

1989

Malm v. Malm : Brief of Respondent

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Jay R. Mohlman; Nelsen & Senior; Attorneys for Plaintiff.

Craig M. Peterson; Littlefield & Peterson; Attorneys for Respondent.

Recommended Citation

Brief of Respondent, *Malm v. Malm*, No. 890153 (Utah Court of Appeals, 1989).

https://digitalcommons.law.byu.edu/byu_ca1/1675

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH COUNTY
BRIEF

UTAH
DOCUMENT
KFU

50

.A10

DOCKET NO.

890153

IN THE COURT OF APPEALS

IN AND FOR THE STATE OF UTAH

-----oo0oo-----

TAMERA KAY MALM,)	
)	
Plaintiff/Appellant,	)	Case No. 890153-CA
)	
v.)	
)	
JAMES S. MALM,)	
)	
Defendant/Respondent.	)	Case Type: Appeal Category 14b

-----oo0oo-----

BRIEF OF RESPONDENT

-----oo0oo-----

Appeal from the Second Judicial District
Court of Davis County
The Honorable Douglas L. Cornaby

-----oo0oo-----

Jay R. Mohlman, #5113
NIELSEN & SENIOR
Attorneys for Plaintiff/
Appellant Tamera Kay Malm
1100 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
Telephone: (801) 532-1900

Craig M. Peterson, #2579
LITTLEFIELD & PETERSON
Attorneys for Defendant/
Respondent James S. Malm
426 South 500 East
Salt Lake City, Utah 84102
Telephone: (801) 531-0435

(1 100)

03 5

IN THE COURT OF APPEALS
IN AND FOR THE STATE OF UTAH

-----oo0oo-----

TAMERA KAY MALM,)	
)	
Plaintiff/Appellant,	)	Case No. 890153-CA
)	
v.)	
)	
JAMES S. MALM,)	
	)	Case Type: Appeal
Defendant/Respondent.	)	Category 14b

-----oo0oo-----

BRIEF OF RESPONDENT

-----oo0oo-----

Appeal from the Second Judicial District
Court of Davis County
The Honorable Douglas L. Cornaby

-----oo0oo-----

Jay R. Mohlman, #5113
NIELSEN & SENIOR
Attorneys for Plaintiff/
Appellant Tamera Kay Malm
1100 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
Telephone: (801) 532-1900

Craig M. Peterson, #2579
LITTLEFIELD & PETERSON
Attorneys for Defendant/
Respondent James S. Malm
426 South 500 East
Salt Lake City, Utah 84102
Telephone: (801) 531-0435

TABLE OF CONTENTS

JURISDICTION AND NATURE OF CASE	1
STATEMENT OF ISSUES PRESENTED FOR REVIEW	1
STATEMENT OF THE CASE	2
A. COURSE OF PROCEEDINGS BELOW	2
B. STATEMENT OF FACTS	2
SUMMARY OF THE ARGUMENT	4
ARGUMENT	
STANDARD OF REVIEW	5
POINT I	
ARGUMENT	
THE RULING OF THE TRIAL COURT MUST BE AFFIRMED, THERE BEING NO ABUSE OF DISCRETION	5
POINT II	
THERE HAS BEEN NO PREJUDICIAL HARM TO THE PLAINTIFF BY THE RULING OF THE COURT AND EVEN IN THE EVENT THE COURT ABUSED ITS DISCRETION IN REFUSING TO ALLOW PLAINTIFF'S MOTION TO SET ASIDE THE DECREE OF DIVORCE, THE ABUSE OF DISCRETION DOES NOT RISE TO THE LEVEL NECESSARY TO REVERSE THE COURT'S RULING	8
CONCLUSION	9

TABLE OF AUTHORITIES

CASES:

<u>Boyle v. Boyle</u> , 735 P.2d 669 (Utah App. 1987)	5
<u>Smith v. Smith</u> , 738 P.2d 655 (Utah App. 1987)	5
<u>Hunter v. Hunter</u> , 669 P.2d 430 (Utah 1983)	5
<u>Thompson v. Thompson</u> , 709 P.2d 360 (Utah 1985)	5
<u>Birch v. Birch</u> , 771 P.2d 1114 (Utah App. 1989)	6
<u>Land v. Land</u> , 605 P.2d 1248 (Utah 1980)	6

STATUTORY PROVISIONS

Rule 60(b), Utah Rules of Civil Procedure	4, 6
Rule 60(b)(3), Utah Rules of Civil Procedure	1, 4
Rule 33, Utah Rules of Civil Procedure	9
<u>Utah Code Ann. §78-2a-3</u>	1

Transcript of Proceedings, October 5, 1988	3, 8
--	------

CRAIG M. PETERSON - 2579
Attorney for Defendant/Respondent
LITTLEFIELD & PETERSON
426 South 500 East
Salt Lake City, Utah 84102
Telephone: (801) 531-0435

IN THE COURT OF APPEALS

IN AND FOR THE STATE OF UTAH

-----oo0oo-----

TAMERA KAY MALM,)	
	)	BRIEF OF RESPONDENT
Plaintiff/Appellant,)	
)	
v.)	
)	
JAMES S. MALM,)	
	)	Civil No. 890153-CA
Defendant/Respondent.	)	Category 14b

-----oo0oo-----

JURISDICTION AND NATURE OF CASE

The Court of Appeals has jurisdiction over this matter under Utah Code Ann. §78-2a-3, as an appeal from a final Order entered in a civil proceeding.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Did the trial court commit reversible error by denying Plaintiff's Motion to Set Aside the Decree of Divorce entered in this matter pursuant to Utah Rules of Civil Procedure 60(b)(3).

STATEMENT OF THE CASE

A. Course of Proceedings below.

1. A Decree of Divorce was entered in this matter on October 19, 1988.

2. On December 29, 1988, the Plaintiff filed a Motion to Set Aside the Decree of Divorce pursuant to Rule 60(b)(3) of the Utah Rules of Civil Procedure.

3. On February 16, 1989, the court denied Plaintiff's Motion.

4. On March 20, 1989, the Plaintiff filed a Notice of Appeal to the Utah Court of Appeals from the ruling denying Plaintiff's Motion to Set Aside the Decree.

5. Plaintiff filed Appellant's Brief on July 3, 1989.

6. Defendant/Respondent filed a Motion to Extend the time for filing the Respondent's Brief on August 2, 1989, and on August 5, 1989, this court entered an Order granting Respondent an enlargement of time until September 1, 1989, in which to file his Brief.

B. Statement of Facts.

1. The Decree of Divorce entered in this matter was pursuant to a Stipulation by the parties made before the court on October 5, 1988, Maurice Richards, Domestic Relations Commissioner, sitting as Judge Pro Tem.

2. The Defendant represented to the court at the time of the hearing that he was earning approximately \$2,000.00 per

month gross income (Transcript of Proceedings, October 5, 1988, Page 6, Lines 23 and 24).

3. Defendant anticipated that his income would be reduced on October 17, 1988, to \$1,500.00 per month (Transcript of Proceedings, October 5, 1988, Page 6, Line 25 through Page 7, Line 1).

4. The Defendant agreed that child support would be set at \$175.00 per month per child, even though that amount of child support exceeded the amount of child support required to be paid by the Defendant based upon the child support schedule in use at that time by the Second District Court for a person with a level of income of \$1,500.00 per month (Transcript of Proceeding, October 5, 1988, Page 7, Lines 4 through 8).

5. Plaintiff agreed that the amount of child support being paid was more than the amount required by the schedule in effect at the time for a level of income at \$1,500.00 per month (Transcript of Proceedings, October 5, 1988, Page 7, Lines 12 through 15).

6. Subsequent to the proceedings, the Defendant commenced his new position with his employer which was on a commission only basis. The Defendant was able to negotiate a \$1,700.00 per month draw against commissions, rather than the \$1,500.00 per month draw which was anticipated. Based upon that fact, the Plaintiff alleged that the Defendant had committed

fraud upon the court and filed a Motion pursuant to Rule 60(b)(3), even though the level of support was still above that required for someone earning \$1,700.00 per month. (Record Pages 89 through 91)

7. Defendant's income was based strictly on commission and in fact since the hearing has been reduced to \$900.00 per month (Exhibit A attached hereto).

SUMMARY OF THE ARGUMENT

The trial court is afforded broad discretion in ruling on a Motion for Relief from Judgment under Utah Rules of Civil Procedure 60(b), and its determination will not be disturbed absent an abuse of discretion.

When a Decree is based upon a Settlement Agreement forged by the parties and sanctioned by the court, equity must take such Agreement into consideration. Equity is not available to reinstate rights and privileges voluntarily contracted away simply because one has come to regret the bargain made.

Even in the event the court finds a misrepresentation of income on the part of the Defendant, the Plaintiff has not been prejudiced by such misrepresentation because the amount of child support agreed and ordered to be paid was in excess of that required by the guidelines then in effect for a person with a level of income at \$1,500.00 per month, or even \$1,700.00 per month.

ARGUMENT

STANDARD OF REVIEW

The law in Utah, regarding the standard of appellate review of a divorce action is quite clear. The appellate court will not disturb the findings of a trial court unless clear abuse of discretion is shown. Boyle v. Boyle, 735 P.2d 669 (Utah App. 1987); Smith v. Smith, 738 P.2d 655 (Utah App. 1987). The applicable standard of review is as follows:

While the Supreme Court may review questions of both law and fact in equity cases, it is not bound to substitute its judgment for that of the trial court, and because of the trial court's advantage position, the Supreme Court gives considerable deference to its findings and judgment. See Hunter v. Hunter, 669 P.2d 430 (Utah 1983)

The Party appealing the Order entered by the trial court must show that the evidence clearly preponderates against the trial court's findings or that the court has abused its discretion. Thompson v. Thompson, 709 P.2d 360 (Utah 1985). In the instant action, Plaintiff has failed to meet either of the aforementioned standards.

POINT I

ARGUMENT

THE RULING OF THE TRIAL COURT MUST BE AFFIRMED,

THERE BEING NO ABUSE OF DISCRETION.

The Plaintiff argues that the Defendant committed fraud or misrepresentation upon the court resulting in the entry of an

Order which is substantially to her detriment. Based upon that position, the Plaintiff filed a Motion pursuant to Rule 60(b) of the Utah Rules of Civil Procedure. Rule 60(b) provides that "the court may, in the furtherance of justice, relieve a party or his legal representative from final judgment" if any of the specified circumstances set out in the rule are shown. Plaintiff then asserts that Defendant's alleged fraud caused her to consent to a Stipulation resulting in a Decree of Divorce based on the alleged fraud. The thrust of the Plaintiff's Motion was that the Decree was improvidently entered and should be set aside.

However, the court has considered this position in Birch v. Birch, 771 P.2d 1114 (Utah App. 1989). Essentially the same allegations made by the Plaintiff here were made by the Appellant in Birch. The court stated in Birch:

The trial court is afforded broad discretion and ruling on a Motion for Relief from Judgment under Utah R. Civ. P. 60(b) and its determination will not be disturbed absent an abuse of discretion. Birch at 1115.

In considering the Appellant's position in Birch, the court applied the standard in Land v. Land, 605 P.2d 1248 (Utah 1980). That standard as set out in Birch stated that "the policy relied on in Land applies with equal force to Rule 60(b) challenges to stipulated Decrees:

When a Decree is based upon a Property Settlement Agreement, forged by the parties and sanctioned by the court, equity must take such Agreement into consideration. Equity is not available to reinstate rights and privileges voluntarily contracted away simply because one has come to regret the bargain made. Accordingly, the law limits the continuing jurisdiction of the court where a Property Settlement Agreement has been incorporated into the Decree and the outright abrogation of the provisions of such an Agreement is only to be resorted to with great reluctance and for compelling reasons. Id. at 1251.

In this matter the parties entered into a Stipulation providing for child support at a level which exceeded the amount required to be paid by the Defendant if his income were \$1,500.00. The trial court in reviewing this matter did not abuse its discretion in denying the Plaintiff's Motion and in fact the Ruling provides to the Plaintiff an alternative form of relief when it states that the Plaintiff's Motion is not the proper procedure to obtain a child support increase, thereby indicating to the Plaintiff that an appropriate remedy would be to file a Petition for Modification of the Decree of Divorce seeking an increase in support if in fact the Defendant's income was greater than \$1,500.00 per month or greater than the level at which \$175.00 per month per child would be the appropriate amount of support.

The court did not abuse its discretion in denying Plaintiff's Motion.

POINT II

THERE HAS BEEN NO PREJUDICIAL HARM TO THE PLAINTIFF
BY THE RULING OF THE COURT AND EVEN IN THE EVENT THE
COURT ABUSED ITS DISCRETION IN REFUSING TO ALLOW
PLAINTIFF'S MOTION TO SET ASIDE THE DECREE OF DIVORCE,
THE ABUSE OF DISCRETION DOES NOT RISE TO THE LEVEL
NECESSARY TO REVERSE THE COURT'S RULING.


The record in this matter clearly indicates that the level of support agreed to be paid by the Defendant exceeded the requirement then in effect in the Second Judicial District (Transcript, October 5, 1988, Page 7, Lines 4 through 15). Even if the level of income of the Defendant became greater than that which was represented to the court, the child support which was agreed to by the parties took into consideration the possibility that the Defendant's income might exceed \$1,500.00 per month. The position of the Plaintiff is one presented to the court only for the sake of argument and is not meritorious in this appeal. It seems clear that the trial court took this position into consideration when making its ruling denying the Plaintiff's Motion.

CONCLUSION

The trial court correctly ruled that the Plaintiff's Motion to Set Aside the Decree of Divorce should be denied. Even in the event this court concludes that there may have been misrepresentation when reviewing the facts presented to the lower court, such misrepresentation was without prejudice to the Plaintiff.

Plaintiff's Appeal should be denied. In addition, Defendant should be awarded his attorney's fees and costs incurred in this appeal pursuant to Rule 33 of the Utah Rules of Civil Procedure for having to defend a frivolous appeal on the part of the Plaintiff.

DATED this 1 day of ^{Sept}~~August~~, 1989.


CRAIG M. PETERSON
Attorney for Defendant/Respondent

37953-55



SALT LAKE

1148 SOUTH 300 WEST
POST OFFICE BOX 25728
SALT LAKE CITY, UTAH 84125
TELEPHONE (801) 487-8481
FAX (801) 467-3447

June 30, 1989

TO WHOM IT MAY CONCERN:

Company policy states that if a salesman doubles his draw in overdraft, his draw will be reduced or discontinued. Jim Malm's draw has been reduced to \$900.00 per month. This is based on his commissions for the last six months.



Jann Galloway
Assistance Division Manager

MW

EXHIBIT A

CRAIG M. PETERSON - 2579
Attorney for Defendant/Respondent
LITTLEFIELD & PETERSON
426 South 500 East
Salt Lake City, Utah 84102
Telephone: (801) 531-0435

IN THE COURT OF APPEALS
IN AND FOR THE STATE OF UTAH

-----oo0oo-----

TAMERA KAY MALM,)	
	)	CERTIFICATE OF SERVICE
Plaintiff/Appellant,)	
)	
v.)	
)	
JAMES S. MALM,)	
	)	Civil No. 890153-CA
Defendant/Respondent.	)	Category 14b

-----oo0oo-----

I hereby certify that I caused to be mailed a true and correct copy of the foregoing RESPONDENT'S BRIEF to Jay R. Mohlman, Esq., NIELSEN & SENIOR, 1100 Beneficial Life Tower, 36 South State Street, Salt Lake City, Utah 84111, postage prepaid, this 1 day of ^{september} ~~August~~, 1989.

37957

