

1996

V. Arlene Weideman, Plaintiff/Appellant, vs. Duane Weideman, Defendant/Appellee : Brief of Appellee

Utah Court of Appeals

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Karen S. Peterson; Attorney for Appellant.

Tineke van Dijk; Attorney for Appellee.

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**UTAH COURT OF APPEALS
BRIEF**

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DOCKET NO. 960570-CA

IN THE UTAH COURT OF APPEALS

V. ARLENE WEIDEMAN,
Plaintiff/Appellant,

vs.

DUANE WEIDEMAN,
Defendant/ Appellee

Appeal No. 960570 CA

BRIEF OF APPELLEE

This appeal is taken from a final order entered July 23, 1996

in the Third District Court, Salt Lake County,

State of Utah

Honorable Tyrone E. Medley

Karen S. Peterson
Attorney for Appellant
211 East 300 South #216
Salt Lake City, Utah 84111
Telephone 364-9828

Tineke van Dijk
Attorney for Appellee
243 East 400 South # 301
Salt Lake City, Utah 84111
Telephone 575-6610

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COURT OF APPEALS

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Karen S. Peterson
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Telephone 364-9828

Tineke van Dijk
Attorney for Appellee
243 East 400 South # 301
Salt Lake City, Utah 84111
Telephone 575-6610

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JURISDICTION OF APPELLATE COURT

This matter is properly before the Utah Court of Appeals pursuant to 78-2A-3(2)

(i) UCA.

STANDARD OF REVIEW

The standard of review in this case is abuse of discretion. This court has long held that trial courts have considerable discretion in determining property distribution in divorce cases. The trial court's decision will be upheld on appeal unless a clear and prejudicial abuse of discretion is demonstrated. Rasband v. Rasband, 752 P.2d 1331, 1333 (Utah Ct. App. 1988).

STATEMENT OF THE CASE

This is an appeal from a final judgment and order of the Third Judicial District Court, Salt Lake County, entered July 23, 1996. (R. 363-367). The matter came on for trial March 14, 1996. The trial judge issued Findings of Fact and Conclusions of Law on April 9, 1996. On May 3, 1996, Plaintiff submitted Objections to Court's Findings of Fact/Conclusions of Law. (R. 345-347). The trial judge ruled on Plaintiff's objections on May 31, 1996. (R. 350-352). A Decree of Divorce was filed on June 12, 1996 which was not signed by the trial judge. On June 19, 1996, the Plaintiff objected to Amended Decree of Divorce as to Form. (R. 353-354). The trial court then entered a minute entry dated June 27, 1996, which sustained the June 19, 1996, Objection to amended Decree of Divorce. Then, a Second Amended Decree of Divorce was signed on July 23, 1996.

STATEMENT OF THE FACTS

On February 22, 1990, the Plaintiff received a retirement disbursement check in the amount of \$22,074.03 from her employer, CaterAir. (R. 384). The Plaintiff then placed the funds in a money market account which was in the name of the Plaintiff and her mother, Arlene B. Thompson.(R. 384 - 385). The account information was mailed to Plaintiff's mother's address. (R. 385). The Defendant's name was not on the account nor did the Defendant have access to the account. (R. 385). The only account statement produced at trial was dated December 17, 1993, and showed an account balance of \$10,377.77. (R. 386). The parties separated on January 7, 1994, less than one month after the account statement produced at trial. (R. 1 - 6).

The Plaintiff testified that she paid off marital debts with the \$10,377.00 (R. 386). However, the documentary evidence verifying the payment of debts submitted by the Plaintiff were not received by the trial court. (R. 333). The Plaintiff's gross monthly income was approximately \$1,700.00 per month and the Defendant's income was \$1,000 per month. (Trial Court's Findings of Fact and Conclusions of Law, R. 335).

The trial court entered its Findings of Facts and Conclusions of Law on April 9, 1996. (R. 334 - 340). The relevant portions of the Findings state that the Plaintiff had a retirement with CaterAir valued at approximately \$16,000 and that the Defendant had a retirement from Brasher of approximately \$2,000. (R. 335). The Plaintiff received \$24,000 from a retirement account and, "within days before the parties' separation, still had remaining \$10,377.00 in account which she used." Further, the defendant is currently receiving the sum of \$213 per month from his AT&T retirement." (R. 335 - 336). The trial court then concluded that the Defendant, "is entitled to \$5,168 of the amount cashed

out by plaintiff and said amount shall be used as an offset against one-half of the marital debts that the plaintiff has paid.” (R. 336).

SUMMARY OF THE ARGUMENT

The trial court is granted broad discretion in both determining how marital property will be divided and on what date the value of such property will be determined. This authority is given to the trial court when the circumstances warrant based upon the trial court’s equitable powers.

The trial court did not abuse its discretion in determining that a date other than the date of trial would be used for valuing money placed in a money market account. The trial court determined that the date of valuation would be close to the time of separation when the account had a value of over \$10,000. The court’s decision was based upon the undisputed fact that the Plaintiff had unilaterally depleted all the funds by the time the case came before the court for trial. Though the Plaintiff claimed that the funds were used to pay bills and meet living expenses, the funds are still subject to equitable division by the trial court. Further, the trial court acted prudently by allowing the Plaintiff to deduct one-half of marital debt paid by Plaintiff during the course of separation from the Defendant’s half of the money in the account.

The Plaintiff has the burden of marshaling the evidence in support of the trial court’s findings and then demonstrate why such findings are still against the clear weight of the evidence. Plaintiff has failed to marshal the evidence and has further stated facts that are not supported by the record. Therefore, it is assumed that the record supports the findings of the trial court’s conclusions of law.

The trial court's findings are sufficiently detailed to support the deviation of when a marital asset should be valued. More specifically, the court provided a specific dollar amount of the asset, a specific date when the asset should be value, along with an explanation of what became of the asset. The trial court's decision should be upheld.

ARGUMENT

Point I

The Trial Court Has Broad Discretion In Both Equitably Dividing a Parties' Marital Assets and Determining The Time at Which to Value the Marital Assets

When a marital estate is divided, the trial court is empowered with broad equitable powers concerning such property division. Kerr v. Kerr, 610 P.2d 1380, 1382 (Utah 1980). "In the distribution of the marital estate there is no fixed rule of formula." Gramme v. Gramme, 587 P.2d 144 (1978). Because trial courts have been granted considerable discretion concerning property distribution, their decisions will be upheld on appeal unless the moving party can show a clear and prejudicial abuse of discretion. Rasband v. Rasband, 752 P.2d 1331, 1333 (Utah Ct. App. 1988).

Part and parcel with such a philosophy, trial courts are allowed to use their equitable powers to determine when a marital asset shall be valued. When determining the value of a parties' marital estate, the general rule is that the estate should be valued at the time of the divorce decree or trial. Rappleve v. Rappleve, 855 P.2d 260, 262 (Utah App. 1993); accord Fletcher v. Fletcher, 615 P.2d 1218, 1222-23 (Utah 1980); Peck v. Peck, 738 P.2d 1050, 1052 (Utah App. 1987). However, when the circumstances warrant, a trial court may use its equitable powers to determine a different date to set the value of a

marital asset. For example, in the case of Peck v. Peck, the trial court used the date of separation because one party had acted obstructively with the marital asset. Id.

In the present case, the trial court followed the general rule of valuing the marital assets at the time of trial with the exception of the \$10,377.26 in the money market account. Regarding the money market account, the trial court used its equitable powers to determine the value of the money market account at the time of separation rather than the time of trial. At trial, evidence was adduced that the Defendant received funds from her retirement account on February 22, 1990 in the amount of \$22,074.03. (Tr 5, R 384). The money was then placed in a money market account with only the Plaintiff and her mother's name on the statements which were mailed to her mother's home. (Tr 5-6, R 384-385). The Defendant's name was not on the account. (Tr 6, R 385). The Plaintiff testified that she paid off marital debts with the money though she provided no specific accounting of such. (Tr 6 - 7, R 385 - 386). At trial, the Plaintiff stated that it would not be fair for the Defendant to receive one-half of the funds in the money market account but it would be fair for him to pay one-half of the marital debt. (Tr 9, R 388).

In support of its ruling, the trial court found that, "the facts show that the plaintiff received in excess of \$24,000 from her retirement and, within days before the parties' separation, still had remaining \$10,377 in an account which she used." (R. 335 & 336). The trial court also found that, the defendant is entitled to \$5,168 of the amount cashed out by plaintiff and said amount shall be used as an offset against one-half of the marital debts that the plaintiff has paid. (R. 335 & 336).

In the present case the facts are undisputed. Prior to the time of separation the parties had \$10,377.77 in a money market account. The Defendant did not have access to

the money. The Plaintiff provided absolutely no evidence that the money was not a marital asset nor did she provide any evidence that a sum less than the above amount existed at the time of separation. Thus, the trial court correctly assumed that the funds were a marital asset subject to equitable division. Since there was no money left in the account at the time of trial, and the Plaintiff failed to provided the court with either another acceptable date or an accurate accounting of the funds, the trial court, based upon the facts presented, valued the marital asset as of December 17, 1993, when the account had \$10,377.77.

POINT II

The Trial Court Did Not Abuse Its Discretion When It Determined The Value Of The Marital Property At The Time Of Separation Rather Than At The Time Of Trial

The Plaintiff contends that the trial court abused its discretion because, “[N]o allegations were asserted at any time during the pendency of the present action nor was evidence introduced at trial to suggest Plaintiff “dissipated” this asset, hid its value or otherwise acted obstructively.” (App. Brief pg. 10). Plaintiff further states that, “to the contrary, Plaintiff testified at trial as to how the money was utilized.” *Id.* In support of this contention, Plaintiff argues that the court divided a non-existent asset while only allowing Plaintiff an offset against marital debt paid and not the mortgage payments. Further, the Plaintiff complains that, “the trial court failed to provide Plaintiff any allowance for even marginal living expenses. It placed no such burden on Defendant.” *Id.* at 11.

Plaintiff relies on Peck v Peck and other cases which holds that, “where one party has dissipated an asset, hidden its value, or otherwise acted obstructively, the trial court

may, under its broad discretion, value the property at an earlier date, i.e., separation.” 738 P.2d 1050, 1052 (Utah App. 1987) However, the case law does not support such a narrow requirement that the trial court must find some sort of bad or obstructive action on the part of the Plaintiff before a marital asset will be valued at a time other than trial. In Shepherd v. Shepherd, 876 P 2d, 429 (Utah App. 1994), the trial court’s decision to value the marital estate at the time of separation was upheld though it was used by the plaintiff for his support. In Shepherd, it was noted that the trial court found that the plaintiff had, utilized portions of the marital estate for his own support during the pendency of the action and that defendant had no access to the liquid assets of the estate during that period. Id. at 433. Further, the trial court found that plaintiff had, “utilized more of the marital assets than authorized and that plaintiff’s use of the marital assets had seriously depleted the marital estate.” Id.

A requirement that a party must wrongfully use a marital asset before the court can determine that a different date can be used to value the marital asset would be against public policy. Such a requirement would allow, if not encourage, one party to unilaterally deplete a marital asset prior to the date of trial and then seek the protection of the court in not dividing the non-existent asset because it was spent on daily needs and living expenses. One could bypass the need for temporary orders regarding alimony and access to marital funds upon a mere showing after the fact that the marital funds were used for necessary living expenses and that they do not exist at the time of trial. Such a holding would allow one party to race to the bank and drain funds with impunity. In the present case, if the trial court had determined that the Plaintiff was entitled to the funds because she “needed them” and they were non-existent at the time of trial, it would have given the Plaintiff

something akin to temporary alimony in excess of \$5,000.00 to meet her needs though she earns \$700.00 more per month than the Defendant.

In the case at bar, the parties went before a domestic relations commissioner on April 25, 1994, slightly over three months after separation. The commissioner ruled that the, "parties agree to preliminary injunction from disposing of marital property without written permission or court order and restrained from incurring debt in name of the other party." (R. 54). Though there was no evidence produced at trial as to when the money market account had been completely depleted, it is clear that account was a marital asset which was not to be spent by the parties pending final resolution of the case. Further, the facts are clear that the marital asset existed at a time prior to the parties' separation and that at the time of trial the asset no longer existed. It is undisputed that the plaintiff used the funds for her own support and that the defendant had no access to the funds.

Based upon the evidence, the trial court did not abuse its discretion or order an unjust division of the assets. Quite to the contrary, the trial court created the only fair and equitable decision possible in light of the Plaintiff's unilateral decision to utilize a sizable amount of the parties' assets for her own use and benefits. First, the trial court determined the value of the asset at the only point in time when there were clearly funds still in the account. Second, the trial court provided the Plaintiff with relief for the marital debts she claims to have paid with the marital asset. Therefore, if the Plaintiff had indeed paid all of the funds toward marital debts, then the Defendant would not receive any of the funds in the money market account, but he would receive a credit for the verifiable debts paid by Plaintiff up to one-half of the total amount in the money market account. In this case the trial court further ordered that any additional debts paid for by the Plaintiff or still

owing would be deducted equally from the parties' equity in the marital home. Thus relieving the Plaintiff of any burden placed upon her by paying for the marital debts. If the trial court had decided the issue in a manner suggested by the Plaintiff, an injustice would have occurred for the Defendant would have lost over \$5,000 in marital assets while still being liable for one-half of the marital debts.

It is the burden of the Plaintiff to marshal the evidence in support of the trial court's findings and then demonstrate why, the trial court's findings are so lacking in support as to be against the clear weight of the evidence, thus making them clearly erroneous. In re Estate of Bartell, 776 P.2d 885, 886 (Utah 1989). Plaintiff has not only failed to marshal the evidence in support of the questioned findings, she has given facts which are not part of the evidence to be considered by this Court. For example, in Plaintiff's trial brief she states that the Plaintiff's take home pay in April of 1994 was \$200.00 per month because of IRS garnishment. (App. Brief 4). However, the only "evidence" of such is the Plaintiff's own Affidavit. "If the appellant fails to marshal the evidence, the appellate court assumes that the record supports the findings of the trial court and proceeds to a review of the accuracy of the lower court's conclusions of law and the application of that law in the case." Saunders v Sharp, 806 P 2d 198, 199 (Utah 1991).

POINT III

The Trial Court Provided Sufficiently Detailed Findings of Fact

When the trial court deviates from the general rule regarding the time when a marital asset will be valued, it must support that deviation with, "sufficiently detailed findings of fact that explain the trial court's basis for deviation. Morgan v. Morgan, 795

P.2d 684, 688 (Utah App. 1990). Appellant cites Rappleye, 855 P 2d 260, in support of her contention that the trial court did not provide sufficiently detailed findings of fact upon which to base a deviation of the general rule regarding when a marital asset will be divided. In Rappleye, it was noted that there were no subsidiary findings to support the trial court's determination that the account should be valued at \$58,456 when the uncontroverted evidence showed that the account had a negative balance. Id. at 262. Thus, the trial court's valuation was vacated and remanded for, "more detailed findings regarding the date at which the account should be valued, as well as its basis for valuing it as of such date." Id. In the case at bar, the uncontroverted evidence showed that the account had \$10,377.00 prior to the parties' separation and that the Plaintiff spent the money in the account. The trial court has provided sufficient findings of fact regarding the value of the account at a time relatively close to the parties' separation to support a deviation from the general rule regarding when a marital asset should be valued.


CONCLUSION

The trial court exercised its discretion in determining that the value of the money market account should be valued at a time other than the time of trial for the Plaintiff unilaterally spent all of the funds in the account. The trial court's decision was the only equitable decision possible in light of the parties' relative incomes and the Plaintiff's actions in spending money which was not hers to spend. The Plaintiff now appeals the trial court's decision and asserts that the decision was against the clear weight of the evidence for she spent the money for legitimate expenses. Case law does not allow for the unilateral depletion of marital funds even if one party argues it was used for legitimate expenses. Plaintiff must marshal the evidence in support of the Findings, and then show

that, even viewing the evidence in the light most favorable to the court's findings, those findings are clearly erroneous. Plaintiff has failed to marshal the evidence or show that the trial court abused its discretion in any fashion.

Defendant respectfully submits that Plaintiff's appeal is without merit, prays that the appeal be dismissed, and that Defendant be awarded attorney fees for his defense of this matter.

DATED this 26 day of December, 1996.


Tineke van Dijk

MAILING CERTIFICATE

I hereby certify that I mailed a copy of the foregoing Brief of Appellee to
Karen S. Peterson 211 East 300 South # 216, Salt Lake City, Utah 84111.

