORDER AS EVIDENCED BY THEIR SUBSEQUENT CONDUCT.

It is undisputed that Appellant has made and Respondent accepted $120.00 per month child support payments from June 10, 1972, until approximately October 1st, 1975. Though Respondent allegedly has made oral demands that the $75.00 payments be resumed, she waited until autumn 1975 to take court action. By that time the accumulated arrearages were $840.00, a large sum for the indigent Appellant. Where construction of a judgment has been acquiesced in by the parties, it should not be disturbed without strong reason. State v. Hawaiian Dredging Company, 48 H. 152, 397 P.2d 593 at 608 (1964), General Creditors of Estate of Harris v. Cornett, 416 P.2d 398 at 400 (1966).

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A decision in favor of Appellant will not adversely affect the chilren involved. They have been well taken care of. The $850.00 judgment will in fact be a windfall for the Respondent. There being no strong reason for disturbing the construction adhered to by the parties, the rule of the Dreging Company case should be followed here.

CONCLUSION

The June 10, 1972, Order should be construed as permanently modifying Appellant's child support obligation because:

I. It did not state that it was a temporary Order.

II. Respondent's Affidavit for Order to Show Cause dated May 15, 1972, which led to the June 10, 1972, Order stated that Appellant's obligation was $60.00 per month per child.

III. The formal written Order supersedes a minute entry if they are inconsistant.

IV. The parties intended the change to be permanent as evidenced by subsequent conduct.

WHEREFORE, Appellant respectfully requests this Court to reverse Judge Stewart M. Hanson, Jr.'s October 28, 1975, Order and Judgment to the extent it requires a child support obligation from Appellant in excess of $120.00 per month ($60.00 per child) after June 10, 1972.

DATED this 9th day of January, 1976.

Respectfully submitted,

Gordon F. Esplin

GORDON F. ESPLIN

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CERTIFICATE OF DELIVERY

I hereby certify that I hand-delivered 2 copies of the foregoing Brief of Appellant to Mr. John C. Green, Esq., Cotro-Manes, Warr, Frankhauser and Beasley, 430 Judge Building, Salt Lake City, Utah 84111, this 9th day of January, 1976.

Gordon F. Esplin

GORDON F. ESPLIN

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