

1992

## LaBadie v. LaBadie : Brief of Appellee

Utah Court of Appeals

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Frank T. Mohlman; Mohlman and Young.

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BRIEF

IN THE UTAH COURT OF APPEALS

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DAVID B. LaBADIE,	:	
Plaintiff/Appellant,	:	
vs.	:	
VERNA M. LaBADIE	:	No. 920796-CA
Defendant/Appellee.	:	Category No. 15

---ooOoo---

BRIEF OF APPELLEE

APPEAL FROM AN ORDER MODIFYING DECREE OF DIVORCE, IN THE THIRD  
JUDICIAL DISTRICT COURT IN AND FOR TOOELE COUNTY, STATE OF UTAH.  
THE HONORABLE DAVID S. YOUNG, PRESIDING.

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**FILED**  
Utah Court of Appeals

APR 19 1993

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### STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction over this case pursuant to UTAH CODE ANN. Section 78-2a-3(2)(i) (Supp. 1992) which provides: "The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over, . . . (i) appeals from district court involving domestic relations cases, including, but not limited to, divorce, annulment, property division, child custody, support, visitation, adoption, and paternity . . . ."

### STATEMENT OF THE ISSUES AND STANDARD OF REVIEW

1. Did the trial court abuse its discretion by ordering the Husband to maintain his Civil Service Survivor Benefits and life insurance in favor of the Wife where the record reflected a clear and uncontroverted agreement that he would do so? The standard of review requires this court to uphold the trial court order absent a showing of an abuse of discretion. Whitehouse v. Whitehouse, 790 P.2d 57, 61 (Utah App. 1990).

2. Did the trial court abuse its discretion by modifying the decree of divorce to correct a clerical error omitting reference to maintenance of Husband's life insurance policy/survivor benefits? The standard of review requires the court to uphold the trial court absent a showing of an abuse of discretion. Lindsay v. Atkin, 680 P.2d 401, 402 (Utah 1984).

3. Did the trial court properly order the Husband to maintain a Civil Service Survivor Benefits and life insurance policy naming the Wife as the beneficiary? The standard of review requires the court to uphold the trial court absent a showing of an abuse of discretion. Whitehead v. Whitehead, 836 P.2d 814, 816 (Utah App. 1992).

4. Wife should be awarded her attorney's fees and costs of court in defending this appeal.

**DETERMINATIVE CONSTITUTIONAL PROVISIONS,**  
**STATUTES, ORDINANCES AND RULES**

1. UTAH R. CIV. P. 60(a):

**Clerical mistakes.** Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

2. UTAH CODE OF JUDICIAL ADMINISTRATION Rule 4-501(3)(a)-(c):

**Hearings.** (a) A decision on a motion shall be rendered without a hearing unless ordered by the Court, or requested by the parties as provided in paragraphs (3)(b) . . . below. (b) In cases where the granting of a motion would dispose of the action or any issues in the action on the merits with prejudice, either party at the time of filing the principal memorandum in support of or in opposition to a motion may file a written request for a hearing. (c) Such request shall be granted unless the court finds that (a) the motion or opposition to the motion is frivolous or (b) that the dispositive issue or set of issues governing the granting or denial of the motion has been authoritatively decided.

### STATEMENT OF THE CASE

The parties tried this divorce case before Judge Richard H. Moffat in the Third District Court for Tooele County on November 13, 1991. The parties had been married in 1960, and were ending a marriage of over 30 (thirty) years. The marriage was a traditional marriage in which the Husband was the wage earner and the Defendant was a homemaker. During the trial Verna Labadie, ("Wife"), testified that she desired David Labadie ("Husband") to maintain his life insurance policy with her as the beneficiary. When asked, Husband indicated he had no objection to Wife's wishes. When Judge Moffat entered the divorce Wife's counsel reminded Judge Moffat of the agreement between the parties to maintain the life insurance policy. Judge Moffat acknowledged this agreement. Husband's counsel then asked to address attorneys' fees and did not return to a discussion of the life insurance issue. Husband's counsel drafted the final decree, which was submitted to Wife's counsel for approval as to form and entered by Judge Moffat on December 11, 1992.

Shortly after Judge Moffat entered the order Wife's counsel discovered that Husband's counsel omitted the provision ordering Husband to maintain his life insurance policy. Wife's counsel notified Husband's counsel and requested the preparation of an amended decree including the Survivor Benefits provision. Husband

did not respond. Wife then filed a motion to amend the decree pursuant to the Utah Code of Judicial Administration Rule 4-501. Wife based this motion on UTAH R. CIV. P. 60(a) which allows for correction of clerical mistakes in judicial orders. Neither party sought a hearing on the motion. Judge David S. Young found Wife's request to be consistent with the stipulation the parties made in court and granted Wife's motion on October 28, 1993. Husband sought a hearing for reconsideration of Judge Young's motion which the court denied.

#### **SUMMARY OF THE ARGUMENT**

Husband's agreement to maintain his life insurance policy in favor of the Wife is clear and uncontroverted in the record and supports Judge Young's order. Furthermore, the court did not abuse its discretion by denying Husband's motion for a hearing for reconsideration where the court authoritatively decided the dispositive issue.

The court did not violate res judicata principles by granting Wife's motion to amend the decree. Rather, the court complied with the requirements of UTAH R. CIV. P. 60(a) which allows the court to correct clerical errors.

Finally, the court did not abuse its discretion by ordering the Husband to maintain his life insurance policy where the parties

stipulated that Husband would do so and the order is consistent with available precedent.

### ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY FAILING TO PROVIDE DETAILED FINDINGS AND GRANT A HEARING ON HUSBAND'S MOTION FOR RECONSIDERATION.

A. The Court Need Not Enter Detailed Findings Where the Record is Clear and Uncontroverted.

The trial court's decision to amend the decree of divorce without a detailed statement of findings and reasons was not an abuse of discretion. Wife concedes that findings are required when a court modifies a divorce decree based on a change of circumstances. Nonetheless, findings are not necessary when the court bases its order on the clear facts in the record. The Utah Court of Appeals in Whitehouse stated, "[T]he trial court must make findings on all material issues, . . . unless the facts in the record are clear, uncontroverted and only support the judgment." 790 P.2d at 61 (emphasis added) (citing Acton v. J.B. Deliran, 737 P.2d 996, 999 (Utah 1987), and Lee v. Lee, 744 P.2d 1378, 1380 (Utah Ct. App. 1987)).

In Whitehouse, the plaintiff sought to amend a decree of divorce because of a change of circumstances. Principally, the plaintiff sought to setoff the defendant's interest in the

plaintiff's retirement account against the plaintiff's interest in the marital home. The plaintiff also sought to end his alimony and child support payments. The defendant countered, asking the court for an immediate payment of her share of the retirement benefits. The court granted the plaintiff's request, effectively denying the defendant's request. 790 P.2d at 59. On appeal, the court emphasized that the "findings of the court were directed to its order terminating the child support and alimony provisions of the decree, not to a modification of the home equity or retirement provisions." Id. at 61. Thus, the court found that the findings were not sufficiently related to the retirement and home equity issues and concluded that the trial court must have based its decision on something else. Id. at 62.

The presence of a clear agreement in the record between Husband and Wife distinguishes this case from Whitehouse. During the trial the following exchange took place between Husband and Wife's counsel:

Counsel: "Do you have any objection to maintaining Mrs. LaBadie as the beneficiary of your life insurance?"

Husband: "I have to, yes."

Counsel: "Pardon Me?"

Husband: "Yes, I was ordered by the court to do that."

Counsel: "I'm talking about continuing that after the divorce. Do you have--?"

Husband: "Yes."

Counsel: "Do you have any objection to continuing her?"

Husband: "No."

(TR, p. 19).

The exchange between Husband and Wife's counsel indicates an uncontroverted stipulation between the parties on the issue of insurance. Unlike in Whitehouse, where the trial court tried to base its decision on unrelated findings, the order amending the decree and inserting the insurance provision refers to this agreement and "finds the amendment to be consistent with the stipulation in court." Minute Entry, October 28, 1992 (emphasis added). Given the clarity of the record, the law does not require further findings in this case.

B. Husband Was Not Entitled to a Hearing On His Motion to Reconsider Because the Issue of Whether the Parties Agreed on the Insurance Provision Authoritatively Decided.

The Court did not abuse its discretion by denying the Husband's motion for a hearing on his motion for reconsideration. UTAH CODE OF JUDICIAL ADMINISTRATION Rule 4-501(3)(c) allows the court to deny a request for a hearing where "the court finds that

(a) the motion or opposition to the motion is frivolous or (b) that the dispositive issue or set of issues governing the granting or denial of the motion has been authoritatively decided."

The Husband based his motion to reconsider on the lack of findings. As discussed above, extensive findings were not necessary in this case because of the clear expression of the parties agreement in the record. It logically follows, then, that the issues governing the denial the Husband's motion for reconsideration were authoritatively decided. Furthermore, Husband's motion to reconsider was frivolous where the judge expressed precise findings based on a clear agreement in his order.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT MODIFIED THE DECREE TO REFLECT THE PARTIES AGREEMENT.

The order modifying the decree to include the life insurance provision corrected a clerical error excluding the provision from the original decree. UTAH R. CIV. P. 60(a) provides: "Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders."

In Stanger v. Sentinel Sec. Life Ins. Co., 669 P.2d 1201 (Utah 1983), the Utah Supreme Court explained that trial courts have discretion to freely correct formal errors. The Stanger court

discovered an error in computing the figure used to determine damages for commissions due to the plaintiff. Id. at 1204. The Supreme Court revised the damages award upward to correct the mistake, and defined clerical mistakes stating: "'It is a type of mistake or omission mechanical in nature which is apparent on the record and which does not involve a legal decision or judgment by an attorney.'" Id. at 1206 (quoting In Re Merry Queen Transfer Corp., 266 F.Supp. 605, 607 (1967)). The Stanger court further explained that

"it matters little whether an error was made by the court clerk, the jury foreman, counsel, a party or the judge himself, so long as it is clearly a formal error that should be corrected in the interests of having judgment, order, or other part of the record reflect what was done or intended."

Id. See also Lindsay, 680 P.2d at 402 ("The distinction between a judicial error and a clerical error does not depend upon who made it. Rather it depends on whether it was made in rendering the judgment or in recording the judgment as rendered." (quoting Richards v. Siddoway, 24 Utah 2d 314, 317, 471 P.2d 143, 145 (1970))).

The absence of any reference to Husband's life insurance policy in the final decree of divorce was a clerical mistake. As discussed, supra, Husband agreed to maintain his life insurance

policy for Wife's benefit during his testimony. Furthermore, Husband's counsel was aware of this stipulation as evidenced by the following exchange at trial.

The Court: "Well, I will grant joint divorces, one against the other. Did she file a counterclaim?"

Wife's Counsel: "She did, your Honor, and she made a request the divorce be final in '92 and he has already agreed to maintain her on his survivor benefits and so the only other issue would be the attorneys fees issue.

Husband's Counsel: "You are talking about life insurance?"

Wife's Counsel: "Yeah. He said he was agreeable to maintain it."

Husband's Counsel: "Could I address that, on attorneys fees?"

The Court: "You may."

(TR. p. 89).

The hesitancy in Husband's counsel's request, as indicated by the comma in the sentence "[c]ould I address that, on attorneys fees?" suggests Husband's counsel did not want to talk about the life insurance policy at all. Instead, he was thinking about attorneys fees and was distracted when Wife's counsel mentioned the life insurance agreement. The fact that Husband's counsel then continued to discuss attorneys fees without any mention of life insurance supports this conclusion. Judge Moffat had no reason to

believe that Husband's counsel opposed the life insurance under these circumstances.

The record is clear. The parties agreed on the Civil Service Survivor benefits and Husband's counsel was aware of the agreement. The order modifying the decree was correct, where, "the mistake is clear from the record [and] reflects no more than what the [Wife is] entitled to." Stanger, 669 P.2d at 1207 (citing Fay v. Harris, 64 Ariz. 10, 164 P.2d 860 (1945)).

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ORDERING HUSBAND TO MAINTAIN HIS LIFE INSURANCE POLICY/SURVIVOR BENEFITS WITH WIFE AS THE BENEFICIARY

The order requiring Husband to maintain his life insurance policy or survivor benefits was within the discretion of the trial court and was supported by adequate legal precedent. "Trial courts may exercise broad discretion in divorce matters so long as the decision is within the confines of legal precedence." Whitehead, 836 P.2d at 816 (citing Cummings v. Cummings, 821 P.2d 472, 474-74 (Utah App. 1991); Haumont v. Haumont, 793 P.2d 421, 423 (Utah App. 1990); and Rudman v. Rudman, 812 P.2d 73, 77 (Utah App. 1991)).

Whether a trial court can order a spouse to maintain a life insurance policy for the benefit of a former spouse is a matter of first impression before this court. Husband cites Menor v. Menor, 391 P.2d 473 (Colo. 1964) as the leading case on the issue.

Colorado, however, has since revised its statutes to allow judges to include provisions requiring on party to maintain a life insurance policy benefitting a former spouse. See In Re Marriage of Koltavy, 612 P.2d 1161, 1162 (Colo. App. 1980) (holding that COLO. REV. STAT. Section 14-10-122(2) (1973) changed prior law to allow the court to order maintenance of life insurance). Many other jurisdictions allow the court to order a party to maintain life insurance in favor of a former spouse. See generally John J. Michalik, Annotation, Divorce: Provisions in Decree That One Party Obtain or Maintain Life Insurance For Benefit of Other Party or Child, 59 A.L.R. 9 (1974). In Gallo v. Gallo, 440 A.2d 782 (Conn. 1981), the trial court ordered the defendant to purchase a life insurance policy with the plaintiff named as the beneficiary. The court explained: "Such an order is well within the inherent equitable power of the court in a dissolution proceeding." Id. at 788 (citing Pasquariello v. Pasquariello, 168 Conn. 579, 585, 362 A.2d 835 (1975); and Thomas v. Thomas, 158 Conn. 477, 482-483, 271 A.2d 62 (1970)). In response to the argument that life insurance policies represent an improper award of alimony continuing after the payor's death the court stated: "Insurance premiums are paid during a decedent's lifetime and the proceeds flow directly to the beneficiary. This is not analogous to a claim of continued payment of periodic alimony from the estate of the deceased ex-spouse."

Id. (citing Harrison v. Union & New Haven trust Co., 147 Conn. 435, 437, 162 A.2d 182 (1960)). See also Robbins v. Robbins, 453 N.E.2d 1059, 1060 (Mass. App. 1983) ("It was within the judge's discretion to require the defendant to maintain a life insurance policy for the plaintiff's benefit."); and Moebus v. Moebus, 529 So.2d 1163 (Fla. Dist. Ct. App. 1988) (affirming judgment ordering the husband to maintain a life insurance policy in favor of the wife to protect the wife's alimony). Colorado's courts have found that the health of the party ordered to pay spousal support is relevant to a decision ordering the party to maintain life insurance in favor of the former spouse. Koktavy, 612 P.2d at 1162.

Even jurisdictions which disapprove of orders forcing the party to provide life insurance allow the parties to include a life insurance provision in their decree where the parties have agreed on the issue. The Menor court, when overruling an order forcing the husband to provide a life insurance policy in favor of his ex-wife stated, "This situation is clearly distinguishable from those cases in which the parties to a divorce action have settled their property rights by contract, the terms of which are incorporated in the decree." 391 P.2d at 477. See also Koktavy, 612 P.2d at 1162 (explaining that Colorado law allows parties to agree in writing that maintenance will continue after death).

The trial court's order conforms to the precedent outlined above. First, the parties agreed that Husband would maintain his life insurance. This agreement was not an agreement in writing, as required in Colorado, but was included in the record of the trial court. Second, there is significant support suggesting that maintaining Wife as the beneficiary of Husband's life insurance policy is not post mortem alimony. Third, as Husband admits, he is in poor health and the life insurance policy is an appropriate method to secure the alimony awarded to Wife. The trial court was well within its broad discretion when it approved Wife's motion and ordered Husband to maintain his life insurance policy with Wife as the named beneficiary.

#### IV. MOTION FOR ATTORNEY'S FEES AND COST ON APPEAL

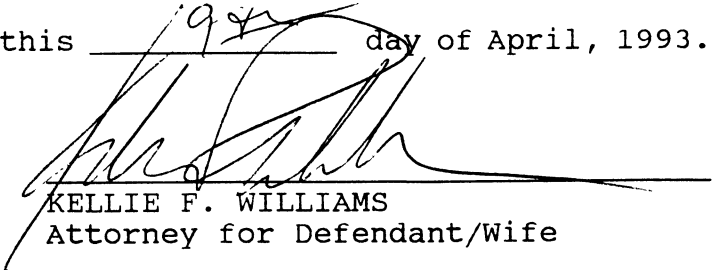
Wife should be awarded her attorney's fees and costs of court in defending this appeal. The parties were divorced by an Amended Decree of Divorce and Amended Findings, entered on October 28, 1992, after having been married 32 (thirty-two) years. The parties had three children and the Wife was a homemaker during the entire marriage and relied upon the Husband for her support and the support of the family.

Wife, the Appellee herein, cannot afford the costs and attorney's fees in defending the instant appeal and respectfully requests an award of fees and costs on appeal.

#### CONCLUSION

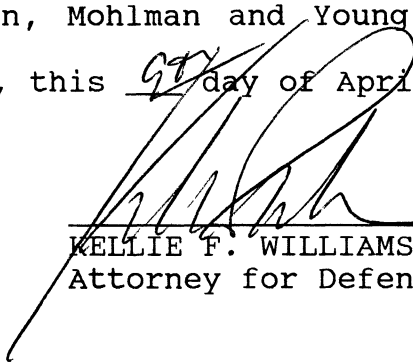
Trial courts have broad discretionary powers in divorce matters. The trial court did not abuse its discretion in this case where the record clearly indicated a stipulation between Husband and Wife that Husband would maintain his life insurance/Civil Survivor benefits with Wife as the beneficiary. The trial court was also well within its discretion when it modified the decree to correct a clerical error. Finally, the trial court did not abuse its discretion by ordering Husband to maintain the survivor benefits where significant precedent from other jurisdictions supports the order. For these reasons Wife respectfully requests that this court uphold the Third Judicial District Court's order requiring Husband to maintain the Civil Survivor benefits with Wife as the sole beneficiary and that the Wife be awarded her attorney's fees and all costs on appeal.

Respectfully submitted this 9<sup>th</sup> day of April, 1993.

  
KELLIE F. WILLIAMS  
Attorney for Defendant/Wife

CERTIFICATE OF MAILING

I, KELLIE F. WILLIAMS, hereby certify that two copies of the foregoing Appellee's Brief, were mailed, first-class mail, postage prepaid to Frank T. Molman, Mohlman and Young, 250 South Main Street, Tooele, Utah 84074, this 9th day of April, 1993.

  
KELLIE F. WILLIAMS  
Attorney for Defendant/Appellee