2002

Laura Bakanowski v. Paul F. Bakanowski : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS OF THE STATE OF UTAH

LAURA BAKANOWSKI,

Petitioner/Appellee,

vs.

PAUL F. BAKANOWSKI,

Respondent/Appellant.

CASE NO. 20020268CA
DISTRICT COURT NO. 984907248DA

On Appeal from the Third Judicial District Court, Salt Lake County,
The Honorable Judge L.A. Dever

REPLY BRIEF OF APPELLANT

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STANDARD OF REVIEW

The Appellant agrees that because the evidence submitted below was by proffer, The Court of Appeals is in "as good a position to review the proffer as was the Trial Court, as no assessment of witness credibility occurred below." (Appellee's Brief, **Standard of Review,** page 6, quoting Fullmer v. Fullmer, 761 P.2d 942, 945 (Ut. Ct. App. 1988)). However, Appellee ignores the real issue presented on Appeal. The issue is whether or not the Court may include in its "standard of living" analysis the recipient's "need" for savings, investments and retirements. That is the narrow legal question presented in this Appeal. There is no Utah case law to suggest that this approach to an alimony award is appropriate. Because the issue is a question of law or a mixed question of law in fact the Court should apply a correctness standard. (See authority cited in Appellant's Principal Brief, **Standard of Review**).

STATEMENT OF FACTS

The Appellant does not dispute, generally, the Statement of Facts of the Appellee[1]. However, in the body of Appellee's Brief references are made to facts not cited in her "Statement of Facts."

1. At page 16 of the Appellee's Brief she asserts that the Respondent, Mr. Bakanowski, " . . . also acknowledged that he had been paying $1,000 per month for

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[1]The Appellee has made an apparent, inadvertent error in ¶'s 9 through 14. These paragraphs refer to the Amended Findings of Fact and Conclusions of Law. However, ¶8 of the Findings has nothing to do with the alimony award.

almost three years prior to the day of Trial as well as tucking away an additional $1,000 per month into a retirement account, both expenditures on top of his basic living needs." The authority for this so called "acknowledgement" is the Trial Transcript, page 36, lines 3-5 and page 18, lines 8-10. However, page 18 of the Trial Transcript makes no reference to this issue. Page 36 is nothing more than the argument of Ms. Bakanowski's counsel.

2. The Appellee also states at page 16 of her Brief that the Court found that the Respondent had been saving $1,000 per month for retirement. Presumably this reference, as with the Appellee's reference in her "Statement of Facts," to "Findings, ¶8" is an advertent error. The Court addresses this issue in ¶15 of the Amended Findings of Fact and Conclusions of Law. There the Court states as follows:

> "15. The Petitioner has demonstrated a need for alimony in the amount of $1,000 per month, as the cost of equalizing her standard of living to that of the Respondent's exceeds her income by $1,000 per month. The Respondent has the ability to pay alimony in the amount of $1,000 per month as demonstrated by his doing so while he has paid temporary alimony of $1,000 per month." (Amended Findings of Fact and Conclusions of Law, page 8, ¶15).

ARGUMENT

I THE AWARD OF "SAVINGS ALIMONY" TO MS. BAKANOWSKI WAS NOT BASED UPON ANY STANDARD OF LIVING "NEED."

Ms. Bakanowski's position in this Appeal can be summarized as follows: the determination of the recipient's standard of living for purposes of an alimony award

should include an allowance for savings, investments and retirement or other capital acquisitions in addition to normal monthly living expenses. Therefore, it follows, the inclusion of savings and investment as a standard of living "need" was within the discretion of the Trial Judge in awarding alimony. Furthermore, Ms. Bakanowski asserts that the Trial Judge made adequate alimony findings. This issue will be treated later.

Mr. Bakanowski does not oppose the general recitation of case law regarding the Court's discretion to equalize the parties' "standard of living." However, that general principle ignores the issue presented to the Court in this Appeal, to wit: is the wish for additional funds to build up savings, investments or retirement is a proper consideration in determining the standard of living for alimony purposes? Instead, Ms. Bakanowski assumes that any reasons that a Trial Judge might give for an award of alimony is within the discretion of the Court. Therefore, the Appellee does not challenge the logic or the law cited by Mr. Bakanowski on Appeal which would not allow alimony for purposes of savings. The Appellee only states that there is no such concept as "savings alimony" and that the Appellant has "invented" the principle. (Appellee's Brief, page 20).

The idea of "savings alimony" has been identified and rejected by other jurisdictions. See Brooks v. Brooks, 957 S.W.2d 783 (Mo. App. 1997) and Mallard v. Mallard, 2000 Fla. Lexus 2247 (November 16, 2000). The concept of "savings alimony" has been rejected by Utah Court's as well. Dehm v. Dehm, 545 P.2d 525 (Utah 1976). In Dehm the Court rejected the idea that a recipient's "needs" do include an amount to

"augment her retirement income and to maintain the insurance policy for her two children." Dehm, *Supra*. In that case, where the recipient ". . . is gainfully employed, making a salary sufficient to satisfy her needs, is adequately housed, and is in good health; one of the functions of alimony is not to provide retirement income." Dehm, *Supra*.

The Appellee has not attempted to distinguish Dehm nor dealt with the logic of that case. The idea of "savings alimony" is a current and important issue in alimony cases and this Court should address the issue and ratify the holding in Dehm.

The Appellee seeks to minimize the significance of the Court's award of "savings alimony" by comparing it to alimony which is meant to assist the recipient in meeting housing or transportation expenses. However, there is a clear distinction between the essential or basic needs of the recipient and the request for additional alimony to augment investments. Where "savings alimony" has been rejected it is because: (1) neither spouse has a vested interest in the good fortune or future income of the other spouse; (2) such "needs" are nothing more than speculative future needs; (3) there is no guarantee the recipient will save the excess alimony; (4) because "savings alimony" is speculative, there is no accounting for the possibility of the recipient's additional income or resources in the future; (5) the Court must assume that the property division and income earned therefrom will prove to be inadequate; and, (6) most importantly, the assumption that "savings alimony" actually equalizes the parties standard of living.

Factually, the Court's conclusion that Mr. Bakanowski could afford to pay $1,000 per month is troublesome. Mr. Bakanowski testified that his living expenses were $2,840 per month. His wife, on the other hand, proffered a monthly budget of $5,252 per month. Even though the Court concluded that Ms. Bakanowski's expenses were "inflated," it is clear that Mr. Bakanowski is being punished for his frugal lifestyle. Mr. Bakanowski has adjusted his monthly expenses so as to permit savings and investments. His former spouse could do the same. Mr. Bakanowski would only be able to assist his former spouse because of his frugal lifestyle particularly when compared to Ms. Bakanowski's relatively extravagant "standard of living."

II THE COURT HAS FAILED TO ARTICULATE ANY LEGITIMATE BASIS FOR THE ALIMONY AWARD UNDER THE *JONES* ALIMONY FORMULA.

Conspicuously absent from the Court's findings regarding alimony is any assessment of the recipient's needs. The Court only indicates that Ms. Bakanowski's proffered budget is "inflated." There is no indication as to what her actual needs, with or without the savings component, are. Instead of making this vital finding, the Court justifies the alimony award based upon two criteria: (1) Mr. Bakanowski's ability to fund his own savings at the rate of $1,000 per month; and, (2) the disparity in the parties' incomes.

As indicated above, Mr. Bakanowski's ability to fund his own retirement is only due to his frugal living. Nothing prevents Ms. Bakanowski from behaving likewise.

Furthermore, if Mr. Bakanowski is able to fund his own savings at the rate of $1,000 per month, when he pays Ms. Bakanowski the same amount he will be entirely deprived of that ability. Logically and mathematically, the goal that the Trial Court wished to achieve would therefore be frustrated.

More important, however, is the fact that it is impossible to determine whether Ms. Bakanowski could meet her needs from her income and the property settlement. This is because her needs are not identified. If Ms. Bakanowski's monthly budget was the same as Appellant's, the resources she has from her earnings and interest on the property settlement might well prove sufficient to provide for her legitimate needs.

The Trial Court attempted to avoid the burden of necessary alimony findings by equalizing the parties' income. (Amended Findings of Fact, ¶15). The Court, after identifying its goal to equalize the parties' standard of living also suggests that ". . . income equalization is appropriate." (Amended Findings of Fact and Conclusions of Law, ¶15).

The Appellee does not defend this justification for the alimony award in her Brief. While it might be appropriate to equalize the parties' standard of living in some cases, alimony simply to equalize income is not appropriate. In Burt v. Burt, 799 P.2d 1166, 1990 Utah App. LEXIS 158 (Ut. Ct. App. 1990). The Court unequivocally rejected an alimony award based upon disparity in income alone.

> "The Trial Court granted Defendant alimony in the amount of $300 per month in an attempt to help equalize the monthly income of the parties.

> While equity should be the watchword as the Trial Court apportions property and calculates alimony payments, *see* Newmeyer v. Newmeyer, 745 P.2d 1276, 1278 (Utah 1987), alimony may not be automatically awarded whenever there is a disparity between the parties' incomes. Alimony is appropriate 'to enable the receiving spouse to maintain as nearly as possible the standard of living enjoyed during the marriage and to prevent the spouse from becoming a public charge.' Eames v. Eames, 735 P.2d 395, 397 (Ut. Ct. App. 1987)." Burt, *Supra.*

In fact, in Burt, the Court specifically stated that the Court's approach in awarding alimony to "narrow the gap between the parties' incomes" was incorrect. Burt, *Supra,* footnote 3.

Any attempt by the Court to award alimony to "narrow the gap" has resulted in a close scrutiny of the Trial Court's alimony award. Even where the Trial Court's award of alimony has been sustained, any appearance of "narrow the gap" thinking has met with strong suspicion and a dissent. In Davis v. Davis, 749 P.2d 647 (Utah 1988) the Court sustained an alimony award of $750 per month. Even at that, the recipient's income was $36,000 per year and the payor's income was close to $100,000 per year. The Court of Appeals in that case determined that even with alimony her lifestyle would probably not equal that which she enjoyed during the marriage. However, because there was some suggestion that the alimony was awarded because of the disparity in incomes, Justice Howe issued a strongly worded dissent as follows:

> "The purpose of alimony is not to equalize the incomes of the parties; it is a forgone conclusion that the practice of law has the potential of greater financial rewards than does the profession of teaching. Rather, the purpose of alimony is to provide an adequate lifestyle for the wife, measured by the criteria set forth in Jones." Davis, *Supra.* (Citations

omitted).

Therefore, the two justifications of the Court in awarding alimony are both contrary to well-established Utah law. Alimony should not be awarded to fund the recipient's savings and investment accounts. Alimony should not be awarded simply to equalize the parties' incomes. Neither device should be used as an alternative to the alimony findings required by the Jones case.

III THE APPELLEE SHOULD NOT BE AWARDED ATTORNEY'S FEES.

Appellee seeks an award of attorney's fees for this Appeal. Appellee was not awarded attorney's fees below. The basis for the Appellee's claim is the suggestion that Mr. Bakanowski ". . . has been unwilling to accept the Trial Court's decision." (Appellee's Brief, page 21). There is no suggestion that Ms. Bakanowski lacks the wherewithal to pay her own fees. She proffered that she has a "good job." The Appellee has earned as much as $62,000 per year. Both parties received a property division of $386,548. There is no suggestion that Mr. Bakanowski's Appeal is frivolous. The mere fact that Mr. Bakanowski has appealed the Court's decision should not, in and of itself, constitute a sufficient basis for an award of fees. As authority, Appellee sites Carter v. Carter, 584 P.2d 904 (Utah 1978). That was a case where the parties had limited funds and Mr. Carter's Appeal was denied virtually *per curium*. It appeared in that case that Mr. Carter had very little basis to contest the Court's alimony award other than his natural reluctance to abide by that order. As a general principle, where the Trial Court

does not award attorney's fees to either party, the party seeking an award of fees on Appeal should at least show that that parties financial situation has changed subsequent to the Trial. Larson v. Larson, 888 P.2d 719 (Ut. Ct. App. 1994).

CONCLUSION

The Appellant respectfully requests that the award of alimony be vacated. The Trial Court's award of alimony, as a matter of law, is an abuse of discretion and contrary to principles of alimony law. Alimony should not be awarded to fund the recipient's savings or investments. Alimony should not be awarded simply to equalize the disparity in the parties' earned incomes. The Court should enter detailed and adequate findings including findings regarding the recipient's standard of living and legitimate monthly needs. This was not done in this case. The Court merely found that her proposed budget was inflated. The approval of "savings alimony" is not only inequitable but would set a dangerous precedent which goes for beyond the purpose of alimony as contemplated by Utah law and cases. The Appellee has the resources available to her to pay her own attorney's fees on Appeal and her request for an award of attorney's fees should be denied.

DATED THIS 21ST day of April, 2003.

Respectfully Submitted,

FREDERICK N. GREEN
Attorney for Respondent/Appellant

CERTIFICATE OF SERVICE

I hereby certify that I am a member or and/or employed by the law firm of Frederick N. Green, 7390 South Creek Road, Suite 104, Sandy, Utah 84093, and that in said capacity and pursuant to Rule 5(b), Utah Rules of Civil Procedure, a true and correct copy of the foregoing **REPLY BRIEF OF APPELLANT** was served by:

_____ Depositing the same in the U.S. Mail, postage prepaid and correctly addressed;

__X__ Hand delivery; and/or

_____ Facsimile transmission.

upon the following on this 21st day of April 2003:

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