1980

Gordon Lee Kiesel v. Evelyn Marie Kiesel : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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GORDON LEE KIESEL,

Plaintiff-
Appellant,

vs.

EVELYN MARIE KIESEL,

Defendant-
Respondent.

No. 16806

- - - - - -

RESPONDENT'S BRIEF

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

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ATTORNEYS FOR PLAINTIFF-APPELLANT

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RESPONDENT'S BRIEF

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

At the hearing held upon defendant's Motion, the Honorable Don V. Tibbs entered an Order modifying the Decree by increasing child support from a total of $125.00 to a total of $250.00.

RELIEF SOUGHT ON APPEAL

Defendant-Respondent requests this Court to affirm the award of child support as to both of the parties' children.

STATEMENT OF FACTS

On October 16, 1974, a Decree of Divorce was entered dissolving

the marriage of the parties and ordering plaintiff to pay child support to his child Marsha Kaye Kiesel in the amount of $75.00 per month and support to his child Mary Ann Kiesel in the amount of $50.00 per month. (R-30)

On August 15, 1979, defendant filed a Petition for Modification seeking continued support for Marsha and an increase in the amount of support for both Marsha and Mary. The hearing on this request was held on September 26, 1979.

At the time of the hearing, Marsha was 19 years old. (R-142). She is a very special child. She is retarded at a third or fourth grade level (R-129, 137) and suffers from severe epilectic seizures at which time she looses control of her body functions. (R-129, 132). Because of these afflictions she requires constant supervision. (R-137, 156, 157).

In 1978 the child scalded herself which has resulted in permanent scars and injuries. (R-139, 157).

As a result of her afflictions and burns, she requires continual medical attention and medication, which includes special nylon body suits, burn creams and tranquilizers. (R-132, 135, 143, 144).

Presently she is enrolled at the Nebo Training Center for retarded children. (R-131).

Mary Kiesel, at the time of the hearing, was 16 years old and enrolled in high school. Her school and clothing expenses have increased over the requirements she had at age 12 when the divorce was entered. (R-146, 151, 152).

The defendant, Evelyn Marie Kiesel has nominal income as an Avon sales person (R-169), but is unable to obtain full time employment because

of the necessity to care for Marsha (R-156). Presently she also receives welfare assitance (R-153).

The plaintiff, Gordon Lee Kiesel, is employed as the Chief of Police of the city of Salina (R0171). At the time the Decree of Divorce was entered he was earning $850.00 per month. By January of 1978, he was earning $1,029.62 (R-127), and as of the time of the hearing has earned $10,042.95 as chief of police (R-172).

In addition to his salary as chief of police, plaintiff has derived additional income from his trucking business. In 1977 plaintiff and his wife had an adjusted gross income of $29,898.00, of which $5,287.42 represented his wife's income. (Defendant's Exhibit 3). Although in 1978 plaintiff showed a loss on his tax return, a substantial part was represented by salaries and depreciation. (Defendant's Exhibit 4). Plaintiff testified further that he expected a similar loss in 1979 from his trucking business, but he also testified that he was going to turn the business over to his sons, so that they could make it a workable operation. (R-175, 176).

The trial court found Marsha to be a special child with physical and mental deficiencies which required continued support, and found further that there had been a change of circumstances justifying an increase of child support for both children (R-113, 114, 117).

ARGUMENT

POINT I

THE EVIDENCE BEFORE THE COURT DID JUSTIFY THE COURT'S MODIFICATION OF THE DECREE:

At the conclusion of the hearing, the trial court stated:

> 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 $150.00 per month. (R-186, 187).

Plaintiff-Appellant now wishes to make much ado over the first quoted paragraph arguing in effect that the court erred in considering his wife's income and failed to give enough consideration to his 1978 and 1979 losses which were based to a great extent on depreciation losses.

In fact, apart from his wife's additional income, plaintiff has received an increase in salary as chief of police from $850.00 per month in 1974 to $1,057.00 at the time of the hearing (R-100, 1973). In addition to that increase in salary, plaintiff in 1977 earned $11,155.57 from his trucking business, (Defendant's Exhibit 3) and, while plaintiff showd a loss in 1979, it is important to point out, as did the trial court, that a large portion of that loss is represented by depreciation.

Plaintiff in argument now wishes to make a great deal over the theoretical out-of-pocket losses sustained by him but he overlooks two important factors. First, while for tax purposes he can depreciate his trucks over a six year life, it is erroneous to assume that after depreciation the vehicles have no value. This assumption is inherrent in his argument. (Defendant's Exhibit 3). Secondly, it is only a short term problem because plaintiff testified that he was going to turn his trucking business over to his sons, so that they could make it an operative business. (R-176). The record is unclear as to whether he will sell it or give it to them, but the result is the same, he will no longer be faced with these losses.

It is interesting to note too, that while plaintiff argues that he suffered "out-of-pocket losses of some $20,000.00 in 1978" (Appellant's Brief - 8) he testified that he was able to spend $3,000.00 during this same year on recreational property for himself and his sons (R-184). A figure some $600.00 in excess over the $2,400.00 he has been ordered by the trial court to pay in support of his children.

An increase in a father's ability to support his children is only one factor for the trial court to consider in trying to determine if there has been a material change of circumstances to justify an increase in child support. Equally important to consider is when there is a showing of increased needs of the children such as when the children grow older and require additional support to properly maintain them. (Wright v. Wright, 586 P.2d 443 (Utah 1978) at 445 and Owen v. Owen, 579 P.2d 911 (Utah 1978) at 913). Such is the situation in the present case. Since the Decree of

Divorce was entered, Mary, age 16, is now enrolled in high school and her clothing and school expenses having increased over her needs at age 12 and the $50.00 per month child support is not enough to meet these increased needs. (R-146, 151, 152).

Marsha's needs have not only increased as a result of her growing older, but also as a result of a burn accident which has permanently injured her so that she requires continual medical treatment, clothing and medication (R-132, 135, 139, 143, 144, 157).

Plaintiff's argument that he be relieved of his obligation to support his children because defendant receives social security supplements and state welfare allotments is completely without merit. This court has said in a similar context:

> In a divorce action, the courts are already injected into the affairs of the family in determining the needs of the children and parent's ability to provide between themselves for the needs of all. The courts need flexibility in re-arranging the obligations as new needs arise; and the purpose of Utah Code Annotated, 1953, Sec. 15-2-1 is to give the courts latitude in determining whether exigent circumstances exist which necessitate further support of dependent children rather than allowing them to become dependant on the state. (Emphasis added) HARRIS v. HARRIS, 585 p.2d 435 (Utah 1978) at 436.

The trial court was not as naive or arbitrary as the plaintiff would like to believe. When faced with the total circumstances surrounding the plaintiff's earning ability, the defendant's limited earning capacity and need to continually supervise Marsha, Mary's increased needs and Marsha's special needs, the trial court did the only rational thing it could do by entering its order. Certainly the record supports the trial court's finding and to argue that the evidence so preponderates against the trial

court's finding that an inequity or an injustice has resulted is perposterous. This court has said in setting forth the standards under which it will review the evidence and make its own findings:

> It is to be appreciated that family relations and problems are often suffused with such complexity that reasonable minds may arrive at difference solutions to them. Whether the justices of this Court, or any particular justice, would have arrived at the same conclusion as the trial judge, or whether some other trial judge would have done so is not the test of its validity. Giving effect to the perogative and the responsibility of the trial judge as hereinabove set forth, we are not persuaded that he abused his discretion, nor that such an inequity or injustice resulted that we should disturb his finding and judgment. OWEN v. OWEN, Supra at 913.

POINT II

THE TRIAL COURT PROPERLY FOUND THAT MARSHA WAS A RETARDED CHILD INCAPABLE OF PROVIDING FOR HERSELF AND REQUIRING SPECIALIZED CARE AND WAS CORRECT IN ORDERING PLAINTIFF TO PAY SUPPORT FOR HER BEYOND THE AGE OF 21.

The trial court found that Marsha was a special child, unable to care for herself ude to her physical and mental deficiencies, which rendered her wholly dependant upon the defendant for her daily needs and care, and that she was in need of special schooling and medical treatment. (R0114). This fact is not disputed by the plaintiff nor is the fact that this court in Dehn v. Dehn, 585 P.2d (Utah 1976) 525 has already ruled that a trial court has the authority to require support and maintenance of retarded children beyond their age of majority. (Appellant's Brief - 15).

What the plaintiff wants, however, is for this Court to overrule the Dehn case and vacate the trial court's Order requiring support for Marsha beyond age 21. He argues that the decisions in Stanton v. Stanton, 421 U.S. 7 (1975) and Harris v. Harris, 585 P.2d (Utah 1978) 435 are dispositive. In

fact, neither case is in point or analogous to the Dehn decision.

The United States Supreme Court in the Stanton case held that Section 15-21-1 was unconstitutuional in that two separate ages were established for males and females with no justifiable reason for the classification.

The Harris case dealt with the issue of whether under Section 15-2-1 U.C.A. (1953) the court could order continuing support for a child until age 21 when unusual circumstances justify it. The Court specifically excepted fro the decision the question of support of adult children mentally or physically incapable of caring for themselves. Ibid. at 436.

This case is clearly and unquestionably in point with the Dehn case. In the Dehn case the subject children were mentally and physically retarded, requiring specialized care and unable to provide for their personal and financial responsibilities. (bid. at 526. Such is the identical situation with Marsha.

Plaintiff's argument has already been considered and rejected by this Court in the Dehn case. The determination that trial courts should have broad equitable powers in safeguarding the interests and welfare of disabled or incompetant adult children is sound and should not be disturbed.

CONCLUSION

It is fundamental that the trial court's decision cannot be disturbed unless it appears that the evidence so preponderates against the trial court's findings that inequity or injustice results, and then and only then may this court make its own findings and substitute its judgment for that of the trial court. Owen v. Owen, Supra at 913. The evidence aduced at the hearing in thi matter clearly supports the trial court's findings that there had been a mater change in circumstances in the needs of the children since the date of the

Decree and further shows that the trial court was correct in continuing support for Marsha and increasing the amount of support as to both children. For these reasons the Order should be affirmed.

Respectfully submitted.