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Diane Olive Frank v. Charles Gordon Frank : Appellant's Brief

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

DIANE OLIVE FRANK,)
Plaintiff and Respondent,)
vs.) No. 15492
CHARLES GORDON FRANK,)
Defendant and Appellant.)

APPELLANT'S BRIEF

Appeal from the Judgment of the Third
District Court for Salt Lake County,
Hon. David K. Winder, Judge

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STATEMENT OF THE KIND OF CASE

This is a divorce action and includes hearings subsequent to trial to fix child support and alimony payments.

DISPOSITION IN THE LOWER COURT

The case was tried to the court. Respondent was granted a Decree of Divorce from Appellant on the grounds of mental cruelty. No award of alimony or child support was made at the time of trial, due to Appellant's temporary inability to earn income. In a subsequent hearing brought on by Respondent, Respondent was granted an award of child support in the amount of \$700.00 per month (\$350.00 per month for each of the parties' two minor children) and an award of alimony in the amount of \$300.00 per month.

RELIEF SOUGHT ON APPEAL

Appellant seeks the striking or reduction to nominal of the award of alimony and a reduction of child support payments from \$350.00 to \$200.00 per month per child.

STATEMENT OF FACTS

The parties were married on June 10, 1955. Two minor children of the parties (Pearson, age 17, and Carter, age 10) reside with Respondent.

Respondent is a partner in a small business. Appellant is a thoracic surgeon. Appellant established his practice in Utah; but in 1975 an emotional disorder ended this practice.

In March, 1976, after the divorce, Appellant was able to resume his medical practice in California.

The trial court found Respondent's annual taxable income to be \$11,200 [R., p. 89, ¶ 8]. Appellant disputes this finding. The trial court found Appellant's annual taxable income to be \$66,692.00 [R. p. 89, ¶ 6]. Appellant disputes this finding.

ARGUMENT

1. IN FIXING ITS AWARD OF ALIMONY, THE TRIAL COURT DID NOT USE THE APPROPRIATE STANDARD ANNOUNCED BY THIS COURT.

A. THE CRITERIA ESTABLISHED BY THIS COURT IN FIXING A REASONABLE AWARD OF ALIMONY INCLUDE: 1) THE FINANCIAL CONDITIONS AND NEEDS OF THE WIFE, 2) THE ABILITY OF THE WIFE TO PRODUCE SUFFICIENT INCOME FOR HERSELF, AND 3) THE ABILITY OF THE HUSBAND TO PROVIDE SUPPORT.

In Nace v. Nace, 107 Ariz. 411, 489 P.2d 48, 50 (1971), cited with approval by the Court in English v. English, No. 14760, filed June 2, 1977, --- Utah 2d ---, the court observed that the criteria to be considered in fixing a reasonable award for alimony include the financial conditions and needs of the wife, the ability of the wife to produce sufficient income for herself, and the ability of the husband to provide support. In English, supra, the Court noted that the standard appropriate to fixing alimony differs from the standard to be employed in dividing the assets of a married couple on their divorce:

The standard utilized by the trial court [to fix an award of alimony], viz., the length of the marriage and the contributions of each to their joint financial success, is not an appropriate

measure to determine alimony. There is a distinction between the division of assets accumulated during the marriage, which should be distributed upon an equitable basis, and the post-marital duty of support and maintenance.

The purpose of alimony is to provide support for the wife and not to inflict punitive damages on the husband. Alimony is not intended as a penalty against the husband nor reward to the wife. . . . [Citing 2 Nelson Divorce and Annulment (2d Ed. 1961 Rev. Vol.) § 14.06, pp. 11-12.] [Emphasis added.]

B. THE CRITERIA USED BY THE TRIAL COURT IN FIXING AN AWARD OF ALIMONY ARE INCONSISTENT WITH THE CRITERIA ESTABLISHED BY THIS COURT.

The trial court, in awarding alimony to Respondent, applied a standard inconsistent with that announced by this Court. In its Memorandum Opinion the trial court states:

. . .as far as alimony is concerned, the Court feels it would be inequitable at this time and under the present circumstances to award either the full \$500.00 per month requested [as alimony] by [Respondent], or no alimony or the token alimony requested by [Appellant]. It is true that the [Respondent] through enterprise and perhaps necessity, does have a far better income than the average female this Court sees. Moreover, the Court acknowledges that in one sense [Respondent] does not "need" alimony in that she probably could subsist without it, and in fact has done so for approximately the last two years. However, and despite the foregoing, the Court feels wholly justified in making the alimony award it has and believes this award is amply supportable under the guidelines laid down in the numerous decisions of our Supreme Court. In making that award the Court has considered, among other things, (1) the length of this marriage, (2) [Respondent's] assistance to [Appellant] during the lean years from June 1955 to 1970 and during which [Appellant] prepared himself for his present profession of cardiovascular surgery and particularly, (3) the present disparity in the [Respondent's] and [Appellant's] income and the disparity of their

income potential. [R., p. 71-72, emphasis added.]

It is clear that the trial court has committed the very error warned against in English, supra, by confusing the standard appropriate to division of assets with the standard appropriate to awarding alimony. The considerations relied upon by the trial court are precisely those proscribed in English.

The trial court's award of alimony is designed to reward Respondent and penalize Appellant. The trial court has attempted to bring the parties' "income potential" into parity, without reference to Respondent's needs. Shall Appellant be penalized because he is a surgeon, without reference to Respondent's needs? Shall Respondent be rewarded because she is not a surgeon, without reference to her needs? Significantly, the trial court stated in its Memorandum Opinion, quoted above, that establishing parity of "income potential" was a "particularly" important aspect of its deliberations.

2. UNDER THE APPROPRIATE STANDARD THE AWARD OF ALIMONY SHOULD BE STRICKEN OR REDUCED TO NOMINAL AND THE AWARD OF CHILD SUPPORT SHOULD BE REDUCED TO \$200.00 PER MONTH PER CHILD.

A. THE EVIDENCE SHOWS THAT RESPONDENT IS CAPABLE OF PRODUCING SUFFICIENT INCOME TO MEET HER NEEDS.

As the trial court's Memorandum Opinion, cited above, tacitly admits, if Respondent's request for alimony were considered under the appropriate standard (her financial condition and needs and her ability to produce sufficient income, together with Appellant's ability to pay), an award of alimony would be inappropriate in this case.

The trial court found that Respondent's annual taxable income was \$11,200 [R. p. 89, ¶ 8]. The evidence of record, however, does not support this finding, which was based on Respondent's 1976 income. During the first quarter of 1977 Respondent was paid a gross salary of \$1,700 per month and on this basis her 1977 annual taxable income is \$20,400.[T., 17].

Respondent's business accountant testified that 1) Respondent's partnership would not be capable of continuing to pay her a salary of \$20,400 annually based on the record of the partnership during the first three months of 1977, which showed a \$1,700 loss to the partnership; and 2) that Respondent's partnership would be capable of paying her an annual salary of \$11,200 [T., p. 15]. On cross examination, however, this testimony was found to be unreliable according to the accountant's own standards of income projection:

Q: Mr. Erickson, are some months better than other months in the business of Wild Flower?

A: Yes, they are.

Q: The first three months are rather slow, aren't they?

A: The first three months are, compared to the final three months of the year, are slower.

Q: In fact, in December of '76, there was a profit for that month of \$3,200 alone, wasn't there?

A: That is correct.

Q: And so the loss of \$1,700 for three months is really kind of meaningless without taking a look at the projection for the last three months to compare with it.

- A: You would have to take into account the other nine months' operations to make a projection.
- Q: So, your projection, when Mr. Sessions asked you, was on the first three months. You can't really base it on three months, can you?
- A: No, you can't. You have to base it on prior years' operations. [T., p. 17]

The inescapable conclusion to be drawn from this testimony is that despite the increase in Respondent's salary in 1977, the partnership's first-quarter loss of \$1,700 is not unusual in light of the previous year's overall operation, since the slower first-quarter is balanced by the more brisk final quarter of the year. This is a picture of a healthy business partnership whose increasing earnings are being distributed, at least in Respondent's case, in the form of a higher salary. The record shows that Respondent's present income is \$1,700 per month. The testimony of Respondent's accountant rebutting that evidence was based on an analysis of only the first-quarter of the partnership's business year, an analysis which the accountant himself acknowledged as deficient.

During 1976 Respondent was able to meet her needs and those of the parties' minor children on an income of \$20,873, which included her salary plus a \$9,000 draw upon her partnership equity [T., p. 13]. No evidence was adduced showing that the standard of living enjoyed by Respondent at this income level was substantially lower than that enjoyed by Respondent during the marriage. In 1977 Respondent's salary increased to a figure of \$20,400. Therefore, Respondent's present salary together with an award of child support in the sum of \$400 per

month (\$200 per month per child), will provide her with an income level of \$25,200, well above her 1976 level. To award Respondent an additional \$300 per month in alimony would provide her a \$3,600 annual windfall unjustified in terms of her needs.

B. APPELLANT IS PRESENTLY CONSTRAINED IN HIS ABILITY TO CONTRIBUTE TO RESPONDENT'S SUPPORT AND MAINTENANCE.

The trial court found Appellant's overhead expenses in the operation of his medical practice to be \$16,692, using as its yardstick a figure of 20% of Appellant's total income [R., p. 89, ¶ 6]. This estimate of Appellant's overhead expense is grossly inaccurate in that it does not include Appellant's costs for the purchase of medical malpractice insurance.

Appellant is a thoracic surgeon, a profession exposed to the threat of medical malpractice lawsuits. Appellant was not covered by medical malpractice insurance at the time of the hearing, but was in the process of obtaining such insurance. Appellant testified that he had not previously been able to afford such insurance coverage and estimated annual premiums for malpractice insurance to be \$30,000 [T., p. 39].

The "20% overhead expense allocation" adopted by the trial court [R., p. 89, ¶ 6] does not include malpractice insurance premiums. Further, that 20% figure was derived from Appellant's 1976 overhead expenses, which were unusually low. Appellant practiced for only 9 months during 1976; in the first three months of his practice (March through May, 1976) he was afforded the opportunity to share offices with a colleague at no overhead cost whatever. The "overhead expense allocation" referred to

by the trial court actually represents only six months' operating expenses and is a serious underestimation of Appellant's annual overhead.

Appellant estimated his annual overhead expense, including malpractice premiums, to be \$54,600 [Exhibit 8-D]. The impact of the trial court's award of alimony and child support on Appellant is reflected by applying Appellant's overhead expense, together with the alimony and child support awarded to the Respondent, to Appellant's total annual income, found to be \$83,461.00 [R., p. 89, ¶6]:

Total income	\$83,461.00
Less overhead (including malpractice premiums)	(54,600.00)
Less annual alimony (\$300/mo.) and child support (\$700/mo.)	<u>(12,000.00)</u>
Income remaining for Appellant	\$16,861.00 *

In gauging Appellant's ability to contribute to Respondent's support and maintenance, the trial court 1) took no consideration of malpractice premiums in estimating Appellant's overhead expenses, and 2) underestimated Appellant's overhead expenses by relying on a year when said expenses were unusually low. To burden Appellant with unjustified alimony payments under these conditions could postpone his purchase of malpractice insurance, endangering his own financial well being and jeopardizing his

* Since child support is taxable to Appellant, he would pay taxes on \$25,261.00.

future ability to support the parties' minor children.

C. THE EVIDENCE DOES NOT SUPPORT AN AWARD OF \$350.00 PER MONTH PER CHILD AS CHILD SUPPORT; SAID AWARD CONTAINS A HIDDEN AWARD OF ALIMONY.

It is clear that the trial court, in derogation of the standard announced by this Court, has attempted to bring the spendable incomes of the parties into parity. It has employed both child support and alimony awards as tools of equalization.

The award of \$350.00 per month per child is unusually high. The record does not show that \$700 per month should reasonably be spent solely to satisfy the needs of the two minor children residing with Respondent. It would appear that the trial court has included in its child support award a hidden alimony payment. The trial court has attempted to determine what total amount, paid from Appellant to Respondent, will bring the parties' spendable incomes into parity, and has then allocated that amount between child support and alimony without reference to the needs of the children or the Respondent.

In Anderson v. Anderson, 110 Utah 300, 172 P.2d 132, this Court stated that awards of alimony and child support are to be based on separate grounds: 1) support of the divorced wife, and 2) support of the minor children.

As indicated hereinabove, there is a variance between the findings and the decree with respect to alimony and support money. The findings show an intention to award both, while the decree refers to "alimony" for the "support of the children." Alimony relates to support of the divorced wife, and support money relates to the compensation to a spouse for the support of minor children. [172 P.2d at 135, emphasis added.]

Appellant contends that a child support award of \$350 per month per child is not justified by the record (or, indeed, by any finding of the trial court) in terms "related[d] to the compensation to a spouse for the support of minor children." Further, Appellant doubts whether it would be in the best interests of the children to spend \$700 per month solely for their needs and desires.

Appellant contends that a reasonable sum to be awarded Respondent for the support of the parties' two minor children is \$200.00 per month per child.

CONCLUSION

In awarding alimony to Respondent, the trial court failed to employ the standard announced by this Court. Alimony was awarded without reference to Respondent's needs, her ability to produce sufficient income, and Appellant's constrained ability to contribute to her support and maintenance. Under the appropriate standard, an award of alimony is unjustified and said award should be stricken or reduced to nominal.

The award of child support is excessive and unsupported by the record. It apparently includes a hidden award of alimony which is intended to "spill over" to Respondent's benefit without reference to the needs of the children. A reasonable

award of child support in this case is the sum of \$200 per month per child.

DATED this 22nd day of DECEMBER, 1977.

RESPECTFULLY SUBMITTED,



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CERTIFICATE OF MAILING

This is to certify that a true and accurate copy of the foregoing APPELLANT'S BRIEF was mailed, postage prepaid, to Clark W. Sessions, Esq., Watkiss & Campbell, 12th Floor, 310 South Main Street, Salt Lake City, Utah, 84101, this 22nd day of DECEMBER, 1977.

