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Melvon David Turner v. Di Ann Carol Turner : Reply Brief

Utah Court of Appeals

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**UTAH COURT OF APPEALS
BRIEF**

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DOCKET NO. 970615-CA

IN THE UTAH COURT OF APPEALS,
STATE OF UTAH

MELVON DAVID TURNER, Plaintiff/Appellee, vs. DI ANN CAROL TURNER, Defendant/Appellant.
--

Appeal No. 970615-CA Priority No. 15

REPLY BRIEF OF APPELLANT

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

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I.
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ARGUMENT.

I. New Matter

A. THE PARTIES' MONTHLY BUDGET.

Appellee's Brief, in the Statement of Relevant Facts at ¶¶ 15 and 17 describes the parties' monthly expenses offered into evidence at trial.

An examination of Mr. Turner's monthly expenses sets forth a claim for house payment in the amount of \$797.00 an amount he was not incurring at the time of trial (Tr. P. 30 L. 3).

Mr. Turner's budget actually demonstrates extravagance and exaggeration. Turner claims that his food budget is \$350.00 per month as compared to DiAnn's food budget for 8 people of \$800.00 per month; a clothing budget of \$50.00 per month compared to DiAnn's of \$150.00 per month for eight people; a utility bill which he was not incurring at the time of trial in the amount of \$100.00 per month; \$150.00 per month to purchase gifts and a \$400.00 per month car payment.

Reducing Turner's claimed monthly expenses of \$4,713.00 per month by his claimed child support obligation of \$1,453.00 leaves Turner with a monthly budget for one (1) person, (including a house payment he doesn't pay) of \$3,260.00 per month. DiAnn Turner's monthly budget is \$2,830.00 for eight people, which she must satisfy without alimony and with imputed income.

Mr. Turner has the ability to pay alimony by reducing his food budget and gifts and by looking for a less expensive residence.

B. Duke Farms.

Appellee also raises the issue of the value of the Duke Farms property and its shares of Wasatch Irrigation stock and claims that DiAnn's share of both is worth \$108,350.00. While the evidence at trial was that the Wasatch Irrigation stock was worth \$87,500.00 (Tr. P. 88) and the Duke Farms was appraised at \$454,250.00, the evidence at trial also was that Duke Farms was owned by a corporation (Tr. Pg. 75, L. 9) and that DiAnn owned 20% of the corporation (Tr. Pg. 75, L. 11) and that DiAnn's share was worth less than 20% of the appraised value if it could be sold as a single unit (Tr. Pg. 75, L. 18). The evidence at trial was that if the other 80% majority shareholders refused to develop Duke Farms, only a fool would pay \$25,000 an acre, not knowing what the other 80% shareholders would do (Tr. Pg. 76, L. 1-8). DiAnn's share of Duke Farms provided no source of money to help her meet her own needs or the needs of her children.

II. APPELLEE'S CLAIM THAT APPELLANT FAILED TO MARSHALL THE EVIDENCE.

A. Imputed Income.

Appellee claims that Appellant failed to marshall the evidence in support of the Court's finding and then failed to demonstrate that the Court's finding was clearly erroneous.

Appellant has marshaled the evidence regarding the imputation of income to her. The evidence at trial was that DiAnn was basically the maid for seven people (Tr. P. 99 L. 15) and that she was no longer able to take the type of hours she had in 1994 when she was taking all of the overtime (Tr. P. 96 L. 3-11). Appellant concedes that she has degrees in both education and nursing and that she has chosen not to work full-time outside the home and that her income from nursing was \$29,875.00 in 1995, and that she is employable. DiAnn appeals from the Trial Court's clearly erroneous finding that she is able to work at a level above that which she is currently employed without findings as to the childrens' needs and the lack of co-parenting which prevented her from working at her historical level.

The Court's sparse findings are against the clear weight of the plain evidence at trial which was that DiAnn no longer had the benefit of Mr. Turner's co-parenting, that the children were in counseling and one had attempted suicide (Tr. Pg. 98-99). The evidence was that DiAnn needed to work when the children were at school and be home when they weren't in order to meet the needs of the seven minor children (Tr. Pgs. 96-97). The Trial Court's findings were so lacking in support as to be against the clear weight of the evidence and therefore the finding that DiAnn was

able to work at a level above that which she was currently employed is clearly erroneous, unfair and an abuse of discretion.

Mr. Turner attempts to dismiss Appellant's arguments about the lack of his co-parenting as a reason to deviate from the Child Support Guidelines and not to impute income to DiAnn by claiming the children are old enough to help in the home and that, if anything, DiAnn should be able to work more, not less, hours as the children grow older and the children grow accustomed to not having their father reside at home. Turner fails to recognize that the only reason DiAnn was able to work the extra hours and shifts during the marriage was because of Turner's co-parenting efforts. His callous disregard of the childrens' best interests is consistent with his extravagant monthly expenses which he claims prevent him from having the ability to pay alimony.

B. The Child Support Award.

Appellee claims that DiAnn failed to marshal evidence on virtually on all issues raised on appeal. He claims that DiAnn's arguments are false relative to her claim that the Court failed to file a child support worksheet and failed to make adequate findings for a child support obligation in excess of six children. Plaintiff's Exhibit "6" is a child support obligation worksheet which was objected to by DiAnn at trial. The Court accepted Exhibit "6" into evidence "because of contingencies" (Tr. Pg. 28, 1.

18) but failed to make any findings or explain itself regarding any contingencies and failed to make any findings as to the application of the guidelines for more than six children or the appropriateness of Turner's worksheet. Merely because an exhibit is offered and admitted into evidence does not mean it is filed within the meaning of § 4-912 of the Code of Judicial Administration or that it is accurate. As DiAnn argues in her brief, the Court failed to make any findings regarding the child support worksheet or its award for more than six children and therefore the issue again is not one only of erroneous findings, but the lack of adequate and sufficient findings to support the ruling.

C. Alimony.

Appellee's Statement of Relevant Facts includes the parties' monthly income and expenses. It is clear from DiAnn's discussion regarding new matter that Turner has expenses that could be pared down in order to give him the ability to pay alimony to DiAnn, to-wit: less expensive housing, gifts, food and credit cards.

The Court made no findings as to the value of Duke Farms or whether DiAnn's interest was divisible or marketable. The evidence at trial was that even if DiAnn's share was worth \$108,350, there was no evidence that she was able to sell or divide her share or otherwise control the development or sale of Duke Farms as a whole in order to meet her own needs. The Court failed to make any

findings whatsoever as to whether or not its decision not to award alimony to DiAnn was based, in part, on a finding that Defendant's interest in Duke Farm would somehow enable her to meet her own needs. There was no evidence whatsoever to support a finding that Duke Farms provided any income to DiAnn or that it otherwise allowed her meet her own needs. Despite this lack of evidence, the Court entered a clearly erroneous finding that DiAnn's interest in Duke Farms somehow precluded her from alimony. Once again, the Trial Court's Findings are deficient and insufficient.

D. Pay-out of Equity.

Turner argues that DiAnn could have refinanced the home and paid off Turner's equity, but fails to recognize ¶ 16 of the Supplemental Decree of Divorce, wherein "each party is prohibited from placing or causing to be placed any lien, mortgage or other encumbrance against the home and property described in ¶15 above." Without alimony and appropriate child support, there was no evidence that DiAnn had any ability to otherwise obtain and pay over Mr. Turner's equity

E. The USAA Debt.

Appellee claims that DiAnn failed to marshal the evidence regarding all of the issues from which she appeals. The evidence is clear that Turner, who has no house payment and an extravagant budget has the ability to pay the USAA debt, the majority of which

was incurred after the separation of the parties. In fact, he lists payment of the debt in his budget as described in Trial Exhibit 4.

F. Attorney's Fees.

DiAnn recognizes the Court did make some findings regarding its award of attorney's fees. The Court made no findings as required by *Willey v. Willey*, 333 Utah Adv. Rep. 8 (Utah 1997) as to why it awarded the amount it did or why it refused to award DiAnn her requested attorney's fees or how DiAnn could pay her own fees,, and the expertise and experience of the attorneys, difficulty of the litigation and the efficiency of the attorneys presenting their case. The claim of Mr. Turner to a share of Duke Farms required considerable attorney's fees that were needlessly incurred. Turner's spurious claim was based on cutting a few crops of hay or infrequent clearing of ditches at Duke Farms which did not enhance its value (TR. P. 73)(R. 102).

CONCLUSION

The crux of DiAnn's appeal is that the trial court failed to make adequate and appropriate findings as required by this Court and the Utah Supreme Court. Appellee's brief focuses on his claims that DiAnn failed to marshal the evidence in support of the findings made by the Court and then demonstrate that they were clearly erroneous and against the clear weight of the evidence.

Other than the finding that DiAnn is able to work at a level above that which she is currently employed (which was clearly erroneous in the face of the evidence regarding the needs of the children and the lack of co-parenting), DiAnn complains that the Court failed to enter sufficiently detailed findings regarding the evidence.

While the finding that DiAnn was able to work at a level above which she is currently employed is against the clear weight of the evidence and clearly erroneous, the Trial Court failed to make sufficient findings regarding its imputation of income to DiAnn, child support, its decision not to award alimony, its decision to require DiAnn to permit Mr. Turner to benefit from DiAnn's pay down of the mortgage and its decision regarding payment of the USAA debt and its determination not to award DiAnn her requested attorney's fees.

DATED this 9 day of April, 1998.

Respectfully submitted,

Steven Kuhnhausen
Joseph F. Orifici

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed, postage prepaid,
on this the 9 day of April, 1998, a true and accurate copy of
the foregoing to:

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