

1993

Mary Coelho v. Alcides J. Coelho : Petition for Rehearing

Utah Court of Appeals

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Defendant/Appellee,

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District Court 11093

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Defendant/Appellee,

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District Court 11093

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Attorneys for Defendant/Respondent

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Defendant/Appellee,

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On June 7, 1994, the Utah Court of Appeals filed its Memorandum Decision in the appeal taken by the Plaintiff and Appellant, Mary Coelho, from the decision of the trial court. The Defendant and Appellee is Alcides J. Coelho.

This Court's decision, among other things, affirmed the trial court's award of one year of alimony to Mrs. Coelho. The decision also affirmed the trial court's allocation of the parties' IRS liability and the equity line second mortgage. Mrs. Coelho petitions this Court for rehearing with respect only to its decision as to these issues.

Mrs. Coelho petitions this Court to rehear and reconsider its decision to affirm the trial court's award limiting her alimony to a period of one year and to affirm the allocation of debts and taxes between the parties based upon the following points of law and facts which were overlooked or misapprehended by this Court:

1. The Court's affirmance of the duration of the alimony award in this case is directly in conflict with preceding cases in which the parties' respective incomes were grossly

disparate and in which the parties had been married a relatively long period of time. For example, see Thronson v. Thronson, 810 P.2d 428 (Utah App. 1991); Rappleve v. Rappleve, 855 P.2d 260 (Utah App. 1992).

2. The income of the parties in evidence at trial, and in fact included in the trial court's Findings of Fact, demonstrates a gross disparity in the parties' respective earning abilities sufficient to justify an award of permanent alimony to Mrs. Coelho.

3. The facts in evidence at trial established that Mr. Coelho's historically ability, and his income, over the last three years of the marriage, was substantial in comparison to Mrs. Coelho's earnings for the same period.

4. This Court's decision fails to recognize the ample and uncontroverted evidence presented at trial of Mrs. Coelho's present ability to earn an income sufficient to maintain herself without support from Mr. Coelho.

5. This Court's decision affirms the trial court's **speculative** determination that, after one year, Mrs. Coelho's circumstances would have changed sufficiently and she would no longer need alimony from Mr. Coelho.

6. This Court's decision affirms the trial court's equal division of the parties' tax liability and the payment of the equity line second mortgage, despite the fact that, without alimony from the Defendant, the Plaintiff had limited ability to pay debts from the marriage.

STATEMENT OF RELEVANT FACTS

The parties were married for sixteen years. During the marriage, three children were born to the parties, Sara, now 15 years of age, born August 7, 1978; Tony, now 13 years of age, born August 19, 1980; and Emily, now 7 years of age, born September 29, 1986. (R.2,

13). At the trial, the parties stipulated that the two youngest children would remain in Mrs. Coelho's custody, and that the oldest child would remain in the custody of Mr. Coelho.

After the parties married, Mrs. Coelho did not complete her college education as an art major (Tr.p.71 lines 19-21; line 23) She held various jobs, in addition to being a full-time homemaker and mother. (Tr.p. 73, lines 5-13) Over the course of the marriage, she worked as a real estate agent during the 1980's (Tr.p. 74, lines 16-17), as a ski repairer (Tr.p. 73, line 8), and as a bookkeeper for Mr. Coelho's business. (Tr.p. 73, lines 12-13)

At the time of trial, Mrs. Coelho was a full-time pre-nursing student. (Tr.p. 81, lines 3-4) She was also working fifty hours per week at two jobs, one as a ski instructor (seasonal) (Tr.p. 80, lines 23), and the other as a trainer in a center for handicapped adults. (Tr.p. 80, line 23) Plaintiff's gross monthly combined earnings from the two jobs were approximately \$1,329. (Tr.p. 80-83, Exhibits 12, 13)

Mr. Coelho is a contractor and ran his own business, Coelho Construction Company, during most of the marriage. (R-341) His earnings during the last three years of the parties' marriage, before deductions for necessary and discretionary business expenses, were \$69,032 in 1990 (Exhibit 9); \$76,954 in 1991 (Exhibit 10); and \$95,346 in 1992. (Exhibit 21) Mr. Coelho's business expenses, as shown on the tax returns (Exhibits 8, 9, 10), included deductions for depreciation, use of personal residence as an office, telephone charges, and entertainment. At the time of trial, Mr. Coelho was still self-employed, but proffered that his projected income for 1993 would be less than his 1992 net schedule "C" income of \$95,346. (Tr.p. 124, line 24)

Mrs. Coelho testified at trial that her earnings as a real estate agent had fluctuated greatly and that in the one year in which she had substantial earnings from sales, 1985, it was due to

the fact that she had received a very large commission on the sale of one property. (Tr.p. 75, lines 15-20) The commission was paid to Mrs. Coelho over three years, with her receiving the largest portion and \$10,000 a year for the following two years. (Tr. p. 75, lines 23-24) In subsequent years, her earnings dropped dramatically, and the increasing needs of the children demanded that she spend more and more time at home attending to their needs. (Tr.p. 76; lines 4-10) Mrs. Coelho also testified that her average net earnings, including extra amounts earned during the busy Christmas ski season, were \$1,121.54 per month (Exhibit 15), and that her monthly expenses, for herself and two of the parties' three children, were \$3,560.00. (Exhibit 14) Mrs. Coelho testified that she had a monthly shortfall, between the amount of income she could generate through her own efforts and the expenses for herself and the two children, of \$2,438.46. (Tr.p. 85, line 11)

At trial, Mr. Coelho did not testify, but his counsel proffered his testimony to the court, including Mr. Coelho's claim that, while 1992 was a very good year (Tr.p. 125, line 4), he believed he would not make as much in 1993 and he had, in fact, received no income for the first month of 1993. Mrs. Coelho's counsel was not allowed to cross-examine Mr. Coelho regarding his testimony because of the time limitations imposed by the court. However, Mrs. Coelho took the position that the court should find that Mr. Coelho's monthly income averaged over the years 1989 through 1992 was \$6,500. Mr. Coelho's counsel proffered at trial that his living expenses were \$3,490 per month. (Exhibit 25)

The trial court, ruling from the bench, found that Mrs. Coelho's income was the amount of \$1,500 per month (Tr.p. 138, line 25), and that Mr. Coelho's income was \$5,000 per month.

(Tr.p. 136, line 24) The court awarded alimony to Mrs. Coelho in the amount of \$1,000 per month, for a period of one year, (Tr.p. 139, line 6).

The trial court also ordered Mrs. Coelho to pay one-half of the parties' 1992 tax liability, despite the fact that the parties had not resided together at all during that entire year and despite the obvious disparity in the parties' earning abilities.

Finally, the trial court also ordered the entire balance owing on the equity line second mortgage to be paid from the proceeds of the sale of the parties' residence, thus requiring Mrs. Coelho to pay one-half of the amount, despite the fact that several thousand dollars of the balance were incurred by Mr. Coelho to pay his temporary support obligation.

ARGUMENT

I.

THIS COURT SHOULD REVERSE THE TRIAL COURT'S DECISION NOT TO AWARD PERMANENT ALIMONY TO MRS. COELHO

This Court's decision in the instant case is in direct conflict with its reasoning in the case of Thronson v. Thronson, supra, as well as other cases, for the reason that this Court affirmed the trial court's award of alimony for a duration of only year. The following facts have a significant impact on the duration of the alimony award:

1. The parties were married for 16 years;
2. The parties enjoyed a high standard of living during their marriage;
3. The parties had substantial disparity in their earnings;
4. Mrs. Coelho's monthly expenses substantially exceeded her earnings;

5. Mrs. Coelho's future earnings, even if she were able to increase her income as the trial court speculated, would be insufficient to meet her needs and she would still have a substantial shortfall.

Despite these facts, this Court in its decision in this case stated that it did "not find the award of alimony for one year at \$1,000 per month . . . to be an abuse of discretion." This conclusion overlooks significant facts as well as misapplies the case law.

Specifically, this Court has repeatedly held that the trial court must consider three factors in determining an alimony award, (1) the financial condition and needs of the party seeking alimony; (2) that party's ability to produce sufficient income for him or herself; and (3) the ability of the other party to provide support. See Naranjo v. Naranjo, 751 P.2d 1144, 1147 (Utah App. 1988) (citing English v. English, 565 P.2d 409, 410 (Utah 1977)).

In the recent case of Thronson v. Thronson, *supra*, this Court reversed the trial court's award of alimony, holding that the trial court "abused its discretion in making the alimony non-permanent, i.e., for one year." The discussion that followed focused on the parties' respective earning abilities, even assuming that Mrs. Thronson obtained full time employment, her needs, and the shortfall between the two. In Thronson, this Court stated:

Accordingly, [Mrs. Thronson] is not capable of meeting her needs, she requires \$9,400 annually to meet her needs, even when employed on a full-time basis. Thus, she will require the \$800 per month (\$9,600 annually) alimony for the foreseeable future. Otherwise, she will face a substantial income shortfall compared to her needs. . . . These findings warrant an award of permanent alimony. The trial court abused its discretion in limiting the alimony award to one year. Rasband v. Rasband, 752 P.2d 1331, 1335 (Utah App. 1988).

(Emphasis added.)

In the instant case, the trial court made the following finding:

. . . The court having reviewed and considered all the evidence, finds that based upon the current circumstances defendant has an earning capacity of \$5,000 per month and plaintiff has an earning capacity of \$1,500 per month, and the court's findings related to support and alimony are based upon these income expectancies.

Using the Court's analysis from the Thronson case here, it is clear that the trial court abused its discretion in awarding Mrs. Coelho alimony for a period of one year. First of all, the Court found that she was capable of earning \$1,500 per month and her monthly expenses were \$3,560.00. Even adding the child support award of \$619 per month to her earnings, Mrs. Coelho had a monthly shortfall of \$1,441. The Court speculated that Mrs. Coelho could "reestablish her income based on her demonstrated historical earning capacity, and limited the \$1,000 monthly award to one year.

By comparison, Mr. Coelho's earnings were found by the Court to be \$5,000 per month, despite the fact that that finding was based solely on his counsel's proffer of his projected earnings for the upcoming year, rather than his historical earning ability. Even at that income, however, Mr. Coelho had nearly \$4,200 of gross earnings after the payment of child support to support himself and **one** of the parties' children. By comparison, Mrs. Coelho had only \$2,119 to provide for herself and **two** of the parties' children, or approximately one-half of that amount. Even assuming that she would have been able to increase her earnings, as found by the court, from \$1,500 to \$2,500 per month, she would still have a shortfall without an award of alimony from Mr. Coelho. This would force her to provide for a household of three with fewer dollars than Mr. Coelho had for a household of two.

Unless this Court reverses the trial Court's award of alimony for a period of only one year, Mrs. Coelho stands to suffer the same consequence that Mrs. Thronson would have suffered had this Court not reversed the trial court's limited award of alimony in that case and made it a permanent award.

II.

THIS COURT SHOULD NOT HAVE AFFIRMED THE TRIAL COURT'S ALLOCATION OF MARITAL DEBT AND TAX LIABILITY

Despite the fact that, even with an award of alimony of \$1,000, Mrs. Coelho's ability to pay the equity line second mortgage and the parties' 1992 tax liability was substantially disparate from Mr. Coelho's ability, the trial court ordered her to pay one-half of the tax liability, as well as one-half of the equity line second mortgage from her share of the home proceeds. This was an abuse of discretion for two reasons:

First, the parties did not reside together at all during the entire 1992 year, and Mr. Coelho paid support to Mrs. Coelho pursuant to the court's temporary Order. To require Mrs. Coelho to pay one-half of the tax liability, when she did not benefit in any way whatsoever from Mr. Coelho's failure to pay it, as the support she received from him was a certain sum every month, was simply inequitable. The tax liability was incurred **after** the parties' separation, and, like other debts incurred subsequent to the time divorcing parties separate, should have been paid by the party who incurred the debt.

Second, Mr. Coelho used several thousand dollars of the money owing on the equity line second mortgage to pay his temporary support obligation, and that amount should have been paid by Mr. Coelho from his share of the home proceeds before the remaining balance was split

between the parties. At the very least, Mrs. Coelho's share of the net equity should not have been reduced by that portion of the loan incurred only by Mr. Coelho.

CONCLUSION

This Court's decision in this case is inconsistent with its previous decisions in that it has affirmed an award of limited alimony that is inappropriate based upon the length of the parties' marriage and the disparity in their respective incomes. The trial court's findings as to the parties' respective incomes constitute a sufficient basis upon which to base an award of indeterminable alimony. The trial court's award limiting Mrs. Coelho's award of alimony to one year should not have been affirmed.

Similarly, the trial court's orders allocating an equal division of the tax liability and an equal repayment of the equity line second mortgage without any offset for amounts incurred by Mr. Coelho, should not have been affirmed by this Court.

For the foregoing reasons, Petitioner requests a rehearing of this matter and a modification of this Court's decision reversing the limited award of alimony and awarding Mrs. Coelho permanent alimony that should terminate only upon her remarriage, cohabitation or death, and a more equitable order with regard to the payment of the tax liability and the equity line second mortgage.

DATED this 21st day of June, 1994.

GUSTIN & CHRISTIAN



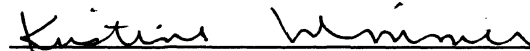
HELEN E. CHRISTIAN

Attorneys for Plaintiff/Appellant.

CERTIFICATION

HELEN E CHRISTIAN, counsel for Petitioner in this action, who, being duly sworn, does hereby certify that the foregoing Petition is presented in good faith, supported by substantial case law and authority, and is not being presented for purposes of delay.

SUBSCRIBED AND SWORN to before me this 21st day of June, 1994.



Notary Public

My Commission Expires:



CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the above and foregoing APPELLANT'S PETITION FOR REHEARING were duly hand delivered, addressed to:

B. L. Dart, Esq.
DART, ADAMSON & DONOVAN
310 South Main Street, Suite 1330
Salt Lake City, UT 84101

DATED this 21st day of June, 1994.



HELEN E. CHRISTIAN