

1986

Sondra Jane Pons v. Edward Pons : Brief of Respondent

Utah Supreme Court

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COURT NO. 860176-CA
IN THE SUPREME COURT OF THE STATE OF UTAH

SONDRA JANE PONS,	:	
	:	860176-CA
Plaintiff/Respondent,	:	CASE NO. 860110
	:	
v.	:	
	:	
EDWARD PONS.	:	
	:	
Defendant/Appellant.	:	
	:	

RESPONDENT'S BRIEF

AN APPEAL FROM AN ORDER OF THE THIRD JUDICIAL COURT
OF SALT LAKE COUNTY STATE OF UTAH DENYING
APPELLANTS' PETITION FOR MODIFICATION

THE HONORABLE JUDITH BILLINGS, PRESIDING



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CLERK 8 1986

Clerk, Supreme Court, Utah

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STATEMENT OF ISSUES PRESENTED

WAS THERE A SUBSTANTIAL CHANGE OF CIRCUMSTANCES TO SUPPORT A REDUCTION OF CHILD SUPPORT AND A REDISTRIBUTING OF MARITAL PROPERTY.

NATURE OF THE CASE

This is defendant's appeal of an order entered by the Honorable Judith Billings, Judge of the Third Judicial District Court, granting defendant's petition for modification of the divorce decree to reduce alimony but denying a reduction of child support and a redistribution of marital property. The Order of the Court appealed from was entered on January 21, 1986.

DISPOSITION IN THE LOWER COURT

This is a divorce proceeding which was originally commenced December 9, 1982. After a trial a Decree of Divorce was entered on July 27, 1983. Subsequent to the divorce, plaintiff brought numerous Order to Show Cause hearings on contempt for defendant's failure to pay alimony and child support, and defendant brought a petition for modification to

have alimony reduced or eliminated, to have child support reduced, and to have the Court redistribute marital assets previously distributed pursuant to the Divorce Decree entered in July of 1983.

A hearing was held December 27, 1985, on Plaintiff's Order to Show Cause for contempt and Defendant's Petition to Modify, Judge Billings eliminated the alimony but did not reduce child support nor redistribute marital assets, and held the defendant in contempt and had him incarcerated in the Salt Lake County Jail. (See Judgment and Order on December 27, 1985 hearing.)

STATEMENT OF FACTS

Plaintiff agrees with Defendant's Statement of Facts and adopts the same except for the following:

1. At the time the Decree of Divorce was entered, defendant did not present any evidence to the above Court in regards to the value of the real estate investments, and plaintiff presented evidence that a \$60,000.00 mortgage was obtained by the defendant on the home and residence of the parties and said monies was used by defendant to invest in the subject real estate investments.

2. That defendant's average monthly income at the time of the Decree of Divorce was approximately \$2,500.00 per month and the amount of child support and alimony awarded to the plaintiff was approximately fifty percent (50%) of the defendant's gross income. Defendant's health has improved and his earning capacity has increased.

3. That at the time of the hearing on the 27th day of December, 1985, defendant's ability to pay alimony and child support was the same as it was at the time of the Decree of Divorce and his income was approximately the same; however, the plaintiff's income had increased by approximately \$400 per month. Both parties living expenses had increased. (See Findings of Fact of hearing held on December 27, 1985).

SUMMARY OF ARGUMENTS

The defendant failed to establish any substantial change of circumstances in regards to defendant's ability to pay child support and the needs of the plaintiff and therefore the Trial Court did not abuse its discretion in denying Defendant's Petition to Reduce the Child Support Payments.

Further the Trial Court did not abuse its discretion in denying Defendant's Petition to Redistribute the Marital Property since again defendant failed to establish any substantial change of circumstances in regards to the same or any fraud involved in the original distribution of said property through the Decree of Divorce.

ARGUMENT

POINT I

**THE TRIAL COURT DID NOT ABUSE ITS DISCRETION
IN FAILING TO MODIFY THE DECREE OF DIVORCE AND
REDUCE CHILD SUPPORT.**

The doctrine of res judicata is based on the concept that the court should not be called upon to adjudicate twice upon the same set of facts. Such considerations, if applied strictly, require the rule that a petition to modify an order for child support cannot be based on the same set of facts that existed when the original order was made. Accordingly, to justify a modification it must ordinarily appear that there has been a substantial change in the material circumstances since the time of the original order. [Gardner v. Gardner, 177 P.2d 743 (Utah 1947), and Scott v. Scott, 142 P.2d 198 (Utah 1943)].

The burden of proof that modification of child support provisions from the Decree of Divorce is warranted lies with the party seeking modification. [Kiesel v. Kiesel, 619 P.2d 1374 (Utah 1980), and Haslem v. Haslem, 657 P.2d 757 (Utah 1982)]. Defendant has failed to meet this burden of proof.

There has been no substantial change of circumstances to warrant the reduction of existing child support. Defendant is still employed in the same line of work, that of tuning and selling pianos, and has the same opportunities available as at the time of the divorce for making adequate income to cover his expenses. Defendant also enjoys better health than at the time of the divorce and so is more physically capable of earning a living than before. Although the defendant argues in his brief that his level of income decreased from the time of the Decree of Divorce to the present, the Trial Court after hearing all of

the evidence found that in fact his income had not decreased significantly and further that defendant's capacity to earn income was the same if not better than at the time of the Decree of Divorce due to his improvement in health.

The fact that the defendant's level of income may have decreased due to his decision to not put in as much time and/or effort in his occupation, is not a substantial change of circumstances and defendant may not intentionally escape his child support obligation by deciding not to put forth the effort to maintain his income level. [Kiesel v. Kiesel, 619 P.2d 1374 (Utah 1980) and Westonskow v. Westonskow, 562 P.2d 1256 (Utah 1977)].

Further, at the time of the divorce there were three minor children which child support was awarded. At the time of the hearing on Defendant's Petition to Modify, there were only two minor children so the child support had in fact been reduced due to the fact that one of the children had reached the age of emancipation. Therefore, defendant's capability of providing support had actually increased.

The defendant argues in his brief that the Findings of Fact by the Trial Court as to defendant's present income and capacity to earn income were inconsistent with the evidence presented at the modification hearing. Said argument is erroneous since defendant presented in its Statement of Facts in its Brief that defendant at the time of the divorce was earning approximately \$2,100 per month and his Defendant's Exhibit 6d of

his 1984 Financial Statement attached to Defendant's Brief indicated that his 1984 gross income was \$24,660. Further the defendant did not object to said Findings of Fact for said modification hearing and further approved the same.

Therefore, the Trial Court having examined all of the circumstances and evidence presented to it, did not abuse its discretion by failing to modify the Decree of Divorce and reduce the child support.

POINT II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY NOT REDISTRIBUTING THE MARITAL PROPERTY AND ASSETS.

Plaintiff does not contend with the fact that the Trial Court had continuing jurisdiction to make changes with regards to the distribution of property but again there must be a substantial change of circumstances or condition of the parties since the entry of the original Decree. In the present case, there is none and defendant did not present any evidence at the modification hearing to even suggest that there was a change of circumstances. The Trial Court at the trial heard all of the evidence and distributed the property. Defendant's argument on appeal is that the Trial Court at the trial failed to take into consideration that the real estate investments awarded to the defendant were involved in bankruptcy. As is stated by the exhibits attached to Defendant's Brief, the bankruptcy for said

real estate investments were filed prior to the divorce trial in this matter. The fact that defendant may have failed to bring said bankruptcy to the attention of the Trial Judge at the divorce hearing on this matter is not a change of circumstances in regards to having the court redistribute the property asset. Again, the defendant failed to present any evidence to the Trial Court at the hearing on the modification as to any change of circumstances in regards to the home and residence and the real estate investments awarded to the defendant. [Dixon v. Dixon, 240 P.2d 1211 (Utah 1952)].

In dividing the property in the marriage dissolution proceeding and later in reviewing the Decree in the modification hearing, the Trial Court did not abuse its discretion in awarding the property to the parties. At the time the property and assets were divided between the parties, there was no fraud involved on the part of the plaintiff and the fact that the real estate investments were involved in bankruptcy has no bearing on the fact that at the time of the divorce the property was distributed in a fair and equitable manner.

In Berger v. Berger, P.2d , 14 Utah Adv. Rep. 4, (Utah 1985), the Court reversed and remanded the question of the value of one particular asset, which the Trial Court did not believe had been properly valued as of its alleged date of sale and had therefore valued it at a prior known value. The Supreme Court held that the martial estate must be valued as of the

divorce trial, citing its previous ruling of Fletcher v. Fletcher, 615 P.2d 1218 (Utah 1980).

In dividing property in a marriage dissolution proceeding; marital estates are evaluated according to what property exists at the time the marriage is terminated. Jespersion v. Jespersen, 610 P.2d 326 (Utah 1980).

Therefore, the Trial Court, did not abuse its discretion by failing to redistribute the marital property and assets of the parties, since defendant's only argument is that the value of his assets decreased.

CONCLUSION

The Trial Court's Order and Judgment on the modification hearing should be affirmed and plaintiff should be awarded its costs incurred.

RESPECTFULLY SUBMITTED this 8 day of June, 1986.



RICHARD S. NEMELKA

MAILING CERTIFICATE

I certify that four true and correct copies of the foregoing Respondent's Brief was mailed, postage prepaid, to James T. Dunn, 4516 South 700 East, Suite 330, Salt Lake City, Utah, 84107.

DATED this 8 day of June, 1986.



RICHARD S. NEMELKA