1984

Laura Thompson v. Brent Thompson : Appellant's Brief

IN THE SUPREME COURT

OF THE

STATE OF UTAH

LAURA THOMPSON	)	
Plaintiff-Respondent.	)	
vs.	)	
BRENT THOMPSON	)	Case No. 19[illegible]
Defendant-Appellant.	)	

APPELLANT'S BRIEF

Appeal from a Final Order of the Third Judicial District Court in and for Salt Lake County, State of Utah, Honorable Jay E. Banks

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LAURA THOMPSON	)	
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vs.	)	
	)	Case No. 19059
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STATEMENT OF THE CASE

This is an appeal from a final order of the Third Judicial District Court, entered on February 15, 1983, the Honorable Jay E. Banks presiding, modifying a Decree of Divorce previously entered by the same Court on March 4, 1982, the Honorable Larry R. Keller presiding. Appellant's appeal is based on the Respondent's failure to prove changed circumstances justifying a modification of the original Decree of Divorce.

DISPOSITION BEFORE THE LOWER COURT

Pursuant to the Respondent's "Petition to Modify Decree of Divorce", the Third Judicial District Court modified the original Decree of Divorce in this matter "to provide that the defendant (Appellant herein) pay and keep current any and all past due and unpaid, as well as any and all future monthly payments, owed on the $3215.47 Promissory Note..." This Order was signed by the Honorable Jay E. Banks on February 15, 1983.

RELIEF SOUGHT ON APPEAL

Appellant is seeking a reversal of that portion of the Order signed on February 15, 1983 providing for a modification of the original Decree of Divorce signed by the Honorable Larry R. Keller on March 4, 1982.

STATEMENT OF THE FACTS

On March 4, 1982, a Decree of Divorce was signed by the Honorable Larry R. Keller, dissolving the bonds of matrimony between the Appellant and the Respondent. (R.p.50-53). The trial of this case took place on January 18, 1982. (R.p.50). Prior to the trial and entry of the Decree of Divorce , the Appellant and Respondent (hereinafter referred to as Parties) made arrangements to procure a new automobile for the benefit and use of the Respondent, To Wit: a 1976 Datsun B210. (R. p. 110-114). The new car was meant as a replacement vehicle for a 1977 four-wheel drive truck which the Respondent had been driving during the pendency of the Parties' divorce. (R.p.111, 1.4-15). The truck was titled in the name of the Appellant. (R.p.150,1.9-11). On December 18, 1981, the Appellant borrowed money from United Bank, and the truck was used as collateral for the money borrowed. (Plaintiff's Exhibit 2-P;R.p.105,1.13-21). While the record is not clear as to how much money the Appellant borrowed on December 18, 1981, the amount was approximately $900.00 to $1000.00. (R.p.108,1.11-17;p.151,1.11-16). When Appellant Borrowed the money on December 18, 1981, he signed a new promissory note for $3215.47, which sum included the additional money borrowed by the Appellant on that date. (Plaintiff's Exhibit 2-P). On December 18, 1981, the collateral for the above loan was the 1977 four-wheel drive truck.

(R.p.106,l.6-22). On January 4, 1982, the Respondent signed a "Motor Vehicle Security Agreement" pledging the 1976 Datsun B210 automobile as security for a loan of $2300.00. (Plaintiff's Exhibit 1-P). On the same date, the Respondent signed the promissory note that had been previously signed by the Appellant on December 18, 1981. (R.p.160,l.15-25;p.161,l.1-5). On January 5, 1982, the Appellant paid $943.18 on the loan of December 18, 1981, thereby reducing the amount owed on the loan to approximately $2300.00. (R.p.106,l.20-23;p.162,l.2-4). The Decree of Divorce in this matter awarded the 1976 Datsun to the Respondent as property in her possession, but the Decree did not order the Appellant to make the car payments on the vehicle. (R.p.50-53). All of the above transactions occurred before the entry of the Decree of Divorce. There is no evidence in the record of changed circumstances between the Parties occurring after the entry of the Decree of Divorce. (R.p.85-88).

ARGUMENT

POINT ONE

A DECREE OF DIVORCE MAY NOT BE MODIFIED UNLESS THERE IS A SUBSTANTIAL CHANGE IN CIRCUMSTANCES OF THE PARTIES OCCURRING SINCE THE ENTRY OF THE DECREE

Pursuant to Utah Code Ann., §30-3-5(1)(1953), the trial court in a divorce action has "continuing jurisdiction to make such subsequent changes or new orders with respect to the support and maintenance of the parties, the custody of the

children and their support and maintenance, or the distribution of the property as shall be reasonable and necessary..." The continuing jurisdiction of the trial court, however, does not grant the trial judge unlimited discretion to modify a decree of divorce.

On the contrary, a decree may not be modified unless the party seeking the modification demonstrates a substantial change of circumstances of the parties occurring subsequent to the entry of the decree. In the case of Lea v. Bowers, 658 P.2d 1213,1215 (Utah 1983), this Court stated:

> On a petition for modification of a divorce decree, the threshold requirement for relief is a showing of substantial change in the circumstances of the parties occurring since the entry of the decree and not contemplated in the decree itself...(cites omitted).

Further, the burden of proving changed circumstances of the parties rests with the party seeking modification of the divorce decree. Christensen v. Christensen, 628 P.2d 1297 (Utah 1981); Kessimakis v. Kessimakis, 580 P.2d 1090 (Utah 1978).

Moreover, the extent of changed circumstances justifying a modification of a divorce decree varies with the type of modification being sought. In the case of Foulgar v. Foulgar, 626 P.2d 412,414 (Utah 1981), it was noted that provisions in an original decree granting alimony, child support and the like must be readily susceptible to alteration because such needs are subject to rapid and unpredictable change. But where the change relates to the parties' real property, a modification should be

granted only upon a showing of compelling reasons arising from a substantial and material change of circumstances. Thus the nature of the modification sought in the case at hand is relevant in determining whether the Respondent has sufficiently demonstrated changed circumstances justifying modification of the Divorce Decree. Applying the above case law to the facts of this case shows that the Respondent has failed to meet the threshold requirements for a modification of the original Divorce Decree.

First, there is no dispute that all transactions involving the four-wheel drive truck and the 1976 Datsun occurred prior to the trial and entry of the Decree of Divorce. Thus all the circumstances surrounding the vehicles existed at the time of trial, and were known to the Parties at the time of the Decree. In paragraph 3 of the Decree (R.p.51), the Respondent was "awarded and declared to be the sole owner of the following property free and clear of any claim of right, title or interest of the defendant therein, to wit:... personal property in her possession and control, other than as hereafter set forth." Since the Datsun was personal property in the possession and control of the Respondent, it was contemplated in the original Decree. If the trial court had ordered the Appellant to make the payments on the Datsun, it would have been included in the Decree.

Second, the Respondent has failed to allege and prove any changed circumstances of the Parties occurring after the entry

of the Decree. There is no testimony or evidence in the record reflecting a change in the positions of the Parties in relation to each other, let alone the substantial change in circumstances contemplated by this Court as a threshold requirement for a divorce decree modification.

Third, the Respondent's modification deals with the division of the Parties' personal property. In Foulgar v. Foulgar, supra, the Utah Supreme Court emphasized the importance of the type of modification being sought in relation to the nature of the changed circumstances. For instance, a modification dealing with real property should only be granted upon a showing of compelling reasons arising from a substantial and material change in circumstances. Although the instant case deals with personal property rather than real property, the application of the sliding scale set forth in Foulgar would indicate that a modification dealing only with personal property should not be granted lightly, especially in a case where there is no evidence of a substantial and material change in the circumstances of the Parties.

POINT 2

THE DOCTRINE OF RES JUDICATA PREVENTS THE RESPONDENT FROM COLLATERALLY ATTACKING THE DECREE OF DIVORCE

In the case of Kessimakis v. Kessimakis, 580 P.2d 1090,1091 (Utah 1978), the Utah Supreme Court stated:

> This Court is clearly committed to the proposition that in order to modify a prior decree the moving party must show a substantial change of circumstances. In the absence of such a showing, the decree shall not be modified and the matters previously litigated and incorporated therein cannot be collaterally attacked in face of the doctrine of res judicata.

The rule of law stated above from the Kessimakis case is directly applicable to the case at hand. Because the Respondent has failed to prove any changed circumstances, her "Petition to Modify Decree of Divorce" is nothing more than a collateral attack on the original decree. Merely because the Respondent had a unilateral expectation that the Appellant would make the car payments on the Datsun does not entitle her to relitigate the Decree. This is especially true in this case where the entire divorce between the parties was vigorously contested at all stages of the litigation. In such a case it is unreasonable to omit an important part of the property distribution simply because that party expected the other party to live up to unstated expectations. In fact, the Appellant's testimony is directly contradictory to the Respondent's understanding that the Appellant would make the car payments. That is, it was the understanding of the Appellant that the Respondent would pay the $2300.00 owed on the Datsun.(R.p.139,l.20-25).

The mere fact that the Appellant paid $943.18 on December 18, 1981 does not imply that the Appellant believed he was responsible to the Respondent for the car payments. Because the Appellant had borrowed approximately the same amount of money

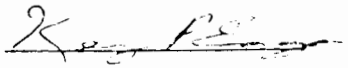
for a purpose other than purchasing the vehicle, the Appellant was simply paying back the excess money he had borrowed for the extraneous purpose. Regardless, the original Decree did not order the Appellant to make the payments on the Datsun, and the Respondent is barred by the doctrine of res judicata from collaterally attacking the Decree.

CONCLUSION

Because the Respondent failed to prove substantially changed circumstances occurring after the entry of the Divorce Decree, she failed to meet the threshold requirement for a modification of the original Decree. Further, she is collaterally estopped from relitigating the property settlement merely because of her unilateral understanding at the time of the original Decree. Therefore, the decision of the trial court modifying the Decree of Divorce should be reversed, and the Respondent's "Petition to Modify Decree of Divorce" should be dismissed for failure to prove a substantial change in circumstances.

Respectfully submitted this 1st day of June, 1984.

McINTYRE, DENNIS & EAGAN



Kerry P. Eagan, Attorney for Appellant

MAILING CERTIFICATE

I certify that I mailed two true and correct copies of the Appellant's Brief, postage prepaid, to:

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on this 1st day of June, 1984.