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Janae S. Dibble v. Carlos M. Dibble : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JANAE S. DIBBLE,

Petitioner and Appellant,

vs.

CARLOS M. DIBBLE,

Respondent and Appellee.

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)
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) Case No. 20010720
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)
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) Priority No. 15
)
)
)

REPLY BRIEF OF APPELLANT

On Appeal from an Order Modifying a Decree of Divorce
entered in the First Judicial District Court
of Box Elder County, Utah
the Honorable Ben H. Hadfield presiding

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Paulette Stagg
Clerk of the Court

TABLE OF CONTENTS

ARGUMENT 1

I. RESPONDENT’S BRIEF MISCHARACTERIZES THE FACTS 1

II. SIGG v. SIGG DISTINGUISHABLE FROM PRESENT CASE .. 4

III. PETITIONER’S STAY WITH MR. ADAMS WAS TEMPORARY
AND BRIEF PERIOD OF TIME INSUFFICIENT TO SATISFY
COHABITATION ELEMENTS 7

CONCLUSION 8

TABLE OF AUTHORITIES

CASES

Bair v. Bair, 737 P.2d 177 (Utah 1987) 7

Haddow v. Haddow, 707 P.2d 669 (Utah 1985) 4

Knuteson v. Knuteson, 619 P.2d 1387 (Utah 1980) 7

Sigg v. Sigg, 905 P.2d 908 (Utah Ct. App. 1995) 4, 5, 6

ARGUMENT

PETITIONER PLANNED TO MOVE TO FLORIDA AND LIVE AT SEPARATE RESIDENCE THAN MR. ADAMS. UPON ARRIVAL PETITIONER'S ARRIVAL WITH ALL HER BELONGS AND HER CHILDREN, PETITIONER HAD NO CHOICE BUT TO TEMPORARILY STAY. PETITIONER MOVED BACK TO UTAH WITHIN TWO AND ONE HALF MONTHS. THESE FACTS FAIL TO ESTABLISH COHABITATION.

I.

RESPONDENT'S BRIEF MISCHARACTERIZES THE FACTS.

Respondent's Statement of Facts misstates and mischaracterizes Petitioner's testimony and the facts regarding Petitioner's intentions to live with Mr. Adams upon arriving in Florida. In paragraph 39 of Respondent's Statement of Facts, the Respondent states that Petitioner "... testified that she did not intend to reside with Mr. Adams if they were not husband and wife. . . ." Respondent attempts to impeach Petitioner's aforementioned statement by setting out Petitioner's specific testimony she gave "thirty seconds later." Respondent then inserts in his brief the following two lines (R. 515: 92 (vol. I)) from the transcript:

Q. Did you anticipate that if you got a house you would rent that [Mr. Adams] would have resided in that home or had you thought that far ahead?

A. Umm, I planned on him being with us.

The "[Mr. Adams]" reference is not in the original transcript and incorrectly implies the reference by Petitioner to "him" in her answer refers to Mr. Adams. The

transcript clearly indicates that the “him” Petitioner is referring to is not Mr. Adams, but rather family friend Matt Zerkle. Beginning on the page 91, line 15, vol. I, of the transcript and continuing to page 92, line 23, vol. I, the entire line of questioning is as follows (*italics indicate part misstated by Respondent*):

Q. You indicated the children that you took with you. Was there one person that went with you that was not a child of yours?

A. Matt Zerkle.

Q. Spell his last name.

A. Z-e-r-k-l-e

Q. And how old is he?

A. I think he’s 22 now.

Q. 22 now. This was back in 1998, so three years ago?

A. Uh-huh.

Q. So about 19 at the time?

A. Yes.

Q. So he was an adult?

A. Right.

Q. What was your relationship with Matt Zerkle?

A. He was a friend of my children.

Q. And why did he go?

A. Umm, because Derric and Erica were moving to Florida and he thought it would be fun to do so too.

Q. *Did you anticipate that if you got a house you would rent that he would have resided in that home or had you thought that far ahead?*

A. *Umm, I planned on him being with us.*

Q. Okay. Where did Matt stay during the time that you were compelled to live in the home with Mr. Adams?

A. With Derric and they slept in a room together.

Q. Okay. And was Matt going to school?

A. No.

Q. Was he employed?

A. He kept trying to find jobs. He had a hard time finding a job.

Q. So he was around most of the time when you were at Mr. Adams's home?

A. Yes.

Respondent then continues to attempt to show Petitioner's inconsistent testimony by citing Petitioner's testimony on page 93, lines 12-19, vol. I, in which Petitioner restates that she "never intended to live with him in the first place." Which in this quote, the reference to "him" is clearly to Mr. Adams.

Petitioner's testimony regarding her intent to not reside with Mr. Adams until the parties married is consistent throughout the transcript. Furthermore, Mr. Adams

testimony regarding Petitioner's intent not to reside with him upon her arrival in Florida is consistent with Petitioner's testimony. Mr. Adams testified as follows:

Q. What was your purpose in attempting to acquire the residence at the address you gave to us?

A. The purpose was to buy a larger house – I think it was either four or five bedrooms – for when she moved here. She would move into that house while me and Derrick stayed in the other until we got married.

Q. Now, had the two of you talked about, in connection with this second residence, that she and the other children would move in there until the two of you got married?

A. Yes.

R. 515: 28-29 (vol. II).

The above cited testimony was elicited from Mr. Adams by Respondent's counsel. Petitioner's testimony and Mr. Adams' testimony are consistent with Petitioner's intention of living in separate residences upon her arrival in Florida.

II.

SIGG v. SIGG DISTINGUISHABLE FROM PRESENT CASE.

Respondent cites Sigg v. Sigg, 905 P.2d 908 (Utah Ct. App. 1995)¹ as squarely fitting

¹The Sigg Court cites Haddow v. Haddow, 707 P.2d 669 (Utah 1985) as the controlling authority with regards to the legal elements of "cohabitation." As a result, the Appellant's brief focused upon Haddow as the controlling authority. As a result, Sigg was not cited in Appellant's Brief. In no way was counsel attempting to mislead the Court by failing to cite Sigg as implied

within the facts of the present case. (Brief of Appellee, p. 31). However, Sigg is distinguishable from the present case. On February 7, 1993, Ms. Sigg “moved to Boulder, Colorado, where she stayed with Mr. Haynes at his condominium for two weeks before obtaining a second condominium of her own nearby.” Id. at 911. The trial court found that “over the next few months, Ms. Sigg and Mr. Haynes “lived together as though they were husband and wife” – that they had sexual intercourse, shared living expenses, had open access to the other’s condominium, ate together, maintained clothing in the same condominium, and used the same furniture.” Id. Furthermore, Ms. Sigg and Mr. Haynes purchased a home and moved in together in August of 1993. Id.

The facts are opposite to the facts in the present case. In Sigg, Ms. Sigg moved to another state and moved into Mr. Haynes’ home for a two week period. Ms. Sigg then obtained another condominium nearby. Ms. Sigg and Mr. Haynes then had sexual relations, shared living expenses, had open access to the other’s condominium, ate together, maintained clothing in the same condominium, and used the same furniture. Finally, Ms. Sigg and Mr. Haynes purchased a home and moved in together in August of 1993.

In the present case, Petitioner moved to another state and moved into Mr. Adams home, similar to Ms. Sigg. However, Petitioner’s intent and understanding was not to move into Mr. Adams home upon arriving in Florida. A separate residence was supposed

in Appellee’s Brief. The Sigg case is distinguishable from the present case as set forth in this Reply Brief.

to be available for Petitioner and her child. Ms. Sigg acquired a separate condominium two weeks after moving into Mr. Haynes' condominium and eventually they purchased a home together some seven months later. Petitioner disputes the extent of the sexual relations while living with Mr. Adams, but not the sexual relations prior to moving to Florida. Mr. Adams did not charge Petitioner rent. Petitioner did pay for her and her children's food. (R.515: 55 (vol. II)). Petitioner had open access to Mr. Adams' home. Clothing and personal items were maintained at Mr. Adams home. However, Petitioner was only in Florida from mid-September 1998 to Thanksgiving day 1998. At best two months and twelve days. Plus, Petitioner was making arrangements to move back to Utah in mid-October.

Ms. Sigg's relationship and cohabitation increased from the time she moved to Colorado to the point where she purchased a home with Mr. Haynes. Ms. Sigg's time period was seven months. Ms. Sigg's was cohabitating with Mr. Haynes as the time increased and with the co-purchase of the home. However, Petitioner's stay with Mr. Adams degenerated to the point of her moving back to Utah in less than a two and half month period. In addition, Petitioner was making plans to return to Utah within a month of arriving.

III.

PETITIONER'S STAY WITH MR. ADAMS WAS TEMPORARY AND BRIEF PERIOD OF TIME INSUFFICIENT TO SATISFY COHABITATION ELEMENTS.


In Knuteson v. Knuteson, 619 P.2d 1387 (Utah 1980), held that the fact that an ex-wife moved in with a neighbor for a two month and ten day period was not enough to terminate alimony. The court stated that an emergency situation arose resulting from the ex-husband's failure to pay alimony. Id. at 1389. When the emergency subsided, the ex-wife moved out of the neighbor's home. Respondent cites Bair v. Bair, 737 P.2d 177 (Utah 1987). Bair concerned a payment to an ex-wife which was determined to be a property settlement rather than an alimony payment. The Bair case cites Knuteson for support for not terminating the payments to the ex-wife. Bair at 179. The Bair Court stated that "exceptional circumstances were present in this case similar to those found in Knuteson v. Knuteson, wherein the statute was found to be without application in the face of exceptional circumstances." Id.

In the present case, Petitioner's situation was an exceptional circumstance in that she was expecting a separate residence upon her arrival in Florida. The Petitioner moved across country with children in a U-Haul. Upon arriving in Florida, Petitioner learned that no separate residence had been arranged. Having no alternatives she stays with Mr. Adams. Within two and one half months, Petitioner had moved back to Utah.

CONCLUSION

Petitioner two and one-half months stay with Mr. Adams does not satisfy the elements of cohabitation has set forth in Utah law.

DATED this 24 day of September, 2002.


Wm. Gregory Burdett

MAILING CERTIFICATE

I hereby certify that I mailed two copies of the foregoing Appellant's Brief to the following:

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