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Larae Jensen nka Larae Thorpe v. Raymond Jensen : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

WILLIAM A. JENSEN,

Petitioner and Appellee,

vs.

SONJA JENSEN

Respondent and Appellant,

Case No. 20070312-CA

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ARGUMENT

RETROACTIVE ALIMONY

The Appellants state that Sonja Jensen failed to present enough evidence to support her claim for retroactive alimony. Sonja Jensen presented all of the evidence that was in existence as to her claim for retroactive alimony. She presented evidence as to her needs, her lack of income to support herself, Mr. Jensen's ability to pay alimony, the Trial Court's Order awarding temporary alimony, the fact that she did not receive any temporary alimony from June 2003 to June 2004, and that Mr. Jensen did not pay any of her financial needs during that period of time. (T. 400 – 423, and Trial Exhibits 36 & 37)

Further, evidence was presented that the issue of retroactive alimony for the period of time prior to the Court's first temporary order awarding alimony was reserved as a trial issue. (T. 242-248) Mr. Jensen relies upon the Court's statement that Sonja Jensen did not present "sufficient evidence to demonstrate a reason why the Court should award retroactive alimony", however, the Trial Court erred in making said statement since apparently the Trial Court failed to review all of the following evidence presented at trial and the Respondent marshals the same herein.

1. Trial Exhibits 36 & 37 presented to the Court showed Sonja Jensen's need for alimony and the fact that she did not receive any alimony from June 2003 to June 2004, a period of time when the parties were separated and she was not working.

2. Sonja Jensen's testimony that Commissioner Evans' in his minute entry of August 2nd, 2004 imputed minimum wage to her for the purpose of calculating the incomes of the parties to determine the amount of child support and alimony to be awarded in the temporary Order. (T. 139-142)

3. Mr. Jensen's testimony that the parties separated in June 2003, and that he did not pay any alimony or other monies to Sonja Jensen until he was ordered to pay in August of 2004. Mr. Jensen further testified about Commissioner Evans' minute entry of August 2, 2004, where Commissioner Evans reduced Sonja Jensen's monthly expenses and found that Mr. Jensen's monthly expenses were substantially overstated and were also reduced. Commissioner Evans then ordered temporary alimony of \$2859 per month to begin in June of 2004 based on said expenses and where Mr. Jensen's expenses included paying the mortgage and HOA fees on the condo in Arizona and the income of Mr. Jensen of \$10,000 per month which was the same at the time of trial. Mr. Jensen went on to testify that his monthly expenses at the time of trial (Exhibit 18) were only \$600 higher than in June 2004, so Mr. Jensen's income and expenses were the same at the time of the temporary order and the time of trial. (T. 242-248)

4. The testimony that Sonja Jensen was not working from June 2003-2004, and had only worked at Southwest Airlines for eight months in 2001-2002, and was unemployed from April 2002 to June of 2004. (T. 73-74)

5. The testimony of Sonja Jensen that she worked to put Mr. Jensen through college shortly after they were married and then became a stay at home mom, specifically being unemployed prior to 1996 except for a few odd jobs and being totally unemployed from 1996 to 2001, and from April 2002 to June 2004. (T. 378-380)

6. The testimony that Sonja Jensen was on medical leave from Southwest Airlines in April, 2002 and then became extremely ill and was hospitalized and suffered severe depression and other physical ailments from April, 2002 until the time of trial. (T. 390-393)

7. The evidence that Sonja Jensen had to move from the marital residence in September, 2003 to allow the Petitioner to live there, and moved in with her mother because she did not have any income to support herself or rent her own apartment. (T. 30, 63, 69, 70, 369, 396, 405, 444, & 451-456)

8. The evidence that Commissioner Evans based his findings of Respondent's needs and actual expenses at the time of the August 2, 2004 minute entry on Mr. Jensen's affidavit of June 2, 2004 and not on Sonja Jensen's affidavit and documents, therefore establishing her needs from the separation in June 2003 to June 2004 on Mr. Jensen's testimony. (Trial Exhibit 26 and T. 467-468)

Therefore, Sonja Jensen has demonstrated that she presented more than sufficient evidence to support an award of retroactive alimony and in fact there was no other evidence that she could have presented. She has satisfied the marshaling requirement, and the finding of the trial Court is not supported by the evidence.

LENGTH OF ALIMONY

Petitioner argues that the trial Court made a detailed finding as to why it only awarded alimony for five years when the parties were married over 17 years. The trial Court only stated “that if the alimony period were longer than five years, Respondent would become older and rely only on the alimony for her support . . . Respondent has the ability to use the period of five years to put her house in order and be able to support herself at that time.” Not only was this finding by the trial Court clearly erroneous, it was also speculative, not based on any evidence presented, and contrary to law.

Respondent refers this Court to paragraphs 1-8 above and incorporates the same by reference in this part of her argument. The Respondent further marshals the following additional evidence presented to the trial court:

1. Mr. Jensen’s monthly income was \$10,000 per month and the trial court imputed income to Sonja Jensen of \$1419 per month based on the highest amount of wages she ever earned, \$8.25 per hour, in the 17 year marriage when she worked for

Southwest Airlines for only eight months, and she has no historical income. (T. 73-74 & 219)

2. Sonja Jensen is 45 years old, only has an associate degree, very limited work experience in the last 17 years, unemployed the last five years, suffers from psychological disorders including Major Depressive Disorder, anxiety and severe depression, was alienated from her daughters and currently unable to work full time. (T. 79, 267-279, 300-306 & 377)

3. Sonja Jensen has no immediate job prospects, is not enrolled in school, has been unable to seek employment due to her illness, and has no income other than alimony. (T. 79-83 & 139-141)

4. Sonja's monthly expenses of \$5743 (T. 401) were reduced by the trial Court to \$4,000 per month leaving her in need of \$2581 per month according to the finding of the Court after subtracting her gross monthly imputed income of \$1419 per month. The trial Court apparently found that Sonja does not have to pay any federal or state taxes or FICA since the alimony award of \$2581 was based on a gross income figure and not a net. (T. 1610)

5. The standard of living at the time of separation in June 2004 was based upon the Petitioner's monthly income of \$10,000 and the Respondent's income of zero (T. 219) and there was no evidence presented that her needs would diminish.

6. Sonja Jensen did not have any employment skills that would allow her to earn more than the imputed \$1419 per month in the next five years, and she had not other financial sources to pay for additional schooling to acquire more skills in the next five years. (Trial Exhibit 36)

7. There was no evidence presented to the trial Court as to how Sonja Jensen in five years would be able to support herself by earning a least \$4000 net per month to meet her reduced needs since the trial Court found that the maximum amount of gross monthly income that Sonja Jensen could earn was only \$1419 per month based upon her current education and employment skills.

As Respondent stated in her initial brief, the case law and applicable statutes support her position she cannot support herself in the same standard of living as the Petitioner for a period of time equal to the length of the marriage without the help of alimony. When the trial Court stated that the Respondent should not depend on alimony and should not be given a “crutch” to help support herself, the trial Court committed an err in law and said finding was clearly erroneous.

Respondent should have the same standard of living that she enjoyed during the marriage and the one that the Petitioner is enjoying and the alimony should be paid for the same period of time that the parties were married, or 17 years.

AMOUNT OF ALIMONY

There is no question that the trial Court made a mathematical error in computing the amount of alimony. The trial Court should take into consideration the fact that the Respondent has to pay federal and state income taxes and FICA not only on her imputed income of \$1419 per month, but also the \$2581 of monthly alimony. Therefore, it was a mathematical error to subtract the imputed gross monthly income of the Respondent of \$1419 from her reduced monthly needs of \$4,000 to arrive at an alimony amount of \$2581. The trial Court should be required to use the net monthly income available to the Respondent and subtract that from Respondent's reduced needs of \$4000 per month to arrive at the amount of alimony to be awarded.

STIPULATION

The Petitioner argues that the trial Court did not abuse its discretion in granting his Motion to Set Aside the stipulation to sell the Murray home and equally divide the net proceeds that was entered into in open court and approved by the Court because the stipulation of the parties is not binding upon the Court. Respondent does not argue with the right of the trial court in its discretion to determine that a stipulation entered into by the parties is not fair or reasonable or not binding upon the Court, but a party should be

able to rely upon the trial Court's approval of the stipulation at the time it is made and not be worried that the Court will change it's mind. The trial Court heard the stipulation during the trial, asked questions about the terms, and then asked both attorneys and the parties if they approved the stipulation. (T. 422-427) At the time the stipulation was made the trial Court, both attorneys and both parties understood that the stipulation was fair and reasonable and further knew the ages of the two daughters and the fact that if the Murray home sold the youngest daughter may have to move for her senior year in high school. In fact it was discussed at the time of the stipulation and the parties concluded that the youngest daughter could drive to her school or the Petitioner could buy another home in the same school district.

However, the trial Court in it's Ruling on August 21, 2006 (T. 1610) did not mention anything at all about the stipulation to sell the Murray home even though it was argued by both counsel in their closing arguments. Instead, the trial Court valued the Murray home and ordered it sold after the youngest daughter finished high school, which was contrary to the Court approved stipulation.


Lastly, as previously argued in Sonja Jensen' initial brief, she was extremely prejudiced by relying upon the stipulation and not presenting any rebuttal evidence as to the value of the Murray home, which she would have done if the stipulation had not been approved by the trial Court.

CONCLUSION

Respondent cannot marshal evidence that was not presented during the trial, however, she has marshaled sufficient evidence to support her position that the trial Court abused its discretion and some of its findings were clearly erroneous. Based thereon, this matter should be remanded and the trial Court instructed to award the alimony for the term of the marriage in an amount based upon the Respondent's net monthly income. The trial Court should also be instructed to award retroactive alimony and comply with the Court approved stipulation to forthwith sell the Murray home and divide the net proceeds received there from.

DATED this 7 day of April, 2008.

NEMELKA & NEMELKA


Richard S. Nemelka, attorney for Sonja Jensen

CERTIFICATE OF MAILING

This is to certify that a true and correct copy of the foregoing Reply Brief was sent this 7 day of April, 2008, postage pre-paid and addressed as follows:

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