

1988

Margie R. Proctor v. Larry K. Proctor : Brief of Respondent

Utah Court of Appeals

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UTAH COURT
BRIEF

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880092-CA

IN THE COURT OF APPEALS OF THE STATE OF UTAH

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MARGIE R. PROCTOR,	:	
	:	
Plaintiff and	:	RESPONDENT'S BRIEF
Respondent,	:	
	:	
vs.	:	
	:	
LARRY K. PROCTOR,	:	No. 880092-CA
	:	
Defendant and	:	
Appellant.	:	

--oo0oo--

14b.

Appeal from Decree of Divorce entered December 18, 1987, in the Third District Court in and for Tooele County, the Honorable Timothy R. Hanson, presiding.

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STATEMENT OF JURISDICTION OF THE COURT
AND NATURE OF THE CASE

Jurisdiction in this appeal is granted by the provisions of Section 78-2a-3(2)(g) Utah Code Annotated, 1986, which provides in part that "the Court of Appeals has appellate jurisdiction, including. . .appeals from District Court involving domestic relations cases, including, but not limited to, divorce. . . ." This is an appeal from the decree of divorce entered December 18, 1987 in the Third District Court in and for Tooele County, the Honorable Timothy R. Hanson, Judge, presiding.

STATEMENT OF ISSUES RESPONDED TO ON APPEAL

1. Whether the District Court abused its discretion when it awarded the plaintiff child support of \$87 per child per month for each of the four children of the marriage, when the defendant had no employment and no source of income?

2. Whether the District Court erred in using the defendant's equity in the marital estate, his equity in the marital abode, as a means of satisfying the child support obligation when it is anticipated that his entire share of the estate will be consumed by the set-offs before he is released from incarceration and able to be gainfully employed?

3. Whether the Trial Court's method of satisfying the child support obligation resulted in a punishment for his criminal conduct for which he is presently serving a sentence of imprisonment?

4. Whether the District Court was statutorily bound to make an equitable division of the marital estate, and whether the decree actually results in an equitable division of that estate?

5. Whether the Court erred when it set the amount of support per child at the sum of \$87 per child when such amount was that suggested for three children by the Court's uniform support schedule, and support was awarded at that level for four children?

STATUTES DETERMINATIVE OF THE APPEAL

30-3-5 Utah Code Annotated, 1985.

- (1) "When a decree of divorce is rendered, the Court may include in it equitable orders relating to the children, property, and parties...."

78-45-3 Duty of Man, Utah Code Annotated, 1953.

- (2) "Every man shall support his child; and he shall support his wife when she is in need."

78-45-4 Duty of Woman, Utah Code Annotated, 1953.

- (3) "Every woman shall support her child; and she shall support her husband when he is in need."

30-2-9 Family Expenses, Utah Code Annotated, 1953.

- (4) "The expenses of the family and the education of the children are chargeable upon the property of both husband and

wife or of either of them, and in relation thereto they may be sued jointly or separately."

STATEMENT OF CASE AND THE FACTS

The parties were married in Tooele City and Tooele County, Utah on April 23, 1971. (T. 21). There were four minor children as issue of the marriage: Treasa Proctor, born November 18, 1971, age 16; Andrew Proctor, born January 8, 1976, age 12; Lori Proctor, born December 5, 1982, age 5; and Christopher Proctor, born October 11, 1983, age 4.

Defendant was convicted on October 14, 1986 (T. 43, 24-25) of Rape of a Child (his oldest daughter, Treasa), (T. 58, 22-25), a first degree felony, pursuant to a plea of guilty to charge voluntarily entered by the defendant. Since October 16, 1986, he has been in the care and custody of the Department of Corrections, and has been housed at the Duchesne County Jail. (T. 32, 7-9) Defendant's motion for reconsideration of sentence was denied on January 14, pursuant to an order entered January 21, 1987 in criminal number CR86-082 of the Third District Court for Tooele County. He was given a minimum mandatory prison sentence of five years. (T. 32, 23-25).

The planitiff brought an action for divorce on January 30, 1988, which included a request for an equitable division of the personal property and real property acquired during the marriage as well as an order for the payment of child support.

The trial was held on November 13, 1987 before the Honorable

4. Whether the District Court was statutorily bound to make an equitable division of the marital estate, and whether the decree actually results in an equitable division of that estate?

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The trial was held on November 13, 1987 before the Honorable

Timothy R. Hanson, who was then presiding in the Third District Court in and for Tooele County, State of Utah. A pretrial was previously held on October 13, 1987.

At the time of trial the plaintiff, Margie R. Proctor, was working two (2) part-time jobs and receiving financial assistance from her church who was paying her utilities and providing her and the four (4) children with food. (T. 46, 13-25)

The plaintiff argued that the Court should consider the assets, liquid and nonliquid, of the defendant, even though incarcerated, in determining what a reasonable amount of child support should be ordered payable to the plaintiff. The only viable asset of the defendant was his share of the equity awarded to him out of the marital assets. (T. 44, 15-25; T. 45, 1-7)

The plaintiff further argued that even though the defendant, because he was incarcerated, had no "monthly cash flow" to speak of he still had separate assets which the Court could consider in determining a child support order. (T. 46, 1-10; T. 55, 9-21)

The Court did determine that the defendant did have a statutory duty to support his children and that the defendant did have the equitable means to satisfy that obligation. The Court set the child support amount pursuant to the defendant's last wage rate prior to being incarcerated; that being \$7.96 per hour. (T. 51, 18-25; T. 52, 1-8; T. 67, 13-24)

According to the uniform child support schedule adopted pursuant to §78-45-7, U.C.A., 1953, the Court ordered the defendant to pay \$73 per month per child and when the oldest

child reached the age of 18, then the defendant was to pay \$87 per month per child for the remaining three (3) children.

After awarding the defendant a 50% share of the equity in the house, the Court further ordered that the amounts which accrued pursuant to this order would be deducted from the defendant's share of the equity in the house. (T. 62, 1-3; T. 63, 1-21)

The defendant's appeal primarily seeks to reverse the Court's order establishing an amount payable for child support during his incarceration and he also appeals the order offsetting the amounts of accrued child support against his share of the equity in the house while he is incarcerated.

SUMMARY OF THE ARGUMENT

POINT I: When a person has a duty to pay child support, even though he or she has no appreciable "cash flow" but does have separate and independent assets or property, these assets and properties may be used by the court in fashioning an equitable order to discharge the legal obligation to pay child support.

POINT II: The trial court permitted the plaintiff the offset any accrued child support against the defendant's share of the equity in the house as a means of satisfying the defendant's legal obligation of support. This is not a "punishment" directed against the defendant because of his

criminal conduct.

POINT III: The trial court equally divided the real property and the division of personal property was primarily stipulated to by the parties. Therefore, the trial court obviously did not use "fault" in determining the division of the property.

POINT IV: The trial court did make an equitable division of the marital estate. After doing so, the trial court allowed the plaintiff the right to offset any amounts of child support which may accrue against his share of the equity in the house. This is in an abuse of discretion and under the circumstances was equitable in relation to the parties and the children.

POINT V: The plaintiff agrees that the Decree of Divorce should be amended to correctly state the trial court's order concerning the monthly amounts of child support. That the correct monthly amount is \$72.00 per month per child, to be increased to \$83.00 per month per child after the oldest child turns eighteen years of age.

POINT VI: The plaintiff requests that the court award to her the reasonable costs and attorney fees incurred in this appeal.

ARGUMENT

POINT I

CHILD SUPPORT SHOULD BE REQUIRED OF LARRY PROCTOR EVEN IF HE IS IN PRISON PROVIDING HE HAS SUFFICIENT ASSETS.

It is the legal duty of a father and a mother to support their children.

78-45-3 Duty of Man, Utah Code Annotated, 1953.

"Every man shall support his child; and he shall support his wife when she is in need."

78-45-4 Duty of Woman, Utah Code Annotated, 1953.

"Every woman shall support her child; and she shall support her husband when he is in need."

The law in the State of Utah has charged the courts with determining how this legal obligation is satisfied based upon an equitable test.

It is not uncommon or unconscionable to order child support where the facts and circumstances dictate that it is "equitable" to do so even though the person so ordered has no appreciable monthly cash flow. The state statute governing these situations is §30-3-5 which states as follows:

"When a decree of divorce is rendered, the Court may include in it equitable orders relating to the children, property, and parties...." (Emphasis added.)

This statute does not require that persons subject to paying child support must have a monthly income or some kind of cash flow before the court can make a child support order.

In fact, in Spangler v Spangler, 561 P.2nd 1076 (Utah 1977),

the father who was unemployed and had no assets to speak of was still ordered to pay \$75 per month child support, which was to be increased when the father's income reached a certain amount.

In the present case, it is admitted that the defendant has no monthly cash flow because he is incarcerated; but he does have assets, i.e., his share of the equity in the house which amounts to \$17,132.50.

The defendant will be in jail for the next five (5) years. He will pay nothing in legal tender to the plaintiff for child support during this time, unless the court makes some equitable order under the facts and circumstances of this case. If no equitable order is entered concerning child support, the plaintiff will be providing 100% of the financial obligation to raise and provide the necessities for the parties four (4) minor children. The plaintiff is working two part-time jobs and is still being subsidized by her church who is paying for food for the plaintiff and the children and paying for the household utilities.

Is it equitable the the plaintiff should continue, under the circumstances, making the house payment of \$646 per month during the time the defendant is in jail; thereby preserving his financial interest while he is in jail, when he pays virtually no support to the plaintiff or the four children?

In fact, at trial the defendant objected to paying anything towards the children's support while he was in jail. (T. 41, 15-25; T. 42, 1-12; T. 52, 9-15)

Defendant states in his brief at page 10:

"Defendant submits that while he would gladly support his children if he were able, present circumstances do not permit it...."

The evidence at trial was just the opposite: See pages 65, 66, and 67 of the transcript:

"You cannot escape a duty to support a child where you have an independent source of assets. I also think that one of the reasons that the court reaches this result is the defendant's own statements here today. I was frankly quite surprised when Mr. White put the question to the defendant that if this home were sold, and there was just a separate and distinct cash fund available to support these children, that Mr. Proctor said that he would not want his children supported out of that fund."

(underlining added)

The law in the State of Utah also provides that the separate property of both the father and mother is chargeable for the payment of the children's necessary expenses.

30-2-9 Family Expenses, Utah Code Annotated, 1953.

"The expenses of the family and the education of the children are chargeable upon the property of both husband and wife or of either of them, and in relation thereto they may be sued jointly or separately."

Therefore, when a person has a duty to pay child support, even though he or she has no appreciable "cash flow" but does

have separate and independent assets or property, these assets or property may be used by the court in fashioning an equitable order to discharge the legal obligation to pay child support.

POINT II

THE TRIAL COURT DID NOT ERR IN DEDUCTING THE COURT ORDERED CHILD SUPPORT FROM LARRY PROCTOR'S EQUITY IN THE HOUSE NOR DID IT IMPOSE A PUNISHMENT ON HIM.

The defendant argues that the trial court imposed a "punishment" upon him by allowing the plaintiff to offset accruing child support payments against the defendant's share of equity in the house. See page 11 of Defendant's Brief. Nothing could be further from the truth; nor did the trial court "mix the defendant's child support obligation with the division of the marital estate" as stated on page 11 of the Defendant's Brief.

Furthermore, the trial court did not set the amount of child support based upon the defendant's share of the marital asset. The monthly child support amount was established by using the defendant's rate of compensation at this employment prior to being incarcerated, that being \$7.96 per hour. (T. 41, 2; 67, 13-25; 68, 1-9.) Hence, the amount of the marital estate had nothing to do with the amount of the monthly child support established by the trial court.

The trial court did permit the plaintiff to offset accrued child support against the defendant's share of the equity in the house as a means to satisfy the defendant's legal obligation of support. This is not a punishment against the defendant. (T. 68, 21-25; 69, 1-10.)

POINT III

THE TRIAL COURT DID NOT USE FAULT AS A BASIS FOR THE DIVISION OF THE MARITAL ESTATE.

The trial court at no time used "fault" as its basis for division of the marital assets. In fact, the plaintiff and defendant each received 50% of the equity of the parties house which was acquired during the marriage. The equity in the house was determined by a certified appraiser, stipulated to by the parties, who determined that the house had a fair market value of \$85,000 with the outstanding mortgage of \$50,375. (T. 61, 7-25; 62, 1-4.)

An equal division of the real property to each party does not evidence a "spirit of revenge" by the trial court argued by opposing counsel at page 14 of the Defendant's Brief. An equal division of the real property can only evidence a clearly objective determination free of any consideration of "fault" or "revenge", notwithstanding the heinous crimes committed by the defendant against his own child; therefore, the trial court did not abuse its discretion and this ruling must be upheld. Turner v. Turner, 649 P.2d. 6 (Utah, 1982) states the "trial courts apportionment of marital property between parties will not be disturbed by the Supreme Court on appeal unless there is such a manifest injustice or inequity as to indicate a clear abuse of discretion."

POINT IV

THE TRIAL COURT DID MAKE AN EQUITABLE DIVISION OF THE MARITAL ESTATE PURSUANT TO §30-3-5(1).

The defendant continues to confuse the legal difference between an equitable division of the marital property and the court's order to permit the plaintiff the right to offset what she should be receiving each month in child support payments. The defendant was awarded 50% of the equity in the house which the plaintiff suggests is "equitable".

The defendant is forgetting that the plaintiff is providing 100% of the actual financial support of herself and the children and will do so for the next five (5) years. It would be inequitable and unjust to allow the courts in effect to preserve the defendant's separate share of assets and hold them safe, as it were, and to protect them from any legal claim while the defendant is in jail. The law imposes no such privileges on its citizens, whether they are in jail or not.

The trial court also stated that should the defendant be released from jail or find some other way to pay the child support that this order would be reviewed at that time and modified accordingly, if need be. (T. 68, 13-20.)

The trial court first equally divided the marital estate and secondly awarded the plaintiff the right to receive child support and thirdly gave the plaintiff right to offset accruing amounts of child support against the defendant's separate and individual property interest. The defendant would have the Appellate Court believe that the process of offsetting the defendant's obligation

of child support amounts to an unequal and unfair division of the marital assets; thus, "depriving" him of his share of the equitable estate. The plaintiff suggests that the right of offset is equitable, because the defendant has assets but not the ability to make a cash payment each month to support the children. Pinney v. Pinney, 245 P. 329 (Utah 1926) and Dahlberg v. Dahlberg, 292 P. 214 (Utah 1930).

POINT V

THE TRIAL COURT DID NOT ERR IN SETTING THE CHILD SUPPORT AT \$87 PER MONTH PER CHILD AND THE TRIAL COURT IS NOT MANDATORILY REQUIRED TO SET THE CHILD SUPPORT AMOUNT AT THE RATE SUGGESTED BY THE UNIFORM CHILD SUPPORT SCHEDULE.

The plaintiff agrees that the decree of divorce should be amended in respect to the monthly amount ordered by the trial court. The correct monthly amount per child should be \$73 for a total monthly support order of \$292. When the oldest child reaches the age of 18 or graduates from high school, which ever is later, then the child support is \$87 per month per child for the remaining three (3) children. (T. 72, 2-6; 73, 1-7.)

There is no legal mandate that the trial court set the child support obligation at the amount listed in the Uniform Child Support Schedule. The court should take into consideration all relevant factors in setting the child support order.

POINT VI

THE PLAINTIFF/RESPONDENT REQUESTS THAT THE COURT OF APPEALS OF THE STATE OF UTAH AWARD HER PAYMENT OF HER REASONABLE ATTORNEY FEES INCURRED IN RESPONDING TO THIS APPEAL.

The plaintiff requests that she be compensated for

reasonable costs and attorney fees incurred in having to respond to this appeal based upon her lack of ability to pay and due to her financial condition. That this issue should either be decided by the Appellate Court or remanded to the Trial Court for a hearing and a finding as to reasonable costs and attorney fees. (T. 69, 11-22.) Peterson v Peterson 189 P.2d. 961 (Utah 1948) and Hendricks v. Hendricks 65 P.2d. 642 (Utah 1937).

CONCLUSION

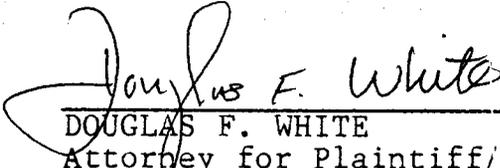
The marital assets of the parties were equitably divided by the trial court pursuant to §30-3-5, U.C.A. 1953. There were some special circumstances in this case which the trial court gave due consideration to in its deliberations. In particular, the fact that the defendant was incarcerated in jail for five (5) years and that the defendant did have separate and independent assets in which to offset an accruing reasonable child support order.

The defendant was deprived of no assets and was fairly and justly dealt with by the trial court in every respect. The real property owned by the parties was divided 50% to each party. The personal property was basically stipulated to by the parties at the time of trial. The trial court making little, if any, decisions as to the division of the personal property.

Therefore, it is respectfully requested that the Appellate Court affirm the Trial Court decision and grant an award of reasonable attorney fees and costs to the plaintiff which were

incurred in this appeal.

Respectfully submitted,



DOUGLAS F. WHITE
Attorney for Plaintiff/Respondent

CERTIFICATE OF MAILING

I hereby certify that four copies of the Respondent's Brief were mailed postage prepaid by depositing the same with the U.S. Postal Service in an envelope addressed to defendant's attorney at the below given address, or personally delivered this 19 of June, 1988 to Alan K. Jeppesen, Attorney for Defendant/Appellant, 200 North Main Street, Tooele, Utah 84074.

