

1997

Turner v. Turner : Petition for Rehearing

Utah Court of Appeals

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**UTAH COURT OF APPEALS
BRIEF**

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DOCKET NO. 971615-CA

IN THE UTAH COURT OF APPEALS,
STATE OF UTAH

MELVON DAVID TURNER, Plaintiff/Appellee, vs. DI ANN CAROL TURNER, Defendant/Appellant.	Appeal No. 971615-CA Priority No. 15
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PETITION FOR REHEARING

FILED

Utah Court of Appeals Panel: Utah Court of Appeals

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

NOV 16 1998

Julia D'Alesandro
Clerk of the Court

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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IN THE UTAH COURT OF APPEALS,
STATE OF UTAH

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

Case No. 970615-CA

Priority No. 15

PETITION FOR REHEARING

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TABLE OF CONTENTS

I.	Table of Authorities	ii
II.	Jurisdictional Statement	iii
III.	Statement of Issues	iv
IV.	Standard of Review	v
V.	Statutes	vi
VI.	Statement of the Case	1
VII.	Summary of Arguments	3
VIII.	Argument	4
IV.	Conclusion	8
X.	Counsel Certification	8

I.
Table of Authorities

Hall v. Hall, 858 P.2d 1018 (Utah Ct. App. 1993)

Reinhart v. Reinhart, 348 Utah Adv. Repr. 22 (Utah Ct. App
July 23, 1998)

Willey v. Willey, 866 P.2d 547 (Utah App. 1993)
914 P.2d 1149 (Utah App. 1996) (Cert Granted);
951 P.2d 226 (Utah 1997)

II.
Jurisdictional Statement

This Court has jurisdiction pursuant to § 78-2a-3(2)(h) and is before this Court pursuant to Rule 35 of the Utah Rules of Appellate Procedure.

III.
Statement of Issues

Petitioner seeks to have this Court rehear the issues raised by Appellant in her brief regarding child support and imputed income for the reason that this Court misapprehended the facts and the law. Those issues also necessarily impact the issues of alimony, debt payment and the marital home.

IV.
Standard of Review

The standard of review for a Petition of Rehearing is a claim that the Appellate Court overlooked or misapprehended points of law or fact.

V.
Statutes

Rule 35, Utah Rules of Appellate Procedure iii
78-2a-3(2)(h) U.C.A. 1953, as amended iii

VI.
Statement of the Case

This case was filed as a result of DiAnn Carol Turner's appeal from the Supplemental Decree of Divorce of the Fourth District Court in Wasatch County, Heber County, State of Utah following a memorandum decision by the Honorable Howard Maetani, presiding. Thereafter, this Court rendered its memorandum decision on November 5, 1998, affirming the trial court. Petitioner contends that this Court overlooked or misapprehended facts which would have caused this Court to render a different result regarding the time spent by Petitioner at home with her seven minor children as opposed to time spent at her employment which resulted in this Court affirming the Trial's Court's rulings regarding child support, alimony, debt payment and the marital home. The Petitioner contends that this Court overlooked or misapprehended the law as to the Trial Court as fact finder and the role of Appellate Courts.

1. At the time of trial, the parties' seven minor children, ranging in age from 6 to 18 resided in the home and in the sole custody of DiAnn Carol Turner.

2. DiAnn Carol Turner changed her employment hours **from** evenings and weekends **to days** in order to care for the children.

(Tr. Pg. 96, L. 11).

3. Petitioner left for work at 6:30 a.m. (Tr. Pg. 99 L. 6-15).

4. Following separation, Petitioner had to work the day shift, resulting in a decrease of her hourly wage of \$5.00 per hour (Tr. Pg. 96, L. 3- 11).

5. DiAnn was unable to work the hours she had before, including weekends and evenings (Tr. 98, L. 1-3) so that she could be home when the children were at home.

6. DiAnn testified that "I need to work days while my children are to school." (Tr. Pg. 98 L. 3.)

7. In response to the question at trial "[w]hy is it that you feel at this point you need to be home with your family?" DiAnn replied "[b]ecause my children have suffered greatly for one thing. I have had to take them to counseling. I have one child who threatened suicide." (Tr. Pg. 98 L. 13-17.)

8. A child support worksheet for 7 children was accepted by the Trial Court because of "contingencies" which were never identified.

VII.

SUMMARY OF ARGUMENT

DiAnn contends that this Court should rehear the issue of imputed income and Petitioner's voluntary under-employment for the reason that this Court misapprehended Petitioner's schedule for work and parenting where in this Court's Memorandum Decision at page 2, it found "[T]he children, however, were in school during most of the time that Appellant stayed home."

DiAnn now seeks rehearing on the apparent lack of Findings regarding the child support award.

Finally, Petitioner asserts that this Court may have misplaced its reliance upon *Hall v. Hall*, 858 P.2d 1018 (Utah Ct. App. 1993) by implying facts in light of *Willey v. Willey*, 951 P.2d 226 (Utah 1997).

This misapprehension of DiAnn's schedule impacted this Court's affirmance of the Trial Court's abuse of discretion in setting child support, denying alimony, and making unfair inequitable orders regarding debts, the marital home, and attorney's fees.

VIII.

ARGUMENT

The Petitioner contends that this Court misapprehended the facts surrounding her employment hours and her ability to parent the children and maintain employment.

The evidence at trial was that Petitioner went to work at 6:30 in the morning and was getting very little help from the children. In response to the question "let me ask you what is the reason you have felt it necessary to cut back on your employment from the types of hours you had in 1994 when you were taking all the overtime." Petitioner replied, "at that time I was working mainly weekends and graveyards and it was because my husband was available to tend the eight children who were at home. With him gone, I have to work days and it gives a decrease in hourly wage of \$5.00 per hours." (Tr. Pg. 96, L. 3-11.) Petitioner also testified that she worked days while the children were in school (Tr. Pg. 98).

None of these facts were disputed by Appellee in his oral argument, in his brief, or at trial.

Neither the ages of nor number of children or the facts that the Appellee did not participate in co-parenting of the children nor Appellant's actual employment hours and schedule were disputed either in Appellee's brief, during oral argument or at trial.

Petitioner contends that this Court has either misapprehended the facts regarding Petitioner's employment or has substituted the fact finding process of the trial court and found facts on its own that were not presented at trial nor were a part of the record.

Petitioner contends and believes that had this Court not misapprehended the facts of her employment as recited in this Court's Memorandum Decision filed on November 5, 1998, or had this Court not substituted its own Findings of Fact contrary to the proscriptions of *Willey v. Willey*, 866 P.2d 547 (Utah App. 1993); 914 P.2d 1149 (Utah App. 1996) (Cert Granted); 951 P.2d 226 (Utah 1997), the outcome of Petitioner's appeal would have been different. As the Supreme Court stated in *Willey v. Willey* (Utah 1997). "It is inappropriate in most instances for an Appellate Court to disregard the Trial Court's Findings of Fact and Conclusions of Law and to assure the task of weighing evidence and making its own Findings of Fact."

Petitioner contends that because of this Honorable Panel's decision in *Reinhart v. Reinhart*, 348 Utah Adv. Repr., July 23, 1998, the result in this case is inconsistent with the *Reinhart* ruling. In *Reinhart*, the Court's ruling did not reflect the ages of the children. The Court of Appeals upheld the trial court's finding and imputation of \$2,000 per month income for the wife when

she had an historical income as a nurse of \$2,930.00. Here, Petitioner had seven minor children in the home, is a nurse, working at the University of Utah Medical Center, living in Heber City, Utah. The record demonstrates that these children have struggled and suffered greatly as a result for the separation of their parents and one has threatened suicide (Tr. Pg. 98). This inconsistency illustrates the lack of guidance for Trial Courts as described in Professor Becker's article (Connecticut Law Review, Vol. 29 #2 1997). To allow one trial court to apply an intermediate test as in *Reinhart*, and others to apply a strict test creates wide-ranging results. The function of the Appellate Court is to make law, not Findings. Had the Court not misapprehended the facts of Petitioner's parenting and employment schedule, it would have resulted in a different decision.

Petitioner further bases her Petition for Rehearing upon this Court's misapprehension of the law regarding the child support worksheet used by the Trial Court. In her Brief, Petitioner complained about the Trial Court's lack of Findings in support of the child support worksheet submitted by Mr. Turner which was accepted by the Trial Court "because of contingencies." (Tr. Pg. 28, L. 18).

In *Willey v. Willey*, 951 P.2d (Utah 1997), the Utah Supreme Court held that:

In domestic relations cases, the parties commonly submit statements of assets and expenses as exhibits. Trial Courts also commonly accept into evidence exhibits constituting that party's claims without objection. However, this procedure does not necessarily obviate the need for further evidence in support of some items listed on the exhibit. Generally, there is further questioning of certain items contained in the exhibit as to value. Trial judges commonly accept, modify, reduce, or reject claimed items in such exhibits, depending upon the item and according to the evidence or the lack thereof. Thus, it is incumbent upon a party to submit supporting evidence to prove the value of the claimed property or claimed expense to avoid the risk that the trial judge will reduce or reject the value of a particular item. This is especially true where the value of the item appears out of the ordinary. The trial court is not required to accept each item of expense as a proven fact just because it receives a statement of expenses into evidence.

Here, despite Petitioner's objection, the Trial Court failed to make sufficient Findings regarding the worksheet for 7 children and made no findings whatsoever to its "contingencies."

This Court's Memorandum Decision relies upon its holding in *Hall v. Hall*, 858 P.2d 1018 (Utah Ct. App. 1993). Subsequently, the Utah Supreme Court has rejected appellate courts' practice of making its own Findings. *Willey v. Willey*, 951 P.2d 2266 (Utah 1997). This Court's holding in *Hall* may have been impliedly overruled by the Supreme Court in *Willey* in 1997. Its application

to this case is not a demonstration of an Appellate Court's equitable powers.

CONCLUSION

This Honorable Court's decision that "the children, however, were in school most of the time that Appellant stayed home" was a determining factor in this Court's conclusion that the trial court did not abuse its discretion by imputing income to Appellant. This matter should be reheard by this Court and remanded to the trial court for additional findings or this Court should reconsider its decision and determine and rule that the trial court abused its discretion.

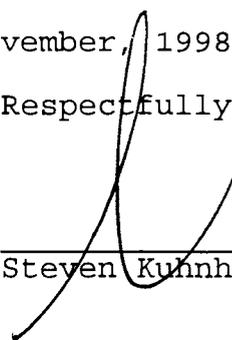
X.

Counsel Certification

Counsel for the Petitioner, Steven Kuhnhausen hereby certifies that this Petition is presented in good faith and not interposed for delay.

DATED this 16 day of November, 1998.

Respectfully submitted,



Steven Kuhnhausen

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed, postage prepaid, on this the 16 day of November, 1998, a true and accurate copy of the foregoing to:

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