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Michael C. Montague v. Moana Fairbanks Montague : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MICHAEL C. MONTAGUE,

Appellee,

vs.

MOANA FAIRBANKS MONTAGUE,

Appellant.

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Appellate No. 20000155-CA

REPLY BRIEF OF APPELLANT

Appeal from the Third Judicial District Court, Salt Lake County,

The Honorable William B. Bohling

Civil No. 964900839 DA

Argument Priority No. 15

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Oral Argument and Published Decision Requested

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Clerk of the Court

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ARGUMENT

I. ADEQUACY OF THE FINDINGS.

1. MR. MONTAGUE ATTEMPTS TO MANUFACTURE FINDINGS THAT DO NOT EXIST.

In his brief, Mr. Montague attempts manufacture on appeal new findings that were never made by the trial court, speculating as to the court's basis as to how it arrived at its broad conclusions. This is wholly inappropriate. "The court on appeal in a law case may look into the evidence to ascertain whether a finding of fact is supported by the evidence, but it cannot look into the evidence to make a finding, nor treat as found that which might have been found." Utah Ass'n of Credit Men v. Home Fire Ins. Co., 102 P. 631 (Utah 1909). The fact remains that the trial court never made any detailed findings in support of its ruling. Rather, the trial court made broad conclusory statements as to the substantial change issue, and did not address any of the details as to how it determined the specific amount of the alimony reduction. Nor is the weight of the evidence favorable to the trial court's ultimate ruling, as the only basis for sustaining inadequate findings.

At the conclusion of trial, instead of taking the matter under advisement and fashioning detailed findings by way of a memorandum decision, the trial court instead made an immediate ruling from the bench, and charged Mr. Montague with drafting the proposed Findings of Fact and Conclusions of Law. As the party charged with this responsibility Mr. Montague could have opted to submit proposed findings that were more than a mere summary of the statements made by Judge Bohling when rendering his decision. "Of what consequence is the recitation that the court heard the evidence without stating what he heard

or found with respect thereto, or to the issues?" Hillyard v. District Court of Cache County, 249 P. 806 (Utah 1926). Had there been an objection to any particular proposed finding the matter could have been heard and ruled upon by the trial court. This never occurred. Mr. Montague did not even attempt to draft detailed proposed findings. Instead, he opted to submit for signature an order containing virtually no findings in support thereof. He now tries to compensate by attempting to create findings on appeal that the trial court never adopted. Mr. Montague's position also assumes that the trial court adjudged the credibility of the witnesses and weighed the evidence exactly as he argues on appeal, when there was no stipulation or findings adopted by the trial court to that effect.

Mr. Montague even attempts to advance an argument that detailed findings are not necessary. In citing In re Estate of Grimm, 784 P.2d 1238 (Utah Ct. App. 1989), he argues that "it is not necessary for the court to resolve all conflicting evidentiary issues." Grimm, however, does not stand for the proposition that a trial court is excused from making findings on all material subordinate and ultimate factual issues. Rather it stands for a proposition already acknowledged by Mrs. Montague – that a trial court's finding of fact should not be set aside unless the appellate court concludes that the finding is against the clear weight of the evidence. Id., citing Reid v. Mutual of Omaha Ins. Co., 776 P.2d 896, 899-900 (Utah 1989).

2. INADEQUACY AS TO VOLUNTARINESS.

As laid out more fully in the Brief of Appellant, in this case there are no findings of fact as to several material issues. For example, on the issue of voluntariness relating to Mr.

Montague's job loss, the trial court did not articulate in any way the basis for its conclusion that Mr. Montague was "terminated. The trial court failed to indicate just what evidence it was relying upon in the face of a substantial evidence demonstrating that Mr. Montague presented with options that might have resulted in job retention, signed a letter of "voluntary resignation" admittedly under no duress, and wherein Mr. Montague admitted that he "decided to look for new employment." The trial court simply concluded that Mr. Montague was terminated and stated that "it was pretty much a foregone conclusions that his career was over with the church." These conclusions are not the the detailed type of findings that the case law universally requires.

II. ABUSE OF DISCRETION.

1. MARSHALING OF THE EVIDENCE.

In arguing that Mrs. Montague failed to meet her burden of demonstrating an abuse of discretion, Mr. Montague cites West Valley City v. Majestic Inv. Co., 818 P.2d 1311, 1315 (Utah Ct. App. 1991) to lay out the standard required of Mrs. Montague. However, unlike in Majestic, no "magnificent array of supporting evidence" supporting either the findings or the ultimate conclusions exists here.

Regarding voluntariness, in her initial brief Mrs. Montague marshaled all of the evidence she could find which supports the trial court's ruling, as follows:

1. Mr. Montague did not want to lose his job with the Church. (R. 62);
2. Mr. Montague submitted a letter of resignation because he was told and believed that he was not wanted in Church employment any longer. (R. 18, 27-8, 45-

6);

3. Mr. Montague submitted a letter of resignation because he was told and believed that if he went through the Church's grievance procedure and lost, he would lose his vested retirement benefits. (R. 26);

4. Two of the four options presented to Mr. Montague at the July 13, 1998 meeting were for him to resign or be terminated. (Exhibit 1).

Mrs. Montague then laid out how despite such evidence, the overwhelming weight of the evidence pointed to an abuse of discretion as to the scant findings and to the ultimate ruling.

It appears that Mr. Montague has failed to adequately rebut Mrs. Montague's initial contention. As to the question of voluntariness, with one exception Mr. Montague's brief cites no additional evidence or testimony which might support the trial court's ruling, and he has not demonstrated how Mrs. Montague's argument fails. Rather, Mr. Montague merely restates the trial court's findings and conclusions, and argues as though it is the evidence the Appellant is required to marshal.

In his sole reference to the record apart from statements of the trial court, Mr. Montague attempts to advance an argument that he actually was provided with only two options, resignation or termination, not the four options set forth in Exhibit 1, the Memorandum of the July 13, 1998 meeting. Mr. Montague argues in his brief:

"Mr. Montague's supervisors, who asked him to resign, admitted that he was being fired. Ron Garrison, the director of human resources, who explained Mike's options to him said resigning

was Mike's alternative to being fired. (Brief of Appellee, p. 27)

This argument is grossly misleading. Indeed on cross-examination Mr. Garrison answered in the affirmative when asked whether Mr. Montague was offered resignation as an alternative to termination" (R.106). However, Mr. Montague fails to cite that portion of the record where Mr. Garrison elaborates:

"We wanted to hear both sides." (R.99)

"We gave four options (R.100)"

When asked about whether Mr. Montague would have retained his job during the pendency of the grievance procedure, Mr. Garrison responded "[m]y experience would suggest he would still have been working during that period." And finally, when asked whether Mr. Montague ever pursued options three or four, which involved possible job retention, Mr. Garrison answered: "No." (R.104). Clearly Mr. Garrison's testimony, when taken as a whole, leads to the unmistakable conclusion that Mr. Montague was provided with four options, two of which afforded Mr. Montague the opportunity to defend the allegations against him, and which might have resulted in employment retention, and that the decision of which option to elect was placed squarely in Mr. Montague's hands. Mr. Montague's sole reference to the record is misleading and does not accurately reflect Mr. Garrison's testimony.

Furthermore, Mr. Garrison's testimony was corroborated by Dean Walker, a Church Human Resources employee. Present at the July 13, 1998 meeting, Mr. Walker testified that "[w]hat we were waiting for is to find out which of these options [Mr. Montague] would

choose." (R.75), and when asked whether Mr. Montague was led to believe at that meeting that if he didn't resign he would be terminated, Mr. Walker testified "I don't know what he was led to believe. He was just given these four options during the meeting."

Finally, Mr. Montague himself acknowledged that he could have pursued options which might have resulted in job retention but that he decided to resign." (R.46-48).

Consequently, even considering the affirmative response of Ron Garrison as issue the overwhelming weight of the evidence suggests that Mr. Montague afforded four options at the July 13, 1998 meeting, and that Mr. Montague chose to resign. By Mr. Montague's own admission it was his decision, not the Church's, to sever the employment relationship. (R.27).

Mr. Montague next argues that Mrs. Montague argues only "the few facts, and directs the court to "a few documents" favorable to her "if looked alone" without the surrounding and contrary evidence. (Brief of Appellee, p.28). He fails to indicate, however, what evidence Mrs. Montague failed to marshal. Mrs. Montague maintains, with respect to voluntariness, that all of the evidence favorable to the trial court's ruling has been marshaled. Simply stated, in this case there is not much to marshal because the overwhelming weight of the evidence points to a conclusion contrary to that reached by the trial court.

2. RELEVANCE OF UNEMPLOYMENT CASES.

Mr. Montague next argues in his brief that the citing of unemployment cases on the issue of voluntariness is irrelevant. The argument makes little sense. Very little Utah case law exists that addresses the issue of what constitutes voluntary unemployment or underemployment in the context of alimony, including the issue of the extent of the moving

party's burden. While not binding, and while this Court has the discretion of adopting or not adopting the standards set forth in unemployment cases, it is neither irrelevant nor erroneous to seek guidance from cases that have addressed the issue of voluntary termination in other contexts.

3. FAILURE TO ARTICULATE HOW LEVITZ AND LOVEGREN ARE MISGUIDEDLY CITED.

Mr. Montague asserts in his brief that the Appellant is misguided in citing Levitz v. Warrington, 877 P.2d 1245 (Utah Ct. App. 1994) and State v. Lovegren, 798 P.2d 767, 771 n.10 (Utah Ct. App. 1990). He fails, however, to distinguish the cases or make any argument as to why the principles set forth in those cases do not apply here, while conceding they stand for the propositions cited. The issue at hand is whether remand is necessary if the evidence concerning the issues are undisputed. The principle to be applied is not affected by the subject matter of the case. It is irrelevant whether the matter involves securities transactions, criminal convictions or domestic relations, and Mr. Montague has failed to show otherwise.

4. FLAGRANT INJUSTICE.

Mr. Montague asserts in his brief that Mrs. Montague's arguments relating to flagrant injustice are rather "general equity arguments." (Brief of Appellee, p. 29) Appellant is somewhat at a loss in attempting to distinguish between the terms "equity" and "justice". Furthermore, contrary to Mr. Montague's assertion in his brief, Mrs. Montague did not argue that the trial court should have forced Mr. Montague through the Church's grievance

procedure. Rather, Mrs. Montague's position was that because Mr. Montague elected to resign an alimony reduction was not justified as a threshold matter. As an alimony obligor Mr. Montague was charged with certain duties, such as a duty to utilize his best efforts to earn and income commensurate with his historical earnings, in order to meet his alimony obligation. If Mr. Montague voluntarily leaves his job, or conducts himself in a manner which leads to termination for cause, and then secures lower paying employment, an alimony reduction is not justified.

Mr. Montague was free to select any of the four options presented, but by electing to resign he should not expect the courts to award alimony relief, especially where he was aware that he would not be able to secure new employment at a pay rate even remotely commensurate with his historical earnings. (R.54-56). While constituting a material change in circumstances, the change does not justify an alimony reduction because it rewards Mr. Montague for breach of his duties as an alimony obligor. Furthermore, the evidence reflects that the LDS Church might consider Mr. Montague for rehire, but Mr. Montague has not availed himself of such opportunity. (R.105). In sum, it is patently unfair to reward Mr. Montague for his decision to leave his job and to require Mrs. Montague to shoulder the burden.

III. FINDINGS AS TO THE AMOUNT OF THE ALIMONY REDUCTION.

Even if overcoming the threshold question of voluntariness as to job loss and current underemployment, Mr. Montague attempts to advance the argument that the need for adequate findings on the issue of alimony recalculation is unnecessary. In so doing he cites

Kinkella v. Baugh, 660 P.2d. 233 (Utah 1983) and argues that the trial court need not publish its calculations as to how it arrived at a new alimony figure. Such reliance, however, is misplaced. Kinkella stands for proposition that it is permissible for a trial court to fail state a conclusion of law where the findings are adequate, not for the proposition that it is permissive to make inadequate findings in the first place. See, Pugh v. North Am Warranty Servs., Inc. 1 P.3d 570 (Utah Ct. App. 2000), footnote 4. Conversely, Kinkella does stand for the proposition that inadequate findings constitute reversible error unless the facts in the record are "clear, uncontroverted, and capable of supporting only a finding in favor of the judgment." Sukin v. Sukin, 844 P.2d 922 (Utah Ct. App. 1992) citing Kinkella.

Mr. Montague's position also flies in the face of the recent decision of Bolliger v. Bolliger, 997 P.2d 93 (Utah Ct. App. 2000) which reaffirmed the standard set forth in Williamson v. Williamson, 983 P.2d 1103 Utah Ct. App. 1999) . In Bolliger, this Court determined that "[o]nce a finding is made that a substantial material change of circumstances has occurred that was not foreseeable at the time of the divorce, the trial court must then consider:

"...at least the following factors in determining alimony: (i) the financial condition and needs of the recipient spouse; (ii) the recipient's earning capacity or ability to produce income; (iii) the ability of the payor spouse to provide support; and (iv) the length of the marriage.' These factors apply not only to an initial award of alimony, but also to a redetermination of alimony during a modification proceeding. The trial court must then make findings of fact based on these factors."

In this case the trial court made no such findings whatsoever. Nor is the record clear and uncontroverted, and only supportive of the Court's ruling. Evidence exists that

demonstrates Mr. Montague's ability to pay alimony is not reduced because of the second household income earned by his new spouse, Jurelle Montague. (R.64-68). Mr. Montague errs when arguing in his brief it was uncontroverted that Jurelle Montague's contribution to the household expenses were only \$500.00 per month. Mrs. Montague clearly argued that such figure was arbitrary and that her apportionment should be higher. (R.146-47). The trial court made no findings on this subject.

Evidence also exists suggesting that Mr. Montague might be able to return to his old employer at a higher wage than he presently earns if he were to avail himself of the opportunity. (R.105). Thus, there exists evidence to suggest that Mr. Montague's earning capacity and thus whether his earning capacity was greater than his present earnings.¹ It also is unclear whether the trial court counted as income Mrs. Montague's earnings from her second job undertaken when Mr. Montague ceased making alimony payments.

Nor is the record clear as to whether Mrs. Montague was being allowed a reasonable expense for repayment on the loan taken to repay Mr. Montague's equity in the marital residence, or whether her contributions toward tithing (necessary for employment retention with the Church) and retirement should be deemed as a reasonable and necessary expense. Also, it is unclear whether the trial court afforded Mr. Montague full credit for the debts and expenses listed on his Financial Declaration. Thus, the Respondent's reliance upon Grimm and Kinkella are misplaced, as it does not excuse a trial court's failure to make adequate

¹ Mr. Montague, bearing the burden of demonstrating an inability to earn at his historical level, called no vocational experts to testify to that effect.

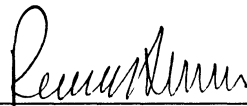
findings as they relate to the material issues. Such argument also contravenes the guidelines set forth in Bolliger. The contention that "Judge Bohling explained his calculations in his ruling" is absurd, and it is improper for this Court to look at the Financial Declarations of the parties and make assumptions as to what Judge Bohling took into account or deemed as credible. Mr. Montague simply assumes that the trial court adopted the calculations he makes on appeal, but the lack of findings renders the assumption to mere speculation.

Finally there is no indication as to the approach the trial court utilized in making its alimony award. For Mr. Montague to argue that "the length of the marriage was not an issue..." flies completely in the face of case law. Where a marriage of long term is concerned, an attempt to equalize the parties' economic positions would have been the desired approach. Gardner v. Gardner, 748 P.2d 1076 (Utah 1988). "An alimony award should, after a marriage of long duration and to the extent possible, equalize the parties' respective standards of living and maintain them at a level as close as possible to that standard of living enjoyed during the marriage." There is no indication whatsoever as to what approach the trial court employed. The trial should have made detailed findings as to (i) the financial condition and needs of the recipient spouse; (ii) the recipient's earning capacity or ability to produce income; (iii) the ability of the payor spouse to provide support; and (iv) the length of the marriage, consistent with Bolliger, Williamson, and Utah Code Ann §30-3-35. It did not, and even if Mr. Montague overcomes the threshold issue of voluntariness in relation to his job loss, the trial court's ruling as to the amount of the alimony reduction cannot be sustained.

IV. SUMMARY.

In sum, in his brief Mr. Montague has erroneously asserted as findings of fact statements which are more accurately described as conclusions of law, attempts to manufacture findings on appeal, asserts that detailed findings are not necessary, has not adequately rebutted Mrs. Montague's showing that the trial court abused its discretion, has failed to explain how Mrs. Montague's argument of flagrant injustice is distinguishable from his assertion that it relates only to "general equity", and has failed to show that the trial court made sufficient detailed findings as they relate to the specific amount of the alimony reduction. This court should reverse the judgment of the trial court and determine that Mr. Montague failed to meet his burden of demonstrating that a substantial and material change in circumstances justifying modification occurred.

DATED this 27 day of December, 2000.



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Attorney for Appellant

IN THE UTAH COURT OF APPEALS

MICHAEL C. MONTAGUE,

Appellee,

vs.

MOANA FAIRBANKS MONTAGUE,

Appellant.

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Appellate No. 20000155-CA

CERTIFICATE OF SERVICE

On this 28 day of December, 2000, I deposited in the United States Mail, postage prepaid, a true and correct copy of the foregoing Reply Brief of Appellant to the following:

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