

1988

Vera Morgan v. Dr. Wallace Jay Morgan : Reply Brief of Appellant

Utah Court of Appeals

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Recommended Citation

Reply Brief, *Morgan v. Morgan*, No. 880414 (Utah Court of Appeals, 1988).
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BRIEF

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DOCKET NO. 88-414 IN THE COURT OF APPEALS FOR THE
STATE OF UTAH

VERA MORGAN,)	
)	
Plaintiff,)	
)	
v.)	Case No. 88CA-414
)	
WALLACE JAY MORGAN,)	
)	
Defendant.)	Priority No. 14b

APPELLANT' S REPLY BRIEF

AN APPEAL FROM THE DECISION OF THE
THIRD JUDICIAL DISTRICT COURT,
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE RICHARD H. MOFFAT, JUDGE, PRESIDING

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DEPOSITED BY THE
STATE OF UTAH
AUG 16 1990

FILED

MAR 1 1989

COURT OF APPEALS

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STATEMENT OF FACTS

Plaintiff/Respondent ("plaintiff") admits that the Statement of Facts in Appellant's Brief is correct insofar as it describes events of the marriage and property that was subject to division upon dissolution of the marriage (Brief of Respondent, p. 2). Plaintiff then complains that the Statement of Facts in Appellant's Brief mischaracterizes the evidence (without stating which evidence is mischaracterized or correcting the misinformation for this Court) and editorializes upon the actions of the lower court (Brief of Respondent, p. 2). Plaintiff professes her desire to avoid such an inappropriate use of the Statement of Facts by discussing "only relevant facts and circumstances pertaining to the legal issues" raised by the appeal (Brief of Respondent, p. 4). Nonetheless, the remainder of plaintiff's Statement of Facts is dedicated to: (1) admonishing this Court that this case may not be viewed in a vacuum and thus, if this Court makes major changes in the Divorce Decree, it may be appropriate to remand to the trial court to allow that court to apply appropriate law in redistributing the parties' assets; and (2) attempting to convince this Court that the inequitable division of property and incorrect legal rulings rendered by the trial court were the result of its finding that defendant was not a credible witness.

The defendant does not dispute that, if this court makes major changes in the property division, it *may be* appropriate to remand the matter to the trial court to make adjustments in the award; however, whether remand will be necessary or appropriate

depends upon this Court's ruling and its impact upon the property division. The defendant strongly objects to the plaintiff's attempts to attack his character before this Court. In order to do so, the plaintiff not only mischaracterizes the evidence, she blatantly alters the facts.

Without citing the record, plaintiff alleges that defendant described his financial statements as "false summaries" or "gross exaggerations" of his real net worth (Brief of Respondent, p. 6). In fact, defendant did note that a financial statement prepared in 1984 was grossly exaggerated, to the point of being incorrect, in that the real estate in 1984 was greater than its value at the time of trial (R. 569, p.20-21). The plaintiff then attempts to characterize the defendant as a gambler who expended large amounts of the parties' estate in gambling but cites no supporting testimony. Defendant admitted that he did engage in gambling. However, the amounts expended could hardly be characterized as a large portion of the parties' estate as the gambling was limited to betting on football and basketball games, horse racing and, occasionally, cards (R. 570, p. 260-262).

Finally, the plaintiff points to a bank account which was allegedly hidden by the defendant and "contained \$60,000.00" (Brief of Respondent, p. 6). In fact, the testimony cited by plaintiff indicates that the bank account had a total of \$60,000.00 worth of transactions in the year 1986 (R. 571, p. 363). After that year, it was effectively inactive, as the business for which it was created ceased to exist, and, at the time of trial the account held approximately \$134.00 .

While the plaintiff asserts that defendant's lack of credibility was the basis for the trial court's inequitable property distribution, there is no indication that the trial court was at all impressed with the plaintiff's attempts to malign the defendant's character. Referring to the financial statements which plaintiff apparently believes convinced the court that defendant lied about the value of his assets, the court noted simply "I think you have already demonstrated here today that financial statements are prepared for lots of different purposes, depending on who looks at them." (R. 569, p. 55).

Finally, and most importantly, the issues before this Court have very little to do with defendant's credibility. The issues are legal issues. Defendant's credibility simply plays no part in their resolution. Consequently, the facts presented by the plaintiff to this court in an attempt to impeach the defendant's credibility are simply irrelevant and are no more than an attempt to smoke screen the fact that the trial court erred as a matter of law and, as a result, rendered an extremely inequitable decision.

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN ORDERING THE DEFENDANT TO PAY PLAINTIFF'S COSTS.

The plaintiff admits that, under Utah law, the defendant could not be ordered to pay expert witness fees and other costs incurred by the plaintiff in preparation for trial, which exceed the fees and costs allowed by statute. The plaintiff argues that, in the instant case, that maxim was not violated because the costs

that the defendant was ordered to pay were treated, not as costs of litigation, but as a debt owed by the plaintiff, which the defendant was ordered to pay. The plaintiff cites the discourse between her counsel and the trial court in which counsel acknowledges that evidence of expert witness fees would be irrelevant in a personal injury suit, because the fees could not be awarded, but argues that in a divorce proceeding a trial court must apportion all assets and debt justifying admission of the amount of the expert witness fees as evidence of a debt. Indeed that is the basis upon which the trial court permitted introduction of evidence of the expert witness fees.

If this Court accepts the plaintiff's reasoning, the rule that litigation costs may be awarded only as provided for by statute will be effectively abrogated. Counsel will simply introduce the expert witness fees and then argue that they are not being introduced to show costs of litigation but as evidence of the financial obligations of the parties which the trial court is entitled to award. That argument would apply to all types of litigation, for example, in divorce matters, counsel will argue, as did plaintiff's counsel, that the fees are a debt, which the court may equitably apportion; and in personal injury or breach of contract suits, the fees will be introduced as a debt that is part of the damages sustained as a result of the malfeasance at issue.

In short, contrary to plaintiff's argument, "a trial court cannot require one party to pay the other party's witness fees in excess of the statutory rate." *Sorensen v. Sorensen*, ____ P.2d ____, Slip Op. 87012-CA (Feb. 10 1989). A trial court may award

only costs of a type and in an amount allowed by statute. *Stevens v. Stevens*, 754 P.2d 952, 959 (Utah App. 1988). Litigants should not be able to circumvent that rule of law by characterizing the costs as a debt that must be apportioned upon divorce or the governing statutes and rulings are meaningless. In the instant case, the trial court erred, as a matter of law, in ordering the defendant to pay nearly \$24,000.00 in excess of the costs that may be awarded under Utah law.¹

POINT II.

THE TRIAL COURT ABUSED ITS DISCRETION BY REQUIRING THE DEFENDANT TO PAY IN FULL THE PLAINTIFF'S CLAIMED ATTORNEYS' FEES.

A. The Fees Charged By Plaintiff's Counsel Are Unreasonable.

Plaintiff argues that the trial court correctly ruled that her \$75,000.00 attorneys' bill is reasonable because the evidence indicated that the case was difficult and required additional time to obtain information from the defendant. Further, the plaintiff notes that her lead counsel testified that he knew of several

¹ The plaintiff supports her argument that the expert witness fees are not "costs" in the instant case by pointing to the fact that she was not required to submit a memorandum of costs under Rule 54 of the Utah Rules of Civil Procedure. That only serves to emphasize that the trial court disregarded Utah law in awarding the costs. Rule 54 provides the only mechanism for submitting a cost bill and obtaining an award of costs. The trial court's decision circumvented that mechanism by simply awarding the costs as part of the divorce decree although the plaintiff admits that she "made no attempt" to file the memorandum required by Rule 54 (Brief of Respondent, p. 10). Thus, in ordering defendant to pay the plaintiffs costs, the trial court not only disregarded the rule that it was limited to awarding costs that are statutorily allowed, it disregarded the procedure mandated by the Utah Rules of Civil Procedure for awarding costs of litigation.

attorneys that charged a rate similar to his own.² This simply misses the central point made in defendant's appellate brief: the bill submitted by plaintiff's counsel is unreasonable, as a matter of law, in that it includes costs, such as fees for appraisers, word processor charges, and delivery fees that cannot be awarded under Utah law and/or are normally included in an attorney's billable rate.

A divorce litigant has the freedom to contract competent counsel and reasonable attorneys' fees may be awarded, even if the litigant's counsel is expensive. However, the trial court has the responsibility to guard against abuses and determine that the fees are indeed reasonable. *Kerr v. Kerr*, 610 P.2d 1380, 1384-1385 (Utah 1980). The trial court in this case erred because it neglected that responsibility and merely rubber stamped the bill submitted by plaintiff's counsel as "reasonable."

B. Plaintiff Is Able To Pay Her Attorney's Fees.

Plaintiff argues, in effect, that if she is forced to pay her attorney's fees she must sell the stock that she was awarded leaving her without that asset.³ That argument is somewhat difficult to follow in that it implies that the defendant has some way to pay the bill and still keep the assets he was awarded. That

² In fact, plaintiff's counsel testified that prominent counsel in this jurisdiction that specialize in domestic litigation charge \$150.00 per hour, ten dollars less than his billing rate. (R. 371, p. 380)

³ She also argues that it is "undisputed" that she has no "useful occupation", as she is merely a housewife and a mother (Brief of Respondent, p 17). That is an outlandish statement in any case, which is further belied in this case by the fact that she testified that she had the skills and experience necessary to manage the Bel-Aire Apartments.

is not the case. The only liquid assets owned by the parties are the stocks. Plaintiff was awarded (by the court's appraisal) stock worth approximately \$200,000.00 more than that awarded to the plaintiff. At the same time he is awarded approximately 130,000.00 in matured debt and debt amounting to approximately \$55,000.00 that is secured by the stock (and thus must be retired if the stock is to be sold). Consequently, in order to pay the matured debt, the defendant, like the plaintiff, will have to sell virtually all of the stocks he was awarded, pay taxes on the sale and will be left without the benefit of the asset.

Plaintiff's version of the defendant's ability to earn sufficient income to pay the debt is equally difficult to follow. Relying upon her Trial Exhibit 52 (attached to Appellant's Brief as Exhibit "L") Plaintiff argues that defendant can be expected to continue to have a "disposable income" of approximately \$200,000.00 per year. That exhibit simply fails to support such a conclusion.

Approximately \$48,000.00 of the income noted in that exhibit for 1986 is income from the Bel-Aire, which was awarded to the plaintiff and, in order to maintain income at that level in 1986, defendant sold \$90,000.00 worth of assets. Thus, the plaintiff's own exhibit indicates that the defendant's income is approximately half of what plaintiff would have this court believe. From that income, the defendant is burdened with virtually all of the parties' debt and is required to support the cash drain posed by the Broadmore Apartments, which, contrary to plaintiff's allegations and due to her reluctance to cooperate, has not been sold.

In short, the tremendous attorneys' fees incurred by the plaintiff present the difficult problem attendant a large, matured debt. However, the facts indicate that the property and alimony awarded to the plaintiff are sufficient to meet her need and pay the debt. Consequently, the trial court erred in ordering the plaintiff to pay defendant's attorneys' fees.

POINT III.

THE BANK ACCOUNTS SHOULD HAVE BEEN VALUED ON THE DATE OF TRIAL.

The plaintiff argues that the trial court properly valued the parties' bank accounts in accord with the statements submitted by the plaintiff because those statements were the "best evidence" of the value of the accounts. In fact, the statements submitted by the plaintiff clearly indicate that the accounts were working accounts, with balances that fluctuated on a daily basis. Moreover, it is common knowledge that bank statements can be deceiving; they reflect checks that have cleared on a certain day and do not reflect checks that are outstanding. Thus, the "best evidence" of the balance in a checking account is evidence of the account balance on certain day, less outstanding checks. That is the evidence that was presented to the court by the defendant when testifying as to the balances in the accounts (R. 569, pp 28-35).

Plaintiff argues that the court could have found that the defendant drained the accounts, justifying valuation in accord with the balances shown on the statements. However, there was no evidence to indicate that the accounts had been improperly drained, the plaintiff did not so much as challenge the defendant's testimony of the balances or outstanding checks and the trial court

did not find that the defendant had dissipated the assets. Consequently, the trial court erred in not valuing the bank account in accord with the balances on the date nearest trial.

POINT IV.

**THE TRIAL COURT ERRED IN AWARDING ALIMONY
AS PLAINTIFF HAS SUFFICIENT INCOME TO MEET HER NEEDS
AND DEFENDANT IS UNABLE TO PAY THE AMOUNT ORDERED.**

Not surprisingly, plaintiff's brief illustrates that she has a completely different view of what the evidence indicates as to her need for alimony and the defendant's ability to pay. Defendant maintains that, if this Court reviews the Appellant's brief and the evidence, it is, at minimum, reasonable to conclude that the assets awarded plaintiff produce sufficient income to meet her needs and defendant is without the ability to pay alimony. Thus, contrary to plaintiff's assertion, this is not a case where need for alimony and ability to pay are clear (Brief of Respondent at p. 24).

The purpose of alimony is to provide support for a spouse in need. *Rasband v. Rasband*, 752 P.2d 1331, 1333 (Utah App. 1988). However, the award must be justified as it is an ongoing burden on the paying spouse and runs the risk of being used as a penalty against the payor or an award to the payee. See *English v. English*, 565 P.2d 409, 411 (Utah 1977). Thus, when need for alimony and ability to pay are not clear, as in the instant case, a trial court must support an award of alimony with findings of fact on need and ability to pay that are "sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached." *Stevens v. Stevens*, 754 P.2d 952, 958 (Utah App. 1988). In this case, the

trial court's substantial alimony award is supported by no findings on the plaintiff's need or the defendant's ability to pay alimony. Instead the trial court simply concluded that it is reasonable that the defendant be ordered to pay \$2,000.00 per month alimony, which will be reduced by only \$250.00 per month at defendant's estimated age of retirement when he will lose his only reliable source of income. It is impossible to determine how the court reached the conclusion that such an award is reasonable. In fact, it is unreasonable, given that the plaintiff is awarded assets that produce an income in excess of her needs. Thus, the defendant respectfully requests that the award of alimony be reversed.

POINT V.

**THE LOWER COURT ABUSED ITS DISCRETION IN FAILING TO
CONSIDER TAX CONSEQUENCES THAT ARE A RESULT OF ITS
DIVISION OF PROPERTY.**

Incredibly, plaintiff argues that there is no indication in the instant case that the defendant will have to sell any of his assets to pay the matured debt he was awarded because his "income and ability to borrow money should be sufficient to take care of the matured obligations." In the instant case, the defendant was awarded \$130,000 in *matured* debt, consisting primarily of the debt owed to plaintiff's attorneys and her costs of litigation. Assuming that these debts could be paid over time, or that money could be borrowed to pay the debts over five (5) years at ten percent (10%) interest (which is conservative) the payment incurred by defendant would be over \$2,700.00 per month. Certainly, if the court intended the defendant to pay the debt that manner, such a

large monthly payment should have been considered in determining whether defendant can afford to pay alimony. The record reflects no such consideration. Reasonably, the only method available for the defendant to pay the matured debt is the sale of the parties' stock. Such a sale necessitates tax consequences and costs of sale which would effectively consume one-half (½) of the value of the stock (see, defendant's proposed distribution of assets attached to Appellant's Brief as Exhibit "H," demonstrating that the parties' stock, at a fair market value of \$303,557 [which includes the stock awarded to plaintiff] has an after tax equity of \$118,281).

Plaintiff also asserts that the funds from the PSI partnership were improperly applied to a line of credit which was written on defendant's dental practice. In fact, the line of credit which the defendant applied the proceeds from the PSI sale had no connection with his dental practice and there is no evidence to indicate that it did. The line of credit was in the name of Dr. Morgan. It existed prior to the parties' marriage and constituted a marital debt that was awarded as part of the divorce decree. Consequently, by applying the proceeds to pay the marital debt, the defendant effectively sought to assure that plaintiff shared equally in the proceeds.

In short, this is a case where there will undoubtedly be tax consequences from the sale of assets due to the court's property division. Because the court order requires only the defendant to sell his assets to pay matured debt, it is inequitable that the court refuse to consider the tax consequences and sales costs attributable to the sale of those assets, which, due to the

magnitude of the debt, exceed \$100,000. Because the trial court's determination renders sale of the parties' stock a necessity and thus renders the tax consequences and costs of sale a certainty, the trial court erred in failing to consider the tax consequences attendant sale of the stock awarded to the defendant.

POINT VI.

**THE VALUE OF A MINORITY PARTNERSHIP INTEREST SHOULD
BE ITS FAIR MARKET VALUE, WHICH INCLUDES A DISCOUNT
FOR A MINORITY INTEREST.**

The plaintiff makes three (3) points in disputing defendant's argument that the trial court erroneously failed to consider a minority discount when valuing his partnership interests. These arguments are:

1. The trial court has discretion in determining how to value a partnership or closely held corporation;
2. A minority discount is not appropriate if other partners are required to purchase the partnership interest of a withdrawing partner on the basis of the value of the partnership assets; and
3. Minority discounts are applicable only if sale is imminent.

It is true that the trial court has discretion in valuing stock or partnership interest.⁴ However, even given that discretion, the trend in courts that have considered the issue is to find that failure to consider a minority discount constitutes an

⁴ Defendant seeks to differentiate the position of a minority shareholder in a closely held corporation from a minority shareholder in a partnership. In truth, these interests are more alike than different. They both suffer from the difficulties inherent in selling an interest that does not have the ability to control the entity.

abuse of discretion. See, *In Re the Marriage of Reiling*, 66 Or.App. 284, 673 P.2d 1360, 1365 (1984); *In the Matter of the Marriage of Belt*, 65 Or.App. 606, 672 P.2d 1205, 1207-1208 (1983); *Hayes v. Hayes*, 756 P.2d 298 (Alaska 1988). In so holding. the Court in *Hayes* specifically rejected the argument that a minority discount is inappropriate unless the sale of the interest is contemplated. 756 P.2d at 300. In fact, a minority discount is nothing more than acknowledging the fact that minority interests in closely held corporations and partnerships should be valued, like any other asset, at its fair market value. The fair market value of those assets includes a minority discount because the minority interest holder is at "the so-to-speak mercy of other stockholders . . ." *Reiling*, 673 P.2d at 1365.

Without guidance from this Court as to the proper method of valuing minority interests in closely held corporations or partnerships, litigants are treated unequally in different courts. Some courts apply a minority interest while others, relying upon the same or similar partnership agreements, refuse to do so. Thus, partners in the same partnership may find themselves being treated diversely when the value of their assets is being evaluated in different courts. Guidance from this court at this time, as to the proper method in valuing minority interests, would promote consistency at the trial court level and equity among litigants.

Finally, as the plaintiff points out, if there is some agreement that remaining partners or shareholders are required to purchase the interest of a withdrawing minority interest holder at a price calculated by the pro rata share of the value of the


partnership or corporate assets, it may be appropriate to disregard a minority interest. However, that simply is not the case in the instant action. The sections of the partnership agreement cited by plaintiff do not require that interest holders in the SunVest partnership or in Eckman & Midgley purchase the interest of a retiring or deceased partner at the value of the partnership assets. Instead, the remaining interest holders are given ninety (90) days in which to elect to purchase the minority interest at that value. If they choose not to elect to do so, there are severe restrictions on the ability to sell the minority interest to other parties, thus justifying the minority discount. As a result, in the instant case, the court abused its discretion in failing to apply a minority discount in calculating the fair market value of the defendant's minority partnership interest.

CONCLUSION

In the instant case, the trial court abused its discretion as a result of several erroneous rulings on matters of law. Consequently, the trial court's property division inequitably awards the defendant insufficient assets to pay the matured debts with which he was burdened and to meet his alimony obligation. Consequently, the trial court's property division should not be upheld.

DATED this 28th day of February, 1989.

COHNE, RAPPAPORT & SEGAL



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CERTIFICATE OF HAND DELIVERY

I hereby certify that on the 1st day of March, 1989, I caused to be hand delivered 5 true and correct copies of the foregoing to:

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