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Robert Byrd v. Adrianna Byrd : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

ROBERT BYRD

Plaintiff and Appellant

vs.

No. 15570

ADRIEANNA BYRD

Defendant and Respondent

RESPONDENT'S BRIEF

Appeal from the Judgment of the 3rd
District Court for Salt Lake County
Hon. Bryant H. Croft

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STATEMENT OF THE KIND OF CASE

This is an action for divorce in which a decree of divorce has been entered and Plaintiff husband has sought modification of such decree and elimination of alimony payments.

DISPOSITION IN LOWER COURT

The Plaintiff husband's petition for modification was tried to the Court. From an order denying modification of the decree and denying elimination or reduction of alimony payments, Plaintiff husband appeals.

RELIEF SOUGHT ON APPEAL

Plaintiff husband seeks reversal of the order denying elimination or modification of alimony payments or alternatively remand for further hearings.

STATEMENT OF FACTS

Plaintiff husband, subsequent to twenty years of marriage, filed for divorce. Defendant wife, who at the time of the divorce was unemployed, was granted the divorce and custody of the parties' minor child.

The property of the parties was divided and Plaintiff ordered to pay to his wife \$125.00 per month child support and \$175.00 per month alimony.

Subsequent to the divorce, Defendant wife obtained employment to augment the income available to herself and her child. Shortly thereafter Plaintiff husband (who had remarried)

obtained an order to show cause why the \$175.00 per month alimony payment should not be eliminated.

Upon hearing the trial court refused to eliminate the alimony payment and Plaintiff husband appealed.

A R G U M E N T

Point I. THERE HAS NOT BEEN A SUBSTANTIAL CHANGE IN RESPONDENT'S CIRCUMSTANCES SUCH AS TO REQUIRE MODIFICATION OR ELIMINATION OF APPELLANT'S OBLIGATION TO PAY ALIMONY TO RESPONDENT.

To secure modification of an alimony award in the state of Utah, the moving party is required to allege and prove changed conditions since the entry of the decree requiring, under rules of equity and justice, a change thereof. Gardner vs. Gardner, 177 P.2d 743 (Utah 1947) emphasis added.

The general rule relating to an award of alimony in the state of Utah has been held to be that the wife is entitled to one-third of either the property or the income of the husband. Griffin vs. Griffin, 55 P. 84 (Utah 1898); Porter vs. Porter, 166 P.2d 516 (Utah 1946). This rule is not a hard and fast rule but is governed to a large extent by the equities and particular circumstances of each case. Bullen vs. Bullen, 262 P. 292 (Utah 1927). The Utah Supreme Court has approved awards approaching one-half of the property accumulated by the joint efforts of the parties to a marriage. Dalhberg vs. Dalhberg, 292 P. 214 (Utah 1930); Porter vs. Porter, supra.

It has been held that the Court, in a proceeding to modify alimony, may change the amount of alimony awarded to the wife "as will be just to both parties in view of their changed condition." Read vs. Read, 78 P. 675 (Utah 1904); Porter vs. Porter, supra. The generally acceptable measurement of alimony requires

that the wife's needs and requirements considering her station in life and the husband's ability to pay be considered. Hendricks vs. Hendricks, 63 P.2d 277 (Utah 1936) modified 65 P.2d 642 (Utah 1937); Porter vs. Porter, supra. This criterion has also been held to consist of the need of the persons supported and the husband's ability to pay. Anderson vs. Anderson, 172 P.2d 132 (Utah 1946).

Notwithstanding the recognized ability of the Supreme Court to modify such a decree involving alimony, the Utah rule as to the modification of such payments for support is that an award which is both reasonable and not excessive under the facts and circumstances of the particular case will not be disturbed on appeal. Anderson vs. Anderson, supra. The Utah Supreme Court has further held that in divorce proceedings it will not substitute its judgment relative to alimony and division of property for that of the trial court unless the record clearly discloses that the trial court's decree in such matters is plainly arbitrary, Allen vs. Allen, 165 P.2d 872 (Utah 1946) and that in the absence of an abuse of discretion, the Supreme Court will not disturb the division of property decreed by the trial court. Lawlor vs. Lawlor, 240 P.2d 271 (Utah 1952). It has further been held that where a fair preponderance of evidence supports the trial court's findings and decisions as to the division of property, the Supreme Court will not disturb the decree. Pfaff vs. Pfaff, 241 P.2d 156 (Utah 1952).

Point II. APPELLANT HUSBAND HAS NOT DEMONSTRATED AN ABUSE OF DISCRETION ON THE PART OF THE TRIAL COURT JUSTIFYING THE MODIFICATION OF THE ORDER ENTERED BELOW.

The Utah Supreme Court has held that the trial court's discretion is not to be applied arbitrarily and that in the event the decision below is found to be erroneous on its face or unjust to either party it may be subject to correction on appeal.

Friedli vs. Friedli, 238 P. 647 (Utah 1925). And further, that the awarding of alimony and amount thereof are within the sound discretion of the trial court and, unless there has been an abuse of discretion, orders granting and fixing alimony will not be disturbed. Blair vs. Blair, 121 P. 19 (Utah 1912); see also Alldredge vs. Alldredge, 229 P.2d 681 (Utah 1951); also Adamson vs. Adamson, 188 P. 635 (Utah 1920).

This court must review the whole evidence in the light most favorable to the findings of the trial court and will not disturb them merely because it might view the matter differently, but only if evidence clearly preponderates against the findings. Stucki vs. Stucki, 562 P.2d 240, at 241 (Utah 1977)

Point III. THE CASES ENTITLED DUBOIS, KING AND MACLEAN CITED BY APPELLANT AS SUPPORTING HIS MOTION FOR ELIMINATION OR REDUCTION OF ALIMONY DIFFER UPON THE FACTS SUFFICIENTLY AS TO NOT BE A PERSUASIVE GUIDE FOR THE COURT.

Appellant cites in support of his appeal the proposition that the Supreme Court has reduced alimony payments to \$1.00 per year in the case of Dubois vs. Dubois, 504 P.2d 1380 (Utah 1973).

Dubois differs from the case at bar so substantially as to the facts as to be inapplicable to the case at bar. While recognizing the superficial similarity of Dubois, Appellant neglects to inform the Court of the following basic information:

1. The total assets of the Dubois marriage amounted to \$588,581.00 with 60% of the estate (\$353,148.60) being awarded to the plaintiff wife.
2. An investment return of a mere 6% of such principal sum would result in an annual income of not less than \$21,188.90.
3. After the commencement of these proceedings (in Dubois) but before the trial the plaintiff's uncle Dr. Charles E. Hirth who had been a generous benefactor of the parties died. Dr. Hirth left a substantial estate of which the plaintiff was a beneficiary. Dubois, supra. at 1381.
4. Additional assets over and above the parties property consisted of the substantial estate of Dr. Hirth as well as plaintiff wife's expectancy in the estate of her mother who, though still living, (at the time of the trial) was of an advanced age.

In King vs. King, 478 P.2d 492 (Utah 1970) appellant husband's motion for an order reducing alimony payments was denied by the trial court and he appealed. The Supreme Court declared the findings and order entered thereon in error which generally consisted of matters relating to the health of the wife over which all parties and counsel appeared to disagree and were confused. This confusion is clearly apparent on the face of the record, King, supra., at 493,494 and 495, and the Court remanded the matter to the district court for further proceedings.

Upon rehearing the trial court noted a change of circum-

stances of such a nature as to permit modification of alimony payments and reduced such payments from:

\$250.00 per month until the home is paid off,
then \$200.00 per month thereafter

to:

\$100.00 for six months, then \$50.00 per month
for one year after which alimony would terminate

from which order wife appealed.

On appeal the district court ruling was affirmed with the court directing that the alimony award be modified to provide for alimony payments in a nominal sum for the purpose of determining whether the wife was able to maintain herself during and subsequent to the recovery from operations seriously affecting her health.

Other than the above, the trial court ruling below was not disturbed.

In Maclean vs. Maclean, 523 P.2d 862 (Utah 1974) defendant wife sought review and modification of that portion of a divorce decree awarding alimony in the amount of \$350.00 per month to be reduced by a percentage annually.

The wife's physician estimated her life expectancy to be five (5) years and offered medical testimony demonstrating severe health problems despite which the trial court determined her to be capable of gainful employment and, as an "inducement" to obtain employment, adopted an annual diminution of alimony payments.

The Supreme Court noted that the decree relating to alimony as entered did not conform to the decision announced from the bench and, in view of the resulting uncertainty readily apparent on the record coupled with the uncertainty of defendant's ability to secure employment, eliminated the provisions which diminished the award of alimony to defendant wife.

CONCLUSIONS

The movant in an action to eliminate or reduce alimony payments must demonstrate a change in circumstances that requires the Court to change such order below. An order reasonable and not excessive under the facts will not be disturbed on appeal nor is the Supreme Court under an obligation to substitute its judgment for that of the trial court unless the trial court was plainly arbitrary.

Alimony awards and their modification are discretionary with the trial court and must be found to be erroneous on the face or unjust to either party before such an order will be subject to correction on appeal. Unless the trial court is found to have abused its discretion, an order entered fixing alimony will not be disturbed with the exception in the case where the evidence clearly preponderates against the findings.

The cases cited by Appellant in support of his motion differ upon the facts to such an extent that they cannot be used as a guide for the resolution of the case at bar. Dubois differs in that the amounts involved are so disparate that under no condition could the Court determine the instant case to be similar. Both King and Maclean deal with trial records in which the record itself

demonstrated error coupled with a resulting uncertainty as to the decree or order itself. The only alterations required by the Supreme Court were to eliminate the confusion and uncertainty upon the record.

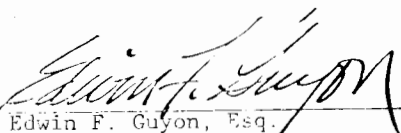
Appellant has clearly not shown that the trial court abused its discretion in refusing to modify the decree entered at the time of the divorce nor that a change of the kind contemplated by prior Utah Supreme Court decisions upon which an alimony modification could be supported had occurred.

Appellant is not entitled to the relief sought.

Respectfully submitted:

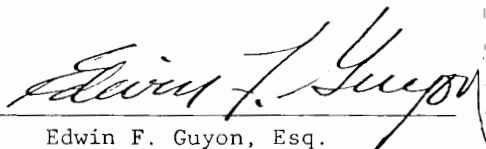
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CERTIFICATE OF SERVICE

I served the foregoing Brief of Respondent, by delivering two copies thereof, personally, to the office of Robert Felton, Esq. Twelve Exchange Place, Salt Lake City, Utah, 84111, this 24th day of April, 1978.

A handwritten signature in cursive script, reading "Edwin F. Guyon", is written over a horizontal line.

Edwin F. Guyon, Esq.