1988

Davis v. Davis : Brief of Respondent

Utah Court of Appeals

G. Michael Westfall; Gallian & Westfall; Attorney for Respondent.
Gary W. Pendleton; Attorney for Appellant.

IN THE UTAH COURT OF APPEALS

KIM CHALMER DAVIS,	)	
Plaintiff and Respondent,	)	
vs.	)	Case No. 880452-CA
TERRIE LEE DAVIS,	)	
Defendant and Appellant.	)	

BRIEF OF RESPONDENT

APPEAL FROM THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR WASHINGTON COUNTY, STATE OF UTAH, THE HONORABLE J. PHILIP EVES, JUDGE PRESIDING

Gary W. Pendleton
Attorney at Law
150 North 200 East, Suite 202
St. George, Utah 84770

Attorney for Appellant

G. Michael Westfall
GALLIAN & WESTFALL
P.O. Box 367
One South Main Street
St. George, Utah 84770

Attorney for Respondent

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St. George, Utah 84770

Attorney for Appellant

G. Michael Westfall
GALLIAN & WESTFALL
P.O. Box 367
One South Main Street
St. George, Utah 84770

Attorney for Respondent

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BRIEF OF RESPONDENT

JURISDICTION AND NATURE OF PROCEEDINGS BELOW:

I. JURISDICTION

This is an appeal from a Decree of Divorce entered in the Fifth Judicial District Court. Jurisdiction of this appeal is vested in the Utah Court of Appeals by virtue of the provisions of Utah Code Annotated §78-2(a)-3(2)(h) and Rule 3 of the Rules of the Utah Court of Appeals.

II. NATURE AND PROCEEDINGS

This is an appeal from those portions of the Findings of Fact and Conclusions of Law and Decree of Divorce entered by the Honorable J. Philip Eves, Fifth District Court Judge, which address the issue of alimony. Judge Eves had ordered alimony in an amount less than that recommended by the Court Commissioner after reviewing the transcript of proceedings held before Court Commissioner Howard H. Maetani pursuant to Fifth District Local Administrative Rule 10.

III. STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Where the trial of an action for divorce has been submitted to a Court Commissioner sitting by Local Administrative Order and not by consent of the parties and the Commissioner hears evidence and makes a recommendation concerning Findings of Fact, is the District Court Judge to whom an objection to the Commissioner's Order is taken bound to follow that recommendation unless clearly erroneous or may the District Court exercise its independent judgment in the matter?

2. Did Appellant waive her right to appeal the scope of the District Court's review of this case by failing to object when the Court advised the parties in open court of the scope of its review, that is, of its intent to make its own findings upon review of the record?

3. Did Fifth District Court Judge J. Philip Eves abuse his discretion or misapply the law when he awarded Appellant alimony in the amount of $50.00 per month for two years?

IV. STATUTES WHOSE INTERPRETATION IS DETERMINATIVE

Utah Code Annotated §78-3-16

> Whenever all the parties to any cause pending in a district court or their attorneys of record shall enter into a written stipulation appointing a judge pro tempore for the trial of the cause, and the person appointed shall take and subscribe an oath to faithfully try and determine the issues joined between the party or parties plaintiff, naming them, and the party or parties defendant, naming them, it shall be the duty of the clerk of the court in which such action is pending to attach together said stipulation and oath, and to place them on file, and also to record them at length upon the minutes of the court; whereupon the person appointed shall be vested with the same power and authority and shall be charged with the same duties as to the cause in and as to which he is appointed as if he were the regularly elected and qualified judge of the district court; provided, that parties may, by the terms of their stipulation, limit the power of the judge pro tempore to the trial and determination of any specified issue or issues, either of law or

fact, and in such case the oath of the person appointed shall correspond to the terms of the stipulation. (Repealed April 25, 1988.)

V. STATEMENT OF THE CASE

Plaintiff sued the Defendant for divorce. The matter was referred to Howard H. Maetani, Court Commissioner, pursuant to Local Administrative Rule 10. Commissioner Maetani heard the evidence and made a recommendation that Defendant be awarded rehabilitative alimony in the amount of $200.00 per month for a period of four years. Plaintiff filed a timely objection to that recommendation. Shortly after the objection was filed the matter was called for hearing before the Honorable J. Philip Eves, Fifth District Court Judge. At that hearing held April 12, 1988, Judge Eves advised counsel concerning his intent to make his own findings based on the evidence in the record. Neither party objected. The District Court then reviewed the record and reduced the alimony award to $50.00 a month for two years. A Decree of Divorce was entered consistent with that reduction. This appeal followed.

VI. STATEMENT OF THE FACTS

Respondent concurs in the statement of facts submitted by Appellant, supplemented as follows:

Shortly after Respondent filed his objection to the Commissioner's recommendation the matter was called before the Fifth District Court, the Honorable J. Philip Eves presiding, for hearing. At that hearing the Court asked Respondent's counsel to indicate whether he was requesting a new trial and the Court proposed an alternative, that is, that the Court "review the transcript of what the Commissioner did [to] see if [the Court] would do it

differently". Later on the Court stated "If the record contains sufficient evidence upon which I can make my own findings then I would probably do so in this case where the issues are limited". (Transcript of April 12, 1988, hearing at 4 through 6) Neither party objected to the Court's notice of intent to make its own findings.

Appellant testified that while employed at Leisure Sports, from roughly November, 1987, and until Easter, 1988, (Transcript of trial at 47) she would earn $5.50 an hour (Transcript of trial at 45) and that she expected to earn minimum wage when not working at Leisure Sports (Transcript of trial at 64).

Neither party submitted any specific evidence at trial with regard to monthly living expenses. However, both parties had submitted Full Disclosure Financial Declarations in conjunction with an earlier hearing on the issue of temporary support. The Domestic Commissioner made no specific findings with regard to the financial needs and conditions of either party except to find that Plaintiff has a gross historical monthly income of approximately $1,500.00 to $1,700.00 while the Defendant has a gross monthly income of approximately $500.00 to $550.00 (R. 82). Upon considering the matter, the Trial Court also made no specific finding with regard to the ability of the Plaintiff to pay alimony but did find that while Defendant claimed monthly household expenses of $1,195.00 in a Full Disclosure Financial Declaration previously submitted, she had testified on the date of trial that she had been able to maintain the household well on $800.00 per month approximately two years ago

when Plaintiff was also a member of the household. With that $800.00 she was able to pay for the mortgage, the utilities, the dental expenses, the medical expenses and food, and she could use what was left over for whatever else she needed (Transcript at 216-217). For a period of time she also paid the phone bill out of that money (Transcript at 216). The only testimony offered by either party with reference to anticipated household expenses was in the form of an acknowledgment by Plaintiff that the Full Disclosure Financial Declaration he had filed in July, 1987, accurately reflected his expenses as far as he could calculate it (Transcript at 155) and Defendant's acknowledgment that the expenses listed in her Full Disclosure Financial Declaration "basically" reflected what her monthly needs were to maintain herself and the children. (Transcript at 215)

As per the Full Disclosure Financial Declaration submitted by the Plaintiff on July 30, 1987, the Plaintiff's monthly expenses, excluding the mortgage on the home, were $1,793.92 (R 24). The Defendant's anticipated expenses each month as per her earlier filed Full Disclosure Financial Statement, excluding the amount of the mortgage payment of $284.00, were "basically" $1,195.00 (R. 51, 215).

VII. SUMMARY OF ARGUMENT

Commissioner Maetani's Recommendation was a recommendation. The matter had been submitted to Commissioner Maetani pursuant to Local Administrative Rule and not by consent of the parties. Cases that discuss the binding effect of a master's factual findings when

the case is referred to the master by consent of the parties therefore do not apply. A court commissioner's recommendation concerning Findings of Fact and Conclusions of Law does not remove from the District Court the right and the responsibility to exercise its own best judgement with regard to resolution of disputed factual and legal issues. That is especially so where, as in this case, the credibility of the witnesses is not so much in dispute as is the conclusion to be drawn from the evidence.

At the time this matter was submitted to the Trial Court for a determination of Respondent's objections to the Commissioner's Recommendation, the Trial Court indicated its intent to exercise its own judgment in reviewing the record and making findings. Neither party objected to that statement concerning the intended scope of the District Court's review. Appellant should not now be permitted to claim that the Trial Court erred when it did precisely what it said it would do and neither party had objected at that time.

When all of the factors relevant to the issue of alimony are considered, Judge Eves' Findings and Decree are clearly not an abuse of discretion nor a misapplication of the law. Commissioner Maetani's recommendation specifically addresses and makes factual findings concerning the parties' respective incomes. However, the Commissioner did not make findings concerning all of the factors necessary to a determination of alimony. The Commissioner made no finding concerning the needs of the Defendant or the ability of the Plaintiff to provide spousal support. The District Court did make

additional findings after a review of the record. In light of those findings, it is apparent that the District Court's decree should be upheld on appeal.

VIII. ARGUMENT

I.

WHERE TRIAL IN A DIVORCE CASE IS SUBMITTED TO A COURT COMMISSIONER FOR THE TAKING OF EVIDENCE PURSUANT TO LOCAL ADMINISTRATIVE RULE AND NOT BY CONSENT OF THE PARTIES, THE RECOMMENDATION OF THE COURT COMMISSIONER TO THE DISTRICT COURT IS ADVISORY ONLY.

Parties can waive procedural and constitutional rights; parties may consent to have someone other than the Court hear and make final determinations on issues of fact. Davis vs. Schwartz, 155 U.S. 631, 39 L. Ed. 289, 15 S. Ct. 237 (1894) is cited by Appellant for the proposition that a District Judge is not free to disregard a recommendation supported by the evidence. However, Appellant's analysis of that case overlooks a critical factor on which the U.S. Supreme Court based its analysis. The Court stated: "The Trial Court could not, of its motion, or upon the request of one party, abdicate its duty to determine by its own judgment the controversy presented, and devolve that duty upon any of its officers...[unless] the parties select and agree upon a special tribunal for the settlement of their controversy..." 155 U.S. at 239. In that case the Court concluded that since the reference to the master was by consent the findings of the master were entitled to a presumption of correctness. In this case, the matter was not submitted to a Court Commissioner by consent of the parties. The matter was submitted pursuant to Local Administrative Order 10.

Administrative Order No. 10 signed by the Honorable J. Philip Eves, Fifth District Court Judge, on September 16, 1987, provides:

> Pursuant to Section 30-3-4.1 through Section 30-3-4.4, all domestic relations matters in Iron and Washington Counties, including orders to show case, pretrial conferences, petitions for modification of divorce decree, scheduling conferences and all other applications for relief, excepting ex parte motions, shall be referred to the Court Commissioner upon filing with the county clerk.
>
> In all matters referred to the Commissioner, the Commissioner shall review all pleadings and conduct hearings for the purpose of submitting recommendations to the Court. At such hearings, the Court Commissioner may require the personal appearance of the parties and their counsel, upon notice; may require the filing of financial disclosure statements and settlement proposals; may obtain child custody evaluations from the Division of Family Services or private agencies under Section 55-15b-6(11), Utah Code Ann (1953, as Amended) and may receive evidence, by direct testimony or proffer.
>
> The Court Commissioner shall, after hearing any motion or other application for relief, recommend entry of an Order by the Court and shall make a written Recommendation and Order to the Court as to each matter heard.
>
> The oral recommendation of the Commissioner shall constitute the Order of this Court in the subject case until either reduced to writing in a Recommendation and Order or modified by Order of the District Court.
>
> The written Recommendation and Order shall contain the preceding paragraph, which should be in bold type and which should constitute the first paragraph of the document.
>
> Should the parties object to the Recommendation and Order, the matter shall be referred to the District Judge for further disposition, which shall consist of a review of the record relating to the stated objections.
>
> The Recommendation and Order shall contain the following:
>
> a. The above referred paragraph.
>
> b. The recommendation of the commissioner.
>
> c. Findings of Fact, Conclusions of Law and Decree of Divorce or other appropriate order.
>
> Any party objecting to the Recommendation and Order shall, within ten days of the entry of the Commissioner's Recommendation and Order, provide notice to the District Court, the Commissioner and opposing counsel that the recommended order is not acceptable. Objections to the Commissioner's recommendation must be specific regarding each matter to which the party objects. If no objection

> is made within ten days, the party shall be deemed to have consented to entry of an order in conformance with the Commissioner's Recommendation and Order. In the event a Recommendation and Order is objected to, the Commissioner's Recommendation and Order shall stand pending the final outcome of further disposition by the District Judge.
>
> In all matters wherein the parties do not object to the Recommendation and Order, the Recommendation and Order shall become the final Order and Decree of the District Court automatically, upon the expiration of ten days following the signing of the Recommendation and Order by the Commissioner. The signatures of the District Judge shall not be required.
>
> Default, contested and uncontested divorces shall also be heard by the Commissioner[1] unless otherwise directed by the Court. (Emphasis added)

Local Administrative Order No. 10 requires that the Court Commissioner hear uncontested divorces unless otherwise directed by the Court but does not give the litigants the opportunity for a trial by the Court. That rule also provides that review of the Commissioner's recommendation would consist of a review of the record relating to the stated objections but does not specify the standard of review to be applied.

Other cases cited by the Appellant in support of her argument concerning the proposed binding effect of the Commissioner's recommendation are founded on the same rationale enunciated in Davis. The parties may, by their consent, have someone other than the Court hear a case and make findings. In the State of

[1] In Wiscombe vs. Wiscombe, 744 P.2d 1024 (Ut. App. 1987) the Utah Court of Appeals indicates that "Hearings before the domestic relations commissioner are based solely on proffers, without formal submission of evidence or testimony." That was not the practice in the Fifth District.

Florida, Rule 1.490 of the Rules of Civil Procedure dealing with the appointment of masters provides:

"(c) Reference. No reference shall be to a master, either general or special, without the consent of the parties. When a reference is made to a master, either party may set the action for hearing before him". 30A Florida Statutes Annotated at 350, Florida Rules of Civil Procedure Rule 1.490(C).

Each case cited by Appellant from the State of Florida is really a restatement of the doctrine set forth in Davis: Once the parties have waived their right to have the Court hear the evidence by selecting another tribunal they can not, after the fact, object to the findings of that mutually agreeable substitute for the Court unless those findings are clearly erroneous. One of the very first cases in the State of Florida to acknowledge the binding effect of the findings of a master was specifically based on the parties having consented to that procedure. In Harmon vs. Harmon, 40 So. 2d. 209 (Florida 1949) the Court stated:

"Parenthetically, this court has allied itself with those courts which place added importance on the reports of masters to whom matters are submitted by agreement of the parties. [citations omitted] In such situations it has been said by this Court that the findings have the weight of the verdict of a jury." 40 So. 2d at 213.

The State of Illinois acknowledges the same rule concerning the binding affect of the findings of a master appointed by consent of the parties. In People ex rel. Reiter vs. Lupe, 89 NE 2d 824 (Ill. 1950) the Court concluded that the Defendants would be deprived of their fundamental right to the decision of a master who saw the witnesses on the stand and heard all their testimony if another master were to review the matter on the record alone and substitute its judgment for that of the master who heard the evidence. That

decision must be reviewed in light of two critical facts: 1) A master at chancery in the State of Illinois was a judicial officer whose position in the judicial branch of government is acknowledged in the Illinois State Constitution. A magistrate is now an "Associate Judge" pursuant to Article 6 section 8 of the Illinois State Constitution. An Associate Judge has a term of office of four years. He is appointed by the Circuit Court Judges in accordance with procedures that the Supreme Court of the State of Illinois establishes by rule and an Associate Judge hears matters determined by Supreme Court rule.[2] Due process as per the Illinois State Constitution contemplates a hearing by a magistrate or Associate Judge. There is no comparable provision in the Utah State Constitution. 2) A recent case in the State of Illinois clarifies the effect of a magistrate's report to the Court. In Oak Park National Bank vs. City of Chicago, (294 N.E. 2d. 42 (Ill. App. 1973). A master had been appointed but had died before completing his report. The parties had consented to have a successor master prepare the report. Appellant disagreed with that master's findings and appealed. The Court of Appeals held that the parties were bound by their agreement to have the successor prepare the report and went on to discuss the significance to be attached to the report.

"Furthermore, and finally, although the findings of a master, approved by the Trial Court are entitled to due weight on review the master's report is advisory only. After filing of the report, the facts remain open for consideration by the Trial Court and by the reviewing court. This Court will make its own determination as to

[2] Ill. Const. 1870, Art. VI, Sec. 8. S.H.A, effective January 1, 1964.

whether...'the decree rendered by the Court [was] a proper one under the law and the evidence...' Without regard to the finding of the master upon any particular question of fact". 204 Ne. 2d. at 45. In Illinois the findings of the master appear to be advisory only.

In McDonald vs. Kenney, 140 SW. 999 (Ark. 1911) the Supreme Court of the State of Arkansas acknowledged that parties can agree to have someone else settle a controversy but "Parties have a right to have a court determine by its own judgment the questions of fact and of law involved in any controversy". If the parties agree that a special tribunal can hear and settle the matter then they will be deemed to have waived certain rights with reference to their selection of a hearing officer. However, where the parties have had no say in the selection of the particular officer to hear the case then the matter should be decided by the Court...in this instance the Fifth District Court Judge.

In Utah, the necessity of consent of the parties prior to the appointment of someone to hear a case other than a judge was found in the Utah Constitution, Article VIII Section 5 until repealed in 1984. The Constitution does not now suggest a different rule except that the specific language providing for the appointment of non judges to sit as judges pro tempore by consent of the parties has been deleted. However, at the time this matter was heard, consent of the parties was critical.

U.C.A §30-3-15.3(2) requires the written consent of the parties before a judge pro tempore, master or referee can hear certain matters.

Rule 53 of the Utah Rules of Civil Procedure, is essentially the same as Rule 53 of the Federal Rules of Civil Procedure. One

glaring difference is the requirement that, for the appointment of a master to hear cases other than those where "some exceptional condition requires," the consent of the parties is necessary. URCP Rule 53(b).

At the time this matter was heard, UCA §78-3-16, provided for the appointment of a judge pro tempore upon "written stipulation" of the parties.

The rule that the decision of a Court Commissioner in Utah is advisory only is especially applicable in this case where the issue in dispute is not one that requires the Trial Court to pass upon the credibility of witnesses. In this instance neither Plaintiff or Defendant offered direct testimony concerning financial need except Defendant's testimony concerning the household expenses when Plaintiff was also residing in the home. Other testimony concerning financial need was offered by way of incorporating prior testimony in the form of Full Disclosure Financial Declarations filed with the Court in July of 1988.

In Anderson vs. Dewey, 350 P. 2d. 734 (Idaho 1960) a successor judge, upon consideration of a motion for new trial, vacated certain of the findings of the trial judge. The Appellant appealed claiming deprivation of due process since the successor judge had not heard the evidence. That Court stated:

> "However, in a case where the successor judge, in resolving the issues raised by a motion for a new trial, is not required to weigh conflicting evidence or pass upon the credibility of witnesses, but can resolve such issues upon questions of law, or upon evidence which is not materially in conflict, he may exercise the same authority as could the judge who tried the case". 350 P.2d. at 737

In this instance the testimony offered with regard to Defendant's needs was offered by Defendant herself. There was no need to resolve disputed evidence submitted by each party. If there was a need to resolve any conflict in the testimony it would involve resolving the conflict between Defendant's own testimony and her prior filed Full Disclosure Financial Statement which "basically" stated her monthly expenses. In such an instance it is not necessary for the court determining the matter to actually hear the party testify. Even if the "live" testimony were entitled to greater weight, Judge Eves was entitled to find, as he did, that the child support, when added to Defendant's income, met her and the children's needs.

In order for Respondent to have been deprived of his opportunity to have a District Court exercise its independent judgment in resolving disputed issues of fact he must have consented to a waiver of that right. In this case no such waiver occurred. This matter was referred to the Court Commissioner pursuant to Local Administrative Rule. The Court Commissioner exercised his discretion and heard evidence and made a recommendation. That recommendation may assist the trier of fact---the District Court Judge---but it is advisory only. Any other rule would deprive Plaintiff of due process of law.

II.

APPELLANT'S FAILURE TO OBJECT TO THE TRIAL COURT'S STATEMENT CONCERNING THE SCOPE OF ITS REVIEW OF THE COMMISSIONER'S RECOMMENDATION CONSTITUTES A WAIVER OF ANY OBJECTION TO THE PROCEDURE FOLLOWED BY THE TRIAL COURT IN REVIEWING THE RECORD AND EXERCISING ITS INDEPENDENT JUDGMENT WITH REFERENCE TO THE EVIDENCE PRESENTED.

At the hearing held April 12, 1988, the Trial Court invited counsel to either request a new trial or request that the matter be submitted for the Trial Court's review on the transcript of proceedings before the Domestic Commissioner. At that time the Trial Court made it clear that he intended to exercise his independent judgment with reference to the matters in dispute. The Trial Court stated: "If the record contains sufficient evidence upon which I can make my own findings, then I would probably do so in this case where the issues are limited" (Transcript of April 12, 1988, hearing at 6). Obviously, the Trial Court intended to exercise its independent judgment with reference to its review of the facts. No objection was made to that procedure at the time. Appellant, having failed to object at that time, should not now be permitted to raise that objection and question the practice of the Trial Court in that regard.

III.

THE TRIAL COURT DID NOT ABUSE ITS DESCRETION AND DID NOT MISAPPLY THE LAW IN AWARDING ALIMONY IN THE AMOUNT INDICATED.

At the trial of this matter evidence was presented concerning each party's ability to produce income. Despite Appellant's own testimony that, during the ski season, she was able to earn $5.50 per hour, or the equivalent of over $900.00 a month, and that she expected to earn minimum wage, approximately $575.00 a month, during other times of the year, the Court Commissioner and the District Court concluded that she had an historical earning capacity of between $500.00 and $550.00 per month. They also found that Appellant had an historical earning capacity of approximately

$1,500.00 to $1,700.00. The Court Commissioner cited language from Paffel vs. Paffel, 732 P. 2d. 96 (Ut. 1986), referred to Boyle vs. Boyle, 735 P. 2d. 669 (Utah App. 1987) and indicated that it had considered the factors relevant to a determination of alimony, to wit: "1) financial conditions and needs of the wife; 2) the ability of the wife to produce a sufficient income for herself, and 3) the ability of the husband to provide support." Jones vs. Jones, 700 P. 2d. 1072 (Utah 1985) as cited in Boyle vs. Boyle. The Commissioner did not make any factual findings on any issue regarding alimony except the parties' income. Because the Commissioner failed to make any factual finding with reference to the ability of the Respondent to provide support or the financial condition and needs of Appellant, the District Court had no alternative but to review the record and make findings.

The District Court, upon reviewing the record, found that the Appellant's needs were "met or nearly so" by her ability to earn $550.00 per month and the $350.00 child support recommended. Appellant had testified that she was able to maintain the needs of the household with $800.00 per month when Respondent was also a member of the household and that she and had money left over. Respondent's absence from the household would obviously reduce the amount necessary to pay basic household expenses and therefore allow Appellant additional disposable income for other purposes. Appellant's needs are met, or nearly so, when her income is combined with the child support ordered. The Trial Court's finding with regard to Appellant's financial condition and needs are amply supported by the evidence and the alimony awarded is consistent with those findings.

IX. CONCLUSION

This case was not heard by the Court Commissioner by consent of the parties but was heard pursuant to Local Administrative Rule. Were this Court to rule that the Court Commissioner's findings were binding upon the parties, Respondent will have been denied due process of law: the right to have the District Court Judge exercise its independent judgment with reference to disputed issues of fact. However, Appellant has waived her right to object to the practice followed by the District Court Judge in this instance by failing to object at the time the scope of the Court's intended review was explained to counsel for the parties. Finally, the decision of the District Court Judge is amply supported by the record. The District Court Judge, the Honorable J. Philip Eves, did not abuse his discretion nor did he misapply the law.

RESPECTFULLY SUBMITTED this _____ day of October, 1988.

GALLIAN & WESTFALL

By:_____
G. Michael Westfall

CERTIFICATE OF MAILING

I hereby certify that I mailed four copies of the above and foregoing Brief of Respondent to Gary W. Pendleton 150 North 200 East, Suite 202, St. George, Utah 84770, on the ____ day of October, 1988.

_____

ADDENDUM 1

IN THE FIFTH JUDICIAL DISTRICT COURT

WASHINGTON COUNTY, STATE OF UTAH

****

KIM CHALMAR DAVIS,	)	Case Number CV 87 1309
Plaintiff,	)	
vs.	)	RECOMMENDATION
TERRIE LEE DAVIS,	)	
Defendant.	)	

****

The above entitled matter came on regularly for hearing before the Domestic Relations Commissioner on February 24, 1988, at which time the court took the matter under advisement. The court having considered testimony and upon being advised in the premises now finds and concludes as follows:

FINDINGS OF FACT

1. Plaintiff is a resident of Washington County and has been a resident of Washington County for at least three months prior to the commencement of this action.

2. Plaintiff and defendant are husband and wife, having been married at Beaver, Utah, on June 23, 1978.

3. There have been two children born as issue of the marriage, namely: Brittany Lee Davis, born May 28, 1979; and Kim Clayton Davis, born June 11, 1982

4. During the course of the marriage defendant admitted having been involved in several physical and emotional relationships with various paramours causing the plaintiff great

mental distress and suffering; therefore, plaintiff is awarded a divorce from defendant on the grounds of mental cruelty.

5. The court considers numerous function-related factors in determining permanent custody, including but not limited to the following as discussed briefly in Pusey v. Pusey, 728 P.2d 117 (Utah 1986), and set out more fully in Atkinson, Criteria for Deciding Child Custody in the Trial and Appellate Courts, 18 Fam. L. Q. 1 (Spring 1984):

a. Primary caretaker: One of the most important factors in the child custody determination is who has been the primary caretaker of the child. The parent who has been the primary caretaker particularly when the child is young, usually has a closer relationship with the child and is more experienced in meeting the child's needs. In addition to indicating parental experience and a close relationship with the child, the parent who has been the primary caretaker also has demonstrated a commitment in caring for the child which, barring contrary evidence is likely to continue. Factors which would be considered to determine which parent is a primary caretaker are as follows:

(1) preparing and planning of meals;

(2) bathing, grooming and dressing;

(3) purchasing, cleaning and caring of clothes;

(4) medical care, including nursing and trips to physician;

(5) arranging alternate care, i.e. babysitting, day care, etc.;

(6) putting child to bed at night, attending to child in the middle of the night, waking child in the morning;

(7) disciplining, i.e. teaching general manners and toilet training;

(8) education, i.e. religious, cultural, etc. The court finds that while both parties are capable of caring for the child, the weight of the evidence presented leans towards the defendant as the primary caretaker of the parties minor children throughout the marriage.

b. Time available to spend with child: A factor related to the identity of the primary caretaker is which parent has more time available to spend with the child. While the primary caretaker factor looks primarily to time spent with the child in the past, the factor of time available to spend with the child looks to the future. The court finds that the weight of the evidence presented indicates that plaintiff will have more time available to spend with the children than the defendant.

c. Stability of environment: If the child has had a more stable and secure relationship with one parent than the other, custody usually would go to the parent offering more stability. The custody evaluation conducted by V. Gerald Thamert, L.C.S.W., and the psychological evaluation conducted by Richard Y. Moody, Ph.D., psychologist, indicate that the children of the parties have bonded very significantly with the defendant

and being younger minor children, they have a need to continue said bonding; therefore, they recommended that the defendant is at this time the most fit and proper person to be awarded the custody of the minor children of the parties.

Further, two other considerations related to stability are the child's school performance and health care. The evidence shows that the health needs of the children have been met and there is no evidence to the contrary that the children are not performing well academically in school.

d. Abuse and neglect: Abuse and neglect of a child obviously can be a determinative factor in custody cases. The abuse can be physical or verbal. Standards regarding abuse do not prohibit physical punishment. Parents or guardians may use corporal punishment to discipline their children so long as the force used is not designed or known to create a substantial risk of death, serious bodily injury, disfigurement, extreme pain or mental distress or gross degradation. The court finds no abuse of the parties children at this time.

Neglect includes lack of supervision of the child, poor appearance of the child, lack of attention to health needs, and inadequate provisions of food, clothing or shelter. The court finds no serious neglect of the parties children; however, the testimony and evidence presented compels the court to advise both parties to insure proper supervision of their children when they are in their custody.

e. Alcohol and drug problems: Another obvious factor in custody determination is a parent's drinking or drug problems. The testimony presented indicates that defendant has used marijuana and perhaps controlled substance; however, the court is not convinced that the defendant has an alcohol problem.

f. Mental instability: Mental instability, along with alcohol and drug problems appear as factors approximately twice as often in initial custody determinations as they do in modification cases. Presumably parents who have those problems are more likely to have had them for a long time rather than have developed them in between the period of initial custody determination. In many instances, the problems may have contributed to the divorce.

In most cases in which a mental health picture draws the attention of the court, the problem is severe, with the patient in question either having attempted suicide or having been hospitalized. Although a parent's current mental health problems are highly relevant to a custody determination, a parent's past problems in which the parent has recovered or current problems which are considered to not affect the children are not grounds for denying custody. In consideration of the evidence and testimony presented before the court, the court does not believe that the defendant is mentally unstable.

g. Non-marital sexual relationships: Although there is a divergence in the manner in which the court's deal with not-marital relationships, there are some situations on

which most court's agree. A parent who has a discreet sexual relationship which the child is not aware of would not lose custody because of the affair, unless the parent is spending so much time away from home that the child is not being properly cared for. A parent who has a relationship of which the child might be aware, but refrains from engaging in sex when the child is home, will also usually not lose custody. A parent who terminates an affair is not likely to resume it would not likely lose custody because of the affair.

At the other end of the spectrum, a parent who has multiple lovers in a short period of time and whose children are aware of the relationship will lose custody--especially if the parent shows other signs of instability. In addition, a parent who has her lover over when the children are at home and places the children in a particularly embarrassing situation is not likely to gain custody.

In between the extremes is a lot of gray area in which case turn on the degree to which a court will presume, without specific proof that a non-marital sexual relationship is harmful to a child.

Non-marital relationships, like marriages, vary considerably in their quality and in their impact on children. Some will have a positive impact; others will have a negative impact; and some may be a mixture of both. While the specific nature of a particular relationship may lead to a justifiable presumption that the impact of the child will be negative, a

negative presumption should not apply to all non-marital sexual relationships. Each case must be examined on its own facts.

In consideration of the testimony and evidence presented, the court does not believe that defendant's extra marital actions has created a negative impact upon the parties' minor children at this time.

h. Child's preference: The weight given the child's preference will vary with the child's age, intelligence and maturity. The court will not put the child in a situation where they must choose which parent they will live with, as that will create a situation in which influence and manipulation would abound. The court finds that pursuant to the custody evaluation and psychological evaluation submitted, both children love both of their parents and want to maintain a relationship with both parents.

i. Joint custody: The minimum criteria for joint custody is as follows:

(1) Both parties are fit;

(2) both desire continuous involvement with the children;

(3) both parents are seen by the child as a source of security and love;

(4) both parents will communicate and cooperate in promoting the children's best interests.

Obviously the most important criteria for issuing a joint custody order is cooperation of the parents. The court

finds that in this case both parents are fit; they both desire continuous involvement with their children; that plaintiff and defendant are seen by the minor children as a source of security and love; however, the court finds that both parents are unable to communicate and cooperate at this time in promoting the successful joint custody situation.

j. Split custody: The court is reluctant to split children because close family relationships should be encouraged; brothers and sisters need each others strengths and associations in the every day and often common experiences and to separate them unnecessarily is likely to be a traumatic and harmful situation. In addition, siblings particularly need each others support to deal with the strain of divorce. The court considered split custody in this situation; however, the court is looking for the best interests of the children and not a solution that will satisfy the parties at the expense of the children. Again, pursuant to the custodial evaluation and the psychological evaluation submitted to the court, the court finds that a split custody situation in this matter is without merit.

Pursuant to the custody evaluation and psychological evaluation submitted to the court and in consideration of the aforementioned paragraphs above, the court finds that defendant on a temporary basis is a fit and proper person to be awarded the care, custody and control of the parties minor children, and that such award is in the children's best interests subject to reasonable visitation rights in the defendant and contingencies set out in paragraphs 6 and 7 below.

b. The mother shall have the children on Mother's Day and her birthday, and the father shall have the children on Father's Day and his birthday.

c. Every other state and national holiday.

d. One-half of the Christmas vacation, i.e. when the children's Christmas vacation commences until 1:00 p.m. on Christmas Day for the year 1988 and from 1:00 p.m. Christmas Day until one day before the children need to return to school in 1989, and the parties to alternate the division of the Christmas vacation each subsequent year thereafter.

e. Four weeks of summer visitation to be elected by the plaintiff between the months of June, July or August for 1988. Commencing 1989 five weeks summer visitaiton between the months of June, July and August.

f. All visitation periods shall be exercised in a prompt manner so that both parties can make their plans accordingly. The noncustodial parent shall pick the children up from the front steps of the custodial parent's residence no earlier than 15 minutes prior and no later than 15 minutes after the visitation period commences. Return of the children to the front steps of the custodial parent's residence shall also be subject to the 15 minute rule. The custodial parent shall have the children fed and ready on time for visitation with sufficient clothing packed and ready for the visitation period.

g. In the event the children are ill and unable to visit, a makeup visitation will be allowed to the noncustodial parent on the next succeeding weekend.

6. It is in the children's best interests to have the noncustodial parent involved in their lives including such areas as school, sports, church, scouting and other activities in which the child has an interest. The custodial parent is responsible for advising the noncustodial parent of particular events of progress of the child in their custody.

7. While the parties minor children are in the defendant's temporary custody, defendant is restrained from smoking marijuana and/or use of other controlled substances; she is further restrained from having any male companions in her home overnight. Also, pursuant to the custody and psychological evaluations submitted to the court, the court will review the custody situation within one year from the date of this recommendation and/or as soon as it can be scheduled by either party thereafter with the clerk of the court. At the time of the review hearing, an updated report from V. Gerald Thamert and Richard Y. Moody is requested. Further, if the court finds it to be in the best interest of the children to change custody, it will do so without finding a change of circumstances because it is only awarding defendant temporary custody at this time.

8. The noncustodial parent is granted reasonable visitation with the children, which shall include, but is not limited to the following:

a. Every other weekend from Friday evening at 6:00 p.m. to Sunday evening at 6:00 p.m.

h. The children will not be permitted to determine whether they wish to visit with the noncustodial parent. Personal plans of the custodial parent or children, school activities, church activities, or other considerations will not be reasons for failing to adhere to the visitation schedule set forth in the order. Only substantial medical reasons will be considered sufficient for postponement of visitation.

i. Both parties will provide addresses and contact telephone numbers to the other party and will immediately notify the other party of any emergency circumstances or substantial changes in the health of the children.

j. The noncustodial parent shall, in addition to the visitation set forth in this order, have the unlimited right to correspond with the minor children of the parties and to telephone the minor children during reasonable hours without interference or monitoring by the custodial parent or anyone else in any way. Unless otherwise agreed to between the parties, telephone conferences between the noncustodial parent and the children shall be limited to no more than once per week and shall be, in total, 15 to 20 minutes or less in duration.

k. Both parties are restrained and enjoined from making derogatory or disparaging comments about the other party or in any other way diminishing the love, respect, and affection that the children have for either party.

9. The parties have a home located at 98 East 300 South in Beaver, Utah. During the parties marriage, the plaintiff and his father and defendant's father and other family members assisted in building the aforementioned residence. The home has an apparent fair market value at the present time of about $80,500.00. That plaintiff's father provided financial assistance in the construction of the home and closing cost in the acquisition of the property in an approximate amount of about $4,000.00.

The court awards defendant temporary possession of the above described home with defendant to have the exclusive use and occupancy thereof for the parties minor children in defendant's custody for two years from the date of this recommendation pursuant to defendant's request or until such time as defendant remarries or cohabitates, or moves from the home. During this period of occupancy, defendant is responsible for all mortgage payments and other costs associated with the upkeep of the home, i.e., maintenance, taxes, etc.

Upon the occurrence of the first of the conditions enumerated above, the residence should be sold as soon as reasonbly practicable and the proceeds of the sale applied as follows:

(a) First, to pay expenses of sale;

(b) Second, to retire any and all mortgages and liens, including but not limited to the $4,000.00 owing to plaintiff's father, and any amount that can be proven paid by plaintiff in

the acquisition of the lot prior to his marraige to the defendant;

(c) Last, the balance remaining thereafter to be divided equally between the parties.

10. The parties have been separated for approximately two years; therefore, the parties have no outstanding marital debts or obligations that needs to be considered by the court. Thus, each party is responsible for all debts and obligations incurred by themselves and to hold the other party harmless from any liability.

11. It is reasonable and proper that the parties be required to maintain in effect a policy of dental, health and accident insurance at all times if it is available through their respective employers at reasonable costs, with the minor children of the parties named as beneficiaries thereunder. Further, each party should pay one-half of all deductible amounts and one-half of all noncovered medical and dental expenses of said minor children. If neither party is able to supply said insurance, each party should be responsible for the payment of one-half of all reasonable and necessary medical and dental expenses for the minor children.

12. Plaintiff is self-employed as a general contractor; however, he is presently between bids and requested that the court ordered temporary support of $550.00 be reduced and made retroactive to August, 1988, since his petition was filed July 29, 1988. But plaintiff has an approximate historical

monthly gross earnings of $1,500.00 to $1,700.00 per month. Plaintiff has a responsibility to support his children; therefore, the court may take into consideration his historical earnings when he has suffered a temporary decrease in income as set out in Olsen v. Olsen, 704, P.2d 564 (Utah 1985). Therefore, the court will require plaintiff to pay child support in the amount of $175.00 per month per child for the parties minor children. Said child support obligation is effective March, 1988. Further, the court will also deny plaintiff's request for reduction of the amount he was ordered to pay on a temporary basis. If plaintiff becomes delinquent in his ongoing child support obligation in an amount at least equal to child support payable for one month, then the defendant is entitled to mandatory income withholding relief pursuant to Utah Code Annotated, Section 78-45d-1, et seq. (1953) as amended.

13. In Paffel v. Paffel, 732 P.2d 96 (Utah 1986), the Utah Supreme Court determined the purpose of alimony to be to enable the receiving spouse to maintain as nearly as possible the standard of living enjoyed during the marriage and prevent that spouse from becoming a public charge. In considering alimony, the court must consider:

(1) the financial condition and needs of the receiving spouse;

(2) the ability of the receiving spouse toproduce a sufficient income for himself or herself;

(3) the ability of the paying spouse to provide support. See Eames v. Eames, 735 P.2d 395 (Utah App. 1987); see also Boyle v. Boyle, 735 P.2d 669 (Utah App. 1987).

Plaintiff has a gross, historical, monthly income of approximately $1500-1700 while defendant has a gross monthly income of approximately $500.00-550.00. Based upon the above mentioned considerations, the court finds that the defendant is entitled to $200.00 per month as rehabilitative alimony for four years. Defendant is to gain the necessary skills within this time period by attending school as suggested in the custody evaluation of Mr. Thamert.

14. During the course of the marriage the parties have acquired items of personal property. Said personal property of the parties should be distributed as follows:

(a) To the plaintiff as indicated in defendant's exhibit D-15.

(b) To the defendant as indicated in defendant's exhibit D-15.

15. The parties are mutually restrained from harassing, annoying, vexing and/or interfering with the lifestyle of the other party.

16. Each party should be ordered to assume his/her own costs and attorney's fees incurred in prosecutng this action.

CONCLUSIONS OF LAW

1. The court concludes that the parties are subject to the jurisdiction of the court as set out above under the court's

Findings of Fact and that the plaintiff is entitled to a decree of divorce from the defendant on the grounds of mental cruelty, the same to become final upon entry therein.

2. The court concludes that all other issues of dispute have been resolved by the court pursuant to the above Findings of Fact.

3. The parties have ten (10) days from the date of this recommended decision to file a specific written objection with the clerk of the court. If no objection to the foregoing recommendation is timely filed, counsel for plaintiff is directed to prepare an appropriate order consistent with the foregoing rule.

DATED at Provo, Utah, this 22 day of March, 1988.

RECOMMENDED BY:

HOWARD H. MAETANI
Domestic Relations Commissioner

cc: G. Michael Westfall
Gary W. Pendleton

ADDENDUM 2

IN THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR WASHINGTON COUNTY, STATE OF UTAH

.....

KIM CHALMER DAVIS,)

Plaintiff,) MEMORANDUM OPINION

vs.) Civil No. 87-1309

TERRIE LEE DAVIS,)

Defendant.)

.....

The above-entitled matter came before the Court on the plaintiff's objection to the recommendation of the Domestic Commissioner following a trial of the issues held February 12, 1988.

The Court has now reviewed the entire transcript of the trial proceedings, the objections of the plaintiff, the memoranda filed in support of and opposition to plaintiff's objections, and the trial exhibits and, being fully advised in the premises, now rules on the objections of plaintiff as follows:

1. Plaintiff has objected to an equal division of the equity in the marital residence after payment of existing liens and mortgages, together with repayment of $4,000. to plaintiff's father and such additional amount as plaintiff can prove he

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invested in the building lot prior to the marriage. Plaintiff's objection appears to be that since he worked extra hours, did the construction himself and did trade work for the house, he should get a lion's share of the equity. Plaintiff testified, however, that defendant was a good wife to him during those first five (5) years of marriage; she cooked his meals, cleaned his house and otherwise performed her function as his wife. I fail to see why, in this marital partnership, plaintiff should consider his contribution to the house as anything extraordinary since he was merely performing his function as a good husband. That is the nature of a partnership. Objection No. 1 is overruled and denied and that portion of the Commissioner's Recommendation is approved.

2. Plaintiff next objects to the commissioner's finding on the earnings of the defendant and the award of alimony in the amount of $200. per month for four (4) years. A careful review of the evidence presented at trial reveals no reason to disturb the commissioner's findings regarding the earnings of the defendant. Although defendant did testify that she earned $5.50 per hour during the "ski season at Mount Holly", she was not at all clear as to how long that job lasted. Also, her testimony as to her anticipated earnings after the ski season were, at best, conjectural since she had no immediate employment prospects. The commissioner was well within the bounds of the evidence submitted,

including Exhibit D-3, showing 1987 earnings totaling $5854.59, in making his findings as to defendant's earning capacity.

With regard to the alimony award, however, I am unpersuaded by a review of the evidence that a rehabilitative alimony award of $200. per month for four (4) years is justified. Defendant is presently employed, albeit seasonally, and has evidenced no desire to obtain either rehabilitative training or education to improve her job skills. In addition, although defendant submitted a full-disclosure financial declaration listing monthly household expenses at $1195., she testified that she was able to manage the household well on $800. per month. When defendant's $550. monthly salary is added to the $350. recommended monthly child support, it is clear that her needs are met, or nearly so. Therefore, the recommendation of the commissioner that defendant receive $200. per month alimony for four (4) years is disapproved and this Court orders instead that plaintiff pay to defendant $50. per month spousal support, beginning on the date of this order and continuing for a two-year period thereafter, or until the marital house is sold and the equity distributed, whichever occurs first.

3. Plaintiff objects to the distribution of personal property and the values fixed thereon by the commissioner. The commissioner obviously adopted the property division and

valuations set forth in Exhibits D-13 and D-15, which were the only items of property discussed during the trial. Although the values are in dispute, the differences do not appear substantial and I find the division was equitable in consideration of all the circumstances, including the plaintiff's purchase of the Nissan 300 ZX automobile using money which defendant felt was partially marital in nature. (See Trial Transcript, P 212 and 213).

Plaintiff apparently feels that the commissioner failed to award some items of property but I find neither discussion of nor reference to those items in the record. If additional items of property remain in dispute, the Court retains jurisdiction and will deal with those items upon proper notice.

It is, therefore, the Court's intention to approve the Commissioner's Recommendation and adopt it as the final Order and Decree of this Court, except as to the award of alimony, which is modified as set forth in Paragraph 2 above.

Counsel for plaintiff to prepare appropriate Findings of Fact and Conclusions of Law and Decree of Divorce.

DATED this 27th day of June, 1988.

J. Philip Eves

J. PHILIP EVES, DISTRICT JUDGE

CERTIFICATE OF DELIVERY

I hereby certify that on the 27th day of June, 1988, copies of the foregoing document were either hand-delivered or mailed, first-class postage prepaid, to Gary W. Pendleton, 150 North, 200 East, St. George, UT 84770 and G. Michael Westfall, P. O. Box 1339, St. George, UT 84770.