

2009

Manuel Romero v. Alice Romero : Reply Brief

Utah Court of Appeals

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Recommended Citation

Reply Brief, *Romero v. Romero*, No. 20090335 (Utah Court of Appeals, 2009).

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IN THE UTAH COURT OF APPEALS

MANUEL ROMERO,

Respondent/Appellant

v.

ALICE ROMERO,

Petitioner/Appellee.

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REPLY BRIEF OF APPELLANT

Case No. 20090335

**APPEAL FROM DIVORCE DECREE ENTERED BY THE
THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY
HONORABLE TERRY CHRISTIANSEN**

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**FILED
UTAH APPELLATE COURTS
MAR 29 2010**

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Dunn v. Dunn, 807 P.2d 1314,1317 (Utah Ct. App. 1990).....5

ADDITIONAL STATEMENT OF FACTS

Ms. Romero directs the Court's attention to page 110 of the trial transcript in an effort to support the finding that there was just one mortgage on Mr. Romero's condominium. However, Ms. Romero asks the Court to look at one page of testimony in isolation. Counsel fails to direct the Court's attention to his ongoing line of questioning on the following page (P. 111) of the transcript wherein Mr. Romero testifies that there is also a second mortgage on the condominium. During the cross examination of Mr. Romero, Mr. Romero testified that he had a first mortgage of \$76,000.00, a second mortgage of approximately \$21,500.00 taken out in November 2003, and another mortgage of \$5,000.00 taken out in February 2007. (R. 370 pp. 111, 123.) Mr. Romero's testimony remained consistent when, on direct examination, Mr. Romero again testified to a first mortgage and a second mortgage on the condominium property.

Ms. Romero was aware that Mr. Romero owned a condominium prior to their marriage. (R. 379 p. 4-5.) Ms. Romero was also aware that there was a second mortgage on the condominium and that some of the funds were used for improvements to the River Glen marital property and for a vacation that she and Mr. Romero took to the Northwest. (R. 379 p. 125.) Mr. Romero used a portion of the second mortgage money from the condominium to make improvements to the River Glen marital property. (R. 379 pp. 125, 135-145.) In addition, some of the funds from the second mortgage on the

condominium were used for a vacation that Mr. and Ms. Romero took to the Northwest. (R. 379 p. 125.)

The mortgage payment on the condominium, along with the Home Owners Association fee, totaled \$650.00 per month. (R. 379 p. 127-128.) Mr. Romero rented the condominium for \$650.00 per month which just covered the mortgage payment and the home owner's fee. (R. 379 p. 125.)

Mr. Romero paid one half of the mortgage payment on the River Glen marital property and one half of the monthly expenses on the River Glen marital property. (R. 379 p. 37-38.) He also maintained the River Glen marital property during the time that the parties lived together such as fixing the sprinkler system, doing all the landscaping, etc. In addition, Mr. Romero made improvements to the River Glen marital property such as putting in a patio cover, patio, walkways, etc. (R. 379 pp.129-145.)

ARGUMENT

From the evidence presented at trial, it is clear that there was a first and second mortgage on the River Glen marital property and that there was a first and second mortgage on the condominium. However, the Trial Court mistakenly failed to record or overlooked the second mortgage on the condominium. The Trial Court stated that its calculations were based on the testimony heard at trial. Upon a review of the trial record,

it becomes obvious that a portion of Mr. Romero's testimony was not heard or failed to be recorded.

In reaching its decision regarding equity and the division of marital property, the Trial Court used the condominium equity in its valuation of the parties' assets and debts. Because the Court considered the condominium in its division of marital property, the proper value regarding the condominium should be used in the Court's calculation.

When the second mortgage on the condominium is included into the calculations and the division of marital property, there is a \$43,000.00 disparity rather than a \$20,000.00 disparity between the parties. Forty three thousand is a significant amount that should be divided equally between the parties based upon Utah law.

The District Court Factored In The Value Of Mr. Romero's Condominium In Its Calculations To Divide The Marital Property But Failed To Use The Correct Value Or To Explain Its Rationale For Not Including The Correct Value And As Such Is Reversible Error.

The Court found there to be a \$20,000.00 in marital equity that required division. Rather than divide that \$20,000.00 equally between the parties, the Trial Court awarded Ms. Romero the entire amount. The Court explained that \$20,000.00 was too "insignificant" to divide between the parties. \$20,000.00 may be an insignificant amount to a judge. However, to Mr. Romero that sum of money is more than one third his annual earnings. \$20,000.00 is a significant amount that should be divided equitably between the parties based upon Utah law.

Ms. Romero argues that because the Trial Court found the condominium property to be separate property, the Court did not need to make a finding as to its value or the debt owed on the property. Within the same paragraph, Ms. Romero also speculates that the Court only included findings on the condominium value as further support for its division of marital property and the Court's deviation from the general presumption that marital property be divided equally. This argument adds further support to Mr. Romero's appeal and to the need for additional findings in this case.

The Court did not adequately explain the rationale for the division of marital property. Moreover the Court overlooked pertinent testimony in its record keeping. Each time Mr. Romero testified about the value of the condominium, he testified to both a first and second mortgage owed on the property. It is unfair to extrapolate one statement found on page 110 of the transcript and not consider ongoing testimony found on page 111 wherein Mr. Romero testifies about the outstanding mortgages owed on the property.

In *Kunzler v. Kunzler*, 190 P.3d. 497, 608 Utah Adv Rep. 6, 2008 UT App 263, the Court explained that "In a divorce proceeding, a property distribution "must be based upon adequate factual findings and must be in accordance with the standards set by this state's appellate Court."¹ Ms. Romero cites *Kunzler* for the proposition that the Court is

¹ Citing *Dunn v Dunn*, 807 P.2d 1314, 1317 (Utah Ct. App. 1990).

not required to make a finding on the value or debt of separate or non marital property. Although *Kunzler* addresses both separate and marital property, the Court does not hold that separate property did not need to be addressed. Rather the Court held that separate property is not beyond the Court's reach in an equitable property division in a divorce action and that the Trial Court may award separate property of one spouse to the other spouse in extraordinary situations where equity so demands.

In this case, even though the Court held that the condominium was separate property, it used the condominium's value in reaching its division of marital property and in support of its deviation from Utah law on the division of marital property. Because the Court used the condominium's value in calculating the division of marital property, the condominium's value and the calculations should be in conformity with the trial testimony. The Trial Court overlooked a major debt. Additional findings need to be made by the Trial Court in order to comply with Utah's standards.

CONCLUSION

The Trial Court's Order overlooks pertinent trial testimony and deviates from Utah law on the division of marital property without adequate explanation for such deviation. Mr. Romero respectfully requests that the case be reversed and remanded to the Trial Court with the instruction that the Trial Court supplement its Findings of Fact to

include the second mortgage and to reconsider the distribution of assets based upon the additional findings.

DATED this 29th day of March 2010.

NIELSEN & SENIOR


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Attorney for Respondent/Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of March 2010, I did cause two true and correct copies of the foregoing **REPLY BRIEF OF APPELLANT** to be mailed, United States mail, postage prepaid, addressed to the following:

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