

1989

David E. Bates v. Christine L. Bates : Petition for Rehearing

Utah Court of Appeals

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Recommended Citation

Legal Brief, *Bates v. Bates*, No. 890430 (Utah Court of Appeals, 1989).
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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 890430-CA

IN THE UTAH COURT OF APPEALS

DAVID E. BATES,

Plaintiff/Respondent,

-vs-

Docket No. 890430-CA
Priority Classification 14b

CHRISTINE L. BATES,

Defendant/Appellant.

PETITION FOR REHEARING

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FILED

JUN 20 1990

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PETITION FOR REHEARING

-VS-

CHRISTINE L. BATES,

Defendant/Appellant.

Docket No. 890430-CA
Priority Classification 14b

COMES NOW THE PLAINTIFF/RESPONDENT, by and through counsel, and, pursuant to Rule 35 of the Rules of the Utah Court of Appeals, hereby petitions the above-entitled court to re-hear and amend its Order of Affirmance and Reversal entered herein on or about June 6, 1990. Specifically, plaintiff/respondent petitions this Court to rehear and amend its decision ordering the reinstatement of One Thousand Dollars (\$1,000.00) per month alimony as provided by the divorce decree.

IN SUPPORT OF THIS Petition for Rehearing, plaintiff/respondent (hereinafter "husband") submits the following:

FACTS OF THE CASE/STATEMENT OF THE CASE

Husband filed a petition to modify the Decree of Divorce in

this action seeking termination of his alimony obligation because of the early availability of retirement funds to the appellant. A trial was held before the Honorable J. Dennis Frederick, District Court Judge, in the Third Judicial District Court in and for Summit County, State of Utah. Judge Frederick found that there had been a material change in circumstances and terminated the alimony obligation.

The parties were divorced on July 8, 1986. At that time the husband was an airplane pilot for Western Airlines and was earning Six Thousand Dollars (\$6,000.00) per month. Defendant/appellant (hereinafter "wife"), at the time of the entry of the Decree, was earning approximately Six Hundred Eighty Dollars (\$680.00) per month.

The trial court awarded the wife shares of Western Airlines stock, One Thousand Dollars (\$1,000.00) per month as alimony and an interest certain in the husband's retirement "Plan A" in the sum of Twenty-Two Thousand Two Hundred Twelve Dollars and Fifty Cents (\$22,212.50), and an interest certain in the husband's retirement "Plan B" in the sum of Ninety-Six Thousand Seven Hundred Forty-Seven Dollars and Fifty Cents (\$96,747.50).

The husband, at the time the Decree was entered, could not collect his retirement unless he retired, and thus, the wife could not collect her interest in the husband's retirement until he retired. Therefore, neither party had access to these funds and could not receive these funds until respondent retired, as of

the existing state of facts at the time of the entry of the Decree.

Since the entry of the Decree of Divorce, Delta Airlines purchased Western Airlines. This purchase altered the terms of the husband's retirement plan and the wife is now able to have immediate access to her funds, in cash, without the necessity of the retirement of her former husband.

In 1988 the husband filed a petition for modification alleging that the early and unexpected availability of the retirement funds to the wife constituted a material change in circumstances which would justify termination of alimony.

At the time the petition for modification was heard, the wife was working part-time as a secretary, earning Six Hundred Twenty-Five Dollars (\$625.00) per month, and attending school full-time. Her expenses had increased only slightly since the Decree of Divorce.

At the time of the modification hearing, the husband's income was between Ten Thousand Dollars (\$10,000.00) and Eleven Thousand Four Hundred Dollars (\$11,400.00) per month. His expenses had increased also.

The trial court found that the availability of the retirement account to the wife constituted a substantial and material change in circumstances. The Court awarded One Hundred Thousand Dollars (\$100,000.00) in immediate cash to the wife for her interest in the husband's retirement plans "A" and "B" and

terminated alimony.

During all times relevant herein, the husband has had the sole care, custody and control of the parties' three minor children and has never been awarded support for these children from their mother.

The matter was appealed by the wife to the above-entitled court. The Court heard the matter on briefs and entered an order of reversal on or about June 6, 1990. In that Order of Reversal, this Court found that the termination of alimony was unsupported by the findings and stipulated facts. The trial court's decision was reversed and the matter was remanded for the reinstatement of One Thousand Dollars (\$1,000.00) per month alimony, as provided by the divorce decree.

SUMMARY OF ARGUMENT

Plaintiff/respondent asserts that this Court has overlooked and/or misapprehended points of law or fact herein, as follows:

1. This Court's decision fails to grant proper deference to the factual findings of the trial court.

2. The ruling of this Court fails to consider the fact that the decision to permit the wife access to the retirement funds is as a result of a change in the retirement system of the husband, altogether, and not a result of any ruling of the trial court.

3. The ruling of this Court fails to consider the fact that the wife now has available to her cash monies in the sum of

One Hundred Thousand Dollars (\$100,000.00), together with her earnings from employment, and that she is relieved of any child support obligation to the custodial parent. This set of circumstances could not have existed under the facts at the time of the entry of the Decree of Divorce and constitutes a legal basis for termination of the alimony award.

ARGUMENT

POINT I: THE DETERMINATION OF THIS COURT ENTERED ON JUNE 6, 1990 FAILS TO GRANT PROPER DEFERENCE TO THE TRIER OF FACT.

Trial courts have considerable discretion to adjust divorcing parties' financial interests. This discretionary power to fashion an equitable property division extends equally to subsequent modifications of an earlier decree. Throckmorton v. Throckmorton, 767 P.2d 121 (Utah. App. 1988).

The determinations of the trial court herein are entitled to a presumption of validity. Absent a showing of clear abuse of discretion, the appellate court should defer to the judgment of the trial court, due to its advantaged position.

The Order of Reversal entered herein on or about June 6, 1990 does not give proper deference to the advantaged position of the trier of fact, and to the trial court's discretion in adjusting the financial circumstances of the parties. This Court should not enter a ruling reversing a trial court's decisions regarding an award of alimony without an explanation of the specific manner in which the trial court has abused its

discretion in making its alimony determination.

**POINT II: THIS COURT HAS MISAPPREHENDED THE FACTS
REGARDING THE HUSBAND'S RETIREMENT ACCOUNT.**

The Order of Affirmance and Reversal entered by the above-entitled court on or about June 6, 1990 tends to indicate a belief on the part of this Court that the trial court modified the division of the husband's retirement plan based upon some petition of the wife to do so, or that the sudden availability of the funds in the retirement plans was somehow due to an action by the trial court.

At the time of the parties' divorce, all of the retirement funds were locked up in retirement plans to which the wife could have no access whatsoever until the actual retirement of the husband. This circumstance changed after the entry of the Decree of Divorce by reason of the purchase of Western Airlines by Delta Airlines and a subsequent change in the husband's retirement plans. After the entry of the Decree of Divorce, the cash funds which had previously been locked up in the retirement plan, became available to the wife.

This sudden availability of substantial reserves of cash to the wife was a substantial and material change in circumstances which was not within the original contemplation of the parties or the Court at the time the original decree was rendered. It is exactly the type of substantial and material change in circumstance which the moving party must demonstrate in order to

support a petition for modification. Thompson v. Thompson, 709 P.2d 360 (Utah 1985).

The original Decree of Divorce simply could not have contemplated that the wife would receive her share of the retirement funds until the husband retired. At the time of the Decree, the trial judge entering the Decree could not have taken into consideration that the wife had immediate access to cash funds, because she did not then have access to any cash funds. It was under these circumstances that the original trial court awarded alimony in the sum of One Thousand Dollars (\$1,000.00) per month.

Moreover, the original trial court entering the Decree of Divorce must have assumed that the husband would retire in order to gain access to his retirement funds for himself and for the wife. Though not specifically stated in the Decree of Divorce, it is most logical to assume that the original trial court anticipated that the husband's alimony obligation would terminate by reason of his retirement and his loss of income at the same time that the wife would receive a substantial lump sum cash distribution from the retirement account for her support and maintenance.

The circumstances of the parties changed after the Decree of Divorce such that the wife will now receive a One Hundred Thousand Dollars (\$100,000.00) distribution in immediate cash. This distribution of cash has so improved her financial situation

that the termination of alimony ordered by the trial court in the modification proceeding is proper.

Given this distribution of funds to the wife, the trial court's determination that the alimony should end was proper. With this large cash distribution to the wife, it will be possible for her to enjoy a standard of living as near as possible to the standard of living she enjoyed during the marriage of the parties and to prevent her from becoming a public charge.

The termination of alimony by the trial court was proper and was not an abuse of discretion.

POINT III: THE DECISION OF THIS COURT FAILS TO CONSIDER THE INTERPLAY BETWEEN ALIMONY AND CHILD SUPPORT IN THIS CASE.

The recipient of alimony in this case is not the parent having custody of the parties' children. In this situation, it is the obligor of the alimony (the husband) who was awarded custody of the three minor children of the parties. Both parties to this action have a legal obligation to support their children. Utah Code Annotated, Section 78-45-7, et. seq. (1953, as amended). This obligation has never been imposed upon the wife in the form of an obligation to make cash child support payments to the custodial parent. The wife has been relieved of any and all obligation to support her children.

When considered in conjunction with the large lump sum distribution of cash to the wife which will occur in the

immediate future, this failure of the lower court to order child support in favor of the custodial parent is a critical factor in considering the termination of alimony. The lower court determined that, given the lump sum distribution of cash to the wife, and the fact that the wife did not pay child support to the custodial parent, a termination of her alimony was proper. This Court has not adequately and appropriately considered the non-payment of child support under the facts of this case in ordering the reinstatement of alimony of One Thousand Dollars (\$1,000.00) per month. In effect, the Order of Reversal of this Court deprives the minor children of the parties of the "support" they are entitled to receive from their mother, in the form of a set-off against her alimony award.

CONCLUSION

For the foregoing reasons, this Court should rehear and reconsider its Order of Affirmance and Reversal and should affirm the decision of the trial court in all respects.

CERTIFICATION OF ATTORNEY

Counsel for the plaintiff/respondent to the above-entitled action hereby certifies to the Court, in conformity with Rule 35(a) of the Rules of the Utah Court of Appeals, that this petition for rehearing is presented in good faith and not for delay.

RESPECTFULLY SUBMITTED THIS _____ day of June, 1990.

CORPORON & WILLIAMS

MARY C. CORPORON
Attorney for Plaintiff/Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am employed in the offices of Corporon & Williams, attorneys for the plaintiff/respondent herein, and that I caused the foregoing Petition for Rehearing to be served upon defendant/appellant by placing ^{four} ~~a~~ true and correct copy^{ies} of the same in an envelope addressed to:

EDWARD K. BRASS
Attorney for Defendant/Appellant
321 South 600 East
Salt Lake City, Utah 84102

and depositing the same, sealed, with first-class postage pre-paid thereon, in the United States mail at Salt Lake City, Utah on the _____ day of June, 1990.