1995

Tamara Lee Coulon v. Mark Fletcher Coulon : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

TAMARA LEE COULON, Plaintiff/Appellant, vs. MARK FLETCHER COULON, Defendant/Appellee.	Case No. 950358-CA Priority No. 15

BRIEF OF APPELLANT

Appeal from Order of Judge Entered by the Honorable Frank G. Noel, Judge of the Third District Court, Salt Lake County.

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TABLE OF AUTHORITIES

REFERENCES TO THE UTAH RULES OF CIVIL PROCEDURE WILL HEREAFTER USUALLY BE CITED ONLY AS "URCP" WITH THE NUMBER DESIGNATION; MOST CITATIONS TO THE UTAH CODE ANNOTATED, 1953, AS AMENDED, WILL HEREAFTER BE CITED ONLY AS "UCA" FOLLOWED BY THE SECTION DESIGNATION.

CASES CITED

STATEMENT OF JURISDICTION

This appeal is based upon Rule 3 of the URCP and is before the Utah Court of Appeals pursuant to UCA §78-2(a)-3(2)(h).

ISSUES PRESENTED FOR APPEAL

The issues presented for appeal are:

1. Is the plaintiff/appellant entitled to receive a judgement against the defendant/appellee for the sum of $28,800.00 as child support arrearages based on the fact that the defendant/appellee has never paid child support. In conjunction with this particular item it must be further determined by the court whether or not the defendant/appellee is entitled to claim payments made by the Social Security Administration to the plaintiff/appellant as his payments of child support.

The standard for review in this particular area is the correction of error standard. Bailey v. Call, 767 P.2d 138 (Ut.Ct.Epp. 1989) cert. denied 773 P.2d 45 (Ut. 1989).

2. What offset is the plaintiff/appellant entitled to receive based upon the defendant/appellee's failure to pay the court ordered support against the residence and additionally is the defendant/appellee allowed to claim the payments made in excess of the court ordered child support through the Social Security Administration for his benefit.

The standard for review in this particular area is the correction of error standard. Bailey v. Call, 767 P.2d 138 (Ut.Ct.Epp. 1989) cert. denied 773 P.2d 45 (Ut. 1989).

STATUTES AND RULES WHOSE INTERPRETATION IS DETERMINATIVE ABOUT THE ISSUES PRESENTED

UCA § 78-45-3.

> Every father shall support his child;...

Rule 6-404 of the Code of Judicial Administration

> (1) Proceedings to modify a divorce decree shall be commenced by the filing of a petition to modify in the original divorce action. Service of the petition and summons upon the opposing party shall be in accordance with the requirements of Rule 4 of the Utah Rules of Civil Procedure. No request for a modification of an existing decree shall be raised by way of an order to show cause.
>
> (2) The responding party shall serve the reply within twenty days after service of the petition. Either party may file a certificate of readiness for trial. Upon filing of the certificate, the matter shall be referred to the domestic relations commissioner prior to trial, or in those districts where there is not a domestic relations commissioner, placed on the trial calendar.
>
> (3) No petition for modification shall be placed on a law and motion or order to show cause calendar without the consent of the commissioner or the district judge.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceeding and Disposition in a Lower Court.

The defendant/appellee brought an Order to Show Cause seeking

his one-half (1/2) share of the equity of the marital residence. R-79. The plaintiff/appellant responded with a Counter Order to Show Cause seeking contempt against the defendant/appellee for his failure to pay child support, judgement for support arrearages, offset for any claims against the marital residence and attorneys fees. R-87. The matter was originally heard by Judith S. H. Atherton, Domestics Relations Commissioner on September 7, 1994. Pursuant to Minute Entry the Commissioner made her ruling on September 14, 1994. R-93. An objection was made to the Commissioner's recommendation by the plaintiff/appellant. R-100. Oral argument was presented to the Honorable Frank G. Noel on March 31, 1995 (R-117) with his ruling being made by Minute Entry on April 6, 1995. R-118-119. The judgement as entered by the court on April 26, 1995 disallowed the plaintiff/appellant's claim of support arrearages against the defendant/appellee of $28,800.00 and granted to the defendant/appellee a judgement in the sum of $2,812.00 pursuant to an offset of $988.00 from the $3,800.00 claimed by the defendant/appellee.

B. Statement of facts relevant to the issues presented for review

The parties were divorced on January 13, 1983. R-19-21. On March 4, 1995 the defendant/appellee's equity in the home was reduced to the amount of $3,800.00. R-66-67.

The defendant/appellee brought his Order to Show Cause seeking payment of $3,800.00 for his claim on the residence. R-79-81. The defendant/appellee has never paid child support. The defendant/appellee became disabled and made application for benefits sometime after November 1987 and commencing approximately November 1987 the plaintiff/appellant began receiving SSI benefits on behalf of the parties' minor children. From the time period of March 1985 through June 1986 the amount of the child support arrearages due by the defendant/appellee to the plaintiff/appellant, calculated at $300.00 per month, would have been $4,800.00. The amount of child support arrearages due from the defendant/appellee to the plaintiff/appellant on the commencement of the SSI benefit would have been the sum of $9,600.00 (Mar. 1985 to Nov. 1987)

There was no evidence that the payments as made herein from the SSI were due to the earnings of the defendant/appellee but were based solely on a disability benefit. The amount as paid to the plaintiff/appellant through SSI from November 1987 to July 1994 was the sum of $32,612.00. The monthly amount as paid to the plaintiff/appellant from the SSI is greater than the $300.00 monthly obligation of child support of the defendant/appellee.

The trial court denied the claim of support arrearages as sought by the plaintiff/appellant against the defendant/appellee of

$28,800.00. The trial court added all the monies which should have been paid by the defendant/appellee from the time period of March 1985 through July 1994 and subtracted from that amount the amount of SSI payments which had been made through July 1994 of $32,612.00 which left an arrearage of $988.00. This $988.00 was offset against the marital residence obligation owed by the plaintiff/appellant to the defendant/appellee of $3,800.00 leaving a judgement against the plaintiff/appellant and in favor of the defendant/appellee in the sum of $2,812.00. R-118-119.

SUMMARY OF ARGUMENTS

Without the necessity of ever having to file a Petition to Modify the Decree of Divorce, the trial court entered an Order which totally modified the child support obligation of the defendant/appellee to the plaintiff/appellant. The trial court misapplied the SSI benefits which have been paid to the parties' minor children to the credit of the defendant/appellee. The defendant/appellee has not paid his support obligations and but for the SSI benefits being paid, the plaintiff/appellant would never have received any support for and on behalf of the parties' minor children. The application of credits and offsets which the trial court gave to the plaintiff/appellant were inappropriate. The $3,800.00 owing by the plaintiff/appellant to the defendant/appellee against the marital residence should have been

totally "wiped out" based upon the support offset obligation owed by the defendant/appellee to the plaintiff/appellant which was in the amount of $4,800.00 owing to June 1986.

The plaintiff/appellant should have been awarded a judgement in the sum of $28,800.00 as the amount owing by the defendant/appellee for the child support obligation from July 1986 to July 1994 but in any event not less than $5,100.00 which would have been the amount of the support obligation owing from July 1986 to November 1987 when the SSI benefit commenced.

ARGUMENT

POINT I

THE APPELLANT IS ENTITLED TO JUDGEMENT AGAINST THE APPELLEE FOR CHILD SUPPORT ARREARAGES IN THE AMOUNT OF $28,800.00

The defendant/appellee has not paid child support. The defendant/appellee's lien on the marital residence was reduced to the sum of $3,800.00 based upon his failure to pay child support. After the $3,800.00 had been determined from the hearing on March 4, 1985, the defendant/appellee again failed and refused to pay child support. The defendant/appellee has ignored his statutory duty to support his children as required by UCA §78-45-3.

The defendant/appellee has not since March 1985 ever moved the court to modify the Decree of Divorce. The only act that have been taken by the defendant/appellee since March 1985 was the filing of

his Order to Show Cause in order to obtain his claimed share against the marital residence.

The plaintiff/appellant has acknowledges receipt of the SSI benefit which amounts would have been greater, on a monthly basis, than the defendant/appellee's child support obligation. These benefits did not commence until November 1987 and have continued through this time.

The trial court in its analysis, did not give to the plaintiff/appellant a judgement against the defendant/appellee for the $28,800.00 arrearages. This amount is based on an eight (8) year period as provided pursuant to UCA §78-12-22, of no payments being made personally by defendant/appellee. The trial court in effect modified the Decree of Divorce based upon the SSI benefits which the plaintiff/appellant has been receiving and used those as "defendant's child support". If these monies had been paid through the SSI based upon defendant/appellee's earnings there may have been a reasonable and rational basis to argue this theory and one which would have been allowed statutorily pursuant to UCA §78-45-7.5(8)(b). (Note: §78-45-7.5(8)(b) became effective on April 24, 1989.) However, there was no showing that these monies were ever based upon the defendant/appellee's earnings but were in fact based upon his disability. In any event no action has ever been taken by the defendant/appellee to come forward and ask the court to modify

the Decree as is required pursuant to Rule 6-404 of the Code of Judicial Administration. The court in this case has proceeded to modify the Decree on an Order to Show Cause calendar without the necessity of filing a formal Petition for Modification. This court has held in Bailey v. Adams, 798 P.2d 1142 (Ut. App. 1990) and Grover v. Grover, 839 P.2d 871 (Ut. App. 1992) that a Decree may not be modified except through the service of the Summons and filing of a Petition for Modification. This has not been accomplished by the defendant/appellee in this case. It is inappropriate for the court to modify the Decree without there existing a Petition for Modification with the appropriate service of a Summons. Additionally, the benefit as provided pursuant to UCA §78-45-7.5(8)(b) can not be sought absent a request through a Petition for Modification. See Bailey v. Adams, 798 P.2d 1142 (Ut. App. 1990) and Grover v. Grover, 839 P.2d 871 (Ut. App. 1992) where this court held that there is no retroactive application of the child support guidelines.

If this court allows the logic of the trial court to be used in this matter of modifying the Decree by Order to Show Cause, then the next issue for this court to determine is when does the modification occur. If the modification occurs on the serving of the Order to Show Cause then the judgement date to which the plaintiff/appellant would be entitled to judgement against the

defendant/appellee for child support arrearages would be as of July 1994 using June 1986 as the commencing date for calculation purposes. If the modification date is seen as the date when the benefits commenced to being paid to the plaintiff/appellant then the judgement date would be November 1987 with June 1986 the commencing date for calculation purposes. The next issue which the court would thereafter need to determine would be how the SSI benefits would apply to the defendant/appellee's child support obligation. The trial court in its reasoning determined a full dollar amount that had been paid to the plaintiff/appellant between the time periods of November 1987 to July 1994 by SSI in making its award. If this logic is followed then it would mean that eventually the plaintiff/appellant would have to repay monies to the defendant/appellee because there would eventually be a greater amount paid by the SSI than what would exist under the defendant/appellee's child support obligation. It can not be imagined that this would be what this court would adopt or find as being the appropriate manner in which to handle this situation. If the support obligation is seen as a month to month payment rather than a dollar against a dollar payment then the defendant/appellee's obligations would have been paid between November 1987 to July 1994 with the resulting arrearages owing by the defendant/appellee to the plaintiff/appellant of $5,100.00

which would be calculated at $300.00 per month owing from July 1986 to November 1987. If no month to month or dollar for dollar credit is given to the defendant/appellee for this based on the fact that he has not petitioned the court to modify his support obligations and the support obligation has continued then the amount that would be owed by the defendant/appellee to the plaintiff/appellant would be the sum $28,800 to July 1994.

It would be better law to require that the defendant/appellee take an affirmative step in having his support obligation modified. This is required by both Bailey and Grover, supra. This has never been done by the defendant/appellee. This action is also required purusant to Rule 6-404 of the Code of Judicial Administration. Because of the defendant/appellee's failure to properly request modification of his support obligation and to have the same addressed so that the SSI benefit could be claimed as his support obligation the trial court should not have used the SSI payments for his support obligation and no relief should be given to the defendant/appellee. The trial court "assumed" a substancial change in circumstances had occured and thereafter retroactively entered the same again, this type of conduct is prohibited by both Bailey and Grover, supra. This court should award to the plaintiff/appellant judgement against the defendant/appellee for the sum of $28,800.00 which would be the support obligation owing

between July 1986 through June 1994. In the alternative, this court should at a minimum award to the plaintiff/appellant $5,100.00 as a judgement against the defendant/appellee over the time period of July 1986 through to November 1987 when the SSI benefit commenced. The defendant/appellee should not be given a credit of the increased amounts as paid by the SSI benefit for his behalf. Eventually it would require repayment by the plaintiff/appellant.

The defendant/appellee has a continuing obligation to support his children. UCA §78-45-3. The defendant/appellee has not supported his children but has allowed the government and citizens of the United States to support his children. The defendant/appellee has done nothing appropriately as required by statute or equity to show that he deserves credit for the payments as made by and through SSI. The defendant/appellee should not have been given relief as granted by the trial court.

POINT II

THE TRIAL COURT INAPPROPRIATELY CALCULATED THE OFFSET ON THE REAL PROPERTY AND THEREAFTER INAPPROPRIATELY GAVE TO THE DEFENDANT/APPELLEE A JUDGEMENT AGAINST THE PLAINTIFF/APPELLANT.

The trial court in its application of offset appropriately followed the case Jacobsen v. Bunker, 699 P.2d 1208 (Ut. 1985) in granting an offset, however the manner of the calculation by the

trial court is inappropriate. The trial court calculated a dollar amount of the obligation which would have been owing from March 1985 through July 1994 and thereafter determined how much had been paid through the SSI benefit and subtracted that amount as a credit against the defendant/appellee's obligation and awarded only $988.00 as an offset from the monies owed by the plaintiff/appellant to the defendant/appellee on the marital residence. This is a misapplication of the credit of the SSI benefits and should not have been done by the trial court in this fashion. No monies should have been required to be paid by the plaintiff/appellant to the defendant/appellee based on the fact that the appropriate amount of offset would have been the sum of $4,800.00 which would have been calculated at the rate of $300.00 per month from March 1985 through June 1986. The eight (8) year statute of limitations (UCA §78-12-22) prohibits the plaintiff/appellant from obtaining the other $1,000.00 from the defendant/appellee but pursuant to Jacobsen the entire $4,800.00 would be offset against any claim of the defendant/appellee against the plaintiff/appellant.

If the logic of the trial court is applied it is again seen that eventually the plaintiff/appellant would owe more monies to the defendant/appellee because of the excess amount paid by SSI over and above the defendant/appellee's child support obligation.

This logic is unreasonable. The plaintiff/appellant should not have been required to pay any sums against the marital residence based on defendant/appellee's failure to ever pay his child support obligation based on the accumulated arrearages which would have been owed through June 1986. The application of the SSI benefits was wrongfully applied by the trial court. The defendant/appellee should not receive a credit for the excess funds paid by SSI as was allowed by the trial court.

CONCLUSION

The awards of the trial court should be set aside and reversed. No judgement should be awarded to the defendant/appellee against the plaintiff/appellant for the $2,812.00 as monies owing on the marital residence. These sums were totally satisfied based upon the defendant/appellee's failure to pay the child support obligation and the appropriate offset which should have been made by the trial court.

The plaintiff/appellant should have been awarded judgement against the defendant/appellee the sum of $28,800.00 for the amount of child support which would have been due and owing from July 1, 1986 through June 1994 or in the alternative at least the amount of $5,100.00 which would have been for the time periods between July 1, 1986 through November 1987. The SSI benefits as paid should not have been credited against defendant/appellee's obligations as was

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CONCLUSION

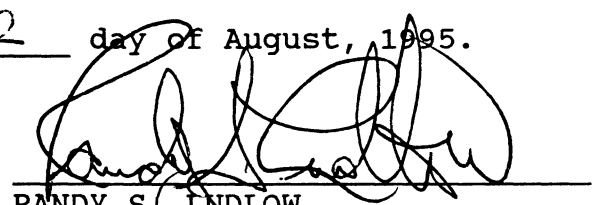
The awards of the trial court should be set aside and reversed. No judgement should be awarded to the defendant/appellee against the plaintiff/appellant for the $2,812.00 as monies owing on the marital residence. These sums were totally satisfied based upon the defendant/appellee's failure to pay the child support obligation and the appropriate offset which should have been made by the trial court.

The plaintiff/appellant should have been awarded judgement against the defendant/appellee the sum of $28,800.00 for the amount of child support which would have been due and owing from July 1, 1986 through June 1994 or in the alternative at least the amount of $5,100.00 which would have been for the time periods between July 1, 1986 through November 1987. The SSI benefits as paid should not

have been credited against defendant/appellee's obligations as was done by the trial court.

Additionally, the plaintiff/appellant should be awarded her costs and attorneys fees in this matter as was sought pursuant to her Counter-Order to Show Cause.

RESPECTFULLY SUBMITTED this 2 day of August, 1995.



RANDY S. LUDLOW
Attorney ~~for~~ Plaintiff/Appellant

ADDENDUM

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

Tamara Lee Coulon, Plaintiff,	:	MINUTE ENTRY
	:	Civil No. 824901630 DA
vs.	:	JUDGE FRANK G. NOEL
Mark Fletcher Coulon, Defendant.	:	

The court has reviewed the plaintiff's Objection to the Recommendation of the Commissioner, has heard oral argument thereon and having taken the matter under advisement now rules as follows:

This ruling applies only to the Objection to the Commissioner's Recommendation which addresses the period of time up to July, 1994. The court makes no ruling with regard to amounts owed by either party, if any, since July, 1994.

It appears from a review of the file that the defendant's claim on the residence was reduced to the amount of $3,800.00 in March of 1985 to compensate for back due child support arrearages.

The amount of child support due therefore, from March of 1985 through June of 1986, at $300.00 per month, would be $4,800.00. The amount due from July, 1986 to July, 1994 would be $28,800.00 for a total child support arrearage of $33,600.00.

Defendant claims that the $4,800.00 amount was time barred. The court is of the opinion however, that under the authority of Jacobson v. Bunker, 699 P.2d 1208 (Ut. 1985) that amount may be used as an offset by the plaintiff for any amounts due and owing to the defendant. If that principle applies in a promissory note context as in the Jacobson v. Bunker case then it surely would apply in the context of a child support arrearage case where the policy considerations for an offset are even greater. Accordingly, the amount due and owing by defendant from the period of time from March, 1985 to July, 1994 is $33,600.00.

The court is of the opinion that defendant should receive credit for SSI payments made to the children through July, 1994 of $32,612.00. That leaves an arrearage of $988.00 which may be used as an offset by the plaintiff against the amount due and owing and the court will therefore award the defendant a judgment of $3,800.00 less the $988.00 offset for total judgment of $2,812.00. The court will affirm the Commissioner's recommendations in every other respect.

Counsel for defendant is to prepare an appropriate order and judgment.

Dated this 6th day of April, 1995.

Frank G. Noel
District Court Judge

STATE OF UTAH
THIRD DISTRICT COURT
SALT LAKE

MAILING CERTIFICATE

I hereby certify that I caused to be mailed a true and correct 2 copies of the foregoing BRIEF OF APPELLANT, by placing the same in the United States Mail, in a postage pre-paid sealed envelope, this 2nd day of August, 1995 to the following:

JAMES C. HASKINS
5085 SOUTH STATE STREET
MURRAY, UTAH 84107-4840

Leslie Frederick
Secretary