

2006

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

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

KALLIE J. SILL, *

Petitioner-Appellee, *

v. *

Case No. 20060296-CA

JOEL GORDON SILL, *

Respondent-Appellant. *

*

BRIEF OF APPELLANT

Appeal from a Final Order Entered by the Third Judicial District Court
For Summit County, State of Utah
The Honorable Bruce C. Lubeck, Presiding

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IN THE UTAH COURT OF APPEALS

KALLIE J. SILL, *
Petitioner-Appellee, *
v. * Case No. 20060296-CA
JOEL GORDON SILL, *
Respondent-Appellant. *
*

BRIEF OF APPELLANT

STATEMENT OF JURISDICTION

This appeal is from the trial court’s final order dismissing respondent-appellant Joel Sill’s petition to modify the divorce decree. (Ruling and Order – hereafter “Order” – attached as Addendum). This Court has jurisdiction over the appeal under UTAH CODE ANN. § 78-2a-3(2)(h) (2002).

ISSUE PRESENTED FOR REVIEW

The issue presented for review is whether the trial court erred in dismissing Mr. Sill’s petition to modify the divorce decree (with respect to the amount of alimony it requires him to pay) based on the court’s conclusion that even a substantial-change-in-circumstances modification was prohibited by the parties’ stipulation, contained in the agreement upon which the decree was based, that the decree could not be modified except in a narrow circumstance not alleged in the petition.

Mr. Sill preserved that issue for review in his memorandum opposing Ms. Sill's motion to dismiss his petition to modify. (R. 127-32).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

UTAH CODE ANN. § 30-3-5(8)(g)(i) (Supp. 2005):

The court has continuing jurisdiction to make substantive changes and new orders regarding alimony based on a substantial material change in circumstances not foreseeable at the time of the divorce.

STATEMENT OF THE CASE

The facts in this case are not in dispute. As the trial court noted (Order 1-3), the parties' decree of divorce was based on their signed written agreement. In that agreement, Ms. Sill accepted an alimony award of \$6,000 per month based on a global settlement involving, among other things, division of approximately \$1.8 million in property. Paragraph 20 of the agreement states: "The provisions of this agreement shall be non-modifiable as shall the Decree of Divorce which implements it 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."

Against that backdrop, Mr. Sill sought modification of the alimony award based on a substantial change of circumstances. The trial court dismissed his petition for modification on the ground that the non-modification provision in the parties' agreement precluded modification of the decree, including the award of alimony.

Order 4.

SUMMARY OF ARGUMENT

Under UTAH CODE ANN. § 30-3-5(8)(g)(i) (Supp. 2005), a trial court retains continuing jurisdiction to make substantive changes and new orders regarding alimony based on a substantial material change in circumstances not foreseeable at the time of a divorce. As the Utah Supreme Court has held, and this Court has recognized, that statutory authority to modify an alimony award is not trumped by the parties' agreement concerning alimony, even where there is a stipulation to an unalterable amount of alimony. In light of that supreme court precedent, the trial court erroneously dismissed Mr. Sill's petition to modify alimony based solely on the parties' agreement concerning alimony and other matters related to the divorce, and the non-modification provision contained in that agreement. That the agreement contains such a provision does not, as the supreme court has made clear, prevent consideration of a petition to modify alimony by the trial court.

ARGUMENT

The trial court erred in dismissing Mr. Sill's petition to modify based on its conclusion that the parties' stipulation concerning no modification of the divorce decree prohibited the court from considering Mr. Sill's request to modify the alimony award based on an alleged substantial material change in circumstances.

A. Introduction

In dismissing Mr. Sill's petition to modify the alimony award in the parties' divorce decree, the trial court concluded that the agreement between the parties, upon which the divorce decree was based, precluded consideration of the petition.

Specifically, the court determined that paragraph 20 of that agreement (the non-modification provision) prohibited a modification of alimony, because it reflected “a clear intent of the parties to live with what they [had] agreed to” and constituted “a knowing and specific waiver * * * of the right to modify alimony, as well as other provisions[.]” Order 3-4. The narrow question in this case is whether the court correctly concluded that, in light of paragraph 20, it could not consider Mr. Sill’s request for a modification of alimony, even though under Utah law a trial court “has continuing jurisdiction to make substantive changes and new orders regarding alimony based on a substantial material change in circumstances not foreseeable at the time of the divorce.” UTAH CODE ANN. § 30-3-5(8)(g)(i) (Supp. 2005).

B. Standard of Review

Because the trial court’s dismissal of Mr. Sill’s petition ultimately involved interpretation of section 30-3-5(8)(g)(i), this Court reviews its decision for correctness. *Diener v. Diener*, 2004 UT App 314, ¶ 4, 98 P.3d 1178, *cert. denied*, 106 P.3d 743 (Utah 2005).

C. The trial court’s ruling is contrary to Utah Supreme Court precedent and therefore should be reversed.

The issue on appeal is straightforward: Did the trial court err in concluding that the parties’ agreement, which contains a non-modification provision, trumps the court’s statutory authority to make substantive changes and new orders regarding alimony based on a substantial material change in circumstances not foreseeable at the time of

the divorce? The simple answer is that the court clearly erred, because the Utah Supreme Court has held that with respect to an alimony award, a court retains the power to modify the award when a change in circumstances justifies it, in spite of the parties' efforts to control the matter by contract.

In *Naylor v. Naylor*, 700 P.2d 707 (Utah 1985), the supreme court rejected the argument that the trial court lacked the power to modify an alimony award in light of the parties' stipulated settlement on the matter. Citing section 30-3-5(1), the court said that "[t]he language of the statute makes it clear that the appellant's position that the trial court lacked power or jurisdiction to modify an alimony award is without merit."

700 P.2d at 709. It noted that it had "rejected a similar argument respecting a stipulated settlement requiring periodic payments in *Callister v. Callister*, 1 Utah 2d 34, 261 P.2d 944 (1953)." *Id.* The court then quoted the controlling language from

Callister:

"We further hold that these [monthly payment] provisions are not an inseparable part of the agreement relating to division of property and by approval of the agreement in the decree the court did not divest itself of jurisdiction under the statute to make such subsequent changes and orders with respect to alimony payments as might be reasonable and proper, based upon change of circumstances. We hold this to be true even though the provisions of the agreement should be interpreted to mean that the parties intended to stipulate for a fixed and unalterable amount of alimony. The object and purpose of the statute is to give the courts power to enforce, after divorce, the duty of support which exists between a husband and wife or parent and child. Legislators who enacted the law were probably aware of the fact, which is a matter of common knowledge to trial courts, that parties to divorce suits frequently enter into agreements relative to alimony or for child support which, if binding upon the courts, would leave children or divorced wives inadequately provided

for. It is therefore reasonable to assume that *the law was intended to give the courts power to disregard the stipulations or agreement of the parties in the first instance and enter judgment for such alimony or child support as appears reasonable, and to thereafter modify such judgments when change of circumstances justifies it, regardless of attempts of the parties to control the matter by contract.*

700 P.2d at 709-10 (quoting *Callister*, 1 Utah 2d at 41, 261 P.2d at 948-49, brackets and emphasis added by *Naylor* court).

The trial court's dismissal of Mr. Sill's petition to modify the alimony award based solely on the parties' agreement is directly contrary to *Naylor* and *Callister*. This Court recently applied those decisions in reversing a trial court's denial of a father's petition to modify a child-support obligation based solely on the father's earlier stipulation concerning that obligation. *Diener*, 2004 UT App 314, ¶ 5 (citing *Naylor* and *Callister*). The analysis employed in *Diener* applies with equal force in the instant case. The error the trial court committed here is indistinguishable from the error the trial court committed in *Diener*. Accordingly, this Court should reverse the trial court's dismissal of Mr. Sill's petition to modify. Under *Naylor*, *Callister*, and *Diener*, the trial court must consider Mr. Sill's contention that a modification of the alimony award is justified based on a substantial change of circumstances, notwithstanding the parties' pre-divorce agreement to an unalterable amount for alimony.

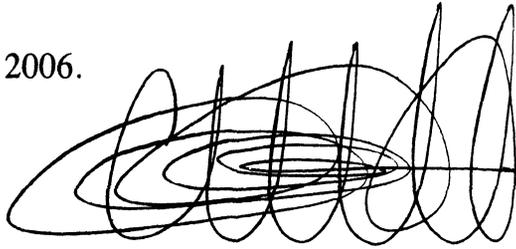
CONCLUSION

Based on the foregoing arguments, this Court should reverse the trial court's order dismissing Mr. Sill's petition to modify and remand the case for consideration of the merits of that petition.

STATEMENT REGARDING ORAL ARGUMENT

Because clear Utah Supreme Court precedent controls this case, oral argument is unnecessary.

Dated this 9th day of August 2006.

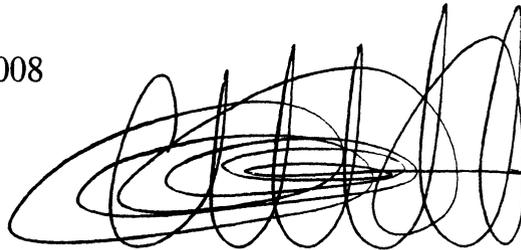
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CERTIFICATE OF SERVICE

I certify that on August 9, 2006, I served the foregoing Brief of Appellant on the attorneys for Petitioner-Appellee by mailing two copies, with postage prepaid, in an envelope addressed to:

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A handwritten signature in black ink, appearing to read 'Christina I. Miller', written over a horizontal line.

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ADDENDUM

ADDENDUM

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SUMMIT COUNTY, STATE OF UTAH

<p>KALLIE J. SILL, Petitioner, vs. JOEL GORDON SILL, Respondent.</p>	<p style="text-align: center;">RULING and ORDER</p> <p>Case No. 004600060</p> <p>Honorable BRUCE C. LUBECK</p> <p>DATE: February 22, 2006</p>
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The above matter came before the court for decision on Petitioner's Motion to dismiss respondent's petition to modify.

In this case a decree was entered March 7, 2001. Respondent filed a petition to modify the decree September 13, 2005. Petitioner moved to dismiss that petition on September 26, 2005. Respondent opposed the motion to dismiss on October 12, 2005, and petitioner replied October 20, 2005. The court scheduled oral argument for January 23, 2006. In the meantime petitioner filed a motion to have respondent held in contempt. At oral argument, for the first time as neither party briefed the issue, it was pointed out that there was a provision in the decree that it was non-modifiable.

Accordingly, the court asked the parties to brief the issue concerning the effect of that provision on the pending motions.

Respondent filed her memo February 2, 2006, and petitioner filed a response February 10, 2006. Respondent filed a reply and Notice to Submit on February 21, 2006.

The court has reviewed the pleadings of the parties and the entire file, and concludes as follows.

ARGUMENTS

Respondent argues that even if there is a stipulation, the court can always modify alimony under UCA 30-3-5(8)(g), wherein the court is given continuing jurisdiction to make new orders concerning alimony. Respondent argues the court has the ability to go beyond an agreement and order what alimony is reasonable.

Petitioner urges that the decree was based on arms-length negotiations, wherein petitioner agreed to accept ten years alimony at \$6000 per month (the parties were married 18 years) based on a global settlement involving a substantial property settlement of approximately \$1.8 million.

If there was a meeting of the minds, the contract should be binding. If there is a clear and unmistakable waiver of some right, that will be upheld and equity should not and does not reinstate rights voluntarily bargained away by agreement. Both parties had counsel and each party benefitted in the decree and both suffered some detriment.

DISCUSSION

This case presents a difficult question to the court. There

is language in cases cited by each party that supports their positions. Thus, to the court, the issue is really one of the intent of the parties, whether that intent is expressed clearly and unmistakably in the decree. The decree was based on a signed written agreement of the parties, each with competent and present counsel. Paragraph 20 of the agreement states "The provisions of this agreement shall be non-modifiable as shall the Decree of Divorce which implements it 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." To the court, that is a knowing and specific waiver, not a waiver of alimony, but a waiver of the right to modify alimony, as well as other provisions, with an exception not alleged or present in this case.

This is not a waiver of alimony case where there are changed circumstances. Substantial assets were present and there was obviously give and take in the process of the settlement. This is not a case where the parties were or are acting *pro se* or where it appears one party was taken advantage of so that equitable powers ought to intervene and "repair" an unfair agreement. From all that appears there was adequate consideration and the agreement is not on its face unconscionable nor even unfair. No public policy seems to be violated in this agreement that resulted in the decree.

This agreement was between two competent and accomplished persons with two competent and accomplished counsel. There is no suggestion of coercion involved in this instance nor fundamental unfairness. Even though there is now alleged a change of circumstances, to allow the settlement now to be changed by either party would, as the courts of this state have noted, encourage fraud and discourage settlements. Settlements would never be final and so settlements would not occur and more litigation would result rather than having cases settle.

The court believes the non-modification provision is clear and encompasses not only alimony but all provisions of the decree. While it did not specify alimony, it was the last paragraph of the agreement and the decree, indicating to the court a clear intent of the parties to live with what they agreed to.

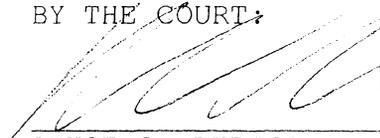
The motion to dismiss the petition to modify is GRANTED. To the extent petitioner now also seeks a change of the decree in her January 17, 2006, filing, that relief is not appropriate under this reasoning.

This Ruling and Order is the Order of the court and no other

order is required.

DATED this 22 day of July, 2006.

BY THE COURT:



BRUCE C. LUBECK
DISTRICT COURT JUDGE

