1989

Adamson v. Adamson : Brief of Respondent

Utah Court of Appeals

Martha Pierce; Utah Legal Services; Attorney for Respondent.
Mary C. Corporon; Corporon & Williams; Attorney for Appellant.

IN THE UTAH COURT OF APPEALS

RAE ADAMSON,

Plaintiff/Appellant,

Docket No. 890680-DA

-vs-

RANAE ADAMSON,

Priority Classification 14b

Defendant/Respondent.

BRIEF OF RESPONDENT

AN APPEAL FROM THE FINAL ORDER AND JUDGMENT ENTERED IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, CIVIL NO. 874904654DA, THE HONORABLE KENNETH RIGTRUP, PRESIDING.

MARTHA PIERCE #4900
Attorney for Defendant/Respondent
UTAH LEGAL SERVICES, INC.
124 South 400 East #400
Salt Lake City, Utah 84111
(801) 328-8891

MARY C. CORPORON #734
Attorney for Plaintiff/Appellant
CORPORON & WILLIAMS
Suite 1100 - Boston Building
#9 Exchange Place
Salt Lake City, Utah 84111
(801) 328-1162

IN THE UTAH COURT OF APPEALS

RAE ADAMSON,

Plaintiff/Appellant,

-vs-

RANAE ADAMSON,

Defendant/Respondent.

Docket No. 890680-DA

Priority Classification 14b

BRIEF OF RESPONDENT

AN APPEAL FROM THE FINAL ORDER AND JUDGMENT ENTERED IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, CIVIL NO. 874904654DA, THE HONORABLE KENNETH RIGTRUP, PRESIDING.

MARTHA PIERCE #4900
Attorney for Defendant/Respondent
UTAH LEGAL SERVICES, INC.
124 South 400 East #400
Salt Lake City, Utah 84111
(801) 328-8891

MARY C. CORPORON #734
Attorney for Plaintiff/Appellant
CORPORON & WILLIAMS
Suite 1100 - Boston Building
#9 Exchange Place
Salt Lake City, Utah 84111
(801) 328-1162

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

IN THE UTAH COURT OF APPEALS

RAE ADAMSON,

Plaintiff/Appellant,

-vs-

RANAE ADAMSON,

Defendant/Respondent.

Docket No. 890680-DA

Priority Classification 14b

BRIEF OF RESPONDENT

DEFENDANT/RESPONDENT, Ranae Adamson, hereby submits the following Responding Brief in the above-captioned matter:

JURISDICTION

Jurisdiction is conferred upon the Utah Court of Appeals in this matter pursuant to Utah Code Ann. §78-2a-3(2)(h) (1953, as amended).

NATURE OF THE PROCEEDING

This is an appeal from the final judgment and order entered by the trial court herein on or about August 28, 1989 in a domestic proceeding. No motions pursuant to Rules 50(a), 50(b), 52(b) or 59, Utah Rules of Civil Procedure were filed in this matter. The Notice of Appeal was filed on November 13, 1989.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

(1) Whether the lower court abused its discretion by denying husband's motion to terminate his alimony obligation.

(2) Whether the lower court abused its discretion by finding no substantial change in circumstances to modify the issue of alimony.

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

There are no case law authorities or statutory authorities believed by Respondent to be wholly dispositive of the issues on appeal herein.

STATEMENT OF THE CASE/STATEMENT OF FACTS

Respondent does not dispute the facts stated in Appellant's Statement of the Facts.

SUMMARY OF ARGUMENT

1. Appellant produced insufficient evidence to sustain a finding that Mrs. Adamson and Mr. McCray shared a common permanent residency and that they engaged in sexual contact evidencing a conjugal association.

2. Appellant produced insufficient evidence to sustain a finding of substantial change of circumstances.

3. Alimony should not terminate based on the equitable circumstances of the parties.

ARGUMENT

POINT 1: THERE WAS INSUFFICIENT EVIDENCE TO SUSTAIN A FINDING OF CONSIDERATION.

Both Utah law and the parties' Decree of Divorce state that alimony terminates upon a finding that the receiving party is cohabiting. Utah Code Ann. §30-3-5(3), and paragraph 11, Decree of Divorce. The standard of review for a finding of cohabitation is that of abuse of discretion. English v. English, 565 P.2d 409, 410 (Utah 1977). The controlling case for this issue is Haddow v. Haddow, 707 P.2d 669 (Utah 1985). In Haddow, the court held that a finding of cohabitation should be based on the two elements of a common residency and sexual contact evidencing a conjugal association. The Haddow court also held that the element of shared living expenses, while not a requisite element of cohabitation, is helpful in determining cohabitation.

Appellant failed to establish common residency, conjugal sexual contact or even shared living expenses sufficient to support a finding of cohabitation.

a. Respondent and Mr. McCray did not share a principal domicile for more than a temporary or brief period of time.

The Haddow court defined common residency as the sharing of a common abode that both parties consider their principal domicile for more than a temporary or brief period of time. 707 P.2d at 672. In the present case, Appellant's evidence regarding any alleged cohabitation was sketchy at best and did not rise to

the level of cohabitation. Appellant produced evidence to show that Respondent lived in a motel room previously rented by Mr. McCray, that he had helped her with the rent from time to time and that he spent a "great deal of time" there. (T. 98-100).

Mrs. Adamson, produced testimony that Mr. McCray's contribution to the rent consisted of his having painted part of the exterior of the motel in which Mrs. Adamson resided in exchange for an offset on her motel bill. Appellant's witness admitted that she had not seen Mr. McCray carry personal belongings in or out of the room. (T. 100-101). Mrs. Adamson testified that she and Mr. McCray were "just very good friends." (T. 113). She also testified that Mr. McCray helped her obtain the motel room because it was too cold to sleep outside and because she needed a place to receive her children for visitation. (T. 38, 114). She testified that Mr. McCray painted part of the exterior of the motel in exchange for a $600.00 offset for three months of her rent and that Mr. McCray's permanent residence was in Draper. (T. 114). The record suggests that Mr. McCray's contribution in the form of painting services would probably not be long term because he had a stroke while painting. (T. 118).

Mr. McCray testified that he lived in Draper with his mother and stepfather and that the Draper residence was his permanent home. (T. 133). He testified that even though he never finished the painting job, Mrs. Adamson still received a partial offset on her rent for a few months. (T. 134).

There was no evidence as to whether Mr. McCray had a key to the motel, whether he spent time there when Mrs. Adamson was not there, whether he could come and go as he pleased, whether he received mail there, whether he ever spent the night, or whether he was registered to vote in that district. In short, there was no evidence to show that the motel room was also Mr. McCray's permanent residence. Therefore, Appellant's argument that the lower court abused its discretion in failing to find cohabitation is unfounded. Therefore, this Court should sustain the lower court's ruling.

b. Appellant presented no evidence to establish that Respondent engaged in a relatively permanent sexual relationship akin to that generally existing between husband and wife.

The Haddow court held that a second element of cohabitation requires the receiving party to be in a sexual relationship evidencing a conjugal association. 707 P.2d at 672.

Appellant presented testimony that Mr. McCray was Respondent's "boyfriend" and that he spent a good deal of time with her. (T. 98-100). Mr. McCray testified that he had dated Mrs. Adamson. (T. 134). Respondent testified that she and Mr. McCray were just good friends. However there was no evidence establishing that the two of them had any kind of sexual relationship, not to mention "a relatively permanent sexual relationship akin to that generally existing between husband and wife." 707 P.2d at 672.

Appellant never showed whether Mrs. Adamson and Mr. McCray had a sexual relationship, and if so, whether their relationship was sustained over a period of time so as to be conjugal in nature.

Based on the evidence produced, the lower court had insufficient evidence to make a finding of cohabitation. Consequently, the court did not abuse its discretion when it did not find cohabitation. Therefore this Court should uphold the lower court's ruling regarding alimony.

POINT 2. THERE WAS INSUFFICIENT EVIDENCE TO SUSTAIN A FINDING OF SUBSTANTIAL CHANGE OF CIRCUMSTANCES.

Appellant argues that he should not be required to show a substantial change in circumstances to modify alimony because the decree stated that the award of alimony was subject to review.

Appellant's argument reads more into the Decree than the lower court intended. In the same paragraph of the Decree quoted by Appellant, the court ordered that alimony continue "until defendant's remarriage or cohabitation, whichever first occurs, or until further order of this Court." (Decree of Divorce, paragraph 11). The record indicates that the court anticipated that Mrs. Adamson would find employment between the time of the trial and the time of the review hearing. In fact, the court appeared at times to pressure and even to badger Mrs. Adamson into a concerted job search: "The Court expects the Defendant to pursue all job training opportunities, that you contact Job Service, that you go through any counseling that they have there,

that you contact the Department of Vocational Rehabilitation, that you contact Social services." (T. 82). "I expect you to go to Vocational Rehabilitation. I expect you to go to Social Services." (T. 82-83). "I would expect that you make, at minimum and more, contact for employment as required by the Department of Employment Security. . . . Even if it's Wendy's or wherever it is, you frequently and commonly see Part-time Jobs or Help Needed." (T. 83). "I expect that you make some contact every week and that you be prepared to come back in six months with a complete diary of every contact, the date and what position you've applied to. I expect you to call Job Service and any other private employment agencies around." (T. 84).

The court may have anticipated that a substantial change in circumstances should or would occur between the date of the trial and the date of the review hearing. Nevertheless, anticipating a change in circumstances is different than waiving the need to show such a change. Nothing in the record supports Appellant's claim that the court made such a waiver. Absent an explicit waiver, this Court cannot assume that such an important substantive and procedural requirement was waived.

Even if Mrs. Adamson had found employment between the time of the divorce and the review hearing, that fact alone would not suffice to automatically terminate alimony absent a finding of change in circumstances. This Court found that it was "inappropriate to have alimony automatically terminate upon completion of education or attainment of full time employment.

Rather, the matter should be returned to the trial court to look at alimony in light of the completed education or full time employment as they apply to the English factors. Andersen v. Andersen, 757 P.2d 476, 478 (Utah Ct. App. 1988), see also Johnson v. Johnson, 103 Utah Adv. Rep. 22 (Utah Ct. App. Mar. 8, 1989).

Furthermore, the lower court did not have the discretion to terminate alimony after a long term marriage absent a finding that the receiving party would be able to support herself at a standard of living to which she was accustomed during the parties' marriage, or that the payor was no longer able to pay. Fullmer v. Fullmer, 761 P.2d 942, 951 (Utah Ct. App. 1988) see also Johnson v. Johnson, 103 Utah Adv. Rep. 22, (Utah Ct. App. March 8, 1989).

Therefore, the court did not abuse its discretion by requiring Appellant to show a change in circumstances, nor did the court abuse its discretion by refusing to terminate alimony. Therefore, this Court should sustain the lower court's ruling regarding alimony.

POINT 3. EQUITABLE CONSIDERATIONS SUPPORT AN AWARD OF ALIMONY.

Appellant is not appealing the original award of alimony. Rather, Appellant is appealing the lower court's refusal to terminate alimony at a post divorce review hearing. Accordingly, Respondent's position is that this Court should not reach the issue of equitable considerations supporting alimony because

there was no showing of substantial and material change in circumstances since the time of the entry of the decree.

However, the following argument is made in the event this Court does reach the issue of equitable considerations.

Appellant, by his own testimony makes $26,067.00 a year. (T. 103). Mrs. Adamson's income is limited to her alimony payments and monthly state assistance consisting of $224.00 for housing assistance, $90.00 worth of food stamps and Medicaid assistance. (T. 127).

One major purpose of alimony is to prevent the receiving spouse from becoming a public charge. English v. English, 565 P.2d at 411. Terminating Respondent's alimony would render her totally dependent on the state.

Appellant cites the fact that he has to pay a second mortgage on the house as a hardship factor for not paying alimony. However, that second mortgage was taken out either shortly before or after the separation. (T. 41 and 61). The $14,000.00 he received from the mortgage was used to pay for his truck and to pay off his student loan bills. (T. 61). He received value for both those debts because he currently has a masters degree and a social work license and he was awarded the truck in the divorce. (T. 62).

On the other hand, Mrs. Adamson received no benefit from the $14,000.00 loan on the house. Nevertheless, Appellant is asking her to forego alimony because he chose to borrow money to cover his own personal expenses.

Even though Appellant may have overextended himself financially, Mrs. Adamson should not be penalized for his poor financial planning. This Court has made clear that alimony need not come from the income of the payor and that alimony could be paid out of inherited or gifted property or from marital property. Sampinos v. Sampinos, 750 P.2d 615, 618 (Utah Ct. App. 1988), Mortensen v. Mortensen, 760 P.2d 302, 308 (Utah 1988), Proctor v. Proctor, 773 P.2d 1389 (Utah Ct. App. 1989). Likewise, the lower court in this case did not abuse its discretion in setting alimony in the present case where the husband had a professional license, was well educated and had a work history demonstrating his ability to provide despite the fact that he may have been underemployed at the time of the trial.

In short, it is equitable to require Appellant to honor his alimony obligation from whatever funds he has. To do otherwise would be to penalize Mrs. Adamson for the fact that Appellant took out an excessive personal loan.

Mrs. Adamson was in a long term marriage with Appellant in that she was married for 17 years. (T. 109). After the first year of marriage, she was not employed outside the home. (T. 20, 109). She should be compensated for foregoing any personal and professional advancements and for devoting her productive years to raising their children as well as his child from a former marriage. Martinez v. Martinez, 754 P.2d 69, 74-75 (Utah Ct.

App. 1988), Rasband v. Rasband, 752 P.2d 1331, 1335 (Utah Ct. App. 1988) (T. 28-30).

In addition, Mrs. Adamson's special needs must be examined when determining alimony. In Noble v. Noble, 761 P.2d 1369, 1371-72 (Utah 1988) the Supreme Court held that it is appropriate for the trial court to take into account whether physical or mental disabilities arising during the marriage, regardless of their cause, have made the receiving party's needs greater.

Mrs. Adamson's health problems include severe abdominal pain, a duodenal ulcer, high blood pressure, severe depression, a urologic infection and foot problems. (T. 34-35 and 46). These problems are compounded by the fact that she is a middle-aged female and, except for a brief period, has been out of the labor market for over 17 years. It is unrealistic to expect her to achieve the marital standard of living. In a case similar to this one, this Court has held that it would be an abuse of discretion to terminate alimony for a woman in her mid-50s who possessed few marketable job skills and had little hope of retraining. Andersen v. Andersen, 757 P.2d 476 (Utah Ct. App. 1988). See also Higley v. Higley, 676 P.2d 379 (Utah 1983).

Another equitable factor used in long term marriages is the standard of living enjoyed during the marriage. "The ultimate test of the propriety of an alimony award is whether, given all these factors, the party receiving alimony will be able to support him- or herself at the standard of living enjoyed during

the marriage." Naranjo v. Naranjo, 751 P.2d 1144 (Utah Ct. App. 1988), Schindler v. Schindler, 110 Utah Adv. Rep. 42 (Utah Ct. App. June 6, 1989).

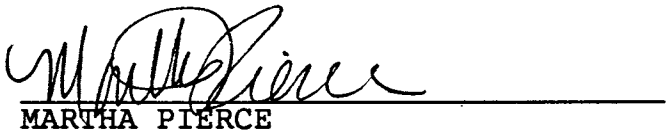
In short, even were this Court to reach the equitable considerations, such considerations would include the length of marriage, Mrs. Adamson's health problems, her lack of job training, Mr. Adamson's education, training, professional license and ability to earn. These considerations would support a generous award of alimony to Mrs. Adamson. Therefore, this Court should sustain the lower court's refusal to terminate alimony.

CONCLUSION

For the foregoing reasons, the lower court's decision should be affirmed.

RESPECTFULLY SUBMITTED THIS 4 DAY OF April, 1990.

UTAH LEGAL SERVICES, INC.



MARTHA PIERCE
Attorney for Defendant/Respondent

CERTIFICATE OF HAND-DELIVERY

I HEREBY CERTIFY that I am employed in the offices of Utah Legal Services, Inc., attorneys for Defendant/Respondent herein, and that I caused the foregoing Brief of Respondent to be served upon Defendant by hand-delivering four true and correct copies of the same to:

MARY C. CORPORON
CORPORON & WILLIAMS
Suite 11 - Boston Building
#9 Exchange Place
Salt Lake City, Utah 84111

on the 4 day of April, 1990.

ADDENDUM

Exhibit A (Decree of divorce, copy from Appellant's brief.)

MARY C. CORPORON #734
Attorney for Plaintiff
CORPORON & WILLIAMS
Suite 1100 - Boston Building
#9 Exchange Place
Salt Lake City, Utah 84111
(801) 328-1162

IN THE THIRD JUDICIAL DISTRICT COURT,

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH.

RAE ADAMSON,

Plaintiff,

-vs-

RANAE ADAMSON,

Defendant.

DECREE OF DIVORCE

Civil No. D87-4654

Judge Kenneth Rigtrup

THE ABOVE-CAPTIONED MATTER having come on for trial before the above-entitled court on Thursday, the 9th day of February, 1989, the Honorable Kenneth Rigtrup, Judge presiding; the plaintiff appearing in person and by and through counsel, Mary C. Corporon, and the defendant appearing in person and by and through counsel, Jeffrey C. Hunt, the Court having heard the sworn testimony of the parties and their witnesses and the arguments of counsel, and the Court having reviewed the file and the pleadings contained therein; based thereon, the Court being fully advised in the premises and more than 90 days having elapsed since the filing of the Complaint in this action, and the Court and having heretofore made and entered its Findings of Fact and Conclusions of Law, now, therefor;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Plaintiff is hereby granted a Decree of Divorce, dissolving the bonds of matrimony heretofore existing between the parties, the same to become final and effective immediately upon being signed by the Judge and entered by the clerk in the register of actions.

2. Plaintiff is hereby awarded the permanent care, custody and control of the minor children of the parties, Shandrae and Tracy.

3. Defendant is hereby awarded visitation weekly with the minor children, with the exact times and dates to be arranged directly between the defendant and the parties' children, taking into consideration the Court's recommendation that this visitation occur either on a Saturday or on a Sunday. In addition, defendant is awarded visitation with the minor children on alternate state and federal holidays, on her birthday, and on the children's birthday, as she may arrange between herself and the children. Further, defendant is awarded reasonable and liberal telephone access with the minor children. The defendant's visitation with the children shall be unsupervised; however, in the event that the defendant should be intoxicated at the commencement of the visitation or become so during the course of the visitation, the children shall not be required to visit with the defendant on that occasion.

4. Plaintiff is ordered to maintain health and accident insurance coverage for the benefit of the minor children of the parties, as it is available to him through his employment.

5. Plaintiff, defendant and the parties' minor children, are hereby ordered to submit to counseling with a qualified

family therapist, either through Salt Lake County Mental Health, the Utah State Department of Social Services, or another qualified counselor or therapist, for purposes of resolving the conflict between the defendant and the minor children of the parties.

6. Plaintiff is hereby awarded the truck, free and clear of any interest of the defendant and defendant is hereby awarded the Ford Granada, free and clear of any interest of the plaintiff.

7. Plaintiff is ordered to pay and assume all debts and obligations incurred by the parties until the date of the divorce herein, including, specifically, any debt incurred by defendant for her living accommodations.

8. The parties' previous division of their items of personal effects, jewelry, clothing and belongings, and household furnishings, fixtures and appliances is hereby confirmed in each and each party is awarded those items currently in his or her own possession, with the exception of the following items, which are hereby awarded to the defendant: the grandfather clock, one set of bathroom linens, her sister's couch, a reasonable portion of the tableware, pots and pans and bedroom linens, and the casual table and chairs.

9. Plaintiff is hereby awarded the permanent use and possession of the real property of the parties located at 4195 South 1865 East in Salt Lake City, State of Utah, and all right, title and interest therein, including the right to any reserve account, free and clear of any interest of the defendant, subject to the first and second mortgage indebtedness owing thereon, which plaintiff is hereby ordered to pay and assume and hold

defendant harmless thereon. Defendant is hereby ordered to execute a Quit-Claim Deed, quit-claiming all interest she may have in said real property to the plaintiff, K.R. subject to the $10,000 lien. Further, defendant is hereby awarded a non-interest bearing equitable lien on said real property, in the sum of Ten Thousand Dollars ($10,000.00), representing her one-half share of the equity in the real property, payable upon the first to occur of the following events:

a. plaintiff's remarriage or cohabitation in the home with woman other than the defendant;

b. the youngest child of the parties attaining the age of 18 years or graduating from high school in due course, whichever last occurs;

c. the death of the plaintiff;

d. the sale of the real property at plaintiff's election;

e. plaintiff's ceasing to use said real property as his primary place of residence.

10. Plaintiff's retirement plan through his employment with the State of Utah, is ordered to be divided between the parties, according to the *Woodward* formula, and a Qualified Domestic Relations Order shall issue from this Court.

11. Plaintiff is hereby ordered to pay to defendant the sum of Two Hundred Dollars ($200.00) per month, as and for alimony, commencing with the month of February 1989, and continuing until the death of the plaintiff or defendant, until defendant's remarriage or cohabitation, whichever first occurs, or until further order of this Court. This award of alimony is subject to

review by this Court on July 7, 1989 at 8:30 a.m., before the assigned judge.

12. Defendant is hereby ordered to pursue all employment opportunities and all job training opportunities available to her as set forth in the Findings of Fact entered by this Court. Further, defendant is ordered to make a reasonable and concerted effort to obtain employment, including making contacts through Job Service, private employment agencies, and making a minimum of three applications for employment per week with prospective employers and is ordered to report her job search efforts to this Court at the hearing on July 7, 1989.

13. Defendant is hereby ordered to pay to plaintiff the sum of Seventy-Five Dollars ($75.00) per month, per child, commencing with the month of February 1989 and continuing until such time as the minor children achieve the age of 18 years or graduate from high school in the normal course of their high school educations, whichever event occurs later. In any month when the defendant fails to make an actual monetary payment to plaintiff for child support, said child support shall be deducted from defendant's lien on the marital residence of the parties.

In the event the defendant falls 30 or more days in arrears in her child support obligation, the plaintiff shall be entitled to mandatory income withholding relief, pursuant to Utah Code Annotated, Section 62A-11-401, et. seq. (Supp. 1988).

14. Each party is ordered to pay and assume his or her own court costs and attorney's fees.

15. Each party should be ordered to execute and deliver all necessary documents to transfer the title and ownership of the

property of the parties pursuant to the Decree entered herein.

DATED THIS 20th day of March, 1989.

BY THE COURT

Kenneth Rigtrup

KENNETH RIGTRUP
District Court Judge

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I am employed in the offices of Corporon & Williams, attorneys for the plaintiff herein, and that I caused the foregoing proposed Decree of Divorce to be served upon defendant by placing a true and correct copy of the same in an envelope addressed to:

JEFFREY C. HUNT
Attorney for Defendant
225 South 200 East
Suite 230
Salt Lake City, Utah 84111

and depositing the same, sealed, with first-class postage pre-paid thereon, in the United States mail at Salt Lake City, Utah on the 22 day of February, 1989.

Teresa K. Bergnon

Secretary