2008

Lori Ann Busche v. Matthias Busche : Cross-Appellant's Reply Brief

Utah Court of Appeals

Rosemond G. Blakelock; Andrew F. Peterson; Blakelock and Peterson; Attorneys for Respondent/Appellant.
Douglas B. Thayer; Andrew V. Wright; Hill Johnson and Schumtz, L.C.; Attorneys for Petitioner/Appellee.

IN THE UTAH COURT OF APPEALS

LORI ANN BUSCHE, Petitioner/Cross-Appellant vs. MATTHIAS BUSCHE, Respondent/Appellant	**CROSS-APPELLANT'S REPLY BRIEF** App. Case No.: 20080388 **ORAL ARGUMENT REQUESTED**

APPEAL FROM JUDGMENT IN THE FOURTH JUDICIAL DISTRICT COURT

HONORABLE CLAUDIA LAYCOCK, DISTRICT COURT JUDGE

Rosemond G. Blakelock (6183)
Andrew F. Peterson (10074)
BLAKELOCK & PETERSON
1832 North 1120 West
Provo, Utah 84604
Attorneys for Respondent/Appellant

Douglas B. Thayer (8109)
Andrew V. Wright (11071)
HILL JOHNSON & SCHMUTZ, L.C.
RiverView Plaza, Suite 300
4844 North 300 West
Provo, Utah 84604-5663
Attorneys for Petitioner/Appellee

IN THE UTAH COURT OF APPEALS

LORI ANN BUSCHE, Petitioner/Cross-Appellant vs. MATTHIAS BUSCHE, Respondent/Appellant	**CROSS-APPELLANT'S REPLY BRIEF** App. Case No.: 20080388 **ORAL ARGUMENT REQUESTED**

APPEAL FROM JUDGMENT IN THE FOURTH JUDICIAL DISTRICT COURT

HONORABLE CLAUDIA LAYCOCK, DISTRICT COURT JUDGE

Rosemond G. Blakelock (6183)
Andrew F. Peterson (10074)
BLAKELOCK & PETERSON
1832 North 1120 West
Provo, Utah 84604
Attorneys for Respondent/Appellant

Douglas B. Thayer (8109)
Andrew V. Wright (11071)
HILL JOHNSON & SCHMUTZ, L.C.
RiverView Plaza, Suite 300
4844 North 300 West
Provo, Utah 84604-5663
Attorneys for Petitioner/Appellee

court erred by relying on this unsupported statement to determine that Lori's fees were one fifth of Matthias'. The trial court also erred by relying on its determination that Lori's fees were one fifth of Matthias' to conclude that Lori's fees were excessive.

CONCLUSION

Accordingly, Lori respectfully requests that this Court find that the trial court erred in refusing to consider Matthias' equity in the marital home in its determination of his ability to pay Lori's attorney fees. Also, Lori requests that this Court find that the trial court erred in determining the award of attorney fees.

STATEMENT CONCERNING ADDENDUM

Pursuant to Utah R. App. P. 24(A)(11), Lori states that no addendum is necessary.

DATED this 28th day of December, 2010.

HILL, JOHNSON & SCHMUTZ

Douglas B. Thayer
Andrew V. Wright
Counsel for Lori Busche

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 28th day of December, 2010 she caused a true and correct copy of the foregoing to be delivered to the following:

Rosemund G. Blakelock
Andrew F. Peterson
Blakelock And Peterson
1832 North 1120 West
Provo, Utah 84604

Sent Via:
____Hand-Delivery
____Facsimile
__X__Mailed (postage prepaid)

Meg Abna

TABLE OF CONTENTS

TABLE OF AUTHORITIES

A. Cases

B. Statutes and Rules

SUMMARY OF THE ARGUMENT

Despite Matthias' arguments to the contrary, the trial court erred in failing to award Lori all her attorneys fees incurred in prosecuting and defending against Matthias' petition to modify. The court found that Lori was the prevailing party, that she had a need for the fees and that Matthias was able to pay. However, the court arbitrarily determined that Lori's requested fees were unreasonable.

The trial court's determinations on this issue are in error based on the following grounds: First, the trial court erred as a matter of law that Matthias' equity and interest in the marital home could not be considered by the court in determining attorneys fees. Second, the trial court erred as a matter of law in relying on an unsupported statement made by Matthias' counsel that Matthias' attorneys fees were a fifth of Lori's.

ARGUMENT

I. THE TRIAL COURT ERRED BY RULING THAT FOR PURPOSES OF AWARDING ATTORNEY FEES, A PARTY'S EQUITY OR INTEREST IN A HOME OR PROPERTY CANNOT BE CONSIDERED ASSETS OR INCOME.

Contrary to Matthias' assertions, the trial court did find, as a matter of law, that Matthias' equity in the marital home could not be considered an asset or income for the purpose of determining Matthias' ability to pay Lori's attorney fees. The trial court found "that [Matthias'] equity in the marital home [was] not ongoing income and . . . that it [was] not appropriate to take the $66,000 in equity . . . for . . . payment of [Lori's]

attorney fees. So I am not going to consider Respondent's equity in the marital home." (Findings of Fact and Am. Decree of Divorce, ¶ 77; R. at 0996]. This was error. A trial court is not limited to ongoing income in its determination of alimony or a party's ability to pay attorney fees.

In *Crompton v. Crompton* the Utah Court of Appeals explained that sources of income vary from one marital arrangement to another. 888 P.2d 686, 689 (Utah App. 1994). Therefore, "it would be inappropriate for an appellate court to tie the hands of a trial court by confining its consideration of income in every case to only that which springs from a forty-hour-week source." *Id.* Rather, "[a] trial court must be able to consider all sources of income that were used by the parties during their marriage to meet their self-defined needs, from whatever source—overtime, second job, self-employment, etc., *as well as unearned income*." *Id.* (emphasis added).

Accordingly, the Utah Court of Appeals has approved the consideration of welfare, unemployment, disability benefits, assistance from friends and church, *Wilde v. Wilde*, 35 P.3d 341, 347 (Utah App. 2001), retirement benefits and "unearned" investment income, *Breinholt v. Breinholt*, 905 P.2d 877, 880-82 (Utah App. 1995), and "historical earnings," and imputed "unemployed" or "underemployed" income, *Moon v. Moon*, 973 P.2d 431, 438 n.8 (Utah App. 1999), in awarding alimony.

The Utah Court of Appeals has also approved the consideration of a party's equity in a home in determinations of alimony and a party's ability to pay attorney fees. For

example, in *Adelman v. Adelman*, the court affirmed the trial court's order offsetting a party's equity in the marital home by the judgment against the party for back alimony. 815 P.2d 741, 746 (Utah App. 1991). And in an unpublished opinion, the court approved the trial court's consideration of a husband's equity in a home in the trial court's determination that the husband had the ability to pay the wife's attorney fees. *Madsen v. Madsen*, 1998 WL 1758391, *2.

In sum, Utah appellate decisions have held that it *is* appropriate for a trial court to consider a party's equity in a home in the trial court's determination of alimony or a party's ability to pay the other party's attorney fees. Therefore, the trial court erred in finding that, as a matter of law, it could not consider Matthias' equity in the marital home in its determination of Matthias' ability to pay Lori's attorney fees.

II. THE TRIAL COURT ERRED BY RULING THAT THE AMOUNT OF LORI'S ATTORNEY FEES WAS UNREASONABLE.

The trial court has broad discretion in determining whether to award attorney fees and the amount of the award. *See Olieken v. Olieken*, 147 P.3d 464, 468 (Utah App. 2006) (citing *Rasband v. Rasband*, 752 P.2d 1331, 1336 (Utah App. 1988)). The trial court "may award considerably less than requested so long as the reduction is supported by adequate findings." *Brookside Mobile Home Park v. Sporl*, 2000 UT App. 195, *3. In this case, the trial court erred by awarding Lori considerably less than requested without supporting its reduction by adequate findings.

In *Madsen*, the wife requested $3,900 in attorney fees. 1998 WL 1758391, *2. Her attorney's testimony explained why $3,900 was reasonable. Based on that testimony and the husband's equity in the home, the trial court ordered the husband to pay $2,000 in attorney fees. *Id.* The Utah Court of Appeals remanded for appropriate findings and adjustment of the attorney fees award "because the trial court failed to explain its reduction in the amount of fees requested, and did not specify in its findings why $2,000 was reasonable." *Id.* at *2-3.

In *Rappleye v. Rappleye*, the Utah Court of Appeals reiterated the factors a court may consider in determining the reasonableness of attorney fees:

> [a] court may consider among other factors, the difficulty of the litigation, the efficiency of the attorneys in presenting the case, the reasonableness of the number of hours spent on the case, the fee customarily charged in the locality for similar services, the amount involved in the case and the result attained, and the expertise and experience of the attorneys involved.

855 P.2d 260, 265 (Utah App. 1993) (citations omitted). The court explained that "[t]he court abuses its discretion in awarding less than the amount [of attorney fees] requested unless the reduction is warranted by one or more of [these] factors." *Id.* at 266 (citations omitted). Therefore, "the trial court must . . . identify such factors on the record and also explain its sua sponte reduction in order to permit meaningful review on appeal." *Id.* (citations omitted).

In *Rappleye*, the wife requested $15,640 in attorney fees. *Id.* The trial court awarded $5,000. *Id.* The trial court found that the wife's attorney's hourly rate was

reasonable but that there was insufficient evidence in the record to allow the court to determine whether the number of hours spent on the case was reasonable. *Id.* The Utah Court of Appeals found that these findings were "insufficient to support the trial court's sua sponte reduction of the amount of attorney fees awarded to [the wife]." *Id.* The court explained:

> While the trial court apparently found that the testimony and supporting affidavit of [the wife's] attorney were insufficient to establish the reasonableness of the full amount of requested fees, it articulated no reasonable basis for its ultimate award of $5000. Because the court's findings fail to demonstrate that the $5000 award was arrived at after proper consideration of the relevant factors for determining the reasonableness of attorney fee awards, such award constituted an abuse of discretion.

Id. Accordingly, the court vacated the trial court's award of attorney fees to the wife and remanded the matter to the trial court for further findings regarding the reasonableness of the award. *Id.*

In this case, the trial court likewise failed to demonstrate that it arrived at the reduced $20,000 award after considering the relevant factors for determining the reasonableness of attorney fee awards. Like the trial court in *Rappleye*, the trial court in this case made some findings as to the reasonableness of the requested award, (Findings of Fact and Am. Decree of Divorce, ¶ 74; (R. at 0997-0996), but articulated no basis for its ultimate award of $20,000. The trial court erred by failing to make any findings

regarding the reasonableness of its $20,000 award. Therefore, the award of attorney fees should be remanded for further findings regarding the reasonableness of the award.

III. THE TRIAL COURT ERRED BY FINDING THAT MATTHIAS' ATTORNEY FEES WERE ONE FIFTH OF LORI'S BASED ON A STATEMENT MADE BY COUNSEL, WHICH WAS UNSUPPORTED BY ANY EVIDENCE PRESENTED AT TRIAL.

The party requesting attorney fees has the burden to present evidence to support the requested award. *See Haumont v. Haumont*, 793 P.2d 421, 425 (Utah App. 1990) (citations omitted) (stating that "[t]o recover attorney fees in a divorce action, the moving party must show evidence (1) establishing the financial need of the requesting party, and (2) demonstrating the reasonableness of the amount of the award). The opposing party must then "offer . . . evidence to rebut [the moving party's] showing and thereby support an award for less than the amount . . . requested." *Salmon v. Davis County*, 916 P.2d 890, 893 (Utah 1996).

In this case, Lori presented evidence, through her counsel's affidavit, that the requested attorney fees were reasonable and necessary. Matthias did not offer any evidence to rebut Lori's evidence. Matthias' attorney represented that his fees were one fifth of Lori's. This statement was unsupported by any evidence presented at trial. Nevertheless, the trial court found, based upon Matthias' attorney's representation, "that the sum of [Matthias'] attorney's fees, from all of his attorneys . . . was a fifth of [Lori's]." (Findings of Fact and Am. Decree of Divorce, ¶ 76; R. at 0997.) The trial

court erred by relying on this unsupported statement to determine that Lori's fees were one fifth of Matthias'. The trial court also erred by relying on its determination that Lori's fees were one fifth of Matthias' to conclude that Lori's fees were excessive.

CONCLUSION

Accordingly, Lori respectfully requests that this Court find that the trial court erred in refusing to consider Matthias' equity in the marital home in its determination of his ability to pay Lori's attorney fees. Also, Lori requests that this Court find that the trial court erred in determining the award of attorney fees.

STATEMENT CONCERNING ADDENDUM

Pursuant to Utah R. App. P. 24(A)(11), Lori states that no addendum is necessary.

DATED this 28th day of December, 2010.

HILL, JOHNSON & SCHMUTZ

Douglas B. Thayer
Andrew V. Wright
Counsel for Lori Busche

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 28th day of December, 2010 she caused a true and correct copy of the foregoing to be delivered to the following:

Rosemund G. Blakelock
Andrew F. Peterson
Blakelock And Peterson
1832 North 1120 West
Provo, Utah 84604

Sent Via:
____Hand-Delivery
_____Facsimile
__X__Mailed (postage prepaid)

Meg Abha