2006

Gillette v. Costa : Brief of Appellee

Utah Court of Appeals

Steven C. Tycksen; Zoll & Tycksen; counsel for appellee.
Steven M. Costa; pro se.

IN THE UTAH COURT OF APPEALS

REBECCA GILLETTE, Petitioner and Appellee, Vs. STEVEN MICHAEL COSTA, Respondent and Appellant.	**BRIEF OF THE APPELLEE** Case No. 20060808

Appeal from a Final Judgment
Of the Fourth District Court in and for Utah County, Utah
The Honorable Judge James R. Taylor and
Commissioner Patton

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STATEMENT OF JURISDICTION

The Utah Court of Appeals has original jurisdiction in this matter pursuant to Utah Code §78-2a-3(2)(h) because this is an appeal from the district court in a domestic relations matter.

DETERMINATIVE RULES AND LAW

> On the motion of one or both of the parents...the court may, after a hearing, modify an order that established custody if:
> (a) The circumstances of the child or one or both custodians have materially and substantially changed since the entry of the order to be modified; and

(b) A modification of the terms and conditions of the order would be an improvement for and in the best interest of the child.

Utah Code Ann. § 30-3-10.4(1).

Trial courts employ a two-step analysis when determining whether to modify a divorce decree. Hogge v. Hogge, 649 P.2d 51 (Utah 1982). First it must decide whether there are significantly changed circumstances that would warrant a modification, then whether the change in circumstance along with all other relevant factors requires a modification in accordance with the best interest of the children involved. Id. at 53.

"If the court finds that an action under this section is filed or answered frivolously and in a manner designed to harass the other party, the court shall assess attorney's fees as costs against the offending party." Utah Code § 30-3-10.4(4).

ISSUES AND STANDARD OF REVIEW

The Respondent raises two main issues on appeal: (1) whether the lower court was clearly erroneous in finding that there was no material change in circumstances of the parties that was substantial enough modify the divorce decree; and (2) whether the lower court abused its discretion in awarding Petitioner her attorney's fees and costs.

The lower court's factual determination that there had been no significant change in circumstances that would merit a modification of the divorce decree is reviewed under a "clearly erroneous" standard. "We uphold a trial court's findings of fact unless they are 'clearly erroneous.'" Drake v. Industrial Comm'n of Utah, 939 P.2d 177, 181 (Utah 1997).

On appeal, the standard of review of a trial court's award of attorney fees is for "patent error or clear abuse of discretion." Valcarce v. Fitzgerald, 961 P.2d 305, 316 (Utah 1998).

STATEMENT OF THE CASE

Although Counsel for the Petitioner struggles to comprehend the Brief of Respondent, which does not contain a single reference to the record in the lower court, Petitioner believes that the proper issue before the Court is whether the trial court clearly erred in denying the Respondent's Petition to Modify the Divorce Decree, and whether the trial court abused its discretion in awarding Petitioner her reasonable attorney's fees incurred to defend against the appeal.

After the parties stipulated to the terms of their divorce and the court entered a divorce decree based upon that written stipulation. The stipulation took into account Respondent's uncertain financial situation. Nevertheless 76 days later the Respondent sought to modify the divorce decree citing his financial situation as a changed circumstance. The Court denied the petition to modify finding that the parties' stipulation contemplated the very circumstances that Respondent' claims were a changed circumstance and awarded attorney's fees to the Petitioner. The Respondent appeals portions of the Court's Order and Judgment.

STATEMENT OF FACTS BEFORE THE LOWER COURT

1. Petitioner filed for a divorce on or about may 31, 2005 on the grounds of irreconcilable differences.1 (Record at 2-5).

2. Petitioner and Respondent ultimately entered a stipulation for divorce on or about August 4, 2007 (Record at 275-284), upon which the divorce court entered a Divorce Decree on or about August 31, 2005(Record at 332-340).

3. 76 days later, the Respondent filed a pro se Verified Petition to Modify the Divorce Decree seeking to change custody, modify the child support and visitation order, and to terminate alimony. (Record at 368-72).

4. Despite Petitioner's timely response to the verified petition, Respondent moved for a default judgment. Upon hearing the Court denied the default, and awarded Petitioner attorney's fees for the premature attempt by the Respondent to obtain a default judgment (Record at 404-05).

5. Trial on the Respondent's petition for modification was held on June 5, 2006. At trial, the Respondent was represented by legal counsel, David Bloom. Before the trial commenced, Mr. Bloom withdrew the petition for a change of custody and visitation, and limited the trial to presenting evidence in support of the petition to terminate alimony and modify child support. Both Petitioner and Respondent testified at trial. After weighing the evidence and arguments at trial, the divorce court declined to modify the child support or alimony amounts

and denied the petition to modify. The minute entry reads: "The Court finds that it has not heard sufficient evidence that anything other than what was anticipated by the decree has occurred." (Record at 591-92).

6. The divorce court awarded Petitioner her attorney's fees of $6,041.40 incurred while responding to and defending the petition to modify pursuant to Utah Code §30-3-10.4 (Record at 604-606).

7. Respondent filed an appeal, but has not supplied the Court with transcripts from either the hearing on March 15, 2006 (regarding default) or from the trial on June 6, 2006.

ARGUMENT

With no transcript of the trial held in the lower court, it is nearly impossible to determine whether the lower court made any error in its ruling. Because the Respondent has failed to provide any transcript regarding the evidence presented to the lower court at trial, his appeal must fail. "Because appellant did not provide a trial transcript on appeal, we assume competent and substantial evidence supported the trial court's [] factual findings." Jeffs v. Stubbs, 970 P.2d 1234, 1240 (Utah 1998); see also Goodman v. Lee, 589 P.2d 759, 760 (Utah 1978) ("When no transcript is furnished on an appeal it is presumed that the evidence given was sufficient to sustain the judgment."). Accordingly since the Respondent has not furnished a transcript of the trial, it should be presumed by

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1 Respondent had left Petitioner for another woman.

this Court that the evidence offered at trial was sufficient to sustain the lower courts order and judgment. The Court should deny Respondent's appeal because the record on appeal is presumed to support the trial court's ruling.

The substance of Respondent's arguments on appeal are two-fold. The first theory for relief is that the Respondent was allegedly misled regarding the effect of stipulation paragraph 9. This argument is addressed in section III below. The second theory is that there has been a material change in circumstances that qualifies as a basis to modify the divorce decree provisions. This argument is addressed in section I below. The contention that attorney's fees were improperly awarded is not argued anywhere in Respondent's brief, but is nonetheless addressed by Petitioner in Section II. Respondent seeks to introduce a new theory on appeal, and new evidence that he claims, if considered, would support his claim that the Divorce Decree should be modified. The new legal theory is addressed in section III, and the new factual evidence is addressed in section IV.

I. The lower court did not clearly err when it denied Respondent's Petition to Modify the Divorce Decree.

Respondent fails to marshal or identify any evidence on the record that would support a conclusion that the lower court erred in denying his petition to modify the divorce decree. Respondent moved for modification based on his belief that there had been a significant change in circumstances following the Court's issuance of the Divorce

Decree.[2] The Respondent moved for modification of the divorce decree, and the divorce court held a trial in the matter during which it received evidence from both sides and ultimately denied the Petition (Record at 604-06). The record supports the lower court's decision. Pursuant to Jeffs and Goodman, since there is no trial transcript on record, the Court must presume that the order was supported by competent and substantial evidence. Because the lower court's order is supported by competent and substantial evidence, it follows that the lower court was not clearly erroneous. This Court should uphold the trial court's findings of fact because, as a matter of law, they are not "clearly erroneous." See Drake v. Industrial Comm'n of Utah, 939 P.2d 177, 181 (Utah 1997).

II. The lower court did not abuse its discretion in awarding attorney's fees to Petitioner on Respondent's Petition to Modify the Divorce Decree.

The divorce court determined that the petition to modify was filed in bad faith, and awarded Petitioner her attorney fees pursuant to Utah Code §30-3-10.4. (Record at 604-06). Although the Respondent asks the Court to reverse the trial court regarding its award of attorney's fees to Petitioner, Respondent does not provide any reason for doing so. Pursuant to the standard of review noted by the Utah Supreme Court in Valcarce, the Court should not reverse the award of attorney's fees unless it determines based on the record from the lower court that there was "patent error or clear abuse of discretion." The record before the Court fully supports the lower court's decision by presumption

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2 Respondent's Verified Petition to Modify Divorce Decree also included an attack on the Petitioner's mental stability, in an effort to obtain custody of the children. This issue was withdrawn by Respondent's counsel prior to trial before the lower court.

(pursuant to Jeffs and Goodman) due to the lack of a trial transcript. The Court must presume that the order was supported by competent and substantial evidence. Because the lower court's order is supported by competent and substantial evidence, it can only be concluded that the lower court did not abuse its discretion.

III. The new theory that Respondent was misled when he signed the stipulation for divorce was never presented to the lower court, and should not be considered by this Court for the first time on appeal.

Respondent contends that he was misled regarding the meaning of the terms of the stipulation (Brief of Appellant pp. 21-2). This argument was never made before the lower court (the Verified Petition to Modify Divorce Decree contains no mention of this argument – see Record at 368-372) moreover the record on appeal contains no mention of this argument. It would be improper to entertain a new argument for the first time on appeal.

In his brief, Respondent admits that when he met with Petitioner to review the stipulation, Counsel for the Petitioner "thoroughly explained every point to me very logically" (Brief of Appellant, p. 21). Of important note is paragraph 27 of the written stipulation for divorce which was signed by Respondent which clearly states:

> The Respondent acknowledges that **Steven C. Tycksen has only represented the Petitioner in this matter and has recommended that Respondent seek the advice and counsel of a lawyer in regards to signing this Stipulation. Respondent has been afforded an adequate opportunity to do so and has either done so or has waived the opportunity to do so of his own free will and choice and signs this**

Stipulation knowing full well that Steven C. Tycksen was not his lawyer in this process and did not give legal advice.

(Record at 311-312) (emphasis added). Respondent had adequate opportunity to seek legal advice and was encouraged to do so, but chose not to. Respondent acknowledged in the stipulation that Mr. Tycksen did not advise him. Despite the fact that this issue is not properly before the Court it is also without merit. The record clearly indicates that the Respondent was fully informed of the details of the stipulation when he signed it and was not advised or misled by Petitioner's attorney. There was no evidence before the lower court to refute this fact, nor is there any record evidence before this court to support Respondent's new contention.

Not only is the theory of being misled a new theory not raised in the lower court, but it was not even identified in the Docketing Statement and is raised for the first time in Respondent's brief. For these reasons, the Court should reject Respondent's contention that he was misled.

IV. New evidence presented for the first time on appeal is improper and should not be considered by the Court.

In the Brief of the Appellant, Respondent repeatedly urges the Court of Appeals to act as a fact finder to make new findings regarding child support and attorney's fees. This is improper appellate procedure. The Respondent has not even attempted to identify any error made by the lower court, but simply asked the Court to make a new ruling. The gravamen of the Respondent's argument is that he does not agree with the lower court,

and that he believes he now has more evidence to support his arguments (Brief of Appellant, p. 27).

Respondent attached 13 new documents as addenda to the Brief of the Appellant that are not a part of the record in this matter. The 13 documents appear to be what Respondent claims are "evidence" that he wishes the Court to now consider. This evidence was never submitted to the divorce court. The Court should not consider evidence that was never presented to the divorce court.

Respondent's approach is entirely inappropriate. It is understandable that a pro se litigant may not be familiar with the role of this Court,[3] but it remains improper to attempt to use the Court of Appeals as a fact finder to review documents and evidence that the Respondent admittedly did not present to the lower court. For the Court of Appeals to assume the role of fact finder would exceed its proper role and would be wholly inappropriate. Bailey v. Bayles, 52 P.3d 1158, 1164 (Utah 2002).

Respondent blames his attorney for the failure to raise certain issues at trial before the divorce court (Brief of Appellant, p. 25). If the Respondent's attorney really did fail to make certain arguments, those issues cannot now be raised for the first time on appeal, but should have been brought before the lower court.

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3 Although Respondent's brief is difficult to understand, it appears that he has asserted in his brief that if he fails to obtain a favorable result from the Court of Appeals, he will seek appellate review of this Court's decision in small claims court. "I am contemplating taking this to small claims court if the fees are not reversed. Hopefully I won't have to do this." (Brief of Appellant p. 10).

"It is well-established that we generally will not address issues raised for the first time on appeal unless a party can demonstrate exceptional circumstances." Pugh v. Draper City, 114 P.3d 546, 550 (Utah 2005) (internal quotations omitted); see also Chen v. Stewart, 123 P.3d 416, 430 (Utah 2005). On appeal, the Respondent failed to assert any exceptional circumstance that would justify having this Court act as a fact-finder. Moreover, this is not the proper venue for the Respondent to seek a remedy for any alleged failure of his former attorney. The Court should not consider the new evidence and issues that the Respondent presents for the first time at appeal. The lower court properly denied the petition, and there is no evidence on the record that would conceivably support a conclusion to the contrary.

V. The Court should award Petitioner attorney's fees and costs on appeal.

This Court should award the Petitioner her attorney's fees incurred to defend this appeal pursuant to Rule 24 of the Utah Rules of Appellate Procedure, and Utah Code §30-3-10.4.

The Petitioner has been unnecessarily forced to defend an appeal that appears to be nothing more than ranting by the Respondent over the result in the lower court and about how he is displeased with his former attorney and how this Court should weigh new evidence because the Respondent is going through hard times, and has become a "martyr." Although the Respondent recites various conditions in his life that may evoke an emotional reaction, he fails to recognize that his hardships are the natural

consequences of his own actions (leaving his wife and job for a new woman with a big family), and it is not the role of this Court to make initial findings for the Respondent based on his "new evidence." The Petitioner has incurred substantial attorney's fees and costs because of the Respondent's appeal of the ruling on his bad-faith petition to modify. The Petitioner has been forced to wade through the Respondent's incomprehensible and misguided appeal and has incurred expenses to do so that she cannot afford.

Rule 24 of the Utah Rules of Appellate Procedure indicates that a party shall set forth any legal basis for recovering attorney fees. See URAP 24(a)(9). The lower court awarded attorneys fees for the bad faith petition, based on Utah Code §30-3-10.4(4). This Court should also grant attorney's fees on the same legal basis as well as based on Utah Code §78-27-56 because the appeal is wholly without merit and procedurally fatally flawed.

An award of attorney's fees is further justified by Respondent's failure to keep his brief "free from burdensome, irrelevant, immaterial or scandalous material." See UBAP 24(k) The Brief of the Appellant uses more than 25 pages to propound and repeat his pitiable story. The assertions and irrelevant tangents are so numerous that they would be very difficult to list, however a few of the most outrageous are: Respondent's efforts to convince the Petitioner not to get an attorney (p. 19), Respondent's financial hardship (throughout), Respondent's confession of forgery (pp. 12-13), criminal background checks (pp. 13-14), family health conditions (p. 29), the mental status of his children (p.

27), how his "wife's ex-husband is crazy" (p. 23), what Respondent believes the State of California is going to do (pp. 15-6), his wife's job history and workplace disputes (p. 22), his conspiracy theory regarding his ex-wives allegedly teaming up with his wife's ex-husband in an effort to get him (p. 27), the working conditions at his current job (p. 29), his spiteful opinion of the character of opposing counsel (pp. 15, 25), his opinion of the "heartless" domestic Commissioner (p. 11), his displeasure with his own attorney (p. 25), unrelated traffic accidents (pp. 19, 28-9), Respondent's belief in and faith in God (p. 30), how the Respondent is in love with his wife (p. 30), how much Respondent's children love Orange County (p. 14), and Respondent's claim: "I have become a martyr" (p. 30). It is a blatant abuse of the legal system for the Respondent to be allowed to foment such irrelevant nonsense and force Petitioner to incur attorney's fees to respond thereto.

Rule 34(a) provides that the prevailing party in an appeal is to be awarded her costs. On this basis, this Court should award the Petitioner her costs on appeal.

If the lower court's decision is affirmed, based on Utah's Rules of Civil Procedure, The Utah Rules of Appellate Procedure and the Utah Code, the Respondent should bear the Petitioner's attorney fees and costs incurred on appeal.

CONCLUSION

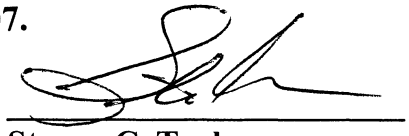
The Appellant has failed to cite to the Record from the lower court, and based solely on this fact, his appeal should be denied. He has failed to marshall the evidence to

support his appeal. He has failed to provide a transcript. He has argued issues and attempted to present new evidence that are not appropriate before the Appellate Court.

As a matter of law the lower court's findings, conclusions, and associated order are presumed to be supported by substantial evidence. The Record supports the lower court's decision. Thus the lower court's order and judgment should be affirmed.

The Respondent's appeal makes little if any sense at all. For more than 25 pages he describes various aspects of his life and his perspective and life theory regarding various random subjects and personalities. The Brief of Appellant utterly fails to describe how the lower Court erred in rendering its decision. What is clear from the Respondent's appeal is that he has no idea what purpose the Court of Appeals serves. Respondent has attached 13 new documents to his brief that have never been presented to the lower court, and repeatedly insists that the Court weigh this new evidence. The approach is improper and has unnecessarily forced the Petitioner to incur substantial attorney's fees defending the appeal. The Court should not only deny the appeal by affirming the lower court's ruling, but it should also award Petitioner her reasonable attorney's fees and costs incurred on appeal, and allow her to submit the same via affidavit.

DATED this 23 day of January 2007.



Steven C. Tycksen
Attorney for the Petitioner

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing, **Brief of the Appellee**, postage pre-paid to the following:

Steven Michael Costa
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Aliso Viego, CA 92656

On this 16 day of January 2007.