1997

Turley v. Turley : Reply Brief

Utah Court of Appeals

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IN THE COURT OF APPEALS

OF THE STATE OF UTAH

JULIETTE TURLEY,	:	
Plaintiff-Appellee,	:	Case No. 970020-CA
vs.	:	Oral Argument Priority 15
ROBERT WALTERS TURLEY,	:	
Defendant-Appellant.	:	

REPLY BRIEF OF APPELLANT

APPEAL FROM A FINAL ORDER OF THE FOURTH DISTRICT COURT OF UTAH COUNTY, UTAH, THE HONORABLE HOWARD H. MAETANI

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REPLY BRIEF OF APPELLANT

STANDARD OF REVIEW

In her statement of issues presented, Mrs. Turley argues that a deferential standard of review applies.[1] Mrs. Turley states: "The Appellant's argument that a lessor [*sic*] standard applies, is undercut by the continued reference to the Findings of Fact made by the Trial Court." (Brief of Appellee at 3.) This betrays an misunderstanding of the nature of the trial court's decision and the scope of this appeal. Mr. Turley's brief does refer to the findings of the divorce decree, but this appeal does not, and could not, challenge those findings nor any part of the initial decree.

[1]Mrs. Turley also includes the statement that "this Court will not review issues that are raised for the first time on appeal." (Brief of Appellee at 2.) The statement correctly states the law, but it is not applicable to this case. Nowhere in her brief does Mrs. Turley identify any issue which was raised for the first time on appeal, and there are no such new issues.

At issue here is a post-decree proceeding. The case was decided on summary judgment, and the trial court therefore did not and could not make any "findings."

Although an appellate court typically "reviews a trial court's modification determination for an abuse of discretion," Hill v. Hill, 841 P.2d 722, 724 (Utah Ct. App. 1992), the trial court's determination in this case involves solely an interpretation of the wording of the decree of divorce. The trial court treated the issue as having been presented by a motion for summary judgment. (R. 158.) The only issues presented involve the interpretation of the decree. "Since appellate courts are in as good a position as trial courts to interpret court rulings . . . , [this court] should review the trial court's interpretation of its order for correctness." Stevensen v. Goodson, 924 P.2d 339, 346 (Utah 1996).

This rule applies in divorce matters. In Bettinger v. Bettinger, 793 P.2d 389, 391 (Utah Ct. App. 1990), which was an appeal from a post-divorce order interpreting the divorce decree, this Court stated:

> A judgment must be enforced as written if the language is clear and unambiguous. *Park City Utah Corp. v. Ensign Co.*, 586 P.2d 446, 450 (Utah 1978). However, ambiguous judgments are subject to the same rules of construction that apply to all written instruments and "the entire record may be resorted to for the purpose of construing the judgment." *Id.* The determination of whether a contract is ambiguous is, at the outset, a question of law. *Regional Sales Agency Inc. v. Reichert*, 784 P.2d 1210, 1213 (Utah Ct. App. 1989). "If a trial court finds the agreement unambiguous and interprets its meaning by examining only the words of the agreement, this interpreta-

> tion also presents a question of law." *Id.* Therefore, we are not required to give the trial court's interpretation of an unambiguous judgment any particular weight, but review its interpretation under a correctness standard. *Id.* However, if the trial court determines the language is ambiguous and finds facts based upon extrinsic evidence, appellate review of such findings is limited to determining whether they are based on substantial, competent, admissible evidence. *50 West Broadway Assoc's. v. Redevelopment Agency of Salt Lake City*, 784 P.2d 1162, 1171-72 (Utah 1989).

793 P.2d at 391-92. *Accord* Williams v. Miller, 794 P.2d 23, 25 (Utah Ct. App. 1990); Whitehouse v. Whitehouse, 790 P.2d 57, 60 (Utah Ct. App. 1990).

Mrs. Turley cites many cases in support of her claim that a deferential standard of review applies, but none is an appeal from a trial court's interpretation of its own decree. Because the instant appeal challenges the trial court's legal conclusions reached on summary judgment, review is for correctness, with no deference to the decision below.

ARGUMENT

POINT I

THE DIVORCE DECREE DID NOT MANDATE THAT CHILD SUPPORT BE FOREVER BASED ON HISTORICAL INCOME.

The divorce decree states that support will continue "only so long as the defendant's income is based upon historical earnings of $181,000.00 per year." Based on this language, Mrs. Turley argues that "[t]he plain use of the language, when interpreted in light of

the applicable support statutes, is to include the event where Mr. Turley might actually terminate his employment, but his historical ability to earn will continue as the basis for his support obligations." (Brief of Appellee at 8.) Mrs. Turley does not identify what are "the applicable support statutes," but one such statute is Utah Code Ann. § 78-45-7.5(7)(b) (1996). That statute provides that potential income, derived from work history and other factors, should be considered in imputing income for child support calculations. Apparently Mrs. Turley stretches this statute in light of the decree to conclude that child support will be forever fixed based on Mr. Turley's historical income of $181,000.00 per year. There are numerous fallacies with this logic.

First, the language of the decree does not support Mrs. Turley's interpretation. The decree should be interpreted to give effect to each word. W. & G. Co. v. Redevelopment Agency of Salt Lake City, 802 P.2d 755, 769 (Utah Ct. App. 1990). If interpreted as advocated by Mrs. Turley, there would be no purpose for the phrase that support should continue "only so long" as income remained at historical levels. Under Mrs. Turley's interpretation, there would never be a time at which historical income changed.

A second fallacy in Mrs. Turley's argument is the assumption that "the applicable support statutes" mandate that income be imputed at historical levels. Utah Code Ann. § 78-45-7.5 (1996) states, in pertinent part, as follows:

> (6) Gross income includes income imputed to the parent under Subsection (7).

> (7) (a) *Income may not be imputed to a parent unless* the parent stipulates to the amount imputed or *a hearing is held and a finding made that the parent is voluntarily unemployed or underemployed.*
>
> (b) If income is imputed to a parent, the income shall be based upon employment potential and probable earnings as derived from work history, occupation qualifications, and prevailing earnings for persons of similar backgrounds in the community.

(Emphasis added.)

Income is not imputed, therefore, until after the court finds, following a hearing, that the obligor is voluntarily unemployed or underemployed. Even then, historical income is only one of several factors which the court is to consider in imputing income.

A third fallacy with Mrs. Turley's interpretation of the decree is that the subject provision is not dealing with imputed income. The provision states that support will continue so long as the income remained at historical levels; it does not say that income will be imputed at historical levels and therefore support will forever continue at the same level.

Finally, there is no support for the wild claim that "[a]ny other interpretation would open the flood gates for obligor parents to avoid high paying and historical income sources, to intentionally punish and deprive spouses and children." (Brief of Appellee at 9.) The statutory provision quoted above provides a very adequate hedge against such a possibility.

The trial court in this case did not purport to impute income to Mr. Turley. That issue will likely surface on remand, and the

trial court will then be required to hold a hearing, receive evidence, and then determine (a) whether to impute income (i.e., is Mr. Turley voluntarily unemployed or underemployed) and, if so, (b) how much income to impute. Historical earnings is only one of several factors relevant to that decision. The decree does not purport to circumvent this process, and Mrs. Turley's argument to the contrary should be rejected.

POINT II

THE "CONSTRUE AGAINST THE DRAFTER" RULE OF CONSTRUCTION DOES NOT APPLY.

Without citation to supporting authority, Mrs. Turley asserts that "it is black letter law" that any ambiguities in the decree should be construed against Mr. Turley as the drafter of the decree. Initially, it should be noted that there is no evidence in the record that Mr. Turley was the sole drafter of the decree. More importantly, the rule would not apply even if Mr. Turley were the drafter. The comments of this Court in Wilburn v. Interstate Electric, 748 P.2d 582 (Utah Ct. App. 1988), are apropos:

> Plaintiff misapprehends the doctrine that contracts should be construed against the drafter. The doctrine does not operate in dispositive fashion simply because ambiguity has been found. Once a contract is deemed ambiguous, the next order of business is to admit extrinsic evidence to aid in interpretation of the contract. It is only after extrinsic evidence is considered and the court is still uncertain as to the intention of the parties that ambiguities should be construed against the drafter. In other words, the doctrine of construing ambiguities in a contract against the drafter functions as a kind of tie-breaker, used as a last resort by the

> fact-finder after the receipt and consideration of all pertinent extrinsic evidence has left unresolved what the parties actually intended. This rule has been summarized as follows:
>
> > After applying all of the ordinary processes of interpretation, including all existing usages, general, local, technical, trade, and the custom and agreement of the two parties with each other, having admitted in evidence and duly weighed all the relevant circumstances and communications between the parties, there may still be doubt as to the meaning that should be given and made effective by the court. If . . . the remaining doubt as to the proper interpretation is merely as to which of two possible and reasonable meanings should be adopted, the court will adopt that one which is less favorable in its legal effect to the party who chose the words.
>
> 3 A. Corbin, *Corbin on Contracts* § 559 (1960).

748 P.2d at 585-86 (footnotes omitted). This is consistent with the rule that the interpretation of an instrument should be determined first from the four corners of instrument, then from contemporary writings, then through application of rules of construction, and finally from parol extrinsic evidence. Continental Bank & Trust Co. v. Bybee, 6 Utah 2d 98, 306 P.2d 773, 775 (1957).

If the decree in this case were ambiguous, the remedy would not be to construe it against the drafter, but rather to resolve the ambiguity by reference to other contemporanous writings. The most reliable extrinsic evidence would be the Findings of Fact and Conclusions of Law. Such an approach was employed in Whitehouse v. Whitehouse, 790 P.2d 57, 60 (Utah Ct. App. 1990). Faced in that

case with a "very unusual and perhaps even inequitable division in the equity of the family home," the court looked at the decree *and* the supporting findings and conclusions to determine the meaning of the decree.

Paragraph 7 of the Findings in the instant case resolves any ambiguity which may exist in the Decree. The findings state that it is reasonable for support to continue at the decree level "in the event [Mr. Turley's] income does not terminate." The obvious corollary is that the support was not intended to continue at the same level if Mr. Turley was unable to find income at the historical level.

CONCLUSION

This Court should review the interpretation of the divorce decree for correctness, without deference to the decision below. The correct interpretation, consistent with the findings of fact, is that the decree contemplated that levels of support in the decree would continue only if Mr. Turley were able to obtain income at the historical level of income. Mr. Turley's petition for modification alleges he was not able to maintain that level of income. The trial court's judgment of dismissal should be reversed and the case remanded for trial on Mr. Turley's petition.

DATED this 21st day of July, 1997.

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MAILING CERTIFICATE

I hereby certify that two true and correct copies of the foregoing were mailed to the following, postage prepaid, this 21st day of July, 1997.

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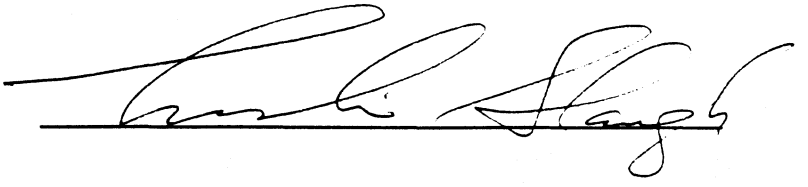

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