1980

Heidemarie Foulger v. John C. Foulger : Brief of Plaintiff-Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

- -

HEIDEMARIE FOULGER, :

Plaintiff-Respondent, :

vs. : Case No. 16,909

JOHN C. FOULGER, :

Defendant-Appellant. :

- -

BRIEF OF PLAINTIFF-RESPONDENT

- -

APPEAL FROM AN ORDER BY THE FOURTH JUDICIAL DISTRICT
COURT OF UTAH COUNTY, STATE OF UTAH,
THE HONORABLE DAVID SAM, JUDGE

- -

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STATEMENT OF THE NATURE OF THE CASE

This appeal is from an order by the Honorable David Sam in the Fourth Judicial District Court, modifying the property settlement of a divorce decree. The original decree was entered by the Honorable George E. Ballif on October 29, 1975, in the same court. An Order to Show Cause and Affidavit in Re Modification of Decree of Divorce was filed by the plaintiff-respondent in November, 1979, and a hearing was held by the Court on December 18, 1979.

DISPOSITION IN THE LOWER COURT

On February 4, 1980, the trial court found paragraph 5, the property settlement in the original divorce decree, to be "inherently unfair," (R.20) and therefore modified the division of property between the parties. In its findings of fact, the Court noted changes of circumstances sufficient to justify such modification. (R.20) The child support provision of the original decree was also modified but no

objection to this was made by the defendant-appellant. This appeal is taken solely from the order modifying the property settlement portion of the decree.

RELIEF SOUGHT ON APEAL

Defendant-appellant seeks a reversal of the trial court's order modifying the property settlement. Plaintiff-respondent seeks an order from this Court remanding the matter to the trial court to consider awarding plaintiff-respondent additional attorney's fees for defending this appeal and an order affirming the trial court's decision.

STATEMENT OF FACTS

On October 29, 1975, a divorce decree was granted to the plaintiff-respondent, Heidemarie Foulger, hereinafter referred to as respondent, and the defendant-appellant, John C. Foulger, hereinafter referred to as appellant. The parties used one attorney at the time of the initial proceeding although it appears that the appellant had talked to his present counsel prior to arranging to meet with Attorney Heber Grant Ivins who handled the original divorce (R.86). At the time the parties appeared in Mr. Ivins' office, the appellant dictated the terms of the Stipulation (R.99) and the parties agreed to allow the respondent to go forward and obtain the divorce.

Paragraph 5 of the Decree of Divorce created an inequitable and unjust division of the equity in the parties' home. It awarded all right, title and interest in and to the real property and residence to the respondent subject to a partially

defined and ever increasing equitable lien in favor of the appellant. Paragraph 5 of the Decree had the effect of requiring respondent to make all payments including the house payment, taxes, insurance, repairs and upkeep on the home, while permitting the appellant to continue to share in the increasing equity in the home brought about by payments made by the respondent and the inflationary economy. (R.10,11) Furthermore, any improvements to the home made and paid for by the respondent, were automatically shared on a 50-50 basis by the appellant without any contribution on his part.

Paragraph 5 of the original Decree which was modified by the trial court in the proceeding from which this appeal was taken reads as follows:

> 5. 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 NE corner of Lot 1, Block 43, Plat "A", Pleasant Grove City Survey; thence South 111.10 feet; thence West 110.60 feet; thence North 111.10 feet; thence East 110.10 feet to beginning.
>
> Subject, however, to a lien on said premises in behalf of the defendant equal to fifty percent (50%) of the amount received from any sale 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 desires, but in the event of sale, the above formula shall apply.

The trial court found that the property settlement was "inherently unfair" (R.19,20) and that there had been material

changes in circumstances which further justified the modification of the property settlement paragraph (R.20,21). These material changes in circumstances included the fact that since the date of the Decree, respondent had paid all monthly payments, taxes and insurance associated with the house totalling $8,544.00 (R.20). In addition, respondent had expended some $2,000.00 in improvements to the property (R.21) and contemplates making additional improvements to the home (R.61). Respondent has been solely responsible for the maintenance, upkeep and repairs to the home for the past two or three years although appellant assisted with repairs and upkeep for approximately two years after the divorce (R.62).

Furthermore, appellant attempted to justify paragraph 5 on the basis that he was fearful that the respondent would take the parties' minor children and return to her native Germany following the divorce and he wanted to have something that would induce her to remain here (R.15,78). Upon cross-examination, however, appellant conceded that there was only one time that the parties even discussed the possibility of respondent returning to Germany and that was several months prior to the divorce (R.86). Respondent denied that the possibility of her returning to Germany was ever discussed or that she had ever indicated she wanted to leave Utah County (R.99).

The trial court specifically found that the circumstances had changed from the time of the Decree and that there no

longer existed any possibility that the respondent would return to Germany with the children (R.20). Respondent had not lived in Germany for more than sixteen years, she had become a naturalized U.S. citizen and has obtained full-time employment with the Alpine School District teaching U.S. History and German (R.20). The Court also found that the respondent has expressed no desire to return to Germany and, in fact, indicated that she wanted to remain here in the United States and that her children are American citizens (R.20).

Therefore, on February 4, 1980, the trial court made an equitable modification of the property settlement (Paragraph 5), granting appellant a lien on the property equal to one-half of the equity value of the home at the time of the divorce which was computed to be one-half of $20,000.00, plus interest on the lien at the rate of eight percent (8%) per annum (R.21,22).

POINT I

IN DIVORCE PROCEEDINGS THE COURT HAS POWER TO MAKE MODIFICATIONS OR REVISIONS OF A PROPERTY SETTLEMENT IN ORDER TO MAKE IT MORE JUST AND EQUITABLE.

In equitable proceedings such as divorce, the court has reserved to it by statute the right to take measures to insure that its judgment is fair, and will remain so. Each court is given the power to make subsequent modifications and to reconsider a divorce decree whenever inequities or oversights come about. In Utah, such proceedings are governed by U.C.A. 30-3-5, which states in pertinent part:

> . . . The court shall have continuing jurisdiction to make subsequent changes, or new orders with respect to the support and maintenance of the parties, the custody of children and their support and maintenance or the distribution of property as shall be reasonable and necessary . . . (Emphasis added.)

This section was designed to empower a court that had granted a decree of divorce and awarded alimony or had made distribution of property, to later increase or decrease alimony or to change the distribution of property to insure justice between the parties. Bott v. Bott, 20 Utah2d 329, 437 P.2d 684 (1968); Crofts v. Crofts, 21 Utah2d 332, 445 P.2d 701 (1968); Flannery v. Flannery, 536 P.2d 136 (Utah, 1975); Mitchell v. Mitchell, 527 P.2d 1359 (Utah, 1974). This general rule was stated by the Utah Supreme Court as follows:

> When a divorce is decreed, the court shall make such order in relation to the children and property of the parties as may be just and equitable. Provided further, that when it shall appear to the court at a future time that it would be for the interest of the parties concerned that a change should be effected in regard to the former disposal of children or distribution of property, the court shall have power to make such changes as will be conducive to the best interests of all parties concerned. (Emphasis added) Whitmore v. Harden, 3 Utah 121, 1 P.465 (1882), cited as recently as 1969 in Harrison v. Harrison, 22 Utah2d 180, 450 P.2d 457 (1969).

Furthermore, when the parties have stipulated to a certain property settlement, the court does not thereby lose the right to make such modifications or changes thereafter as may be requested by either party. Callister v. Callister,

1 Utah2d 34, 261 P.2d 944 (1953); Jones v. Jones, 104 Utah 196, 139 P.2d 222 (1943); Barraclough v. Barraclough, 100 Utah 196, 111 P.2d 792 (1941).

The trial court, then, has the power to modify and alter a judgment whenever it will render the decision more just and equitable for the parties involved. If, upon consideration of the circumstances and conditions of a particular case, the division of property by the court seems inequitable, the court has continuing jurisdiction to make needed modifications and revisions of the settlement. With reference to U.C.A. 30-3-5, the Utah Supreme Court in Iverson v. Iverson, 526 P.2d 1126 (Utah, 1974), stated that the trial court has continuing jurisdiction to make such subsequent changes with respect to distribution of divorced parties' property as "shall be reasonable and necessary."

In the case at bar, the property settlement described in paragraph 5 of the original divorce decree clearly presented problems--it was inequitable and in need of revision. The settlement granted the respondent, Mrs. Foulger, all right, title and interest to the property, subject to a lien on the premises in behalf of the appellant equal to 50 percent of the amount received from any sale in excess of $17,000.00, which was the purchase price of the residence and remaining mortgage obligation at the time of the Decree (R.6). The appellant was further awarded a first option to purchase the residence in the event of sale, and apply his equity upon the purchase price (R.6,7).

For more than four years, Mrs. Foulger made all of the payments on the house, totalling in excess of $6,384.00, (R.10), paid increasing property taxes and insurance in excess of $2,160.00 (R.10), and paid for or performed all upkeep and made major improvements to the residence, increasing its value (R.10). Furthermore, she desired to make additional improvements in the home, namely, insulating and finishing the basement in order to reduce heating costs. The appellant, however, made no financial contribution to the property after the divorce decree was granted (R.10), yet the original decree allowed him to share in and benefit from any ongoing appreciation in value which accrued to the property. The lower court found this settlement to be "inherently unfair," and therefore modified paragraph 5 (R.20).

The revised property settlement grants a lien on the premises in favor of the appellant for one-half of the appreciation of the home at the time of the divorce in excess of $17,000.00. The court valued the home at $37,000.00 at the time of the divorce, and accordingly the amount of the appellant's lien is one-half of $20,000.00, or $10,000.00 (R.16). The modification further awarded the appellant interest on the lien at the rate of eight percent (8%) per annum, commencing from the date of the ruling (R.16). This modification was clearly necessary in order to make the settlement equitable and to insure substantial justice between the parties. Furthermore, such modification was entirely within the discretion of the trial judge. The

particular changes or modifications needed to make a divorce decree more equitable are always a matter of discretion:

> The trial court granting a decree of divorce has continuing jurisdiction over the parties with regard to the decree, enabling it to make such subsequent modifications as are equitable, and the breadth of discretionary power given the trial court in the initial determination of property division extends in equal measure to the subsequent modifications. (Emphasis added) McCrary v. McCrary, 599 P.2d 1248 (Utah 1979).

See also Dahlberg v. Dahlberg, 77 Utah 157, 292 P.214 (1930); Pinney v. Pinney, 66 Utah 602, 245 P. 329 (1926); Openshaw v. Openshaw, 80 Utah 9, 12 P.2d 364 (1932); and Buzzo v. Buzzo, 45 Utah 625 148 P. 362 (1915).

A trial court may, therefore, use its broad discretionary powers in the modification of a property settlement, and before a decision to modify can be reversed, the appellant has the burden of proving that the trial court abused that discretion. Christensen v. Christensen, 21 Utah2d 263, 444 P.2d 511 (1968); Knapp v. Life Ins. Corp. of America, 8 Utah2d 220, 332 P.2d 662 (1958). In the case at bar, appellant must show that the evidence clearly preponderates against the trial court's decision and that modification constituted substantial, reversible error. Clearly, the appellant has failed to meet this burden--all of the evidence indicates that the trial judge was entirely fair in his decision to modify. Since no abuse of discretion can be shown, therefore, the modification must be upheld.

The more broad and general rule is that the trial court

in any equitable matter has a wide range of discretion to make such orders as may be just--including the review of previous orders. See 27 Am.Jur.2d 627, Equity §102. Sound discretion is the controlling guide of judicial action in every phase of a suit in equity. Pennsylvania v. Williams, 294 U.S. 176 (1935); Slipp v. Amato, 231 Or. 512, 373 P.2d 673 (1962), Hightower v. Bigoney, 145 So.2d 505, (Fla. 1962), rev'd on other grounds, 156 So.2d 501; Food Pantry Limited v. Waikiki Business Plaza Inc., 575 P.2d 869 (Hawaii 1978).

In the trial court's sound discretion the remedies of equity are molded to the needs of justice and are employed to protect the equities of all parties. The flexibility of equitable jurisdiction permits innovation in remedies to meet all varieties of circumstances which may arise in any case. Ripley v. International R. of Cent. America. 8 App. Div. 310, 188 N.Y.S. 2d 62, aff'd 209 N.Y.S. 2d 289, 171 N.E. 2d 443 (1959).

Again, the appellant in the case at bar has failed to show that this broad range of discretion, granted to the trial court in equity, was abused, and therefore the decision of the lower court must be affirmed.

It should be pointed out, furthermore, that the appellant's brief argues highly inconsistent positions. Counsel argues that property settlements should never be modified--that the court should make such settlement agreements "permanent, final and unreviewable except through normal appeal channels."

(See pages 6 and 7 of appellant's brief.) Appellant then agrees, however, that it would be proper and "only fair" to modify the decree through an amendment, excluding himself from participation in any increases in value resulting from improvements made by the respondent. (See pages 5 and 6 of appellant's brief.) Not only is the appellant's argument against the clear weight of authority in this state, its inconsistencies also make it untenable.

Moreover, the cases cited by the appellant in support of his argument are all clearly distinguishable from the case at bar, or stand completely different propositions than advocated by appellant.

The decision in Kinsey v. Kinsey, 231 Cal. App.2d 219, 41 Cal.Rptr. 802 (1964) dealt with an interlocutory decree, not a final divorce decree as in the case at bar. The case of Sande v. Sande, 83 Idaho 233, 360 P.2d 998 (1961), cited by the appellant as stating that a decree should not be modified, in fact states:

> Where an agreement is inequitable and unfair to the wife, equity will not enforce the agreement but will grant relief to her even though no actual fraud or duress was restored to by her husband in procuring it. Sande, supra at 1003.

The court in Hughes v. Leonard, 66 Colo. 500, 181 P. 200 (1919) did not dictate the rule proscribed by the appellant that modification is improper in the absence of fraud, duress or undue influence. The requested modification of the decree in Hughes was not allowed because of other

circumstances, even though misrepresentation was shown.

Both Irwin v. Irwin, 150 Colo. 261, 372 P.2d 440 (1962) and Ross v. Ross, 403 P.2d 19 (Oregon 1965) cited by appellant in his brif are based on their prospective state laws and statutes, which are clearly distinguishable from U.C.A. 30-3-5.

Respondent does not argue with the requirement of a change of circumstances in order to modify a decree, as set forth in Klein v. Klein, 544 P.2d 472 (Utah 1975) since, as stated in POINT II of this brief, the lower court in the case at bar found a change of circumstances sufficient to modify the property settlement of the decree.

The appellant's argument, therefore, is not substantiated by case law and is antithetical to the rule proscribed in U.C.A. 30-3-5.

POINT II

THE TRIAL COURT FOUND A CHANGE OF CIRCUMSTANCES SUFFICIENT TO MODIFY THE DECREE.

It is well recognized that a change of circumstances is necessary in order to modify a divorce decree. Sorensen v. Sorensen, 20 Utah2d 360, 438 P.2d 180 (1968); Adams v. Adams, 593 P.2d 147 (Utah 1979); Wright v. Wright, 586 P.2d 443 (Utah, 1978). Although the majority of cases which require a change of circumstances in order to modify a decree deal with alimony and child custody, the premise has also been applied to property distribution. Openshaw v. Openshaw, 80 Utah 9, 12 P.2d 364 (1932).

In the case at bar, the trial court expressly found a change of circumstances sufficient to modify the decree. The court, in its Findings of Fact (No. 10), held that the reason stated by the appellant for including Paragraph 5, the property settlement, no longer exists. (R.20) Appellant testified in the court below (later contradicted on cross-examination, see R.86) that his main reason for including the original property settlement in the decree, reserving in himself a lien on future appreciation of the residence, was to let it act as an "inducement" for the respondent, a native of Germany, to remain in this area (R.15,78). Respondent testified that she knew nothing of this agreement between the appellant and the parties' former attorney to place the particular property settlement provisions in the decree solely for this reason, and would not have agreed to such had she know of it. (R.99,100)

Since the divorce decree was granted, the respondent has obtained a teaching certificate and local employment as a school teacher, has remained in the residence for more than four years and lived in the United States a total of sixteen years. (R.52,57) Any doubts, therefore, that the appellant may have had as to whether the respondent would remain in this area, are now totally unfounded and without basis. The trial court, therefore, found that a change of circumstances did exist--the appellant's reason for including the original property settlement was no longer tenable or just.

Furthermore, a change of circumstances existed by reason of the fact that respondent, since the divorce decree, had made all payments on the home, insurance and taxes, and had made substantial improvements to the residence, all without the benefit of financial assistance from the appellant. (R. 20,21)

These findings come to the Supreme Court clothed with verity, and should not be disturbed unless the appellant demonstrates that in making such findings the trial court abused its discretion. As mentioned in Point I, above, appellant has the burden of proving that the trial court's findings of fact and decision to modify under 30-3-5 were clearly erroneous, and constituted substantial, reversible error. Knapp v. Life Ins. Corp. of America, 8 Utah2d 220, 332 P.2d 662 (1958); Bezner v. Continental Dry Cleaners, Inc., 548 P.2d 898 (Utah 1976); Redevelopment Agency of Salt Lake City v. Mitsui Inv. Inc., 522 P.2d 1370 (Utah 1974); Brunson v. Strong, 17 Utah2d 364, 412 P.2d 451 (1966); Lee v. Howes, 548 P.2d 619 (1976); Gilhespie v. DeJong, 520 P.2d 878 (Utah 1974).

POINT III

PLAINTIFF IS ENTITLED TO RECOVER THE COST OF ATTORNEY'S FEES ON APPEAL.

The established rule in Utah is that an award of attorney's fees on appeal are entirely within the discretion of the Supreme Court. Swain v. Salt Lake Real Estate & Inv. Co., 3 Utah2d 121, 279 P.2d 709 (1955); Eastman v. Eastman, 558

P.2d 514, 516 (Utah 1976). See also 5 Am.Jur.2d 445, Appeal & Error, §1022. In cases where the modification of a divorce decree has been appealed, the Supreme Court has seen fit to award attorney's fees to the party who has been forced to follow through and defend an appeal commenced by the opposing party. This Court in Kiger v. Kiger, 29 Utah2d 167, 506 P.2d 441 (1973), a case involving similar circumstances to the case at bar, stated:

> The wife, respondent, on appeal from the second amended divorce decree, was entitled to attorney's fees and the case should be remanded for taking of evidence . . . and an appropriate award of attorney's fees for services performed by the wife's counsel on appeal.

See also Christensen v. Christensen, 18 Utah 2d 315, 422 P.2d 534 (1967).

The case at bar is clearly within general rule described by this Court in Kiger, supra. Since the defendant pursued this appeal and plaintiff, the prevailing party, was compelled to respond, the cost of attorney's fees on appeal should be awarded to the plaintiff. See Bates v. Bates, 560 P.2d 706 (Utah, 1977).

CONCLUSION

Paragraph 5, the property settlement in the original divorce decree, was clearly in need of revision and modification. The settlement was inequitable and unjustly allowed the appellant to benefit from the appreciation in value of property to which he was making no financial contribution. The trial court had continuing jurisdiction and statutory

power, granted by U.C.A. 30-3-5, to modify the property settlement in order to reflect justice between the parties. Furthermore, the trial court found that a change of circumstances did exist sufficient to justify a modification of the property settlement. Since the appellant has failed to show in any way that the trial judge abused his discretion, the findings and modification of the trial court must stand, and the cost of attorney's fees on appeal should be awarded to the respondent.

Respectfully submitted this 16th day of June, 1980.

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MAILED two (2) copies of the foregoing to Mr. Noall T. Wootton, Attorney for Defendant-Appellant, Suite 12, Geneva Building, American Fork, Utah, 84003, this _____ day of June, 1980.

SECRETARY