1980

Gordon Lee Kiesel v. Evelyn Marie Kiesel : Appellants Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

GORDON LEE KIESEL, Plaintiff- Appellant, vs. EVELYN MARIE KIESEL, Defendant- Respondent.	No. 16806

APPELLANT'S BRIEF

Appeal from the Judgment of the
Sixth Judicial District Court, Sevier County
Honorable Don V. Tibbs

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NATURE OF THE CASE

This controversy arises from the Motion made by defendant to modify a 1974 Divorce Decree for the purpose of increasing child support.

DISPOSITION IN LOWER COURT

A hearing was held upon defendant's Motion, at which time The Honorable Don V. Tibbs entered an Order modifying the Decree by increasing child support from a total of $125 to a total of $250.

RELIEF SOUGHT ON APPEAL

Plaintiff-appellant requests this Court to vacate any award of child support as to Marsha Kiesel and to modify the amount of child support as to Mary Kiesel.

STATEMENT OF FACTS

On October 16, 1974, a Decree of Divorce was entered dissolving the marriage of the parties to this action. At such time it was provided that plaintiff should pay support to his child Marsha Kaye Kiesel in the amount of $75 per month and support of Mary Ann Kiesel in the amount of $50 per month. (R. p. 30.) In addition, other awards of property were made by the Court, including an award to defendant of the family residence.

Subsequent to the divorce several Orders to Show Cause were filed by both parties. These Orders concerned various subjects, including the failure of defendant to enroll Marsha Kiesel in special training at Primary Children's Hospital. Defendant was held in contempt of Court for this inaction (R., p. 70-71). Subsequently, defendant was also held in contempt of Court for failing to bring the children before the Court for interview and for continuing to harass plaintiff (R., p. 88).

On August 15, 1979, a Petition for Modification was filed by defendant seeking an increase in support for Marsha and Mary. A hearing was held on September 26, 1979, regarding this request.

The lower court found a chance of circumstances justifying an increase of child support for Mary from $50 per month

to $100 per month. The Court continued support for Marsha, even though at the time of the hearing she was over 20 years of age. The Court specifically found her to be a special child with physical and mental deficiencies requiring continued support (R., p. 113-114).

It is from this Order of Modification that the present appeal is taken (R., p. 117).

ARGUMENT

POINT I

THE RELEVANT EVIDENCE BEFORE THE COURT DID NOT JUSTIFY THE COURT'S MODIFICATION OF THE DECREE.

It is fundamental that a previously entered decree may not be modified for the purpose of increasing support unless it is alleged and proved and the trial court finds that circumstances on which the decree was based have substantially changed. Gale v. Gale, 258 P.2d 986 (Utah 1953). Each case must be determined upon the basis of the immediate fact situation. Hunsaker v. Fake, 563 P.2d 784 (Utah 1977).

This Court is authorized to make its own findings and substitute its judgment for that of the trial court when it would be fair and equitable and in the interest of justice. Wright v. Wright, 586 P.2d 443 (Utah 1978). The lower court decision, however, will not be disturbed unless it appears that the evidence so preponderates against the trial court's finding that inequity or injustice results. Owen v. Owen, 579 P.2d 911 (Utah 1978).

It is also basic law that the trial court has considerable discretion in reviewing petitions for modification. However, this discretion cannot be used to arrive at decisions which are not based upon competent evidence in the record.

The decision of the Court at the conclusion of the hearing was as follows:

> The Court finds that in 1977 Mr. Kiesel remarried and that he and his spouse together, as shown by Exhibit No. 3, had an adjusted gross income of $29,898. The Court finds there was a loss in 1978 but the Court finds that a substantial part of that was depreciation. The Court finds that based upon the taxes of 1979, there would be in excess of $30,000 depreciation which would offset the loss that Mr. Kiesel testified to.
>
> The Court finds that there has been an increase in Mr. Kiesel's gross earnings to date of $10,042.95 and the Court finds that Mrs. Kiesel has nominal earnings, and the Court finds that this is a special child and the record is replete all the way through, right from the commencement of this divorce action, concerning the fact that this child would require special education and special care for the balance of her life and the Court is of the opinion that Mrs. Kiesel is needed in the home to take care of her and maintain her and do the best she can with her.
>
> The Court finds that there has been a change of circumstances. As to Mary, the support money is increased to $100 a month and to the minor child, Marsha, that the support should continue and the support rate is set for $150 per month. (R., p. 186-187.)

Several errors are apparent from the Court's stated opinion. First, the Court in arriving at the 1977 income

and in the 1978 income utilized the income figures of plaintiff's new wife. Exhibit 3 entered by the defendant shows that approximately $5,200 of the total $17,000 from wages was earned by plaintiff's new wife. Likewise, Exhibits 1 and 4 show that in 1978 plaintiff's new wife earned approximately $6,500 of the total $18,000 income from wages.

The inclusion of plaintiff's new wife's income was erroneous. This Court has held on numerous occasions that a husband may not defend against a claim for support from his former wife based upon the husband's subsequent remarriage and undertaking of expenses. See Sorensen v. Sorensen, 438 P.2d 180 (Utah 1968); Wright v. Wright, 586 P.2d 443 (Utah 1978). Likewise, if a wife remarries and her new husband has substantial income and assets, this does not relieve the former husband from his obligation of child support. Martin v. Martin, 251 SW.2d 302 (Ky. 1952).

These standards are equally applicable to the instant case. If plaintiff cannot claim a defense because he has married a woman and has assumed a responsibility as to her, it is only just that defendant cannot claim an advantage gained by plaintiff marrying a woman who also brings in income to plaintiff's household. Because of the irrelevant nature of plaintiff's wife's income, no testimony was introduced by plaintiff as to the obligations plaintiff's new wife has

or the obligations which he has undertaken because of this marriage. It is no more relevant for plaintiff to claim additional expenses from his new marriage to oppose defendant's Petition for Modification than it is for defendant to include the income of plaintiff's new wife in support of the Petition for Modification. The trial court erred in including the new wife's income in computing a change of circumstances.

Second, the Court erred in its determination that no real loss was suffered by the plaintiff in 1978 and 1979. Exhibits 1 and 4 show that plaintiff's wage income for 1978 was approximately $12,700. This income was derived from his salary as Police Chief of Salina, Utah. In addition, however, plaintiff is engaged in a trucking business and has been since the time of the Divorce Decree. In 1978 the Gordon Kiesel Trucking Company grossed $100,295. (Schedule C, Exhibit 4.) At the same time, however, the total deductions amount to $151,666. (Schedule C, Exhibit 4.) The 1978 tax form showed a loss of $51,371.

Of this loss $32,000 was depreciation. The trial court discounted depreciation as a viable factor to represent loss. While depreciation may be an artificial element as to real property, it is certainly a genuine loss as to personal property involving mechanical vehicles such as dump trucks and tractors. The Court should take judicial notice that these type of vehicles actually do lose their value each year and

will eventually become useless as opposed to real property, which gains in value each year and which does not suffer any loss of use.

In any event, even if the depreciation is completely discounted from the loss figures, the 1978 tax return still shows an actual out-of-pocket loss of $20,000 from the trucking business.

Mr. Kiesel explained that this loss was caused because of an airplane accident which resulted in an injured back. Because of this injury, plaintiff is now unable to make any long-haul drives. He has had to use his income to subsidize his trucking business and has had to borrow money in order to save it. (R., 176-177.) Plaintiff testified that for 1979 the income of the trucking business to September of that year was $77,000, while his expenses were about $110,000. (R., 175.) This again resulted in a deficit of $30,000 in actual out-of-pocket expenses.

The trial court noted there was a loss in 1978 but found "a substantial part of that was depreciation." As for 1979, the court said: "The Court finds that based upon the taxes of 1979, there would be in excess of $30,000 depreciation which would offset the loss that Mr. Kiesel testified to." (R. 186.) These oral statements were reduced to written findings subsequently by the Court. (R. 113-114.)

It is fundamental accounting that depreciation serves no purpose in reducing a loss. Depreciation is only good

for offsetting income. The Court erroneously concluded that since plaintiff's depreciation for 1979 would amount to the approximate sum of his out-of-pocket losses, that the two would somehow offset each other. In fact, however, depreciation only adds to the already existing loss, making a total loss for plaintiff in 1979 of some $60,000.

Thus, the trucking business of plaintiff clearly suffered an out-of-pocket loss of some $20,000 in 1978 and some $30,000 in 1979. In addition, the equipment owned by plaintiff in actual value depreciated nearly $60,000. The combined out-of-pocket losses for plaintiff during the two years was over $50,000, and the depreciation was over $60,000. These figures definitely contradict the trial court's conclusion that no actual loss was incurred by plaintiff in 1978 and 1979.

In addition, the defendant failed to show any substantial change in income from the trucking business of plaintiff in the 1978-1979 years as compared with 1975. The Answers to Interrogatories submitted by plaintiff show, in fact, that in July of 1975 plaintiff had an income of $5,807 from his trucking business, while in January of 1978 he had only $1,362. (R. 100.)

The preceding clearly shows that the trial court erred in including the income of plaintiff's new wife in the

computation of changed circumstances and also in concluding that no actual monetary loss had been suffered by plaintiff in his trucking business. The only other income which could be relied upon by the trial court was that of his salaried job as Police Chief of Salina, Utah. Again, plaintiff's Answers to Interrogatories show that in July of 1975 he was grossing $850 per month, in 1978 he was grossing $1,029 per month and in 1979 he was grossing $1,057 per month (R., p. 100, 173).

These figures show that plaintiff's actual salary as a policeman increased $200 during the four year period, or only 24 percent.

When this figure is compared with plaintiff's actual losses from the trucking business, it can be seen that this small increase was quickly absorbed by the losses sustained in the trucking business. But even if it were assumed that plaintiff increased his income, this alone would not justify an increase in support. This Court has stated:

> While an increase of the defendant's income is certainly an important factor to consider, this proposition is also true: The fact that a man may so use his abilities as to increase his income should not necessarily impose a penalty upon him by automatically increasing his obligations under a divorce decree. The increase in income is only to be considered along with the other facts and circumstances concerning the needs of the children and the ability of the father and mother to provide for them. Owen v. Owen, 579 P.2d 911, 913 (Utah 1978).

Of course, the buying power of plaintiff's dollar is no better and, in fact, is probably worse than it was in 1975. This Court has held that while inflation is not a defense to a modification request, that it is fair for the request to be made proportional to the increased income of the father. Wright v. Wright, 586 P.2d 443 (Utah 1978). In this case, an increase of 25 percent would be equitable as compared to an actual increase of 100 percent which was made by the trial court as to each child.

The trial court also determined that the living expenses of Marsha and Mary have "substantially increased since the Decree of Divorce" (R. 114). Plaintiff has no dispute with this finding, but observes that his living expenses have also increased substantially. These expenses were never offered by plaintiff, although he could have done so.

The Order of the trial court as to Mary Kiesel was excessive. There was no evidence presented by defendant as to the monthly amount required to sustain Mary as compared with the amount required back in 1974. Rather, defendant testified as to specific items of clothing which were purchased for Mary and compared these items with what they would have cost back in 1974. (R. 150-153.) Items such as shoes, a school jacket, and sewing material could be items which would last for many years and could not be computed on a monthly basis.

In addition, the evidence showed that Mary was making approximately $100 a month as a waitress not including tips, which could have increased this amount substantially, as evidenced by the fact that Mary had made $9.00 in tips on the night prior to the trial.

Plaintiff respectfully submits that based upon his negative income, the failure of defendant to show the monthly living expenses of Mary, and her present ability to work, that an increase to $70 per month would be equitable.

The Court also abused is discretion with reference to Marsha Kiesel. As will be noted infra, it is plaintiff's contention that the trial court had no authority to order support for Marsha since she was 20 at the time of the hearing and was no longer a minor. Irrespective of this argument, however, the evidence does not warrant an increase in the support paid by plaintiff to defendant for Marsha's benefit.

There can be no doubt that Marsha has a mental and physical handicap which results in her being unable to financially support herself.

This situation is indeed unfortunate. However, even if it is assumed that plaintiff must continue to support her for the rest of her life, a 100 percent increase in the amount is not justified. Defendant testified that she is presently receiving $208 from Social Security as a supplement for retarded children. This money is presumably based upon the present

$75 amount being paid to defendant by plaintiff for Marsha's support. Defendant testified that an increase in support by plaintiff would amount to a decrease in the amount of payment by the Social Security Administration. (R. 155.) While the record is unclear as to the relationship between support and Social Security payments, this Court can take judicial notice that the Social Security regulations require a dollar-for-dollar reduction for any amount received as child support. In other words, the award of $75 additional support would decrease the Social Security benefits by $75.

It is obvious that the effect of increasing the award to Marsha has no net gain for the benefit of the child. Since plaintiff has contributed throughout his life to the Social Security fund, and since the fund is especially establish to assist retarded children, it serves no purpose to require plaintiff to pay the additional $75 while at the same time relieving the Federal Government of this obligation. This is especially true considering plaintiff's serious financial situation based upon the enormous losses he has suffered during the last two years in his trucking operation as a result of his accident.

It should also be borne in mind that defendant is receiving $253 from Welfare (R. 153), earns small income from the sale of Avon products, and uses approximately $50 a month worth of products for herself and her children.

(R. 160.) While it undoubtedly difficult for defendant to carry on a full time job because of Marsha's condition, the Court's conclusion that defendant is needed in the home to take care of Marsha is not justified for part-time work, which defendant has never attempted to obtain. In addition, the original Divorce Decree specifically found that "defendant has earned and is capable of earning sufficient funds for her personal support," even though at the time Marsha was a special child and required the same type of care. (R. 26.)

The fact that the needs of the children have increased since 1975 does not in itself justify an increase in support without consideration of other factors, including the supplemental income which has been derived by defendant in their support, together with the ability of Mary to support herself. These are always difficult cases but this Court stated the following consideration in determining whether modification is justified:

> There is no question but what plaintiff cannot fully support the children on $100 a month and that she needs the $140. That, however, is only one of a number of important factors to be considered in making an award for their support. When one blanket is cut to fit two beds it seldom will cover them both. The best that the Court can do usually is to make such division of the income as seems most reasonable, fair and equitable to all concerned under the circumstances. This is often done indulging the hope that the slack may be made up some other way. Gale v. Gale, 258 P.2d 286, 287 (Utah 1953).

The "slack" in this case has been made up by the Social Security Administration, the State Welfare, the income of Mary, and the actual and potential income of defendant. To now require plaintiff to pay an additional $125 a month in view of the obvious financial crisis he has encountered is inequitable and unjust, especially considering that $75 of that amount is only substituting the payment already made by the Social Security Administration.

Because the trial court improperly considered the income of plaintiff's wife, improperly concluded that the plaintiff had not suffered actual monetary losses during the last two years, and had improperly failed to take in account the equities existing between the parties as to their abilities and needs, the Order of the trial court increasing support should be modified to $70 for the support of Mary and $75 for the support of Marsha, assuming that any support of Marsha is justified.

POINT II

PLAINTIFF IS NOT REQUIRED UNDER UTAH STATUTORY DIVORCE LAW TO PROVIDE SUPPORT FOR MARSHA PAST THE AGE OF TWENTY-ONE.

The trial court found that Marsha was a special child due to her inability to care for herself, and that she had physical and mental deficiencies which rendered her wholly dependent upon the defendant for her daily needs and care, and that she was in need of special schooling and medical

treatment. (R. 114.)

Plaintiff does not dispute this finding. The only question is whether plaintiff is legally obligated under the Decree of Divorce to continue support of Marsha for the rest of her life.

Plaintiff asserts that regardless of what moral or ethical obligation he believes he has as to the care and maintenance of Marsha, he is not under a legal obligation to continue support of her by the terms of the Divorce Decree.

This same question has been raised before this Court in Dehm v. Dehm, 545 P.2d 525 (Utah 1976). In a three to two decision this Court held that §30-3-5, U.C.A., does not limit the term "children" to minor children as defined in §15-2-1, U.C.A. Plaintiff respectfully submits that in light of decisions subsequent to Dehm and in light of the reasoning stated in the dissent, that this decision should be overruled.

There are basically three statutory sections which are applicable to the resolution of this question. The first is §30-3-5, U.C.A., which states that a court may make such orders in relation to the "children" as may be equitable, and that the court may make subsequent changes for the support of the "children." As noted in the Dehm opinion, no definition of "children" is provided in the divorce code.

The second applicable section in 15-2-1, U.C.A., (Supp. 1953), which states the following:

> The period of minority extends in males and females to the age of 18 years; but all minors obtain their majority by marriage. It is further provided that Courts in divorce actions may order support to age 21.

The third applicable law is known as the "Uniform Civil Liability for Support Act" contained in Chapter 45 of Title 78. This Act provides that every man shall support his child and wife and that every woman shall support her child and husband. The amended version of §78-45-2 defines "child" as a son or daughter under the age of 18 years and a son or daughter of whatever age who is incapacitated from earning a living and without sufficient means.

Plaintiff submits that §30-3-5 must be read solely in conjunction with §15-2-1 in that the Uniform Civil Liability for Support Act has no application to divorce actions. The reasoning behind this argument is as follows.

First, since the divorce statute, §30-3-5, provides no definition of "children" it is necessary for the courts to determine when the obligation for child support ceases. Historically, this Court has equated "children" with the definition of "minor" children provided for in §15-2-1. The original statute passed in 1898 and recodified in the 1953 Code, stated that a male was a minor until 21 years of

age and a female until 18 years of age. In the context of a divorce action, the United States Supreme Court held that §15-2-1 was unconstitutional in that two separate ages were established for males and females with no justifiable reason for such classification. Stanton v. Stanton, 421 U.S. 7 (1975). This Court in three separate decisions finally concluded that in the context of a divorce decree the period of minority extended to 18 for both sexes. See 517 P.2d 1010 (Utah 1974); 552 P.2d 112 (Utah 1976); and 564 P.2d 303 (Utah 1977). In each case decided by this Court and the United States Supreme Court, all references as to the meaning of the divorce decree were to §15-2-1. No reference was ever made in any of these decisions to the Uniform Civil Liability for Support Act.

It is obvious that §15-2-1 is the controlling definition of §30-3-5 since the original definition contained in §78-45-2 would not have been offensive to the equal protection clause of the United States Constitution, and would not have resulted in review by the United States Supreme Court. §78-45-2 as passed in 1957 defined "child" as a son or daughter under the age of 21 years, as well as a son or daughter who is incompacitated from earning a living and without sufficient means. Obviously, this Section adopted a uniform age for both sexes and had it been applicable to a divorce context, the Stanton cases would not have resulted.

The dissent in Dehm written by Justice Tuckett notes this relationship between the divorce code and the definition of minors contained in §15-2-1. The dissent specifically notes that the Uniform Civil Liability for Support Act provides a separate cause of action for the enforcement of the duty of support by parents, but that there is no provision made which would permit enforcement under the divorce laws. The dissent concludes by stating:

> It is further noted that the Uniform Support Act designates who may become parties and those designated are not necessarily a husband and wife. I do not think the Court should commingle the provisions of that Act with Section 30-3-5, U.C.A. 1953, which deals with the support of minor children in a divorce proceeding. 545 P.2d 529-530.

Regardless of any liability plaintiff may have under the Uniform Civil Liability for Support Act, the trial court did not have authority to order perpetual support for Marsha under the terms of the Divorce Decree pursuant to the statutory authority granted by §30-3-5. Rather, §15-2-1 only allows the Court to order support to age 21 upon a special finding of unusual circumstances to justify such extension. Harris v. Harris, 585 P.2d 435 (Utah 1978). Had the Legislature wished to extend support in divorces for children who are incapacitated it could have done so by either defining children as such within Title 30 of the Divorce Code, or by amending §15-2-1 to include such children. As a result, this Court can only enforce support for Marsha under statutory authority which would clearly terminate at age 21 regardless of Marsha's physical

or mental capacity.

Plaintiff, therefore, submits that the Stanton decisions clearly establish the relationship of the Divorce Code with the minority definition and that the dissent in the Dehm case was correct in its analysis, and therefore that the Dehm case should be overruled and that the Order requiring support of Marsha past 21 years of age must be vacated.

CONCLUSION

Although the trial court has considerable discretion in its decisions concerning modification, this discretion is not unlimited. The Court does not have discretion to include irrelevant evidence as to the income of plaintiff's wife in computing his income. The Court does not have discretion to erroneously conclude that depreciation will offset a loss when in fact it can only offset a gain. The Court does not have discretion to ignore the economic realities of the situation where plaintiff's increased payments as to Marsha will only substitute for the money which defendant is presently receiving from Social Security of which plaintiff has contributed from his lifetime wages.

While the trial court followed the existing law as to support for retarded children, the Dehm case must be overruled in light of the clear relationship established between §30-3-5 and §15-2-1, U.C.A., as established by the subsequent

Stanton decisions.

For these reasons, therefore, the award of support for Mary should be modified and the award of support to Marsha should be vacated.

Respectfully submitted,

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