

2008

Jennifer Hawks v. Jeff Hawks : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JENNIFER HAWKS,

Petitioner/Appellee,

vs.

JEFF HAWKS,

Respondent/Appellant.

Appellate Court No. 20080649

REPLY BRIEF OF THE APPELLANT

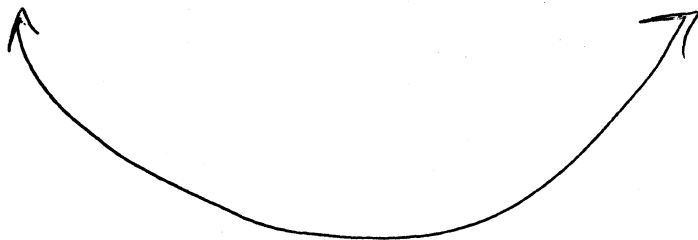
APPEAL FROM AN ORDER ENTERED BY THE
SECOND JUDICIAL DISTRICT COURT IN AND FOR THE
COUNTY OF DAVIS, STATE OF UTAH
HONORABLE MICHAEL ALLPHIN DISTRICT COURT JUDGE, PRESIDING

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REPLY BRIEF OF THE APPELLANT

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REPLY BRIEF OF THE APPELLANT

ARGUMENT

POINT I :

**THE TRIAL COURT MUST DETERMINE THE APPELLEE'S ABILITY TO
SUPPORT HERSELF.**

The Appellee acknowledges that the court is required to make a finding concerning the Appellee's earning capacity and her ability to produce an income. The Appellee contends that because the court concluded the Appellee could work part time and make \$600.00 per month, the court fulfilled its statutory requirement. The Appellee also contends that it should be assumed that the court did not accept the expert's testimony, or felt that there were problems with the expert's testimony.

The Appellee's position overlooks the fact that the court made the following findings concerning the Appellee (the Petitioner in the lower court). Judge Allphin in his video recorded ruling stated, "Petitioner has the ability to work and to earn some income..." "She

is still relatively young, and even though it is a 30 year marriage, she has the ability to work, as was testified by an expert, and the court will find that she is going to have to do that in order to make ends meet.” “...the court will find that she has sufficient ability to even get a part time job to supplement that income.” “The court finds that she has more needs than that, even though she has the ability to work...” (See Exhibit A of Appellee’s Brief, p. 5-6)

The court did not find, and the Appellee did not contend that she did not have the ability to hold a full time job. The Appellee’s attorney in his closing argument acknowledged that the Appellee could work full time and earn between \$6.40 and \$6.50 per hour. (See transcript, p. 202). There was no testimony received by the court that the Appellee did not have the ability to work. In fact, the Appellee testified during trial that she wanted to work, but had not attempted to find a job since 2005. (See transcript, p. 70).

The court did not find that there was any reason to question the testimony of Dr. Christy Farnsworth, a vocational specialist, who testified that the Appellee could make between \$18,720 and \$20,800 per year in the existing job market. (See transcript, p. 169-170). The only comment the judge made as it related to the expert was, “She is still relatively young, and even though it is a 30 year marriage, she has the ability to work, as was testified to by an expert...” (See Exhibit A of Appellee’s Brief, p. 5). The court did not make a finding that there was any reason to question the testimony of the expert, or that there was any reason why the Appellee could not work making the income as testified by the expert. This court, in the case of *Leppert v. Leppert*, 200 P.3d 223, 228-229 (Ut. App. 2009), reversed the trial court’s decision as it related to alimony because, “...the district court’s

reasoning is not clear on its face, and without an explanation this court cannot meaningfully review the court's reduction of alimony determination..." As indicated in the Appellant's Brief, the law in Utah is clear that a court must make proper findings as to each of the elements that must be considered in awarding alimony.

The trial judge did not make adequate findings as to the amount of money the Appellee could make to contribute to her own support. The court did not make adequate findings as to why it only considered income from a part time job in determining the Appellee's ability to contribute to her own support. In addition, the court did not indicate how much time the Appellee would work on a part time basis in order to earn \$338.00. If the Appellee made minimum wage, she would have to work approximately 52 hours per month, or approximately 13 hours per week. No findings were made that the Appellee had any limitations physically, mentally, or otherwise that would prevent her from working on a full time basis.

The findings seemed to imply that the court accepted the testimony of the expert witness. However, the court made no findings as to why it did not apply the expert witnesses opinion as to the Appellee's ability to produce a monthly income to contribute to her own support. Without these findings this court is not able to review the basis of the trial court's determination of the alimony which the Appellant was ordered to pay the Appellee. Consequently, this matter should be reversed and remanded to the district court to determine the Appellee's earning capacity and ability to produce an income, and apply that to the court's determination of the Appellant's responsibility to pay alimony to the Appellee.

**POINT II:
THE TRIAL COURT INCORRECTLY REDUCED THE APPELLANT'S
BUDGET.**

The trial judge reduced the Appellant's budget sheet by \$400.00 per month for travel. The only finding of the court is, "I - It looked to me like he has counted travel twice. He has got \$400.00 for travel, then he has a whole lot of expenses for a vehicle and other such circumstances..." (See Exhibit A to Appellee's Brief, p. 6). As indicated in the Appellant's Brief, the Appellant testified that he was required to travel extensively with his employment, many times out of state. That travel cost, which was not reimbursed to the Appellant, was in addition to the expenses which he listed on his budget sheet for vehicle, gas, and other expenses associated with his daily living. The \$400.00 was not a duplication of the expenses listed on his budget sheet. The court made no findings other than his statement that it looked like he counted the travel cost twice. The evidence did not support that conclusion on the part of the court. The trial court was required to consider all of the evidence given by the Appellant concerning this issue. The trial court obviously overlooked or misunderstood some of the testimony. Had the trial court made the detailed finding, which was required, the court may have realized its mistake. This matter should be remanded to the trial court to make detailed findings concerning the Appellant's business travel expense and his monthly expenses for personal travel.

CONCLUSION


The Appellee acknowledges that the court has an obligation to determine the

Appellee's earning capacity and ability to produce income. The Appellee's contention in its Brief that the court made proper findings concerning this issue, is unsupported by the evidence or by the findings. The trial court did not make any findings as to why the Appellee should not work full time, the amount that the Appellee could make working full time, and why the court only projected a part time employment for the Appellee making \$338.00 per month. The court's failure to make these findings is in violation of the state law and the requirements that this court has imposed on a trial court judge.

The trial court's conclusion that the \$400.00 in travel costs, which the Appellant testified he needed in connection with his business travel was duplicated by the Appellant's budget, showing his monthly personal needs for travel, was not supported by adequate findings, and is contrary to the evidence that was presented before the court. The trial court should be required to make specific findings as to the travel expense. By doing so, the trial court will likely discover that the expenses are separate, and not duplicated.

The Appellant requests that the court remand this matter back to the trial court to make the appropriate findings, and require the trial court to determine the Appellee's income from full time employment and modify the Appellant's obligation to pay alimony accordingly.

DATED this 18 day of March, 2009.


ROBERT A. ECHARD
Attorney for Defendant/Appellant

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vs.

JEFF HAWKS,

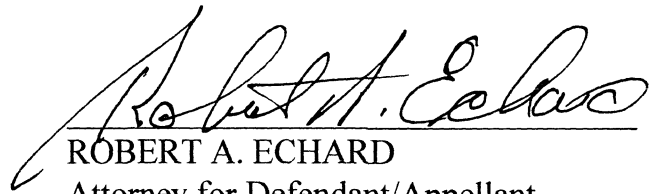
Defendant/Appellant.

Appellate Court No. 20080649

CERTIFICATE OF SERVICE

I, Robert Echard, certify that on MAR, 19, 2009, I served two copies of the Reply Brief of the Defendant/Appellant upon Keith Backman, counsel for Plaintiff/Appellee, Jennifer Hawks, by personally delivering two copies of the Reply Brief of Defendants/Appellants to the following address: Centennial Bank Building, 4605 Harrison Blvd., Third Floor, Ogden, Utah 84403.

DATED this 19 day of March, 2009.


ROBERT A. ECHARD
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