

1980

Joyce M. Despain v. Robert V. Despain : Brief of Appellant on Appeal

Utah Supreme Court

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SUPREME COURT OF UTAH

STATE OF UTAH

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JOYCE M. DESPAIN,

Plaintiff and
Respondent,

vs.

ROBERT V. DESPAIN,

Defendant and
Appellant.

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APPELLANT'S
BRIEF ON APPEAL

Case No. 17034

* * * * *

On Appeal From the Third Judicial District Court
For Salt Lake County, State of Utah
The Honorable Kenneth Rigtrup, Presiding

* * * * *

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FILED

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be required to provide a college education for his children or to pay support beyond their 21st birthdays absent special circumstances justifying such an order. His motion was premised on the argument that changes in the law after the entry of the Decree constituted a change of circumstances justifying modification of the Decree. He proposed to support the children through the age of 21 while they were full-time students residing with respondent but to terminate support at age 21. The trial court ruled that since he had agreed to support the children so long as they resided with respondent and remained in school, the Decree could not be modified.

Appellant appeals from that Order.

NATURE OF RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the trial court's Order Denying Modification of the Decree and either an order modifying the Decree to terminate the obligation to support his children upon their 21st birthday, or, in the alternative, a reversal of the trial court's ruling and a remand to the trial court for determination of whether, in view of the change of law enunciated in the decisions of this Court, and the fact that neither of the minor children of the parties to which the child provisions of the Decree apply suffer any disability which would require support beyond their 21st birthdays, the Decree should be modified

to terminate the appellant's child support obligation upon the attainment of the age of 21 of each of said children.

STATEMENT OF FACTS

Respondent initially filed a complaint for divorce in this matter on November 15, 1973 (Record 2-7). Three years thereafter, November 24, 1976, the parties filed with the Court a property settlement agreement which provided for resolution of all of the matters in issue. (Record 94-98). Paragraph III of that agreement provided:

That defendant agrees to pay the plaintiff the sum of \$1,500.00 per month as alimony and child support, said \$1,500.00 being \$500.00 per month alimony and \$500.00 per month for each child as child support until that child reaches his or her majority. The alimony payments shall last for a period of ten years from the date of Decree of Divorce is entered. (Record 95).

and the relevant portion of Paragraph IV provided:

That defendant additionally agrees that if either minor child desires to continue his or her education after graduation from high school, then the child support shall be paid to the plaintiff for the support of that child so long as that child resides in the home of and with the plaintiff and so long as that child is a fulltime student. (Record 95).

The settlement agreement was presented to and accepted by the trial court. The two terms of the stipulation set out above were incorporated as Paragraphs 4 and 5 of the Findings of

Fact (Record 102) and paragraphs 3 and 4 of the Decree of Divorce (Record 105) which was made and entered on November 24, 1976.

After the entry of the Decree of Divorce, this Court rendered a series of decisions, discussed infra, which established that a parent could not, absent special circumstances justifying such a requirement, be ordered to pay for the college education of his or her children, be required to support his or her children between the ages of 18 and 21 and be required to support a child beyond the age of 21.

Appellant determined, based on these decisions, to seek modification of the Decree as Susan, the older of the two children covered by the Decree, approached her 21st birthday. He sought to terminate the requirement that he continue to pay \$500.00 per month as child support for her while Susan and her brother resided with respondent and remained as full-time students after they attained their 21st birthdays. (Record 276-277, 295). Susan is a full-time student and resides with the respondent. (Record 252-253). Eric is still a minor. (Record 102).

Appellant agreed to pay support for the two children until their 21st birthdays if they reside with respondent and are full-time students, but seeks to have the child support terminate for each child on that child's 21st birthday. (Record 276-277, 295).

ARGUMENT

A CHANGE IN THE LAW CONSTITUTES CHANGE OF CIRCUMSTANCES JUSTIFYING THE MODIFICATION OF A DECREE OF DIVORCE

A change of law which has a significant impact upon a Decree of Divorce is a change of circumstances which this Court should rule requires a trial court to re-examine a Decree of Divorce entered before the change to see if the change produced a result which justifies modification of the Decree. In the instant matter, the trial court refused to even consider doing so stating:

My ruling is that I am simply approving the Decree which recognized that he agreed as a matter of contract. A deal is a deal. The bottom line is that a deal is a deal.
(Record 295).

Judge Rigtrup rejected, without consideration, the argument that a change of law is a basis upon which a Decree of Divorce entered pursuant to the agreement of the parties, may be modified. That is an error which requires reversal by this Court.

In the instant matter, between the entry of the Decree of Divorce and appellant's motion to modify the Decree, a series of decisions by this Court established a substantial change in the law which require a re-examination of the Decree. In English v. English, 565 P.2d 409 (Utah 1977); Carlson v. Carlson, 584 P.2d 864 (Utah 1978); and Harris v. Harris, 585

P.2d 435 (Utah 1978), this Court established that a parent, absent special circumstances [such as those set out in Dehn v. Dehn, 545 P.2d 525 (Utah 1976)], has no duty to support his children beyond the age of 18.

From the wording of that statute, it could hardly be made plainer that the authority to extend the obligation of a parent to support his child beyond the age of 18 is discretionary. We see this as a wise and proper legislative recognition of the fact that though children attain their majority and thus become emancipated at 18, there may nevertheless be unusual circumstances where the Court would be justified in placing an additional burden on parents. However, it is to be kept in mind that any discretionary power is not absolute, but must be exercised with reason and good conscience upon the foundation of facts so justifying. (emphasis added).

Carlson v. Carlson, 584 P.2d at 856.

In that same year it was ruled that trial courts do not have the power to require a parent to pay for the college education of a child in the absence of compelling special circumstances, Ferguson v. Ferguson, 578 P.2d 1274 (Utah 1978).

Based on those rulings, appellant determined that he should return to the court for modification of the Decree as Susan, the older of the two children covered by the Decree, approached her 21st birthday. He sought a modification of the Decree to terminate his obligation to pay \$500.00 per month as child support when Susan attained her 21st birthday in September of 1980. He asserted the change or articulation of the law as

thus enunciated, constituted a change of circumstances which required the District Court to modify the Decree in this case.

While this matter was pending, this Court opined in two cases which make clear the error of the trial court. In Chandler v. West, 610 P.2d 1299 (Utah 1980), it was stated:

Land v. Land, Utah, 605 P.2d 1248 (1980), held that property settlements are entitled to greater sanctity than alimony and support payments in proceedings to modify divorce decrees. However, property settlements are not sacrosanct and are not beyond the power of a court of equity to modify.

610 P.2d at 1300. It is thus clear that the summary action of the trial court based on "a deal is a deal" (Record 291-292) is a rejection of the rule articulated by this Court that even stipulated Decrees are to be re-examined when circumstances change.

Appellant asks this Court to reverse the trial court because it summarily rejected his assertion that a change in the law is a change in circumstances which justifies re-examination of the Decree of Divorce. There is no question of fact in the instant matter; it is a question of a change in the law. It is on this basis that the appellant has pursued this appeal.

In the second decision, Kerr v. Kerr, ____ P.2d ____, Utah, 1980, this Court ruled:

Defendant next complains of the requirement that he pay \$450.00 per month for the support of his 15-year old son, Stephen, as long as he continues to reside with the plaintiff and is

attending college fulltime or serving a mission for his church. This objection is well taken. U.C.A., 1953, 15-2-1, as amended, provides that minors attain their majority at age 18 unless sooner married, but that courts in divorce actions may order support to age 21. The Decree here did not limit the support to age 21 and more seriously was not based upon any finding of circumstances which would justify the order compelling the defendant to support his son beyond the age of 18. We held in Carlson v. Carlson, Utah, 584 P.2d 864 (1978) that in the absence of such a finding, an order of support for a child over 18 cannot stand. We appreciate that since Stephen's 18th birthday was, at the time of trial, more than three years in the future, the court could not know and therefore, could not find what his specific needs would be at age 18. We therefore modify the Decree to provide for the payment of child support until his 18th birthday at which time if support is still needed, the plaintiff may petition for a continuation of support based upon the circumstances existing at that time. _____ P.2d at _____ slip opinion at 3-4.

This is precisely the question raised by appellant in the instant matter. The sole difference between the question raised by appellant and Kerr v. Kerr, supra, is the fact that appellant initially agreed to accept this condition and only when subsequent changes in or articulation of the law occurred, did he return to the court for a re-evaluation of the Decree -- precisely what this Court told the respondent to do in Kerr v. Kerr, supra.

In contrast to Kerr v. Kerr, the agreement between the instant parties was negotiated prior to the rules applied in Kerr v. Kerr, supra, being articulated by this Court. Until the

law was enunciated, appellant did not know the provisions of the Decree exceeded the authority of the trial court. Now, his daughter is approaching age 21 and he is required to pay \$500.00 per month in perpetuity while she lives with respondent and attends school. His son can follow the same course. He sought a ruling from the court that his obligation to pay child support should terminate when his daughter reaches age 21. Neither of his children suffer any disability nor is there any other factor which would justify continuation of support beyond their 18th birthdays, but he has accepted that pursuant to his agreement, support should continue to age 21. (Record 295).

The District Court summarily overruled his motion. If the District Court ruling is correct, it would establish a principle directly contrary to the overall policy of the law to encourage settlements. If, as in Kerr v. Kerr, supra, a case goes to trial and a party is ordered to do something that he could not legally be required to do, he may appeal or seek to modify the order. Under the trial court's ruling in the instant matter, however, once he entered into an agreement and the law was thereafter modified, this relief would be denied to him. Such a ruling would not only discourage entering a settlement, it could serve to make an attorney guilty of malpractice were he to advise or concur in his client's entering a settlement which contained terms which a court later determined invalid. The

attorney would have to insist on trial or risk a malpractice action if, following the proffered advice, the client agreed to a settlement, then learned he was barred from seeking a modification of the Decree while he could have done so had he gone to trial.

The errors in the trial court's ruling are manifest and require this Court to reverse the decision and order.

CONCLUSION

This Court must reverse the trial court and rule that when there is a change in the law that has a significant impact on the provisions of the Decree of Divorce, including a Decree of Divorce entered pursuant to stipulation of the parties, it constitutes a change of circumstances requiring a District Court to examine the provisions of the Decree and determine if the change in law does require a modification of the Decree. In the instant matter, this Court should determine that it does and rule that the obligation of the appellant to support his children in the sum of \$500.00 per month so long as they are full-time students and reside with the respondent, terminates when each of the said children attains the age of 21.

RESPECTFULLY SUBMITTED this 25 day of July, 1980.



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CERTIFICATE OF MAILING

I hereby declare that I caused to be mailed two true and correct copies of the foregoing Appellant's Brief on Appeal in Case No. 17034, postage prepaid, this 25th day of July, 1980, to J. Thomas Greene and Russell Hedinger of Callister, Green & Nebeker, Attorneys for Respondent, at 800 Kennecott Building, Salt Lake City, Utah 84133.


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