1980

Lowell Isaac Black v. Sonya Gustaveson Black and State of Utah : Brief of Respondents

Utah Supreme Court

Shirlene A. Cutler; Attorney for Appellant;
J. Dennis Kroll; Robert B. Hansen; Attorneys for Defendant;

IN THE SUPREME COURT
OF THE STATE OF UTAH

LOWELL ISAAC BLACK,

Plaintiff-Appellant,

vs

Case No. 17097

SONYA GUSTAVESON BLACK
and THE STATE OF UTAH

Defendants-Respondents.

RESPONDENTS' BRIEF

Appeal from the judgment of the
Third Judicial District for Salt Lake County

Honorable Edward A. Watson

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BRIEF OF RESPONDENT

NATURE OF CASE AND DISPOSITION IN LOWER COURT

Respondent concurs in Appellant's statement of the nature of the case and disposition in Lower Court.

RELIEF SOUGHT ON APPEAL

The Respondent prays that the Supreme Court affirm the judgment of the trial court.

STATEMENT OF FACTS

The Appellant filed for divorce on September 26, 1975. The parties, thereafter, entered into an agreement called a Stipulation, Waiver, and Property Settlement Agreement which was drafted by Plaintiff's attorney. This document was substantially adopted in the divorce decree entered by Judge Stewart M. Hansen on November 7, 1975. In the agreement the parties agreed that the Defendant would have custody of the minor child and that the Respondent would also get the family car and the equity in the family home, subject to the Respondent assuming the payments on the home. Because the Appellant was a full time student at the time of the divorce, his monthly financial obligations were minimal. The Respondent was awarded no alimony and child support was set at"$50.00 per month for the care and support of the parties' minor child, Michele, during the period that the Plaintiff was continuing his university education and $150.00 per month upon his employment...". Record p. 19, paragraph 10.

The agreement contained numerous other provisions

including extensive property settlement terms which are not relevant to this appeal.

The Appellant paid $50.00 per month as child support until September 1979 when he increased his payments to $100.00 per month pursuant to a stipulation of the parties and an order signed by Judge Christine M. Durham on September 27, 1979. (Record p. 55). This change in support amount by stipulation of the parties came after the time in question on this appeal.

Beginning in August of 1975 the Respondent and the parties' minor child received public assistance from the State of Utah and continued receiving assistance until May of 1979. (Record p. 70). As required by law, the Respondent executed an assignment of her rights to collect child support from the Appellant to the State of Utah. (Record p. 38).

On October 4, 1979 the State of Utah was granted an ex parte motion to join as a party to the action, (record p. 57), for the purpose of pursuing Appellant, according to Divorce Decree, for reimbursement of welfare provided to his child.

The following facts are relevant to the amount of support owed by Appellant pursuant to Divorce Decree since the Divorce Decree based the amount upon whether the Appellant was a full time student or working full time.

The Appellant attended university classes at the

University of Utah full time Autumn Quarter 1975, Winter Quarter 1976, Spring Quarter 1976. (Record p. 96 Lines 7-22). Appellant testified that he only attended one quarter in 1977 and only returned for one quarter in Winter 1978. (Record p. 106 Lines 13-22). That was the last time he attended classes and he has not yet completed his degree, although he has been a student from 1971 to 1980. (Record p. 96, 97). He is no longer majoring in pharmacy and intends to pursue a degree in business. (Record p. 98). In February 1978 the Appellant began full time employment with the post office. (Record p. 97).

On April 9, 1980, Appellant came before the Court on an Order to Show Cause why he should not pay the additional $100.00 per month child support arrearages, pursuant to the Divorce Decree. This Order to Show Cause was instituted by the State of Utah and the purpose of the hearing was to determine if the Plaintiff was a student or employed during the time in which the Respondent and the child were receiving public assistance, and thus, whether the Appellant should pay the increased support amount of $150.00 rather than the $50.00 per month. The Court found, based on testimony at p. 106 Line 13-22, that the Appellant was not a fulltime student and was employed as contemplated in the Divorce Decree for thirty five of the forty six months that the Respondent and the child were on public assistance. (Record p. 107). The Court

also found after Appellant's testimony, that the Divorce Decree contemplated that the Appellant had to be a full time student to avail himself of the lower child support provisions and that intermittent study would not be enough to allow him to retain the lower child support status. (Record p. 107). Based on these findings, the Court ordered the Appellant to pay $100.00 per month for 35 months of back child support. This represented the difference between the $150.00 per month child support decreed during periods of Appellant's employment and the $50.00 per month actually paid by Appellant.

ARGUMENT - POINT 1

The trial court had sufficient evidence, based on the Appellant's testimony, before it to support the judgment and its judgment should not be overturned on appeal.

The Court which heard this matter was a Court of competent jurisdiction. In a divorce case the trial court has broad powers and the trial court's decision will not be overturned on appeal unless the Appellant shows some manifest error or abuse of discretion. Eastman vs Eastman 558 P.2d 514 (Utah 1976); Curry vs Curry 321 P.2d 939, 7U.2d 198 (1958).

The primary issue the trial court had before it was whether the Appellant had been a full time student during the time period in which the minor child was receiving support from the state. Under the terms of the

Divorce Decree, the Appellant was to pay "$50.00 per month for the care and support of the parties' minor child, Michele, during the period that the Plaintiff is continuing his university education and $150.00 per month upon his employment". (Record p. 19) Appellant took the position that so long as he attended the university one quarter a year and was not employed full time he was only obligated to pay $50.00 per month as child support. The Court rejected this argument, (record p. 107) and found that Appellant was obligated to pay $150.00 per month as child support every month that he was not a full time student, in pursuit of a normal 4 year or 5 year degree. (Record p. 107).

The State of Utah is a party to this action because it provided support for the Appellant's minor child at a time when Appelant was not adequately providing for her support. When the State of Utah provided support for the child it became subrogated to the child's rights of support and could enforce the Decree to the same extent as could the child herself. UCA 78-45b-3, Utah Code Annotated 78-45-9, State Department of Social Services vs Clark 554 P.2d 1310 (1976).

In determining the Appellant's liability for past child support the Court had before it the Affidavits of the attorney for the State which included a summary of the amounts expended by the Department of Social Services for child support during the period in question. Also,

Affidavits with an Order to Show Cause are commonly accepted practice in this jurisdiction to set forth the accounting as to Divorce Decree ordered amounts and payments made. Affidavits are admissible in evidence as an exception to the hearsay rule to the extent permitted by the statute and rules of procedure of the State. (Utah Rules of Evidence Rule 63(2)). Under Rule 43(e) of the Utah Rules of Civil Procedure a motion based on facts not appearing of record may be heard on affidavits, unless the court directs otherwise.

The Appellant was present in court with counsel on the day in which the motion was heard. Appellant could have objected to the use of affidavits but he failed to do so. Now he is arguing on appeal that he was prejudiced by his inability to cross examine the person who kept the records. It is a well settled rule of law that a party's failure to raise an objection in an earlier proceeding constitutes a waiver of the objection and he is estopped from raising the objection on appeal. Sanders vs Cassity 586 P.2d 423 (Utah 1978). Counsel must give the trial court an opportunity to correct the error before asking the Appelate Court to overturn the judgment. Porcupine Resevoir vs Lloyd W. Keller Corp 392 P.2d 620, 15 U.2d 318 (1964).

The cases cited by the Appellant in his brief are distinguishable from the instant case. In Santee vs North 574 P.2d 191 Kansas 1977) the parties objected to the

examination and specifically asked for the right to cross examine the witness and the Judge refused to permit cross examination. No objection of any kind was made to the use of affidavits in t he instant case. Aylor vs Aylor 478 P.2d 302 (Colo 1970) cited by Appellant actually supports the position of Respondent because the Court in that case allowed the written reports of psychiatrists to be used as evidence in a child custody case without the benefit of cross-examination because the parties waived objections. The losing party then appealed on the grounds that he had been denied due process and the Appellate Court rejected these contentions because the Appellant had waived his objections to the use of written reports and could not complain on appeal. By failing to object to the Affidavit at the hearing on the motion, Appellant has also waived his objections and should not be allowed to complain for the first time on appeal.

The Affidavit lists child support payments made to the minor child. (Record p. 64). Although it is possible that there is some confusion in Appellant's mind as to who was supported by these amounts, because of the title of Exhibit "B", the amounts listed are less than the standard amount paid out by the State for the support of one child during the appropriate periods of time. Appellant knew that the child was receiving public assistance through the "Stepfather's Assistance Program" (Brief p. 10), and could

easily understand that because his wife had remarried, the State was only providing assistance for the child. If he had truly been interested in finding out whether any of these sums were going toward the support of his ex-wife, he could have either:1) raised an objection to the Affidavits at trial,or 2) contacted the Department of Social Services for an explanation. Either of these actions would have made it clear to the Appellant that the only funds listed in the Affidavit were funds expended for the child.

Appellant however, has attempted to confuse the issue by bringing up the subject of alimony. Alimony was not discussed at the hearing on the order to show cause. Appellant did not object to the use of the Affidavits at the hearing or request an explanation of the disbursements. The issue is raised only on appeal in an attempt to confuse the issue and overturn a judgment which was adverse to the Appellant's interests.

The Court should not be diverted, however, from the main issue, which was before the trial court, i.e., whether or not Appellant was complying with the terms of the Divorce Decree. If he was not complying with the Decree any party to the action - the Respondent, the child, or the State of Utah - could bring an action to enforce the Decree according to its terms. Utah Code Annotated 78-45b-3 Bartholomew vs Bartholomew 548 P.2d 239 (1976). The fact that the State had provided public assistance is relevant

only in that it allows the State to enter an appearance as a party to the action. The amount of assistance provided by the State is a minor issue which becomes important only if the Court found that the Appellant was not complying with the Decree and then only if the amount recovered from the Appellant through the Order to Show Cause exceeds the amount the State expended for the child. Utah Code Annotated 78-45b-3(5).

An Affidavit is perfectly good evidence where, as here, the issue addressed by the Affidavit is of minor importance (accounting statement), or when objections to its admissibility are waived, or when the outcome is not directly dependant on the Affidavit. Lee Wayne Co Inc vs Pruitt 550 P.2d 1374 (Okla 1976). The Appellant waived his objections by failing to raise them at the proper time. What's more, the issue addressed by the Affidavit is only collateral to the main issue which is: Was the Defendant in compliance with the Divorce Decree?

The Court's interpretation of the language of the Divorce Decree is entirely proper. The Decree was based on an agreement between the parties which was drafted by the Appellant and his attorney. They picked the language which was used in the provision regarding child support and they wrote the agreement regarding the property settlement of which the Appellant now complains. In the case of Skousen vs Smith 493 P.2d 1003, 27 U.2d 169 (1972) Justice

Henriod said,

> ...In addition to this, the fact persists that the document which Defendant now urges did not mean what it says, was drafted and executed by the Defendant. It is axiomatic that language in a written instrument is interpreted more strongly against a scrivener who executes it. It is equally elementary that parties may be bound by the language they deliberately use in their contracts, irrespective of the fact that it appears to result in improvidence, beyond perhaps in excess of what the mythical prudent man might feel constrained to venture. The freedom of contract is not reserved to the more-than-average intelligent, but to the less fortunate less-than-average brother. It is only where their contracts are carried into the domain of equity on a raft of unconsciounability so laden with shockingness as to justify the Chancellor in sinking both that the sanctity of contracts should be molested" at p. 1005.

The Court interpreted the language of the agreement and the Divorce Decree according to its common everyday usage. The Court interpreted the language against the party who was responsible for it. The Trial Court's action was entirely proper and this Court should not overturn it on appeal. Skousen vs Smith supra.

Once the trial Court has interpreted the Divorce Decree it had the factual task of determining whether the Appellant had complied with the Decree. The Court found that the Appellant was not attending school on a full time continuing basis, that he had been employed, and that he was not in compliance with the Decree. Since he was not in compliance with the Decree he owed child support for his

daughter Michele Black at the rate of $100.00 per month for each of the months in which he did not comply with the Divorce Decree. The State of Utah was the Trustee of the cause of action belonging to Sonya Black and had the power (UCA 78-45-9) to bring the action and receive and cash any payments received as a result of that action, Utah Code Annotated78-45-b-3(1)(5)and (6). The Court acted within its powers in determining the factual issues presented. The Court acted legally in awarding the judgment for back child support to the State Department of Social Services. The issues of Affidavits is a collateral issue which was of little relevance to the outcome of the case and to which the Appellant did not even object at the hearing. The trial court acted within its powers and there is no manifest error or abuse of discretion in its actions which justifies overturning the verdict. Eastman vs Eastman 558 P.2d 514 (Utah 1976)

POINT II

The trial court did not abuse its discretion in finding that the Appellant did not comply with the Divorce Decree.

In the Divorce Decree the Court took into account at that time, the fairness of the property division agreements of the parties and gave the stipulated provision the Court's approval. At the time the Court set child support, it had in mind the division of property between the

parties. Soon after the Decree was entered the Appellant filed a motion to set aside the Decree of Divorce on the grounds that the Appellant did not feel he was treated fairly. (Record p.21). This motion was denied. (Record p.44 and 45). In the hearing on the order to show cause the Appellant tried to relitigate the issue of the fairness of the property settlement and the court sustained Respondent's objection that the testimony was irrelavant to the issue of whether the Appellant had complied with the Decree of Divorce (Record p. 100 and 101). The Appellant brings the issue up on appeal again, pages 9 and 10 of his brief. No matter how bitter the Defendant may feel about his lot, the matter has been litigated and was not in issue in these proceedings.

The issue of Appellant's obligation to provide child support was also raised again in the Order to Show Cause proceedings. However, the Order to Show Cause hearing was a proceeding to determine whether the Appellant had complied with the Decree of Divorce in the past, not a proceeding for modification of the Decree. Utah Code Annotated Section 78-45-7 which is cited by Appellant deals with prospective support, not arrearages. Therefore, the living conditions, wealth, material, change in circumstances etc., were not relevant in this hearing and the Court was not required to take them into account because child support obligations become unalterable as they come due. Larsen vs Larsen 561 P.2d

1077 (1977). If the Appellant had experienced a material change of circumstances he could have petitioned the Court for a modification of the support order many years before he was hauled into Court on an order to show cause and could have avoided the accrual of arrearages. However, the Appellant did not do this. Instead, although he was working full time and not attending school on a full time continuing basis, he now wants the court to effect a retroactive modification of his support obligation. This the court cannot do, and the Court acted properly in determining that he was not in compliance with the Decree. Larsen vs Larsen supra.

CONCLUSION

The Appellant had a full and fair hearing on the matter and the Court, having heard all of the evidence that the Appellant desired to present, ruled that the Appellant had not complied with the Divorce Decree. The Court found that the Appellant was delinquent in an amount of $3,500 and entered judgment in favor of the State of Utah as Trustee of the cause of action of Respondent Sonya Black Heitman and the Appellant's minor child.

The fact that Appellant desires to have his child supported by the tax payers of the State of Utah and to avoid paying the Court ordered amount of support, is not sufficient to warrant the relief requested by the Appellant. The issue of the fairness of the property settlement has been litigated several times and decided against Ap-

pellant. The Court has examined the Divorce Decree and found that it did not give the Appellant the right to avoid child cupport payments when he attended classes at the university only one quarter a year on a non-fulltime basis.

Appellant and his attorney drafted the Decree which has caused the Appellant so much grief, Appellant has persistently tried to relitigate his problems before various courts, he now tries to get this Court to overturn a sound and well reasoned judgment with argument of an alleged defect in a collateral matter to which the Appellant did not even object in the Court below.

For the foregoing reasons, this Court should affirm the decision of the Court below.

Respectfully submitted,

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Attorneys for Defendant-Respond

CERTIFICATE OF MAILING

I hereby certify that on the 14 day of November, 1980, I mailed a true and correct copy of the foregoing Brief, postage prepaid, to Shirlene A. Cutler, Attorney at Law, Attorney for Appellant, at 1465 Canterbury Drive, Salt Lake City, Utah 84108.

Mary Ballingham