2001

Janae S. Dibble v. Carlos M. Dibble : Brief of Appellant

Utah Court of Appeals

Wm. Gregory Burdett; Scott B. Davis; Burdett, Neeley & Davis, PLLC; Attorneys for Appellant.
Clark W. Sessions; Clyde, Snow, Sessions & Swenson; Attorneys for Appellee.

IN THE UTAH COURT OF APPEALS

JANAE S. DIBBLE,	)	
Petitioner and Appellant,	)	**BRIEF OF APPELLANT**
vs.	)	
CARLOS M. DIBBLE,	)	Case No. 20010720
	)	Priority No. 15
Respondent and Appellee.	)	

BRIEF OF APPELLANT

On Appeal from an Order Modifying a Decree of Divorce
entered in the First Judicial District Court
of Box Elder County, Utah
the Honorable Ben H. Hadfield presiding

WM. GREGORY BURDETT (7825)
SCOTT B. DAVIS (9266)
BURDETT, NEELEY & DAVIS, PLLC
2411 Kiesel Avenue, Suite 212
Ogden, UT 84401
Telephone (801) 612-1511

Attorneys for Appellant

Clark W. Sessions
Clyde, Snow, Sessions & Swenson
201 S. Main Street, #1300
Salt Lake City, UT 84111

Attorney for Appellee

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Clyde, Snow, Sessions & Swenson
201 S. Main Street, #1300
Salt Lake City, UT 84111

Attorney for Appellee

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JURISDICTIONAL STATEMENT

The Court has jurisdiction pursuant to §78-2-2(4) Utah Code Annotated (as amended, 2001), and §78-2a-3(2)(h) as an Appeal from final Orders granting a Petition for Modification of a Divorce Decree in the First Judicial District Court..

ISSUES PRESENTED FOR REVIEW

1. Do the facts support a finding that Appellant cohabitated within the meaning of section 30-3-5(9) UCA and paragraph 18 of the Decree of Divorce?

2. Standard of Review: The issue in this case is a mixed question of fact and law. Consequently, the appeals court is not bound by the conclusion of the trial court. Haddow v. Haddow, 707 P.2d 669, 671 (Utah 1985). Furthermore, the appeals courts in Utah are vested with broad equitable powers in divorce actions when reviewing a trial courts decision. Haddow, supra see also Read v. Read, 594 P.2d 871, 872-73 (Utah 1979).

3. The issues raised in this appeal were raised in the trial court, being substantive rather that technical and are thus preserved for appeal.

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES, AND REGULATIONS

Utah Code Ann. Section 30-3-5(9) (2000) states:

> (9) Any order of the court that a party pay alimony to a former spouse terminates upon establishment by the party paying alimony that the former spouse is cohabitating with another person.

STATEMENT OF THE CASE

Nature of Case

This is a domestic action wherein Respondent (Carlos M. Dibble) seeks to be relieved from the obligation to pay alimony to Petitioner (Janae S. Dibble)[1] arising from a Decree of Divorce entered October 13, 1998, in the First Judicial District Court for Box Elder County, State of Utah, the Honorable Ben H. Hadfield presiding. (R. 193)[2]. Respondent alleges that alimony should terminate by reason of Petitioner's cohabitation, as set forth in said Decree at paragraph 18:

> Respondent shall pay Petitioner alimony in the amount of $3,500.00 per month for a period of 11 years commencing September 1, 1998. Alimony shall terminate upon Petitioner's remarriage or cohabitation with a member of the opposite sex as provided by Section 30-3-5, Utah Code Annotated, or the death of either party. (R. 202)

Course of Proceedings

Respondent filed a Petition for Modification on May 26, 2000, with the First Judicial District Court for Box Elder County, State of Utah. (R. 225). Petitioner was served with a Summons and the Petition for Modification on May 30, 2000. (R. 288-

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[1]Janae S. Dibble has married Mr. Terry, on or about October 6, 2000, and is now know as Janae S. Terry. Her remarriage was not at issue in the trial court proceeding. ® 496, paragraph 9 of the Findings of Fact).

[2] For purposes of this Brief, reference to the abbreviation "Tr." shall mean the page number of the transcript of Trial, March 21-22, 2001, and reference to the abbreviation "R." shall mean the page number of the general record from the First District Court.

289). Petitioner, by counsel, filed an Answer to Petition for Modification[3] on or about June 26, 2000. (R. 230). Petitioner filed an Order to Show Cause In Re: Contempt on or about June 28, 2000, requesting the Respondent to show cause, if any, why the Respondent should not be held in contempt of court for failing to pay alimony. (R. 236). On October 11, 2000, the court issued an Order following a hearing on Petitioner's Order to Show Cause. (R. 380). In the order, the court award a judgment of delinquent alimony through the month of August 2000 in the sum of $14,750, but stayed the enforcement of $9,500 of the judgment until such time as the court hears the Respondent's Petition for Modification. (R. 380-381). Respondent paid $5,250 as satisfaction of the portion of the judgment not stayed by the court. (R. 378).

Respondent's Petition for Modification was tried to the Honorable Judge Ben H. Hadfield on March 21 and 22, 2001, without a jury. The entered Findings of Fact and Conclusions of Law were entered by the court on or about August 6, 2001. (R: 489). The court also entered an Order Modifying Decree of Divorce on or about August 6, 2001, in which Respondent's obligation to pay alimony was terminated as of October 1, 1998, and Respondent was award a judgment in the amount of $67,854 against Petitioner.[4]

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[3] Respondent raised several issues in his Petition for Modification and the court's resulting Order from the trial on the Petition for Modification. The issue raised on appeal only concerns the court's decision with regards to Respondent's request that alimony be terminated as a result of Petitioner's alleged cohabitation which the court ordered.

[4] Paragraph 3 of the Order Modifying Decree of Divorce states the following:

. . . the Respondent be and he is hereby awarded a judgment

Statement of Facts

Petitioner and Respondent were divorce October 13, 1998. Petitioner was awarded custody of the parties children, child support, various marital property, and monthly alimony. (R. 193-208). Respondent was order to pay Petitioner as alimony $3,500 per month for a period of 11 years from September 1, 1998. (Paragraph 18 of the Decree of Divorce, R 202). The decree provides that alimony shall terminate upon Petitioner's remarriage or cohabitation with a member of the opposite sex as provided by Section 30-3-5, Utah Code Annotated, or the death of either party. (Paragraph 18 of the Decree of Divorce, R 202).

At trial, the court found that during sometime in March 1997 met a Mr. Mitchell Adams ("Mr. Adams") at a seminar in Colorado. (R. 490, Findings of Fact paragraph 2; Trans. p. 3, ln. 18-24). Mr. Adams and Petitioner did not know each other before that time. (Trans. p. 3, ln. 25, p. 4, ln. 1-2). While in Colorado attending that seminar, Mr. Adams and Petitioner had sexual contact. (R. 490, Findings of Fact paragraph 2). After

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> against the Petitioner for the sum of $67,854 provided however, that execution on said judgment shall be stayed and the Respondent shall be permitted to deduct the sum of $1,192.00, per month from his child support obligation of $3,000.00 per month and to credit the amount of $1,192.00 monthly until the judgment is fully paid and satisfied. The Judgment shall not bear interest. ® 486).

It is understood from the court's memorandum decision ® 482) the $67,854 is for repayment of an overpayment of alimony by Respondent paid Petitioner from October 1, 1998, the date the court terminated Respondent's alimony obligation in the Order.

March of 1997, Petitioner and Mr. Adams communicated by telephone and e-mail. (R. 490, Findings of Fact, paragraph 3). The court further found that Petitioner and Mr. Adams met each other face-to-face over the next several months in Colorado, California, Florida and Utah, with sexual contact at each meeting. (R. 490, Findings of Fact, paragraph 3).

The court found that during the late summer of 1998, Petitioner and Mr. Adams became engaged and that in the early fall of 1998 Petitioner decided to move with her children to the State of Florida. (R. 491, Findings of Fact, paragraph 2 and 3). Mr. Adams agreed to arrange for a separate home for Petitioner and her children to use in Florida until their marriage. Mr. Adams decided to acquire a larger home that Petitioner and her children could use. (R. 491-492, Findings of Fact, paragraph 3). Mr. Adams testified at trial he intended Petitioner and her children to stay at the larger home until Mr. Adams and Petitioner married. (Trans. p. 29, ln. 2-5, p. 52, ln. 7-19). Mr. Adams failed to purchase the larger home because he was not able to obtain financing. (Trans. p. 52, ln. 17-20). As a result, Petitioner had no choice but to temporarily stay with Mr. Adams until the other arrangements could be found. Mr. Adams further testified that while Petitioner and her children stayed at his home Mr. thought their stay would be temporary. (Trans. p. 52, ln. 21-25, p. 53, ln. 1-3).

Respondent's twenty year son (Derrick Dibble) testified at trial that it was his when Petitioner and her children would arrive in Florida that it was his understanding and

expectation that Petitioner and his siblings would be staying at another home until Petitioner's and Mr. Adams' marriage. (Trans. p.126, ln. 8-25, p. 127, ln. 1). Derrick Dibble also testified that while they stayed at Mr. Adams' home he understood and expected that another home would become available (Trans. p. 127, ln. 20-25, p. 128, ln. 1-20, p. 150, ln. 10-11).

Petitioner's and Respondent's daughter (Erica Storey) testified at trial that it was her understanding and expectation that when she and her mother would arrive in Florida they would reside in a different home than Mr. Adams. (Trans. p. 152, ln 4-25, p. 153, ln. 1-10). Erica Storey testified that while they stayed with Mr. Adams, they would move to other home without Mr. Adams until the marriage. (Trans. p. 153, ln. 11-19). In addition to Derrick Dibble's and Erica Storey's testimony, Matthew Zerkle, a friend of the family who stayed approximately the entire time with Petitioner and her children at Mr. Adams home in Florida, testified that it was his understanding and expectation that they would not be in the same home as Mr. Adams. (Trans. p. 159, ln. 13-19). be in a separate home in

Petitioner testified that it was her understanding and expectation that she and her children would not reside in the same home as Mr. Adams until they married. (Trans. p. 174, ln. 23-25, p. 175, ln. 1-13). Petitioner understood and expected a different home would be ready for her and her children when she arrived in Florida. Id. Petitioner

further testified that no date of marriage had been established and that she considered Mr. Adams' relationship as a friendship. Id.

Upon Petitioner's arrival in Florida, she began looking for alternative place to stay so she and her children could move out of Mr. Adams' home. Mr. Adams testifies of this fact (Trans. pg 53, ln. 4-22), Erica Storey testifies of this fact (Trans. pg. 153, ln. 11-25, pg. 154, ln. 1-17), and Matthew Zerkle testifies of this fact (Trans. pg. 159, ln. 20-25, pg. 160, ln. 1-7). Petitioner returned to Utah October 13, 1998, to rent a place in Davis County. (Trans. pg. 169, ln. 13-25, pg. 170, ln. 1-25, pg. 171, ln. 1-4).

Petitioner and her children only move a few of their personal belongings into Mr. Adams' home. Only certain furniture, a mattress, and minimal personal items were brought in from the moving trucks. (R. 493-494, Findings of Fact paragraph 8.d.). In fact, most of Petitioner's and her children's personal belongings stayed in the moving trucks. Id. The moving trucks were eventually repossessed by the moving truck company with Petitioner's and the children's belongings. Id.

Mr. Adams and Petitioner did not share in the expenses of Mr. Adams' home. (R. 493, Findings of Fact paragraph 8.c.). The court found that Petitioner did not contribute to the payment of any indebtedness against the Adams residence, utilities at the Adams residence. Id. Mr. Adams testified that his finances were not shared with the Petitioner and that Petitioner purchased food for herself and her children. (Trans. pg. 55, ln. 21-25, pg. 56, ln. 1-3).

The found that the Petitioner and her children had sleeping arrangements whereby one male child and a male friend slept in one bedroom at the Adams residence, that the children and Petitioner slept on mattresses and/or a couch in the living and/or dining room, and that one female child slept on a couch. (R. 494, Findings of Fact paragraph 8.g.).

The court found that the Petitioner and her children moved to Florida between the mid-September 1998 and returned to Utah on or about the Thanksgiving holiday in 1998. (R. 492-494, Findings of Fact paragraph 6. And 8.l.).

SUMMARY OF ARGUMENT

Utah case law has clearly defined cohabitation under section 30-3-5(9) of the Utah Code Annotated. The weight of the facts of this case indicate that Mrs. Dibble's stay with Mr. Adams was temporary, and did not constitute cohabitation under Utah law. The trial court abused its discretion by misapplying the facts of this case to the case law concerning cohabitation. The proper conclusion when applying Utah law to the facts of this case is that Mrs. Dibble did not cohabitation with Mr. Adams and alleged.

ARGUMENT

I. THE FINDINGS OF THE TRIAL COURT FAIL TO SATISFY THE DEFINITION OF COMMON RESIDENCY AS DEFINED BY UTAH LAW.

The law involving cohabitation is well settled in Utah. In the case of Haddow v. Haddow, 707 P.2d 669 (Utah 1985), the Utah Supreme court established a two prong test

for cohabitation. The first prong of the test is common residency. The second prong of the test is sexual contact evidencing conjugal association. Several Utah cases since Haddow have following and applied Haddow's two prong test. See, Pendleton v. Pendleton, 918 P.2d 159 (Utah Ct. App. 1996); Hill v. Hill, 968 P.2d 866 (Utah App. 1998). In Haddow, the court went on to state that "common residency means the sharing of a common abode that both parties consider their principal domicile for more than a temporary or brief period of time." Id. at 672. "Cohabitation is not a sojourn, nor a habit of visiting, nor even remaining with for a time; the term implies continuity." Id. at 673 (quoting Burke v. Burke, 340 P.2d 948, 950 (Or. 1959)). The court in Haddow also stated that the residency clause of the termination of alimony statue was drafted for the same purpose as the cohabitation clause in the decree of divorce. Id.

"Residency" is not a defined term in the termination of alimony statute, however, the Utah Supreme Court has defined the word "residing" as used in the statue as: "To dwell permanently or for a length of time; to have a settled abode for a time." Knuteson v. Knuteson, 619 P.2d 1387, 1389 (Utah 1980) (quoting Webster's New Twentieth Century Dictionary, 2nd. Edition).

The Utah Supreme Court in Knuteson, affirmed Third District Judge Christine M. Durham's decision not to terminate the recipient spouse's alimony based on the termination of alimony statute. In Knuteson, the recipient spouse moved in with a neighbor for roughly two months and ten days, at least in part because of the grim

financial situation brought about by her exhusband's non-payment of alimony. Id. at 1388. Although she candidly confessed to having sexual relations with the neighbor, Mr. Conder, the reviewing court refused to terminate her right to receive alimony because "the wording of the statute does not appear to cover a temporary stay at another's home." Id. at 1389.

The Knuteson decision supports Petitioner's arguments in this case. In Knuteson, Mrs. Knuteson stayed with Mr. Conder for a period of two months and ten days. In the present case, the court found that the Petitioner stayed with Mr. Adams from mid-September 1998 to about the Thanksgiving holiday of 1998. This is the same amount of time that Mrs. Knuteson stayed with Mr. Conder, plus or minus a day or so. The exact date of the Petitioner's arrival was not exactly established. The court in Knuteson determined that 2 months and 10 tens did not establish permanent residence.

Knuteson also based its decision on the fact that a financial emergency occurred before Mrs. Knuteson's move to Mr. Condor's home. Similarly, an emergency caused Petitioner in this case to temporarily stay with Mr. Adams. Petitioner drove across the United States with the expectation of staying in separate homes. When she arrived, Mr. Adams had not been able to secure the other home for Petitioner. Petitioner was forced to temporary stay with Mr. Adams. Petitioner made attempts of securing separate living arrangements in Florida. She even returned to Utah on October 13, 1998, and arranged for an apartment in Davis County.

The Haddow decision is a powerful precedent for this case. In Haddow, the Utah Supreme Court reversed the trial court's order that the ex-wife pay her former husband one-half of the equity in the home in which she was living pursuant to an equitable lien established in the divorce decree. The reviewing court held that the trial court had improperly construed the "cohabitation" language in the decree. Haddow, 707 P.2d at 670. The trial court found that the spouse spent most of her free time with her boyfriend, Mr. Hudson. Mr. Hudson had dinner at the spouse's house five or six times a week, and spent the night with her approximately once a week. Mr. Hudson would leave clothes at her home, which she would launder, and sometimes take to the dry cleaner. He would sometimes shower and change at her home. Mr. Hudson maintained a separate residence at his parent's home. He did use her home as a mailing address for a couple of bank accounts. There was no evidence that they shared any assets or had any joint financial accounts, projects, or liabilities. Mr. Hudson gave the spouse money to reimburse her for the food he ate, and took her car to be serviced at a car dealership where he worked. "Beyond that, Mr. Hudson made no financial or tangible contributions to appellant or to her household, nor did he share living expenses with her in any sense." Id. at 670-71. The court found it significant that Mr. Hudson did not pay any of the receiving spouse' living expenses, or consistently share her assets. He did not contribute to the mortgage payment, the insurance on the house, or the utility bills. They rarely shared automobiles. Id. at 673-74. The court recognized Mr. Hudson's reimbursements for food and dry

cleaning as evidence of their intent that each bear their own expenses. Id. at 674. In addition, the court was not critical of the fact that Mr. Hudson left a van parked at the receiving spouse's home fore several months for storage purposes, rather than for the convenience of daily use. Mr. Hudson and the spouse had been dating each other exclusively for about fourteen months. They also took trips together to Hawaii and Elko, Nevada. Id. at 672.

In the present case, Petitioner and Mr. Adams did not share expenses. Mr. Adams did not require Petitioner to share in any of his expenses. The share a few meals. Petitioner paid for her and her children's food. These facts are consist with the facts in Haddow. The facts found by the trial court do not establish a permanent residence. Petitioner and Mr. Adams did not have a permanent residence.

It is important to break apart each part of the Haddow definition. First, the parties must share a common abode. Second, both parties consider the adobe their principal domicile. Third, the parties must consider that the domicile is for more than a temporary or brief period of time. In this case, the findings of fact do not establish this prong of the cohabitation test.

In the present case, Ms. Dibble moved to Florida and for a short period stayed with Mr. Adams with her children. Therefore, the parties shared a common abode for a short time. However, both parties did not consider the abode their principal domicile. This is clear form the testimony at trial from all parties who live in the home. Mr. Adams

testified that Ms. Dibble's intentions were to more to Florida and move into a separate house that Mr. Adams was arranging. Mr. Adams further testified that this was what he intended and understand would happen. But, financing for the second home became a problem. While in Florida, Ms. Dibble continued to pursue finding alternative residence, a residence were she and her children could stay while Mr. Adams stayed in the home he already had. This clearly shows that the parties did not consider the abode their principal domicile. Mr. Adams may have considered it his principal domicile. But, Ms. Dibble did not consider it her principal domicile. Mr. Adams did not consider it her principal domicile as well. Ms. Dibble's children did not consider it their principle domicile as well. Petitioner's children testified they understood that when they were going to Florida that they would reside in a different home than Mr. Adams. Therefore, the trial court's findings clearly show Petitioner did not consider the home her principal domicile before leaving for Florida, when arriving at Florida, while staying in Florida, and when leaving Florida.

Finally, the parties must consider that the domicile is for more than a temporary or brief period of time. In this case, Ms. Dibble moved to Florida sometime after mid-September 1998. She left on Thanksgiving day 1998. At best, two months and twelve days. This is a temporary or brief period of time. In Knuteson v. Knuteson, 619 P.2d 1387, 1389 (Utah 1980), the Court held that a stay of two months and ten days did not establish a settled abode. In this case, the time is similar or less. In addition, Petitioner

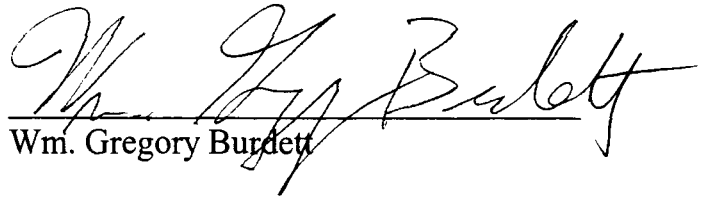
from the day she arrived and until she left in November was pursuing alternative residence.

Moreover, Petitioner had in fact left Florida in October and rented an apartment in Farmington, Utah. Clearly at time period less than the time in Knuteson. After spending about a week in Utah in October, she returned to Florida to obtain her belongings and move back to Utah. Petitioner's intentions and understanding are supported by Mr. Adams' testimony and Ms. Cobbley's testimony, both who were the appellee's witnesses. At no time did Ms. Dibble considered Mr. Adams' home her principle domicile.

CONCLUSION

Utah case law has clearly defined cohabitation under section 30-3-5(9) of the Utah Code Annotated. The weight of the facts of this case indicate that Mrs. Dibble's stay with Mr. Adams was temporary, and did not constitute cohabitation under Utah law. The trial court abused its discretion by misapplying the facts of this case to the case law concerning cohabitation. The proper conclusion when applying Utah law to the facts of this case is that Mrs. Dibble did not cohabitation with Mr. Adams and alleged.

DATED this 22 day of April, 2002.



Wm. Gregory Burdett

MAILING CERTIFICATE

I hereby certify that I mailed two copies of the foregoing Appellant's Brief to the following:

Clark W. Sessions
Clyde, Snow, Sessions & Swenson
201 S. Main Street, #1300
Salt Lake City, UT 84111