1993

Frank P. O\'Donnell v. Mary A. O\'Donnell : Reply Brief

Utah Court of Appeals

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930300 IN THE COURT OF APPEALS

FOR THE STATE OF UTAH

FRANK P. O'DONNELL,	)	
Appellant,	)	Case No. 930300-CA
vs.	)	
MARY A. O'DONNELL,	)	
		Priority No. 16
Appellee.	)	

REPLY BRIEF OF APPELLANT FRANK P. O'DONNELL

Appeal from an Order Denying
Appellant's Petition to Modify a Divorce Decree
Entered by the Third Judicial District Court
for Salt Lake County, State of Utah
Honorable Richard H. Moffat
District Judge

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REPLY BRIEF OF APPELLANT FRANK P. O'DONNELL

ARGUMENT

I. THE TRIAL COURT ERRED IN CONSIDERING PLAINTIFF'S PRESENT WIFE'S INCOME IN DETERMINING THAT NO SUBSTANTIAL CHANGE OF CIRCUMSTANCES HAD TAKEN PLACE FOR PURPOSES OF MODIFICATION OF ALIMONY AND CHILD SUPPORT

In support of her position that the trial court may consider a new spouse's income for purposes of determining modifications of child support and alimony obligations, defendant cites *Crockett v. Crockett*, 836 P.2d 818 (Utah App. 1992). That case is inapposite because it applies to awards of attorney's fees and costs, not child support and alimony. In *Crockett*, the petitioner sought an increase in child support and an order applying the increase retroactively. The trial court increased the child support by $900 a month, but denied the request to apply the award retroactively as well as petitioner's request for attorney's fees and costs in the amount of $23,679.66.

On appeal, petitioner argued that the trial court should not have considered her new husband's income in determining that she had no financial need for assistance with her

attorney's fees. The Court of Appeals acknowledged that the legislature, by enacting UTAH CODE ANN. § 78-45-7.4, had prohibited the trial courts from considering a new spouse's income in setting child support obligations, overruling *Kiesel v. Kiesel*, 619 P.2d 1374 (Utah 1980). But the court noted that the legislature had not placed a similar prohibition on considering a new spouse's income in determining whether to award *attorney's fees and costs*. The court stated: "We therefore similarly hold that a trial court is not precluded as a matter of law from considering the income of a receiving parent's new spouse *when determining the receiving parent's 'need' for costs and attorney fees.*" *Crockett*, 836 P.2d at 822 (emphasis added).

Here, the trial court evidently considered the income of plaintiff's new spouse when considering *both* child support *and* alimony. In the minute entry denying the plaintiff's petition, the court does not distinguish between child support and alimony--the court simply says: "The Petition is denied." Record at 589. The findings of fact recite that "Plaintiff's present wife, Susan, has a base salary of $3,000.00 per month from Scotia Engineering." Record at 638, ¶ 5. (Susan, however, testified that at the time of the trial on November 30, 1992, she had *actually* received only $17,700 for the year 1992--an average of $1,609 a month--although she *should have* received a base of $3,000 a month. In prior years, her income was even less. Transcript at 107).

UTAH CODE ANN. § 78-45-7.4 (Supp. 1992), specifically prohibits the trial court from considering a new spouse's income for purposes of determining child support:

> Adjusted gross income shall be used in calculating each parent's share of the child support award. *Only income of the natural or adoptive parents of the child may be used to determine the award under these guidelines.*

(Emphasis added).

Defendant argues that UTAH CODE ANN. § 78-45-7.4 (1992) merely precludes the trial court from using a new spouse's income in calculating the child support award under the uniform child support guidelines--the trial court is not precluded from considering a new

spouse's income in cases where the guidelines are rebutted. Defendant points to UTAH CODE ANN. § 78-45-7(3), which instructs the trial court to consider "the standard of living and situation of the parties" and "the relative wealth and income of the parties" in establishing a support award where there is sufficient evidence to rebut the guidelines. Defendant contends that measurement of the parties' standard of living necessitates consideration of a new spouse's contribution to the standard of living of the parties under § 78-45-7(3). The Court of Appeals has already rejected a similar argument in *Ebbert v. Ebbert*, 744 P.2d 1019 (Utah 1987). In *Ebbert,* the father contended that the wealth of the mother's parents, who made large gifts of money to the mother during the marriage, should have been considered by the trial court when establishing the amount of child support under UTAH CODE ANN. § 78-45-7. The court stated:

> Such a consideration would be tantamount to imputing the wealth and income of her parents to defendant, and thereby imposing a duty of child support on the grandparents. *Such a result is contrary to the concepts of parental duty and common sense.*

Id. at 1023.

The trial court's consideration of plaintiff's wife's income is tantamount to imputing her income to plaintiff, thereby imposing a duty upon her to support plaintiff's child and ex-wife. Such a result is contrary to common sense and concepts of the duties of a new spouse to the former spouse and children of the former marriage.

Defendant also cites UTAH CODE ANN. § 78-45-4.1 in support of her argument that the legislature did not intend to prevent stepparents from having *any* obligation to support the stepchild. Section 78-45-4.1 provides:

> *A stepparent shall support a stepchild to the same extent that a natural or adoptive parent is required to support a child.* Provided, however, that upon the termination of the marriage or common law relationship between the stepparent and the child's natural or adoptive parent the support obligation shall terminate.

(Emphasis added.) Section 78-45-4.1 does not help defendant--section 78-45-2(14) defines "stepparent" as "a person ceremonially married to a child's natural or adoptive *custodial* parent . . . ." (Emphasis added). Thus, the stepparent's duty of support does not apply to persons married to the *noncustodial* parent, such as plaintiff's new wife.

In addition, UTAH CODE ANN. § 78-45-4.1 conforms to federal regulations pertaining to eligibility for Aid to Families with Dependent Children (AFDC)--a child who lives with both a parent and stepparent is not a "dependent child" for purposes of AFDC, if under state law of general applicability, stepparents are required to support stepchildren to the same extent that natural or adoptive parents are required to support their children. See *Concerned Parents of Stepchildren v. Mitchell*, 645 P.2d 629 (Utah 1982) (holding that the State of Utah lawfully terminated AFDC benefits for stepchildren). Further, under UTAH CODE ANN. § 78-45-4.2, stepparents may sue natural parents for indemnification of support payments which the stepparents have made. *Id.* at 634. Section 78-45-4.2 provides:

> Nothing contained herein shall act to relieve the natural parent or adoptive parent of the primary obligation of support; *furthermore, a stepparent has the same right to recover support for a stepchild from the natural or adoptive parent as any other obligee.*

Thus, the legislature's main intent in enacting UTAH CODE ANN. § 78-45-4.1 was to force stepchildren to look to a stepparent *living with the custodial parent* for support, rather than AFDC or other public welfare programs.

Defendant's argument that the legislature did not mean entirely to prohibit the court from considering a new spouse's income when making and modifying awards of child support fails completely. Here, the trial court obviously considered plaintiff's wife's income when denying the petition to decrease child support and that consideration was error.

The trial court also erred in considering plaintiff's present wife's income in denying plaintiff's petition to modify the alimony award. In *Paffel v. Paffel*, 732 P.2d 96 (Utah 1986), the Utah Supreme Court merely held that, *when placed in context,* the trial court did not err in considering the appellant's present wife's income and separate assets in

determining the appellant's ability to pay spousal support--the court *did not* hold that it is *always* proper for the trial court to consider the new spouse's income, as defendant argues. *Paffel* at 101-102.

In this case, the trial court should not have relied on *Paffel* since it is fundamentally different from the present case. In *Paffel*, the appellant's inclusion of his wife's expenses while excluding her income from his statements about his finances was patently unfair and deceptive--it was not just a "mere difference in numbers" as defendant asserts. Appellee's Brief at 8. The Utah Supreme Court felt that the appellant's own behavior justified the trial court's consideration of appellant's present wife's income and assets. *Id.* at 102.

In *Muir v. Muir*, 841 P.2d 736 (Utah App. 1992), the Court of Appeals observed that the appellee's new wife drew a salary from a closely-held corporation in which the appellee was virtually the sole owner. The court noted:

> We do not suggest that the new wife's income should be added to Husband's stated salary. However, the new wife's income most likely relieves Husband of a portion of his stated expenses.

Id. n. 1 at 741. In this case, where plaintiff carefully separated his present wife's expenses from those of his own, the trial court erred in adding her income to his in deciding that his financial circumstances have not changed from the time of the divorce decree.

II. THE TRIAL COURT ERRED IN ADDING PLAINTIFF'S TRAVEL AND ENTERTAINMENT BENEFITS TO HIS SALARY WHERE THERE IS NO EVIDENCE IN THE RECORD THAT PLAINTIFF'S BENEFITS HAD CHANGED

Defendant contends that the trial court correctly considered the value of plaintiff's employment benefits to determine that no substantial change in circumstances had occurred. Defendant argues:

> The trial court found that the Plaintiff's business perquisites constituted a substantial benefit, requiring an upward adjustment of his stated income. *After adjusting the stated income to include the employment benefits, the trial*

court found that there was no substantial change in Plaintiff's circumstances. These determinations are all correct in fact and law. Muir v. Muir, supra.

Appellee's Brief at 9. (Emphasis added).

Actually the trial court never did place a value on plaintiff's business perquisites. In the findings of fact, the court recites: "In addition to the Plaintiff's salary, he receives a car, medical insurance and an entertainment allowance which he uses for entertaining clients, but which also pays for his travel and entertainment." Record at 638. The court made no further findings as to the worth of these benefits or whether such benefits had increased since the time of the divorce decree.

Plaintiff does not dispute that the trial court may take into consideration the value of employer-provided benefits when determining a party's income. The problem with the trial court's findings and conclusions are that they do not go far enough--a mere finding that plaintiff receives benefits does not lead inexorably to a conclusion that these benefits should be added to plaintiff's stated income. The court also should be required to find whether the benefits have changed since the time of the divorce decree. If the benefits have remained the same, then the precise value of the benefits have little relevance to a determination of whether there has been a material change in circumstances.

Here, there is no evidence in the record that plaintiff's benefits had changed since the time the divorce decree was entered--in fact, plaintiff testified he still drove the same company car (a Cadillac purchased in 1988) he drove at the time of the divorce in February 1991. Transcript at 108, 116. In the absence of any evidence to the contrary, one could infer safely that plaintiff's level of travel and entertainment on behalf of the company was about the same in November 1992, as it had been two years before in February 1991. Plaintiff stipulated that his expenses were the same--the only change in plaintiff's circumstances is that his salary decreased by $1,500 a month.

Defendant claims that plaintiff failed to respond to discovery requests for "detailed expense records." Appellee's Brief at 12. This statement is utterly false--defendant never

made any discovery requests. Transcript at 93-94; *See* Index to Record on Appeal. Defendant served a trial subpoena on Warren Barber, an officer of plaintiff's employer, commanding him to bring the 1991 corporate income tax returns, company financial statements, and the "Entertainment Expense Ledger for 1992" *to the trial.* Record at 586-587. At the trial, defendant's attorney attempted to conduct the discovery that he should have completed during the year the petition to modify the decree was pending. Transcript at 94-96. Understandably, the trial court grew very impatient with counsel's attempt to establish who-ate-what-meal-with-whom-and-where for each entry in the ledger through a witness who also, understandably, could not remember the details of each lunch he had eaten during the past year. Transcript at 81, 96-97. Once plaintiff had produced evidence that his salary had substantially decreased, the burden of proof shifted to defendant to come forward with evidence that plaintiff's circumstances had *not* changed, considering other factors applicable to his financial situation, including his benefits. Transcript, 83, 95. It was not plaintiff's burden to prove a negative; that is, that reimbursement for business expenses should not be added to his income.

III. THE TRIAL COURT ERRED IN AWARDING ATTORNEY'S FEES TO DEFENDANT

Defendant cites *Lyngle v. Lyngle*, 831 P.2d 1027 (Utah App. 1992) in support of her argument that the attorney's fee award should be upheld despite the fact that the court failed to make specific findings regarding plaintiff's ability to pay the attorney's fees, defendant's financial need to have assistance with the attorney's fees, or the reasonableness of the fees. *Lyngle* has no application to this case, even in principle--*Lyngle* was a suit to enforce the provisions of a divorce decree, not a suit to modify the decree. In response to the husband's claim that an award of attorney's fees must be supported by evidence of the wife's financial need, the court responded:

> Husband fails to comprehend the nature of these proceedings. *In this suit, Wife is not seeking to obtain or modify a divorce decree but to enforce the*

> *provisions of a decree she obtained in 1986.* In an action to enforce the provisions of a divorce decree, an award of attorney fees is based solely upon the trial court's discretion, regardless of the financial need of the moving party. (Emphasis added, footnote omitted).

Id. at 1030.

CONCLUSION

The trial court erred in considering plaintiff's present wife's income in denying plaintiff's petition to modify the divorce decree by reducing his child support and alimony obligation. UTAH CODE ANN. § 78-45-7.4 specifically prohibits a trial court from considering a new spouse's income in making child support awards. It was inappropriate for the court to consider plaintiff's wife's income in refusing to modify the alimony award where plaintiff excluded his wife's expenses from those of his own in the evidence presented to the court.

The trial court was not required to determine the precise value of plaintiff's employer-provided benefits in determining whether plaintiff's ability to pay alimony had materially changed, where the record is devoid of any evidence that the benefits had increased from the time of the decree. Defendant also failed to establish that the benefits had value. In any case, defendant's failure to conduct any discovery on the issue of benefits cannot be attributed to plaintiff. Plaintiff sustained his burden of proving that his income had decreased, causing a material change in his financial circumstances.

The trial court erred in awarding attorney's fees to defendant without making the requisite findings regarding the plaintiff's ability to pay, defendant's financial need, and the reasonableness of the fees, and without finding that defendant was even obligated to pay attorney's fees.

The court should reverse the decision of the trial court denying plaintiff's motion to reduce his child support and alimony obligation and ordering plaintiff to pay defendant's attorney's fees.

DATED this 7 day of October, 1993.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that I mailed four true and correct copies of the foregoing **REPLY BRIEF OF APPELLANT FRANK P. O'DONNELL** to the following, postage prepaid, this 7 day of October, 1993:

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