

2001

Suzanne Marie Bilancia, fka, Suzanne Marie Bilancia Bemis v. Chris Thomas Bemis : Brief of Appellee

Utah Court of Appeals

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JURISDICTION OF THE UTAH COURT OF APPEALS

Appellee concurs with Appellant that the Utah Court of Appeals has jurisdiction in this matter pursuant to Utah Code Ann. §78-2a-3(2)(h)(1996).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Appellee believes this court is faced with one additional legal issue, that being; Did the lower court abuse its discretion in terminating alimony.

STANDARD OF REVIEW

This Court's review of a trial court's order regarding alimony is a question of fact that is set aside only upon a showing of an abuse of discretion. See Childs v. Childs, 967 P2d 942 (Utah Ct. App. 1998).

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND RULES

U.C.A. §30-3-5(7).

STATEMENT OF THE CASE

Appellee generally accepts Appellant's statement of the case and facts. However, disputes the conclusions implied by Appellant regarding the extent and duration of alimony and the basis upon which it would continue or terminate.

Additionally, the court found that Mr. Bemis had paid his one-year alimony obligation in part by using property awarded to him in the divorce. These assets were depleted during the year following the divorce and are now gone. (R. 110-111). Mr. Bemis has income which is just barely sufficient to meet his expenses. (R. 111, 112). The court specifically found that Mr. Bemis' expenses appeared reasonable (R. 111).

SUMMARY OF ARGUMENTS

1. The procedure in this case to proceed by motion regarding alimony after the first one-year period of time was accepted by the trial court

and followed by the parties. There was no need to file a petition to modify, as the parties simply followed the procedure they stipulated to and that was made a part of the court order. The court properly and of necessity considered all of the alimony factors in reaching a final order concerning alimony.

2. Res Judicata does not apply to the present case because the order on alimony was temporary by its own terms. A requirement under the doctrine of Res Judicata is that a final order be entered.

3. The trial court did not violate U.C.A. §30-3-5 or Rule 6-404. The procedural status of this case left the alimony issue open to review after a one-year term. Appellant, herself, followed this procedure when she filed a motion to extend alimony. Appellant's own conduct in these proceedings indicates that a petition to modify was not necessary or even contemplated after the one-year alimony term had expired. Either party could move the court for relief. The court could then consider all relevant and statutory criteria in reaching a final order on alimony.

4. The proper scope of review in this matter is a consideration of whether the trial court abused its discretion in terminating alimony. In domestic and alimony cases, the trial court is granted broad discretion in fashioning an appropriate order. The trial court's facts and conclusions should not be set aside unless there is a clear abuse of discretion. The court appropriately considered all of the relevant facts, entered appropriate findings of fact, and entered an order terminating alimony. There was no abuse of discretion. The facts are clear and supported and Appellant has not tried to marshal the facts, or to even refute them. The trial court's order should be upheld. Moon v. Moon, 973 P2d 431 (Utah Ct. App 1999).

ARGUMENT

1. The trial court correctly entered a permanent order regarding alimony.

The Decree of Divorce was unique in this case in one particular – it allowed for one year of temporary alimony. It then allowed for the alimony issue to be brought back before the Court by motion rather than by a new petition to modify. See (Stipulated Decree of Divorce ¶15 at R. 58-59.) This procedure was exactly what Appellant, Ms. Bilancia, did, when she filed her Verified Motion and Memorandum to Continue the Payment of Alimony Pursuant to Paragraph 15 of the Stipulated Decree of Divorce, rather than a petition to modify. (R. 72).

The nature of the alimony award left the lower court with discretion in fashioning a permanent award regarding alimony and to do so by motion. While the Appellant correctly outlines the law regarding petitions to modify a decree, she fails in her interpretation that the proceedings in the lower court were handled as a petition to modify. Ms. Bilancia attempts to argue that by not continuing alimony, the proceedings were converted to a petition to modify, but that somehow, that same argument would not apply to their motion if the alimony was just continued; yet a simple reading of the parties' stipulation and decree of divorce clearly states that either party could bring the motion, one to terminate the alimony, and one to continue the alimony. Ms. Bilancia cannot logically argue that her motion to continue alimony falls under the lower standard of proof that a motion provides and that termination of alimony must fall under the more stringent standards required under a petition to modify.

The basis of the initial alimony award was intended to be a temporary order by the language itself. The parties stipulated to the entry of alimony

for a one year period, subject to having alimony reviewed by the court upon the request of either party. It is noted that the parties' stipulation contains no facts regarding the statutory alimony criteria, i.e., financial needs, ability to earn, ability to pay, etc. The parties simply stipulated to a one-year temporary alimony term. This term and procedure were accepted by the trial court.

After the one year term, either party could have brought the motion concerning alimony. Once the motion was brought the trial court then needed to follow the statutory criteria in deciding a final order regarding alimony. As part of that process, the court necessarily did consider Mr. Bemis's ability to pay.

It is now pointed out that counsel for Ms. Bilancia drafted both the stipulation and decree of divorce. If the parties' intent was truly what Ms. Bilancia now asserts and urges this Court to believe, it could have written the decree in the simple language of "if Appellant is still disabled, alimony shall continue". However, this was not the language used, because this was not the parties' agreement. Mr. Bemis was also given the opportunity to ask the Court to terminate alimony with the same phrase, "based on the continuing status of petitioner's disability" used. This provision would have no effect whatsoever in the stipulation and decree if Ms. Bilancia's current interpretation were accepted. Why would Mr. Bemis be given a chance to terminate alimony if Appellant's disability continued? Why, because the parties knew the Court would be reviewing all of the alimony criteria in fashioning that final order.

The trial court did consider the statutory alimony criteria. See U.C.A. §30-3-5(7); Jones v. Jones, 700 P2d 1072 (Utah (1985)). U.C.A. §30-3-5(7)(A) provides:

The Court shall 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;
- (iv) the length of the marriage;
- (v) whether the recipient spouse has custody of minor children requiring support;
- (vi) whether the recipient spouse worked in a business owned or operated by the payor spouse; and
- (vii) whether the recipient spouse directly contributed to any increase in the payor spouse's skill by paying for education received by the payor spouse or allowing the payor spouse to attend school during the marriage.

The court found that Ms. Bilancia had a financial need, and that she did not have the ability to earn sufficient income herself. But, those were only two of the required criteria. The trial court then properly considered Mr. Bemis's ability to pay and properly concluded he did not have an ability to pay alimony. The trial court used its discretion in reaching this decision. It is an accepted principle of appellate law that the appellate court will not overturn such findings absent an abuse of discretion. See Childs v. Childs, 967 P2d 942 (Utah Ct. App. 1998); Rasband v. Rasband, 752 P2d 1332 (Utah Ct. App. 1988); Naranjo v. Naranjo, 751 P2d 1144 (Utah Ct. App. 1988); and Paffell v. Paffell, 732 P2d 96 (Utah 1986).

Ms. Bilancia has not attempted to show there was an abuse of discretion, and indeed, this Court should uphold the lower Court's order, because there was no abuse of discretion. Appellant has also failed to marshal any of the evidence which could be used to show an abuse of discretion occurred. The trial court did make specific findings on Mr. Bemis's income and expenses and his ability to pay alimony. (See R. 110-

113). The Court then properly concluded that Mr. Bemis did not have the ability to pay alimony and finally decided that alimony on a permanent basis was not appropriate in this case. This court should affirm that decision.

2. Res Judicata does not apply to a temporary order.

As pointed out above, the initial alimony award was a temporary order only. As such, Res Judicata does not apply. The law in this regard provides that the principal of Res Judicata applies only after a final order has been entered on the particular topic. See Macris & Associates, Inc., v. Neways, Inc., 16 P2d 1214 (Utah 2000); and Swanston v. Intermountain Health Care, 766 P2d 1059 (Utah 1988). Since the alimony issue was left open for further review, it was only a temporary order. Thus the doctrine of Res Judicata does not apply to preclude Mr. Bemis from seeking to have the alimony terminated, nor did it apply to bar Ms. Bilancia from seeking to have the alimony continued. It also does not bar Appellee from raising all of the alimony issues, as he, too, was extended the right under the joint stipulation and decree to ask for termination of alimony, even if Appellant's disability continued.

In the Macris decision, the Supreme Court discussed how parties stipulations can affect collateral estoppel. The court stated,

An issue determined by stipulation rather than judicial resolution is binding in a subsequent action if the parties manifested an intention to that effect. See, e.g., 18 Charles A. Wright et. al., Federal Practice and Procedure §4443, at 382 (1981) ("Issue preclusion does not attach unless it is clearly shown that the parties intended that the issue be foreclosed in other litigation."); 18 James Wm. Moore, Moore's Federal Practice §132.03[2][h][ii](Matthew Bender, 3d ed. 2000)("Stipulation may be binding in a subsequent action if the parties . . . manifested an intention to that effect."). Macris at ¶43.

The reasoning set forth should apply to the parties in this case. In the present case, the parties did not manifest an intention to preclude reviewing alimony at a subsequent time. In fact, their manifested intent was just the reverse. They intended to delve into the alimony issue at least one more time; and that was in one year.

3. The Court did not violate the provisions of §30-3-5 or Rule 6-404.

Ms. Bilancia has argued that by terminating alimony, the lower court modified the decree without a petition to modify having been filed. Appellant, however, then believes that if alimony were continued, that wouldn't violate the provisions of §30-3-5 and Rule 6-404.

Appellant can't have it both ways. The decree applies equally to both parties, and the rules apply equally to both parties.

Ms. Bilancia has failed to accept the fact that Mr. Bemis was given an identical right, i.e., he could ask for termination of alimony, even if her disability continued.

The status of alimony in the decree was left temporary on purpose; it was the agreement of the parties. The trial court then considered its temporary alimony order and entered its final order terminating alimony altogether. The provisions of U.C.A. §30-3-5(7) clearly mandates that the court shall consider the recognized alimony criteria in determining alimony. In this case, the trial court considered those criteria as the law requires and determined that alimony should not be paid. The court did not modify the decree; it followed the parties' stipulation by determining whether alimony should continue or not.

4. There was no abuse of discretion in terminating alimony.

A trial court has wide latitude in determining alimony issues between parties in a divorce action. Our courts have consistently held that as long as the trial court considers the appropriate alimony factors and thereafter exercises its discretion within the bounds and under those standards set, the appellate court will not disturb the ruling. Our courts have also stated it in this fashion, “we will not disturb the trial court’s alimony award unless such a serious inequity has resulted as to manifest a clear abuse of discretion”. Childs v. Childs, 967 P2d 942, at 946 (Utah Ct. App. 1998). We have also seen our court use the language that unless a “clear and prejudicial abuse of discretion” has occurred, the trial court’s award of spousal support will not be disturbed. See: Rasband v. Rasband, 752 P2d 1332 (Utah Ct. App. 1988); Naranjo v. Naranjo, 751 P2d 1144 (Utah Ct. App. 1988); Paffell v. Paffel, 732 P2d 96 (Utah 1986). The trial Court properly considered all of the alimony factors and used appropriate judicial discretion in terminating the alimony. Ms. Bilancia has spent considerable time and effort in an attempt to construe the order of the court in a fashion which fits her own arguments and objectives, but does not squarely address the real facts and issues. Our court has discussed these issues in a case with similar issues. In Moon v. Moon, 973 P2d 431 ¶24 (Utah Ct. App 1999), our court stated:

Mr. Moon has neglected a critical requirement of appellate advocacy: the duty to marshal the evidence when challenging the trial court’s findings of fact. While it is true that Mr. Moon gave some citations to the record, this is not all that is required.

The marshaling process is not unlike becoming the devil’s advocate. Counsel must extricate himself or herself from the client’s shoes and fully assume the adversary’s position. In order to properly discharge the duty of marshaling the evidence, the challenger must present, in comprehensive and fastidious

order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists. After constructing this magnificent array of supporting evidence, the challenger must ferret out a fatal fault in the evidence. The gravity of this flaw must be sufficient to convince the appellate court that the court's finding resting upon the evidence is clearly erroneous.

West Valley City v. Majestic Inv. Co., 818 P2d 1311, 1315 (Utah Ct. App. 1991). When an appellant fails to meet the "heavy burden" of marshaling the evidence, *id.* (citation omitted), we "assume [] that the record supports the findings of the trial court," Wade v. Stangl, 869 P2d 9, 12 (Utah Ct. App. 1994) (quoting Saunders v. Sharp, 806 P2d 198, 199 (Utah 1991)). Here, Mr. Moon simply re-argued his own evidence. Accordingly, because Mr. Moon has failed to marshal the evidence supporting the trial court's findings and then to show that the findings are unsupported, we affirm the trial court's construction of the ambiguous alimony provisions of the divorce decree.

Ms. Bilancia has only chosen selected facts from the record which she claims supports her position. However, she has not attempted, even in cursory fashion, to marshal the evidence and show that there is such a flaw in that evidence that the court's finding is clearly erroneous.

In this regard, like in Moon v. Moon, the court should affirm the trial court's order.

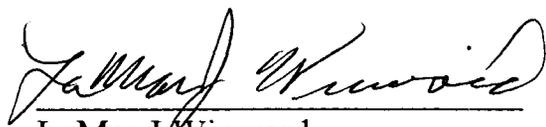
CONCLUSION

The trial court used judicial discretion in determining that alimony should not continue. The parties stipulated that alimony would be temporary for one year and then either party would seek to terminate or continue the alimony, even if the Appellant's disability continued. The proceedings were not in the nature of a petition to modify, because that was the parties' agreement, which was accepted by the court initially. This case is truly a matter of accepting the sound discretion of the trial court. There was no

abuse of discretion. There is very little to interpret in the decree. The rules apply equally to both parties in this case. Appellee acknowledges that they are properly before the court by mere motion. Having accepted this procedure, Ms. Bilancia can not complain that this procedure doesn't also apply to Mr. Bemis and his desire to have the alimony terminated.

The trial court's Order should be affirmed.

DATED this 21st day of December, 2001.

A handwritten signature in cursive script, appearing to read "LaMar J. Winward".

LaMar J Winward

Attorney for Respondent/Appellee

MAILING CERTIFICATE

This is to certify that I mailed a true and exact signed copy of the above and foregoing BRIEF OF APPELLEE, postage prepaid, on this 21st day of December, 2001, to:

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with