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IN THE UTAH COURT OF APPEALS

JOANN SELLERS, Petitioner/Appellant Cross Appellee, vs. GLEN RAY SELLERS, Respondent/Appellee Cross Appellant.	Appellate Case No. 2009518-CA

REPLY BRIEF OF APPELLANT AND BRIEF OF CROSS-APPELLEE

Appeal from the Amended Findings of Fact and Conclusions of Law and Amended Decree of Divorce of the Third District Court, Judge Robert Faust, signed and entered on March 23, 2009.

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APPELLANT'S INITIAL ARGUMENT 1

Did the trial court commit error by entering custody orders without the court conducting a best interest examination as is mandated in Utah Code §30-3-10 through 30-3-10.2 and based upon the recommendation of the custody evaluator who did not comply with the Rules of Judicial Administration, Rule 4-903(5)?

APPELLEE'S COUNTER POINT 1

Appellant did not preserve this issue at the trial court level.

APPELLANT'S REPLY: The main thrust of this claim by Appellant (hereafter referred to as "JoAnn") is that the Utah Code and the Code of Judicial Administration mandate compliance by the Court that certain considerations and findings must be made and specifically entered by the Court when custody of a minor child is being challenged.

1. Appellee (hereafter referred to as "Glen") admitted at trial that he requested custody of the parties' minor child (Record @ 682, page 234: 9-12). This created a genuine dispute between the parties.

2. At trial held on February 20, 2008 the parties determined that they would tackle the issue of child custody first (Record @ 682, page 19: 13-15). The custody evaluator, Dr. Valerie Hale, was called and testified regarding custody. Even though the evaluator was called as part of JoAnn's case in chief, JoAnn did not

agree with the recommendation of the evaluator regarding joint custody and the 20/10 overnight split (Record @ 682, page 104:2-5).

3. Counsel for JoAnn also put the Court on notice of the custody issue in her opening statements (Record @ 682, page 12:1-17) and that the custody evaluator's recommendation was not accepted by JoAnn (Record @ 682, page 36).

4. The trial judge stated that he was aware of the considerations that must be undertaken when deciding custody (Record @ 682, page 35).

5. Glen's counsel instructed the trial court that it was not necessary to go through all of the necessary factors mandated (Record @ 682, page 36:17-18).

The court was fully aware of the specific mandates of the Utah Code and the requirements in the Rules of Judicial Administration.

This was a trial issue and was preserved as an appeal issue and was not waived. Further, JoAnn's counsel put the court on notice that JoAnn was rejecting the recommendation of the custody evaluator (Record @ 682, page 36 and 37).

APPELLEE'S COUNTER POINT 2

The Amended Findings and Amended Decree entered by the trial court were prepared by counsel for JoAnn. If the claim is that the final documents were deficient, JoAnn cannot create the problem and then be heard on the problem.

APPELLANT'S REPLY: Glen presents two universal arguments throughout the entirety of his defense to JoAnn's appeal. First, as already dealt with is Glen's claim that certain issues were not preserved as appealable issues. Second, that JoAnn's

counsel ultimately prepared the final documents that were entered by the trial court, therefore, JoAnn created the problem and is now asking for relief from the very problem she created. Glen asks this court to examine Utah Chapter of Sierra Club v. Air Quality Board, 2009 UT 76, (Utah 2009) as supportive of his claim.

1. Technically, the trial court created the Amended Findings and Amended Decree documents even though Glen's counsel was ordered by the trial court to prepare the final documents (Record @ 441, last hand written directives by trial court). Glen's counsel did prepare the initial Findings and Decree and the Decree of Divorce was entered just three business days after the drafts were sent to JoAnn's counsel with JoAnn's counsel not approving the drafts. Not knowing that the divorce was finalized on May 28, 2008, JoAnn's counsel objected on May 30, 2008 to the Findings and Decree that had already been wrongfully entered by the trial court.

Interestingly enough, within a week of signing the final documents the trial court scheduled a hearing on June 2, 2008 and JoAnn's objections were heard at that time and neither Glen nor the trial court informed JoAnn or her counsel that the divorce had already been signed and finalized. Technically, the Court should have set aside the erroneously signed Findings and Decree but unfortunately for JoAnn, the error was not corrected until the Court turned JoAnn's proposed Findings and Decree into Amended Findings and an Amended Decree ten months after the fact.

Unbelievably, JoAnn and her counsel were not informed the case had been finalized as they went before the Court once again at the June 2, 2008 hearing and

the trial court spent a lengthy amount of time listening to oral argument regarding JoAnn's counsel's objections to the Findings and Decree that had already been entered unbeknownst to her.

JoAnn and her counsel, still not knowing that the parties had been divorced for almost nine months, prepared draft Findings and a draft Decree based on the objection hearing held on June 2, 2008 and sent them to Glen's attorney on January 2, 2009 (Record @ 610-627). Despite objections raised by Glen's counsel to JoAnn's draft Findings and Decree (Record @ 578-585) prepared by her counsel, the court took the draft documents prepared by JoAnn's counsel and changed those documents into Amended documents and signed those documents on March 23, 2009 thus turning JoAnn's proposed final documents into Amended Findings and an Amended Decree.

That is why technically the trial court created the final documents by unilaterally changing them to Amended Findings and an Amended Decree. JoAnn was finally informed in April, 2009 that she had been divorced for almost one year. This creates a monumental injustice to JoAnn since all of Glen's retirements and investment accounts will be divided a year earlier than when JoAnn was made aware that the divorce was final and any increases in those accounts will not be equitably divided since the initial Decree was wrongfully signed in May, 2008.

2. Further, the Amended Findings and Amended Decree entered by the trial court were a compilation of the rulings of the trial court at the end of trial and the

Minute Entry ruling made by the trial court five days after trial (Record @439-442) as well as decisions of the court during the objection hearing. Glen argues that Sierra Club should be controlling and that since JoAnn's counsel prepared the final documents, she should not benefit by now opposing the very documents she created. The holding in Asper v. Asper, 753 P.2d 978; 81 Utah Adv. Rep. 43 states, "if the court's order is contrary to the party who subsequently prepares findings, appeal of that very issue by the same party will not be defeated by the failure to include adequate findings for signature by the court".

3. JoAnn raised the issues of custody and alimony with the trial court and the trial court made determinations against JoAnn on both issues. This is similar to what occurred in the Asper case. The Court of Appeals in Asper also stated that, "it would be manifestly illogical to require her to produce a finding of fact to justify an award so at variance with her request". Even though JoAnn's counsel prepared draft Findings and a draft Decree that the trial court ultimately turned into Amended final documents, those documents should not bar JoAnn from seeking appellate relief.

4. In the first three paragraphs of Glen's Counter Point 2, paragraph #2 is not consistent with paragraphs #1 and #3 concerning who really prepared which documents.

APPELLEE'S COUNTER POINT 3

The trial court correctly stated and applied the law in reference to custody as found in the Code and Rules of Judicial Administration.

APPELLANT'S REPLY: This claim by Glen is most troubling. The claim is two-fold. First, the trial court correctly stated the law in reference to a custody case. The mere recitation of the specific section in the Utah Code by the trial court does not mean that the trial court necessarily took into account the mandated provisions of the statute. It is extremely important to note that the statute uses the language "shall" in Utah Code Section 30-3-10(1)(a) stating, "in determining any form of custody, the court shall consider the best interest of the child and, among other factors the court finds relevant, the following…"

Interestingly enough, this is the same argument that Glen used against JoAnn in Counter Point I, page 6, paragraph #6. Glen attempts to hold JoAnn to a standard that he now wants to embrace.

Second, Glen claims that the trial court applied the law in question in reference to custody. Application means showing how the trial court went from point A (knowledge of the specifics of the statute) to point B (what specific facts, factors, testimony, and information was used by the trial court) to ultimately reach point C (the actual custody determination).

JoAnn has set forth problems associated in part with point A (does correctly identifying a statute mean that the Judge understands the requirements and mandates of that statute?). More important is that the trier of fact can't jump from point A to point C. He or she must show or explain point B. What was relied on, what findings were entered by the trial court to justify its custody decision.

For example, Utah Code Section 30-3-10-(1)(a)(ii) states as one of the factors the trial court shall consider as, "which parent is most likely to act in the best interest of the child, including allowing the child frequent and continuing contact with the non-custodial parent".

This and several other mandated factors are part of the best interest test that must be thoroughly analyzed by the trier of fact before point C (a custody determination) is reached.

The findings (prepared by Glen's counsel) and the Amended Findings are silent on how the trial court reached its decisions on custody and giving Glen additional parent time in excess of the minimum guidelines, thus putting the parties into a joint physical custody child support worksheet situation.

The trial court simply adopted the recommendations of the custody evaluator and did not extrapolate what was specifically relied on. Of specific importance was that the evaluator recommended a 20/10 split for overnights with the parties, yet the child's preference was to continue with the status quo (sole physical with JoAnn as the custodial parent which had been ongoing for the parties' three-year separation).

The minor child had not exercised additional overnights with Glen yet that is what the evaluator recommended without any justification. Why the evaluator did not address this issue in her recommendation which was contrary to the child's preference is puzzling. Especially in light of the evaluator's statements at trial about the minor child, which included the following:

a. The child was extraordinary distressed over the divorce (Record @ 682, page 23:14);

b. He was a child for whom change was extremely difficult (Record @ 682, page 23:14-15 and page 25: 15-16);

c. He was an exceeding anxious child (Record @ 682, page 31:14);

d. He is extremely non resilient in terms of change (Transcript 682, page 40:1);

e. He structures his life very carefully (Record @ 682, page 40:2);

f. Cameron prefers the standard visitation schedule (Record @ 682, page 49:17-19);

g. He doesn't want to increase his overnights (Record @ 682, page 49: 23-24); and,

h. The child's therapist said he was one of the most phobic and resistant to change children he had dealt with (Record @ 682, page 72: 17-22).

What is even more troubling about Glen's argument is that his own counsel specifically informed the trial court in the middle of trial that Glen wasn't seeking custody and that the requirements for the statute and the rules for the court to follow in determining custody wouldn't really be helpful. Glen's counsel stated on the record @ 682, page 36: 14-18, "I don't know that it's going to be helpful when you find that we're not asking for custody, to have spent the time going over each of

those factors is going to be helpful to you". This is evidence of Glen undermining the entire custody process which he should not be allowed to benefit from.

In fact, the Amended Findings do not reflect one word about the best interest test and say very little about the custody evaluator's recommendation or the adoption of that recommendation.

JoAnn admits that at the end of trial, after all the evidence was in, that the Judge took the last few minutes and entered the following rulings which had no supportive findings (Record @ 682, pages 253):

> 1. The parties have agreed and the court finds it is in the best interest of the child that the parties are awarded joint legal custody; and,
>
> 2. The Court adopts the recommendation proposed by the expert on the 20/10 split of the visitation… the Court understands that this is slightly more than the statutory guidelines.

A huge problem is that the parties did not stipulate to joint legal custody at any time. Glen stated that he would stipulate but JoAnn never did. The trial court entered a finding of joint legal custody based on a false understanding and none of this information made it into the Findings or Amended Findings. Additionally, it is important to note, that with all of Glen's criticism of the Amended Findings and Amended Decree, it was his own counsel who prepared the initial Findings and Decree that was signed by the trial court and was controlling in the case for almost

ten months and which provided the framework for the Amended documents that followed.

Simply put, the trial court did not cover the statutory factors necessary to make a best interest determination and joint legal custody was not stipulated.

APPELLANT'S INITIAL ARGUMENT 2

Did the trial court commit error by entering findings and ordering the parties to exercise joint legal custody of the parties' minor child without the parties submitting a parenting plan and without the Court determining that joint legal custody was in the best interest of the minor child?

APPELLEE'S COUNTER POINT 1

Appellant never preserved this issue at the trial level.

APPELLANT'S REPLY: The thorough analysis submitted by JoAnn to this exact same Counter Point in argument Point 1 applies. Custody has been at issue in this case from its inception. Both legal custody and physical custody were never agreed to by JoAnn. Glen admitted under oath that he had been seeking full or sole custody. At trial, Glen's counsel admitted that Glen would stipulate to the recommendation of the evaluator which was for joint legal custody to be enacted.

For arguments sake, let's say that this issue was not preserved at the trial court level. Is Glen claiming that the trial court does not need to rigidly follow the law wherein for the court to issue an order of joint legal custody, a parenting plan must have been submitted?

Glen's counsel even cites the appropriate law in Utah Code Section 30-3-10.2 at page 3 of his brief which states at subsection (1), "the court may order joint legal custody or joint physical custody or both if one or both parents have filed a parenting plan in accordance with Section 30-1-10.8 …"

Case law also supports the argument that the trial court cannot enter an order of joint legal custody absent a parenting plan. Even when parties stipulate to exercise joint legal custody, it is still mandated that a parenting plan must be submitted before the court enters a final adjudication.

Glen claims at page 17 of his brief, second to last paragraph, that since there was no objection raised by JoAnn regarding a parenting plan, she has waived her right to object. Since JoAnn is arguing that a parenting plan was never filed, Glen's claim is that there must have been an objection filed to something that didn't occur.

Finally, Glen claims at page 17 of his brief in the last paragraph, that the best that can be said about putting the Court on notice of the lack of a parenting plan is that counsel, "had some concerns about the 20 day, 10 day split." Actually, this is the exact information that must be submitted as part of the parenting plan. The exact time sharing plan of the parties, conflict resolution and other issues are all part of what must be submitted in a parenting plan.

APPELLEE'S COUNTER POINT 2

Since JoAnn's counsel prepared the final documents, JoAnn caused the exact problem she is raising at the Appellate Court level. If paperwork was omitted, it was omitted by JoAnn's counsel.

APPELLANT'S REPLY: See JoAnn's thorough response to the same claim in argument #1 in her Reply to Counter Point 2.

APPELLEE'S COUNTER POINT 3

The Amended Findings already include a parenting plan controlling the issues regarding custody.

APPELLANT'S REPLY: Glen's claim that the Amended Findings in some way, shape, or form reach the level of qualifying as a parenting plan is not made in good faith. The statute mandates that a plan must be submitted by a party to the case or the parties.

The Amended Findings and the Amended Decree have been imposed by the Court against JoAnn in relation to many of the issues. There is no dispute that JoAnn thought it was in the best interest of the minor child that joint custody not be exercised. JoAnn supported and fought for the minor child's desires to have standard visitation implemented (Record @ 682, page 104:2-5).

Glen could make a plausible argument that if either party had submitted a parenting plan and the Court had adopted that plan, the plan could be ratified by the Court and imposed on the parties. However, one purpose of filing a parenting plan

is that it gives the opposing party notice of the filing and an opportunity to object and file their own plan. Here, the trial court's rulings on parent time (which is also an issue of this very appeal) cannot be construed as a bona fide parenting plan as set forth in Utah Code Section 30-3-10.2.

APPELLEE'S COUNTER POINT 4

The parties' written parenting plan (the Amended Findings and Amended Decree) had actually been working well between the parties.

APPELLANT'S REPLY: JoAnn has already established that there was no specific separate parenting plan submitted by either party. She has established that she never stipulated or agreed to the enactment of joint legal custody. Now Glen goes so far as to claim that at the June 2, 2008 objection hearing the parties agreed in open court and on the record to the parenting time previously set forth by the trial court at the end of trial on February 20, 2008, which included a parenting plan (visitation schedule) and Glen claims that the schedule was working well. ABSOLUTELY NOTHING COULD BE FURTHER FROM THE TRUTH! JoAnn simply agreed at the June 2, 2008 hearing that the parties were in agreement as to what the Court ordered at the end of trial pertaining to joint legal custody and the 20/10 overnight parent time order. It was not an admission on JoAnn's part that she was now embracing and agreeing to the Court's joint legal custody mandate.

APPELLANT'S INITIAL ARGUMENT 3

Did the trial court commit error by entering amended findings and an amended decree that were inconsistent and created confusion regarding parent time of the minor child's overnights with each parent? Does this issue intertwine with the problem of there being no joint legal custody parenting plan submitted by the parties or demanded by the court?

APPELLEE'S COUNTER POINT 1

Appellant did not preserve this issue at trial.

APPELLANT'S REPLY: See JoAnn's thorough response to the same claim in the previous replies.

APPELLEE'S COUNTER POINT 2

Glen agrees that there are problems with the actual math. Glen states that it is absolutely clear which parent gets which overnighters as outlined by the Court and if there is an ambiguity in the documents they should be construed against the drafter and since the drafter is the Appellant, she cannot challenge her own mistake.

APPELLANT'S REPLY: JoAnn has already identified that her counsel prepared the Finding and the Decree consistent with what was ruled on by the trial court. Under Asper, since the court's ruling was contrary to the party preparing the final documents, that party will not be defeated by its preparation of the final documents. Of course, the trial court turned those documents into Amended Findings and an Amended Decree unilaterally.

Glen claims at page 25, line 11 of his brief that, “it is absolutely clear in the documents which parent gets what overnights as outlined by the Court . . .” If this is true, why is there such a huge discrepancy between the Findings entered by the Court that were controlling for the first ten months finding that Glen had 160 overnighters per year and JoAnn with 205 overnighters (Record @ 549). The Amended Findings (Record @ 611) stated that the Court adopted the 20/10 split as proposed by the evaluator which equates to a 243/122 split (Record @ 612) which is far different than the wrongfully entered Findings submitted by Glen’s counsel and entered by the Court initially.

Additionally, Glen claimed at page 579 of the Record in his last filed Objection that he was exercising 152 overnighters per year with the minor child in 2008. The custody evaluator stated at trial that, “I think we should at least have a standard summer visitation that parents get” (Record @ 682, page 56:6-10).

Glen admits at page 27 of his brief, last full sentence that, “Mom would get approximately twice the amount of time with child as would father”. Yet, in almost the same breath Glen claims that the trial court made a miscalculation on its Findings of Fact #7 and that therefore, the ratio should be 163 overnights for Glen and 202 overnights for JoAnn (see Glen’s response, Argument One of the Cross Appeal at page 44).

It is truly amazing that in one sentence Glen claims the overnight issue is “absolutely clear” and in the next argument the trial court miscalculated the number

of overnights by as many as 40 and yet Glen admits that it was clear that JoAnn would have twice as many overnights as Glen.

APPELLEE'S COUNTER POINT 3

If there is a problem with clarity of the Amended Findings and Amended Decree, the Appellant created the problem.

APPELLANT'S REPLY: Once again, JoAnn has already addressed this issue several times.

APPELLEE'S COUNTER POINT 4

A careful reading of Appellant's argument three is that Glen actually has more overnights than the strict 20/10 split.

APPELLANT'S REPLY: JoAnn claims that there are inconsistent findings that create confusion. Glen attacks and claims under this counter point that JoAnn's argument, "is claiming that the exactitude in the math is more important to the Court than promoting the best interests of the minor child . . ." (page 27 of Glen's brief). However, when Glen challenges the same Amended Findings claiming there is a miscalculation (see cross appeal issue #1 of Glen, page 44), the Court should note that this miscalculation claim of Glen's goes to the child support issue.

JoAnn's motives deal with clarity and help for the minor child who needs stability and structure and has a difficult time with change. Whereas Glen's motives lie in how much money is he overpaying JoAnn in child support each month because he thinks the Court miscalculated and made an errant finding.

APPELLANT'S INITIAL ARGUMENT 4

Did the trial court commit error in its determination that neither party was awarded alimony from the other, either now or in the future?

APPELLEE'S COUNTER POINT I

There is no legal basis for the appellate Court to reverse the trial court. Appellee points out the arguments that JoAnn has not made in relation to alimony.

APPELLANT'S REPLY: JoAnn's argument under this point has to do with the trial court's decision to forever bar her from receiving any alimony from Glen. The argument as set forth deals with the trial court's error in forever barring her from making a claim for alimony against Glen. GLEN MAKES ABSOLUTELY NO ATTEMPT TO COUNTER THIS ARGUMENT. There is no case law provided by Glen and no argument whatsoever to claim that JoAnn's argument is not correct or should not prevail.

Additionally, the Utah Court of Appeals dealt with a similar situation in the case of Anderson v. Anderson, 757 P.2d 476; 85 Utah Adv. Rep. 17, wherein the Court of Appeals found the trial court had abused its discretion in terminating alimony when Mrs. Anderson completed her schooling or became employed full-time. Even though Mrs. Anderson was awarded $300 a month alimony, the termination factors created a bar from receiving ongoing alimony.

The Court of Appeals enumerated in Anderson, "the Court's order terminating Plaintiff's alimony upon completion of her schooling without requiring proof that her

financial circumstances had materially changed was an abuse of discretion and places an unwarranted burden on Plaintiff".

This is analogous to the case at hand. Even though the trial Court ordered no alimony to JoAnn, it was an abuse of discretion to forever bar alimony if JoAnn had a change of circumstance that warranted the Court examining the issue of alimony at some future date.

JoAnn explained at length in her initial brief that Utah law does provide for extenuating circumstance situations as it relates to alimony, but Glen refused to address JoAnn's argument relating to "forever barring alimony" no matter what material change of circumstance may occur in JoAnn's future.

One of the major themes of Glen's argument against JoAnn has been that since JoAnn's counsel drafted the final documents in dispute any and all problems associated with the documents should be interpreted against JoAnn and that this "forever barring alimony" should be at the top of the list. However, since Glen's counsel prepared the initial Finding and Decree that were signed and in place for ten months, it is important to understand that is where the forever barring language first appears (Record @ 562, paragraph 12).

This error on the part of the trial Court should be the catalyst for a reversal of the trial Courts decision to revisit alimony.

APPELLANT'S INITIAL ARGUMENT 5

Did the trial court commit error in its determinations that JoAnn was to receive no alimony from Glen because she had no need and because Glen's ability to pay had not been calculated?

APPELLEE'S COUNTER POINT 1

The Amended Findings and Decree were created by JoAnn's own counsel.

APPELLANT'S REPLY: JoAnn's position has been previously explained in the preceding arguments.

APPELLEE'S COUNTER POINT 2

There is no need to consider Glen's ability to pay alimony if there is no need from JoAnn.

APPELLANT'S REPLY: The focal points of JoAnn's initial argument was that the trial court found she had no need and Glen's ability to pay alimony had not been quantified. JoAnn explained in her initial brief that the exhibits relied upon by the trial court were in fact her financials for several years previous when the divorce was in the beginning stages. Glen makes absolutely no attempt whatsoever to dispute this claim. Therefore, JoAnn's claim must prevail! Glen's focus is on JoAnn's needs.

Additionally, JoAnn points out in her initial brief that it is necessary that Glen's financial situation be explored by the trial court regarding his financial needs and ability to pay. JoAnn cites case law so indicating. Even more important was the trial court's failure to enter Findings regarding the reasonableness of either parties'

expenses. [At page 30 of JoAnn's brief there was an error on the issue of the trial court needing to enter Findings about the reasonableness of expenses. JoAnn cited Griffith v. Griffith, 959 P.2d 1015, when in actuality this was the case of Willey v. Willey, 866 P.2d 551.]

The failure of the trial court to enter Findings regarding the reasonableness of either JoAnn's or Glen's claimed monthly expenses is reversible error. The trial court entered Findings regarding JoAnn's monthly expenses by stating, "she has demonstrated her monthly living expenses in the approximate amount of $2,100 per month range . . ." (Record @ page 440). The trial court went on to state that JoAnn's earning capacity and ability to produce income is more than adequate to maintain her in the lifestyle to which she is accustomed. This is verbatim language from the Ruling of the trial court found at page 440 of the Record. This was also put in the Amended Findings at page 615 and 616.

This, in and of itself, is an interesting finding by the trial court which insinuates that the Court had an understanding about the parties' lifestyle which is not reflected anywhere in the Findings or Amended Findings. Additional Findings would need to be provided by the trial court to support this finding regarding the parties' lifestyle.

Additionally, the Utah Court of Appeals stated in the case of Bell v. Bell, 810 P.2d 489; 159 Adv. Rep. 33 that, "the court failed to make adequate findings on the needs of either Husband or Wife . . . no findings were made as to the reasonableness of these expenses . . . without a finding on reasonable expenses,

we are unable to determine Husband's actual ability to pay . . . The statement of the trial court that husband can 'afford nothing' . . . is simply not supported by the record, absent some finding as to the reasonableness of his claimed expenses. Furthermore, there is no explanation why, if wife needed 'a great deal' the court awarded no monetary award of alimony."

Bell is similar to the case at hand since the trial court awarded no monetary award of alimony to JoAnn and made no findings regarding ability to pay for Glen other than "he could pay some alimony," and there was absolutely no discussion regarding the reasonableness of either parties' expenses.

With Glen providing no responses to the several cases initially cited by JoAnn, the trial court's decision on alimony must be reversed.

APPELLANT'S INITIAL ARGUMENT 6

Did the trial court commit error by declining to take into account in its alimony determination JoAnn's request to have Glen pay post-divorce savings and/or retirement monies to her?

APPELLEE'S COUNTER POINT

JoAnn requests that the trial court and now the Court of Appeals should re-divide what Glen saved from the time of separation.

APPELLANT'S REPLY: This is not what is being sought by JoAnn at argument 6. JoAnn seeks post divorce savings and retirement division as part of the alimony claim.

APPELLEE'S CONTENTION

In part, the reason the trial court declined to award alimony and attorney fees to JoAnn was because she was claiming fault on the part of Glen when she admitted fault at trial.

APPELLANT'S REPLY: JoAnn raised the issue of the trial court committing error by the trial court declining to take into account in its alimony determination JoAnn's request to have Glen pay post divorce savings and retirement monies to her since they had a lifestyle of savings and banking practices that would set them up for retirement. THERE IS NOT ONE WORD IN GLEN'S BRIEF ON THIS POINT WHICH DEALS WITH THIS CLAIM! Instead of dealing with this issue, Glen averts the court's attention to:

1. division of funds at separation;
2. faults of the parties, especially exploring JoAnn's "homosexual problems" as claimed by Glen; and,
3. attorney fees.

THESE CONTENTIONS OF GLEN HAVE NOTHING TO DO WITH JOANN'S ARGUMENT, POINT 6. Since Glen once again (this similarly occurred in argument 4, regarding forever barring alimony) refuses to tackle the issue identified by JoAnn, her argument must prevail.

Additionally, there was evidence presented at trial which established that the parties had a lifestyle of saving and investing. This was important due to one of

JoAnn's theories of alimony at trial was that she should be entitled to alimony that would enable her to keep up with the same pace in savings and retirement monies as Glen, once the divorce was finalized.

Glen testified that Exhibit #12 showed that he was making monthly contributions into his retirement account in the amount of $377.08 and his employer was paying $188.54 per month for a total monthly amount of $565.62 (Record @ 682, pages 220:22-25 and 221:1-2).

Exhibit #12 also verified that Glen put another $350 per month towards savings which created a total of $905 a month that Glen put into his savings and retirement accounts (Record @ 682, page 221:9-21).

JoAnn testified that, "I've worked really hard at trying to save, too . . . Glen is very conservative and insisted on all of us being conservative" (Record @ 682, pages 144:18-25; 145:1-8).

JoAnn further testified regarding the lifestyle of the parties that there were times that old bread was eaten and that she would sweep cornflakes off the floor and reuse them. She testified that money was saved by not eating out and not going to movies and not having expensive hobbies (Record @ 682, pages 144:18-25 and 145:1-8).

JoAnn suggested to the trial court through her attorney that she should be allowed to invest in her savings and retirement at the same rate as Glen, that being approximately $900 per month (Record @ 682, pages 245:20-25 and 246:1-20).

Additionally, Exhibits #32 and #33 were received into evidence which showed a different option the trial court could examine showing the needs JoAnn had to enable her to save and have retirement income comparable to that of Glen.

Most important were all the various exhibits received by the court and submitted into evidence beginning with Exhibit #12 through Exhibit #23 (Record @ 305-329) showing the vast extent of the parties' savings and investment and retirement accounts. Most telling was the historical purchases of savings bonds from 1980 through 2000 (Record @ 329).

The bottom line was that JoAnn submitted exhibits and testimony was taken from both parties showing that saving for retirement was done throughout the marriage and was an important part of the family budget.

Glen's response to this was that JoAnn shouldn't receive one-half of separation monies and no alimony or attorney fees were awarded due to JoAnn's fault and homosexuality.

JoAnn submitted case law in her initial brief that was undisputed by Glen relating to the need for alimony as it pertains to post divorce retirement and savings. Additionally, in further support of her claim, JoAnn submits the case of Bakanowski v. Bakanowski, 80 P.3d 153; 2003 UT App 357, supporting her position that the trial court may consider equalizing the parties standard of living in relation to the common practices and standards of the parties during the marriage relating to savings and investments and retirement accounts.

The trial court in Bakanowski ordered husband to pay wife alimony of $1,000 per month in order to equalize the parties' income levels and the Court of Appeal reversed. However, the Court of Appeals stated that the wife's needs to fund post-divorce saving and retirement could be considered as part of the needs analysis for determining alimony if such was a standard practice during the marriage. Therefore, the decision of the trial court of no alimony to JoAnn should be reversed.

CROSS APPEAL

APPELLEE'S/CROSS APPELLANT ARGUMENT 1

The trial court miscalculated child support

APPELLEE'S/CROSS APPELLANT ARGUMENT 2

The trial court abused its discretion in refusing to factor tax consequences in the balancing of the equities.

APPELLANT'S/CROSS APPELLEE REPLY:

1. Regarding both issues raised in this cross appeal, Appellee/Cross Appellant has failed to marshal the evidence to properly bring these claims before the Court of Appeals.

The Utah Supreme Court set forth in Chen v. Stewart, 2004 UT 82, 100 P.3d 1177 specific "requirements" that Respondent must meet in filing an appeal. An in depth analysis of these requirements brings to light the serious deficiencies in Respondent's Cross-Appeal. As is stated in Chen, "In order to challenge a Court's factual findings an appellant must first marshal all the evidence in support of the

finding and then demonstrate that the evidence is legally insufficient to support the finding even when viewing it in a light most favorable to a Court below" (quoting Wilson Supply, Inc. v. Fraden Mfg. Corp., 2002 UT 94, 54 P.3d 1177).

The Utah Supreme Court elaborated in Chen that more recently the Utah Court of Appeals explained that, "In order to properly discharge the duty of marshaling the evidence, the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very finding that appellant resists" (quoting Neely v. Bennett, 2002 UT App 189, 51 P.3d 724).

The Court in Chen gave additional direction to appellants by stating, "This does not mean that the party may simply provide an exhaustive review of all evidence presented at trial. Rather, appellants must provide a precisely focused summary of all the evidence supporting the findings they challenge. This summary must correlate all particular items of evidence with the challenged findings and then convince us that the Trial Court erred in the assessment of that evidence to its findings "(quoting W. Valley City v. Majestic Inv., Co., 818 P.2d 1311, 1315 (Utah Ct. App.1991)). "What appellants cannot do is re-argue the factual case they presented in the Trial Court" (quoting Ondera/SLIC v. Ondera Cold Storage & Warehouse Inc., 872 P.2d 1051, 1053 (Utah Ct App. 1994).

Additionally, the Court in Chen stated, "to properly marshal the evidence the challenging party must demonstrate how the Court found the facts from the evidence

and then explain why those findings contradict the clear weight of evidence" (citing Ondera at 1054).

Here Respondent made the exact same argument that he made at the June 2, 2008 Objection hearing. Hence, with Respondent not properly marshaling the evidence, the facts as found by the Trial Court stand or as the Court stated in Chen, "if the marshaling requirement is not met, the Appellate Court has grounds to affirm the Court's findings on that basis alone" (quoting Wilson).

2. The issue of miscalculation of child support claimed by Appellee/Cross Appellant was previously and thoroughly dealt with in Appellant's Argument, Point 3 wherein Appellant claimed that the trial court entered several conflicting orders which made it impossible for the parties to carry out the visitation directives of the court.

3. Next, Glen's claims that the trial court refused to factor the tax consequences is not credible. In fact, Glen would have this court believe that he has already suffered a tremendous disadvantage and taken a financial hit because of the consequences he may suffer. Glen fails to entertain the following scenarios:

a. If Glen takes out a loan against his retirement, he will not be facing a 38% tax penalty;

b. If Glen does not withdraw money from his savings and retirement accounts (the most likely scenario based on Glen's history) and he retires he will not face a 38% tax penalty;

c. Glen has not taken into account that in all actuality JoAnn would be facing a similar situation if she were to sell the house. She received a majority of the home equity and the marital home. If she sells the home, she will not receive all the $290,000 claimed equity. There would be commissions, closing costs, etc. that she would get hit with similar to Glen's claims of 38%. If she doesn't sell the home, there will be no penalties.

4. Any claims made by Glen are speculative. Under Glen's theory of tax consequences and how they relate to the off-sets in equity in the marital home and his retirement would have JoAnn taking all equity in the marital home and Glen taking all of his Qwest Savings & Investment Plan (Exhibit #12) totaling $291,317.36 and JoAnn still owing Glen approximately $57,000, which would be inequitable.

In other words, the entire issue raised by Glen is speculative and both parties could suffer financial consequences based on their future decisions. Both parties are equally at risk and Glen should not receive additional compensation and the ruling of the trial court should stand on both of cross-appellant issues proposed.

CONCLUSION

Appellant requests the relief sought in this appeal and that issues and claims raised by Appellee in his Cross-Appeal be denied and that Appellant be awarded her attorney fees and court costs for the necessity of this appeal.

DATED this _____ day of _____, 2010.

_____
David J Friel
Attorney for Appellant

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed a true and correct copy of the foregoing document on this _____ day of _____, 2010 by United States mail, first class, postage pre-paid, to:

John Walsh, Esquire
3191 South Valley Street, Suite 240
Salt Lake City, UT 84109

_____

Sellers.apprpy