

2007

Monte Bambrough v. Maria Bambrough : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MONTE BAMBROUGH,	:	BRIEF OF APPELLEE
Petitioner/Appellee,	:	
vs.	:	
MARIA BAMBROUGH,	:	Case No. 20061176
Respondent/Appellant.	:	

APPEAL FROM THE SECOND JUDICIAL
DISTRICT COURT OF WEBER COUNTY
JUDGE ERNIE W. JONES

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UTAH APPELLATE COURT

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STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction over this appeal pursuant to Section 78-2a-3(2)(n) Utah Code Annotated, as amended, and Rule 3(a), Utah Rules of Appellate Procedure.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. The trial court was correct in ruling that Maria 's evidence failed to demonstrate that the costs of private school and a car for the parties' minor child were reasonably necessary expenses sufficient to set child support above the top guideline.

Standard of Review. The amount of child support set by the trial court is reviewed for abuse of discretion. Ball v. Peterson, 912 P.2d 1006 (Utah App. 1996).

Issue Preserved. This point is in Monte's capacity as Appellee, and as such, Maria has preserved it. In addition, Monte presented the trial court with his supporting case law of Reinhart v. Reinhart, 963 P.2d 757 (Utah App. 1998) and Ball v. Peterson, 912 P. 2d 1006 (Utah App. 1996) during opening argument. Tr. pp. 7-8., R., p.201.

2. The trial court was correct in ruling that Maria failed to show a basis for modifying the allocation of the child tax exemption claim

Standard of Review. A denial of a modification of a child support type provision is reviewed for an abuse of discretion. Ball v. Peterson, 912 P. 2d 1006 (Utah App. 1996).

Issue Preserved. This point is in Monte's capacity as Appellee and, as such, Maria has preserved it.

STATEMENT OF THE CASE

This case involves the trial court's denial of Maria's Verified Petition to Modify Decree of Divorce, filed March 3, 2005. An Order To Show Cause Hearing was held on April 11, 2005, at which the parties stipulated to a temporary increase in Monte's child support obligation from \$637 per month to \$826 per month. This was not based on any income figure for the parties- rather, it was by stipulation.

On September 25, 2006, the matter was tried to the Honorable Ernie W. Jones, District Judge. Judge Jones denied Maria's request to increase Monte's child support obligation beyond the previously stipulated \$826 per month, and in general, denied Maria all relief for which she had prayed, in the Judge's Memorandum Decision dated October 5, 2006.

An Order on Respondent's Petition To Modify Child Support Provisions of Decree of Divorce was entered on December 5, 2006. Maria filed her Notice of Appeal on December 26, 2006.

STATEMENT OF THE FACTS

1. The parties were divorced January 3, 1991. Judgment and Decree of Divorce, R at pp. 1-3. In the Decree, Maria was awarded custody of their minor child, Casey Jordan Bambrough born March, 1990 and Monte was ordered to pay child support of \$350 per month. Decree, paragraphs #3 and 10, R. pp. 2-3.

2. On July 7, 1998, the parties, through counsel, stipulated to a child support increase to \$637 per month, based upon Maria's then imputed income of \$1000 per month gross, and Monte's then actual income of \$6901 per month gross. Stipulated Order, paragraphs 3, 5 and 7; R. pp. 21-22. The parties' combined

incomes were still within the child support guideline limits.

3. On March 3, 2005, Maria filed a Verified Petition To Modify Decree of Divorce. R., pp. 28-34. She basically sought to increase Monte's child support obligation from \$637 per month to \$2500 per month, based on two main alleged changes in circumstances: (1) that Monte was averaging \$20,123.45 per month gross income, Petition To Modify, paragraph #7; R.p. 29; and (2) that Casey now had increased reasonable expenses because she was attending private high school at Xavier College Preparatory Academy. Petition To Modify , paragraph #11; R., p. 30. She also asked for Monte to pay for one half of any expenses relating to providing Casey with a car and car insurance, not to exceed \$500 per month, once Casey reached 16 years of age (Casey was not quite 15 when Maria filed the present Petition To Modify and not even driving yet). Petition To Modify, paragraph (f); R., p.33.

4. Casey was a straight A student in public school in the 8th and 9th grades. Maria's testimony, Tr. p.52 lines 19-25 R., p. 201;. Monte's Trial Exhibit #1, R.p 200. Maria's decision to move Casey from the public schools to an extremely expensive private school was based purely on Maria's feelings and not on its being necessary. Maria's Testimony, Tr. pp. 52-55; R., p.201.

5. Casey could have walked to her public high school, taken the bus or Maria could have driven her, as it was only one and a half miles from their home. Maria's Testimony Tr. p. 56, line 25 - p. 57, line 22; R., p. 201. Maria's decision to purchase a car for Casey's transportation was solely due to her unilateral decision to send her to the costly private school, which was 22 miles from home. Maria's

Testimony, Tr. p. 56 line 22 - p. 57 , line 22; R., p.201. Maria did not even purchase the car until August, 2006, some 17 months after she filed the present modification proceedings. Maria's Testimony, Tr. page 62, line 10 - line 24; R., p.201.

6. At trial, other than testifying to the cost of private school and car expenses, Maria presented no evidence of Casey's reasonable needs- no evidence concerning the costs of housing, food, clothing, extracurricular activities, hobbies, medical, dental or other health-related expenses. Instead, in direct response to Judge Jones's question as to how she came up with a child support figure of \$2500 per month, she indicated it was "...[b]ased pretty much on a percentage of ... Mr. Bambrough's monthly income..." Tr. p. 105, line 21- p.106, line 4; R., p.201.

7. Casey turns 18 in March, 2008, and her high school class graduates in May, 2008. Maria's Testimony TR. p.55, lines 12-16; R.,p. 201. The additional classes Casey takes are not necessary for her high school diploma, and are just early college classes. Maria's Testimony, Tr. p. 55, line 23 - p.56, line 3; R., p. 201.

8. Judge Jones found that Monte's gross income was \$15,739 per month, and that Maria's average for 2001-2005 was \$3795 per month. Memorandum Decision, paragraphs #2-4; R.,p.169. At the time of trial, Maria was only earning \$1733 per month gross. Maria's Testimony, Tr.p.50, lines 4-10.

9. Judge Jones also found that the evidence presented did not establish an increase in reasonable needs for Casey or that Casey needed to be in private school, or that a car was a necessary expense for her. Memorandum Decision, R.p.170.0.

SUMMARY OF ARGUMENT

Section 78-45-7.12, Utah Code Annotated, as amended, states that when the parties' adjusted gross income exceeds the highest level in the Base Combined Child Support Obligation Table (Section 78-45-7.14), an appropriate and just child support amount shall be ordered on a case-by-case basis, not to be less than the highest level specified in the table. In the case of one child, that amount is \$826 per month - the amount ordered by the trial court in this case. To go above that top guideline amount, the trial court must make findings on a child's reasonable needs and all appropriate and just factors. Ball v. Peterson, 912 P.2d 1006 (Utah App. 1996).

Maria advocates the applicability of Section 78-45-7(3), Utah Code Annotated, as amended. That Section applies only when there has been introduced sufficient evidence to rebut the guidelines, which implies that the parties' incomes are within the guidelines. Otherwise, the trial court's decision is to be on a case-by-case basis pursuant to Section 78-45-7.12. Baker v Baker, 866 P.2d 540 (Utah App. 1993), with no mandatory listing of criteria.

The main thrust of Maria's argument is that Casey's expenses of private school and a car are necessary, and that she (Maria) need not have presented any other evidence of Casey's reasonable needs (such as housing, food, clothing, extracurricular activities/hobbies, medical, dental or other health-related expenses)-rather she needed only to show Monte's income. Judge Jones's finding that Maria simply opted to place Casey in a private school, but that there was no evidence

presented that she needed to be in a private school, because she did well in the public school, supports his determination that the private school was not a reasonable need. See Statement of Facts #4, this Brief. Maria does not challenge that finding, but rather, merely points to other evidence that supports her view that private school was a reasonable need. Judge Jones did not abuse his discretion in finding that it was not reasonably necessary. Ball v. Peterson, supra. Similarly Judge Jones's finding that a car was not a necessary expense for Casey was supported by the evidence and not an abuse of his discretion. See Statement of Facts #5, this Brief.

ARGUMENT

POINT I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN SETTING CHILD SUPPORT AT THE TOP GUIDELINE AMOUNT OF \$826 PER MONTH.

Section 78-45-7.12, Utah Code Annotated, as amended, provides:

If the combined adjusted gross income exceeds the highest level specified in the table, an appropriate and just child support amount shall be ordered on a case-by case basis, but the amount ordered may not be less than the highest level specified in the table for the number of children due support.

To go above the top guideline amount, the trial court must make findings on a child's reasonable needs and all appropriate and just factors. Ball v. Peterson, 912 P.2d 1006 (Utah App. 1996).

The main thrust of Maria's argument is that Casey's private school costs and car costs are necessary expenses, and that she (Maria) need not have presented

any other evidence of Casey's reasonable needs, e.g., housing, food, clothing, extracurricular activities/hobbies, medical, dental, or other health-related expenses. Rather, she only needed to show Monte's gross income and take a percentage of that. See Statement of Facts #6., this Brief. Judge Jones rejected this argument, finding that the evidence did not show that Casey needed to be in private school, because she had done well in public school, nor did the evidence show that a car was a necessary expense for Casey. These findings are supported by the evidence. See Statement of Facts, #4 and 5, this Brief.

The setting of child support is a matter committed to the discretion of the trial court. Durfee v. Durfee, 796 P.2d 713 (Utah App. 1990) and this is so even when the parties' combined gross monthly incomes are in excess of the guideline table set forth in Section 78-45-7.14, Utah Code Annotated, as amended. Ball v. Peterson, 912 P.2d1006. (Utah App. 1996). In addition, in child support cases where parental income exceeds the guidelines, the parties must introduce evidence to establish the reasonable needs of a child, and a demonstration of an increase in the obligor's income alone is not sufficient. Reinhart v. Reinhart, 963 P.2d 757 (Utah App.1998).

In the present case, Judge Jones found that the school costs and car costs were not necessary, based on the evidence. Maria does not challenge these findings, but instead points to other evidence she presented- basically that in her opinion, these are necessary expenses. However, it is incumbent upon Maria to demonstrate that Judge Jones's finding was not supported by the evidence and she has not done so.

Rather, Maria contends that Judge Jones erred by not considering evidence she entered, or tried to enter, under Section 78-45-7(3), Utah Code Annotated, as amended, citing Baker v. Baker, 866 P.2d 540 (Utah App. 1993). However, the Baker holding itself makes it clear that this section only applies to cases where the parties' incomes are within the guideline amounts, and the guidelines are then rebutted.

In Baker, the father's income alone \$150,120 per year, an amount exceeding the statutory guideline amounts. The trial court set support for the children at \$1600. per month, higher than the top guideline amount for two children of \$1400 per month. On appeal, Mrs. Baker contended that the trial court, in determining an appropriate and just child support amount under Section 78-45-7.12 (above the guideline incomes) must consider all the factors set forth in Section 78-45-7(3) (rebutting the guidelines), just as Maria argues in her Brief.

The Court of Appeals rejected this very holding:

...However, by the very language of that section [78-45-7(3)], a trial court need consider these enumerated factors only when there is sufficient evidence to rebut the guidelines set forth in section 78-45-7.14. In the case at bar, since the award of child support was beyond the amount listed in the statutory guidelines, neither party's proposed award even addressed, much less rebutted the guidelines. Accordingly, the trial court did not err in declining to address the factors listed in section 78-45-7(3). 866 P.2d 540, at 545.

Thus, Section 78-45-7(3) applies only in cases where the parties' combined incomes are within the guidelines and one of the parties seeks to rebut their applicability. That is not the case here. Maria's argument that she was prevented

form presenting evidence under this section fails, because the section does not apply. She had to prove that the amount of child support sought was for the reasonably necessary expense of Casey's support. This she did not do. Not only did she not persuade the trial court under Section 78-45-7.12, but her argument that the guideline rebuttal criteria of Section 78-45-7(3) apply is not supported by the case law.

In addition, Maria argued at trial that she was entitled to an increase based on a percentage of Monte's income , see Statement of Facts #6, this Brief. Such a position is analogous to the linear extrapolation prohibited by Ball v Peterson ("...Strict reliance on linear extrapolation would be erroneous, because taken to the extreme, a child could be awarded support vastly exceeding any reasonable need." Ball v. Peterson, 912 P.2d 1006, at 1014.)

Maria's citation of Jeffries v. Jeffries, 752 P.2d 909 (Utah App. 1998) is inapposite, because Jeffries was a pre-guideline case decided in 1988, and the guidelines apply only to cases establishing or modifying child support on or after July 1, 1989. Section 78-45-7.2(1), Utah Code Annotated, as amended. Her citation to Hill v. Hill, 841 P.2d 722 (Utah App. 1992) is also distinguishable, because the Hill holding relied on Jeffries, a pre-guideline case. The Hill income figures were also clearly within the guideline amounts.

POINT II. THE TRIAL COURT WAS CORRECT IN RULING THAT MARIA FAILED TO SHOW A BASIS FOR MODIFYING THE ALLOCATION OF THE CHILD TAX EXEMPTION CLAIM.

Maria argues that, under Section 78-47.21, Utah Code Annotated, as amended, she is entitled to modify the divorce decree's allocation of the child tax

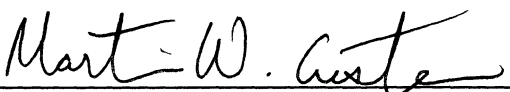
exemption claim entitlement, because she pays so much of Casey's expenses, arguing that this is a change in circumstances. She does not mention that she only earns \$1733 per month gross currently because she changed jobs. Maria's Testimony, Tr. p.50, lines 4-10. She also presented no analysis to the trial court of how much asserting the tax exemption claim was worth to her as compared to what it was worth to Monte, Section 78-45-7.21(2)(b); what the parties' circumstances were when the Decree was entered originally; or any other evidence that there has been a material and substantial change in circumstances. Judge Jones was therefore correct in ruling that Maria failed to show a basis for modifying the allocation of the child tax exemption claim.

CONCLUSION

The trial court was within the sound exercise of its discretion when it ruled that Maria failed to prove that either an expensive private school or a car expense in the future, was necessary for Casey's support. Judge Jones followed correctly the requirements of Section 78-45-7.12 when he modified the previous child support award, setting it at the top guideline amount.

Marie also requests that the case be remanded for further findings and evidence. She is not entitled to that relief. Judge Jones's decision should be affirmed, with no attorney fee award.

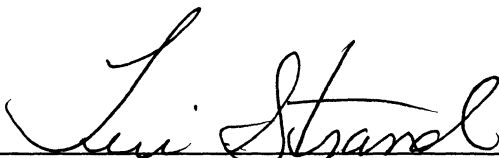
DATED this 14th day of September, 2007.


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CERTIFICATE OF MAILING

I hereby certify that on this 14th day of September, 2007, I ,
mailed two true and correct copies of the above and foregoing Brief of Appellee,
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