

1988

Lee v. Lee : Brief of Respondent

Utah Court of Appeals

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BRIEF

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DOCKET NO. 880276-CA

IN THE COURT OF APPEALS OF THE STATE OF UTAH

LAWANA EGAN LEE,

Plaintiff and Respondant, :

v.

Case No. 880276-CA

STERLING CALVIN LEE,

Defendant and Appellant. :

BRIEF OF RESPONDANT

APPEAL FROM FINAL DECREE DATED APRIL 28, 1988,
IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR
UTAH COUNTY, STATE OF UTAH, THE HONORABLE RAY M.
HARDING, JUDGE, PRESIDING

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COURT OF APPEALS

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SUMMARY OF ARGUMENT

POINT I

The Trial Court did not abuse its discretion when it followed the general rule that on requests for modification of a decree, the question whether there has been a substantial change in circumstances is determined with respect to the period commencing with the date of the most recent order on a motion for modification and not with respect to the time since the original decree was entered.

Defendant fails to show how under the circumstances of the instant case, the Trial Court's decision not to eliminate alimony could possibly be capricious. The Trial Court's decision was rational and reasonable.

POINT II

The Trial Court has broad discretion to modify decrees and his judgment should not be changed absent a showing of manifest injustice or inequity to Defendant as to indicate a clear abuse of discretion. None of the three courts to consider this matter contemplated that alimony should be other than permanent. Defendant is not clearly prejudiced by paying Plaintiff \$50.00 alimony out of his \$1,300.00 monthly income when Plaintiff is in her early sixties, unemployed, lives on \$396.80 Social Security disability and has little chance of entering the job market.

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY LIMITED ITS REVIEW OF THE REQUEST TO MODIFY TO THE PERIOD COMMENCING WITH THE DATE OF THE MOST RECENT ORDER FOR MODIFICATION.

The Trial Court properly limited its review of Defendant's request to modify the decree of divorce by entirely eliminating alimony in this matter to the period of time from the most recent order for modification to the present and not to the total time since the original decree was entered.

The case of Short v. Short, relied upon by Defendant in Point I of his brief, adequately sets forth the general rule that the review of requests for modification should be limited to the time since the most recent order of modification and not extend to the time since the original decree was entered.

There is but one point on appeal: That the court erred in failing to compare the parties' present circumstances in relation to those at the time of the decree.

By and large in the ordinary divorce case the appellant's contention would be meritorious, and the cases decided by this court sustain his contention. The difficulty here is that in exercising the latitude of discretion accorded to and recognized in the trial court in these domestic relations matters the appellant's contention is not immalleable, but must yield to reason and the equities attendant in each particular case. In the instant case, we must and do assume that the court did not intend that the \$75 alimony award would be

eliminated if Mrs. S. obtained a job paying \$75 per month, __ or even \$175 per month, __ or even \$389 per month, the income of Mrs. S. at her job at time of the third petition to eliminate the alimony. We think the facts in this case themselves reflect no abuse of discretion on the part of the trial court in refusing to vacate the \$75 alimony award, and we base our conclusion here, not necessarily on any authority to the effect that the court views the facts in relation to the last petition for modification, but because the denial was not capricious when viewed in the light of circumstances existing at the time of the divorce, __ the \$75 award implemented by a necessary and inescapable assumption by the court that Mrs. S. could not survive under any conceivable hypothesis on \$75 per month, and there is nothing in the record to indicate she had any other means of livelihood.

Short v. Short, 25 Utah 2d 326, 327, 481 P.2d 54, 55 (1971).

In Short the Utah Supreme Court did not find that the Trial Court had abused its discretion in dismissing Mr. Short's third petition to eliminate alimony and cited two reasons for its decision. First, the general rule that courts review requests for modification from the time of the last modification and, second, that even when viewed from the time of the divorce the court's actions in that case were not capricious.

The general rule for the period of time considered in a review of request for modification is set forth in the work cited in the footnote in the Short case.

Where there have been one or more previous decisions on motions for modification of a decree, the question whether there has been a substantial change in the circumstances of the parties is

determined with respect to the period commencing with the date of the most recent order on a motion for a modification and not with respect to the time since the original decree was entered.

18 A.L.R 2d at 18-19.

Certainly it was not erroneous nor an abuse of discretion for the Trial Court in this matter to follow this general rule and limit its review of any alleged change of circumstances to the period beginning with the date of the most recent modification order.

The Trial Court's action in limiting its review as set forth above was also not capricious, even when viewed from the date of the original decree. Paragraph 4 of the original 1971 decree sets forth alimony in the amount of \$200.00 "until further order of the Court". The court's further order that alimony now be reduced to \$50.00 cannot be said to be capricious merely because the court did not eliminate alimony altogether.

POINT II

THE COURT DID NOT ABUSE ITS DISCRETION BY ALLOWING ALIMONY TO CONTINUE AT A REDUCED AMOUNT.

It has been long recognized, as for example in the Short case cited above in Point I, that "the trial judge has considerable latitude of discretion in such matters and that his judgment should not be changed lightly, and in fact, not at all, unless it works such a manifest injustice or inequity

as to indicate a clear abuse of discretion." Wilson v. Wilson, 5 Utah 2d 79, 296 P.2d 977.

In the instant case, the original decree provided for alimony in the amount of \$200.00 per month "until further order of the Court." This was modified in 1976 to \$75.00 per month "until said plaintiff obtains work and receives gross income of \$200.00 or more per month at which time said alimony shall be reduced to the sum of \$50.00 per month" The Trial Court in the instant case found that the disability payments Plaintiff now receives are in lieu of wages and accordingly ordered a reduction in alimony as contemplated by the 1976 modification.

The language of the original decree is clear that the trial court there did not contemplate the elimination of alimony to Plaintiff upon her obtaining employment. The 1976 modification is even more clear that alimony was not to be eliminated, but merely reduced, when Plaintiff obtained sufficient employment. Thus, at no time has the trial court expressed the idea that alimony should be entirely eliminated in the instant case.

That the court in the instant matter has refused Defendant's request to eliminate alimony is not an abuse of discretion, but a full exercise of its discretion to decide such matters upon the facts and circumstances of each

individual case. In Rasband v. Rasband, 80 Utah Adv. Rep 32, 32 (1988), this court stated that "This court will not disturb the trial court's award of spousal support absent a showing of a clear and prejudicial abuse of discretion. Paffel v. Paffel, 732 P.2d 96, 100 (Utah 1986)." Defendant has failed to show how the trial court has abused its discretion in this matter or how the court's order is prejudicial to him.

It is hard to see how Defendant is prejudiced by being ordered to pay Plaintiff \$50.00 out of his \$1,300.00 monthly income. Plaintiff's only other source of income is her monthly \$396.80 Social Security disability check. Adding the \$50.00 alimony to the \$396.80 disability income gives Plaintiff a total monthly income of \$446.80. This is just over one-third of Defendant's resulting monthly income of \$1,250.00. Certainly Defendant is not thus prejudiced.

As stated by the Supreme Court in Stephens v. Stephens, 728 P.2d 991, 993 (Utah 1986)

Here, defendant is a woman in her forties who did not pursue her own career during the parties' marriage, has few marketable skills, and earns one-third of plaintiff's salary, with little chance, absent further education, to increase that amount. Those criteria well support a finding of need for alimony, and we uphold that trial court's decision.


Although Defendant seems to urge in his brief that Plaintiff should be compelled to enter the work force and

support herself to spare him the trouble of paying alimony, as pointed out in the Stephens case, this is not always possible. Plaintiff receives Social Security disability because she is disabled and unable to hold a regular job. She is also in her early sixties, has few marketable skills and thus has little chance of entering the job market. Under these circumstances, the Trial Court did not abuse its discretion to continue alimony.

CONCLUSION

The Trial Court properly limited its review of Defendant's request to eliminate alimony to the period after the 1976 modification. The circumstances of the parties prior to that time were considered by the previous trial courts. The Trial Court's refusal to terminate alimony in light of the respective incomes and needs of the parties is not an abuse of discretion. This Court should refuse to change the judgment of the Trial Court and allow that judgment to stand.

Respectfully Submitted,



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