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Diane Olive Frank v. Charles Gordon Frank : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

DIANE OLIVE FRANK,

Plaintiff and
Respondent,

vs.

CHARLES GORDON FRANK,

Defendant and
Appellant.

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Case No. 15492

BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT OF THE
DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
HONORABLE DAVID K. WINDER, DISTRICT JUDGE

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- Ehninger v. Ehninger, 569 P.2d 1104 (Utah 1977).
- English v. English, 565 P.2d 409 (Utah 1977)
- Hendricks v. Hendricks, 91 Utah 553, 63 P.2d 277 (1936).
- Mitchell v. Mitchell, 527 P.2d 1359 (Utah 1974).
- Pearson v. Pearson, 561 P.2d 1080 (Utah 1977)

CASES FROM OTHER JURISDICTIONS

- Nace v. Nace, 107 Ariz. 411, 489 P.2d 48 (1971)

PRELIMINARY STATEMENT

The Appellant by his appeal to this Court seeks a modification of a supplemental order modifying decree of divorce and judgment entered by the trial court on October 20, 1977, following two evidentiary hearings, wherein the trial court awarded to the Respondent the sum of Three Hundred Dollars (\$300.00) per month as alimony and the sum of Three Hundred Fifty Dollars (\$350.00) per month per child, a total of Seven Hundred Dollars (\$700.00) per month child support for the support and maintenance of the two minor children of the parties. Appellant bases his challenge on the proposition that the trial court did not, in fixing these amounts, follow the appropriate standards and criteria announced by this Court.

RELIEF SOUGHT ON APPEAL

The Respondent seeks affirmance of the Order and Judgment of the trial court and in addition, seeks an award of attorney's fees in defense of the appeal and Respondent's costs.

STATEMENT OF FACTS

The Respondent agrees with Appellant's statement of facts, but submits such statement is not sufficiently detailed to accurately and completely reflect the circumstances of the parties upon which the order and judgment of the trial court was made and entered, and Respondent therefore sets out her own statement of facts for consideration by this Court.

The parties were married on June 10, 1955 and had three (3) children born as the issue of their marriage. Since the commencement of the divorce action below, the eldest of the parties'

children married, leaving the parties' two minor sons remaining. The Court awarded the custody of these children to the Respondent.

During the early years of the parties' marriage, the Appellant secured an education and a degree as a medical doctor. Following a period of residency, the Appellant practiced medicine as a thoracic surgeon in the State of California and subsequently in the State of Utah.

The Appellant enjoyed a successful medical practice and the parties enjoyed a high standard of living up to 1975, when the Appellant suffered a disability necessitating a temporary termination of his medical practice. During 1975, the Respondent, together with her parents, opened a small gift shop business in Salt Lake City. Respondent was so employed at the time of the divorce in March of 1976. The Respondent provided for the support of the family during the Appellant's period of disability from her earnings from the business and loans from her parents.

In the divorce action, the lower court specifically held in abeyance the matter of alimony and the matter of child support to be determined at such time as the Appellant was capable of providing the same and had secured gainful employment. (R. 31 and 38) During March of 1976, the Appellant returned to the State of California and commenced the practice of medicine there. On December 30, 1976, the Respondent filed a petition for modification of the Decree of Divorce for the purpose of setting and determining among other things, alimony to be paid to her and child support for the support and maintenance of the parties' minor children. The Appellant was served with an order to show cause issued

pursuant thereto in the State of California, but did not appear personally at the hearing held thereon on January 14, 1977. At the January hearing the trial court heard evidence from the Respondent and her accountant concerning the needs of the family, the historical earnings of the Appellant and the parties' standard of living prior to and following the Appellant's disability and the arguments and statements of counsel for both parties. (R. 53-54) The Court ordered the Appellant to pay the Respondent the sum of Two Hundred Dollars (\$200.00) per month per child, a total of Four Hundred Dollars (\$400.00) per month as child support, at the January hearing and continued the matter with respect to alimony, additional child support and other matters to a future date to be determined by counsel. Apparently, the Appellant does not challenge the evidence adduced at that hearing nor the matters found and determined by the Court at that hearing. 1/ Thereafter on May 20, 1977, a further hearing was held with respect to Respondent's petition, following which the trial court filed a Memorandum Decision on May 23, 1977 (R. 71-72) and thereafter made and entered its Supplemental Order Modifying Decree of Divorce and Judgment on October 5, 1977 (R. 94-96) from which this appeal is taken.

ARGUMENT

APPELLANT HAS NOT MET THE BURDEN NECESSARY TO JUSTIFY MODIFICATION OF THE TRIAL COURT'S AWARD

A careful review of the Appellant's brief suggests a rehash of the same arguments submitted and made to the Trial Court at

1/ The transcript of the testimony of the January hearing has not been included in the record filed by the Appellant herein.

both evidentiary hearings.

Although the consideration of alimony and child support is regarded as a matter of equity and notwithstanding the power of the Supreme Court to review both the law and the facts and to make its own findings in connection therewith, this Court has repeatedly refused to substitute its judgment for the judgment of the Trial Court in matters of this kind. Eastman v. Eastman, 556 P.2d 514 (Utah 1976). Recognizing that the trial judge is obviously in the advantageous position of observing the parties and the witnesses and hearing the evidence first hand, this Court has previously determined that the actions of the trial Court are indulged with a presumption of validity. Mitchell v. Mitchell, 527 P.2d 1359 (Utah 1974). This presumption may only be overturned where an appellant sustains the burden of demonstrating that based upon the evidence the decision of the trial court was clearly wrong. See, Carter v. Carter, 563 P.2d 177 (Utah 1977).

In order to prevail, the Appellant in this case must show first, that the evidence clearly preponderates against the findings as made by the trial court; second, that there was a misunderstanding or misapplication of law by the trial court resulting in substantial and prejudicial error to the appellant; or third, that a serious inequity has resulted so as to manifest a clear abuse of discretion by the trial court. Mitchell v. Mitchell, 527 P.2d 1359 (Utah 1974).

Although the Appellant has not specified which of the above listed standards his appeal is based upon, Respondent submits

that Appellant has failed to show the Trial Court's award to be deficient under any of such standards.

A. The evidence presented at the trial clearly supports the findings made and entered by the Trial Court.

1. The Appellant states in his Brief that he disputes the findings of the Trial Court regarding his income, and further, that he is constrained in his ability to pay Respondent. In support of this proposition, Appellant recites on page 8 of his brief the effect of applying his overhead expenses as projected by Appellant, including the alimony and child support award to the Respondent on Appellant's total annual income for the period of time from April, 1976 through March, 1977 as found by the Trial Court. Appellant concludes that such a projection would result in the amount of only \$16, 861.00 as income remaining for the Appellant.

Appellant does not state that his actual remaining income is \$16, 861.00, nor is Appellant requesting a reconsideration of the award of alimony due to changed circumstances. Instead, Appellant appears to be suggesting that the Trial Court allocated too low a figure in estimating Appellant's future overhead expenses. Appellant goes on to argue that the Trial Court failed to consider Appellant's malpractice insurance premiums in estimating Appellant's overhead expenses and under-estimated Appellant's overhead expenses by relying on a year when expenses were unusually low (Appellant's Brief, pps. 7-9).

The Appellant is wrong in stating that the Trial Court failed to consider the malpractice insurance premiums; he is also

wrong in assuming that the Court did not consider the evidence presented when determining Appellant's future ability to pay.

The transcript of the hearing shows that evidence was presented as to contemplated malpractice insurance costs, increased overhead involved in a contemplated move to a new office and increased costs for salary already being paid to Appellant's secretary (Tr. 27-29, 38-42, 44-46). This evidence of the projected overhead expenses was received and considered by the Trial Court in reaching its subsequent award of alimony and child support. Appellant also mischaracterizes the testimony presented when he states that the Court relied only on a year when overhead expenses were unusually low. Evidence presented at trial included both the overhead expenditures for the last eight months of 1976 and the first three months of 1977, and the projected expenses for the remainder of the year 1977. It should be noted that this period of time was the total period for which figures were available, i.e. from the beginning of Appellant's practice in California to the hearing date.

Although Appellant states that he disagrees with the findings of the Trial Court that his annual taxable income is \$66,692.00 (Appellant's Brief, p. 2), Appellant does not specify the basis of any such disagreement other than to state that the overhead expenses allowed by the Court were unusually low, as discussed above. A review of the evidence presented at trial will substantiate the Court's findings that Appellant's income on an accrual basis for the nine month period ending December 31, 1976 was \$62,855.00 and that for the period of January through March of

1977 the Defendant's earnings were \$20,576.00 for a total income of \$83,461.00 before overhead expenses (See Exhibits P-2, P-4, P-5 and P-6). While the Trial Court used an amount of twenty percent (20%) overhead allocation, Appellant's actual overhead expense ratio was 15.9% (Tr. 27).

Appellant argues his inability to provide for Respondent and the minor children of these parties at the level ordered by the Trial Court but apparently did not feel any financial stress over providing adequately for himself. Notwithstanding his claims, he was able during his first year of practice to purchase a new automobile at a cost of \$9,000.00 (Tr. 34-35); accumulate in a personal savings account between \$3,000.00 and \$4,000.00 after the payment of taxes (Tr. 34); take a trip to Hawaii at a cost of \$3,363.00 and attend another convention in San Francisco at a cost of \$900.00 (Tr. 37), plan to purchase new office furniture and equipment for some \$15,000.00 (Tr. 46) and move to a new office (which Appellant did not anticipate would result in an increase of his income) (Tr. 28), all while paying for the support of Plaintiff and the minor children of the parties in the calendar year 1976 the total sum of Eight Hundred Dollars (\$800.00) (Tr. 31).

Appellant has not shown by his argument that the evidence presented clearly preponderates against the findings; he has only shown that he disagrees with the result reached by the Trial Court, a situation not in and of itself warranting reversal or modification of the Trial Court's award.

2. Appellant argues that the evidence presented at trial shows that Respondent is capable of producing sufficient income to meet her needs. In support of this argument, Appellant states on page 5 of his brief that on the basis of Respondent's salary during the first quarter of 1977, her taxable income was \$20,400.00. Appellant then questions the reliability of testimony given by the accountant that the gift shop is not capable of paying Respondent a salary of \$20,400.00 annually based upon the income of the gift shop for the first three months of 1977. Appellant concludes that the gift shop's loss of \$1,700.00 for the first quarter of 1977 is not unusual; that the gift shop is a "healthy" business and that the record shows Respondent's income to be \$20,400.00 per annum or \$1,700.00 per month (See, Appellant's Brief, p. 6).

Respondent disputes the conclusions reached by Appellant regarding the testimony given by the Accountant, Mr. Ericksen.

In the first place, the accountant testified that the Respondent's salary from the gift shop in the calendar year 1976 was \$11,200.00. (Tr. 13) The Accountant further testified that the Respondent received additional cash in the amount of approximately \$9,300.00 during 1976 and that the source of those funds was a draw on the Respondent's partnership equity representing a decrease therein plus a loss in the business during the year 1976 (Tr. 13, 14). It can hardly be argued that a salary plus a decrease in partnership equity and a business loss for the year 1976 can be equated to a salary payable from the business to the Respondent as argued by the Appellant. Apparently the Trial Court chose to believe

the testimony of Mr. Ericksen as it entered its finding that plaintiff's salary was in fact \$11,200.00 for that year (R. 89).

During the first three months of 1977, the Respondent received a gross salary of \$5,100.00 or \$1,700.00 per month, which the accountant concluded the business could not continue to pay for the full twelve month period of 1977. (Tr. 15) In fact, it is interesting to note that at the 1976 salary rate of \$11,200.00 per year, the business lost money, i.e. \$290.00 (Tr. 14) Based upon that evidence, the Respondent submits the Appellant seriously mischaracterizes the economic picture of the gift shop in stating that "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" (See Brief of Appellant, p. 6). It is difficult to imagine that a small business in which the first quarter shows a loss of \$1,700.00 (Tr. 16) and the previous year reflected a loss of \$290.00 can in any way be regarded as "healthy" .

A more reasonable explanation for Respondent's high first quarter income for 1977 lies in the fact that the business is owned by Respondent and her parents. And further, that Respondent's mother works in the business without salary. (Tr. 17, R. 89 ¶8).

The evidence was clear that during the period of April, 1975 to April 1976 the Appellant did not earn any income nor contribute to the support of the Respondent and the parties' family (Tr. 23). Fortunately, during that period the parents of the parties' were able to provide some assistance and support (Tr. 23) and of course, the Respondent provided the balance from income generated

from the business.

It is certainly not the purpose of alimony to provide support and maintenance for a party only after depletion of that party's resources and that party's family's resources. Respondent should not be required to live from the proceeds of loans from her parents, particularly during a period of time when the Appellant, a trained thoracic surgeon, was able to provide for the support and maintenance of his wife of over twenty years and their minor children where the evidence is as clear as it is in this case that Appellant's income is more than adequate to pay the alimony and child support awarded to the Respondent by the Trial Court.

It is therefore clear that Appellant misstates the evidence presented when he claims that Respondent has an income adequate to meet her needs without the payment of alimony. Instead, the evidence presented amply supports findings of the Trial Court in making its award. Respondent's expenses on a monthly basis exceed the sum of \$2,300.00 per month without any repayment of loans to Respondent's parents required by her to be paid in the Decree of Divorce in connection with the Respondent's business (R. 37 ¶12), including a loan from her parents in the sum of \$15,000.00 (Tr. 7).

3. Appellant argues that the evidence does not support an award of \$350.00 per month per child as child support. Appellant does not support this argument by reference to the evidence, to any exhibit, by citation to the record or otherwise (See, Appellant Brief, pp. 9, 10).

A review of the evidence presented does, in fact, support the award of child support at the amount indicated and the Trial

Judge, after a consideration of the testimony and all relevant factors, so found. The evidence at the trial was abundantly clear that Respondent's expenses included items for housing, food, clothing, transportation, etc., a substantial portion of which is obviously required for the support and maintenance of the two children in Respondent's custody. (Ex. 1-P)

The Appellant somehow suggests that the case of Anderson v. Anderson, 110 Utah 300, 172 P.2d 132 (1946) implies that the trial court here confused the purpose of alimony and the purpose of child support and thereby granted Respondent a "hidden award of alimony" in what Appellant considers excessively high child support. In fact, in the Anderson case, there was a variance between the findings and the decree with respect to alimony and child support. The Respondent submits that Anderson is totally inapplicable to the instant case in that the trial judge here made specific findings and conclusions with respect to both alimony and child support (R. 91, ¶2). The Anderson court noted that the criterion for the determination of support money is the need of the persons supported and the Defendant's ability to pay. Id. at 135-136. The trial court in this case found both a need on the part of the minor children and that the Appellant in fact had the ability to pay.

B. The Trial Court did not misunderstand or misapply the law so as to create substantial prejudicial error.

Appellant argues that in deriving the amount of the alimony award the Trial Court applied criteria inconsistent with criteria recommended by the Utah Supreme Court. Appellant suggests that

the Trial Court's consideration of

. . . among other things, (1) the length of the marriage, (2) Plaintiff's assistance to Defendant during the lean years from June, 1955 to 1970 and during which Defendant prepared himself for his present profession of cardiovascular surgery and particularly, (3) the present disparity in the Plaintiff's and Defendant's income and the disparity in their income potential.

indicates that the Court did not base the award upon the correct criteria which the Appellant argues is the financial condition and need of the wife, the ability of the wife to produce a sufficient income for herself and the ability of the husband to provide support (See, Appellant's Brief p. 4).

1. Appellant is not justified in accusing the Trial Court of applying incorrect criteria. In its reference to the "present disparity" in the Plaintiff's and Defendant's income and the disparity in their income potential, the Court does base the award on the ability of the Respondent to support herself and the ability of the Appellant to provide support. Obviously, when one has a low income potential, one has a limited ability to support oneself, whereas, when one has a high income potential, one may have the ability to provide support for another, and in this case, the obligation to provide such support. In that connection, it should be noted that in April of 1976, the first month the Appellant reopened his medical practice in California, his receipts were \$100.00. His receipts in May were \$384.00, and those receipts increased per month to the point that in December of 1976, Appellant's receipts after fee adjustments totalled \$9,325.18. (Exhibit 2-P). In January of 1977, Appellant's receipts exceeded \$5,800.00 (Exhibit 4-P); in February, \$5,200.00 (Exhibit 5-P) and in March, Appellant's receipts exceeded \$9,400.00 (Exhibit 6-P).

Based upon such earnings, it can hardly be argued with convincing force that the Appellant does not have the ability to support his former wife and two minor children. In view of such overwhelming evidence, it is clear that the trial Court demonstrated in its award that it knew and applied the criteria recommended and urged by the Appellant and supported by numerous decisions of this Court.

This Court recently considered "economic disparity" in the income potential of divorced parties and noted in Ehninger v. Ehninger, 569 P.2d 1104 (Utah 1977), the following:

Notwithstanding all of the talk of equal rights for women, the trial court would be justified in taking cognizance of the commonly known fact that in many fields of endeavor there is an unfavorable disparity between the economic potential for women as compared to men. For whatever reason, there is in fact quite a wide difference between the economic status of these parties. 569 P.2d 1104, 1106.

Contrary to the argument advanced by Appellant that the trial Court confused the standard appropriate to the division of assets with the standards appropriate to awarding alimony as proscribed in English v. English, 565 P.2d 409 (Utah 1977), the trial Court in fact followed the instructions and standards set forth in the cases cited in English 2/ in that the amount of alimony to be awarded is measured by the needs and requirements of the wife, considering her station in life, and upon the husband's ability to pay. In Mitchell, the situation presented to this Court was a situation where, for one year the parties' income

2/ Nace v. Nace, 107 Ariz. 411, 489 P.2d 48, 50 (1971); Hendricks v. Hendricks, 91 Utah 553, 559, 63 P.2d 277 (1936).

increased substantially and significantly and the trial court there apparently did not consider either the Plaintiff's actual or potential earning ability, the effect of certain potential rental income, nor the Defendant's historical earning situation (noting that the Defendant's income in the previous year was fifty percent (50%) less) and that he had experienced unusual prosperity during the one year which the trial court used in basing its award. Clearly, those factors are not present in the instant case.

Here, the Appellant was able, during his first year of the resumption of his medical practice, to earn on an accrual basis in excess of \$83,000.00 and on a cash received basis, in excess of \$64,000.00 (R. 89, ¶¶ 5, 6). While the Respondent's income, without alimony, child support or a reduction in the equity of her business was \$11,200.00. (R. 89 ¶8).

Even if this Court finds that the Trial Court misunderstood or even misapplied the law, which Respondent denies, such a defect would not result in substantial prejudicial error to the Appellant. The award made by the Trial Court is equitable under any test. The evidence clearly substantiates the findings of the Trial Court that Respondent has a need for alimony; Respondent does not have the ability to produce a sufficient income for herself and the minor children of the parties; and the Appellant is able to provide the alimony and support awarded.

C. No serious inequity has resulted so as to manifest a clear abuse of discretion by the Trial Court.

Under Utah law, when deciding questions concerning an award of alimony or child support, the trial court has considerable

latitude of discretion. The findings of the Trial Court should not be modified unless as made and entered they work such an injustice or inequity as to indicate a clear abuse of discretion, Pearson v. Pearson, 561 P.2d 1080 (Utah 1977). Since the Court's findings are substantiated by the evidence and there is no injustice in the award, the trial court clearly did not abuse its discretion.

CONCLUSION

Based upon the foregoing, the Respondent respectfully requests that the Order and Judgment of the Trial Court be affirmed and further that the Respondent be awarded her attorney's fees in defense of this appeal and Respondent's costs.

Respectfully submitted this 20th day of January, 1978.



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Certificate of Service

I hereby certify that two copies of the foregoing Brief of Respondent Diane Olive Frank were served upon the Defendant and Appellant, Charles Gordon Frank by mailing the same, first class postage prepaid, to his attorney, L.E. Richardson, at his offices at 516 Boston Building, Salt Lake City, Utah 84111, this 20th day of January, 1978.

A handwritten signature in black ink, appearing to read "Charles Gordon Frank", written over a horizontal line.