

1997

Melvon David Turner v. Di Ann Carol Turner : Response to Petition for Rehearing

Utah Court of Appeals

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IN THE COURT OF APPEALS

STATE OF UTAH

MELVON DAVID TURNER,)	
Plaintiff/Appellee,)	Appeal No. 970615 CA
vs.)	
DI ANN CAROL TURNER,)	Priority No. 15
Defendant/Appellant.)	

RESPONSE TO PETITION FOR REHEARING

Utah Court of Appeals Panel:

Honorable Russell W. Bench
Honorable Judith M. Billings
Honorable Gregory K. Orme

Appeal from Supplemental Decree of Divorce,
in Fourth District Court
Wasatch County, State of Utah
Honorable Howard Maetani
District Court Judge

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**UTAH COURT OF APPEALS
BRIEF**

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I.

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II.

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III.

ARGUMENT

A. THIS COURT DID NOT MISAPPREHEND THE FACTS SURROUNDING MRS. TURNER'S EMPLOYMENT HOURS AND HER ABILITY TO PARENT AND MAINTAIN EMPLOYMENT.

Mrs. Turner's primary argument in her Petition for Rehearing is that this Court misapprehended her work schedule and ability to parent and maintain employment. In particular, Mrs. Turner challenges the following statement from the Memorandum Decision:

....Appellant testified that she reduced work hours to care for the needs of her children. The children, however, were in school during most of the time appellant stayed home.
(Memorandum Decision, Pg. 2)

This Court did not misapprehend Mrs. Turner's schedule or the facts of this case. It is undisputed that at the time of trial all the children of the parties living at home, ranging in age from 6 to 18, were attending public school. Accordingly, when Mrs. Turner reduced her work hours from 36 to 16 hours per week she was home alone at least three school days each week.

The timing of Mrs. Turner's reduction of work hours is highly suspect. The parties separated in June, 1995 and it wasn't until less than two months before trial on November 21, 1996 that she cut her work hours from thirty-six to sixteen hours per week. (Tr. 110). Mrs. Turner should be able to work more rather than less hours as the children grow older, attain school age and become accustomed to having their father absent from the home.

In the Petition for Rehearing Mrs. Turner again raised the issue of one child threatening suicide as a reason for reducing

her work schedule. The suicide threat occurred more than one year prior to trial and shortly after the separation of the parties in June, 1995. There was no testimony that the threat of suicide existed at the time of trial. Judge Orme specifically corrected Mrs. Turner's counsel during oral argument that the record reflects that there was a threat rather than an attempt to commit suicide. If there were unusual emotional or physical needs of the Turner children, Mrs. Turner would not have waited until a few weeks before trial to reduce her work load to two shifts per week.

Mrs. Turner's argument that working days decreases her hourly wage \$5.00 per hour also does not tell the whole picture. Full-time work was available if she desired and her income in 1996 would have been \$33,693.00 or \$2,808.00 per month had she worked full-time. In contrast, Mrs. Turner's income in 1994 was \$31,246.00 or \$2,604.00 per month and her income in 1995 working a 36 hour week was \$29,875.00 or \$2,490.00 per month. (Tr. 78-80, 110-112). Accordingly, her wage increases more than offset any reduction by working days rather than nights and weekends.

B. THIS COURT DID NOT SUBSTITUTE ITS OWN FINDINGS
OF FACT FOR THAT OF THE TRIAL COURT.

Mrs. Turner next argues that if the Court did not misapprehend the facts regarding Appellant's employment it "substituted the fact finding process of the trial court and found facts on its own that were not presented at trial nor were a part of the record". (Petition for Rehearing, Pg. 5). As set forth in Argument A above, the record reflects that the children living

at home were all in school and Mrs. Turner working 16 hours per week would be home alone at least three school days each week. The record is clear that the trial court made the requisite findings under U.C.A. 78-45-7.5(7)(a) that Mrs. Turner was voluntarily underemployed and this Court correctly concluded that the "trial court did not abuse its discretion by imputing income to appellant". (Memorandum Decision, Pg. 2) The trial court's findings were sufficiently complete to support its decision.

C. THIS COURT DID NOT MISAPPREHEND THE
LAW REGARDING THE CHILD SUPPORT WORKSHEET.

Mrs. Turner initially argued on appeal that there was no Child Support Worksheet filed in this case. This Court summarily disposed of that argument as follows:

Appellant argues that the trial court erred in its child support award. First, appellant argues that appellee has failed to file a child support worksheet. Our review of the record, however, shows that appellee did file a worksheet with the trial court.... (Memorandum Decision, Pg. 2).

Mrs. Turner now argues that her Petition for Rehearing is further based on "this Court's misapprehension of the law regarding the child support worksheet used by the Trial Court". (Petition for Rehearing, Pg. 6). This Court addressed her first issue regarding a determination of child support for seven children when the table only provides for child support obligations for up to six children. This Court concluded that adding an additional \$65.70 for the seventh child was not an abuse of discretion. This Court stated:

...Because the trial court has broad discretionary powers in

setting child support obligations in excess of the tables, we conclude the court did not abuse its discretion when it determined the amount of child support. (Memorandum Decision, Pg. 2)

Mrs. Turner next challenges the Child Support Worksheet arguing that the Trial Court failed to make findings with respect thereto and cites Willey v. Willey, 951 P.2d 226 (Utah 1997) for the proposition that courts commonly accept, modify, reduce or reject claimed items in exhibits. The only variables in a Child Support Worksheet are the number of children and the respective incomes of the parties. The Child Support Worksheet which is set forth as Addendum E in the Brief of Appellee shows an income of \$2,490.00 for Mrs. Turner and \$4,461.00 for Mr. Turner resulting in a child support award of \$1,452.80. Paragraph 2 of the Court's Findings of Fact set forth in its Memorandum Decision establishes Mr. Turner's income at \$4,461.00 per month and paragraph 15 of said Findings of Fact establishes Mrs. Turner's income at \$2,490.00 per month. Accordingly, there is no basis for Mrs. Turner's argument that this Court misapprehended the law regarding the Child Support Worksheet.

D. THE DECISION IN THIS CASE IS CONSISTENT WITH REINHART.

Mrs. Turner next argues that the result in this case is inconsistent with Reinhart v. Reinhart, 348 Utah Adv. Rep. 22 (1998). In Reinhart, this Court upheld the trial court's finding and imputation of \$2,000 per month income for the wife when she had an earning capacity as a nurse of \$2,930.00. The trial Judge questioned whether Mrs. Reinhart, a full-time student in a

graduate nursing program, could hold down the shift work required for the higher salary while caring for four minor children.

In the case at bar, had the trial Judge imputed income to Mrs. Turner for a 40-hour week based on her 1996 income the Court would have imputed income of \$33,693.00 per year or \$2,808.00 per month. Instead, the Court imputed income based on Mrs. Turner's income in 1995 working a 36-hour week to arrive at an income of \$2,490.00 per month. Accordingly, in both this case and Reinhart, income was imputed at less than full earning capacity and this Court held the trial court did not abuse its discretion in imputing income. Accordingly, the decisions are not inconsistent.

IV.

CONCLUSION

This Honorable Court's Memorandum Decision concluding that the trial court did not abuse its discretion in imputing income is correct and supported by the record. The allegation that this Court misapprehended the facts of Mrs. Turner's employment or substituted its own Findings of Fact is without merit. Ironically, the issue of whether the children were in school most of the time Mrs. Turner stayed home or whether the trial court abused its discretion in imputing income should be a moot issue as it relates to the issues of alimony, the marital home, debts and attorney's fees. As set forth in the Brief of Appellee previously filed herein, had the trial court not imputed income to Mrs.

Turner but used her actual monthly income in 1996, she would have a positive monthly cash flow of \$527.44 as compared to Mr. Turner who has a negative monthly cash flow of \$252.00. The Petition for Rehearing should be denied and Mr. Turner awarded his attorney's fees in responding thereto.

RESPECTFULLY SUBMITTED this 25th day of November, 1998.

Terry L. Christiansen
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Attorney for Plaintiff/Appellee

MAILING CERTIFICATE

I hereby certify that two true and correct copies of the foregoing Response to Petition for Rehearing, were mailed, postage prepaid, to Steven Kuhnhausen, 450 South 900 East, Suite 240, Salt Lake City, Utah 84102, on this 25th day of November, 1998.

Terry L. Christiansen