

1999

Mary Ann Moon v. Stanley W. Moon : Reply to Brief in Opposition

Utah Court of Appeals

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Hollis S. Hunt, Hollis R. Hunt; Hunt & Rudd; attorneys for respondent.

J. Jay Bullock, Karen Bullock Kreeck; attorneys for petitioner.

Recommended Citation

Legal Brief, *Moon v. Moon*, No. 990242 (Utah Court of Appeals, 1999).

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UTAH SUPREME COURT

BRIEF

ET NO. 990242-SC

IN THE UTAH SUPREME COURT

Mary Ann Moon,

Plaintiff / Appellee / Respondent

v.

Stanley W. Moon,

Defendant / Appellant / Petitioner.

Case No: 990242-SC

(Ct. of Appeals No.: 971542-CA)

(Third District No.: 90-4901685)

REPLY TO BRIEF IN OPPOSITION TO CERTIORARI

Hollis S. Hunt (1587)
Hollis R. Hunt (8191)
HUNT & RUDD
392 East 12300 South, Suite A
Draper, Utah 84020
Telephone: 801-495-3500
Attorneys for Respondent

J. Jay Bullock (0484)
Karen Bullock Kreeck (6761)
BULLOCK LAW FIRM
353 East 300 South
Salt Lake City, Utah 84111
Telephone: 801-521-6660
Attorneys for Petitioner

FILED
MAY 13 1999
CLERK SUPREME COURT
UTAH

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HUNT & RUDD
392 East 12300 South, Suite A
Draper, Utah 84020
Telephone: 801-495-3500
Attorneys for Respondent

J. Jay Bullock (0484)
Karen Bullock Kreeck (6761)
BULLOCK LAW FIRM
353 East 300 South
Salt Lake City, Utah 84111
Telephone: 801-521-6660
Attorneys for Petitioner

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ARGUMENT

- I. Plaintiff raises the issue of the application of Utah Rule of Civil Procedure 54(b), asserting that the Court of Appeals applied Rule 54(b) in this matter. The Opinion of the Court of Appeals does not make any reference to Rule 54(b) and therefore to assert that this Court should examine the propriety of the Court of Appeals' decision regarding the Order to Show Cause in light of Rule 54(b) is incorrect.

On page 14 of the Plaintiff's Brief in Opposition to Certiorari ("Plaintiff's Brief in Opposition"), Plaintiff asserts that the Court of Appeals has applied Rule 54(b) of the Utah Rules of Civil Procedure in reviewing the reconsideration by the trial court of the Plaintiff's Motion for Order to Show Cause after dismissal. As is evident from a careful reading of the Court of Appeals Opinion filed January 22, 1999 (the "Court of Appeals Opinion") the Court of Appeals did not base its decision affirming the trial court's action on Rule 54(b). In fact, Rule 54(b) is not included in the Court of Appeals Opinion at any point.

If this Court does determine that it is proper to consider the actions of the trial court in light of Rule 54(b), it is clear that such consideration would result in a decision that the trial court's reconsideration of the order to show cause was not appropriate.

Rule 54(b) has two provisions which relate to orders and other forms of decision. First, Rule 54(b) allows for the certification of a trial court's determination as to one or more claims, as a final judgment, thus providing a basis for appeal of the determination. Second, Rule 54(b) provides that absent such a certification,

"any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

In Pate v. Marathon Steel Co., 692 P.2d 765 (Utah 1984), this Court described the three requirements for certification as a final judgment under Rule 54(b), that is:

" First, there must be multiple claims for relief or multiple parties to the action. Second, the judgment appealed from must have been entered on an order that would be appealable but for the fact that other claims or parties remain in the action. Third, the trial court, in its discretion, must make a determination that "there is no just reason for delay" of the appeal."

Id. at 767 (quoting 10 C. Wright, A. Miller & M Kane, Federal Practice and Procedure: Civ. 2d §2656, at 47-48 (1983)). In further analysis of these requirements, the Court in Kennecott Corporation, et al. v. Utah State Tax Commission, 814 P.2d 1099 (Utah 1991), sought to clarify the second requirement as a judgment which ends the litigation on the merits of a separate claim. *See*, Kennecott, 814 P.2d at 1101-1106.

The denial and dismissal of the Plaintiff's Motion for Order to Show Cause, is a determination which would have qualified for certification as a final judgment under Rule 54(b), however Plaintiff chose not to challenge the determination of the trial court and instead moved forward on a Petition for Modification of the Decree of Divorce. Simply because Plaintiff did not avail herself of the correct means by which to bring the Order to Show Cause back before the trial court, ie. through an appeal of the denial and dismissal and the resulting remand, does not mean that she should be rewarded by the trial court revisiting the matter on its own initiative.

Secondly, it is clear from the decision of this Court in Timm v. Dewsnup, 851 P.2d 1178 (Utah 1993), that a determination which has not been certified for appeal may be reconsidered by the rendering trial court upon the filing of a motion for reconsideration. No motion for reconsideration was filed in this matter, in fact, after the

domestic relations commissioner ruled that this matter was more appropriately to be considered in the form of a petition for modification, the Plaintiff filed a petition for modification.

Furthermore, the law of the case doctrine supports a determination that the trial court's sua sponte reconsideration of the order to show cause was inappropriate. As the Court of Appeals stated in Salt Lake City Corporation v. James Constructors, Inc., 761 P.2d 42, 44 (Utah App. 1988), "[t]he 'law of the case' doctrine nonetheless promotes a measure of predictability in such cases by creating a kind of presumption that the court's prior rulings, even if not certified as final under Rule 54(b), were correct and should stand." The Court of Appeals further opined "[a]lthough a trial court is not inexorably bound by its own precedents, prior relevant rulings made in the same case are generally to be followed." Id., at 45, *citing*, People ex rel. Gallagher v. District Court, 666 P.2d 550, 554 (Colo. 1983).

In the matter at hand, no action was taken by Plaintiff upon denial and dismissal of the Plaintiff's order to show cause. Plaintiff neither requested that the determination be certified as a final judgment, nor made a motion to the trial court for reconsideration of the issue.

II. While merely rearguing her case as presented to the Court of Appeals, Plaintiff incorrectly asserts that new evidence has been introduced in Defendant's Petition for a Writ of Certiorari. No new evidence has been introduced, Defendant's Petition contains explanations of the law appropriate to a determination of whether or not the Court of Appeals was correct in affirming the trial court's application of terms in the Decree of Divorce.

Plaintiff's Brief in Opposition does little more than reargue the position of Plaintiff asserted before the Court of Appeals, rather than addressing whether the issues

asserted by Defendant are proper for review by this Court.

Plaintiff asserts that the rule of Saunders v. Sharp, 806 P.2d 198 (Utah 1991) was in fact satisfied by the Court of Appeals, by stating that it is evident that the Court of Appeals did examine the trial court's conclusions of law with respect to the meaning of bonus, and directing the attention of the Court to paragraph 21 of the Court of Appeals Opinion. *See*, Plaintiff's Brief in Opposition at p. 9-10. Unfortunately, this does not support Plaintiff's assertion inasmuch as paragraph 21 of the Court of Appeals Opinion is merely a recitation of the findings entered by the trial court, not an indication of the Court Appeals' analysis or decision. At no point in the Court of Appeals Opinion is there an affirmation of the trial court's conclusions of law, in fact the Court of Appeals did not even reach this question due to a summary dismissal of Defendant's claims by way of finding that Defendant failed to marshal the evidence, and thereafter failing to finish the analysis required by Saunders and reviewing the conclusions of law.

Plaintiff asserts that Defendant has "attempted to introduce new evidence (concerning the nature of K-1 income) in the form of a chart in his Petition for Writ of Certiorari." Plaintiff's Brief in Opposition at p. 11. No new evidence was included in Defendant's Petition for a Writ, however Defendant did include a chart which summarizes relevant law for the use and information of the Court. In connection with this assertion Plaintiff also claims that the issue of K-1 income is not relevant to the findings of the trial court and the Court of Appeals on the order to show cause. *See*, Plaintiff's Brief in Opposition at p. 11-13. Plaintiff again fails to understand that the proper treatment of amounts reported on a K-1 to a shareholder, partner or member is

relevant to any amount which may be required to be paid as alimony under a decree of divorce as originally written or as may be modified. Whether or not the tax designation of Defendant's employer, MST Trucking, Inc., changed before or after the Decree of Divorce was entered is not the fact which raises this issue, it is the mere fact that it must be determined what amounts should be considered as income of a payor spouse for purposes of calculating alimony.

Plaintiff further implies that the question now before the Court has previously been decided by citation to two Court of Appeals cases, Morgan v. Morgan, 854 P.2d 559 (Utah App. 1993) and Muir v. Muir, 841 P.2d 736 (Utah App. 1992). Neither of these cases addressed the issue at hand. In Morgan, the Court of Appeals addressed the valuation of a closely held entity for purposes of determining a fair and equitable property distribution and affirmed the decision of the trial court in looking to the amount of the capital account shown on the schedule K-1 for that purpose. Morgan, 854 P.2d at 566. In Muir, the Court reviewed the determination of the trial court as to one spouse's income where the spouse was a 96.61% shareholder of a corporation. Muir, 841 P.2d at 738-741. Although the question presented to the Court at this time is related to that presented in Muir, the facts at hand are quite different and more complex, ie. Defendant has not held more than a 24% interest in MST Trucking, Inc. and is not the only person voting on the proper operation of the entity.

CONCLUSION

Based upon the foregoing and the arguments contained in the Defendant's Petition for a Writ of Certiorari, Defendant respectfully petitions this Court for a writ of certiorari.

Dated this 12th day of May, 1999, and respectfully submitted.

BULLOCK LAW FIRM

A handwritten signature in cursive script, appearing to read "Karen Bullock Kreeck", written over a horizontal line.

J. Jay Bullock

Karen Bullock Kreeck

Attorneys for Defendant

J. JAY BULLOCK (0484)
KAREN BULLOCK KREECK (6761)
BULLOCK LAW FIRM
353 East 300 South
Salt Lake City, Utah 84111
Telephone: 801-521-6660
Telecopier: 801-521-6689

Attorneys for Defendant/Appellant/Petitioner Stanley W. Moon

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I hereby certify that two (2) copies of the Petitioner's Reply to Brief in Opposition to
Certiorari were mailed, postage prepaid to:

Counsel for Plaintiff and Respondent

Hollis S. Hunt
Hollis R. Hunt
HUNT & RUDD
392 East 12300 South, Suite A
Draper, Utah 84020

DATED this 12th day of May, 1999.


Karen Bullock Kreeck