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Evan Garth Westenskow v. Glora Westenskow : Brief of Appellant

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

EME COURT
E OF UTAH

EVAN GARTH WESTENSKOW,

Plaintiff-Appellant,

vs.

GLORA WESTENSKOW,

Defendant-Respondent.

Case No. 14436

REBUTTAL BRIEF OF APPELLANT

Appeal From the Judgment of the
Second District Court for Weber County
Honorable Ronald O. Hyde, Judge

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IN THE SUPREME COURT
OF THE STATE OF UTAH

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Plaintiff-Appellant,	:	
vs.	:	Case No. 14436
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STATEMENT OF THE KIND OF CASE

This is a divorce action.

DISPOSITION IN THE LOWER COURT

The case was tried to the court without a jury. The District Court awarded Glora Westenskow the divorce and in the decree provided for automatic increases in alimony and support money payments, and in addition divided the marital estate by giving approximately 85% to Glora Westenskow with only 15% to Evan Westenskow.

RELIEF SOUGHT ON APPEAL

Evan Westenskow seeks on this appeal:

(a) A modification of the trial court's Decree of Divorce eliminating

in Paragraph 6 the automatic increases in alimony payments with both parties being left to avail themselves of relief contemplated by Section 30-3-5, Utah Code Ann. (1953), and

(b) A modification of the trial court's Decree of Divorce eliminating the automatic increases in child support payments leaving the parties to avail themselves of relief contemplated by Section 30-3-5, Utah Code Ann. (1953), and

(c) A modification of the trial court's Decree of Divorce to provide for an equitable property division of 50% to each party.

IDENTIFICATION OF THE PARTIES AND EXPLANATION OF ABBREVIATIONS

Evan Westenskow, the Plaintiff and Appellant, will hereinafter be referred to as the Appellant, the Plaintiff,or, where appropriate, by his name. Glora Westenskow, the Defendant and Respondent, will hereinafter be referred to as the Respondent, the Defendant, or, where appropriate, by her name.

"R" is a reference to a page in the record of the case.

STATEMENT OF FACTS

The Plaintiff and Appellant, Evan Westenskow, has already set forth a Statement of Facts in his initial brief. The Respondent, in her brief, has also set forth a Statement of Facts. Inuendos and inferences in the Respondent's Statement of Facts (which may or may not have some

bearing on the case) prompt the following supplemental statement on the part of the Appellant:

A. Respondent, on page 3 of her brief, indicates that the Appellant intentionally terminated his employment with Burroughs Corporation about two months prior to trial. The fact is that the divorce action had nothing to do with Appellant's termination at Burroughs (R.121). The Appellant indicated in his initial Brief that he had often discussed with Glora Westenskow his desire to become self-employed and have his own business (R.121). His plans had been to work for a good company for a short period of time after graduation from college to gain some experience and then to try to get into business for himself (R.121). The opportunity for self-employment came in July, and he had to exercise the option and take advantage of that opportunity (R.121). The marital difficulties experienced by the parties prior to the termination of Appellant's employment precluded the Appellant from obtaining a better opportunity with Burroughs (R.121 & 122). He doubted that he would be given other and further opportunity with the company (R.122), and therefore took advantage of the self-employment business opportunity when it arose (R.122).

B. Also, on pages 3 and 4 of her brief, Respondent states: "Two weeks prior to the trial of this matter, Appellant purchased a 1976 Pontiac Grand Prix and testified that the purchase of this new car would affect his ability to pay alimony and child support during the next five years."

Here are the facts Respondent failed to mention: It was critical for Appellant to have good transportation in his business (R.134). Appellant's business required that he travel every day (R.124). The geographic area in which he must travel includes Utah and most of Idaho (R.124). Appellant's previous car broke down three times in one week (R.134 & 160). Appellant was faced with a repair bill on his old car of approximately $800.00 (R.135). Since an automobile was absolutely necessary for the business that Appellant was engaged in, the Appellant decided, upon the advice of a mechanic and Appellant's father (R.168), who was the major investor in Appellant's new company (R.134), that it would be best in the long run to get rid of the old car (R.134) and get a new car (R.168).

C. On page 5 of her brief, Respondent suggests that the Appellant valued his one-sixth interst in 390 acres in Wayne County at $200-$300 per acre. In reality, Appellant could not give an accurate appraisal of the value of the Wayne County property interest. When asked if he had any idea of the fair market value of the property in question, Appellant replied, "I really don't." Appellant then ventured a guess as to the value of the property (R.150). Subsequently, the Appellant testified: "I have no idea of the value." (R.151).

D. Also on page 5 of her brief, Respondent characterized Appellant's one-sixth interest in 390 acres in Wayne County as a vested interest. The interest is properly characterized as an expectancy or an inheritance outside of the marital estate (R.152). The deed reciting Appellant's interest

is unrecorded and its purpose is simply to expedite the handling of the Grandmother's estate and avoid a future probate proceeding. Counsel for Respondent conceded: "We are not claiming any interest in the property, Your Honor, as far as this inheritance. We're not taking the position that we want any of the property." (R. 153). The land subject to the deed is the means of support for Appellant's Grandmother and Appellant receives no income from the land as a result of the deed. Appellant has nothing to do with the property (R. 167).

E. On page 5 of her brief, Respondent states that the Appellant was awarded all of the gifts of stock transferred to the Appellant from his Grandmother. This was proper as the stock was incident to Appellant's "inheritance of the one-sixth interest of acreage in Wayne County, Utah". (R. 92). That stock is not a part of the marital estate. With respect to other stock, however, the Respondent was awarded "one-half of the stock of the parties". (R. 93).

F. On page 3 of her brief, the Respondent states that Appellant's new business started generating income in September of 1975. The evidence, however, shows that the Appellant made no income during September, which month was the start-up period for his new corporation (Exhibit E and R. 135).

G. On page 3 of her brief, the Respondent states: "Two new vans were leased to transport machines to be sold and to be used by Appellant and one employee (R. 170)." The Appellant testified: "When this business was started, Your Honor, there were two of us that were working full-time,

and another one went to part-time. There were three principals in the corporation. I would not have leased both of the vans had it have been my business" (R.170). The company, with other principals involved, chose to lease the new vans because that was all they could obtain (R.170).

H. On page 6 of her brief, Respondent states: "Appellant was further ordered to pay any indebtedness owing to his grandmother, if any there be (R.95 and Ex.B)." Appellant's Grandmother did make a loan of $5,000 to Appellant and Respondent and it is a bona fide obligation owed to her (R.129 and 130). There is an urgent necessity for payment of that loan because Appellant's Grandmother is presently in greater need of the money than she has been in the past (R.130).

I. On page 4 of her brief, Respondent indicates that the value of the home at the time of trial was between $36,000 and $38,000. The Appellant testified that the value of the home was $41,000 (R.153).

J. Grounds for divorce are not in issue on this appeal. Nevertheless, counsel for the Respondent on page 3 of his brief, refers to certain information in the record in an effort to create the inference that another woman was involved. What really broke up the marriage--which is not an issue on this appeal--was fully delineated by Evan Westenskow in his direct testimony, if it is of any interest to this Court (R.114 - 118).

CASES CITED

STATUTES CITED

ARGUMENT

POINT I

THE TRIAL COURT ABUSED ITS DISCRETION IN PROVIDING FOR AUTOMATIC INCREASES IN ALIMONY PAYMENTS AND AUTOMATIC INCREASES IN CHILD SUPPORT PAYMENTS.

The Appellant reaffirms his position in his initial brief that there was no basis whatsoever for the trial court to provide automatic increases in alimony and child support. The Respondent has cited no evidence justifying automatic increases; indeed, no such evidence could be cited. Outside of Evan Westenskow's optimistic projection of what he hoped his net income would be over the subsequent three month period [R.135, 136; Plaintif's Exhibit E (Appendix, page 28)], there is no evidence whatsoever regarding either Evan Westenskow's or the Respondent's future financial circumstances.

Automatic increases based solely on Evan Westenskow's present income are as arbitrary as increases based solely on the passage of time. Support for each child was initially set at $75 per month. With respect to alimony, the trial court awarded $75.00 per month to Respondent. These amounts were, of course, based on the financial circumstances of the parties at the time of trial. Child support should have been left at that figure with the parties having resort to the court under the provisions of Section 30-3-5 Utah Code Ann. (1953) in the event of changed circumstances.

The Respondent, on page 12 of her brief, suggests "options" available to the court with respect to setting child support and alimony, but at the same time concedes the propriety of setting child support and alimony at an initial figure subject to the Court's continuing jurisdiction to consider changed circumstances. Respondent then urges, on page 12 of her brief, that "there is another option available, i.e. the option of providing increases in alimony and child support based upon increases in the income of the Appellant." In this case, however, there is absolutely no evidence that there will even be any increase in income let alone what any such increase would be. In addition, there is no evidence showing what Evan Westenskow's future financial picture would be, including obligations and liabilities, even if there is an increase in his income.

The two cases cited by Respondent--In the Matter of the Dissolution of the Marriage of Patricia Ann Tyerman, 534 P.2d 998 (Ore. App 1975) and Berg v. Berg, 434 P.2d 1 (Wash. 1967)--do not support Respondent's position. Both cases are clearly distinguishable. They are not precedents for allowing automatic increases based solely on the passage of time and/or increased income without considering all other aspects of the payor's financial position.

In Tyerman (cited by Respondent on page 12 of her brief) the Court did not provide for automatic increases in alimony. On the contrary, the trial court had ordered an automatic alimony decrease after ten years

where the husband, a medical doctor, withdrew from private practice during the dissolution of the marriage and entered the military service as a Major. On appeal, the husband argued that in two years, when his take-home pay would drop from $1,750 per month to approximately $1,500 per month, it would be impossible for him to pay to his children and wife the support awarded by the trial court. In response, the Oregon Court of Appeals stated:

> We think the evidence is too indefinite to be assured what husband's income will be after two years in the service.
>
> If what counsel asserts proves to be so, an adjustment probably should be made in two years in the amount of the wife's support. The indefiniteness of the evidence appears to reflect as much an inability to determine what the husband's pay will be in two years as it does a failure to produce available evidence. Hence a determination of what the payments should be then may be determined by future unpredictable events.
>
> . . . if the husband's income drops as his counsel forcasts it will in two years, that will be a change of circumstances which will then justify a reappraisal of the amount of support for the wife if proper motion is made therefor.

534 P.2d at 1000. Accordingly, no automatic two year adjustment was allowed and the parties were left with the opportunity of a future judicial reappraisal of the matter in the light of any changed circumstances.

In Berg (cited by the Respondent on page 13 of her brief) the Washington Supreme Court approved an automatic decrease in alimony. No automatic increase was involved. There is an essential conceptual difference between awarding alimony and support with automatic increases based on income and providing for automatic decreases. In providing for

a decrease in the amount of alimony to be paid the trial court, in essence, is curtailing the right to alimony. The trial court is awarding alimony based on the husband's then existing financial circumstances and then diminishing the right to alimony over a period of time (or terminating the right altogether) based on those same existing circumstances. The underlying policy is expressed in the following language of the Court's opinion in Berg:

> 'Alimony is not a matter of right. When the wife has the ability to earn a living it is not the policy of the law of this state to give her a perpetual lien on her divorced husband's future income [Citations omitted].
>
> ' The criterion adopted by this court for the allowance of alimony includes two factors: (1) the necessities of the wife, and (2) the financial ability of the husband [Citations omitted].
>
> . . . It is not the purpose of the law to place a permanent responsibility upon a divorced spouse to support a former wife indefinitely. She is likewise under an obligation to prepare herself so that she might become self-supporting. The allowance of alimony is to provide such an interval for her reasonable preparation.

434 P.2d at 2-3.

Now in the instant case where the trial court provided for an automatic increase in alimony (as opposed to a situation where there would be an automatic decrease), not only is a continued entitlement to alimony being recognized, but the amount to be paid is being increased with only one consideration: the passage of time. Financial realities are not even considered.

It is significant to note in Tyerman that with an income of $1,750.00 per month the husband was only required to pay $150 per month for the

support of each of the minor children. Here is what the Trial Court saddled Evan Westenskow with:

> a. Alimony at the rate of $75 per month for a period of six months and thereafter at the rate of $100 per month for a period of six months and thereafter to $150 per month for a period of four years; and,
>
> b. a child support obligation in the sum of $75 per month per child for a period of three months after which it would increase to $125 per month per child and remain at that level until Evan's income reached $15,000 per year at which time it would raise to $150 per month per child and if and when his income reaches $18,000 per year the child support will be at $180 per month per child.

--all with a projected income of only $680 per month with no evidence whatsoever of any potential increase and if any increase does occur the increased alimony and support obligations would be effective without considering any other aspect of his financial position other than his income.

With no judicial prededent for automatic increases the Respondent, on page 13 of her Brief, refers to what is described as a "common practice among attorneys to provide for various levels of alimony and child support as they relate to fluctuations in the husband's earnings level". There is no basis whatsoever for that statement and to the extent there

is any such willingness on the part of an attorney to work out a varying level of alimony and child support, he would never--if he is in his right mind--undertake to saddle a client with alimony increases without solid assurance of what the total future financial picture would be.

In this case, the Court must come to grips with a problem that has far-ranging consequences: Should the trial court without evidence of future financial circumstances be permitted to provide for automatic increases in alimony and/or child support based solely on the passage of time and/or income increase, or should the Court set an initial support and alimony award based on financial circumstances prevailing at the time of the trial and leave/the possibility of future appraisal and adjustments pursuant to Section 30-3-5 in the light of all future financial circumstances? If this Court approves the trial court's decision in the instant case a precedent is going to be set giving the "green light" to trial courts to provide for automatic increases for years to come and for adjustments upward based on simply the passage of time or income, all of which opens the door to abuses and financial burdens from which a husband and father could get little relief. In effect the obvious purpose of Section 30-3-5 will have been nullified. The obvious solution, where alimony and support are proper, is to require the trial court to make a present alimony and support award in the light of then existing circumstances and leave future determinations to proper reappraisals under Section 30-3-5 in the light of all existing circumstances.

POINT II

THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING THE RESPONDENT APPROXIMATELY 85% OF THE MARITAL ESTATE WITH ONLY 15% GOING TO EVAN WESTENSKOW

With respect to the division of property in a divorce action, it is recognized that there is no hard and fast rule. However, the recent decision of this Court in McKean vs. McKean, 544 P.2d 1238 (Utah 1975) (cited by the Respondent on page 8 of her brief) underscores and affirms the widespread trend of recent years in the vast majority of divorce actions to divide property "down the middle"--50% to each party.

In Leftwich vs. Leftwich, 549 P.2d 447 (Utah 1976) (cited by the Respondent on page 8 of her brief) this Court affirmed a decision of the trial court wherein the trial court rejected a 1/3 (to the wife)--2/3(to the husband) formula urged by counsel for the husband. The decision of the trial court, which was affirmed by this Court on appeal, was consistent with McKean vs. McKean.

Neither McKean nor Leftwich support anything like the 85% (to the wife)--15% (to the husband) property division which was imposed by the trial court in the instant case.

Judge Hyde's response to the Appellant's request for a division "down

the middle", (R. 201) that "it overlooks the interest of these children" (R. 201), is simply unrealistic and untrue. An equitable division of the property on a 50%--50% basis could easily have been accomplished with the Respondent being permitted to continue to occupy the home with the children in her care and custody and with the Appellant being given a more appropriate lien. A 50%--50% division of the property would have resulted in no harm whatsoever to the children. The matter of property division, as long as the children are provided suitable living accomodations, is a matter involving the husband and wife. The Appellant proposed a property division (see Exhibit "F" of the Appendix to the Appellant's initial Brief) which would have involved the sale of the home, it being his view that the home payments were too much of a burden for either party and that apartment quarters could have been better handled. There is no problem, however, with respect to an equitable 50%--50% division with the home going to the Respondent as was awarded by Judge Hyde. Certainly with the Respondent being granted the home and the custody of the children, the children will be taken care of in the home. There will be support money payments for the benefit of the children. All that would have been required to effect an equitable 50%--50% division of property without any harm to the children whatsoever would have been to increase the amount of the Appellant's lien from $5,000.00 to $11,541.72 and to provide for an appropriate time of payment. Such is done many times a day on the trial court level in cases that never reach this Court.

With respect to the matter of the division of property,

> . . . it is not necessary for this court to find a gross abuse of discretion on the part of the trial court before modifying the judgment as to alimony . . . See Hendriks vs. Hendriks, 91 Utah 553, 63 P. 2d 277, 279 (1936).

Presumably such would also be true with respect to child support and marital property.

On page 15 of her brief, the Respondent denies the Appellant's contention that the Respondent was awarded "everything she asked for" citing the prayer of her Complaint. It is conceded that if "everything she asked for" was equitable there would be no reason to deny what was granted simply because it was asked for, but granting the Respondent "everything she asked for" in this case simply dramatizes the inequity and abuse of discretion that occurred. The Appellant urged the trial court to divide their small estate "down the middle". The Respondent, in the prayer of her Counterclaim, had demanded an even more exorbitant portion of the property than was asked for in argument at the conclusion of the trial. At the conclusion of the trial, the Respondent's demand and suggested division was less than had been prayed for in the Complaint, though grossly unfair (see Respondent's Exhibit No. 5), and it was the Respondent's Exhibit No. 5 that was followed verbatim by the trial court in a Memorandum Decision more than two weeks after the case was heard (R. 63, 66)--even to the inclusion of a "debt" for which there is no evidence in the record whatsoever. Compare Exhibit 5 with the Memorandum Decision (R. 66). There is no evidence in the record whatsoever

of any debt owing the Bank of Utah. It is obvious that the trial judge, some two weeks after the trial of the case, simply referred to the Respondent's proposal (Exhibit 5) and granted the Respondent everything she requested--whether all of the items were in the estate or not.

CONCLUSIONS

It was an abuse of discretion for the trial court to provide for automatic increases in alimony and support money payments as was done and to award the Respondent approximately 85% of the property of the parties. Alimony and support money should have been left at the levels initially established--$75.00 per month alimony to the Respondent and $75.00 per month for the benefit of each child by way of support. The interests of the children would not have been jeopardized in any respect with an equitable property division. All the trial court needed to do was to increase the amount of the Appellant's lien and provide for an appropriate payment thereof.

The decree of the trial court should be modified eliminating from paragraph 6 the escalated alimony payments and eliminating from paragraph 7 the escalated child support payments. Furthermore, the decree of the trial court should be modified to provide for a 50%--50% division. This could easily be accomplished, with no resulting harm whatsoever to the children or to Mrs. Westenskow, by simply providing for an increase in the amount of the lien in paragraph 3 of the Decree from $5,000.00 to $11,541.72. If the

decision of the trial court in this case is not modified, we will have a disastrous precedent in the State of Utah.

Respectfully submitted,

McKAY, BURTON, McMURRAY & THURMAN

By _____
Macoy A. McMurray
Attorneys for Evan Garth Westenskow
Plaintiff-Appellant

MAILING CERTIFICATE

I hereby certify that I mailed two (2) copies of the attached brief to Richard H. Thornley of Froerer, Horowitz, Parker, Thornley & Critchlow at 2610 Washington Boulevard, Ogden, Utah, Attorneys for Defendant-Respondent, this 11th day of February, 1977.

_____