

1986

Marchant v. Marchant : Reply Brief

Utah Supreme Court

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BRIEF

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IN THE COURT OF APPEALS IN AND FOR
THE STATE OF UTAH

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KAREN SHUMANN MARCHANT,)	
)	APPELLANT'S REPLY BRIEF
Plaintiff/Appellant,)	
)	
v.)	860250CA
)	Supreme Court No. 860498
DONALD J. MARCHANT,)	
)	Civil No. 85-8-9605-2
Defendant/Respondent.)	Category No. 7

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APPEAL FROM TRIAL BEFORE
HONORABLE DONALD V. TIBBS,
SIXTH JUDICIAL DISTRICT COURT

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CASES	i
INTRODUCTION	1
LEGAL ANALYSIS OF ISSUES RAISED IN RESPONDENT'S BRIEF.	3
I. THE FINDINGS OF FACT ON THE CUSTODY ISSUE SHOW THAT THE COURT DID NOT MAKE A DETERMINATION OF THE "BEST INTERESTS" OF BRANDON AND SARAH MARCHANT, MISAPPLIED AND DID NOT FOLLOW APPROPRIATE LEGAL STANDARDS AND ACTED BEYOND THE BOUNDS OF JUDICIAL DISCRETION	3
II. FAILURE TO AWARD KAREN MARCHANT ALIMONY WAS AN ABUSE OF DISCRETION	8
III. THE COURT ABUSED ITS DISCRETION IN THE PROPERTY DIVISION	11
CONCLUSION	12

TABLE OF CASES

	<u>Page</u>
<u>Hutchinson v. Hutchinson</u> , 649 P.2d 38 (Utah 1982) . .	3
<u>Jones v. Jones</u> , 700 P. 1072, 1075 (Utah 1985)	9, 11
<u>Kerr v. Kerr</u> , 610 P.2d 1380 (Utah 1980)	11
<u>Pusey v. Pusey</u> , 728 P.2d 117 (Utah 1986)	3, 4, 7, 8
<u>Smith v. Smith</u> , 726 P.2d 423, 426 (Utah 1986)	4

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Appellant Karen Marchant herewith submits her Brief in reply to the new matters raised by Respondent Donald J. Marchant's Brief.

INTRODUCTION

In his Reply Brief, Donald J. Marchant has attempted to hide Judge Tibbs' misapplication of the law and abuse of discretion behind the veneer that in divorce proceedings, the trial judge is vested with "broad discretion" in awarding custody and dividing the marital estate. The arguments rely on "broad judicial discretion" to sweep under the carpet the court's failure to follow judicial principles of domestic relations law provided by the Utah Supreme Court as guidelines for trial courts. Additionally, novel concepts of morality are raised.

As an example, the Defendant is reduced to interpreting the Findings of Fact on custody issues and assuming what the court may have intended in its ruling due to the lack of clarity and lack of facts stated. These Findings of Fact clearly do not provide a "rational and logical factual basis upon which the "best interest" of the parties' children was determined. Further, the Findings of Fact on custody do not relate to who is functionally the best parent to care for the children. The interpretation provided by the Respondent does show the basis for the moral witch hunt which erroneously deprived Karen Marchant of custody of the parties' children, Brandon and Sarah, after 15 months of continuous sole custody.

Defendant's Brief does not address the trial court's failure to enter Findings of Fact regarding specific standards used in either granting or denying alimony. Defendant states that Karen Marchant was "living beyond her means" which is simply a misstatement of fact evidenced by Karen Marchant's financial statement (Plaintiff's Ex. 3). Again, Defendant attempts to void the abuse of discretion by relying on a broad statement that alimony awards will not be disturbed on appeal unless a clear and prejudicial abuse of discretion occurred. Even under this standard, it is evident the court's failure to award alimony should be overturned.

With respect to the property awards, Defendant does not bother to address two issues raised in Plaintiff's Brief: that

the trial court abused its discretion by failing to consider the \$20,000.00 personal injury award to Plaintiff which was contributed to the marriage and the court's abuse of discretion in awarding 8 percent interest on the pay out of the pension plan rather than the statutory 12 percent required by statute. Based upon the evidence presented at trial and the Findings of Fact entered by the Court, it is clear the trial court prejudicially abused its discretion and misapplied the law to the facts. The broad sweeping generalizations of "judicial discretion" served up by the Respondent's Brief do not change the trial court's errors.

LEGAL ANALYSIS OF ISSUES RAISED IN RESPONDENT'S BRIEF

I.

THE FINDINGS OF FACT ON THE CUSTODY ISSUE
SHOW THAT THE COURT DID NOT MAKE A DETERMINATION
OF THE "BEST INTERESTS" OF
BRANDON AND SARAH MARCHANT, MISAPPLIED AND
DID NOT FOLLOW APPROPRIATE LEGAL STANDARDS
AND ACTED BEYOND THE BOUNDS OF JUDICIAL DISCRETION

Defendant recites the standard factors upon which a trial court is bound to rely in making custody determinations found in Hutchinson v. Hutchinson, 649 P.2d 38 (Utah 1982), and Pusey v. Pusey, 728 P.2d 117 (Utah 1986). (Brief, pp. 12-13.) However, Defendant fails to show where the trial court applied these standards to the custody determination which highlights the difficulty of upholding the award. Based on the statements in the Brief, it is clear that the Defendant had to grasp at straws in supporting the court's findings rather than being able to rely

on clear factors provided as guidelines by the Utah Supreme Court.

In Pusey, Justice Durham stated for the court:

"We believe that the choice in competing child custody claims should instead be based on function-related factors. Prominent among these, though not exclusive, is the identity of the primary caretaker during the marriage. Other factors should include the identity of the parent with greater flexibility to provide personal care for the child and the identity of the parent with whom the child has spent most of his or her time pending custody determination if that period has been lengthy. Another important factor should be the stability of the environment provided by each parent." Pusey, at p. 120.

None of the Findings of Fact show function-related factors warranting an award of custody of the children to Defendant. The Findings of Fact actually show an unwavering bias towards Mrs. Marchant.

The Findings of Fact do not provide a logical and legal basis for awarding custody to Don Marchant, a requirement for any judicial determination. Smith v. Smith, 726 P.2d 423, 426 (Utah 1986).

Since the Findings of Fact do not relate to the principles and guidelines supplied by the court, are not function-related factors and are simply emblems of prejudice towards Mrs. Marchant, the Respondent tries to interpret their meaning and makes a variety of interpretations and unwarranted assumptions.

Respondent interprets Findings of Fact 5.B. as follows:

"The Finding supports the court's apparent conclusion [emphasis added], that Mrs. Marchant's unjustified acts of selfishness and rebellion and her unstable and changing moral values were inconsistent with the parental role." Brief, at p. 15.

This interpretation is certainly unwarranted by the language of the Finding and is not supported by the record. Mrs. Marchant's "unjustified acts of selfishness and rebellion" was deciding to obtain a divorce from a man she did not love, with whom she was sexually and financially incompatible, who continually criticized her choice of clothing and who on one occasion knocked her unconscious with a blow to the face. This Finding does not relate to anything having to do with the best interests of the children.

Finding of Fact 5.C. makes a prejudicial statement about Mrs. Marchant and her children being with Mrs. Marchant's sister, Helen, who is characterized as being "a divorced woman". It further makes a vague statement, "that the standard of living under which Plaintiff has been residing while having temporary custody of the children in Salt Lake City, Utah, is not what it should have been nor was it in the best interests of the children."

Respondent interprets this as the Court concluding that living with her aunt and cousins under one roof is an inappropriate atmosphere in which to raise children and that the court "disapproved of the communal lifestyle."

This Finding by the Court is not supported by the evidence in the record despite Respondent's novel interpretation of

the language. Elizabeth Stewart found that the children were well adjusted and recommended that the Court maintain the status quo. (Defendant's Ex. 9, Recommendation, p. 3.) No evidence was introduced to show any abnormal behavior or below standard living conditions. The fact that Helen did some mothering while Mrs. Marchant was at work does not support the vague finding that the conditions were not what they should have been. The issue is immediately raised that if Helen's mothering, who is the children's maternal aunt, makes the standard of living unsuitable, it logically follows that the conditions will be less suitable when Mr. Marchant hires an unrelated caretaker for the children to fulfill his custody obligations while he is at work.

Finding of Fact 5.D., that Mrs. Marchant became involved with another man in the latter part of the marriage is interpreted as reflecting on Mrs. Marchant's "moral character". The only evidence offered in the trial was testimony by Mrs. Marchant of her friendship with Don Fannesbeck and Mr. Marchant's testimony of an assumed affair of sorts. Mr. Marchant was admittedly jealous of Mrs. Marchant's boss and threatened by his occasional gifts to her which Mrs. Marchant honestly disclosed and brought home. There was no evidence of sexual involvement and she denied ever having stated she had anything more than a friendship with her boss. If she was sexually attracted, the evidence shows her moral strength in avoiding sexual relations. One thing is clear: The evidence does not show she was immoral

in any respect or has a poor moral character. The evidence on her "relationship" with Don Fannesbeck, does not relate to the function-related factors which are to be determined in custody issues.

Finding of Fact 5.C. is accurate in the sense that in the latter years of the marriage, Mrs. Marchant decided to go to work, became involved in her job and was occasionally away on weekends which necessitated Don Marchant taking the children to church alone. However, these changes were consistent with her no longer loving her husband and deciding on a divorce and were not motivated by selfishness. She testified:

"My career aspirations were to be a wife and mother. And a job is nice and I am grateful that I enjoy my work. But I certainly wouldn't term myself a career girl or woman, or whatever. I am grateful that I enjoy my work." (Transcript p. 60, L. 12-16.)

However, she recognized in the event of divorce, she would have to work to support the children and herself. Finding that a woman who is unhappy in her marriage and recognizes a need to work as "being selfish," is inappropriate by penalizing her based on the decision to divorce. In other words, the presumption would be that any person who does not want a divorce or who fails to recognize a problem in marriage will be a better caretaker for the children. This kind of punitive adjudication based upon classifications unrelated to child rearing was specifically disavowed by the Utah Supreme Court in Pusey v. Pusey, supra., which overturned gender-based preferences. The unfortunate

travesty by the court in this matter is that Mrs. Marchant was deprived of custody of Sarah and Brandon based upon factors which were unrelated to standards and principles which the court has stated should control custody determinations. On balance, the "prominent function-related factors" in Pusey, strongly favored Mrs. Marchant but were ignored entirely by the Court.

Mrs. Marchant had been the primary caretaker during the marriage. Mrs. Marchant had been sole custodial parent for the 15 months prior to the divorce. Elizabeth Stewart, in her evaluation, stated that:

"There is a preference for leaving the custody arrangement in place where it is clear that they have made a good adjustment and there is no reason to think that they are not doing well or that a different custody arrangement would be better for them."

Elizabeth Stewart also states:

"Since the children are doing well in the mother's custody at the present time, the least disruptive placement would be to leave them in her custody."
(Defendant's Ex. 9, Recommendations, p. 3.)

Where most factors are equal, the court's failure to rely on "prominent" factors enunciated by the Utah Supreme Court and instead go on a prejudicial "moral" hunt, was an abuse of discretion.

II.

FAILURE TO AWARD KAREN MARCHANT ALIMONY WAS AN ABUSE OF DISCRETION

While Plaintiff agrees with the legal standard to be considered by the trial court in making its determination

regarding an award of alimony, she wholly disagrees with the statement of evidence in the Brief. (Brief, pp. 20-21.) The trial court failed to enter Findings of Fact relating to the standard. The situation is similar to Jones v. Jones, 700 P. 1072, 1075 (Utah 1985), where the Court noted that the trial court had failed to analyze the circumstances of the parties in light of the three factors and overturned the court's alimony award as being wholly inadequate.

In his Brief, Donald Marchant admits that he makes \$793.00 per month net more than the Defendant. However, he indicates that Plaintiff's only indication of "need" was her express desire to return to school, which is incorrect. Defendant's Financial Declaration (Plaintiff's Ex. 3) shows expenses which significantly exceed her income. Even if these expenses are reduced by taking the needs of the children away from the figures, her income is still insufficient to meet her minimal needs, and this is especially true where she desires to continue her education which would be a significant additional expense. It is clearly inequitable to have recognized that Karen Marchant supported Don Marchant through his schooling during the marriage and when Karen Marchant desires further education, to deprive her of the ability to obtain that where there is a significant difference in economic earning power.

Don Marchant also notes that he is saddled with "the lion's share of marital debts totaling \$32,800.00." This Court

should note that the debt on the truck in the amount of \$11,000.00 was voluntarily assumed under Stipulation by the Defendant and he received that property. (Transcript, L. 3-5, p.13.) Next, Mr. Marchant assumed a loan in the amount of \$14,000.00 from his father, M.A. Marchant. His testimony with respect to the loan is that he did not sign a Promissory Note for that amount and it is payable only "when I can get it". (Transcript, L. 6-17, p.104.) Regarding the \$5,000.00 amount owed on the trailer, Mr. Marchant testified he was selling the trailer since he was living in the family's home in Central, Utah, that he had previously agreed to pay the debt and presumably would relatively quickly be liquidated by the sale of the trailer. (Transcript, L. 18-25, p. 26; L. 1-3, p. 77.) The "lion's share" of the marital debt, after deducting these items out, amounts to \$5,800.00. (Defendant's Ex. 10.)

The Defendant has mischaracterized Karen Marchant's income allowing her to live as she desires in Salt Lake City, Utah. Don Marchant, in his Brief, states that \$1,321.00 per month of net income of Karen Marchant allowed her to live in the area she selected with the children and did not seek temporary alimony. Karen was able to do this with the aid of the monthly child support payments from Don Marchant in the amount of \$400.00. Her income for purposes of expenses was, thus, increased to \$1,721.00 per month.

The Defendant's assertion that it was evident that both parties were living beyond their means is not supported by the

record. Karen Marchant's Financial Declaration (Plaintiff's Ex. 3) does not bear this out nor does any other factors or statements introduced in the record. In fact, on a comparative level, it was clear that Mrs. Marchant was not living according to the standard to which she had become accustomed during the marriage, in a spacious home provided by her husband. She was being forced to share quarters with her sister and nephew to cut expenses.

The court's failure to analyze the standard for awarding alimony presents the situation in Jones v. Jones, supra., which allows this court to review the factors warranting alimony independently. Based on this standard, Karen Marchant is clearly entitled to alimony.

III.

THE COURT ABUSED ITS DISCRETION IN THE PROPERTY DIVISION

Don Marchant's Point IV regarding property distribution fails to address two salient issues raised in Karen Marchant's appeal: The trial court failed to consider \$20,000.00 in personal injury awards made to Karen Marchant which were contributed to the marriage and the court's awarding 8 percent interest rather than 12 percent interest on the Judgment requiring payment of one-third of the pension plan money over a ten-year period. The court was under an obligation to give due consideration to the personal injury awards in dividing the property. Kerr v. Kerr, 610 P.2d 1380 (Utah 1980).

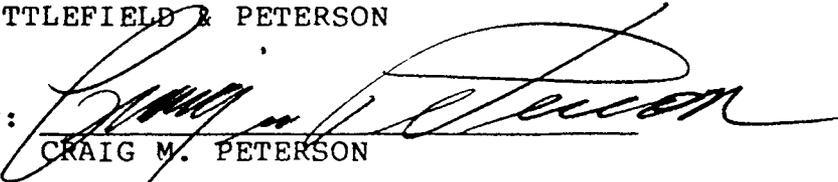
Plaintiff Karen Marchant has addressed the issue of the actual amount of marital debt which Don Marchant assumed in the immediately preceding portion of this Brief. Examination of those debts assumed by Don Marchant only further reinforces Karen Marchant's position that the property award was inequitable.

CONCLUSION

The Defendant's interpretation for this court of the Findings of Fact regarding custody clarify the position of Karen Marchant that the court wholly misapplied the law and ignored "prominent factors" which clearly were controlling the custody issue. The monetary factors and needs of the parties raised by the Respondent also clearly indicate the court's abuse of discretion in failing to award alimony to Karen Marchant. Finally, the Defendant's failure to address the issues raised in Plaintiff's Brief regarding the inequitable property distribution underscores the attempt to sweep all abuses of discretion away behind the facade of "broad judicial discretion" in domestic relations proceedings. This Court should reverse the trial court's award of custody to Don Marchant, enter an appropriate award of alimony and property to Karen Marchant as warranted by the facts.

DATED this 4 day of May, 1987.

LITTLEFIELD & PETERSON

By: 

CRAIG M. PETERSON

By: 

E. PAUL WOOD

Attorneys for Plaintiff/
Appellant Karen S. Marchant

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed a true and correct copy of the foregoing Appellant's Reply Brief to Hans Q. Chamberlain, Attorney for Defendant/Respondent Donald Marchant, 110 North Main Street, Cedar City, Utah 84720, this 4 day of May, 1987.