1982

Beverly Kerr v. Thomas Alden Kerr : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE

STATE OF UTAH

BEVERLY KERR,	:	
Plaintiff-Respondent,	:	
vs.	:	Case No. 18329
THOMAS ALDEN KERR,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

Appeal from a Judgment of the
Third Judicial District Court for Salt Lake County
HONORABLE ERNEST F. BALDWIN, Judge

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BRIEF OF RESPONDENT

NATURE OF THE CASE

AND DISPOSITION BY THE COURT BELOW

This appeal arises out of a Motion of Defendant for the Modification of a Divorce Decree reducing or eliminating the payment of alimony and child support and Plaintiff's Order to Show Cause seeking payment of back alimony through August of 1981 in the amount of $5,891.00. After an evidentiary hearing held on August 24, 1981, before the Honorable Ernest F. Baldwin, Jr., District Judge, the Court denied Defendant's Motion for Modification and awarded Plaintiff a Judgment for $5,891.00 in unpaid alimony through August, 1981.

RELIEF SOUGHT ON APPEAL

Defendant seeks an Order of this Court vacating the Judgment of the trial court and awarding Defendant a reduction of alimony and/or child support retroactively to the date the Motion for Modification was filed.

STATEMENT OF FACTS

While Defendant in the Statement of Facts contained in his brief on this appeal makes some ostensible effort to summarize the evidence taken by the trial court, the Defendant fails to review or even acknowledge significant testimony upon which the decision of the trial court was based. For that reason, Plaintiff has little choice but to expand upon the statement of facts set forth in Defendant's brief.

On April 5, 1979, the Honorable Dean E. Conder, District Judge, entered his Memorandum Decision granting divorce to each of the parties, distributing the marital property and setting child support and alimony. (R. 183-88). The Memorandum Decision was followed by the Court's entry of Findings of Fact and Conclusions of Law (R. 207-18) and a Judgment and Decree of Divorce (R. 219-24) on May 11, 1979. Both the Memorandum Decision and the Judgment and Decree of Divorce provided for the payment of $799.00 per month alimony, and $450.00 per month child support for the minor child of the parties. In paragraphs 14 and 15 of the Findings of Fact (R. 213-14), the Court expressly recognized that the amounts awarded for child support and alimony would not cover the costs and expenses of maintaining the Plaintiff and the minor child of the parties in the family home, and

that the Plaintiff would accordingly be required to look to her own resources and income to supplement those support and maintenance payments.

In compliance with the directive of Judge Conder, Plaintiff in fact did look to her own separate income and assets for partial maintenance of herself and the minor son of the parties. The investment income, however, was simply insufficient to pay the bills and during the year 1979, Plaintiff was required to liquidate and deplete her assets by the sum of $3,600.00. (R. 934). As a consequence of her inability to meet her living expenses from her interest and dividend income without depleting the assets from which that income was derived, Plaintiff sought employment and commenced working for the Veteran's Administration in October of 1979. (R. 933). Plaintiff was asked why she simply didn't continue to deplete those assets in lieu of seeking employment. Her answer was as follows:

> "Well, the interest I get from my assets helps pay the expenses. If I use them all up now, they would be gone in two, two and a half years, and I would not have that income. At this point, I can't get work that is going to pay more than I am making now, and I need that money to operate."

(R. 934-35).

The evidence further reflected that Plaintiff's total income for the year 1981 through the date of the hearing in the Court below, excluding any alimony or child support, was $4,365.06 from her employment, together with an additional

$4,688.03 from interest and dividends, for a total of $9,053.09. (Ex. 5-P). During the same period of time, Plaintiff's total expenses in maintaining herself and her minor son was $17,529.46, (Ex. 6-P) or a short fall of nearly $8,500.00. In as much as she had received only $4,900.00 in child support and alimony payments from Defendant through August of 1981, (Ex. 5-P) Plaintiff had been required to further liquidate an additional $3,012.00 in assets in order to make up the short fall. (R. 936). Plaintiff also testified that the expenditures shown on Exhibit 6-P reflected only cash outlays made during the year to date and did not include other debts, including counsel fees, that she had not been able to pay. (R. 936).

Defendant testified that his net income, after taxes, had gone from $3,257.58 at the time of the original trial in 1978 (Defendant's Exhibit 4), to $2,302.32 for the first eight months of 1981. (Ex. 3-D). No evidence was introduced regarding any change in expenses or other circumstances of Defendant. Defendant's net average income from the practice of dentistry included a net income for the month of April of only $298.37. (Ex. 3-D). His gross receipts for that month however, were within $500 of the preceding month and nearly $2,000 more than the gross receipts for May. (Ex. 3-D). The unusually low net income for April was the consequence of a one-time non-recurring expense of nearly $3,000.00 for the repair of certain dental equipment. (R. 923).

Defendant claimed it was the combination of the change

of circumstances of Plaintiff obtaining employment and Defendant's reduction in income which required the modification of the divorce decree with respect to the payment of alimony and child support.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN REFUSING TO MODIFY THE DECREE OF DIVORCE

1. The Standard on This Appeal.

In arguing before this Court that all that need be shown to justify a modification of the Decree of Divorce is a change in circumstances, Defendant has significantly understated the standard against which this appeal must be judged. As noted by this Court in Ring v. Ring, 29 Utah 2d 436, 511 P.2d 155, 158 (1973) Defendant's burden is more than just a mere change in circumstances. This Court put it as follows:

> "Defendant must furthermore sustain the burden of proving that there has been a substantial change in the material circumstances of either one or both of the parties since the decree was entered. [Emphasis as in original.]

This same principle was later reinforced in Carter v. Carter, 563 P.2d 177, 179 (Utah 1977) where this Court delineated the scope of its review of a denial by the trial court of a motion to modify a divorce decree.

> "As opposed to Defendant's insistence that the trial court should have modified the decree, it is appropriate to have in mind that the burden of persuading the trial court that there has been such a change in

> circumstances as to justify such modification rests upon him; and that the same rules of review apply in supplementary proceedings, as in original divorce matters; that is, that we survey the record in the light most favorable to the findings and determination made by the trial court; and that we do not interfere therewith unless it appears that the evidence clearly preponderates against his findings or that he abused his discretion." [Emphasis added.]

The evidence in the record does not clearly preponderate against the trial court's denial of Defendant's Motion, but to the contrary clearly supports and sustains the decision of the trial court. When Defendant's appeal is measured against the criteria established in the above-referenced case law, it is apparent that the Judgment of the trial court should be sustained.

2. A Change in Defendant's Income Does Not Automatically Result In a Modification of the Divorce Decree.

Defendant seems to believe that a reduction in his income axiomatically requires a reduction in the payment of child support and alimony. That argument was quickly dispatched by this Court in Carter v. Carter, supra. There, a defendant who had been in good health at the time of the divorce decree and earning approximately $21,000 per year in construction work had suffered some impairment in his health and his earning capacity had been reduced to $12,000 per year. The defendant accordingly sought a reduction in alimony from $200 per month to $100 per month. The trial court denied the request for modification and on appeal, this Court affirmed. At 563 P.2d

178-79, the Court laid out the following rule, which is dispositive of Defendant's contention on this appeal:

> "In regard to the major problem, the defendant's argument that the evidence compels a reduction in the alimony payment from $200 to $100 per month. He is mistaken in his assumption that the amount of alimony payable should be correlated in percentage to his income, to be scaled up or down as his income may vary. His earning capacity and his income are, of course, important factors to be considered. But that is only part of the total circumstances to be considered as to what is appropriate and equitable. Another major one is what are plaintiff's needs and requirements; and there is no showing that there has been any decrease therein."

Defendant's contentions in the instant case are clearly subject to the same fate. Defendant has shown nothing more than a claimed change in his level of income. Defendant's average net monthly income for the eight months of 1981 was still over $2,300 per month, even including the abberational month of April. No effort was made and no evidence was introduced to show that a net income after taxes of $2,300 per month was not sufficient to meet the alimony and child support obligations imposed in the original divorce decree of $1,249.00 per month. 1/

1/ If anything, the evidence in the record is to the contrary. Subsequent to the entry of the Divorce Decree, the Defendant made a voluntary $3,200 investment in Pardners Restaurants (R. 907) and during 1981, gave an automobile to one of the married children of the parties at the very time he was refusing to make the alimony payments to the Defendant. (R. 909). This hardly sounds like a person living on the edge of poverty.

3. Plaintiff's Need for Alimony and Child Support Has Not Diminished.

As this court noted in Carter, of at least equal importance with Defendant's claimed diminished income is the continued need and requirements of the Plaintiff. In spite of Plaintiff's obtaining employment with the Veteran's Administration, those needs and requirements have not materially changed since the time of the Divorce Decree.

As noted earlier in the Statement of Facts, Judge Conder in the original Findings of Fact and Conclusions of Law recognized that the alimony and child support payments awarded to Plaintiff would be insufficient to meet the expenses of Plaintiff and the minor child of the parties. Judge Conder expressly indicated that Plaintiff would be required to supplement the the alimony and child support awarded from the Defendant and provide a portion of those needs herself. As Plaintiff testified, the sum of $4,000 in income earned by Plaintiff from the investments and savings awarded to her as her separate property was simply inadequate to make up the full short fall between the child support and alimony and her every day and normal living expenses.

As a consequence of the continued short fall, Plaintiff was forced to deplete the very assets upon which that needed income was generated, liquidating $3,600 of those assets in 1979 with an additional $3,000 having been liquidated in the first eight months of 1981. In order to provide the continued supplementary income which was clearly anticipated by Judge

Conder, Plaintiff was left with only one viable choice. She could not continue to deplete the assets upon which her income was dependent. The only alternative was to seek employment. It is only by the combination of the income derived from her employment, together with the continued interest and dividends from her separate investments that Plaintiff is able to make up the short fall between her actual expenses and the award of alimony and child support granted by the Decree of Divorce. 2/

Defendant erroneously contends that whatever may have been anticipated by Judge Conder at the time of the original Divorce Decree is immaterial, and that the only fact which the trial court in the instant case was entitled to examine was that Plaintiff was not working at the time of the original Decree, and was working at the time of the hearing on Defendant's Motion for Modification. That is not, however, the case law of this State.

2/ Defendant's argument that Plaintiff had voluntarily limited her work hours when she could have further augmented her income by working additional hours per week is of little relevance in this case. Working the available additional hours would have resulted in adding only $48 every two weeks to Plaintiff's gross income. (R. 943). Plaintiff further testified that the reason why she had cut back her hours from a full 40 hours per week to 32 hours was to enable her to be home at 3:00 o'clock in the afternoon when her son arrived home from school. She testified that her presence at home and the supervision that added had resulted in an increase in grade point average for the child from a 1.8 to 3.1. (R. 944). Would Defendant really have Plaintiff trade that needed parental supervision for an increase in gross income of some $96.00 per month?

In Felt v. Felt, 27 Utah 2d 103, 493 P.2d 620, 624 (1972) this Court expressed the applicable rule as follows:

> "[A] divorce decree containing awards for support based on either expressed or assumed facts contemplated by . . . the court . . . should not be modified when the contemplated facts are obvious or agreed to by the parties and in turn incorporated in the decree, in which event the continuous jurisdiction of the court to modify should not be used to thwart the expressed or obvious intentions of the . . . court - unless such contemplated facts lead to manifest injustice or unconscionable inequity."

There is no doubt that where the findings of the trial court expressly anticipate that the plaintiff will be required to supplement alimony and child support payments through her own income, the foregoing rule is applicable and the subsequent obtaining of employment by the Plaintiff does not constitute a material change in circumstances. In Allen v. Allen, 25 Utah 2d 87, 475 P.2d 1021 (1970), this Court rejected a claim for reduction in alimony and child support payments predicated upon the fact that the plaintiff had obtained employment subsequent to the entry of the original decree of divorce. In finding that there had been no material change in circumstances, the Court noted:

> "[T]he decree of divorce, when granted, contemplated that the Plaintiff would secure employment and contribute to her own support."

See, also, Short v. Short, 25 Utah 2d 326, 481 P.2d 54 (1971).

Again, Defendant has simply failed to meet his burden of demonstrating that the trial court abused its discretion in

finding that there was no substantial change in any material circumstance. Defendant's appeal is without merit and the judgment below should be affirmed.

POINT II

EVEN IF THE MODIFICATION WERE GRANTED, IT COULD NOT BE MADE RETROACTIVE BACK TO THE DATE OF THE FILING OF THE MOTION FOR MODIFICATION

Defendant correctly concedes in his brief that the trial court's denial of defendant's motion to make any modification in child support and alimony retroactive is in accord with Utah law. This Court did, in fact, clearly speak on that issue in Scott v. Scott, 19 Utah 2d 267, 430 P.2d 580, 583 (1967). The court there was faced with a similar request for a retroactive modification of a divorce decree. In responding to that claim, the Court explained the rule of law applicable in this State as follows:

> "The usual rule is that a judgment for alimony payable in monthly or other periodic installments cannot be changed or modified after the installments have become due. [Citations omitted.]
>
> The right to such accrued installment payments vested in the Plaintiff upon the due date of each installment, and the Plaintiff is entitled to interest thereon at the legal rate until payment is made. [Citations omitted.] Accordingly, the lower court was correct in its holding that it had no power or authority to change or modify the Nevada judgment as to the accrued installments of alimony thereunder.

Defendant has demonstrated no good reason why this Court should now modify or overturn that long standing

rule of law in this jurisdiction.

POINT III

PLAINTIFF IS ENTITLED TO AN AWARD OF HER REASONABLE ATTORNEY'S FEES ON THIS APPEAL

As demonstrated hereinabove, the Judgment entered by the trial court denying Defendant's Motion for Modification of the Decree of Divorce and awarding to Plaintiff back alimony and child support should be affirmed. This appeal was necessitated solely by the actions of the Defendant and is without merit. Accordingly, pursuant to the rules set down in Keiger v. Keiger, 59 Utah 2d 167, 506 P.2d 441 (1973) and Ehninger v. Ehninger, 569 P.2d 1104 (Utah 1977), this Court should enter its Order declaring Plaintiff is entitled to her reasonable attorney's fees on this Appeal and remanding the case to the District Court for an evidentiary hearing on the amount of such fees to be awarded.

CONCLUSION

The trial court acted properly and within its discretion denying Defendant's Motion to Modify the Decree of Divorce by reducing or eliminating the payment of child support and alimony and in awarding to Plaintiff judgment for back alimony and child support payments unpaid by Defendant. The Judgment of the District Court should, accordingly, be affirmed in all respects. Plaintiff should further be awarded her costs of appeal, including reasonable attorney's fees, and the case

should be remanded to the District Court for an evidentiary hearing on the amount of such costs and fees.

RESPECTFULLY SUBMITTED, this 17th day of November, 1982.

Glen E. Davies

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CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of November, 1982, I mailed two copies of the foregoing Brief of Respondent, postage prepaid, to the following:

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