1972

Alice B. Ring v. Wallace H. Ring : Brief of Plaintiff-Appellant

Utah Supreme Court

IN THE SUPREM
OF THE STA

ALICE B. RING,

WALLACE H. RI
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BRIEF O

Appeal from

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IN THE SUPREME COURT OF THE STATE OF UTAH

ALICE B. RING,
Plaintiff-Appellant,
vs.
WALLACE H. RING,
Defendant-Respondent.

Case No. 12961

BRIEF OF PLAINTIFF-APPELLANT

NATURE OF THE CASE

This is an appeal from an order of the Honorable Merrill C. Faux modifying a decree of divorce with regard to alimony and child custody.

DISPOSITION BELOW

The trial court modified the decree (1) to eliminate any obligation to pay alimony and (2) to so expand the Respondent's "visitation rights" that he in fact has custody of the parties' three children during one or two months per year.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the modification order primarily as it relates to custody and secondarily as it relates to elimination of alimony.

STATEMENT OF FACTS

The Complaint in the original divorce action was filed in April of 1967 (R-1). In December of that year, a counterclaim was filed (R-10). The action was never tried; a decree based on stipulation was entered on September 19, 1968 (R-22).

Throughout the marriage of the parties', Appellant produced income for the family by practicing her profession on a more or less part-time basis (R-131 et seq). She received as much as $915.00 per month for that activity (R-132). At the time the decree was entered, she was making $6,996.68 per year (Exhibit 2D). She was at all times licensed to practice medicine and surgery.

After the decree, Appellant prepared to practice full-time. She selected a specialty, public health, which would permit regular hours to be devoted to her children (R-139). To this end, she completed graduate training at the University of California (R-90), and became Assistant Regional Director for Health Manpower in the P.H.S. offices in San Francisco (R-91). This is a civil service position for which the salary is $25,620.00 per year.

Although she has increased her dollar income by some $19,000.00 per year since the decree was entered, Appellant incurs expenses for transportation to and from her place of work, for parking, for insurance, for entertainment, for out of state travel and for the maintenance of her home, all of which would be unnecessary if she chose not to be productive. These are estimated to consume about $200.00 per month (R-140 et seq). The really major expense items, however, are taxes, estimated at $7,200.00 per year (R-140) and child care, presumably about $3,100.00 per year (Exhibit 4-P).

The trial court refused to hear testimony with regard to comparative costs of living as between Salt Lake and San Francisco (R-141). The court further refused to receive evidence relating to the sources of the family income during the decade of the parties' marriage (R-152 statement of court with regard to Exhibit 3-P, offered and refused), or the degree to which the parties were influenced by tax considerations in dividing the support payments to which they stipulated (and which were incorporated in the original decree) as between spousal and child support (R-143).

During the period since the divorce, Respondent's annual dollar income has increased from $29,500.00 (R-108), to something in excess of $40,000.00, of which $35,000.00 is paid in taxable salary and bonuses (R-106) and "more than" $5,000.00 is paid in non-taxed contributions to a profit sharing plan and insurance benefits (R-116).

With regard to Respondent's exercise of his visitation rights during the years after the divorce when the children were in Salt Lake, the evidence is that he saw the children "sporadically" (R-144) and would stay away from them "for long periods of time — a month or more" (R-145). While Appellant was completing P.H.S. training at Berkeley and the children were with her, Respondent made little effort to communicate with them. One summer, he asked the children if they would like to take a river trip with him, but he refused to pay their transportation to and from Salt Lake (R-119, 146).

In any event, it is clear that Appellant has been most considerate and cooperative in making the children available to their father. Four years elapsed between the filing of the com-

plaint and the filing of the petition to modify the decree. During those important, formative years of the children's lives, Respondent showed little disposition to enjoy their company.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN MODIFYING THE CUSTODY PROVISIONS OF THE DECREE ON THE EVIDENCE BEFORE IT

At the time of the decree, the parties stipulated that Appellant should have custody of the children subject to "reasonable visitation rights." Respondent's petition for modification sought, and the court granted, a basic alteration of the custody situation on no evidence except that Appellant had found it necessary or expedient to take employment and residence in California.

We are aware that Respondent and the trial court looked upon the order that the children spend two months per year in their father's home as a mere clarification of "reasonable visitation rights." We submit, however, that the placement of these children for two months each year in a different home, in a different city under the supervision of a person whose attitudes and concepts of right conduct are at strong variance from Appellant's is a change in their custody. The person who has the custodial responsibility makes decisions and establishes patterns with regard to such things as church attendance, personal hygiene, and entertainment, and imposes an overall discipline. A parent with mere visitation rights can exercise no such fundamental influence.

The parties agreed, and the court concurred in 1968, that Appellant should have the sole and exclusive custody of these children and set the tone of their upbringing. Appellant has taken special pains to realize her professional potential in a manner which permits her to be home most of the time when the children are home. There is not a word in the record to suggest that she has failed in any respect to give the children guidance and wholesome example.

In the six years between Respondent's 1966 departure from the home of the parties' and his filing of the petition for modification in 1972, Respondent demonstrated little desire for the companionship of his children. He would leave them alone for weeks at a time when he had easy access to them. When they lived in California, he chose to travel extensively in Europe and Mexico in preference to visiting them. He cancelled a proposed river trip with the children because he couldn't afford to pay the costs of their transportation to and from Salt Lake.

The record simply doesn't reveal a change in circumstances which justifies the court in taking the children from their mother for months each year. If there was reason for divided custody in 1968, Respondent should have insisted upon it or submitted the matter to the court. Having stipulated that the circumstances were such that Appellant should have full custody, Respondent should be required to show some failure on Appellant's part to meet the demands of custody if he now feels constrained to assume a true parental role.

Obviously, when a marriage ends and children are involved, sympathy can be engendered for both parents in their endeavors to maintain relationships with their children. There

are many arguments that can be made for a split custody arrangement. Children may require both masculine and feminine influences. A father may need and deserve the companionship and affection of his children as much as a mother. All these are arguments which should be made at the time of the *divorce* proceedings. Once the decree has been entered, the same basic judicial philosophy applies to custody provisions as to property settlement and support provisions; the parties should be able to rely on the finality of the decree.

The standard texts treat the subject of custody at great length, and little purpose would be served by quoting at length from them. We feel, however, that the following excerpts from the American Jurisprudence Treatise on Divorce and Separation are particularly relevant.

> "The doctrine of res judicata applies to that part of the divorce decree which grants custody, and the court cannot re-examine the facts formerly adjudicated and make a different order thereon. It is accordingly stated broadly that there must be a substantial change of circumstances presenting a new case before the court may make a substantial change in the custody order. The ordinary doctrine of res judicata contemplates that an adjudication operates not only as to matters actually litigated and decided but also as to matters which could have been but were not litigated, so long as the parties and the cause of action are the same." (24 Am Jur 2nd 928)

> "A court which is charged with the duty of awarding the custody of a minor child has the power to divide or alternate the custody of a child between the parents or other persons, as by awarding custody to one person for 6 months or more and then to another person for 6 months or less, and to repeat the shifting of custody

each year. Nevertheless, the courts frequently criticize the practice of dividing or alternating the custody of children for equal periods of time, and have said that divided custody should be avoided whenever it is reasonably possible to do so, and that divided custody will not be approved except under very exceptional circumstances. Divided custody is not considered to be in the best interests of a child; if a child is shifted from home to home and from city to city it will have no real home and no permanent environment and associations." (24 Am Jur 2d 907)

POINT II

THE TRIAL COURT ERRED IN GIVING CONTROLLING WEIGHT TO APPELLANT'S INCOME IN FIXING THE LEVEL OF ALIMONY AND IN EXCLUDING ALL TESTIMONY AS TO OTHER FACTORS BEARING ON THE PROPRIETY AND ADEQUACY OF ALIMONY.

The evidence that Appellant has increased her annual dollar income since the date of the decree is, of course, uncontrovertible. The court refused to hear any testimony as to the basis on which the spousal and child support levels of the 1968 stipulation were fixed, and ruled, in effect, that a wife is entitled to *no* continuing support from her husband if, after their divorce, she begins producing income sufficient for her reasonable needs.

In essence, the trial court adopted the concept that the one factor which can *even be considered* in determining whether a husband must contribute to his wife's support after divorce is her *need* of that support.

The attitude of the trial court in this regard is at serious variance with that of this court as expressed periodically over the years. Perhaps the most recent occassion for discussing the factors which should control in fixing alimony (where the parties cannot agree and that responsibility is imposed on the trial judge) was *Wilson v. Wilson,* 5 U2d 79, 296 P2d 977. An apt quote from that decision is found at page 83 of the Utah Reporter:

> "The court's responsibility is to endeavor to provide a just and equitable adjustment of their economic resources so that the parties can reconstruct their lives on a happy and useful basis. In doing so it is necessary for the court to consider, in addition to the relative guilt or innocence of the parties, an appraisal of all of the attendant facts and circumstances: the duration of the marriage; the ages of the parties; their social positions and standards of living; their health; considerations relative to children; the money and property they possess and how it was acquired; their capabilities and training and their present and potential incomes."

The same point of view is expressed in *Pinion v. Pinion,* 92 U 255, 67 P2d 265, and *McDonald v. McDonald,* 120 U 573, 236 P2d 1066.

It is noteworthy that the quoted language from Wilson in no sense ties the support obligation to the income of the wife at the time the decree is entered. The incomes of the parties is the last factor to be mentioned, and then it is emphasized that not just the "present" income but the "*potential*" income should be considered. It is not the income of the wife but her *capacity* to produce income which determines her need of support.

In the instant case, the parties were represented by counsel when they executed their stipulation, and it must be assumed that they reached their decision about the appropriate family support obligation to be assumed by Respondent by evaluating the factors identified as relevant by this court.

With reference to those factors, the court in 1968 found that Respondent used abusive language to Appellant, disclaimed affection for her, threatened to leave her and in fact left the home of the partes' on August 1, 1966. There is otherwise nothing in the record to indicate where the fault for the marriage disintegration lies.

We know that the marriage lasted for more than a decade, that three children were born, that the parties are old enough to have been medical students in 1956, and that Appellant was a source of significant income for the family throughout the marriage. All these are circumstances which favor the imposition of alimony obligation.

With regard to Appellant's actual and potential income at the time of divorce, the record reveals her actual income, and, if the court resorts to data which is well within the scope of judicial notice, her potential income can be determined with reasonable accuracy. The 1971 Edition of the U.S. Department of Commerce's *Statistical Abstract of the United States* reports the median annual income of general practitioners in the United States (after tax-deductible professional expenses) to have been $31,370.00 in 1967, rising to $32,990.00 in 1968. Since Appellant was properly categorized as a general practitioner in 1967 and had maintained her skills during a decade of at least part-time practice, her potential income was somewhere near the median at the time of the divorce.

While the court would hear no testimony on how the parties evaluated Appellant's income potential when they made their stipulation, the record is not entirely devoid of evidence on this subject. In his counterclaim (R-10-12), paragraph 5, Respondent represents to the court that Appellant "is a physician and surgeon and is capable of earning sufficient income to support herself." This representation was true; subsequent history has proved it, and the parties were perfectly aware of it when they made their stipulation. If the record supports any presumption, it is the presumption that the parties agreed Respondent should pay $800.00 per month in family support *even though* Apellant could and would produce income near the average of general practitioners.

Another factor which this court considers significant with regard to alimony is how the parties acquired their marital estate and achieved their financial position. Here again, the trial court refused to receive evidence. Appellant offered Exhibit 3D, however, which reveals, even without supporting testimony, that Respondent achieved his stature in the medical community and qualified to command the more than $40,000.00 annual income he now enjoys *because* Appellant supported the family whenever Respondent wanted to take the time for residency or other training necessary for certification in his specialty. The only real assets the parties owned at the time of their separation were their medical credentials, and Respondent's education was basically purchased by Appellant. The parties stipulated and the court concurred, in 1968, that Appellant should share the fruits of Respondent's exalted medical status. The mere fact that she began to produce income (as the parties anticipated) after the divorce is hardly a valid reason for taking from her an asset for which she paid. Clearly, a wife's income from an-

ticipated employment is not a proper basis for reduction of alimony. This court so held in *Allen v. Allen,* 25 U2d 87, 475 P2d 1021.

It is significant, we submit, that it was only after Respondent had completed his residency and begun to enjoy a specialist's income that he left Appellant. The equities do not favor elimination of alimony in the circumstances of this case.

All the above are facts which were clearly known and contemplated by the parties when they stipulated for divorce. They are obvious facts even if no recital of them appears in the formal stipulation. This court has recently spoken on the duty of the trial court in this situation. In *Felt v Felt,* 493 P2d 620, 27 U2d 103, the court said:

> "In doing so, we affirm our previous pronouncements that a divorce decree containing awards for support based on either expressed or assumed facts contemplated by the parties or the court or both, 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 parties and/or the court . . ."

POINT III

THE COURT ERRED IN RULING THAT AN INCREASE IN APPELLANT'S EARNED INCOME WAS A CHANGE IN CIRCUMSTANCE COMPELLING ALIMONY ELIMINATION EVEN IF THE STIPULATION DID NOT CONTEMPLATE SUCH INCREASE

The evidence in this case is that Appellant's dollar income has increased, since the date of the decree, by some $19,000.00

per year. Of that, however, she must pay approximately $13,000.00 in taxes, costs directly attributable to her employment status, and costs of providing adequate supervision for the children while she is away. Her real income has increased by an amount which merely permits her family of four to live nicely but not luxuriously so long as Respondent contributes as he agreed.

The trial court would not permit testimony about the higher costs of San Francisco living and ruled that, if Appellant chose to accept California employment, her purchasing power must nevertheless be evaluated by Utah standards for purposes of determining whether there has been a change in financial circumstances. We submit that the trial court's position in this regard is patently illogical and unrealistic.

We do not deny, however, that Appellant's financial position has improved by reason of her employment. She could undoubtedly cope if she received no support from Respondent. The question is not whether she *could* cope but whether she should be *required* to.

We have already commented upon the circumstances which, in equity, entitle Appellant to share the fruits of Respondent's elevated earnings as a specialist. It is of passing interest that *his* annual earnings, since the divorce, have increased by some $11,000.00, half again as much as he was required to pay in alimony. He has assumed no new financial responsibilities.

Our major point is that (even where the parties have not stipulated to alimony anticipating the wife's return to employment) it is not in the interest of society that a wife should be penalized for being industrious once the level of support

to which she is entitled from her husband is established by a divorce decree.

We have been unable, in our research, to discover a single case where an alimony award has been reduced because the wife began earning money *except* where it has been apparent that the payment of the originally decreed alimony worked a serious hardship on the husband. Where it is obvious that the original alimony was set at a level which reduced the husband to a sub-marginal living standard, but no other source of support for the wife was available, the courts have granted the husband some relief when the wife has begun to earn.

In *Christensen v. Christensen,* 294 NW 154, 295 Mich. 203, the trial court suspended alimony payments where the husband was making $1,800.00 per year and, after the divorce, the wife begain making $2,200.00 per year. The Michigan Supreme Court reversed and reinstated the alimony, saying:

> "Plaintiff's self-efforts do not in any degree afford release of defendant."

The Michigan court reaffirmed that position in *Harter v. Harter,* 11 NW 2d 880.

In *Brody v. Brody,* 252 NY Supp 2d 1008 (1964), the New York court made this statement on the subject:

> "A wife, separated by decree from her husband, should be encouraged to devote her energies in an effort to make herself economically useful. Her right to support under the decree at the hands of her husband should not be limited merely because, in an effort to promote self-respect and to acquire a measure of independence and future security, she seeks to keep intact her capital assets and she devotes herself to some employment or occupation resulting in earnings, small or large."

This subject is annotated in 18 ALR 2d. A relevant quote from page 62 of the annotation, supported by a dozen cited cases is this:

> "The mere fact that the wife has secured employment or that her income has increased since the entry of the decree for alimony or maintenance does not automatically require a reduction in or termination of payments, since the circumstances may be such that it will be just to permit the wife to receive the alimony or maintenance in addition to her income from personal services."

In the instant case, there is special cogency to the argument that a wife should not be discouraged from becoming economically productive after divorce. Appellant's skills are in tragically short supply in our society. The failure of America's medical schools to keep pace with the desperate need (let alone the demand) for medical services is a national scandal. Appellant is employed in a program designed to distribute medical services among the disadvantaged.

Obviously, this is not a usual case, but it points up the shortsightedness of any judicial policy which removes the incentive for a wife to become productive. It is neither natural or necessary that a woman stagnate after a divorce in order to enjoy the right of support which a court has decreed she deserves.

POINT IV

THE TRIAL COURT ABUSED ITS DISCRETION IN MODIFYING A DECREE BASED UPON STIPULATION IN THE ABSENCE OF ANY SHOWING OF HARDSHIP

There is, of course, an impressive support for the proposition that a court may, where it appears that changes in the

circumstances of the parties since a decree of divorce justify it, modify the decree as it relates to alimony, support, and custody. This court has, however, emphasized that a divorce decree *is a final judgment* and is not lightly to be altered. The trial court must be convinced that considerations of equity and justice *compel* that the obligations of the parties be modified.

A recent expression on the subject is found in *Sorenson v. Sorenson,* 20 U2d 360, 438 P2d 180. The court then said:

> "The rules governing modification of the alimony portion of a divorce decree grant the trial court the advantage of some discretion, since the parties are usually before the court and a sounder appraisal of the situation can be made. Generally, the court is required to give such a decree the final status accorded to any civil judgment and to apply the doctrine of res judicata thereto. *The parties should be entitled to rely on the finality of the alimony award in determining the right to receive and the duty to pay.* Our statute permits subsequent changes which are reasonable and proper. This has been construed to empower the court to make a modification where there has been a substantial change in the material circumstances of either one or both of the parties since the decree was entered. An application for a modification should be subjected to thorough scrutiny by the court. There are many factors that can have a bearing on the resolution of the question." (Our emphasis)

However reluctant the court should be to disturb the de-decree where it is based upon evidence received by the court and represents the court's judgment of what the obligations of the parties should be, that reluctance should be strongly fortified where the decree is based on an agreement between the parties covering property settlement as well as child and spousal support. There is support in the cases for the proposition that a

decree *cannot* be modified without the consent of the parties where it is based on a stipulation covering all aspects of property and income division. The editors of American Jurisprudence (24 Am Jur 2d 789, Divorce Section 670) say this on the subject:

> "A contract of property settlement which also provides for alimony, if approved by the decree of the divorce court, becomes forever binding upon the parties, and neither the contract nor the decree adopting it may be revoked or modified without the consent of the parties."

The concept that a court should be particularly slow to modify a decree based on stipulation was recognized by this court in *Bott v. Bott,* 20 U2d 329, 437 P2d 684. In that case, the court commented on the basis for the trial court's retention of jurisdiction to modify a divorce decree. "Especially should this be true" (i.e., that the court retains jurisdiction), said Justice Ellett, "when the parties voluntarily litigate a matter over which the court has jurisdiction."

In the instant case, the parties did not voluntarily litigate their cause, they negotiated a settlement agreement which the court adopted as its decree.

CONCLUSION

The trial court has completely reformed the parties' agreement and the decree which issued from it. The court has eliminated alimony and split custody on no evidence of wrong doing on Appellant's part whatsoever.

Because you dared to restructure your life and put your talent and education to use, said the court to Appellant, and because you have assumed the professional role which best permits you to supervise your children adequately, the court is going to penalize you by taking away all support and even taking your children from you for one-sixth of each year.

The approach of the trial court is totally out of harmony with the views of this court. The court's refusal to hear evidence on factors which should be of controlling influence was error. The order modifying the decree should be annulled.

Respectfully submitted,

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