

1980

Annette K. Beardall v. Neil J. Beardall : Brief of Appellant

Utah Supreme Court

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THE SUPREME COURT OF THE STATE OF UTAH

ANNETTE K. BEARDALL,
Plaintiff-Respondent,

:
Case No. 16994

v.

NEIL J. BEARDALL,
Defendant-Appellant.

APPELLANT'S BRIEF

Appeal from the Judgment of the
District Court of Utah County
Honorable J. Robert Bullock, Judge

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THE SUPREME COURT OF THE STATE OF UTAH

ANNETTE K. BEARDALL, :
 Plaintiff-Respondent, :
 :
v. :
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NEIL J. BEARDALL, :
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THE SUPREME COURT OF THE STATE OF UTAH

ANNETTE K. BEARDALL, :
Plaintiff-Respondent, : Case No. 16994
v. :
NEIL J. BEARDALL, :
Defendant-Appellant. :

APPELLANT'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

Plaintiff and Defendant in this matter are a divorced couple, and this matter arose out of an Order to Show Cause brought by the Plaintiff regarding said divorce. The Plaintiff requested that the Defendant be required to pay certain sums of money that the Plaintiff claimed were owed under the provisions of the Divorce Decree. Specifically, that Defendant owed sums of money for payment of medical expenses, payment of insurance premiums and attorney's fees.

DISPOSITION IN THE LOWER COURT

The matter was tried in the Fourth Judicial District Court in and for Utah County, Honorable J. Robert Bullock, Judge, presiding. Defendant was found to be owing certain sums of money and was ordered to pay \$285.88 for doctor bills and medical expenses, \$73.32 as reimbursement for prescription drugs, \$700.00 as reimbursement for insurance premiums and \$125.00 as attorney's fees for a total Judgment of \$1,184.20. It is from the Judgment for \$700.00 for insurance premiums and the Judgment for \$125.00 in attorney's fees that the Defendant appeals.

RELIEF SOUGHT ON APPEAL

Defendant seeks a reversal of the Judgment awarding \$700.00 as reimbursement for insurance premiums and the Judgment awarding \$125.00 as attorney's fees.

STATEMENT OF FACTS

Annette Knotts, hereinafter referred to as "Respondent", and Neil J. Beardall, hereinafter referred to as "Appellant", were married at Winnemucca, State of Nevada, on May 5, 1951. The marriage was dissolved by a Decree of Divorce entered on November 22, 1968 in the Fourth Judicial District Court of Utah County, State of Utah. The Decree awarded Respondent custody of two of the couple's four children: Lisa Ann, then age 8, and Sherrie Kim, then age 3. Appellant was awarded custody of Michael Gus, then age 13, and John Neil, then age 17, and was ordered to pay child support and medical and dental expenses for the two minor daughters.

The payment of the medical and dental expenses for the two minor daughters has been a source of much contention between the parties. In November of 1975, the Appellant was ordered to show cause why he should not reimburse Respondent for monthly group health insurance premiums paid, in part, by Respondent on behalf of the two daughters. In a Judgment and Order dated November 19, 1975, the Fourth Judicial District Court ruled that the Divorce Decree did not require Appellant to provide medical insurance for the couple's two minor daughters and Appellant was found to be not liable for reimbursement of the premiums paid by Respondent. Judge J. Robert Bullock specifically stated that: "Defendant [is] not found responsible to provide medical insurance for the two minor daughters of the parties."

Despite this Order, the Respondent continued the insurance coverage on her two daughters knowing full well that the Appellant was not liable and that she was voluntarily making unreimbursable payments for the continued coverage.

On February 6, 1980, a hearing was held before the Honorable J. Robert Bullock of the Fourth Judicial District Court on Respondent's Order requiring Appellant to show cause why he had not paid Respondent's \$3,395.24 in medical, hospital and dental expenses for the parties' two daughters. In his Judgment and Order of March 6, 1980, Judge Bullock found, on Stipulation of the parties, that Respondent had paid \$285.88 for doctor bills and \$73.32 for prescription drugs beyond amounts collected by Respondent from medical and dental insurance, and ordered Appellant to reimburse Respondent in those amounts. Furthermore, Respondent once again asked for reimbursement of her payments on the group health insurance premiums. In regard to these insurance premiums, Judge Bullock stated: ". . . . technically I could not award her a Judgment for the insurance premiums that she has paid under the terms of this Decree or as it was amended, could I?" (T 15). Despite the fact that Judge Bullock recognized that he had, in 1975, ordered that the Appellant was not responsible to provide medical insurance, Judge Bullock found that group health insurance premiums paid by Respondent amounted to \$700.00, and ordered Appellant to reimburse Respondent in that amount. Furthermore, Appellant was ordered to pay \$125.00 in attorney's fees, for a total

Judgment against Appellant of \$1,184.20. From the Judgment awarding \$700.00 for reimbursement of insurance premiums and \$125.00 for attorney's fees, Appellant has taken this appeal.

ARGUMENT

POINT I. THE ORDER OF MARCH 6, 1980 REQUIRING APPELLANT TO REIMBURSE RESPONDENT FOR \$700.00 IN MEDICAL INSURANCE IS AN INVALID DE FACTO MODIFICATION OF THE DIVORCE DECREE INASMUCH AS THERE WAS NO SHOWING OF CHANGED CIRCUMSTANCES.

A Decree of Divorce may be modified as is equitable to provide for the support and maintenance of the parties. U.C.A. 30-3-5 (1953) clearly gives the Courts continuing jurisdiction to make any modifications needed as is reasonable and necessary. In the present case, a Divorce Decree was entered on the 22nd day of November, 1968, wherein the Appellant was "ordered to pay all medical and dental expense incurred for medical and dental care to the minor daughters of the parties." This Decree was properly modified in part on the 19th day of November, 1975, by an Order of the Fourth Judicial District Court of Utah County, wherein the Appellant was "found not responsible to provide medical insurance for the two minor daughters of the parties."

The Order of March 6, 1980 by the Court was an invalid modification of the Divorce Decree inasmuch as the Respondent failed to show a substantial change of circumstances. This Court has clearly stated the proposition that in order to modify an existing Decree, the moving party must show a substantial change of circumstances. Kessimakis v. Kessimakis, 580 P.2d 1090, 1091 (Utah 1978); Smith v. Smith, 564 P.2d 307, (Utah 1977); Gale v. Gale, 123 Utah 277, 258 P.2d 986 (1953).

If a showing of changed circumstances is not made, the decree cannot be modified and the matters previously litigated and incorporated therein cannot be collaterally attacked in light of the doctrine of res judicata. Kessimakis v. Kessimakis, 580 P.2d 1090, 1091 (Utah 1978); McLane v. McLane, 570 P.2d 692, 695 (Utah 1977). In the case of Searle Brothers v. Searle, 588 P.2d 689 (Utah 1978), this Court identified the four requirements for the application of the doctrine of res judicata,

- "1. Was the issue decided in the prior adjudication identical with the one presented in the action in question?
2. Was there a final judgment on the merits?
3. Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?
4. Was the issue in the first case competently, fully and fairly litigated?"

(588 P.2d at 691)

This Court further stated that:

"In general, a divorce decree, like other final judgments, is conclusive as to parties and their privies and operates as a bar to any subsequent action. In order for res judicata to apply, both suits must involve the same parties or their privies and also the same cause of action; and this precludes the relitigation of all issues that could have been litigated as well as those that were, in fact, litigated in the prior action."

(588 P.2d at 690)

In this case, there was no finding of a substantial change of circumstances between November, 1975 and March, 1980 to warrant a modification of the Decree that the Appellant is

not responsible for medical insurance for the two minor daughters. Furthermore, the Respondent made no showing of a substantial change in the circumstances so as to warrant a modification of the Divorce Decree.

The two suits dated respectively November, 1975 and March, 1980, involved the same parties and the same cause of action. The four requirements for applying the doctrine of res judicata have been clearly fulfilled. Inasmuch as the Respondent failed to show a substantial change of circumstances, the Order of November, 1975 should be res judicata on the issue of whether the Appellant is liable for the medical insurance premiums.

POINT II. THE ORDER OF MARCH 6, 1980, REQUIRING APPELLANT TO REIMBURSE RESPONDENT FOR \$700.00 IN MEDICAL INSURANCE PREMIUMS IS AN INVALID DE FACTO MODIFICATION OF THE DIVORCE DECREE SINCE IT IS RETROACTIVE, NOT PROSPECTIVE, IN EFFECT.

Even if there has been a showing of a substantial change in circumstances, which would justify a modification of the Decree, such a modification cannot be applied retroactively. In Larsen v. Larsen, 561 P.2d 1077 (Utah 1977), this Court affirmed the lower Court's dismissal of a Motion for retroactive support, stating: "In this jurisdiction, alimony and support payments become unalterable debts as they accrue; therefore, a periodic installment cannot be changed or modified after the installments have become due." (561 P.2d at 1079). Also, see Whitaker v. Whitaker, 551 P.2d 226 (Utah 1976); Scott v. Scott, 19 Utah 2d 267, 430 P.2d 580 (1976). If the Respondent disagreed with the November, 1975 Order that the Appellant was not liable for providing health insurance for the couple's two daughters, she should have filed an appeal with this Court. Instead, she incurred these insurance expenses voluntarily for a period of three years and now seeks reimbursement from the Appellant for an expense which the November, 1975 Order clearly identified as an item for which the Appellant was not liable.

The trial Judge stated:

"I'm not saying anything except that technically I couldn't award her a Judgment for the insurance premiums that she's paid under the terms of this Decree or as it was amended, could I?" (T.15).

The Judge recognized that he could not make the modification apply retroactively, yet he still awarded judgment against the Appellant in the sum of \$700.00 as reimbursement for insurance premiums. This Order is an invalid retroactive application of the modification.

The \$700.00 judgment for reimbursement for insurance premiums against the Appellant should be set aside in that there was no showing of changed circumstances by the Respondent to justify modification, and, even if there were, the modification cannot be applied retroactively.

POINT III. THE AWARD OF ATTORNEY'S FEES TO THE RESPONDENT
IN THE PRESENT CASE WAS IMPROPER.

A. THE TRIAL JUDGE ABUSED HIS DISCRETION IN AWARDING
RESPONDENT ATTORNEY'S FEES.

The Utah Rules of Civil Procedure, Rule 54(d)(1) and U.C.A. 30-3-5 (1953) allow an award of costs and attorney's fees to be made in domestic relations cases. In the recent case of Adams v. Adams, 593 P.2d 147 (Utah 1979), this Court stated that the award of attorney's fees in a show cause hearing or divorce matter is within the sound discretion of the trial Court. However, in the most recent case of Kerr v. Kerr, #16495, _____ P.2d _____ (Utah 1980), this Court held that an award of attorney's fees must be based on evidence of need and reasonableness. This Court set forth that the evidence of need and reasonableness must be produced at the trial.

In the case presently before the Court, as in the Kerr case, no evidence as to reasonableness of the attorney's fees or as to the need was presented. In fact, the contrary was shown. As is evidenced by the financial declaration received in evidence by the trial Court, and the stipulated facts, the Appellant is in far worse financial condition than the Respondent. The award of attorney's fees, then, must be reversed on two counts. The first being that the Respondent failed to introduce any evidence that the amount awarded was reasonable under the circumstances. The second count is that there was no evidence whatsoever to support the finding by the trial Judge

that the Respondent should receive the attorney's fee because of her financial situation. The lack of evidence on both these counts clearly indicates that this Court should reverse the award of attorney's fees.

B. AN AWARD OF ATTORNEY'S FEES WHICH IS UNRELATED TO THE OUTCOME OF THE LAWSUIT HAS A SIGNIFICANT CHILLING EFFECT ON THE PARTY'S FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS.

The Fourteenth Amendment of the United States Constitution guarantees a person the right to due process of the law. This has been interpreted many times to include the right to a hearing. In the present situation, the Respondent asserted a claim against the Appellant. The Appellant felt that the claim was substantially in excess of any claims that Respondent may have had against him. As such, he felt it necessary to exercise his Fourteenth Amendment right to due process and requested a hearing. At that hearing, the Appellant asserted a good faith defense against the claims of the Respondent. In fact, he substantially prevailed in those claims against the Respondent. As such, an award of attorney's fees in this case constitutes a punishment against the Appellant for exercising his right to due process. If this Court were to uphold the award of attorney's fees in this case, it would create an atmosphere whereby a person with a good faith defense may refrain from asserting that defense in fear of receiving a greater judgment for attorney's fees.

C. AN AWARD OF ATTORNEY'S FEES AGAINST A PARTY THAT IS IMPECUNIOUS UNDER U.C.A. 21-7-3, 4 (1953) EFFECTIVELY DENIES THAT PARTY HIS RIGHTS UNDER THAT STATUTE.

U.C.A. 21-7-3 (1953) allows a party to declare that he is impecunious. Furthermore, U.C.A. 21-7-4 (1953) grants to a party who is impecunious access to the legal system without prejudice because of his financial condition. Public policy demands that all, even the poor, should have access to justice. The above-mentioned statutory pronouncements reflect this public policy by removing the cost barriers to the judicial system. The Affidavit required under the statute must show that the individual filing the Affidavit meets two criteria. The first being that he/she is in fact impecunious. The second being that the individual, in good faith, believes that he/she is entitled to the relief sought. In the present case, there were no findings by the trial Judge that either the Defendant was not impecunious or that his defense was not in good faith. In fact, the defense must have been in good faith in that the amount received by the Respondent was approximately one-third of the amount requested. That one-third, in fact, reflects the questionable \$700.00 Judgment for reimbursement of insurance expenses.

If an impecunious party knows that even if he presents a good faith defense and substantially prevails, a Judgment for attorney's fees will likely be entered against him, his access to the legal process is substantially threatened. In the present

case, the Appellant presented a good faith defense and substantially prevailed, but still a Judgment for attorney's fees was entered against him. Such an award of attorney's fees is contrary to public policy manifested by the legislative enactment of U.C.A. 21-7-4 (1953). A better rule for the judiciary would be to award attorney's fees against impecunious defendants only when they present a frivolous defense, without basis in fact or law, and that such a determination is made at the time of trial.

CONCLUSION

Prior to a divorce decree being properly modified, the party requesting such a modification must present evidence of a substantial change in circumstances. Unless the party does so, the doctrine of res judicata applies and the modification cannot be made. In this case, there was no evidence of a substantial change in circumstances; therefore, any modification was improper.

Even if the Respondent in this case had presented evidence of a substantial change in circumstances, the case law is clear that a modification cannot be applied retroactively. The Respondent was requesting that the trial Court order the Appellant to reimburse her for medical insurance premiums. The trial Court, in an earlier ruling, stated that the Appellant was not required to pay said premiums. The de facto modification made by the trial Court was, in effect, applied retroactively and was improper.

While it is true that the trial Court has broad discretion in the awarding of attorney's fees, the award must be based on reasonableness and need. It is clear from the record in this case that the Respondent failed to introduce any evidence whatsoever, as to the reasonableness of the fee. The evidence of need shows that the Appellant is more in need financially than the Respondent.

A holding under the circumstances of this case, that the award of attorney's fees was proper, would have a significant chilling effect on the Appellant's rights to due process. The Appellant also presented evidence that he was, in fact, impecunious under the State Impecuniosity Statutes. As such, the award of attorney's fees in this case flies in the face of the public policy enunciated under the State Impecuniosity Statutes and must be reversed.

Wherefore, the Judgment awarding the Respondent \$700.00 for reimbursement of insurance premiums and \$125.00 for attorney's fees, should hereby be reversed.

DATED this 16 day of July, 1980.

Respectfully submitted,

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