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Kim S. Black v. Jon Cornell Black : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

KIM S. BLACK, Appellant/Petitioner, vs. JON CORNELL BLACK, Appellee/Respondent.	:	Appellate Case No. 20071014

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I. THE PLAIN LANGUAGE OF UTAH CODE SECTION 30-3-5(10) DOES NOT GIVE THE TRIAL COURT THE DISCRETION TO RETROACTIVELY TERMINATE ALIMONY BASED ON COHABITATION.

Utah Code section 30-3-5(10) provides, "[a]ny order of the court that a party pay alimony to a former spouse terminates upon establishment by the party paying alimony that the former spouse is cohabitating with another person." UTAH CODE ANN. § 30-3-5(10) (West 2004). This section clearly provides that alimony is to be terminated prospectively upon the establishment of cohabitation and does not allow for retroactive termination of alimony. The legislature knows how to give a court authority to modify an alimony award retroactively, (*see e.g.* UTAH CODE ANN. § 78B-12-112(4) (2008) (previously numbered as 78-45-9.3(4)) but did not do so. The legislature also knows how to terminate alimony automatically upon a stated event, such as death or remarriage, (*see* § 30-3-5(9)), but did not provide that alimony be terminated automatically upon the event of cohabitation.

An analysis of Utah Code section 30-3-5(10) will show that the legislature never intended alimony to be terminated retroactively on the basis of cohabitation. For the purpose of ascertaining statutory intent, we note that before alimony can be terminated, the party paying alimony must establish "that the former spouse *is cohabitating* with another person," § 30-3-5(10) (emphasis added), and not that "the former spouse *was* cohabitating with another person." One of the reasons for the use of the present tense in this section is to make sure that there is a sufficiently solid relationship, such that the

needs of the spouse and any children will be provided for In *Paffel v Paffel*, the court explained that the purpose of spousal support is to enable the spouse receiving alimony payments to maintain a standard of living enjoyed during the marriage and to prevent the spouse from becoming a public charge *Paffel v Paffel*, 732 P 2d 96, 100 (Utah 1986)

Drafting section 30-3-5(10) in the present tense shows that the legislature envisioned a scenario where the payee spouse is presently cohabitating with another person who will provide financial support This support from the new cohabitant will replace the lost alimony payments and thus prevent the spouse from becoming a public charge To require the payor spouse to prove that the payee spouse is presently cohabitating with another person shows that the legislature never intended that alimony be terminated retroactively

A similar motive is seen in Utah Code section 30-3-5(9), which provides, "any order of the court that a party pay alimony to a former spouse automatically terminates upon the remarriage or death of that former spouse However, if the remarriage is annulled and found to be void ab initio, payment of alimony shall resume if the party paying alimony is made a party to the action of annulment and his rights are determined " (West 2004) The fact that alimony can be reinstated even after a marriage with accompanying cohabitation shows that the legislature is concerned with the solidarity of the relationship

Respondent argues that the court should have discretion over whether to terminate alimony retroactively Respondent's Br at 11 As support for this proposition, Respondent cites *Wall v Wall* "The legislature's use of 'may' clearly gives the court

discretion to make child support modification retroactive." Respondent's Br. at 11; *Wall v. Wall*, 2007 UT App 61, ¶ 20, 157 P.3d 341. However, in *Wall*, the court was quoting language from Utah Code section 78B-12-112(4) (previously numbered as 78-45-9.3(4)). Respondent devotes about four pages to explaining why section 78B-12-112(4) is inapposite to this issue and why section 30-5-3(10) should apply. Respondent's Br. at 8-12. If section 78B-12-112(4) does not apply to this issue, as Respondent urges, the court should not have the discretion authorized by that section to modify alimony retroactively.

Respondent cites *Sigg v. Sigg*, 905 P.2d 908 (Utah App. 1995), as precedent for the proposition that alimony may be terminated retroactively based on cohabitation. While it is true that the Court of Appeals in *Sigg* upheld the trial court's decision, which included a retroactive termination of alimony, *Id.* at 917-18, the issue of whether a court could retroactively terminate alimony was not directly addressed. The trial court in *Sigg* modified alimony retroactively to the date of cohabitation, which was eight (8) months before the petition to modify was filed. The statutes and case law argued herein were not addressed or raised in *Sigg* nor is the holding in *Sigg* applicable herein because it didn't address these issues. In this case more than five (5) years have elapsed and to retroactively terminate alimony to the date of cohabitation would result in significant hardship and injustice. The continuances and delays in this matter are not attributable to the Appellant and it is not appropriate that she should be the party to suffer what is proposed by the Respondent.

II. IF THIS COURT DETERMINES THAT A COURT HAS DISCRETION TO TERMINATE ALIMONY RETROACTIVELY BASED ON COHABITATION UNDER UTAH CODE SECTION 30-5-3(10), THE

TRIAL COURT SHOULD ALSO HAVE DISCRETION OVER THE LENGTH OF TIME OF RETROACTIVITY, BUT NOT BEYOND THE TIME WHEN NOTICE OF THE ACTION TO TERMINATE ALIMONY BASED ON COHABITATION WAS RECEIVED.

Respondent argues that if the trial court judge retroactively terminates alimony, he has no discretion over the time period of retroactivity, but must terminate alimony to the date cohabitation began Respondent's Br at 15 If this Court determines that Utah Code section 30-5-3(10) gives the trial court discretion over whether to terminate alimony retroactively, it would be more consistent with the statutory framework to allow the judge to determine both whether the award should be retroactive and the period of retroactivity, as in section 78B-12-112(4) (previously numbered as 78-45-9 3(4))

However, the trial court should not have discretion to terminate alimony retroactively to a date prior to when notice was given of the action to terminate alimony based on cohabitation Section 78B-12-112(4) (previously numbered as 78-45-9 3(4) allows for the retroactive modification of spousal support orders That section also has a limitation "A child or spousal support payment under a support order may be modified with respect to any period during which a modification is pending, but only from the date of service of the pleading on the obligee, " *Id* Because section 30-5-3(10) is silent regarding the court's power to retroactively terminate alimony based on cohabitation, if this Court decides that retroactive termination is permissible, it should also adopt the limitation of section 78B-12-112(4) (previously numbered as 78-45-9 3(4) which tempers the harsh results that can result when alimony is terminated retroactively In this case,

notice of the action to terminate alimony based on cohabitation was received in June of 2005, so the termination of alimony should not extend to a date previous to that date

The Respondent, when he requested to amend his petition for modification in June 2005, placed in the amended petition a request for the ruling to be *nunc pro tunc* The Respondent knew that the request was contrary to statute and the existing case law which is why the request was made Appellant opposed the amendment and requested that the trial court require that a new petition for modification be filed and served and furnished to the trial court the statutory and case law basis of why that should be done supporting her position (See Exhibits C and D which are attached to Appellant's Brief See also R 346-349 and 356-357) The arguments as made by Appellant in opposing the amended petition for modification are applicable here and support the position as contained in the then statute of UCA §78-45-9 3(4) prohibiting modification of the alimony anytime earlier than when the Respondent amended his petition for modification in June 2005

III. THE LONGSTANDING RULE UNDER UTAH STATUTES AND COMMON LAW PROVIDES THAT TRIAL COURTS MAY MAKE RETROACTIVE ALIMONY MODIFICATIONS ONLY TO THE DATE A MODIFICATION PETITION IS SERVED.

In Wilde v Wilde, 2001 UT App 318, the court squarely addressed the issue of retroactive modification of alimony

> Under the statutes discussed above and Utah common law, we conclude trial courts have the discretion to award modified alimony retroactively to the date a modification petition is served The Utah Supreme Court has suggested that courts have the discretion to retroactively award modified alimony for the period during which a modification is pending See Marks v Marks, 98 Utah 400, 404, 100 P 2d 207, 209 (Utah 1940) (noting "court[s] do[] not have the power to modify an installment of alimony which has accrued prior to the making of the application to modify the decree" (emphasis added)) (citing Myers v Myers, 62 Utah 90, 218 P

> 123 (Utah 1923)). This is clearly the majority rule. See Hill v. Hill, 435 S.E.2d 766, 768 (N.C. 1993) ("'[A] majority of the courts of other states which have considered the question have held a trial court may make modifications effective as of the date the petition is filed.'" (quoting Kruse v. Kruse, 464 N.E.2d 934, 938 (Ind. Ct. App. 1984))); Trezvant v. Trezvant, 403 A.2d 1134, 1138 (D.C. 1979) ("[T]he few cases addressing this question in other jurisdictions have also concluded that orders increasing support payments may, in the discretion of the trial judge, be retroactive to the date when application for the increase was made." (citing McArthur v. McArthur, 106 So. 2d 73, 76 (Fla. 1958) (citations omitted))); cf.Shelton v. Shelton, 885 P.2d 807, 808 (Utah Ct. App. 1994) (concluding retroactive award of alimony was within trial court's discretion because obligor deceived court regarding income and other equities were not present).

Wilde v. Wilde, 2001 UT App 318, ¶ 23.

In *Wilde*, the court was analyzing Utah Code section 30-3-10.6(2), which is now renumbered and amended at 78B-12-112(4) (2008). That section provides in relevant part, "(4) A child or spousal support payment under a support order may be modified with respect to any period during which a modification is pending, but only from the date of service of the pleading on the obligee, if the obligor is the petitioner, or on the obligor, if the obligee is the petitioner." Although Respondent contends that section 78B-12-112(4) should not apply to a petition to terminate alimony based on cohabitation, (Respondent's Br. at 8-12), we note that the *Wilde* court did not rely solely on the above statute, but based its decision on both "the statutes . . . and Utah common law." *Wilde v. Wilde*, 2001 UT App 318, ¶ 23 (emphasis added). Utah law thus clearly provides in both statutes and case law that alimony may be modified retroactively only to the date of service of the modification petition, which in this case is June 2005.

Recognizing the law that prevents retroactive modification of alimony previous to the service of the modification petition, the trial court below made a retroactive modification of alimony to the date of the modification petition, which was on June 7,

2001 (R 76-80) However, we argue that this decision was error or abuse of discretion for two (2) reasons First, Respondent failed to prosecute the 2001 claim, See Petr's Br at 4, and should be estopped or precluded from using the 2001 date because of the doctrine of laches Second, the cohabitation claim was entirely different from the claim on which the 2001 modification petition was based, and did not provide petitioner notice of the cohabitation claim See Petr's Br at 11-12 Instead of using the June 2001 date, the trial court should have used the date of June 2005, when the cohabitation claim was made, (R 748), as the earliest date to which alimony could be retroactively modified

CONCLUSION

Under the plain language of Utah Code section 30-3-5(10), alimony may not be terminated retroactively If this Court holds that alimony may be terminated retroactively, such termination should not relate back further than when notice of the action to terminate alimony based on cohabitation is received

Wherefore, Kim S Black prays that this Court reverse the judgment and order of the trial court and hold that retroactive termination of alimony is inconsistent with section 30-3-5(10) Additionally, this Court should deny Respondent's request for attorney's fees and costs, (see Br of Respondent at 15), as Respondent does not set forth a "legal basis for such an award" as required by Rule 24(a)(9) of the Utah Rules of Appellate Procedure The trial court did not award attorney fees, nor should this court

DATED this 21st day of August, 2008

/s/
RANDY S LUDLOW

CERTIFICATE OF MAILING

I hereby certify that on this 21st day of August, 2008, I caused to be mailed, by deposit in the United States Mail, two (2) true and correct copies of the foregoing **REPLY BRIEF OF APPELLANT** to the following:

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