

2008

Leslie Smith Trubetzkoy v. Sergei Trubetzkoy : Appellees Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LESLIE SMITH TRUBETZKOY,

Petitioner/Appellant,

v.

Case No. 20080406

SERGEI TRUBETZKOY,

Respondent/Appellee.

APPELLEE'S REPLY BRIEF

Appeal from the divorce ruling of Third District Court Judge LA Dever, case number
20080406.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	Pg. 3
NATURE OF THE PROCEEDINGS AND JURISDICTION.....	Pg. 4
STATEMENT OF THE ISSUE.....	Pg. 4
STANDARD OF REVIEW	Pg. 5
STATEMENT OF THE FACTS.....	Pg. 5
SUMMARY OF THE ARGUMENT.....	Pg. 7
ARGUMENT.....	Pg. 8
CONCLUSION.....	Pg. 17

TABLE OF AUTHORITIES

COURT CASES

<u>Chen v. Stewart</u> , 2005 UT 68, P53 (Utah 2005).....	Pg. 15
<u>Child v. Child</u> , 2008 UT App 338, ¶2 (Utah Ct. App. 2008).....	Pg. 15
<u>D.A. v. State (In the Interest of W.A.)</u> , 2002 UT 127, P36 (Utah 2002).....	Pg. 10
<u>Elman v. Elman</u> , 2002 UT App 83, P17 (Utah Ct. App. 2002).....	Pg. 16
<u>Gardner v. Bd. of County Comm'rs</u> , 2008 UT 6, P31-P32 (Utah 2008).....	Pg. 11
<u>Howell v. Howell</u> , 806 P.2d 1209, 1213 (Utah Ct. App. 1991).....	Pg. 13
<u>Knickerbocker v. Cannon (In re Estate of Knickerbocker)</u> , 912 P.2d 969, 979 (Utah 1996) Pg. 13	
<u>Mineer v. Mineer</u> , 706 P.2d 1060, 1062 (Utah,1985).....	Pg. 5
<u>Schaumberg v. Schaumberg</u> , 875 P.2d 598, 602 (Utah Ct. App. 1994).....	Pg. 14
<u>State v. Evans</u> , 2001 UT 22, 20, 20 P.3d 888.....	Pg. 10
<u>State v. Pena</u> , 869 P.2d 932 (Utah 1994).....	Pg. 5
<u>Thronson v. Thronson</u> , 801 P.2d 428 (Ut. Ct. App. 1991).....	Pg. 10
<u>Tschaggeny v. Milbank Ins. Co.</u> , 2007 UT 37, P 22, 163 P.3d 615.....	Pg. 11
<u>Waldrop v. Waldrop</u> , 2008 UT App 140 (Utah Ct. App. 2008).....	Pg. 13
<u>Wall v. Wall</u> , 700 P.2d 1124, 1125 (Utah 1985).....	Pg. 5

STATE STATUTES

Utah Code Ann. §30-3-10.....	Pg. 8,10
Utah Code Ann. §30-3-10.1.....	Pg. 8
Utah Code Ann. §30-3-32(2)(b)(i).....	Pg. 14
Utah Code Ann. §30-3-34.....	Pg. 11
Utah Code Ann. §30-3-35.....	Pg. 11
Utah Code Ann. §30-3-35.5.....	Pg. 11
Utah Code Ann. §78-2a-3.....	Pg. 4

IN THE UTAH COURT OF APPEALS

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Petitioner/Appellant,

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v.

SERGEI TRUBETZKOY,
Respondent/Appellee.

NATURE OF THE PROCEEDINGS AND JURISDICTION

This is an appeal of the rulings made by LA Dever in the case of the above named parties. Lower Court case number 20080406.

This court has jurisdiction pursuant to Utah Code Ann. §78-2a-3.

STATEMENT OF THE ISSUES

Issue I:

Did the trial court properly award joint legal custody after fully considering the evidence and taking into account the best interests of the child?

Issue II:

Did the trial court properly award parent-time according to statutory standards in order to preserve the best interests of the child when the parties could not otherwise agree?

Issue III:

Did the trial court properly and equitably divide the parties' property?

Issue IV:

Did the trial court properly grant the divorce of the parties' based on irreconcilable differences?

STANDARD OF REVIEW

This divorce proceeding is a civil case and, "[a] trial court's conclusions of law in civil cases are reviewed for correctness and therefore no deference is given to the trial court's ruling on questions of law. See, State v. Pena, 869 P.2d 932 (Utah 1994). Furthermore, when looking at child custody "[t]he trial court is given particularly broad discretion in the area of child custody incident to separation or divorce proceedings. A determination of the "best interests of the child" frequently turns on numerous factors which the trial court is best suited to assess, given its proximity to the parties and the circumstances. Only where trial court action is so flagrantly unjust as to constitute an abuse of discretion should the appellate forum interpose its own judgment. Wall v. Wall, 700 P.2d 1124, 1125 (Utah 1985).

Any additional factors regarding property are equitable decisions. "Under prevailing standards of review, this Court may review both the facts and the law of matters in equity . . . Nonetheless, we accord considerable deference to the judgment of the trial court and interpose our own judgment only where the evidence clearly preponderates to the contrary or the trial court abuses its discretion or misapplies principles of law." Mineer v. Mineer, 706 P.2d 1060, 1062 (Utah,1985).

STATEMENT OF THE FACTS

1. The parties were married in July of 1993, and one child was born during the marriage named Julia Trubetzkoy, born on December 30, 2000. R261.
2. The parties separated in February 2003, and Appellant filed for divorce in

September of 2005. R253.

3. Appellee began to do palm readings and sell items at Renaissance Fairs approximately 30 years ago, or he had been involved in Renaissance Fairs for approximately 12 years previous to Appellant's involvement in the fairs. R53-53, 411:11 ln.23.
4. Appellee has assembled by hand all of the carts and display stands used in his business. R410: 31 ln.12, 410: 118 ln.24.
5. Appellee travels internationally, usually in Southeast Asia, to obtain the inventory that he sells during the Renaissance Fairs. R115, 262.
6. Appellee has participated in the same Renaissance Fairs for substantial periods of time. He has participated in the Northern and Southern California fairs for over thirty years, the Arizona fair for the last ten years, and fairs in Colorado and Texas for the last seven years. R410: 113.
7. The parties purchased a property in Salt Lake City, Utah that includes a store and a residential property in August 1996. R254, 263.
8. The parties purchased the store because Appellant did not like the fair life and to give them additional income during the Christmas season. R410:122 ln.3, R410:35 ln.16.
9. Appellant has always been primarily responsible for the store, its management, and the inventory kept there. R.410:122.
10. The parties' also own a piece of property in Colorado. R. 282.
11. Appellee lives in California in a trailer he uses at the two major fairs he sells

at in California. R.410:113.

12. *Appellee applies to each fair on a yearly basis, and receives a yearly employment contract. He does not have any influence over the boards that make the decisions on entrance to the fairs.* R263.

13. The parties' child, Julia, has been diagnosed with diabetes and mood disorder. R.410:11, R410:84.

14. Julia has always primarily resided with the Appellant and Appellee stipulated to primary physical custody with Appellant. R280.

15. Appellee requested joint legal custody in order to stay up to date with her *medical care and other aspects of her life.* R.267.

16. Appellee requested standard parent-time because he loves his child and wants to be a part of her life. R267, R410:124.

17. Appellee has always stated he is capable and willing to take care of all of Julia's medical and emotional needs. R281, R410:126.

SUMMARY OF THE ARGUMENT

The trial court properly evaluated the evidence in this case according to the best interests of the child. There was no physical custody determination to be made, only legal custody. Appellant presented no evidence to show that Appellee should not be allowed to share the right, privileges, and duties of being Julia's father. Therefore the trial court properly granted joint legal custody.

The trial court also properly applied the statutory parent time for parents living in different states. This schedule is presumptively in the best interest of the child, and the child court adjusted it to meet Appellant's concerns over the child's birthday. The trial

court has broad discretion is custody and parent-time issues, and the courts finding should not be overturned.

The property in this case was equitably divided as marital assets. Appellant did not marshal the evidence, and therefore the courts factually findings cannot be overturned by this court. Notwithstanding, no accounting of the business was necessary because Appellee started the business before he met Appellant and as such was allowed to continue the employment he has been doing for more than thirty years. The trial court gave each party the property they already had possession of and equalized the difference. No evidence was admitted as fact that contradicts an equitable division of property.

The divorce was properly granted on irreconcilable difference, and all finding of the trial court should be upheld.

ARGUMENT

I. THE TRIAL COURT PROPERLY AWARDED JOINT LEGAL CUSTODY AFTER FULLY CONSIDERING THE EVIDENCE AND TAKING INTO ACCOUNT THE BEST INTERESTS OF THE CHILD.

The only custody issue in this case was legal custody because Mr. Trubetskoy (“Sergei”) stipulated to Appellant having sole physical custody knowing it was in the best interest of Julia, because of his traveling work schedule. The trial court awarded joint legal custody to the parties because Judge Dever found it was in the best interest of the child. Joint legal custody is defined in Utah Code Ann. §30-3-10.1 as “the sharing of the rights, privileges, duties, and powers of a parent by both parents.” Utah law further states: “The court shall, in every case, consider joint custody but may award any form of custody which is determined to be in the best interest of the child.” Utah Code Ann. §30-3-10.

This is exactly what the trial court did in this case. Judge Dever started with joint legal custody and considering all the evidence weighed the best interests of the child. The trial judge specifically found:

1. “The petitioner’s claim that joint legal custody should be denied because of the fear that the father may not have the experience to handle the daughter’s medical needs is without merit.” R. 281.
2. “If there is a dispute as to medical treatment or education issues, the petitioner has the deciding vote.” R.281

Both of these statements clearly show that the trial judge took into account both parties’ arguments while maintaining the central purpose of providing for the best interests of the child. Evidence showed that Sergei has experience with a family member with diabetes, took a class about diabetes, and had made contact with Julia’s physiologist to discuss her diagnosis. R410:125-126, R410:86 ln14. In contrast, no evidence was presented that Sergei was incapable of making informed decisions about Julia’s care, or even that he has not taken interest in such things. Furthermore, while awarding joint legal custody the trial judge still gave the Appellant the final say on any matters of dispute regarding medical or education decisions. This ruling in itself should alleviate any concerns Appellant may have about joint legal custody. There should be no argument, because if there is a dispute between the parties’ she gets to make the final decisions. Therefore, Appellant’s statement that “the trial court did not make any findings as to the best interest of the child . . .” lacks merit and support by the evidence, and the trial court’s ruling should not be overturned. Appellants Brief at 23.

a. The trial judge did not misapply the joint custody statute.

The Appellant claims that because the trial court stated in its order that “the presumption in the law is for joint legal custody . . .” the judge misapplied Utah statute. Appellant’s brief at 23. However, as stated above the statute on joint legal custody states: “The court shall, in every case, consider joint custody . . .” Utah Code Ann. §30-3-10. Judge Dever was merely following this requirement of the code and general custom in Utah. Appellant relies on the Thronson case which was decided before the Statute was amended and does not address this language. Thronson v. Thronson, 801 P.2d 428 (Ut. Ct. App. 1991). Joint legal custody is normally presumed in Utah divorce cases, unless an objection is made.

Furthermore, even if this court found that Judge Dever improperly stated there is a presumption for joint custody the mistake is harmless error. The judge also found that no evidence was presented to support denying Appellee joint legal custody. R281. While on the other side significant evidence was presented showing Sergei’s interest in the health and welfare of his daughter. R410:125-126, R410:86 ln14. “Harmless error is an error that is sufficiently inconsequential that there is no reasonable likelihood that it affected the outcome of the proceedings.” D.A. v. State (In the Interest of W.A.), 2002 UT 127, P36 (Utah 2002) quoting, State v. Evans, 2001 UT 22, ¶20, 20 P.3d 888. The Appellant presented nothing but unsubstantiated claims that Sergei should not be given joint legal custody, as a result the trial court’s decision should be upheld.

b. Appellant cannot raise the issue of a parenting plan because it was not argued in the trial court.

Appellant raises the issue of lack of a parenting plan from either party as a

violation of Utah code. Appellant's Brief at 23. However, this issue was never raised in the trial court and therefore cannot be addressed on appeal. "Issues not raised before the district court are normally waived and cannot be raised for the first time on appeal." Gardner v. Bd. of County Comm'rs, 2008 UT 6, P31-P32 (Utah 2008). This is because, "[B]y not allowing the trial judge an adequate opportunity to consider the issues, [the plaintiff] waived the right to raise the issue on appeal." Tschaggeny v. Milbank Ins. Co., 2007 UT 37, P 22, 163 P.3d 615. The trial court award of joint custody should be upheld because the decision came after the court reviewed all of the evidence and found it is in the best interests of the child.

II. THE TRIAL COURT PROPERLY AWARDED PARENT TIME ACCORDING STATUTORY STANDARDS IN ORDER TO PRESERVE THE BEST INTEREST OF THE CHILD WHEN THE PARTIES COULD NOT OTHERWISE AGREE.

The trial court found that the standard statutory schedule for parents living in different states should apply in this case because the parties were unable to agree. See Utah Code Ann. §30-3-35, §30-3-35.5. "The advisory guidelines as provided in Section 30-3-33 and the parent-time schedule as provided in Sections 30-3-35 and 30-3-35.5 shall be presumed to be in the best interests of the child." Utah Code Ann. §30-3-34. This presumption for parent-time remains unless the Appellant could show by a preponderance of the evidence that less parent-time should be awarded by any of the following factors:

- (a) parent-time would endanger the child's physical health or significantly impair the child's emotional development;
- (b) the distance between the residency of the child and the noncustodial parent;
- (c) a substantiated or unfounded allegation of child abuse has been made;

- (d) the lack of demonstrated parenting skills without safeguards to ensure the child's well-being during parent-time;
- (e) the financial inability of the noncustodial parent to provide adequate food and shelter for the child during periods of parent-time;
- (f) the preference of the child if the court determines the child to be of sufficient maturity;
- (g) the incarceration of the noncustodial parent in a county jail, secure youth corrections facility, or an adult corrections facility;
- (h) shared interests between the child and the noncustodial parent;
- (i) the involvement or lack of involvement of the noncustodial parent in the school, community, religious, or other related activities of the child;
- (j) the availability of the noncustodial parent to care for the child when the custodial parent is unavailable to do so because of work or other circumstances;
- (k) a substantial and chronic pattern of missing, canceling, or denying regularly scheduled parent-time;
- (l) the minimal duration of and lack of significant bonding in the parents' relationship prior to the conception of the child;
- (m) the parent-time schedule of siblings;
- (n) the lack of reasonable alternatives to the needs of a nursing child; and
- (o) any other criteria the court determines relevant to the best interests of the child.

Id. Appellant did not show through a preponderance of the evidence that any of these factors were present in this case and should alter the standard parent-time schedule. Rather, Appellant stated at trial that she was not opposed to Appellee having parent-time and that “she [Julia] enjoys the visits very much.” R410:24 ln.22, R410:25 ln.4-5. Julia’s Physiologist stated when asked about extended visits “I think that’s something Julia would probably really like.” R410:87 ln.23. Finally, Sergei has always held that he wants time with his daughter. In fact, Appellant testified that in the first six months of 2008 Sergei called Julia nine times, twice leaving a message, and he saw her twice in Salt Lake. R410:24 ln.17. In addition, Sergei testified that usually when he calls Appellant does not answer, therefore any problem Appellant has with Sergei’s effort to contact his daughter is not due to lack of effort on his part. R410:125 ln7.

Appellant makes several arguments about Judge Dever ignoring Appellant's evidence at trial regarding parent-time, and not addressing the best interests of the child. Appellant's Brief at 26. However, the Appellant is confusing disagreement with Appellant's evidence with the court taking no consideration of the evidence. The standard statutory parent-time was a presumption that Appellant had to overcome; the trial judge after viewing all the evidence did alter the standard schedule. The trial judge found, as Appellant requested, that the parties should share Julia's birthday even though it falls within the Christmas break which would be Sergei's time under the standard schedule.

R359. "[T]he trial court is required to make factual findings on all material issues, [however] we also recognize that "[t]he trial court is not required to recite each indicia of reasoning that leads to its conclusions, nor is it required to marshal the evidence in support of them." Waldrop v. Waldrop, 2008 UT App 140 (Utah Ct. App. 2008), quoting Howell v. Howell, 806 P.2d 1209, 1213 (Utah Ct. App. 1991), quoting Knickerbocker v. Cannon (In re Estate of Knickerbocker), 912 P.2d 969, 979 (Utah 1996).

Appellant also argues that Judge Dever improperly changed the parent-time schedule previously ordered at the Objection Hearing because Sergei requested new provisions. Appellant's Brief at 27. This claim is factual inaccurate. The reason for the change with the trial judge's exasperation with Appellant's continued resistance to parent-time even after the court had made a final order. The following conversation from the Objection hearing is illustrative:

THE COURT: So, what are you—what is his parent time if he comes to Utah?

MS. SUTLIFF: It is whatever Paragraph 3 says his parent time is, he can

exercise it in Utah or California, as long as he gives the appropriate notice and—

THE COURT: Well, that's very interesting. So he come to town for—for three days and according to the statutory time that you have, he's not entitled to see this child because it doesn't fit in one of those categories. Is that it ? . . .

MS. SUTLIFF: Your order didn't talk about parent time otherwise, so this is another reason why we were confused and wanted some clarification.

THE COURT: How—how—how confusing can that be to your client, that if he comes to town, he's entitled to see his daughter?

R410:24-25. This record shows the trial judge was trying to “considered the best interests of the children, which include "hav[ing] frequent, meaningful, and continuing access to each parent.” Waldrop, 2008 UT App 140, quoting Utah Code Ann. §30-3-32(2)(b)(i). Because Sergei lives in California the times he comes to Utah are not as frequent as he would like because of expenses. Judge Dever thought it important for Appellee to be able to see his daughter when he is in the state. Appellant did not provide any evidence to support a reduced parent-time schedule, and the trial courts ruling on parent-time should be upheld.

III. THE TRIAL COURT EQUITABLY DIVIDED THE PARTIES' PROPERTY.

The evidence is clear that the trial court made an equitable division of the property in this case. The “trial court has considerable discretion concerning property [division] in a divorce proceeding, thus its actions enjoy a presumption of validity.” Schaumberg v. Schaumberg, 875 P.2d 598, 602 (Utah Ct. App. 1994).

a. Appellant did not properly marshal the evidence and therefore the property division of the trial court cannot be overturned.

In order to overturn the factual findings of the trial court regarding the property division between the parties the Appellant must first marshal the

evidence. “In order to challenge a court's factual findings, an appellant must first marshal all the evidence in support of the finding and then demonstrate that the evidence is legally insufficient to support the finding even when viewing it in a light most favorable to the court below.” Chen v. Stewart, 2005 UT 68, P53 (Utah 2005)(quotation omitted). The marshaling requirement is more than just making an argument.

The process of marshaling is . . . fundamentally different from that of presenting the evidence at trial. The challenging party must temporarily remove its own prejudices and fully embrace the adversary's position; [the challenging party] must play the devil's advocate. In so doing, appellants must present the evidence in a light most favorable to the trial court and not attempt to construe the evidence in a light favorable to their case.

Child v. Child, 2008 UT App 338, ¶2 (Utah Ct. App. 2008)(citations omitted).

Appellant’s brief simply sets forth her own argument and presents only the evidence that supports her claim, she did not meet this strict marshaling requirement.

b. The trial court divided the business assets equitably.

Contrary to Appellant’s assertions the trial court equitably divided the business assets as marital property. Appellant argues that the parties business was a partnership and thus Sergei was required to make an accounting. However, the trial court specifically rejected this argument because the parties did not create the business together. “THE COURT: Well, they participated in the business together; they obviously didn’t start it together, because he was in the business when he met her, so they didn’t create it together.” R411:11 ln.23. As such the

business assets were treated as marital property, not a partnership, and divided equitably.

The order of the trial court is very specific that the “inventory is the primary value of the business,” and that the business doesn’t have “any value beyond the inventory and carts owned.” R282-283. “We disturb a trial court’s property division and valuation only when there is a misunderstanding or misapplication of the law resulting in substantial and prejudicial error, the evidence clearly preponderates against the findings, or such a serious inequity has resulted as to manifest a clear abuse of discretion.” Elman v. Elman, 2002 UT App 83, P17 (Utah Ct. App. 2002). The trial court’s division followed the parties’ historical practice of Sergei selling at the renaissance fairs and the Appellant operating the store in Salt Lake City. R264. Thus, Sergei was awarded the inventory in his control and the carts to use at the fairs, and Appellant was awarded the inventory at the store. R282. The court even equalized the discrepancy in inventory awarded by giving Appellant all the equity in the parties home in Salt Lake City. R282-283. No error was made by the court, and the factual findings of the court regarding division of the business assets should be upheld.

c. All other assets were divided equitably according to the evidence.

The trial courts property division was based in equity and should not be overturned. Appellant claims that her calculations and values are “uncontroverted.” Appellant’s Brief at 39. This is a complete distortion of the record. Appellee’s attorney objected to the admission of these calculations (exhibit 9) at the trial, “Well I still am going to object. I think it’s extremely

unclear what it is she's attempting to how or how she's come up with these figures." R410:62 ln.3. As a result, the calculations were only admitted as illustrative of Appellant's testimony, not as facts. R410:133-134. The trial court gave each party the property in their own possession and divided the Colorado property 50/50. There is no basis in the record that this is an inequitable division of the parties' property.

IV. THE TRIAL COURT PROPERTY GRANTED THE DIVORCE BASED ON IRRECONCILABLE DIFFERENCES.

The Appellant's argument that this court should reverse the trial courts factual finding that the divorce should be granted on irreconcilable differences has no factual basis or legal purpose. The Appellant submitted no evidence that suggest Sergei had an affair and thus a finding of divorce on grounds of adultery was not supported by the evidence, and would only serve to humiliate the Appellee. The trial judge said is clearly at the Objection Hearing:

I'm not going to take judicial notice that a person is committing adultery when he says they're not—they're not doing it. Did you bring anyone here to testify he saw them engaged in any sort of conjugal relationship? No, you didn't. So, I'm not going to put it in there. So, that request is denied.

R.411:5 ln9. Appellant's final argument is more than frivolous its intention is to harm the Appellee. The trial courts granting of the divorce on irreconcilable difference should be upheld.

CONCLUSION

Based on the foregoing, the Appellant respectfully asks this court to Uphold all finding of the trial court and award appellate attorney's fees to Appellee for an unwarranted Appeal.

RESPECTFULLY SUBMITTED this 27 day of October, 2008.



Gregory B. Wall
Attorney for Respondent/Appellee

CERTIFICATE OF DELIVERY

I, Gregory B. Wall, hereby certify that I have caused to be hand-delivered eight copies of the foregoing to the Utah Court of Appeals, 450 South State Street, Salt Lake City, Utah 84114-0230, and four copies to the Appellant, this 27 day of October, 2008

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Gregory B. Wall

DELIVERED to the Utah Court of Appeals and the Appellee as indicated above
this 27 day of October, 2008.