

2006

Kallie J. Sill v. Joel Gordon Sill : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS IN AND FOR THE
STATE OF UTAH

KALLIE J. SILL,

Petitioner and Appellee,

v.

JOEL GORDON SILL

Respondent and Appellant.

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APPELLEE'S BRIEF

Appellate Case No. 2006-0296

District Court No. 004600060

Appeal from Ruling and Order of
Third District Court Judge Bruce Lubeck

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JURISDICTION OF THE COURT

This court has jurisdiction over this matter pursuant to Utah Code section 78-2a-(3)(2)(h) (2004).

ISSUES PRESENTED AND STANDARDS OF REVIEW

1. The trial court properly determined that parties to a divorce are entitled to limit or eliminate their right to seek modification of an existing alimony award that was the product of a settlement agreement between the parties.

Standard of Review: “A trial court’s legal conclusions are reviewed for correctness.” *Ong Int’l U.S.A. Inc. v. 11th Ave. Corp.*, 850 P.2d 447, 452 (Utah 1993); *see also IHC Health Servs. Inc. v. D & K Mgmt., Inc.*, 2003 UT 5, ¶ 6, 73 P.3d 320 (noting that under the proper circumstances, the issue of waiver may be decided through summary judgment); *Soter’s, Inc. v. Deseret Fed. Sav. & Loan Assoc.*, 857 P.2d 935, 940 n.1 (Utah 1993) (noting that the issue of waiver could, under the proper circumstances, be determined as a matter of law). This issue was preserved for review by Appellee’s Brief Re: Modification of Issues Raised at January 22, 2006 Hearing on [Appellee’s] Motion to Dismiss. [R. 157].

2. The trial court acted within the limits of its authority when it determined that Appellant had failed to present evidence sufficient to support his alleged claim of a change in circumstances.

Standard of Review: The court of appeals reviews a trial court's denial of a petition to modify an existing alimony award for abuse of discretion. *See Bollinger v. Bollinger*, 2000 UT App 47, ¶ 10, 997 P.2d 903. This issue was preserved for review by Appellee's Motion to Dismiss Respondent's Petition to Modify Decree of Divorce and its supporting Memorandum. [R. 119-26].

DETERMINATIVE CONSTITUTIONAL OR STATUTORY PROVISIONS

There are no constitutional or statutory provisions that are determinative on this appeal.

STATEMENT OF THE CASE

In March 2000, Appellee Kallie J. Sill ("Kallie") filed a petition to end her eighteen year marriage to Appellant Joel Gordon Sill ("Joel"). [R. 1]. The parties both retained counsel, and after protracted negotiations, they entered into a global settlement agreement that was subsequently adopted in whole by the trial court. [R. 94, 103]. Pursuant to the settlement, Joel was obliged to pay Kallie alimony in the amount of \$6,000.00 every month for a period of ten years. [R. 94 at ¶ 13]. Additionally, each party agreed to waive their right to modify the terms of the settlement, which included terms favorable to both parties, and which was the product of informed and protracted negotiations. [R. 94 at ¶ 20]. But, contrary to the terms of the settlement agreement, in September 2005, Joel petitioned the trial court for modification of the terms of the parties' alimony agreement. [R. 113]. After Kallie directed the trial court's attention to

the waiver provision of the settlement agreement, as well as to the obvious absence of anything that would support a conclusion that Joel's circumstances had substantially and materially changed, the trial court denied Joel's motion and dismissed the claim. [R. 182]. Joel now appeals. [R. 188].

BACKGROUND

In March 2000, after eighteen years of marriage, Appellee Kallie J. Sill ("Kallie") and Appellant Joel Gordon Sill ("Joel") decided to end their relationship and Kallie filed a Divorce Petition in the Third District Court of Summit County. [R. 1]. Each party retained competent counsel and after protracted negotiations, Kallie and Joel agreed to the terms of a settlement, which disposed of all of the issues material to the divorce. [R. 76, 94]. Through the settlement, the parties agreed, in effect, to split the marital assets, including the value of any real property that the parties had obtained while married and Joel's accumulated retirement accounts. [R. 94 at ¶ 3]. The parties also agreed to a formula for the distribution of any proceeds realized through the eventual sale of the marital home, which was being built when the relationship ended. [R. 94 at ¶¶ 3(f), (g), (i), 8, 9]. During the marriage, Joel had accrued rights to certain royalty payments that had yet to be paid, and the parties agreed to divide these equally as they were received. [R. 94 at ¶ 11]. Joel agreed to assume certain debt and both parties agreed to take all actions necessary to implement the provisions of the decree, including an agreement to jointly file their 2000 tax return and share in any tax liability for that year. [R. 94 at ¶¶ 14,

17, 18]. Finally, the parties agreed to the terms of alimony that Joel would provide Kallie. [R. 94 at ¶ 13].

Although the parties had been married for eighteen years, Kallie agreed that the alimony should run for only ten years, and Joel agreed to pay her \$6,000.00 per month over that period. [R. 94 at ¶ 13]. The parties specifically agreed that the alimony payments would cease if Kallie either remarried, cohabitated, or died before the end of the agreed upon alimony term. [R. 94 at ¶ 13]. However, to ensure that Kallie would receive the entire alimony amount, Joel agreed to obtain a life insurance policy, naming Kallie as the sole beneficiary, in the principle amount of \$750,000.00, which approximated the amount of alimony that Joel was expected to pay over the term of the agreement. [R. 94 at ¶ 15]. The settlement further provided that only after Joel had complied with all of the terms of the settlement agreement, including payment of all alimony, would he be permitted to either cancel the policy or name a different beneficiary. [R. 94 at ¶ 15]. Having agreed to all of the terms material to the final dissolution of the marriage, the parties then decided to make the agreement permanent; therefore, they agreed to waive all rights to modify any of the terms of the agreement once it had been accepted by the trial court. [R. 94 at ¶ 20]. Specifically, paragraph twenty of the settlement states, “[t]he provisions of this Decree of Divorce shall be non-modifiable with the *sole* exception that if all of the assets have not been disclosed and

divided in this agreement, those may be brought back before the Court for appropriate disposition.” [R. 94 at ¶ 20] (emphasis added).

The parties made no mention in the settlement agreement of Joel’s income at the time of the divorce or his historic income. Nor did the parties discuss Kallie’s income or her ability to produce income. Instead, the entire settlement agreement focused on the parties’ assets, including existing and expected liquid assets. In fact, the terms of the alimony agreement do not appear to be based on any need versus ability analysis. The trial court, after reviewing the terms of the settlement agreement—including the alimony agreement—and the parties’ pleadings and disclosures, adopted the settlement agreement in whole, including the waiver provision, on March 6, 2001. [R. 94].

Both parties complied with all of the terms of the agreement until September 13, 2005, when Joel filed a Petition to Modify the Divorce Decree with the district court. [R. 113]. Through this petition, Joel asked the court to reduce the amount of alimony that he had agreed to pay, asserting without reference to any supporting facts that he had experienced a substantial decrease in income since the decree was entered. [R. 114 at ¶ 4]. Kallie moved to dismiss, arguing not only that Joel failed to present the court with any grounds that would support modification, but also that the parties—both of them—had waived the right to modify any of the terms of the settlement, including the terms of the alimony agreement. [R. 119, 157]. The court, after reviewing substantive pleadings

submitted by both parties, agreed with Kallie and dismissed Joel's Petition. [R. 182]. Joel now appeals. [R. 188].

SUMMARY OF THE ARGUMENTS

Under Utah law, every competent and informed individual is entitled to waive virtually any substantive right, whether constitutional or statutory. The rights subject to waiver range from the right to counsel to the right to appeal an adverse decision.

Moreover, the right to seek modification of the terms of an agreed-upon alimony award is also subject to waiver, and Utah courts have recognized and enforced such waivers.

Utah's position agrees with the position of most, if not all, of her sister states, where it has been generally accepted that a party to a stipulated divorce agreement is fully empowered and permitted to waive his right to seek modification of the terms of the settlement agreement, even when the agreement includes an alimony award.

Under Utah law, as well as the law of Utah's sister states, waiver will be found when a party has a right, knows of the right, and intentionally waives his or her right to exercise that right. Here, it is undisputed that under Utah law parties have the right to petition a court to modify an alimony award if the circumstances warrant the modification. It is equally undisputed that at the time the parties entered into the settlement agreement, they were each aware that under Utah law they had the right to seek

modification should there be a substantial and material change of the parties' circumstances.¹ Finally, Joel has never argued that in signing the settlement agreement and presenting it to the trial court he did not intend to waive his right to modify the alimony terms. Moreover, the terms of the agreement are clear, and under paragraph twenty of the stipulated decree, both parties agreed to waive the right to modify any of the terms of the agreement, which clearly includes the terms of the alimony agreement. Consequently, Joel's settlement waiver satisfies each of the elements required under Utah law and the trial court properly concluded that he had waived the right to seek modification.

Additionally, even if no waiver existed in this case, Joel has abjectly failed to present the court with any facts to support his claim that his income substantially decreased between the time of the decree and 2005. To successfully plead a petition to modify, at a minimum, Joel must present the court with facts showing a material, substantial change in circumstances. Here, he pleaded no facts at all; instead he presented the court with a bald and unsupported conclusory statement that his income had substantially decreased. When faced with a motion to dismiss highlighting this failure,

¹ Joel did not argue before the trial court, and has made no effort to argue here, that he was unaware of this right at the time he entered into the settlement. Moreover, at all times relevant to this proceeding, Joel has been represented by competent and qualified counsel who advised him at every step in the process. Thus, it should be presumed that Joel was aware of his statutory right to modify the alimony terms when he chose to waive that right.

rather than amend his pleading or attempt some other avenue of repair, Joel maintained that his assertion was facially sufficient. In the absence of any facts supporting the claim, the court properly dismissed Joel's petition.

ARGUMENT

Utah has long permitted parties to waive their substantive statutory and constitutional rights, including the right to seek modification of the terms of an alimony agreement. Further, many of Utah's sister states follow a similar rule, with the caveat for all being that the waiver must be made knowingly and intelligently. In this case, the parties stipulated to the disposition of all matters concerning their divorce, including the amount and duration of the alimony award. They then agreed to waive any and all right to modify any element of the stipulated decree, including alimony, and the trial court, after examining the stipulation, adopted the stipulation as its order. Consequently the trial court did not err in dismissing Appellant's Motion to Modify.

Moreover, assuming that the parties had not waived the right to seek modification, as the petitioner, it was incumbent upon Appellant to plead sufficient facts to support his alleged substantial material change in circumstances. Instead, he merely asserted in his complaint that his income was "substantially reduced" from the time of the decree. This is materially insufficient, and the trial court acted well within its discretion in dismissing his claim as lacking any evidentiary basis.

I. THE TRIAL COURT CORRECTLY DETERMINED THAT THE PARTIES HAD AFFIRMATIVELY WAIVED THE RIGHT TO MODIFY THE TERMS OF THE DECREE

Joel argues that Utah law prohibits the waiver of the right to modify an agreed-upon alimony award, and that as such, the trial court erred in dismissing his Petition to Modify. However, Joel is incorrect.

Utah has long allowed competent adults to waive substantive statutory and constitutional rights, and this includes allowing parties who agree to the terms of a divorce settlement to waive the right to seek modification. Moreover, Utah's position reflects the position adopted in most, if not all, of Utah's sister states and there is no rational public policy reason to treat the waiver of the right to modify differently from the waiver of any other substantive right.

A. Utah Has Long Recognized that Adults Have the Right to Affirmatively Waive Substantive Statutory and Constitutional Rights

Although Joel insists that waiver is not permitted in this context, his position is unsupported. Utah courts have long recognized a party's ability to waive the right to modify the terms of an alimony award contained in a stipulated divorce decree, and Joel's assertion of a contrary position is simply incorrect. Perhaps most instructive on this issue is *Kinsman v. Kinsman*. See 748 P.2d 210 (Utah Ct. App. 1988). In *Kinsman*, the parties agreed to the terms of a settlement agreement, which addressed all of the material aspects of their divorce, including a provision wherein the petitioner waived her right to alimony. See *id.* at 211. The parties presented the settlement agreement to the court and the court

adopted the agreement as its decree of divorce. *See id.* at 211. Within the settlement agreement, the parties included the following provision:

“The parties hereby stipulate and agree that each party is a fit and employable person capable of supporting himself and herself respectively and that neither party is entitled to alimony and both parties hereby waive the same now and forever.”

Id. at n.1 (quoting language from the parties’ stipulated divorce Decree). After the divorce was final, the petitioner asked the court to modify the terms of the decree to include alimony. *See id.* The petitioner argued that due to the respondent’s declaration of bankruptcy, and the effects of that action, there had been a substantial, material change in circumstances warranting modification, even though the petitioner had waived any present or future right to alimony. *See id.* The trial court, without commenting on the decree’s waiver provision, granted the petitioner’s motion. *See id.* On appeal, the court of appeals chastised the trial court, stating that it “decline[d] to hold that a change of circumstances can overcome a knowing and specific waiver in a stipulation.” *Id.* at 212. The court explained that “to base the award of alimony on changed circumstances ignores the finality of the terms of the stipulation which should only be overturned ‘with great reluctance and for compelling reasons.’” *Id.* at 212 (quoting *Land v. Land*, 605 P.2d 1248, 1251 (Utah 1980)). The court further explained that if a party were allowed to overcome its agreements by claiming that a “change in circumstances” has occurred, “[n]othing would prevent a party from negotiating a favorable settlement in exchange for a waiver

. . . and sometime later, having enjoyed the benefit of the agreement and having dissipated the assets awarded, coming back to the court to [modify the agreement].” *Id.* at n.2.² The court then proceeded to examine the settlement agreement as it would any contract. *See id.* at 212. Using this analytical structure, the court affirmed the trial court’s decision, but only because the defendant had failed to perform the condition precedent necessary to trigger the agreement’s waiver provision. *See id.* at 212-13.

Similarly, in *Reese v. Reese*, the Utah Supreme Court held “that spouses or prospective spouses may make binding contracts with each other and arrange their affairs as they see fit, insofar as the negotiations are conducted in good faith . . . and do not unreasonably constrain the court’s equitable and statutory *duties*.” 1999 UT 75, ¶ 25, 984 P.2d 987 (emphasis added). And more recently, this court, in *Medley v. Medley*, discussed waiver in the context of a stipulated divorce decree and held that the appellant “must show that [the appellee] knowingly and intentionally gave up the right to obtain support from him in the future.” 2004 UT App 179, ¶ 8, 93 P.3d 847. Throughout its analysis, the *Medley* court recognized that parties to a stipulated divorce retained the ability to waive their substantive rights and that this ability was not precluded merely

² The court did, however, determine that the stipulation was void for failure of a condition precedent, and thus it relieved the Appellee of her obligation to perform under the stipulation. *See Kinsman v. Kinsman*, 748 P.2d 210, 213 (Utah Ct. App. 1988). This holding, however, has no application here, because the parties included no provision in the Decree that remotely resembles a condition precedent. Consequently, *Kinsman* provides no avenue of relief for Appellant in this case.

because of their status as parties to a divorce. *See id.* Thus, there is no question that under Utah law that divorcing parties are permitted to waive their substantive right to modify a stipulated divorce decree.

Additionally, outside of this context, Utah courts have accepted that any competent party has the right to waive virtually any substantive statutory and constitutional right. *See United Park City Mines Co. v. Stichting Mayflower Mountain Fonds*, 2006 UT 35, 533 Utah Adv. Rep. 21; *State v. Pedockie*, 2006 UT 28, 137 P.3d 716; *Lucero v. Kennard*, 2005 UT 79, 125 P.3d 917; *State v. Lara*, 2005 UT 70, 124 P.3d 243; *438 Main Street v. Easy Heat, Inc.*, 2004 UT 72, 99 P.3d 80; *In re Estate of Flake*, 2003 UT 17, 71 P.3d 589; *McCoy v. Blue Cross & Blue Shield*, 2001 UT 3, 20 P.3d 901; *see also Bluemel v. State*, 2006 UT App 141, 134 P.3d 181; *Aspenwood, L.L.C. v. C.A.T., L.L.C.*, 2003 UT App 28, 73 P.3d 947; *State v. Valencia*, 2001 UT App 159, 27 P.3d 573; *Badger v. Madsen*, 896 P.2d 20 (Utah Ct. App. 1995); *State v. Cornejo*, 2006 UT App 215, 138 P.3d 97.

For example, in *State v. Cornejo*, the Utah Court of Appeals recognized that a criminal defendant could waive his or her right to a speedy trial, a substantive constitutional right, through his own actions or the actions of his attorney. *See* 2006 UT App 215 at ¶¶ 28, 31. In *Lucero v. Kennard*, the supreme court discussed a criminal defendant's ability to waive the right to counsel, and stated that "[a] court may not presume waiver of the right to counsel unless there is some evidence that the defendant affirmatively acquiesced to the waiver of counsel." 2005 UT 79 at ¶ 25. But, the court's

discussion made it clear that a criminal defendant was empowered to waive the right to counsel. *See id.* In *Schultz v. State*, the court of appeals recognized that a defendant is capable of waiving his right to appeal an adverse ruling, *see* 2006 UT App 105, ¶¶ 9-10, 132 P.3d 701, and in *State v. Beckstead*, the supreme court noted that a criminal defendant's guilty plea operates as a waiver of most substantive constitutional rights. *See* 2006 UT 42, ¶ 10, 557 Utah Adv. Rep. 66. *See also Turville v. J & J Props., L.C.*, 2006 UT App 305, ¶ 44, 556 Utah Adv. Rep. 24 (noting that under Utah law it is possible to waive the right to appeal by accepting the benefits of a judgment in his favor).

Perhaps most important to this discussion is *Soter's Inc. v. Deseret Federal Savings & Loan*, in which the supreme court addressed Utah's waiver rules and created an integrated approach to be applied to all waiver cases. 857 P.2d 935 at 940-42. To accomplish its task, the *Soter's* court was forced to address several existing decisions that created what it described as different standards of proof. *See id.* at 939. The court traced the genesis of these different standards and concluded that waiver law had become "confused" in Utah. *Id.* Then, in an attempt to reconcile the confusion, the court admitted that errors had been made, and, after a brief discussion of the aforementioned errors, the court held "that there is only one legal standard required to establish waiver under Utah law." *Id.* at 942. Thus, in Utah, "[a] waiver is the intentional relinquishment of a known right. To constitute waiver, there must be an existing right, benefit or

advantage, a knowledge of its existence, and an intention to relinquish it.” *Id.*³

Since the issuance of the *Soter*’s decision, Utah courts have applied the *Soter*’s analysis to a number of cases, which involved a number of legal questions. In *Jensen v. IHC Hospital, Inc.*, the supreme court applied the *Soter*’s analysis to the question of whether the defendant had waived its right to assert a defense in a medical malpractice setting. 2003 UT 51, ¶¶ 81-92, 82 P.3d 1076. In *IHC Health Services v. D & K Management, Inc.*, the supreme court applied *Soter*’s to determine whether the plaintiff had waived its right to enforce the default provision of its lease with the defendant. 2003 UT 5, ¶¶ 7-9, 73 P.2d 320. In *In re Estate of Uzelac*, this court applied the *Soter*’s analysis to determine whether the personal representative of the estate had waived his right to claim “certain personal property.” 2005 UT App 234, ¶¶ 22-24, 114 P.3d 1164. But perhaps most illuminating are the statements that the supreme court made in *In re Discipline of Alex*, 2004 UT 81, 99 P.3d 865. In that case, the court was asked to determine whether an intervenor had “waived its right to seek reconsideration of the March 22 order when it stipulated to the trustee’s possession of Alex’s property in the context of the contempt hearing.” 2004 UT 81 at ¶ 20. However, although the court’s discussion of waiver in that context is illuminating, more important to the analysis of this case is the language of the court wherein it articulated the broad application of *Soter*’s,

³ The court also noted that “[i]n Utah, a distinct intent to waive must only be shown by a preponderance of the evidence.” *Soter’s, Inc. v. Deseret Fed. Sav. & Loan Assoc.*, 857 P.2d 935, 942 n.6 (Utah 1993).

stating, in effect, that when the issue involves the waiver of a substantive right, as opposed to a procedural right, the *Soter*'s analysis applies. 2004 UT 81 at ¶ 21 n.2. Consequently, there is no question that *Soter*'s represents the articulation of waiver law in Utah, and under *Soter*'s and its progeny, the *Soter*'s analysis is applicable whenever the court is asked to examine the waiver of a substantive right, such as the right to seek modification of an existing alimony award.

The ability to waive substantive rights is well-established in Utah, and there exists no rational basis to preclude waiver of the right to modify an agreed-upon alimony award. Moreover, Utah courts have recognized the right to waive the power to seek modification, and Joel's argument to the contrary is simply incorrect.

B. Utah's Position is Mirrored in Most, if Not All, Jurisdictions within the United States

Mirroring the position adopted by the Utah courts, most, if not all, of Utah's sister states have accepted that competent parties to a stipulated divorce decree are empowered to waive their right to modify an alimony award, and that the agreements executed by those parties should be enforced. *See In re Marriage of Thornton*, 115 Cal. Rptr. 2d 380, 383 (Cal. Ct. App. 2002); *In re Marriage of Christin*, 899 P.2d 339, 343 (Colo. Ct. App. 1995); *Bassett v. Bassett*, 464 So. 2d 1203, 1205-06 (Fla. Ct. App. 1985); *Dimon v. Dimon*, 204 S.E.2d 148, 149 (Ga. 1974); *Staple v. Staple*, 616 N.W.2d 219, 226-28 (Mich. Ct. App. 2000); *In re the Marriage of Gessner*, 487 N.W.2d 921, 923 (Minn. Ct. App. 1992); *In re Marriage of McInnis*, 110 P.3d 639, 642-43 (Or. Ct. App. 2005);

Degenhart v. Burriss, 602 S.E.2d 96, 97-98 (S.C. Ct. App. 2004); *Nichols v. Nichols*, 469 N.W.2d 619, 622-23 (Wis. 1991).

For instance, in *In re Marriage of McInnis*, the Oregon Court of Appeals was asked to review the effect of a stipulated divorce decree, which included the following provision: “[a]ll spousal support payments as provided herein shall be non-modifiable.” See 110 P.3d at 640 (alteration in original) (quoting from the parties’ settlement agreement). After describing the agreement, the *McInnis* court asserted that its analysis was founded on the principle that “[i]t is well established that the parties to a dissolution proceeding ‘may and often do enter into separate agreements regarding the terms of dissolution.’” *Id.* (citation omitted). “Once approved by the court . . . ‘agreements entered into by the parties are to be enforced as a matter of public policy.’” *Id.* (citation omitted).⁴ The court then proceeded to address the question of “whether

⁴ In describing the nature of public policy, the court stated
“‘It is axiomatic that public policy requires that persons of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by courts of justice; and it is only when some other overpowering rule of public policy intervenes, rendering such agreements unfair or illegal, that they will not be enforced.’”

In re Marriage of McInnis, 110 P.3d 639, 642-43 (Or. Ct. App. 2005). In general, public policy has been defined as “‘the community common sense and common conscience, extended and applied throughout the state to matters of public morals, public health,

waiving the right to seek a modification of spousal support contravenes the statutory authority of the court.” *Id.* at 645. The court noted that “[t]he waiver provision in this case has nothing to do with the authority of the court; rather, it involves only whether the parties may invoke it”; thus, such waivers neither implicate nor interfere with the trial court’s general authority related to modification cases. *Id.* The court further noted that “adults with the capacity to do so generally are free to waive a panoply of rights, statutory and constitutional, so long as the waiver is knowing and intentional.” *Id.* Then, after discussing the “panoply of rights” that Oregon allows a party to waive, the court concluded that “a waiver of spousal support is fully enforceable as long as the terms of the agreement as a whole are fair and equitable and the spouse is not without reasonable means of support.” *Id.* Therefore, the court concluded, “[a] provision providing that no alimony shall be paid will be enforced unless the spouse has no other reasonable source of support.” *Id.* at 646-47 (alteration in original) (citation omitted).

Similarly, in *Loo v. Loo*, although the Minnesota Supreme Court ultimately concluded that the parties had not waived the right to modify an alimony award, the court

public safety, public welfare, and the like.”” *Adams v. Green Mountain R.R. Co.*, 862 A.2d 233, 235 (Vt. 2004) (citations omitted); *see also Hammonds v. Aetna Cas. & Sure. Co.*, 243 F.Supp. 2d 793, 796 (N.D. Ohio 1965) (defining public policy as “that general and well settled public opinion relating to man’s plain, palpable duty to his fellowmen, having due regard to all the circumstances of each particular relation and situation”). Here, the parties entered into the settlement agreement freely and with the guidance of competent and capable legal counsel. The settlement was presented to, and adopted by, the court as its order. Neither party was coerced to enter into the agreement and both parties benefitted from the agreement. Consequently, there is no sound public policy reason to void the parties’ agreement.

maintained “that a waiver of the statutory right to move for modification of spousal maintenance, if contained in a stipulation that a trial court has incorporated into a judgment and decree of marital dissolution, is enforceable.” 520 N.W.2d 740, 740 (Minn. 1994) (citing *Karon v. Karon*, 435 N.W.2d 501 (Minn. 1989)). The court further stated that

[a]lthough Minn. Stat. § 518.64 provides that orders regarding maintenance may be modified upon a showing of one of several statutory factors, in *Karon* we held that a stipulation in which the parties expressly waive their rights to modify the maintenance terms of the judgment and decree is enforceable and that courts may not later modify the stipulated maintenance provision.

Id. at 744 (citing *Karon*, 435 N.W.2d at 503). Thus, it is beyond dispute that Minnesota allows parties to a stipulated divorce decree to waive their right to seek a modification of the terms of their decree.

In 2000, the Michigan Court of Appeals followed a similar approach in its waiver discussion contained in *Staple v. Staple*. See 616 N.W.2d 219 (Mich. Ct. App. 2000). In *Staple*, the court was “asked to decide if parties who negotiate a divorce settlement may forego [the] statutory right to petition the court to modify the alimony provisions and instead agree that the agreed-upon alimony provisions are final, binding, and nonmodifiable.” *Id.* at 220. The court concluded that parties were indeed permitted to waive their right to modify an agreed-upon alimony award, *see id.*, stating that “we opt to honor the parties’ clearly expressed intention to forego the right to seek modification and to agree to finality and nonmodifiability.” *Id.* at 223. The court grounded its decision on

its conclusion that Michigan’s modification statute “does not [expressly] preclude the parties from waiving their rights to petition the court for modification,” *id.* at 226, and the fact that the courts of Michigan have historically “enforced agreements to waive statutory rights,” *id.* As a result, the *Staple* court concluded that “the statutory right to seek modification of alimony may be waived by the parties where they specifically forego their statutory right to petition the court for modification and agree that the alimony provision is final, binding, and nonmodifiable.” *Id.* at 228.⁵

Both *Bassett v. Bassett*, 464 So. 2d 1203 (Fla. Ct. App. 1985), and *Nichols v. Nichols*, 469 N.W.2d 619 (Wis. 1991), also have held that parties to a stipulated divorce decree are permitted to waive their right to modify the terms of the agreement. In *Bassett*, the court reaffirmed that the law in Florida, and elsewhere, was clear: “the availability of statutory modification [of existing alimony awards] is indeed subject to being waived.”

⁵ The *Staple* court noted that its decision advances several public policies[, including] (1) nonmodifiable agreements enable parties to structure package settlements, in which alimony, asset divisions, attorney fees, postsecondary tuition for children, and related matters are all coordinated in a single, mutually acceptable agreement; (2) finality of divorce provisions allows predictability for parties planning their postdivorce lives; (3) finality fosters judicial economy; (4) finality and predictability lower the cost of divorce for both parties; (5) enforcing agreed-upon provisions for alimony will encourage increased compliance with agreements by parties who know that their agreements can and will be enforced by the court[;and 6] the public policy of requiring individuals to honor their agreements. *Staple v. Staple*, 616 N.W.2d 219, 228 (Mich. Ct. App. 2000).

Bassett, 464 So. 2d at 1205. In *Nichols*, the court stated that the law as it exists in Wisconsin was clear, “the consent of the parties to nonmodifiable maintenance makes such a maintenance provision enforceable notwithstanding the provision [of Wisconsin law] that maintenance is always subject to modification.” *Nichols*, 469 N.W.2d at 622. The court then found that because the appellant “received a benefit-one-half of the couple’s assets” and because the appellee assumed the parties’ debts, the waiver provision did not violate public policy. *Id.* at 625.

Taken as a whole, it is clear that the majority of Utah’s sister states agree with Utah and allow parties to a stipulated divorce decree to waive their statutory right to modify the terms of an agreed-upon alimony award. Such waivers do not, as a rule, violate public policy, nor do they implicate or circumvent trial court authority. Rather, courts around the nation view waivers simply as contractual provisions that, in the absence of evidence to the contrary, were freely and voluntarily adopted for the mutual benefit of the parties to the agreement. As such, where a stipulated settlement agreement contains language that clearly indicates that the parties intended to waive their modification rights, courts should enforce the waiver provision and parties should be estopped from attempting to seek modification.

C. The Trial Court Properly Interpreted the Decree as Including an Affirmative Waiver of the Parties' Right to Seek Modification of the Alimony Terms

Examining the plain language of the stipulated divorce decree, through the lens of the aforementioned authority, it is clear that Joel affirmatively waived his right to modify the alimony terms and that he did so knowingly and intelligently. “Waiver is ‘the intentional relinquishment of a known right.’” *Hinckley v. Hinckley*, 815 P.2d 1352, 1354 (Utah Ct. App. 1991) (quoting *Mont Trucking v. Entrada Indus.*, 802 P.2d 779, 781 (Utah Ct. App. 1990) (additional citations omitted)). “To constitute waiver, there must be an existing right, benefit, or advantage, a knowledge of its existence, and an intention to relinquish it.” *United Park City Mines Co. v. Stichting Mayflower Mountain*, 2006 UT 35, ¶ 22, 553 Utah Adv. Rep. 21 (quoting *Soter’s Inc. v. Deseret Fed. Sav. & Loan Ass’n*, 857 P.2d 935, 942 (Utah 1993)). “[T]he statutory right to seek modification of alimony may be waived by the parties where they specifically forego their statutory right to petition the court for modification and agree that the alimony provision is final, binding, and nonmodifiable.” *Staple*, 616 N.W.2d at 228. So long as the parties waived their rights knowingly and intelligently, courts are instructed to hold them to the benefit of their bargains. *See Land v. Land*, 605 P.2d 1248, 1251 (Utah 1980).

In Utah, it is settled law that “spouses . . . may make binding contracts with each other and arrange their affairs as they see fit, insofar as the negotiations are conducted in good faith . . . and [the contracts] do not unreasonably constrain the court’s equitable and

statutory duties.” *Reese v. Reese*, 1999 UT 75, ¶ 25, 984 P.2d 987. Moreover, Utah courts have expressly determined that spousal contracts, or contracts between soon to be ex-spouses, “are generally subject to ordinary contract principles.” *In re The Estate of Beesley*, 883 P.2d 1343, 1351 (Utah 1994). Therefore, if the language within a stipulated divorce Decree demonstrates that the parties had a “meeting of the minds,” *Brown v. Brown*, 744 P.2d 333, 335 (Utah Ct. App. 1987), *superceded by rule on other grounds as recognized in Dayton v. Dayton*, 2003 UT App 205U (Utah App. Jun 19, 2003), and is accompanied by valid consideration, the terms of the agreement that lead to the decree should be considered a valid and binding contract. *See In re Beesley*, 883 P.2d at 1351; *see also Kinsman v. Kinsman*, 748 P.2d 210, 212 (Utah Ct. App. 1988). “Consideration may be found ‘whenever a promisor receives a benefit or where [a] promisee suffers a detriment, however slight.’” *Id.* Moreover, Utah courts have held that parties, through their contracts, are able to waive their “statutorily protected rights,” if they do so in a clear and unmistakable fashion. *Medley*, 2004 UT App 179 at ¶¶ 7-8. Under this authority, waiver will be found if it is clear that the parties to the contract “knowingly and intelligently” waived their rights. *See id.* at ¶ 8; *see also Kinsman*, 748 P.2d at 212. Once the court determines that the parties’ waiver was proper, “equity is not available to reinstate rights and privileges voluntarily contracted away simply because someone has come to regret the bargain made,” *Land*, 605 P.2d at 1251, and courts will not interpose themselves to relieve a party—in this case Joel—the obligations and limitations that he

voluntarily assumed in the Decree. *See Despain v. Despain*, 627 P.2d 526, 528 (Utah 1981). Finally, under clear Utah guiding law, “the underlying intent of the contract is to be gleaned from the instrument itself; only where the language is uncertain or ambiguous need extrinsic evidence be resorted to.” *Land*, 605 P.2d at 1251; *see also Webbank v. Am. Gen. Annuity Serv. Corp.*, 2002 UT 88, ¶¶ 9-10, 54 P.3d 1139 (stating that ““if the language within the four corners of the contract is unambiguous, the parties’ intentions are determined from the plain meaning of the contractual language, and the contract may be interpreted as a matter of law”” (citation omitted)).

In the instant case, as a threshold matter, there is no dispute between the parties that they each had a statutory right to seek modification of the decree and that at the time that they entered into the agreement they were aware of this right. This is evidenced not only by Joel’s failure to argue anything that would contradict this fact, but also by the language of the agreement, wherein the parties agreed to the terms that would terminate Kallie’s right to alimony, and the agreement’s plain reference to modification. [R. 97. at ¶¶ 13, 20]. Moreover, at no point during these proceedings has Joel asserted that he did not intend to waive the modification right; instead, his arguments have focused on attempting to show that such a waiver is impermissible under Utah law. Consequently, Joel has conceded the intent element of the waiver analysis, and in doing so, Joel’s waiver of the right to modify should be recognized and enforced.

Moreover, assuming that Joel presented the trial court with some argument on any of the elements of waiver, given the clear circumstances surrounding his waiver, his arguments should be disregarded. When the decision to divorce was made, both parties retained legal counsel, and through said counsel, the parties entered into a protracted negotiation through which they hammered out all of the terms of the divorce. They agreed on the property distribution; they agreed to the distribution of the marital debt; and they agreed to take the necessary actions to ensure that all of the provisions of the agreement could be accomplished. [R. 97]. They agreed that Kallie would receive alimony, which would be modified only upon her death, cohabitation, or remarriage. [R. 97]. To limit Joel's responsibility, Kallie agreed that the duration of the alimony award would run only ten years—as opposed to the eighteen available to her due to the length of the parties' marriage—and to guarantee that Kallie would receive the entirety of the amount due to her under the agreement, Joel agreed to obtain a life insurance policy for the entire alimony amount and to name Kallie as the sole beneficiary. [R. 97 at 13, 15]. Finally, after including language that settled all of the issues involved in the divorce, the parties agreed that “The provisions of this Decree of Divorce shall be non-modifiable *with the sole exception* that if all of the assets have not been disclosed and divided in this agreement, those may be brought back before the Court for appropriate disposition.” [R. 97 at ¶ 20] (emphasis added).

Examining these facts through the lens provided by Utah's courts, it is clear that both Joel and Kallie understood that their divorce implied several substantive statutory rights, including the right to an equitable property distribution, the right to maintain premarital property, and Kallie's right to alimony. It is further clear that the parties understood that under Utah law the agreement alone would not settle the issues connected to these rights, and that either party was entitled to seek modification of any of the terms of the agreement unless the parties took action to foreclose those avenues. Thus, to ensure that the settlement agreement was the final expression of the terms of their divorce, and to foreclose any possible modification of the terms of the agreement, both Joel and Kallie intentionally and permanently waived any and all rights to modify the terms of the agreement, including the terms of the alimony agreement. Under generally accepted principles of contract law—and the plain language of the decree—it is clear that upon completion of the process, Joel and Kallie intended it to contain fixed terms that were not subject to modification, and that the parties deliberately, knowingly, and intentionally waived any right to modify the decree, including the alimony terms.

Moreover, a brief examination of the Decree demonstrates that both parties received benefits from adopting the stipulation, and that both parties suffered some detriment, regardless of how slight, in adopting the stipulation. For instance, Kallie gave up her right to have the court distribute the marital property, and instead agreed to the property distribution contained in the Decree, without outside valuation, to facilitate the

stipulation. In addition, she agreed to limit the duration of her alimony award to a term of ten (10) years and waived her right to seek alimony for a period of time equal to the duration of the marriage, which lasted eighteen years. Similarly, Joel agreed to assume full responsibility for the loan that was necessary to complete the property distribution and to hold Kallie harmless should he default on the obligation. Finally, the stipulation was presented to the trial court, which had a duty to ensure that no provision in the Decree violated public policy. Consequently, the Decree, entered on March 6, 2001, was the embodiment of the intention of the parties, it comported with Utah law, and it did not violate public policy; therefore the settlement agreement should now be seen as an integrated, binding contract to which the parties agreed, and to which the parties should now be held.

II. THE TRIAL COURT ACTED WITHIN THE LIMITS OF ITS DISCRETION IN DETERMINING THAT THE APPELLANT FAILED TO SHOW ANY SUBSTANTIAL, MATERIAL CHANGE IN CIRCUMSTANCES

Even ignoring the existence of Joel's waiver of the right to seek modification of the terms of the alimony agreement, the trial court acted within its discretion in dismissing his petition. Joel abjectly failed to present the court with any facts that would have supported his claim that his income had substantially reduced over time. Joel's approach was fatal to his petition. When seeking to modify the terms of an existing alimony award, Joel is required to "first show that a substantial change in circumstances has occurred "“since the entry of the decree and *not contemplated in the decree itself.*””

Bollinger v. Bollinger, 2000 UT App 47, ¶ 11, 997 P.2d 903 (emphasis in original) (quoting *Durfee v. Durfee*, 796 P.2d 713, 716 (Utah Ct. App. 1990)). Moreover, “[w]hile it is axiomatic that parties to a divorce decree will experience some type of economic change after the original divorce decree is entered,” *id.* at ¶ 20, “[a] temporary . . . decrease in the payor’s income does not necessarily constitute a substantial change.” *Muir v. Muir*, 841 P.2d 736, 739 (Utah Ct. App. 1992).

In this case, the parties stipulated to the terms of the divorce after negotiating a settlement and relying on the advice of their respective attorneys. The settlement contains no reference to the rationale for the terms of the alimony agreement, and both the settlement document and the divorce Decree are devoid of any mention of the parties’ then current incomes, Joel’s ability to pay, and Kallie’s need for alimony. Instead, the settlement largely focused on the distribution of the parties’ marital assets, including both real and personal property, and it carefully identified the amount of the marital estate that was to be awarded to Kallie. In fact, the only information in the settlement that even remotely addresses income is found in paragraph eleven, where the parties agreed to split evenly all royalties that Joel was to receive for work performed during the marriage. [R. 76, 97]. Thus, absent evidence not apparent in the settlement document or the decree of divorce, Joel’s income level should not be considered material to the alimony issue. Instead, the alimony should merely be interpreted as the method chosen by the parties to recognize Kallie’s contributions to Joel’s career. Thus, because the parties’ relative

incomes were not relevant to the terms of alimony, any purported change to Joel's income level could not form the basis of a successful petition to modify.

Further, assuming that Joel's income is material to this discussion, Joel pleaded no facts—none at all—concerning his income, either at the time of the divorce or currently. In fact, a review of the record reveals that when the court was asked to enter a judgment concerning the parties' divorce, it was presented with the negotiated agreement in which the parties stipulated to the terms of the divorce. Joel's income was not discussed in that document. Similarly, when Joel filed his petition to modify, he presented the court with no evidence of his current income, but instead he merely asserted that his income “has substantially decreased.” (R. 113). Thus, the court was presented with no facts concerning Joel's income. In the absence of any information concerning Joel's income, current or historical, Joel's bald and unsupported statement cannot support his petition. *See generally Bollinger*, 2000 UT App 47 at ¶ 11. The trial court, at Kallie's urging, recognized this fatal flaw and declined to entertain Joel's petition. Because its decision did not exceed the limits of its considerable discretion, this court should affirm the trial court's action.

CONCLUSION⁶

In Utah, it is settled law that a party is permitted to waive his substantive rights, so long as the waiver is intentional. This rule applies broadly to all substantive rights, including the right to seek modification of an agreed-upon alimony award. Moreover, Utah's position is not unique, but instead it mirrors the position on waiver adopted by most of her sister states.

In this case, the uncontroverted evidence overwhelmingly supports a conclusion that Joel waived his right to seek modification of the stipulated terms of alimony. Through a protracted and intense negotiation, with the assistance of competent counsel, Joel agreed to each and every term that was eventually included in the settlement agreement. From the plain language of the settlement, it is clear that Joel understood he had the right to seek modification, but chose to waive that right to conclude the settlement. Thus, the trial court correctly denied Joel's petition to modify.

Moreover, ignoring Joel's waiver, he failed to present the court with any facts that could be used to support his claim that his income had substantially reduced since the time of the divorce. Instead, he merely asserted, without support, that his income had decreased. He made no reference to his current income level or to his income level at the time of the divorce. Moreover, he made no effort to demonstrate factually that his income

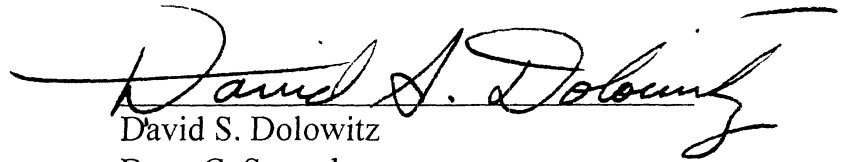
⁶ Kallie also renews her request for an award of her costs and fees, which she placed before this court in her Motion for Summary Disposition, filed April 20, 2006, on which this court reserved decision pending its plenary review on May 23, 2006.

levels were material to the terms of the alimony agreement as drafted. Consequently, the trial court properly denied the Appellant his desired relief.

Accordingly, this court should affirm the trial court's decision.

RESPECTFULLY SUBMITTED this 11th day of September, 2006.

COHNE, RAPPAPORT & SEGAL, P.C.

A handwritten signature in black ink, appearing to read "David S. Dolowitz", with a long horizontal flourish extending to the right.

David S. Dolowitz

Dena C. Sarandos


Thomas J. Burns

Attorneys for Petitioner/Appellee

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 11th day of September, 2006, I caused a true and correct copy of the foregoing to be mailed via U.S. Mail, First Class postage prepaid, to the following:

Christina I. Miller
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Attorneys for Respondent/Appellant

A handwritten signature in black ink, reading "Daniel A. Dolan". The signature is written in a cursive style with a horizontal line underneath the name.