

1989

Howell v. Howell : Unknown

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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890596-CA

IN THE UTAH SUPREME COURT

WALTER JAMES HOWELL,	:	
	:	
Plaintiff/Appellee/Petitioner	:	Supreme Court No. 910134
	:	
v.	:	Utah Court of Appeals 890596-CA
	:	
BARBARA JOYCE HOWELL,	:	Priority 16
	:	
Defendant/Appellant/Respondent.	:	

OBJECTION TO PETITION FOR WRIT OF CERTIORARI
FROM THE DECISION OF THE UTAH COURT OF APPEALS

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UTAH

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The Defendant, BARBARA JOYCE HOWELL, respectfully submits this brief in opposition to the Plaintiff's Petition for Writ of Certiorari.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the question presented by the Petitioner is of the character and scope necessary to be considered by the Utah Supreme Court on certiorari or whether the decision of the Court of Appeals is case and fact specific, thus not entitling Petitioner to a Writ of Certiorari under the provisions of Rule 46 of the Utah Rules of Appellate Procedure.

2. Whether the decision by the Utah Court of Appeals in this matter has created a new rule in awarding alimony or whether it is instead consistent with prior case law.

CONTROLLING STATUTES AND RULES

Utah Code Ann. §30-3-5(1) (1989):

When a decree of divorce is rendered, the court may include in it equitable orders relating to the children, property, and parties.

Rule 46, Utah Rules of Appellate Procedure:

Review by a writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for special and important reasons. The following, while neither controlling nor wholly measuring the Supreme Court's discretion, indicate the character of reasons that will be considered:

(a) When a panel of the Court of Appeals has rendered a decision in conflict with a decision of another panel of the Court of Appeals on the same issue of law;

(b) When a panel of the Court of Appeals has decided a question of state or federal law in a way that is in conflict with a decision of the Supreme Court;

(c) When a panel of the Court of Appeals has rendered a decision that has so far departed from the accepted and usual course of judicial proceedings or has so far sanctioned such a departure by a lower court as to call for an exercise of the Supreme Court's power of supervision; or

(d) When the Court of Appeals has decided an important question of municipal, state, or federal law which has not been, but should be, settled by the Supreme Court.

STATEMENT OF THE CASE

The Defendant does not dispute the initial paragraph of the Plaintiff's statement of the case. However, the Defendant would clarify and supplement the remaining facts outlined in the Plaintiff's statement of the case. To begin with, the substantial discrepancy between the Plaintiff's income at the time of the filing of the Complaint and the time of trial, two years later, was due in large part to a mutual decision of the parties during their marriage. Specifically, the Plaintiff's employer, Western Airlines, suffered severe financial problems in 1984. At that time, Western Airlines asked its pilots to accept a wage freeze (TR. 113). The parties agreed to do so, and as a result, the family experienced a financial strain during that period of time (TR. 217). In 1986, Delta took over operation of the airlines, and Mr. Howell began receiving increased compensation (TR. 114). The

Court of Appeals recognized this sacrifice and stated that "Plaintiff's ability to take advantage of that change [to Delta] was at least in part a result of having persevered during the lean times, as did his wife and children." Howell v. Howell, 155 Utah Adv. Rptr. 15, 19 (February 28, 1991).

In addition, although the Complaint was filed in 1986 and the trial was conducted in 1988, the parties attempted at least one reconciliation during that period of time (TR. 42). Contrary to the Plaintiff's statement that the trial court determined the standard of living of the parties by examining the five (5) years prior to the divorce, the trial court averaged the Plaintiff's income earned over the five (5) years prior to the filing of the Complaint in 1986 (Findings of Fact, Nos. 5, 6 and 7).

Based upon this finding as to the standard of living, the trial court awarded Mrs. Howell permanent alimony in the amount of \$1,800.00 per month (Decree of Divorce ¶ 6). Mrs. Howell appealed, among other issues, this alimony award, arguing that it was an abuse of discretion in light of the disparity between the parties' incomes, the length of the marriage, and the Defendant's needs and lack of specific job training or skills. Mrs. Howell also argued that it was an abuse of discretion for the trial court to determine the award of alimony using the current income of the Plaintiff at the time of trial to establish his ability to pay alimony, while at the same time basing the parties' standard of living on the reduced

income earned by the Plaintiff during the years 1981 through 1986. (See Mrs. Howell's Appellate Brief at Page 1.) The Court of Appeals agreed with the Appellant that the trial court had abused its discretion and remanded the case for a further determination regarding the alimony award. (See Howell, 155 Adv. Rptr. at 21.)

The crux of the Plaintiff's Petition is that the Court of Appeals failed to apply the appropriate standards for alimony and that the decision will require the lower courts to project a standard of living which may never have existed during the marriage. However, Plaintiff's interpretation of the decision is not supported by the language therein.

To begin with, the Court of Appeals found that the trial court had abused its discretion in this case by looking at the pre-separation standard of living in setting alimony rather than the standard of living enjoyed during the marriage, including up to the time of trial. The Court of Appeals stated:

In so concluding we do not intend to establish a rigid rule which must be followed in all domestic cases, but acknowledge that trial courts have discretion to determine the standard of living which existed during the marriage after consideration of all relevant facts and equitable principles.

Id. at 20.

In addition, the Court of Appeals carefully reviewed the trial court's findings with respect to the three factors required to determine alimony. Because the trial court failed to make the

requisite findings, the Court of Appeals remanded "for findings as to Defendant's financial needs, the parties' standard of living at the time of the trial, and for adjustment of the amount of alimony to better equalize the parties' abilities to go forward with their respective lives." Id. at 21.

Thereafter, Plaintiff filed his Petition for Writ of Certiorari.

ARGUMENT

PLAINTIFF CANNOT ESTABLISH A COMPELLING REASON FOR REVIEW BY THIS COURT.

The criteria governing the review by this Court of a matter decided by the Court of Appeals is outlined in Rule 46 of the Utah Rules of Appellate Procedure. While the reasons enumerated therein are not the only basis for review, they indicate the character of reasons to be considered. These reasons include:

(a) When a panel of the Court of Appeals has rendered a decision in conflict with a decision of another panel of the Court of Appeals on the same issue of law;

(b) When a panel of the Court of Appeals has decided a question of state or federal law in a way that is in conflict with a decision of the Supreme Court;

(c) When a panel of the Court of Appeals has rendered a decision that has so far departed from the accepted and usual course of judicial proceedings or has so far sanctioned such a departure by a lower court as to call for an exercise of the Supreme Court's power of supervision; or

(d) When the Court of Appeals has decided an

important question of municipal, state, or federal law which has not been, but should be, settled by the Supreme Court.

In his brief, Plaintiff has failed to expressly state the basis for review as required by Rule 46. The implied basis is that the Howell decision is in conflict with other decisions of the Court of Appeals and of this Court. However, that is simply not the case.

It is well settled in Utah that a trial court must consider three factors in determining alimony. First, it must consider the needs of the recipient spouse; second, the ability of that spouse to provide for his or her own needs; and third, the ability of the payor spouse to pay alimony. (See Jones v. Jones, 700 P.2d 1072 (Utah 1985); Olsen v. Olsen, 704 P.2d 564 (Utah 1983); and Naranjo v. Naranjo, 751 P.2d 1144 (Utah App. 1988).)

In addition, Utah case law requires consideration of the standard of living enjoyed by the parties during the marriage in making a determination of alimony. For example, in the case of Naranjo v. Naranjo, 751 P.2d 1144 (Utah App. 1988), the Court of Appeals stated:

[Alimony] should, so far as possible, equalize the parties' 'respective standards of living and maintain them at a level as close as possible to the standard of living enjoyed during the marriage'.(citations omitted) '[T]he ultimate test of the propriety of an alimony award is whether, given all of these factors, the party receiving alimony will be able to support him - or herself as nearly as possible to the standard of living . . .

enjoyed during the marriage.'

Id. at 1147 (citations omitted).

Five years prior to the Naranjo decision, this Court indirectly addressed the standard of living issue. In Savage v. Savage, 658 P.2d 1201 (Utah 1983), this Court stated:

Where a marriage is of long duration and the earning capacity of one spouse greatly exceeds that of the other, as here, it is appropriate to order alimony and child support at a level which will insure that the supported spouse and children may maintain a standard of living not unduly disproportionate to that which they would have enjoyed had the marriage continued.

Id. at 1205 (emphasis added).

More recently, this Court has addressed the issue in the case of Gardner v. Gardner, 748 P.2d 1076 (Utah 1988). In Gardner, this Court stated that "an alimony award should, after a marriage such as this and to the extent possible, equalize the parties' respective standards of living and maintain them at a level as close as possible to that standard of living enjoyed during the marriage." Id. at 1081 (emphasis added).

While the basis for the Plaintiff's Petition is his argument that the Howell decision is inconsistent with prior case law, including Gardner, that is simply not the case. Instead, the Court of Appeals properly articulated the three factors which must be considered by trial courts in making an alimony award, and then scrutinized the trial court's findings in light of those factors. The Court of Appeals found that while the trial court made findings

as to the parties' gross incomes, it did not make the requisite finding as to Mrs. Howell's financial needs. (See Howell, 155 Utah Adv. Rptr. at 20.)

The Court also reiterated the need for trial courts to analyze these three factors in light of all the circumstances of the parties including their standard of living. The Court of Appeals stated:

Therefore, trial courts should first, determine the financial needs and resources for both parties, by examining the three factors enumerated. Second, the Court should set alimony as permitted by those parameters, to approximate the parties' standard of living during the marriage as closely as possible. It follows that if the payor spouse's resources are adequate, alimony need not be limited to provide for only basic needs, but should also consider the recipient 'spouse's station in life'. Gramme v. Gramme, 587 P.2d 144, 147 (Utah 1978).

In Gardner v. Gardner, 748 P.2d 1076 (Utah 1988), the Utah Supreme Court reviewed an alimony award after a long-term marriage. The court found that the alimony award in that situation should, 'to the extent possible, equalize the parties' respective standards of living and maintain them at a level as close as possible to that standard of living enjoyed during the marriage.' Id. at 1081.

Howell, 155 Utah Adv. Rptr. at 20 (other citations omitted).

Applying this standard to the facts of the Howell case, the Court of Appeals concluded that it was an abuse of discretion for the trial court to set the parties' standard of living at the pre-separation level of income. This resulted in grossly

disproportionate post-divorce standards of living, allowing Mr. Howell "a two to four times advantage" over Mrs. Howell. (Howell, 155 Utah Adv. Rptr. at 21.) In reaching this conclusion, the Court of Appeals expressly pointed out that:

[E]xact mathematical equality of income is not required, but sufficient parity to allow both parties to be on equal footing financially as of the time of the divorce is required.

Id. at 21, fn. 3.

The Court of Appeals went on to expressly state that it was not creating a rigid rule to be followed in all cases. Instead, it affirmed the trial court's broad discretion in determining alimony, but found that, in this case, the trial court had abused its discretion in setting the standard of living at the pre-separation level.

The Plaintiff relies on the dissent of Judge Bench as a basis for review. The thrust of Judge Bench's dissent is that the majority has created a judicially unworkable requirement, because a determination of the parties' standard of living at the time of divorce is purely speculative. However, because the Howell decision is consistent with prior case law, it creates no more speculation than is already inherent in the process currently used by trial courts. In this case, the trial court failed to appropriately analyze the disparate earning ability of the parties, thereby making an alimony award which failed to provide any parity between the parties' post-divorce standards of living. Because all

of these factors can be concretely measured by the trial court at the time of trial, the determination is in no way speculative.

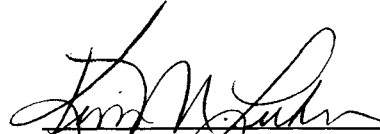
Lastly, to support his position, the Plaintiff relies upon the case of Bridenbaugh v. Bridenbaugh, 786 P.2d 241 (Utah App. 1990) and claims that the Howell decision is contrary to Bridenbaugh. However, Bridenbaugh is easily distinguished on its facts. The issue before the court in that case was a petition to modify the decree to terminate alimony. The Petition was brought twenty-two years after entry of the Decree of Divorce. As such, Bridenbaugh is wholly inapplicable.

CONCLUSION

This Court should deny the Plaintiff's Petition for Writ of Certiorari based upon Plaintiff's inability to establish a compelling reason for such review. The Howell decision is consistent with prior decisions of both the Court of Appeals and the Utah Supreme Court, and is case and fact specific. Plaintiff is therefore not entitled to a Writ of Certiorari.

DATED this 21st day of April, 1991.

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CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed a true and correct copy of the foregoing OBJECTION TO PETITION FOR WRIT OF CERTIORARI FROM THE DECISION OF THE UTAH COURT OF APPEALS by placing same in the United States mail, postage prepaid, on this 29th day of April, 1991, addressed to:

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