

1996

Jetta Ann Pearson Davie v. Craig Vernon Davie : Reply Brief

Utah Court of Appeals

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UTAH COURT OF APPEALS
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DOCKET NO. 960096-CA

IN THE UTAH COURT OF APPEALS

JETTA ANN PEARSON DAVIE, :

Plaintiff and
Appellee,

Appeal No. 960096-CA

vs. :

CRAIG VERNON DAVIE,

Defendant and
Appellant. :

Trial Court No. 94-CV-29
Honorable J. Philip Eves

Priority No. 15

APPELLANT'S REPLY BRIEF

APPEAL FROM DECREE OF DIVORCE OF THE DISTRICT COURT OF THE FIFTH
JUDICIAL DISTRICT IN AND FOR BEAVER COUNTY, STATE OF UTAH

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FILED

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COURT OF APPEALS

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ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION BY OVERSTATING GOODWIN LEASE'S VALUE, INCLUDING IT AS MARITAL PROPERTY, AND AWARDING IT TO DEFENDANT.

As demonstrated in the Brief of Appellant ("Brief"), Judge Eves abused his discretion by overstating the value, if any, of the Goodwin Lease, by including it among the marital assets and by using its inflated value to dramatically distort the equitable division of marital property.

A. The Trial Court Abused Its Discretion By Overstating the Value of the Goodwin Lease.

In his Brief, Defendant/Appellant marshalled the evidence to show that Plaintiff/Appellee testified that the Goodwin Lease was valued at \$244,100. (Brief at 4, 13; R. at 1025-26.) She later testified that farming the Goodwin property was not profitable. (R. at 1181-1183.)

Clifford Cook, an individual who farmed the Goodwin property for 20 years before the Davies, testified that he never realized a profit and considered farming it to be an "expensive hobby." (R. at 1403.) Judge Eves later observed that based on the evidence presented at trial, it appeared as if the Davies' farming activities were producing nothing more than tremendous expenses every year. (R. at 1190-92.)

Defendant/Appellant argued that considering the property's unprofitability, the Goodwin Lease was essentially worthless. (Brief at 12-15; R. at 1182, 1301, 1306, 1403-04.) At least one point during the trial, Judge Eves appeared to believe the same. (R. at 1190-92.) Furthermore, any future income to Defendant/Appellant from farming activities would be

conditioned on Defendant/Appellant's own hard labor--which does not qualify as a marital asset. (Brief at 14.) See Erickson v. Wasatch Manor, Inc., 802 P.2d 1314, 1323 (Utah App. 1990) (noting that future income conditioned on personal services is not a marital interest).

The trial court received no expert testimony or appraisals regarding the value of the land subject to the Goodwin Lease. On its face, the Goodwin Lease covers 277 acres of property. (R. at 242DY.)¹

Judge Eves invented his own formula for the purpose of valuing the Goodwin Lease: "\$3,000 per year times 30 years, which equal a total current value of \$90,000." (Brief at 4, 11; R. at 699.) Such formula is not supported by the record on appeal, is not consistent with Utah law and is not within the trial court's discretion. (Brief at 10-15.)

Plaintiff/Appellee, in violation of Rule 11, Utah Rules of Appellate Procedure, referenced an accounting text and formula not used at trial in an effort to justify Judge Eves' valuation. Such accounting text and formula should be stricken, pursuant to the Court's Order dated October 11, 1996, because they are not part of the record on appeal and were clearly not used by Judge Eves in reaching his \$90,000 valuation of the Goodwin Lease. (R. at 699.) Even when applying her accounting formula, Plaintiff/Appellee incorporates Judge Eves' error of using 30

¹ It is noteworthy that references in the Plaintiff/Appellee's Brief asserting that the Goodwin Lease covered a larger tract of land were not supported by the record and were therefore stricken pursuant to an Order by this Court on October 10, 1996.

years as the remaining term on the Goodwin Lease. (Brief at 11 n.4.)

As indicated in the Brief, Judge Eves abused his discretion with regards to the Goodwin Farm in several respects, including the following: (1) by overvaluing the Goodwin Lease; (2) by using a faulty formula; (3) by not discounting the amount to its present value; (4) by not including sufficiently detailed financial findings as required by Utah law; (5) by not obtaining an expert appraisal on the property; (6) by not considering the Lease's extensive restrictions and invalidations; (7) by placing a value on Defendant/Appellant's future personal services; and (8) by not properly weighing the testimony from all relevant witnesses, including Plaintiff/Appellee, that farming operations on the Goodwin Farm had proven unprofitable and amounted to nothing more than an "expensive hobby." (Brief at 9-15.)

At two points in the trial, in fact, Judge Eves indicated that he agreed that farming the Goodwin property constituted an "expensive hobby." (R. at 1402-1404.) At one point, Judge Eves stated:

I guess the point that I am making is this. If we look at these figures, it looks to me like your desire to farm is an expensive hobby that isn't producing any income. What it does is produce tremendous expenses every year, and you're slowly but surely digging yourself a big hole. And if that's the situation, Craig may be in the same circumstance, and, in fact, his farming operation may not have any value either. That's the -- that's the -- what's to be drawn from these figures that you're presenting is that your losing money every year from your farming operations. So that's why I asked.

(Emphasis added.) (R. at 1190-92.) Judge Eves noted that Plaintiff/Appellee's figures showed that the parties were losing money every year on their farming activities. Plaintiff/Appellee did not present other figures to contradict such conclusion. Defendant/Appellant maintains in this appeal that Judge Eves abused his discretion by disregarding such figures and inventing his own formula instead.

B. The Trial Court Abused Its Discretion By Including the Goodwin Lease as Marital Property.

In addition to grossly overvaluing the Goodwin Lease, Defendant/Appellant maintains that Judge Eves abused his discretion through his inconsistent application of the "sweat equity" doctrine. Plaintiff/Appellee testified that she contributed a significant amount of time and effort to the maintenance, repairs and upkeep of both the Cow Hollow and Goodwin properties. (R. at 907-16, 973-84.) Judge Eves found that Plaintiff/Appellee's labors, maintenance and repairs on Cow Hollow were merely consistent with the "family use of the property," (Brief at 9; R. at 688-89), while her labors on the Goodwin Farm constituted "sweat equity" which converted the Goodwin Lease to a marital asset. (Brief at 8-9; R. at 1559.)

While recognizing that Utah law provides a "sweat equity" exception for donee property, Defendant/Appellant maintains that Judge Eves' position on the Goodwin Lease is arbitrary, inconsistent and in contradiction of his position on the Cow Hollow property.

C. The Trial Court Abused Its Discretion By Awarding Defendant/Appellant the Majority of the Marital Debt Offset Against the Overvalued Goodwin Lease.

By overvaluing the Goodwin Lease and classifying it as a marital asset awarded to Defendant/Appellant, Judge Eves has grossly distorted the fair and equitable distribution of the marital property. Plaintiff/Appellee argues in her brief that Utah law does not require a precisely equal division of property. While this may be true, the general rule is that marital property should be shared equally between the parties, unless the trial court memorializes adequate findings of unusual circumstances. Hall v. Hall, 858 P.2d 1022 (Utah App. 1990). (Brief at 9-11.) Judge Eves, rather than memorializing unusual findings which justified the grossly disparate distribution of debts and assets absent the inflated value of the Goodwin Lease, found that "the division of debt appears appropriate" "in view of the fact that Defendant received a higher value of the marital property." (R. at 806-807.)

The "higher value of marital property" awarded to Defendant/Appellant consists primarily of the disputed Goodwin Lease--since the value of the Lease comprised over 61 percent² of the marital property awarded to Defendant/Appellant. (R. at 801-02.) Were it not for the Judge Eves' overvaluation of the Goodwin Lease, Plaintiff/Appellee likely would have been awarded substantially more of the marital debt and Defendant/Appellant

² Defendant/Appellant was awarded \$147,069 in marital property. (R. at 801-02). The trial court valued the Goodwin Lease at \$90,000. (R. at 799-00). \$90,000 divided by \$147,069 equals 61 percent.

would likely have been awarded more of the "genuine" marital assets.

II. THE TRIAL COURT ABUSED ITS DISCRETION BY IMPUTING MORE INCOME TO DEFENDANT/APPELLANT THAN HE EARNED IN FOUR YEARS PRECEDING THE DIVORCE.

Judge Eves abuse his discretion by imputing a monthly income to Defendant/Appellant that was substantially higher than he earned in the four years immediately preceding the divorce decree. (R. at 751.) While reviewing the couples' joint tax information from 1991 through 1994, Plaintiff/Appellee testified that Defendant/Appellant earned substantially less than \$1,500 per month. (Brief at 15-17; R. at 1058-63.) Judge Eves' imputation of income was not in accordance with Utah law. Utah Code Ann. § 78-45-7.5(7)(a) (Supp. 1995). (Brief at 15.)

In her brief, Plaintiff/Appellee argues that Judge Eves' imputation was appropriate because the record supported the conclusion that Defendant/Appellant was earning more than \$2,540 per month. However, Plaintiff/Appellee completely disregarded or misunderstood the difference between gross income and net income. Plaintiff/Appellee's argument completely ignored the "tremendous expenses involve in the farming operations that caused the parties to lose money every year. (R. at 1191.)

For instance, a farmer expends labor, the cost of the seed, water, ground, equipment, etc. in order to grow hay. If he then feeds that hay to his animals, the farmer does not realize income from his hay. Rather, a farmer recognizes "expenses" of his farm operations. Testimony at trial proved that the "expenses" of the Goodwin farm operations typically exceeded its

revenues. (R. at 1191.) Even Judge Eves acknowledged this fact. (R. at 1190-92.)

While ignoring or misunderstanding this concept, Plaintiff/Appellee's brief lists every aspect of Defendant/Appellant's farming operation as "income," without any consideration for the correlating expenses. Thus, Plaintiff/Appellee's conclusion that Defendant/Appellant was earning in excess of \$2,540 per month is false, misleading, without merit and therefore should be stricken. If Judge Eves' ruling is allowed to stand, then trial judge's in future Utah divorce actions will be permitted to impute whatever income a disgruntled spouse feels that her ex-husband is capable of earning. Such a policy is plainly wrong and therefore should be avoided.

Most individuals in this state could earn more money by working harder through overtime, second jobs, career changes, etc. In fact, many public servants could earn a lot more income if they were to work in the private sector. Some elementary school teachers may even earn more money if they left teaching and became garbage collectors. However, public policy dictates that we do not require parties in divorce to leave their professions of choice and find higher paying jobs. Craig Davie chose to be a farmer. It may be possible that he could have earned more money in another profession--but such is not the issue. If every farmer in this country were to give up farming to find other work, what kind of society would remain?

Judge Eves' finding that Defendant/Appellant was "capable" of earning more than the evidence revealed at trial was

an abuse of discretion, and his subsequent imputation of a \$1,500 monthly income for the purpose of calculating child support was clearly erroneous.³

III. THE TRIAL COURT ABUSED ITS DISCRETION BY IMPROPERLY RESTRICTING DEFENDANT/APPELLANT'S VISITATION RIGHTS.

It is amusing how much emphasis Plaintiff/Appellee's counsel places on Defendant/Appellant's alleged fornication or adultery when the record clearly reflects Plaintiff/Appellee's own out-of-wedlock sexual relationship with her "friend," Glade. (R. at 1422-23.)

Judge Eves, however, made no findings or conclusions regarding either party's morals. Instead, Judge Eves made an explicit finding that both "Sheb and Seth have expressed discomfort with visiting overnight when their father is entertaining Ms. McFall overnight." (R. at 685-86, 749-50.) Plaintiff/Appellee has not disputed the fact that the record does not support such a finding. (Brief at 17-19.) Due to the lack of sufficiency of evidence, such finding should be set aside pursuant to Utah Rules of Civil Procedure, Rule 52(a) .

IV. DEFENDANT/APPELLANT'S BRIEF AND APPEAL ARE IN COMPLIANCE WITH UTAH RULES OF APPELLATE PROCEDURE.

In her brief, Plaintiff/Appellee makes several attacks concerning the adequacy of Defendant/Appellant's Brief and the effectiveness of this appeal, all of which are without merit.⁴

³ It is noteworthy that any and all references in Plaintiff/Appellee's Brief to Defendant/Appellant's post-divorce income were ordered stricken by this Court in an Order dated October 10, 1996.

⁴ It is noteworthy that Plaintiff/Appellee's motion of suggestion of mootness was denied by this Court in an Order dated October 10, 1996.

Defendant/Appellant's appeal and Brief are in full compliance with the Utah Rules of Appellate Procedure.

A. Defendant/Appellant's Brief Complies With The Requirement Of Marshalling The Evidence.

Defendant/Appellant has adequately met his requirement to marshal the evidence through his statement of the case and his argument with numerous cites to the record on appeal. Specifically, Defendant/Appellant marshalled the evidence for each issue on appeal: (1) the valuation of the Goodwin Lease as a marital asset; (2) the court's imputing a \$1500 monthly income to Defendant/Appellant for the purpose of determining child support; and (3) the restrictions placed on Defendant/Appellant's overnight visitations with his sons.

1. Evidence Regarding the Goodwin Lease Was Adequately Marshalled.

First, with regard to the valuation of the Goodwin Lease as a marital asset, Plaintiff/Appellant's Brief marshalled the following evidence: (1) the terms and restrictions of the Goodwin Lease, (Brief at 3-4; R. at 292DY-EC); (2) Plaintiff/Appellee's testimony regarding the terms and value of the Goodwin Lease, (Brief at 3-4, 11; R. at 1110-15, 1024-26); (3) Judge Eves' finding regarding the labors, maintenance and repairs of Plaintiff/Appellee constituting sweat equity, (Brief at 4, 8; R. at 801, 1559); (4) Clifford Cook's testimony regarding the unprofitability of the Goodwin property, (Brief at 3; R. at 1403-04); (5) Judge Eves' formula and calculation for valuation of the Lease, (Brief at 4, 11 n.4; R. at 699); (6) Plaintiff's labors, repairs and maintenance on Cow Hollow, (Brief

at 8-10; R. at 688-89); (7) Judge Eves' division of marital debts and assets, (Brief at 4-5; R. at 787, 803, 1313.)

Defendant/Appellant's argument centered around the valuation formula and the finding that Plaintiff's labors on Cow Hollow were consistent with the family use on the property, while her labors on Goodwin converted the property to a marital asset. Utah courts require only that an appellant marshal relevant evidence, which Plaintiff/Appellant has done. Slattery v. Covey & Co., Inc., 857 P.2d 243, 246 (Utah App. 1993). Furthermore, Utah courts do not require an appellant to marshal evidence in situations where, as in the instant case, the court's findings are insufficiently detailed. Campbell v. Campbell, 896 P.2d 635, 638 (Utah App. 1995). Lastly, to the extent that an appellant fails to adequately marshal the evidence in her first brief, she can do so in her reply brief. State v. Sherard, 818 P.2d 554, 561 (Utah App. 1991).

In short, the record does not even contain a scintilla of competent evidence to support Judge Eves' formula for valuing the Goodwin Lease. The record does contain an extensive account of Plaintiff/Appellant's considerable labors on the Goodwin farm, (R. at 910-18, 968-83, 1111-41, 1173-76), but Judge Eves made no findings or conclusions which justify the disparity of treatment between the "family use" labors on the Cow Hollow property and the labors Plaintiff/Appellant performed on the Goodwin (R. at 1080-94.) Defendant/Appellant maintains that Plaintiff/Appellee's labors on Goodwin were also consistent with the "family use" of the property. (Brief at 7-9.) Thus, Judge Eves' conclusions of law regarding the Goodwin Farm are incorrect and

should be overturned since such conclusions are accorded no particular deference on appeal. Slattery v. Covey & Co., Inc., 857 P.2d 243, 246 (Utah App. 1993).

2. Evidence Regarding Defendant/Appellant's Income Was Adequately Marshalled.

Second, with respect to the court's imputing a \$1500 monthly income to Defendant/Appellant for the purpose of determining child support, Defendant/Appellant marshalled the evidence regarding Plaintiff/Appellee's testimony with respect to his income during the marriage. (Brief at 5, 15-16; R. at 752, 1059-63.)

As was the case with the formula used in valuing the Goodwin Lease, Defendant/Appellant's requirement to marshall the evidence supporting Mr. Davie's imputation of income was not an overly burdensome task because the record contains absolutely no support for such a finding. See Slattery, 857 P.2d at 246 (requiring only the marshalling of relevant evidence). Both the valuation of the Goodwin Lease and the imputation of income to Mr. Davie involve mathematical numbers that are strictly traceable to specific portions of the record on appeal. Defendant/Appellant provided the Court with specific cites to such figures, formulas and calculations in his Brief and accordingly satisfied the marshalling of the evidence requirement.

Plaintiff/Appellee argues in her brief that, in her opinion, Defendant/Appellant is capable of earning \$1500 per month--even though he never did during their marriage. (R. at 1063.) It is interesting that Plaintiff/Appellee spends a

considerable amount of time at trial testifying that her husband was a lousy and lazy farmer, but seems to believe that he can almost double his income overnight after the divorce--and after he lost the Kirk/13 Mile farm to her in the divorce.

Judge Eves abused his discretion by relying on Plaintiff/Appellee's opinion testimony that her ex-husband was capable of earning \$1500 per month. (R. at 1059-63.) Outside of Plaintiff/Appellee's bald assertion, there was no other evidence introduced at trial or considered by Judge Eves which indicated that Defendant/Appellant ever earned \$1,500 per month. Plaintiff/Appellee readily admitted during cross-examination that her \$1,500 figure was merely her estimation and imputation of what she felt that he was "capable" of earning. (R. at 1059-60.) Judge Eves adopted Plaintiff/Appellee's \$1,500 monthly income figure into his findings of fact and conclusions of law without any measure of scrutiny. (R. at 295-96, 751.) To the extent that Judge Eves relied on Plaintiff/Appellee's bald assertion regarding ex-husband's income capabilities to impute a specific income to Mr. Davie, he abused his discretion. Since there is no other evidence in the record on appeal to justify a \$1,500 monthly income for Defendant/Appellant, this Court should overturn the trial court's findings as being clearly erroneous.

3. Appellant Appropriately Marshalled Evidence Regarding Visitation Restrictions.

Third, with respect to the trial court's restrictions on Defendant/Appellant's overnight visitations with his sons, Defendant/Appellant appropriately marshalled the relevant evidence. (Brief at 5, 17-19; R. at 685, 782-83, 1415-17, 1495,

1502.) Due to Judge Eves specific findings that the boys "have expressed discomfort with visiting overnight," (R. at 685), the only relevant evidence necessary to challenge such a finding is the testimony of the boys. Defendant/Appellant's Brief showed that neither Sheb or Seth ever made any such statement. Judge Eves abused his discretion by mischaracterizing their testimony in attempt to justify his denying Mr. Davie the right to reasonable visitation rights with his teenage sons. Thus, Judge Eves' finding that the boys expressed discomfort with overnight visitation is against the clear weight of evidence making such a finding clearly erroneous.

B. Defendant/Appellant's Notice of Appeal Is In Compliance With The Utah Rules Of Appellate Procedure

Plaintiff/Appellee argues in her brief that this appeal must be dismissed because Defendant/Appellant failed to reference the trial court's Findings of Fact and Conclusions of Law in his Notice of Appeal. Such argument is completely without merit and is unsupported with any case law.

Rule 3(a), Utah Rules of Appellate Procedure, provides that appeals may be taken "from all final judgments and orders." The Rules do not require an appellant to appeal from specific findings or conclusions. See Rule 3(d), Utah Rules of Appellate Procedure; Form 1, Notice of Appeal, Utah Rules of Appellate Procedure. Several Utah cases show that a divorce decree is the very type of "final judgment or order" referred to in Rule 3. Kessimakis v. Kessimakis, 546 P.2d 888 (Utah 1976) (holding that an appeal had to be taken within one month of the divorce decree,

even though such decree did not become a final judgment until three months after its entry).

In fact, there are numerous reported Utah cases in which appeal is taken on underlying issues from the decree of divorce. Watson v. Watson, 837 P.2d 1, 2 (Utah App. 1992); Allred v. Allred, 835 P.2d 974, 975-76 (Utah App. 1992); Noble v. Noble, 761 P.2d 1369, 1371 (Utah 1988); Beals v. Beals, 682 P.2d 862, 863 (Utah 1984).

Furthermore, when appealing from an entire final judgment, it is not necessary to specify each and every order and detail from which the appellant seeks review. Scudder v. Kennecott Copper Corp., 886 P.2d 48 (Utah 1994). Hence, Defendant/Appellant's Notice of Appeal was in full compliance with the Utah Rules of Appellate Procedure.

C. The "Benefits of the Judgment" Argument Raised in Brief of Appellee Is Not Applicable In A Divorce Context.

Contrary to Plaintiff/Appellant's brief, the "benefits of the judgment" argument does not apply in a divorce context. Applying the rule in a divorce context would prove disastrous and against public policy because parties would be forced to abandon their personal property in order to appeal a divorce decree.

There are no reported cases in Utah in which a court has applied the so-called "benefits of the judgment" rule to a divorce case. Were such a rule to be applied in a divorce context, most if not all parties to a divorce would be precluded from appealing.

Furthermore, Defendant/Appellant maintains that he received no "benefit" from the divorce decree. He was awarded a

substantially high portion of the joint marital debt, and a gift lease from his mother was the only significant marital asset awarded to him. The "benefits" listed in Plaintiff/Appellee's brief are nothing more than income from farm property owned by Mr. Davie--to argue that Mr. Davie must refrain from his farming occupation pending the outcome of this appeal is utter nonsense.

CONCLUSION

Based on the foregoing points and authorities, Appellant respectfully requests that this Court reverse the trial court's Findings of Fact, Conclusions of Law and Decree of Divorce.

DATED this 5 day of November, 1996.

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Mailing Certificate

I hereby certify that I mailed, postage prepaid, two (2) true and exact copies of the foregoing Appellant's Reply Brief to the following party on the 6th day of November, 1996:

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