1998

Jeroldene Bayles nka Jeroldene Bailey v. Randee Bayles : Brief of Petitioner

Utah Court of Appeals

Craig C. Halls; Attorney for Respondent.
Rosalie Reilly; Utah Legal Services; Attorney for Petitioner.

IN THE UTAH COURT OF APPEALS

JEROLDENE BAYLES, n.k.a.	*	
JEROLDENE BAILEY,	*	
Plaintiff/Appellant/	*	Case No. 980347-CA
Petitioner,	*	
	*	
vs.	*	Priority 10
	*	
RANDEE BAYLES,	*	
Defendant/Appellee/	*	
Respondent.	*	

BRIEF OF THE PETITIONER

INTERLOCUTORY APPEAL FROM THE ORDER
DENYING PETITIONER'S MOTION TO DISMISS
RESPONDENT'S MOTION FOR MODIFICATION,
IN THE SEVENTH DISTRICT COURT
IN AND FOR SAN JUAN COUNTY, STATE OF UTAH
THE HONORABLE LYLE R. ANDERSON, PRESIDING

UTAH LEGAL SERVICES
BY: ROSALIE REILLY #6637
148 South Main, #1
Post Office Box 404
Monticello, Utah 84535
Telephone: (435) 587-3266
Attorneys for Petitioner

CRAIG C. HALLS
333 South Main
Blanding, Utah 84511
Telephone: (435) 678-3333
Attorney for Respondent

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IN THE UTAH COURT OF APPEALS

JEROLDENE BAYLES, n.k.a., JEROLDENE BAILEY, Plaintiff/Appellee/ Petitioner,	:	**Case No.: 980347-CA**
vs.	:	
RANDEE BAYLES, Defendant/Appellant/ Respondent.	:	

BRIEF OF PETITIONER

STATEMENT OF JURISDICTION

This Court has jurisdiction over this matter pursuant to this Court's Order, dated July 30, 1998, allowing the interlocutory appeal. Rule 5, Utah Rules of Appellate Procedure.

STATEMENT OF THE ISSUE PRESENTED

Whether the trial court erred in its determination that there was a substantial change of circumstances allowing Defendant to relitigate a stipulated property settlement, based on allegations of fraud, that Defendant was aware of prior to the signing and entry of the parties' stipulation [R. 97].

Whether the movant established a substantial change in circumstances is a question of law, which is reviewed for correctness, affording no deference to the

trial court. *Smith v. Smith*, 793 P.2d 407 (Utah Ct. App. 1990).

STATEMENT OF THE CASE

A. NATURE OF THE CASE

Petitioner, Jeroldene Bayles, now known as Jeroldene Bailey, (hereinafter "Jeroldene") was granted a divorce from the Defendant, Randee Bayles (hereinafter "Randee"). The divorce was based on the parties' stipulation which was incorporated into the final judgment.

Approximately four months after the final judgment was entered, Jeroldene filed a Motion for an Order to Show Cause in an attempt to enforce the stipulated property settlement. Randee responded by filing a Petition for Modification wherein he alleged that Jeroldene had secreted marital assets and that the settlement should be offset by that amount. Jeroldene then filed a Motion to Dismiss Defendant's Petition for Modification.

This appeal is from the trial court's Order, dated June 16, 1998, denying Petitioner's Motion to Dismiss Defendant's Petition for Modification. The trial court was the Seventh Judicial District Court, in and for San Juan County, State of Utah, the Honorable Lyle R. Anderson presiding.

B. COURSE OF THE PROCEEDINGS

1. On January 27, 1997, a Verified Divorce Complaint and Motion for Order to Show Cause were filed.

2. On February 3, 1997, an Answer and Verified Counterclaim, Motion for Order to Show Cause and Affidavit in Support of Order to Show Cause were filed.

3. On February 6, 1997, a hearing on the reciprocal show-cause motions was held.

4. On February 13, 1998, an Order Re: Reciprocal Orders to Show Cause was filed.

5. On April 4, 1997, Plaintiff's counsel, Rosalie Reilly, filed a Notice of Withdrawal.

6. On May 2, 1997, a Motion to Bifurcate was filed.[1]

7. On May 7, 1997, a Motion in Re: Contempt and Affidavit of Plaintiff were filed.

8. On May 9, 1997, a Motion in Re: Contempt and Affidavit in Support of Motion Re: Contempt were filed.

9. On May 13, 1997, a hearing was held and a Decree of Divorce was entered.

10. On June 13, 1997, the parties' Stipulation was filed.

11. On June 17, 1997, the Findings of Fact and Conclusions of Law as well as an Order In Re: Divorce Settlement were entered.

12. On September 29, 1997, Defendant's counsel filed a Notice of

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[1]Douglas Terry, Esq. entered his first appearance on behalf of Jerodlene by way of the Motion to Bifurcate.

Withdrawal.

13. On October 24, 1997, Plaintiff's counsel, Rosalie Reilly, filed a Motion for Order to Show Cause and Affidavit in Support of Motion.

14. On October 29, 1997, Plaintiff's counsel, Douglas Terry, filed a Notice of Withdrawal.

15. On November 19, 1997, a Petition for Modification, Affidavit of Craig C. Halls, Motion for Order to Show Cause and Affidavit of Defendant were filed.

16. On November 20, 1997, a hearing was held on the Order to Show Cause at which time some issues were addressed and the hearing was continued until December 23, 1997 to address the remaining issues.

17. On December 11, 1997, a Motion to Dismiss Defendant's Petition for Modification was filed.

18. On January 2, 1998, a Response to Plaintiff Motion to Dismiss Defendant's Petition for Modification was filed.

19. On February 9, 1998, a Notice to Submit was filed.

20. On February 11, 1998, a Ruling on the Motion to Dismiss was filed.

21. On June 16, 1998, an Order Denying Plaintiff's Motion to Dismiss was entered.

22. On June 30, 1998, a Notice of Filing Petition for Permission to Appeal Interlocutory Order was filed.

23. On July 30, 1998, an Order granting the Petition for Permission for

Interlocutory Appeal was entered.

C. **DISPOSITION IN THE COURT BELOW**

The proceedings are stayed pending the outcome of this appeal.

STATEMENT OF THE FACTS

The Divorce Complaint in this action was filed on January 27, 1997 and Jeroldene's Motion to Bifurcate was filed on May 2, 1997 [R. 1, 24] Prior to the hearing on the Motion to Bifurcate, Randee's counsel sent a letter to Jeroldene's counsel, dated May 7, 1997, which, among other things, set forth the allegation that Jeroldene had secreted marital assets:

> I would like to convey my client's concern with regard to the Bayles Exploration accounts . . . It seem [sic] that Randee paid thousands of dollars into the personal account and Jeroldene made approximately $20,000, all of the personal debts of the parties were paid out of the Bayles Exploration account, including in early 1997, double utility payments and double car payments. The upshot of this is that the corporation has been drained of assets, which we believe should be accounted for and adjustment made in the settlement.

[R. 105].

The letter also made mention that while Randee did not have "all of the necessary information with regard to the necessary adjustments . . . some of the noteworthy items are" three thousand dollars ($3000.00) from the home safe; double car and utility payments; seven hundred fifty dollars ($750.00) worth of frozen beef; telephone charges for the months of February, March and April;

credit card purchases made on business funds, tax preparation costs; and liability on 1996 corporate taxes [R. 105]. Finally, the letter also addressed the business records, noting that discovery was being drafted and may be filed to force the return of those records to Randee [R. 105].

On June 13, 1997, a Stipulation, signed by all of the parties[2], was filed and the same was entered on June 17, 1997 [R. 41]. In ¶ 17 of the Stipulation, Randee expressly waived issues raised and listed in the May 7, 1997-letter.

> Defendant waives any claims against Plaintiff with respect to those items listed in Defendant's attorney's letter dated May 7, 1997, to wit:
>
> (a) Three Thousand Dollars ($3000) cash kept in safe in the home safe,
> (b) Double payments on the car;
> (c) Double utility payments;
> (d) Frozen beef worth approximately $750;
> (e) Telephone charges for February, March and April, charged to Randee's card;
> (f) Credit card charges involving personal items which were paid from business funds;
> (g) Cost of preparation of tax return;
> (h) Liability for corporate taxes for 1996

[R. 45]

The parties' Stipulation was incorporated in the Findings of Fact and Conclusions of Law as well as the Order in Re: Divorce Settlement, both of which

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[2]Jeroldene signed the Stipulation on May 30, 1997 and her attorney signed on May 28, 1997 Randee signed the Stipulation on May 10, 1997 and his attorney signed on June 9, 1997 [R 47] The Findings and the Order that followed were approved as to form and content, with changes, by Randee's attorney [R 55, 62]

were signed by the trial court and entered on June 17, 1998.

On October 24, 1998, Jeroldene filed a Motion for Order to Show Cause to enforce the property settlement [R. 64]. On November 19, 1997, Randee filed a Petition for Modification[3] in which he sought to, in effect, reopen the trial based on allegations of misconduct prior to, and during the divorce proceedings. [R. 76]. Randee alleged that Geraldine failed to respond to his formal and informal discovery requests regarding the parties' personal and financial records in addition to Randee's alleged recent reconstruction of his financial records[4] which allegedly showed that Jeroldene took seventeen thousand dollars ($17,000.00) out of the parties' business [R. 89]. In his affidavit, Randee alleged that Jeroldene secreted money from the business in the months preceding the filing of the divorce complaint [R. 91]. In addition, Randee also complained of the property specifically waived in ¶ 17 of the Stipulation (three thousand dollars ($3000) from the home safe, charges on the phone card and credit card, the cost for preparation of the tax returns)[R. 92, 90, 90].

On December 11, 1997, Jeroldene filed a Motion to Dismiss Defendant's

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[3]Randee also filed a reciprocal Motion for Order to Show Cause which requested some of the same relief prayed for in Defendant's Petition for Modification.

[4]Although Randee claims that he was unable to reconstruct his financial records, it is significant to note that on July 22, 1997, during the interlocutory period and after the judgment had been entered, Randee subpoenaed Jeroldene's banking records. No further action, however, was taken until September 9, 1997, at which time, counsel for Randee withdrew.

Petition for Modification to which Randee objected [R. 97, 117]. The matter was submitted on February 9, 1998 [R. 127]. On February 11, 1998, the trial court issued a written ruling denying the Motion to Dismiss and the Order was entered on June 16th, 1998 [R. 129, 132].

SUMMARY OF ARGUMENT

Randee failed to show that there had been a substantial change in circumstances since the entry of the judgment. Randee was aware of the circumstances prior to the entry of the judgment. That he allegedly has more details than he did prior to the entry of the judgment does not constitute a change in circumstances, let alone a substantial change in circumstances.

Likewise, Randee's allegations about Jeroldene are not compelling and do not justify the relitigation of the case. Assuming arguendo, the allegations against Petitioner are true, Randee was, at the least, on notice of the alleged misconduct and failed to diligently pursue his remedies. His actions should be construed as a waiver of those issues and he should be barred from reopening the case on the grounds of *res judicata*.

ARGUMENT

POINT 1: NO SUBSTANTIAL CHANGE IN CIRCUMSTANCES EXISTS JUSTIFYING A MODIFICATION.

It is well established that a property settlement may be modified if the movant demonstrates that there exists a substantial change in circumstances since the time of the divorce. This is codified in Utah Code §30-3-5:

> On a petition for modification of a divorce decree, the

> threshold requirement for relief is a showing of substantial change in the circumstances of the parties *occurring since the entry of the divorce and not* contemplated in the divorce itself.

Various cases have addressed the burden for this showing, and have consistently held that the showing is particularly high. *See generally, Land v. Land*, 605 P.2d 1248 (Utah 1980); *Adams v. Adams*, 593 P2.d. 147 (Utah 1979). That there should be a particularly high burden is embodied in the following:

> Under Utah Law, a trial court sitting in a divorce matter retains continuing jurisdiction to make such modifications in the initial decree of divorce as it deems just and equitable. Where no appeal is taken from the original divorce decree, however, a change of circumstances must be shown in order to justify a later modification of such decree. Absent such a requirement, a decree of divorce would be subject to ad infinitum appellate review and readjustment according to the concepts of equity held by succeeding trial judges.

Fouler v Fouler, 626 P.2d 412, 414 (Utah 1981).

In the case at hand, Randee claims that the issues that he raised, but never fully explored and/or pursued, are a sufficient showing of a change of circumstances. The trial court agreed, however, the reasoning was problematic: "[l]ogically it would seem that a difference between reality and apparent reality does not constitute a change in circumstances, only a change in perception", but the trial court then went on to add that if the difference between reality and apparent reality was a change in perception, Randee would be bound to stringent deadlines or a separate action. That Randee would be bound to stringent

deadlines or a separate action adds nothing to the analysis of whether Randee showed a substantial change of circumstances. Indeed, the trial court, in its statement, implicitly acknowledges that there was not really a change in circumstances, but then decides, presumably under equitable principles, that Randee should, nevertheless, go forward.

Assuming that Randee's allegations were true, his claims could have only been brought appropriately under a Rule 60(b) motion. Rule 60(b) of the Utah Rules of Civil Procedure provides, in relevant part, that:

> On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party...from a final judgment...for...(1) mistake, inadvertence, surprise, or excusable neglect, (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial...[or for] (3)fraud (whether heretofore determined intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party...The motion shall be made within a reasonable time and for reasons (1), (2), or (3), not more than 3 months after the judgment.

Randee's motion might conceivably have fit under subsections 1, 2[5] or 3, but he did not bring such a motion and his Petition for Modification was not filed until after the three-month deadline had expired.

In *Richins v. Delbert Chipman & Sons*, 817 P.2d 382 (Ut. Ct. App. 1991), this Court found that Rule 60(b)(1) -mistake, surprise, inadvertence or neglect-

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[5]Although the facts show that due diligence was not exercised prior to the resolution of this matter.

applied based on the Defendant's claim that he mistakenly entered an ill-advised stipulation. The Defendant, however, had not filed within the three-month time period and attempted to set aside the judgment based on catch-all subsection of Rule 60(b) -" any other reason justifying the relief from the operation of the judgement". This section is not bound by a deadline. This Court held that since subsection (1) was applicable, the catch-all subsection was inapplicable and could not be used to overcome the failure to file within the three-month deadline.

Here, the trial court's ruling not only relieved Randee of his burden showing a substantial change of circumstances but it also circumvents the deadline otherwise imposed by the Rules of Civil Procedure.

Finally, if the issue of a change in circumstances was reviewed on the basis as proposed by the trial court in this case, one could always find a reason to modify a judgment. This is precisely what the *Fouler* Court cautioned against: "ad infinitum appellate review and readjustment according to the concepts of equity held by succeeding trial judges." *Fouler, supra*, 626 P.2d. at 414.

This is particularly disturbing in light of the fact that the parties entered into a stipulated settlement and when Jeroldene sought to enforce that settlement, Randee responded by claiming that the case should be relitigated on the basis of Jeroldene's alleged misconduct.

POINT II. THERE ARE NO COMPELLING REASONS TO RELITIGATE THE CASE.

In *Despain v. Despain*, 627 P.2d 526 (Utah 1981), the Utah Supreme

Court addressed the issue of modification where there had been a stipulated agreement incorporated into the judgment. In denying the request for modification, the Court placed a great deal of emphasis on the fact that the parties entered into a stipulation:

> When a decree is based upon a property settlement agreement, forged by the parties and sanctioned by the court, equity must take such agreement into consideration. Equity is not available to reinstate rights and privileges voluntarily contracted away simply because one has come to regret the bargain made. Accordingly, the law limits the continuing jurisdiction of the court where a property settlement agreement has been incorporated into the decree, and the outright abrogation of the provisions of such agreement is only to be resorted to with great reluctance and compelling reasons.

Id. 526, fn. 6.

Randee, at the very least, was on notice of the alleged missing assets as addressed in his May 7, 1997 letter. Even with this knowledge, Randee and his attorney signed the stipulation. The signing of the stipulation also took place after the threat was made that discovery was being drafted to compel the return of the records allegedly held by Jeroldene. Randee held these same concerns at that time and was aware of discovery methods by which more information could be obtained. Yet, he put these concerns aside and entered into a stipulation. Thus, there are no compelling reasons to reopen the case.

In *Glover v. Glover*, 242 P.2d 298 (1952), the Utah Supreme Court allowed a property settlement to be relitigated solely on the basis that the husband had

engaged in active, extrinsic fraud. There, the husband had the wife quit claim her interest in real property with the promise that he would pay her one-half of the appraised value, something he had no intention of doing. The wife, relying on her husband's representation, did not raise that issue in the divorce settlement. The Utah Supreme Court reasoned that since the divorce settlement did not address the property in dispute, the parties were not relitigating any issues.

This case stands in sharp contrast to *Glover*. There are absolutely no allegations that Randee was coerced or misled about the "missing" assets before he and/or his attorney signed the stipulation. Moreover, Randee, as his attorney noted in the May 7, 1997-letter, had the option of compelling the discovery. Indeed, he indicated that the discovery was being drafted, but it was never pursued. Thus, the issue should be considered waived.

In *Christensen v. Christensen*, 619 P 2d 1372, 1373-1374 (Utah 1980), the Utah Supreme Court held that a property settlement based on a stipulation could not be reopened and property redistributed based on the wife's claim that her ex-husband had misrepresented the value of property that was acquired and maintained during the marriage and that was ultimately awarded to the husband. The Court simply refused to disturb a stipulated property settlement merely because the wife relied on information given to her by her husband in an adversarial proceeding.

Here, Randee, with knowledge, voluntarily contracted his claims away in the divorce stipulation. The May 7, 1997 letter from Randee's counsel shows

knowledge of this alleged secreting of funds. Randee had the option to, but failed to use the discovery process. During the interlocutory period, Randee subpoenaed Jeroldene's banking records, but never followed up on that investigation. That Randee failed to diligently pursue the matter argues against reopening the case.

There are no compelling reasons to relitigate this case and no change in circumstances has occurred that would allow a modification of the decree.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the trial court's Order denying the Motion to Dismiss Defendant's Petition to Modify be reversed.

DATED this 8th day of October, 1998.

UTAH LEGAL SERVICES, INC.
By Rosalie Reilly
Attorney for Petitioner

CERTIFICATE OF SERVICE

Two copies of the foregoing Brief of Appellant were mailed, postage prepaid, to Defendant's attorney, Craig C. Halls, at 333 South Main, Blanding, UT 84511, this 8th day of October, 1998.

UTAH LEGAL SERVICES, INC.
By Rosalie Reilly