

2003

Kenneth D. Sursa v. Karen J. Sursa : Reply Brief

Utah Court of Appeals

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Clark B. Allred; Allred McClellan and Trotter P.C.; Attorneys for Appellee.

Lorie D. Fowlke; Donald E. McCandless; Scribner and McCandless P.C.; Attorneys for Appellant.

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IN THE UTAH COURT OF APPEALS

KENNETH D. SURSA,

Appellant/Petitioner,

vs.

KAREN J. SURSA,

Appellee/Respondent.

Case Number: 20030987-CA

REPLY BRIEF OF THE APPELLANT

AN APPEAL FROM THE ORDER OF DISMISSAL IN THE EIGHTH JUDICIAL DISTRICT COURT OF DUCHESNE COUNTY, UTAH, THE HONORABLE JOHN R. ANDERSON PRESIDING.

CLARK B. ALLRED
Allred McClellan & Trotter, P.C.
121 West Main Street
Vernal Utah 84078
Telephone: 435 789 4908

Attorneys for Appellee

LORIE D. FOWLKE
DONALD E. McCANDLESS
Scribner & McCandless, P.C.
2696 North University Avenue, Suite 220
Provo, Utah 84604

Attorneys for Appellant

**UTAH COURT OF APPEALS
BRIEF**

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121 West Main Street
Vernal Utah 84078
Telephone: 435 789 4908

Attorneys for Appellee

LORIE D. FOWLKE
DONALD E. McCANDLESS
Scribner & McCandless, P.C.
2696 North University Avenue, Suite 220
Provo, Utah 84604

Attorneys for Appellant

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ARGUMENT

I. PETITIONER USED THE CORRECT STANDARD OF REVIEW

The Appellee (hereinafter “Karen” or “Respondent”) claims Petitioner uses the wrong standard of review because the Court dismissed this case, as it “was not persuaded by the evidence” presented by Petitioner, as opposed to a failure to present a prima facie case. However, Respondent mixes the directions in Rule 41 (b) of the Utah Rules of Civil Procedure (hereinafter “URCP”) with the clarification provided in *Sorenson v. Sorenson*, to come to this conclusion. 783 P.2d 1141, 1144 (Utah App. 1994).

Rule 41 (b) URCP, governing involuntary dismissals, provides that defendant “may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief”. The court may then “render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence.” Rule 41(b) URCP. Then the rule says: “If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a)” and explains further that a dismissal under subsection (b) is a dismissal on the merits. Rule 41(b) URCP. As stated by Respondent, the court, in *Sorenson v. Sorenson*, does clarify that dismissal under Rule 41 (b) URCP is appropriate in two circumstances and each has a different standard of review. 783 P.2d at 1144. “Failure to establish a prima facie case . . . is a question of law”, which is “reviewed for correctness.” *Id.* A “clearly erroneous standard [is appropriate] because the trial court was not persuaded by the evidence.” *Id.*

Respondent then concludes, without basis that, in this case, the court received the evidence “but was not convinced by it” and therefore the correct standard is “clearly

erroneous”. Respondent’s brief, p.8. However, the court made no findings, which indicate that it dismissed either because it believed Petitioner failed to make a prima facie case or because it was unconvinced by the evidence presented.

A prima facie case is defined as the “establishment of a legally required rebuttable presumption; a party’s production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party’s favor.” BLACKS LAW DICTIONARY 1209 (7th ed. 1999). In fact, in the Order of Dismissal in this case, prepared by Respondent, it states “[t]here was no evidence to show an intent or desire by the Respondent to move in or live with Mr. Gerkin. The evidence did not establish that the Respondent was cohabitating with Mr. Gerken.” Further, Respondent’s Order indicates “the Court granted a directed verdict”. R.443-442. (Attached as Exhibit “A”). This means the court believed Petitioner did not present a prima facie case, for which the standard is reviewed for correctness.

In *Sorensen*, the court noted that the question in that case was the “existence of an implied-in-fact employment contract as a question of fact.” *Sorenson v. Sorenson*, 783 P.2d at 1144. This would necessitate a clearly erroneous standard. *Pendleton v. Pendleton*, 918 P.2d 159, 160 (Utah App. 1996). However, the question in this case is the termination of alimony, which is “a mixed question of fact and law.” *Haddow v. Haddow*, 707 P.2d 669, 671 (Utah 1985). While the court should “defer to the trial court’s factual findings unless they are show to be clearly erroneous, [it should] review its ultimate conclusion for correctness”. *Pendleton v. Pendleton*, 918 P.2d 159, 160 (Utah App. 1996). This is because the “ultimate conclusion” is a question of law.

Therefore, while the factual findings are reviewed under a clearly erroneous standard, the “ultimate conclusion” should be reviewed for correctness. *Pendleton v. Pendleton*, 918 P.2d at 160.

II. PETITIONER MARSHALLED THE APPROPRIATE EVIDENCE

Respondent claims that Petitioner did not marshal all the evidence necessary under Rule 24 (a)(9) of the Utah Rules of Appellate Procedure. Respondent then proceeds to include a litany of “evidence” which she claims was presented at trial and not “marshaled” by the Petitioner.

“The challenging party must marshal all relevant evidence presented at trial which tends to support the findings . . . “ *Bell v. Elder*, 782 p.2d 545, 547 (Utah App. 1989)(emphasis in original). Marshalling “provides the appellate court the basis from which to conduct a meaningful and expedient review of facts challenged on appeal.” *Robb v. Anderton*, 863 P.2d 1322, 1328 (Utah App. 1993).

The Utah courts have identified many cases in which the efforts in marshalling were inadequate. Some appellants merely present carefully selected facts and excerpts of trial testimony in support of their own position, conveniently omitting negative facts. See, *Valcarce v. Fitzgerald*, 961 P.2d 305, 312 (Utah 1999); *Johnson v. Higley*, 977 P.2d 1209, 1218 (Utah App. 1999). Some parties incorrectly state marshaled “facts” to try to improve their position. See, *Johnson v. Board of Review of the Indus. Comm’n*, 842 P.2d 910, 912 (Utah App. 1992)(appellant stated he missed no work days though record showed he missed at least nine days). Finally, some appellants merely reargue the same

case made before the trial court. *Moon v. Moon*, 973 P.2d 431, 437 (Utah App. 1999). *See, generally*, Norman H. Jackson, Utah Standards of Appellate Review - Revised, 12 UTAH BAR JOURNAL, 8, 13 (1999); Norman H. Jackson, Utah Standards of Appellate Review, 8 UTAH BAR JOURNAL, 9, 13 (1994).

Respondent overstates the burden somewhat in claiming Petitioner “falls short of meeting the marshaling threshold”. Respondent’s brief, p.11. Most of the “evidence” which Respondent claims Petitioner did not provide to this court is not direct evidence of a lack of co-habitation, but instead, rebuttal to evidence put on by Petitioner. This rebuttal evidence propounded by Respondent does not move a fact forward so much as offer an explanation for some of the evidence presented by Petitioner. There is no requirement that “marshaling the evidence” forces Petitioner to repeat all the hypothetical explanations that Respondent’s counsel may create in cross-examination for the evidence presented by Petitioner.

For example, Respondent claims Petitioner should have included the evidence that when the private investigator testified he never saw anyone or Karen’s [Respondent’s] truck at the Cedar View house, upon cross examination, he acknowledged the truck could have been in the garage. Respondent’s brief, p.13. In fact, when not seen in front of the house, the truck could have been anywhere else in the world, including where Respondent’s counsel suggested, but that suggestion does not have to be included in Petitioner’s marshaling of the evidence against him. Then Respondent presents a litany of the things the witness did not see, again based upon counsel’s cross-examination and

presentation of hypothetical situations. Respondent's brief, p.14. All possible scenarios raised by counsel in cross-examination need not be included in the marshaling standard.

Further, other "evidence" Respondent claims was omitted is evidence that carries no weight on the relevant issues. For example, Respondent criticizes Petitioner for omitting the fact that Respondent still had toiletries of hers in her own home; however, this was never disputed. Respondent's brief, p. 12. Nor is it particularly relevant. The fact that other individuals very occasionally drove Respondent's truck was also undisputed. Respondent's brief, p.13. However, the fact that "Mr. Richard acknowledged that Karen's truck could have been in the garage at Cedar View" was, in fact, included in Petitioner's brief at p. 9.

Respondent mischaracterizes the "evidence" cited by Petitioner in her claims that he has not marshaled adequately. For example in asserting that Dane Gerkin took the truck whenever he wanted to, she claims Petitioner cited to a statement of his counsel at 525:144:24 to 525:145:1, rather than to Respondent's contrary testimony. However, Respondent ignores the fact that there were actually three citations to that fact reference, and the other references all refer to other witnesses besides Karen Sursa's self-serving testimony. Further, the other trial testimony referenced was clear that Karen Sursa frequently allowed Dane Gerkin to drive her truck without her. R.525;91:5-17; 525:92:2-3; 525:144:24-145:1.

Respondent claims that Petitioner did not include the evidence of the "very limited sexual contact with Mr. Gerkin". Respondent's brief, p.16. However, Petitioner's brief states, as does Respondent's brief, that Karen testified they had a sexual relationship for

the first few months but now the relationship was platonic. Petitioner's brief, p.10. The fact that Respondent stayed with Dane Gerkin sometimes because she was "dependent on him for health or other reasons." is also referenced in Petitioner's brief, though as a fact that supports Petitioner's claim, not the Respondent's. Therefore, it was not included in the marshaling section. Petitioner's brief, p.20.

Finally, Respondent attempts to claim that deposition testimony, which was not introduced at trial, was evidence that should have been included in the marshalling of facts against Petitioner's position. Respondent's brief, p.12. This is outside the scope of the marshaling requirement.

II. PETITIONER PRESENTED SUFFICIENT EVIDENCE TO ESTABLISH COHABITATION

Petitioner alleges that the evidence, which Respondent submitted, at trial, did not establish that she cohabitated with Dane Gerkin. She claims she and Mr. Gerkin did not share a common residence, had an "abbreviated sexual involvement", and did not share expenses. Respondent's brief, p.24-28.

As stated, the rule for terminating alimony consists of showing "the former spouses is residing with a person . . . and engaging in sexual contact with the person," based upon an objective, not subjective, standard. *Sigg v. Sigg*, 905 P.2d 908, 917 (Utah App. 1995). Cohabitation is comprised of . . . two elements: (1) common residency and (2) sexual contact evidencing a conjugal association." *Pendleton v. Pendleton*, 918 P.2d 159, 161 n.1 (Utah App. 1996).

A. THE PARTIES SHARED A COMMON RESIDENCE

Petitioner alleges the parties did not share a common residence because there was no evidence that “either kept furniture or clothing at the other’s home other than the clothing Ms. Sursa had on the occasion she was recuperating from an illness at Mr. Gerkin’s home.” Respondent’s brief, p.19. She further justifies this occasion because she was allegedly “recuperating from an illness . . . just even occupying one of his beds but was lying on the floor.” Respondent’s brief, p.19. This sanitization of the circumstances of this incident is a remarkable mischaracterization of the evidence presented to the trial court. In fact, Karen was lying on the floor wearing underwear and Dane Gerkin’s T-shirt. R. 525:22:23; 525:41:5. Further, “her bra was on the floor with her pants”. R.525:22:23-24. Her “pursue, her cigarettes, her keys, and her clothes and her shoes” were also there, though not on her. R.525:23:12-13. Dane Gerkin was dressed in “red cut-off sweats and a green T-shirt.” R.525:22:15. They had made a bed on the floor with a blanket belonging to Karen. R.525:23:7-9; 525:22:20-21.

Karen alleges she and Dane Gerkin only occasionally ate together, and “overnight visits were rare”. Respondent’s brief, p.19-20. However, she is selectively presenting her own self-serving testimony in support of these claims, while ignoring the balance of the evidence presented.

Karen was unemployed and spent most of her time at the home of Dane Gerkin as evidenced by her conversations with her daughter. R.525:22:6. Her truck was usually seen at his home regularly for over a year and rarely seen at her own home. R. 525:93:23 – 94:8; 525:71:15-21; 525:73:12. Her children could usually only get a hold of her on

her cell phone, while she was at Dane Gerkin's. R. 525:25:23-25; R.525:27:9-23. Karen did pay some of Dane's expenses, though she tried to claim it was in exchange for pictures he drew for her. R: 525:35:14-20. Dane cared for Karen, as a husband would care for a wife. This was particularly evidence when she preferred going home with him instead of her children after her trip to the hospital for an overdose. R. 525:31:4-10; 525:31:23-32:23. They ate at Dane's home an unknown number of times, and also went out to eat publicly "once or twice a week", and were seen together all over town, frequently. R. 525:120:18-22. This evidence is consistent with the facts in *Sigg v. Sigg and Pendleton v. Pendleton* to show a shared residence. 905 P.2d 908 (Utah App. 1995); 918 P.2d 159 (Utah App. 1996).

B. THE PARTIES HAD A SEXUAL "CONJUGAL" RELATIONSHIP

Karen appears to acknowledge that she had sexual contact with Dane Gerkin but that because it was "for only a two-month time period" by her testimony, it was not the type of sexual contact requisite to prove cohabitation. Respondent's brief, p.23. She distinguishes this from the few months of sexual contact present in *Pendleton*, since the parties there were still involved in sexual contact at the time of trial. *Id.*, citing *Pendleton v. Pendleton*, 918 P.2d at 160.

There is no legal basis for Karen's claim that if sexual contact has allegedly terminated prior to trial, cohabitation did not exist. In fact, it is counter-intuitive, since many parties would cease the actions for which they have been brought before the court, after the initiation of litigation. Further, Karen's claims the relationship changed from a

sexual one to a more of a “friendship” because of her illness, but even then they spent the night at each other’s home and that Dane Gerkin took care of her. R. 525:146:2.

“Conjugal rights” are defined as “the rights of married persons which include ‘the enjoyment of association, sympathy, confidence, domestic happiness, the comforts of dwelling together . . . as well as the intimacies of domestic relations.’” BARRON’S LAW DICTIONARY 88 (2nd ed. 1984). This defines exactly the relationship of Karen and Dane Gerkin, as evidenced by the extensive testimony presented at trial.

Respondent claims that she does not have the burden to disprove sexual contact because the statute changed and the “cases that he relies on were based on a former version of the statute that provided for that split in he burden.” Respondent’s brief, p.17n.1. She further alleges. “[T]he present statute now clearly puts that burden on Mr. Sursa.” *Id.* In fact, as noted in Petitioner’s original brief, (p.17), the statute changed in 1995 and the cases relied on primarily are *Sigg v. Sigg*, and *Pendleton v. Pendleton*, which were ruled upon in 1995 and 1996 respectively. 905 P.2d 908, 917 (Utah App. 1995); 918 P.2d 159, 161 n.1 (Utah App. 1996).

III. THE COURT USED THE WRONG STANDARD

It is clear from the court’s statements, in this case that it believed that the parties were supporting each other and had ongoing sexual contact. It identified Dane Gerkin as “like a gigolo” but that, obviously based upon its subjective opinion, Karen Sursa would clearly “not want to spend the rest of her life with somebody like that.” R.525:159:17-19. The court further recognized from the evidence presented that, in addition to above

description of the parties' relationship, Karen was "dependent on him" [Dane Gerkin]. R.525:259:16. Based upon these findings, together with the appropriate standard, the court should have concluded that Karen Sursa and Dane Gerkin had cohabitated, thus terminating Petitioner's alimony obligation.

IV. PETITIONER IS ENTITLED TO HAVE THE AWARD OF ATTORNEYS FEES REVERSED

The lower court ordered Petitioner to pay \$14,656.63 for Respondent's attorney fees. This amount has been deposited with the court pending the outcome of the appellate court. R.512-514. This court should reverse the ruling of the lower court on the issue of cohabitation. If it does so, then the court should also reverse its ruling on attorneys' fees and Petitioner should be entitled to a return of these funds.

CONCLUSION

Based upon the foregoing facts and argument Petitioner respectfully requests that the court reverse the trial court and conclude that Respondent, Karen Sursa, cohabitated with Dane Gerkin. Based thereon, alimony should therefore, be terminated and Petitioner should be entitled to retain the funds paid into the court for Respondent's attorney fees.

DATED this 8 day of February 2005.

SCRIBNER & McCANDLESS, P.C.

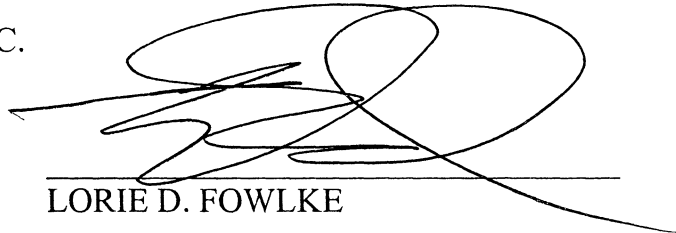
BY: 

LORIE D. FOWLKE
DONALD E. McCANDLESS
Attorneys for Petitioner

MAILING CERTIFICATE

I hereby certify that on this 18 day of February 2005, I mailed, postage prepaid, two accurate copies of the foregoing Appellant's Brief to:

Clark B. Allred
Allred McClellan & Trotter, P.C.
121 West Main Street
Vernal Utah 84078



LORIE D. FOWLKE

ADDENDA

Table of Addenda

1. R. 443-442

Addendum 1

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CLARK B ALLRED - 0055
CLARK A. McCLELLAN - 6113
McKEACHNIE, ALLRED, McCLELLAN & TROTTER, P.C.
Attorneys for Respondent
72 North 300 East (123-14)
Roosevelt, Utah 84066
Telephone: (435) 722-3928

IN THE EIGHTH JUDICIAL DISTRICT COURT OF DUCHESNE COUNTY
STATE OF UTAH, ROOSEVELT DEPARTMENT

KENNETH D. SURSA,)	
)	
Petitioner,)	ORDER OF
)	DISMISSAL
vs.)	
)	
KAREN J. SURSA,)	Civil No. 004000114 DA
)	
Respondent.)	Judge John R. Anderson

The above captioned matter came before the Court for trial on September 22, 2003. The Petitioner, Kenneth E. Sursa, was present with his attorney Bryan Sidwell. The Respondent, Karen J. Sursa, was present with her attorney Clark B Allred. The Petitioner called several witnesses and then rested. The Respondent moved for a directed verdict and requested that the Petitioner's petition be dismissed. The Court having heard the evidence and argument from counsel and having reviewed the case law and other information provided granted the motion and based thereon makes and enters the following order.

1. The issue before the Court was whether the Court should terminate the Petitioner's obligation to pay alimony on the claim that the Respondent was cohabitating with Dane Gerken.

2. Pursuant to Utah Code Ann. §30-3-5(10), the Petitioner who is seeking to terminate alimony, had the burden to establish that the Respondent, Karen J. Sursa, was cohabitating with Dane Gerken.

3. The evidence, when viewed in a light most favorable to the Petitioner, shows that the Respondent and Mr. Gerken had a friendship and a dating relationship. There was no evidence to show an intent or desire by the Respondent to move in or live with Mr. Gerken. The evidence did not establish that the Respondent was cohabitating with Mr. Gerken. The facts did not meet either the residency or the sexual relationship requirements, required by the case law to establish cohabitation.

4. The Petitioner dismissed his alternative claim to reduce alimony based on a change of financial circumstances prior to the trial.

5. Because the Court granted a directed verdict evidence was not received on the issue of reimbursement of legal fees. The Respondent had submitted to the Court an affidavit regarding the attorney fees and costs she has incurred thru September 15, 2003.

The Court Therefore Orders as follows: