

2007

Willa Mae Young v. Darrel Edward Young : Reply Brief

Utah Court of Appeals

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District Court No. 024100321

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THIS IS AN APPEAL OF
FINDINGS OF FACT AND CONCLUSIONS OF LAW AND
JUDGMENT AND ORDER MODIFYING DECREE OF DIVORCE
OF THE FIRST JUDICIAL DISTRICT COURT
FOR CACHE COUNTY, UTAH
THE HONORABLE GORDON J. LOW

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FILED
UTAH APPELLATE COURTS
MAY 19 2008

IN THE UTAH COURT OF APPEALS

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WILLA MAE YOUNG,)	
)	
Petitioner/Appellee,)	
)	
v.)	Case No. 20070577
)	
DARREL EDWARD YOUNG,)	
)	
Respondent/Appellant.)	District Court No. 024100321
)	

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REPLY BRIEF OF RESPONDENT/APPELLANT

THIS IS AN APPEAL OF
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JUDGMENT AND ORDER MODIFYING DECREE OF DIVORCE
OF THE FIRST JUDICIAL DISTRICT COURT
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ARGUMENT

(Point I)

RESPONDENT/APPELLANT'S STATEMENT OF ISSUES ON APPEAL PROVIDES CITATION TO THE RECORD.

"Petitioner/Appellee asserts that Respondent/Appellant failed to include in his statement of the issues either a citation to the record showing the issue was preserved in the trial court or a statement of grounds for seeking review of an issue not preserved in the trial court."

The Respondent/Appellant's Brief speaks for itself and provides a citation of the record for each statement of issue on appeal. Ironically, Petitioner/Appellee's Brief provides a statement of issue and standard of review with supporting authority but provides no citation to the record.

(Point II)

THE TRIAL COURT ABUSED ITS DISCRETION TO IMPUTE RESPONDENT/APPELLANT'S SOCIAL SECURITY BENEFITS TO HIS INCOME FOR PURPOSES OF CALCULATING ALIMONY WHEN IT WAS A LEGAL IMPOSSIBILITY FOR RESPONDENT/APPELLANT TO RECEIVE SOCIAL SECURITY DURING HIS PERIOD OF INCARCERATION.

Petitioner/Appellee states that "it was entirely appropriate for the trial court to impute Appellant's Social Security benefits to his income for purposes of calculating alimony" citing *Proctor v. Proctor*, 773 P.2d 1389 (Utah App. 1989). In *Proctor*, the Court of Appeals held that the fact the father was incarcerated did not relieve him of a duty to support his children finding that "an able-bodied person who stops working, an exercise of personal preference or as a result of punishment for an intentional criminal

act, nonetheless retains the ability to earn¹ and the duty to support,” *Proctor*, 773 P.2d at 1391.

During *Proctor*, the state wide child support guidelines went into effect that apply to support orders entered on or after July 1, 1989, which explicitly permit income to be imputed to a custodial or a non-custodial spouse who is found to be voluntarily unemployed or underemployed. U.C.A. §78B-12-203(7)(a)(b) and (d) provides:

“(a) Income may not be imputed to a parent unless the parent stipulates to the amount imputed, the parent defaults, or, in contested cases, a hearing is held and the judge in judicial proceedings or the presiding officer in administrative proceedings enters findings of fact as to the evidentiary basis for the imputation.

(b) If income is imputed to a parent the income shall be based upon employment potential and probable earnings as derived from employment opportunities, work history, occupational qualifications, and prevailing earnings for persons of similar backgrounds in the community, or the median earnings for persons in the same occupation in the same geographical area as found in the statistics maintained by the Bureau of Labor Statistics.

(d) Income may not be imputed if any of the following conditions exist and the condition is not of a temporary nature:

(i) the reasonable costs of child care for the parents’ minor children approach or equal the amount of income the custodial parent can earn;

(ii) a parent is physically or mentally unable to earn minimum wage;

(iii) a parent is engaged in career or occupational training to establish basic job skills; or

(iv) unusual emotional or physical needs of a child require the custodial parent’s presence in the home.”

¹The Appellate Court in *Proctor* found that the incarcerated obligor possessed assets to satisfy his child support obligation. See *Proctor*, 773 P.2d at 1391.

The Utah Court of Appeals in *Griffith v. Griffith*, 959 P.2d 1015 (Utah App. 1998) addressed the issue of imputing income stating: “It is appropriate and necessary for the trial court to consider all sources of income that were used by the parties during the marriage to meet their self-defined needs, from whatever source, over-time, a second job, self-employment, etc., as well as unearned income,” *Griffith v. Griffith*, 959 P.2d at 1018; citing *Breinholt v. Brienholt*, 905 P.2d 887, 880 (Ut. Ct. App. 1995).

“A court may impute gross income if it has first examined the parent’s historical and current earnings to determine that underemployment or overemployment exists,” *Griffith v. Griffith*, 959 P.2d at 1018; citing *Hill v. Hill*, 869 P.2d 963, 964 (Utah App. 1994). “However, the goal of imputing income is to prevent parents from reducing their child support, or alimony, by purposeful unemployment or underemployment,” *Griffith*, 959 P.2d at 1018. “Thus, a court may not impute income to a parent unless the parent either stipulates to the amount imputed or there is a hearing in which the finding is made that a parent is voluntarily unemployed or underemployed,”^{2 3} *Griffith*, 959 P.2d at

²The Utah State Legislature has made a number of attempts to address the issue relative to obligors who are incarcerated and who may have support obligations. See House Bill 248, 2005 General Session and House Bill 310, 2004 General Session.

³As to the issue of whether a parent who is in prison is voluntarily unemployed or underemployed, in *Leisure v. Leisure*, 378 P.A.supra.613, 549 A.2d 255 (1988), the husband was sent to prison for two (2) years for crimes unconnected with his support obligation. The court had refused to modify the child support obligation concluding that it was the husband’s voluntary act that put him behind bars. The Appellate Court reversed and found that incarceration is involuntary. It is highly unlikely, the Court concluded, that a parent would seek to avoid child support by going to prison.

Other courts have had the same result. In *Benedixen v. Benedixen*, 962 P.2d 170 (Alaska 1998): “Serving jail time is not a goal of criminal conduct; incarceration is therefor not a voluntary act; *Arizona Ex.Rel. Department of Economic Security v. McEvoy*, 955 P.2d 988 (Ariz. Ct. App. 1998) (a father’s incarceration rebuts statutory presumption that every obligor can earn a minimum wage) *Nab v. Nab*, 114 Idaho 512, 757 P.2d 1231 (Ct. App. 1988); (imputing income of \$150,000 per year when a parent was incarcerated for Medicare fraud was error, absent evidence obligor could earn this amount in prison) and *Woods v. Woods*, 964 P.2d 1259 (Wyo. 1998) (incarceration is not a voluntary act).

1018.

Based on the above, Petitioner/Appellee does not meet the criteria for any of the statutory or case law exceptions to impute income. During the marriage, Social Security was not available to the parties. Legally, it is impossible to impute an income in that Respondent/Appellant does not qualify for Social Security during the period of time he is incarcerated. Respondent/Appellant has not stipulated to the imputation of Social Security nor has there been a hearing and evidence taken of imputation of Respondent/Appellant's Social Security.⁴ It is impossible to impute any income to the Respondent/Appellant as he has no employment potential, no employment opportunities, work history, and occupational qualifications are immaterial due to Respondent/Appellant's incarceration.

(Point III)

RESPONDENT/APPELLANT HAS ADEQUATELY MARSHALED ALL THE EVIDENCE SUPPORTING THE FINDINGS WHICH ARE CHALLENGED.

In part, Respondent/Appellant's challenge of the findings were based on memorandums and affidavits submitted by the parties reduced to a Memorandum Decision and finalized Findings of Fact and Conclusions of Law. There was no trial.

A number of other states have taken the position that, since imprisonment is the result of an intentional criminal act, imprisonment is a voluntary act, for example, *In re marriage of Vetterneck*, 334 N.W.2d 761 (Iowa 1983) (order for child support payments would not be reduced were father incarcerated); *In re marriage of Kern*, 408 N.W.2d 387 (Iowa Ct. App. 1987) (after suspension of husband's medical license and conviction for delivering a controlled substance, husband was not allowed to modify his alimony obligation); *In re Thurmond*, 265 Kan.715, 962 P.2d 1064 (1998) (parent's imprisonment does not in and of itself justify abatement of child support).

⁴At hearing on September 20, 2006, the parties agreed to submit the issues of alimony and attorneys' fees to the trial court for decision.

1. Respondent/Appellant need not show evidence that the findings are inadequate. Respondent/Appellant need not go through the futile exercise of marshaling evidence when the findings are so inadequate they cannot be meaningfully challenged as factual determinations, *Woodward v. Fazzio*, 823 P.2d 474 (Utah Ct. App. 1991). Respondent/Appellant provided a focused summary establishing that the findings were inadequate in that they failed to consider the minimum statutory factors under U.C.A. §30-3-5(8)(a)(i) - The financial needs and conditions of the recipient spouse; (ii) The recipient's earning capacity or ability to produce income; and (iii) The ability of the payor spouse to provide support.

Since the trial court's findings failed to adequately address all the above-named statutory criteria, it would be a futile exercise to marshal evidence when the findings were inadequate.

2. Respondent/Appellant adequately marshaled the evidence challenging the trial court's ultimate findings. The party challenging the trial court's factual findings must marshal the evidence in support of the findings and then demonstrate that despite this evidence the trial court's findings are not supported by clear and convincing evidence, *AWINC Corp. v. Simonsen*, 112 P.3d 1228 (Ut. Ct. App. 2005).

Respondent/Appellant provided a precise focused summary of the evidence, or more notably the lack thereof, each with a precise correlating deficiency of the court's findings as required by *Utah Code Ann. §30-3-5(8)(a)* as set forth above.


Petitioner/Appellee fails to state what evidence or how Respondent/Appellant failed his marshaling burden.

CONCLUSION AND REQUEST FOR RELIEF

Respondent/Appellant respectfully requests a reversal and revocation of the judgment entered against the Respondent/Appellant awarding alimony, judgment for retroactive alimony, and attorney's fees; or, alternatively, reversing remand for adequate funds on the issues of substantial material change in circumstances, extenuating circumstances, and statutory requirements for alimony.

Respondent/Appellant also respectfully requests an award of attorney's fees and costs pursuant to *Rule 34 of the Utah Rules of Appellate Procedure*.

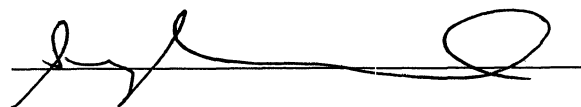
DATED this 19 day of May, 2008.


Gregory Skabelund
Attorney for Respondent/Appellant

CERTIFICATE OF MAILING

I, Gregory Skabelund, certify that on May 19, 2008, I served a copy of the attached REPLY BRIEF OF RESPONDENT/APPELLANT upon Kevin J. Fife, the counsel for the appellee in this matter, by mailing it to him by first class mail with sufficient postage prepaid to the following address:

Kevin J. Fife
Olson & Hoggan, P.C.
130 South Main, Suite 200
PO Box 525
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78B-12-203**Statutes and Session Law****Title 78B - Judicial Code****Chapter 12 - Utah Child Support Act****78B-12-203 Determination of gross income -- Imputed income.**

78B-12-203. Determination of gross income -- Imputed income.

(1) As used in the guidelines, "gross income" includes prospective income from any source, including earned and nonearned income sources which may include salaries, wages, commissions, royalties, bonuses, rents, gifts from anyone, prizes, dividends, severance pay, pensions, interest, trust income, alimony from previous marriages, annuities, capital gains, Social Security benefits, workers' compensation benefits, unemployment compensation, income replacement disability insurance benefits, and payments from "nonmeans-tested" government programs.

(2) Income from earned income sources is limited to the equivalent of one full-time 40-hour job. If and only if during the time prior to the original support order, the parent normally and consistently worked more than 40 hours at the parent's job, the court may consider this extra time as a pattern in calculating the parent's ability to provide child support.

(3) Notwithstanding Subsection (1), specifically excluded from gross income are:

(a) cash assistance provided under Title 35A, Chapter 3, Part 3, Family Employment Program;

(b) benefits received under a housing subsidy program, the Job Training Partnership Act, Supplemental Security Income, Social Security Disability Insurance, Medicaid, Food Stamps, or General Assistance; and

(c) other similar means-tested welfare benefits received by a parent.

(4) (a) Gross income from self-employment or operation of a business shall be calculated by subtracting necessary expenses required for self-employment or business operation from gross receipts. The income and expenses from self-employment or operation of a business shall be reviewed to determine an appropriate level of gross income available to the parent to satisfy a child support award. Only those expenses necessary to allow the business to operate at a reasonable level may be deducted from gross receipts.

(b) *Gross income determined under this subsection may differ from the amount of business income determined for tax purposes.*

(5) (a) When possible, gross income should first be computed on an annual basis and then recalculated to determine the average gross monthly income.

(b) Each parent shall provide verification of current income. Each parent shall provide year-to-date pay stubs or employer statements and complete copies of tax returns from at least the most recent year unless the court finds the verification is not reasonably available. Verification of income from records maintained by the Department of Workforce Services may be substituted for pay stubs, employer statements, and income tax returns.

(c) Historical and current earnings shall be used to determine whether an underemployment or overemployment situation exists.

(6) Gross income includes income imputed to the parent under Subsection (7).

(7) (a) Income may not be imputed to a parent unless the parent stipulates to the amount imputed, the parent defaults, or, in contested cases, a hearing is held and the judge in a judicial proceeding or the presiding officer in an administrative proceeding enters findings of fact as to the evidentiary basis for the imputation.

(b) If income is imputed to a parent, the income shall be based upon employment potential and probable earnings as derived from employment opportunities, work history, occupation qualifications, and prevailing earnings for persons of similar backgrounds in the community, or the median earning for persons in the same occupation in the same geographical area as found in the statistics maintained by the Bureau of Labor Statistics.

(c) If a parent has no recent work history or a parent's occupation is unknown, income shall be imputed at least at the federal minimum wage for a 40-hour work week. To impute a greater income, the judge in a judicial proceeding or the presiding officer in an administrative proceeding shall enter specific findings of fact as to the evidentiary basis for the imputation.

(d) Income may not be imputed if any of the following conditions exist and the condition is not of a temporary nature:

(i) the reasonable costs of child care for the parents' minor children approach or equal the amount of income the custodial parent can earn;

(ii) a parent is physically or mentally unable to earn minimum wage;

(iii) a parent is engaged in career or occupational training to establish basic job skills; or

(iv) unusual emotional or physical needs of a child require the custodial parent's presence in the home.

(8) (a) Gross income may not include the earnings of a minor child who is the subject of a child support award nor benefits to a minor child in the child's own right such as Supplemental Security Income.

(b) Social Security benefits received by a child due to the earnings of a parent shall be credited as child support to the parent upon whose earning record it is based, by crediting the amount against the potential obligation of that parent. Other unearned income of a child may be considered as income to a parent depending upon the circumstances of each case.

Renumbered and Amended by Chapter 3, 2008 General Session

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