2009

Jeanine P. Draney v. T. Kevin Draney : Brief of Appellee

Utah Court of Appeals

N. Adam Caldwell; Lewis P. Reece; Snow Jensen & Reece; Attorneys for Petitioner/Appellee.
Stephen K. Harris; Matthew Harris; Harris & Harris Lawyers, LLC; Attorneys for Respondent/Appellant.

IN THE UTAH COURT OF APPEALS

JEANINE P. DRANEY, Petitioner/Appellee, vs. T. KEVIN DRANEY, Respondent/Appellant.	Court of Appeals Case No. 20090111-CA

BRIEF OF APPELLEE

Appeal from the Fifth Judicial District Court
in and for Washington County, State of Utah

Honorable James L. Shumate
Civil No. 064500942

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I. LIST OF ALL PARTIES

The Appellant T. Kevin Draney is listed as shown on the heading. The Appellee Jeanine Draney is listed as shown on the heading.

II. TABLE OF CONTENTS

III. TABLE OF AUTHORITIES

CASES

CONSTITUTION, STATUTUES & RULES

IV. STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction over this matter pursuant to Utah Code Ann. § 78A-4-103(2)(h).

V. ISSUES PRESENTED AND STANDARD OF REVIEW

(1) Whether the trial court erred in dividing the marital debts according to Appellee's proposed division when Appellant's legal counsel of record failed to appear at the parties' December 23, 2008 hearing.

(2) Whether the trial court erred in awarding Appellee her attorney's fees incurred in her attempts to divide the parties' marital debts.

(3) Whether the trial court erred in stating it did not have jurisdiction to rule on Appellant's Rule 60(b) motion because an appeal had already been filed by Appellant.

In that this appeal essentially deals with the issue of excusable neglect, the legal issues are most closely akin to those issues found in Rule 60(b). "Utah appellate courts review a trial court's denial of a motion for relief from judgment under rule 60(b) for abuse of discretion." Rukavina v. Sprague, 170 P.3d 1138 (Utah App. 2007).

VI. STATUTES, ORDINANCES AND RULES OF CENTRAL IMPORTANCE TO THE APPEAL

Utah Rules of Civil Procedure, Rules 60.

VII. STATEMENT OF THE CASE

A. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION IN COURTS BELOW

Appellant and Appellee agreed to divide their marital debts and assets as set forth in a Stipulated Order dated May 15, 2007. Despite the Order to divide the debts, more than a year later the marital debt remained undivided. Appellee then sought the assistance of the trial court to divide the martial debt. The hearing to divide the martial debt, along with all other pending issues, came before the court for a hearing on December 11, 2008. The balance of the hearing was then scheduled for December 23, 2008.

B. STATEMENT OF FACTS

For the most part, Appellant's "Statement of Relevant Facts" are accurate and complete. There are only a few additional facts which the Appellee believes will be useful to this Appellate Court:

1. On May 15, 2007, the parties' agreed to a "Stipulated Order" which provided for the division of the parties' debts. R. 38-43.

2. In dividing the marital debts per the parties' Stipulated Order, the parties agreed that each party would take fifty percent of the marital debt – with the Appellant taking an additional $6,000.00 of marital debt. R. 42.

3. More than a year after the parties' Stipulated Order, the parties debt had not been divided, and the Appellee requested a hearing for the Court to divide the debt for the parties. R. 232.

4. An evidentiary hearing was held on December 11, 2008. The balance of the evidentiary hearing was then continued to December 23, 2008. R. 281.

5. On December 23, 2008, the trial court called the parties' matter for the balance of the hearing at 9:04 a.m. When Appellant's counsel failed to show, the trial court granted the relief sought in favor of Appellee and awarded Appellee her attorney's fees. The hearing concluded at 9:05 a.m. R. 283

6. After a brief conversation, between 9:08 a.m. and 9:10 a.m., Appellee and her mother exited the Fifth District Courthouse and entered the parking lot. Neither the Appellee or her mother saw Appellant's counsel, or anything that resembled a minor fender bender. R. 324-328.

VIII. SUMMARY OF THE ARGUMENT

It should be within the trial court's discretion to grant the relief sought when an attorney of record fails to show at a scheduled hearing or trial. As to the case at hand, there is sufficient evidence in the record to support the trial court's award of attorney's fees. Finally, although it appears that the trial court initially appeared to mistakenly believe that it did not have jurisdiction to rule on Appellant's Rule 60(b) motion, such error is harmless, and in any event has since been rectified in that the trial court has scheduled a hearing on the matter for August 13, 2009.

IX. ARGUMENT

A. IT IS WITHIN THE TRIAL COURT'S DISCRETION TO GRANT RELIEF SOUGHT WHEN AN ATTORNEY OF RECORD FAILS TO APPEAR AT A SCHEDULED HEARING.

Although Appellant cites several cases making the point that a party should have his/her day in court, Appellant fails to cite to any cases on point – dealing with situations where the "day in court" is scheduled, but an attorney of record fails to show for the hearing or trial. Although Utah case law appears to be sparse on this particular issue, other states support a trial court's discretion to dismiss and/or grant requested relief when counsel fails to appear at a hearing.

In Watson v. New York City Transit Authority, the Court dismissed Plaintiff's action where Plaintiff's counsel failed to appear at trial. Plaintiff's attorney defended the failure to appear due to another court matter happening simultaneously. The trial court found that "plaintiffs' counsel was using the medical malpractice case as a 'pretext' for a delay" and denied the motion to vacate the default. The New York Supreme Court, Appellate Division, affirmed the trial court's decision to dismiss – finding that "the engagement of counsel in another case was not a reasonable excuse for the default." See Watson v. New York City Transit Authority 38 A.D. 3d 532, 533 (March 6, 2007).

Another court has held that the court "could have, but declined, to order that the complaint be dismissed at the time trial counsel failed to appear on

September 8th." Hood v. City of New York, 781 N.Y.S.2d 431, 434 (June 25, 2004) (citations omitted).

In the case at hand, as a result of the failure of Appellant's counsel to appear at the hearing, Appellant was not ordered to pay all the marital debts. Instead, Appellant was merely ordered to pay half the martial debts, per the parties' May 15, 2007 Stipulated Order, as proposed by Appellee. Additionally, Appellant has failed to demonstrate how the end result would have been significantly different, had any such additional evidence been presented.

Appellant argues that the trial court violated Article I § 11 of the Utah Constitution. However, Appellee could argue this same section of the Utah Constitution to support the trial court's decision to grant the relief sought in that the court is required to administer a case "without denial or unnecessary delay." In the matter at hand, although an Order of the Court required the parties' to divide their debts, more than a year later, this had not been done. Although it was agreed that the issue of the parties debts would be heard by the Court on May 20, 2008, the trial court was not able to ultimately schedule the matter until December 11 and 23, 2008. R. 232, 281 and 283. This was after the Appellee already agreed to continue a previously scheduled date to resolve the debt issues on September 30, 2009 – which was continued due to a conflict with Appellant's counsel's calendar. R. 259. To continue the matter yet again, due to the failure of Appellant's counsel to appear, would have only further unnecessarily delayed the

issues at hand. This would have been particularly unfair to the Appellee given that the bulk of the marital debts were in her name only – causing the constant harassment and grief from the parties' unpaid creditors. R. 318.

As to whether the trial court abused its discretion by not asking the Appellant whether he wanted to proceed on his own, this is a question that does not appear to be answered by existing Utah case law. However, it is Appellee's belief that this should be within the trial court's discretion on how to handle such matters – taking into account the circumstances, the parties, counsel's track record of appearing (or not appearing) at hearings and/or the issues then before the court.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN AWARDING APPELLEE HER ATTORNEY'S FEES.

Appellant argues that the Court abused its discretion in awarding Appellee her attorney's fees without taking "any evidence of the Petitioner's financial need or the Respondent's ability to pay attorney's fees." See Appellant's Brief, p. 18. However, the record is full of evidence to support the trial court's award, particularly where it is an abuse of discretion standard. During the divorce, Appellant has been employed making approximately $6,700.00 per month, whereas the Appellee has been making approximately $2,600.00 per month. R. 3, 24. Despite the significant income difference between the parties, the Appellant does not pay alimony, and as part of the parties' division of property, the

Appellant was awarded a home in Coral Canyon (not the marital home) and five other lots the parties had acquired during the marriage. R. 41.

Finally, neither the December 11th nor December 23rd hearing was the parties' first hearing before the trial court – in that the parties' have appeared before the trial court on prior occasions. In that there was more than sufficient evidence in the record to support the trial court's award of attorney's fees, the trial court did not abuse its discretion in awarding attorney's fees. The trial court's decision to award Appellee her attorneys' fees should be affirmed.

C. THE TRIAL COURT'S BELIEF THAT IT DID NOT HAVE JURISDICTION TO RULE ON APPELLANT'S RULE 60(B) MOTION IS HARMLESS ERROR AT BEST.

Appellant's assessment of the law regarding the trial court having jurisdiction to rule on a Rule 60(b) motion, while a matter is before an appellate court, appears to be correct. However, although Utah case law provides that "the trial court has jurisdiction to consider a 60(b) motion while an appeal is pending" there does not appear to be any authority requiring the trial court to consider a Rule 60(b) motion while on appeal. Baker v. Western Surety Co. 757 p.2d 878, 880 (Utah App. 1988). Thus, while the trial court may have mistakenly believed that it did not have jurisdiction to rule on Appellant's 60(b) motion, this mistake is harmless error at best – given that the trial court is not required to rule on the motion either prior to or during an appeal.

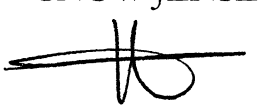
Additionally, this issue is arguably moot given that on May 19, 2009 the trial court set the Appellant's Rule 60(b) motion for a hearing – which is presently set for August 13, 2009. (Although the record is not numbered at this point in the file, the correct citation to the record would appear to be R. 409).

X. CONCLUSION

It was properly within the trial court's discretion to grant Appellee the relief she requested – dividing the marital debts consistent with the evidence she presented. It was also within the court's discretion to award Appellee her attorney's fees in the present matter. The ruling of the trial court should accordingly be upheld.

Respectfully submitted this 12th day of June 2009.

SNOW JENSEN & REECE



N. Adam Caldwell
Attorney for Jeanine Draney

CERTIFICATE OF MAILING

This is to certify that on this 12th day of June 2009, I caused a true and correct copy of the BRIEF OF APPELLEE to be delivered via first class U.S. Mail, postage prepaid, to the following:

Matthew L. Harris
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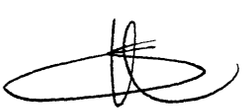

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