1980

Heidemarie Foulger v. John C. Foulger : Brief of Defendant-Appellant

Utah Supreme Court

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IN THE SUPREME COURT

OF THE STATE OF UTAH

HEIDIMARIE FOULGER, Plaintiff and Respondent,	:	
	:	Case No. 16,909
vs.	:	
JOHN C. FOULGER, Defendant and Appellant.	:	

BRIEF OF DEFENDANT-APPELLANT

APPEAL FROM AN ORDER GRANTING PLAINTIFF-RESPONDENT'S PETITION FOR MODIFICATION OF DIVORCE DECREE ENTERED BY THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY, STATE OF UTAH
THE HONORABLE DAVID SAM, JUDGE

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CASES CITED

Irwin v. Irwin, 150 Colo. 261, 372 P.2d 440

Kinze v. Kinze , 231 Cal App. 2d 219, 41 Cal Rptr. 802

Klein v. Klein, 544 P.2d 472 (Utah)

Ross v. Ross 403 P. 2d 19 (Oregon)

Saudi v. Saudi 360 P. 2d 998, 83 Idaho 233

STATUTES CITED

Utah Code Annotated, 30-3-5 (1953 as Amended)

IN THE SUPREME COURT

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BRIEF OF DEFENDANT - APPELLANT

NATURE OF THE CASE

This appeal is taken from a final order issued by the Fourth Judicial District Court presided over by the Honorable David Sam and entered February 4th,1980, which modified the provisions of Paragraph 5 of a Decree of Divorce entered by the Honorable George E. Ballif, in the same Court October 29,1975.

DISPOSITION IN THE LOWER COURT

A hearing on the plaintiff-respondent's application for modification of the original Divorce Decree was held December 18,1979. On February 4th, 1980, the trial Court entered an Order granting the respondent's application to increase the child support provisions of the original Decree and modify the property settlement provisions. It is from the Order modifying the property settlement provisions that this appeal is taken.

RELIEF SOUGHT ON APPEAL

Appellant seeks to have this Court reverse the Trial Court's order amending the property disposition provision of the Decree of Divorce dated October 29,1975, and to reinstate that Order.

STATEMENT OF FACTS

On October 29,1975, a default Divorce Decree was entered granting a divorce to the respondent, paragraph 5 of which provided as follows:

> The plaintiff is hereby awarded all right, title and interest in and to the real property and residence at 195 North 7th East, Pleasant Grove, Utah, described as follows, to-wit:
>
> > Commencing at the Northeast corner of Lot 1, Block 43, Plat "A", Pleasant Grove City Survey; thence South 111.10 feet; thence West 111.60 feet; thence North 111.10 feet; thence East 111.60 feet to beginning.
>
> subject, however, to a lien on said premises in behalf of the defendant equal to 50% of the amount received from any sales in excess of $17,000.00, which is the purchase price of said residence. Defendant is further awarded a first option to purchase said residence in the event of sale and apply his equity upon said purchase price. Plaintiff is hereby granted the right to reside in said residence as long as she so desires, but in the event of sale, the above formula shall apply."

This provision was entered following the Court's approval of a Stipulation and Property Settlement Agreement which had been executed by both parties hereto on September 12,1975, paragraph 4 of which contained the provision cited above.

In the original pleading the respondent was represented by Heber Grant Ivins, an attorney located in American Fork, Utah. The Settlement

Agreement was prepared by him. The appellant was not represented in said proceedings. (Transcript page 25)

Respondent's application to modify the provisions setforth above was heard on an Order to Show Cause before the Honorable David Sam on December 18,1979. In that proceeding the respondent contended that paragraph 5 should be amended because she had been residing in the home since the divorce decree was entered, had made all of the mortgage payments, paid all of the taxes and insurance, had installed carpet in two rooms, wants to finish the basement and took the position that it is not fair to allow the appellant to continue to share in the home's appreciated value beyond the date of the original divorce decree. (Order to Show Cause and Affidavit in re Modification of Divorce dated November 19,1979)

The appellant contends that the circumstances surrounding the original stipulation and settlement Agreement and its subsequent approval by the trial court have not changed, except for some anticipated improvements to be made to the home by the respondent, and that the payment of taxes, insurance and mortgage installments by the respondent were all anticipated at the time she was awarded the home. He is not interested in sharing any increases in the value of the home which may result from the installation of new permanent improvements, but desired when the Decree was entered into and continues to desire to share in any increase in value resulting from the efforts of neither party but merely from changes in the over-all state of the economy.

The Appellant testified that he had a specific purpose in setting no time limit on the sale of the home, but in having his interest in the home remain at 1/2 of the sale value in order to induce the Respondent to remain in the home and to not sell it without the penalty of having to pay 50% of the proceeds to him, because he wanted his children to remain in the area and was apprehensive that the Respondent may return to Germany where she had lived prior to coming to the United States.(See transcript page 61) The Respondent denies that this was the motive for that type of disposition on the home and essentially testified that she was not totally aware of the negotiations between her counsel and the Appellant and was under a great deal of stress at the time (Page 66 Transcript.

ARGUMENT ON APPEAL

POINT I

THE TRIAL COURT'S ORDER GRANTING RESPONDENT'S PETITION TO AMEND THE PROPERTY SETTLEMENT PROVISIONS OF THE ORIGINAL DECREE OF DIVORCE IS NOT SUPPORTED BY ANY MATERIAL CHANGE IN CIRCUMSTANCES.

No appeal having been taken from the Judgment entered on October 29,1975, it became absolute and final and could not properly be changed or modified except for a change in circumstances, to the end that the same matters will not be litigated anew and one trial Judge will not be passing judgment upon the acts of another. (See Klein v. Klein, 544, P.2d 472)

In her application for Order to Show Cause the Respondent requested

the Court to modify the original Divorce Decree in two ways. First, she wished the Court to increase the child support provisisions and the Court did. With this we do not quarrel and it is not challenged in this appeal.

The trial Court's determination to modify the property disposition provisions of Paragraph 5 to cut off the Appellant's equity interest in the the home effective October 29,1975, supported by its Findings of Fact No. 9, in which it finds the original provisions to be "inherently unfair" insofar as it permits the Appellant to share in any on-going appreciation in value while requiring the Respondent to make all the payments on the property, including taxes and insurance. It also arrived at that conclusion based on Findings Nos. 10, 11, 12 and 13 that circumstances have changed in that the Respondent has not yet returned to Germany and was likely not to, had made all of the house payments, tax payments and insurance payments on the residence without assistance from the Appellant.

It is respectfully submitted that these are not changes of circumstances compelling the alteration made to the original Decree. Those are not circumstancial changes at all. Obviously, that was contemplated to be the future case at the time the original Decree was entered. The respondent just doesn't like it now.

The respondent contended and the Court found that to allow the Appellant to share in any increase in value to the property because of improvements made by the Respondent subsequent to the Divorce Decree is

absolutely true. The Appellant has no interest in that type of profit, but it doesn't compel or justify depriving him of all increases in value if those increases are caused by neither of the parties to this action.

POINT II

THE REAL PROPERTY DISPOSITION PROVISIONS OF THE ORIGINAL DECREE OF DIVORCE WERE NOT PATENTLY UNFAIR TO THE RESPONDENT, WERE APPROVED BY THE ORIGINAL TRIAL COURT PURSUANT TO AN ARMS-LENGTH STIPULATION AND SETTLEMENT AGREEMENT AND CANNOT BE AMENDED UNLESS FRAUD, DURESS OR UNDUE INFLUENCE IS SHOWN AND NO SUCH SHOWING WAS MADE.

It is respectfully submitted that a Divorce Decree providing for the equal division of the equity from the sale of the home, after deducting those amounts paid by the Respondent on the original mortgage while allowing the Respondent to live there in return for making the payments on the mortgage, the taxes, the insurance and the maintenance is not patently unfair. This is particularly true where the home is the principal asset acquired by the parties during their marriage.

Even if a preponderance of the evidence support the finding that it is unfair, the Respondent is still not entitled to set it aside simply because she made a bad bargain.

It has been repeatedly held that no Stipulation and Settlement Agreement between the parties to a Divorce proceeding is necessarily binding upon the Court and is merely advisory in nature. Once it is approved by the trial Court, and incorporated in and made a part of the Decree of Divorce

becomes a final judgment of the Court and should not be disturbed merely because one or the other of the parties subsequently changes their mind. Particularly should this be true where the agreement was prepared by counsel for the Respondent and contained terms negotiated in an arms-length transaction. (See Saudi v. Saudi 360 P2nd 998, 83 Idaho 233 and Hughes vs. Leonard 66 Colo. 500 181 P. 200).

The provisions of 30-3-5 Utah Code Annotated provides among other things, that ".....the Court shall have continuing jurisdiction to make such subsequence changes or new orders with respect to the support and maintenance of the parties, the custody of the children and their support and maintenance, or the distribution of the property as shall be reasonable and necessary....." It is respectfully submitted that this provision should not be construed to grant to the trial Court the power to give or take away property between the parties to a divorce action indefinitely unless it makes a specific reservation of jurisdiction to do so in the original Decree.

CONCLUSIONS

The record in this proceeding does not support any findings by the trial Court that circumstances have changed since the entry of the original Decree of Divorce which would justify the amendment made to that Decree insofar as the property settlement provisions are concerned. If the Court were to enter an amendement to the Decree excluding the Appellant from participating in any increases in value resulting from improvementrs made by the Respondent the Appellant has no objection. That is only fair.

More importantly, however, it is respectfully submitted that this Court should look at adopting a rule in such cases which would make the property divisions of a Settlement Agreement permanent, final and unreviewable except

through normal appeal channels once they are approved by the Court, incorporated into the provisions of the Final Decree of Divorce and made the Judgment of the Court, unless fraud, duress or undue influence is involved, or unless the Court chooses to retain jurisdiction to review the matter at a subsequent time. Any other interpretation of the provisions of 30-3-5 of the Utah Code Annotated may result in gross injustice and places litigants in a position where they can never count on permanently owning anything they have acquired. Simply because a person is subjected to the jurisdiction of the Court because he becomes divorced shouldn't mean th his property is forever subject to the power of the Court to take it away from him. At some point in time he should be in a position where he can count on keeping what has been awarded to him. What better point to draw the line than when the Decree becomes absolute and the normal appeal time has expired.

Obviously such a rule cannot be the case where alimony and child support provisions are concerned. But even with these provisions there is a point at which they terminate. If the decision of the lower Court in this case that a property settlement can be reviewed anytime and can be changed if found to be unfair after previously having been approved, then the point at which the Court's jurisdiction comes to an end is never reached. Such a rule would appear to be intolerable and does not seem to be the position taken by the majority of the Courts who have considered the issue. (See Kinze v. Kinze, 231 Cal. App. 2d 219, 41 Cal Rptr 802 - Irwin v. Irwin, 150 Colo. 261, 372 P. 2nd 440 and Ross v. Ross 403 P. 2nd 19 (Oregon).

It is respectfully submitted that the judgment of the lower Court amending the provisions of paragraph 5 of the Decree of Divorce entered October 29,1975, should be reversed.

DATED this 12th day of May,1980.

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Mailed a copy of the foregoing Brief to Craig Snyder, 120 East 300 North, Provo, Utah 84601, attorney for Plaintiff-Respondent, this 12th day of May,1980.