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Wardle v. Bowen : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS
STATE OF UTAH

REBECCA J. WARDLE,

Appellee/Petitioner,

vs.

RICKY RAY BOWEN,

Appellant/Respondent.

Appellate No. 20031004-CA

Oral Argument Requested – Priority 15

APPELLEE’S BRIEF

**APPEAL FROM THE THIRD DISTRICT COURT
SALT LAKE COUNTY
Honorable Judge Frank G. Noel**

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APPELLEE'S BRIEF

Appellate No. 20031004-CA

STATEMENT OF JURISDICTION

This matter comes within the jurisdiction of the Court of Appeals pursuant to Utah Code Ann. §78-2a-3(2)(h). This is an appeal in a domestic relations matter.

STATEMENT OF THE ISSUES

1. **Did the trial court abuse its discretion when it found that Appellee's yearly income, based on historical earnings for previous years, not including overtime, was \$60,000.00?**

The award of child support will not be overturned without a clear abuse of discretion. Reinhart v. Reinhart, 963 P.2d 757, 759 (Utah App., 1998).

2. Did the court abuse its discretion by determining that the amount paid by Ms. Waddle for care of the child outside of regular school hours was reasonable in light on no contrary evidence?

The award of child support will not be overturned without a clear abuse of discretion. Reinhart v. Reinhart, 963 P.2d 757, 759 (Utah App., 1998).

3. Did the trial court act outside of its jurisdiction when it found that the father's share of his child's medical bills and day care expenses, which were paid by the mother, were nondischargeable under Bankruptcy Code §523(a)?

On a question of law this court gives the trial court no deference. Questions of law are reviewed for correctness. Hebertson v. Willowcreek, 923 P.2d 1389, 1392 (Utah 1996). In this case, the trial court entered a finding that the medical expenses and the daycare expenses for his child which Appellant claims were discharged in bankruptcy were in the nature of family support. The award of child support will not be overturned without a clear abuse of discretion. Reinhart v. Reinhart, 963 P.2d 757, 759 (Utah App., 1998).

4. Did the trial court abuse its discretion when it awarded Ms. Wardle attorneys' fees?

Attorneys' fees may be awarded in the broad discretion of the court, and will not be disturbed absent abuse of discretion. See Rudman v. Rudman, 812 P.2d 73 (Utah Court

of Appeals, 1991); Kerr v. Kerr, 610 P.2d 1380, 1384 (Utah 1980); Rasband v. Rasband, 752 P.2d 1331, 1336 (Utah Ct.App. 1988); Huck v. Huck, 734 P.2d 417, 419 (Utah 1986).

STATEMENT OF THE CASE

Appellee, Rebecca Wardle (“Ms. Wardle”), and Appellant, Ricky Bowen (“Mr. Bowen”), are the biological parents of L.W., born December 13, 1994. This court entered a formal award of paternity on August 10, 1998. (R. 416). In that order, Mr. Bowen was ordered to pay one half of daycare expenses and medical expenses of the child as well as child support in the monthly amount of \$214.00. (R. 411). The child support in the Order of Paternity was based on Mr. Bowen’s monthly income of \$1,846.00 and Ms. Wardle’s monthly income of \$1,387.00. (R. 411). Mr. Bowen failed to pay his share of daycare and some of the medical expenses of L.W. which Ms. Wardle paid for him. (R. 409-410)

In September, 2000, Ms. Wardle filed a Petition to Modify Child Support which was later served in February, 2001. (R. 131-135; 411) Ms Wardle filed a Motion for Judgment to collect unpaid daycare and medical expenses for L.W. (R. 136-155; 409-410). A trial was held on August 13, 2003 regarding the Petition to Modify Support and the certification of contempt as well as an objection to the commissioner’s recommendation. (R. 419-422).

The court determined that Mr. Bowen had not followed its orders and ordered him to pay \$6,000.00 to Ms. Wardle for attorneys fees she had incurred in her action for collection of child care reimbursement and a modification of support. (R. 414-415). The court awarded a judgment in favor of Ms. Wardle for past due child care and medical expenses. (R. 411). Ms. Wardle's placed L.W. at Challenger School in an all day Day Care program which cost \$496.00 a month. (T. 71 ln. 21 - 72 ln. 20). A family member had watched L.W. previously. (R. 251; Trial Exhibit M:55) When L.W. began kindergarten, Ms. Wardle payed the entire cost of kindergarten tuition and only charged Mr. Bowen \$111.00 a month for after school care. (T. 71 ln. 21 - 72 ln. 20; R. 410).

There was no testimony of any less expensive option than Challenger School in evidence. (R. 410). The court found that day care expenses presented by Ms. Wardle were reasonable and awarded her a judgment against Mr. Bowen. (R. 410).

At trial, Mr. Bowen failed to appear. (R. 419). However, his pay stubs and tax returns were stipulated to and admitted as exhibits. (Trial Exhibit M). The court determined that Mr. Bowen's income had increased to \$5,000.00 a month for child support purposes and Ms. Wardle's income had increased to \$2,894.00. (R. 411). Based upon these changes in income, the court determined that there had been a substantial change in circumstances and modified child support using these incomes in accordance with the Uniform Child Support Guidelines. (R. 411-413).

On the pay stubs in evidence before the court, Mr. Bowen's average income over the past four years was \$64,333.00. (R. 412). The income on the pay stubs for 2002 averaged \$6,350.00 a month (\$76,964.03 for the year). (Trial Exhibit M). The income on the paystubs for 2003 averaged \$6,000 a month. (Trial Exhibit M). The court made an equitable adjustment in Mr. Bowen's favor because there had been some fluctuation in overtime over the past four years. (R. 412). The court lowered Mr. Bowen's income from \$6,000 a month at the time of trial to \$5,000 for purposes of calculating child support. (R. 412).

The court found that Ms. Wardle was in need of assistance with her attorneys' fee based upon the outstanding amount of fees owed and her monthly income. (R.415) The court found that Mr. Bowen could afford to pay Ms. Wardle's attorneys fees based on his monthly income and his stated expenses. (R. 412; Trial Exhibit 2).

SUMMARY OF THE ARGUMENT

Under Utah law, the court has discretion to consider overtime in determining family support when it is regular or consistent. In this case, it is undisputed that Mr. Bowen's average yearly income was \$6,000.00 a month or more in 2002 and 2003. (Trial Exhibit M). Based upon these average incomes, the court under Utah law could consider the overtime of Mr. Bowen to be regular and consistent.

Under Utah Code Ann. §78-45-7.16, parents are equally responsible for day care expenses. There was no evidence to suggest that the amount of \$496.00 a month for full day care was unreasonable. Therefore, the court properly ordered Mr. Bowen to reimburse one half of L.W.'s expenses paid by Ms. Wardle.

Appellant correctly points out an improper citation to 11 USC §523(a)(15) in the court's Conclusions of Law. (R. 417-418). The court clearly decided this came under 11 USC §523(a)(5) not 11 USC §523(a)(15) . Interlineating the correct citation in the Conclusions of Law would make the document more accurate. However, the improper citation does not deprive the court of jurisdiction to make the determination it made

Ms. Wardle should be awarded attorneys fees on appeal pursuant to U.C.A. Section 30-3-3 as she was awarded fees by the trial court below.

ARGUMENT

A. APPELLANT FAILS TO MARSHAL THE EVIDENCE IN SUPPORT OF HIS CLAIM THAT THE TRIAL COURT ABUSED ITS DISCRETION IN THIS CASE.

Aa appealing party must show that the evidence, when viewed in the light most favorable to the verdict, is insufficient. Tingey v. Christensen, 373 Utah Adv.Rep. 10 (Utah 1999) see also Hansen v Stewart, 761 P.2d. 14 (Utah 1998). In this case, Appellant cannot show that the evidence of his income was insufficient to support a finding of

\$60,000.00 for time that was “normally and consistently worked” at his full time job.

U.C.A. Section 78-45-7.5(2).

- 1. Did the trial court abuse its discretion when it found that Appellee’s yearly income, based on historical earnings for previous years, not including overtime, was \$60,000.00?**

Appellant seems to concede that there was a substantial change in circumstances due to the change in income for both parties. Therefore a modification of child support was appropriate. Appellant does not argue that the court misapplied the child support guidelines, assuming the court correctly determined the incomes of the parties. The argument of Appellant on the issue of child support is limited to his claim that the court picked the wrong number as Appellant’s income.

Even though Appellant was absent at trial, the court had considerable evidence of Appellant’s income before it, including tax returns, pay stubs, Mr. Bowen’s deposition and the prior orders and findings of the court.

The only evidence that Appellant points to in support of his claim that the court abused its discretion was that to reach the number of \$60,000.00, the court had to include some overtime pay.

First Appellant argues that voluntary overtime pay should not be considered in a support award. In making this assertion, Appellant acknowledges that a court can include

overtime pay if it determines that the parent “normally and consistently” worked overtime. U.C.A. Section 78-45-7.5(2).

On appeal, Appellant must “marshall [sic] all of the evidence supporting the findings and show that despite the supporting facts, and in light of the conflicting or contradictory evidence, the findings are not supported by substantial evidence.” Whitear v. Labor Comm'n, 973 P.2d 982, 984 (Utah Ct.App.1998). Appellant cannot show that the court abused its discretion in choosing the number of \$60,000.00 as Appellant’s income. However, the court considered all of the facts in determining the number of \$60,000.00. This number was well supported by the average yearly income of Mr. Bowen over the four years prior to the trial. Based on the tax returns and pay stubs presented to the court, the court could have found that Mr. Bowen earned an average of \$74,000.00 in 2002 and 2003 and based the award on that recent income history. (See Trial Exhibit M). The court exercised its discretion to Mr. Bowen’s benefit based on the evidence presented at trial.

Second, Appellant argues that the court must have included overtime by mistake because the court stated in its own findings that it would not consider voluntary overtime if it hasn’t extended over a long period of time. See Appellant’s Brief p. 9. If Appellant felt like the court did something that the court did not intend to do, Appellant should have filed a motion to amend findings pursuant to Rule 52(b) of the Utah Rules of Civil

Procedure or a motion to amend the order pursuant to Rule 59(e) of the Utah Rules of Civil Procedure within ten days of the court's signature on the Order Modifying the Divorce Decree. Failing to file the proper motion, Appellant cannot now argue that the court made an unintentional error.

The two cases that Appellant cites for the proposition that child support should not be based on overtime pay are misconstrued.

(a) In Jensen v. Bowcut, 892 P.2d 1053 (Utah App. 1995), the court holds that “a full-time job can exceed forty hours per week if consistent with the obligee's prior practice.” Id. n.3.

The real question in the Bowcut case was whether it was proper for the trial court to consider what Bowcut claimed to be a “second source of income,” and the court responded by holding that “both sources involved the performance of Bowcut's professional duties as a physician.” Id. at 1057. The facts in the Bowcut case are not on point because Bowcut had two separate sources of income and Mr. Bowen only has one. However, the case reaffirms the discretion of the court in basing support on consistent overtime work.

(b) In Hurt v. Hurt, 793 P.2d 948 (Utah App. 1990), the court held that it would overturn a finding of fact (or the refusal to find a fact) based on a trial to the bench only if the appellant marshals all of the relevant evidence and shows the finding to be clearly erroneous. Sweeney Land Co. v. Kimball, 786 P.2d

760 (Utah 1990); Doelle v. Bradley, 784 P.2d 1176, 1178 (Utah 1989). Francis has done neither in this case.

Id. n.4.

Mr. Bowen cannot show clear error on the part of the trial court. Although the trial court states that the voluntary nature of overtime had some effect on its exercise of discretion, Appellant has not cited the court to any precedent for the proposition that voluntary overtime cannot be considered by the court. Further, Appellant cannot marshal the evidence in favor of the findings and show by contrary evidence that the evidence in favor of fixing Mr. Bowen's income at \$60,000.00 was insufficient.

2. Did the court abuse its discretion by determining that the amount paid by Ms. Wardle for care of the child outside of regular school hours was reasonable in light on no contrary evidence?

Appellant appears to argue that the court ordered him to pay preschool tuition not child care. However, the court makes no mention of the terms "preschool tuition". The court's Findings state that Ms. Wardle took L.W. to Challenger Day Care. (R. 409-410). An artful recharacterization of the court's findings is not an accepted method of contesting a matter on appeal. Rather, Appellant has the burden to "marshall [sic] all of the evidence supporting the findings and show that despite the supporting facts, and in light of the conflicting or contradictory evidence, the findings are not supported by substantial evidence." Whitear v. Labor Comm'n, 973 P.2d 982, 984 (Utah Ct.App.1998).

There was no contrary evidence. The court in this case found that the day care expenses at Challenger day care were fair and reasonable, that Respondent presented no evidence that any fees incurred were unreasonable. There was no evidence that Respondent has requested reimbursement for any costs of private school tuition. Challenger was taking care of L.W. during the time that Ms. Wardle worked. Appellant introduced no evidence that the expenses were incurred during a time when Ms. Wardle was not working. Further, Mr. Bowen concedes at the top of page 3 of Appellant's Brief that the evidence before the court showed that a need for change of day care settings was necessary to "meet L.W.'s needs".

Appellant's citation to precedent regarding contract law misconstrues the issue before the court. The obligation of each parent to pay one half of a child's day care is established by statute. The trial court has authority to interpret that statute within its discretion. In this case, the court interpreted the statute to mean that both parties would pay one half of the day care incurred at Challenger Day Care which is the same location that Mr. Bowen refers to as Challenger school or Challenger preschool. There is no evidence presented that would challenge the appropriateness of the court's exercise of discretion in determining that the costs charged by Challenger Day Care were reasonable and were divisible between the parents of L.W..

3. Did the trial court act outside of its jurisdiction when it found that family support was undischargable under Bankruptcy Code §523?

The applicable Bankruptcy Code Sections state as follows:

§523(a): “A discharge . . . does not discharge an individual debtor from any debt

(5) to a spouse . . . or child of the debtor, for all support of such spouse or child. . . .

(15) not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce [or other such order] . . .”

§523(c)(1) reads . . . “the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), (6) or (15) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge.”

The findings of the trial court in this case were that “[b]oth the child care and medical expenses incurred by Petitioner in this case are in the nature of child support and were nondischargable in bankruptcy.” Although 4b of the Conclusions of Law mistakenly cites (a) (15), instead of (a)(5) of this section of the Bankruptcy Code, the language of the court’s conclusions make it clear that the court intended the family support to be considered nondischargable without a hearing. (R. 417).

Under section (a)(5), a creditor is not required to make a claim in a bankruptcy court when a court determines that the debt is in the nature of family support. All other judgments in a divorce setting come under 11 USC §523(a)(15) such as division of assets, division of debts, and an award of attorneys' fees. These require a hearing to prevent discharge.

The citation in the court's Conclusions of Law is incorrect. Ms. Wardle will stipulate that the reference at 4b of the Conclusions of Law to 11 USC §523(a)(15) should be amended in the Conclusions of Law to read 11 USC §523(a)(5). However, the conclusions of the court were proper under 11 USC §523(a)(5) and the state court did have jurisdiction to make that determination as to whether a domestic relations order was in the nature of family support.

Regarding Bankruptcy Code 11 USC §523(a), Colliers states as follows, "for all the other exceptions [referring to sections (2) (4) (6) and (15), which are referenced above in 523(c)(1)] to discharge enumerated in §523(a), jurisdiction may be exercised by either the bankruptcy court or the state or other nonbankruptcy court (citing In re Crawford, 103 B.R.103, 33 C.B.C. 2d 1427 (Bankr.W.D.Va.1995))." 4 Collier on Bankruptcy §523.03. Section 523(a) is one of those enumerated sections which may be decided by a state court – it is the exception to discharge for obligations in the nature of family support.

Because the state court can determine dischargeability of a debt under §523(a)(5), the court should not overturn the determination by the trial court. Rather, if a change is needed to the Conclusions of Law, this court can simply order that the typographical error at paragraph 4b of the Conclusions of Law be corrected to refer to §523(a)(5).

4. Did the trial court ere when it awarded Ms. Wardle attorneys' fees?

Attorneys' fee cites no law or facts that would support a claim that the court abused its discretion in awarding attorneys' fees.

B. MS. WARDLE REQUESTS HER ATTORNEYS FEES ON APPEAL.

Ms. Wardle requests an award of attorneys' fees on appeal. In the case of Burt v. Burt, 799 P.2d 1166 (Utah App. 1170) it states, "in Rasband [Rasband v. Rasband, 752 P.2d, 1331 (Utah App. 1998)] we stated that a trial court has the power to make an award of attorneys' fees in divorce action, pursuant to Utah Code Ann. §30-3-3 (1989) 752 P.2d at 1336. Ordinarily when fees in a divorce were awarded to the party who then prevailed on appeal, fees will also be awarded to that party on appeal. Westin v. Westin, 773 P.2d 408, 412. (Utah Court App. 1999); Maughn v. Maughn, 770 P.2d 156, 162 (Utah Court App. 1989)." Id. Although the court in Burt did not award attorneys' fees on appeal, that decision was based on the grounds that the Defendant did not recover

attorneys' fees in the trial court below. However, in the present case, Ms. Wardle was awarded attorneys' fees which are disputed by Mr. Bowen on appeal. Based upon an award of attorneys' fees below and based upon Utah Code Ann. §30-3-3 (1989), Ms. Wardle requests this court to award attorneys' fees incurred by her on appeal.

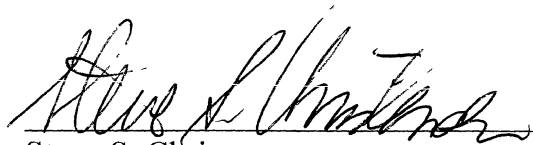
CONCLUSION

Because there is no factual or legal basis to question the court's determination of Mr. Bowen's income, the court's division of daycare costs and medical expenses or the award of attorneys' fees, the trial court's decision should be affirmed.

Further, Appellee requests the court to award attorneys' fees for having to respond to this appeal.

DATED this 15th day of September 2004.

HIRSCHI CHRISTENSEN, PLLC

A handwritten signature in black ink, appearing to read "Steve S. Christensen", is written over a horizontal line.

Steve S. Christensen
Attorney for Appellee/Petitioner