

2009

Manuel Romero v. Alice Romero : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca3



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Richard S. Nemelka; Nemelka & Nemelka; Attorneys for Appellee.

Ptricia L. LaTulippe; Nielsen & Senior P.C.; Atroneys for Appellant.

Recommended Citation

Brief of Appellee, *Romero v. Romero*, No. 20090335 (Utah Court of Appeals, 2009).
https://digitalcommons.law.byu.edu/byu_ca3/1617

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

ALICE ROMERO,

Appellee/Petitioner,

vs.

MANUEL ROMERO,

Appellant/Respondent.

Appeal No. 20090335

Lower Court No. 074400280

BRIEF OF APPELLEE ALICE ROMERO

PATRICIA L. LATULIPPE
NIELSEN & SENIOR
5217 South State Street #400
Salt Lake City, Utah 84107
Telephone: 801-327-8200
Attorney for Appellant
Manual Romero

Richard S. Nemelka
NEMELKA & NEMELKA
6806 South 1300 East
Salt Lake City, Utah 84121
Telephone: (801) 568-9191
Attorney for Appellee
Alice Romero

FILED
UTAH APPELLATE COURTS

JAN 28 2010

IN THE UTAH COURT OF APPEALS

ALICE ROMERO,

Appellee/Petitioner,

vs.

MANUEL ROMERO,

Appellant/Respondent.

Appeal No. 20090335

Lower Court No. 074400280

BRIEF OF APPELLEE ALICE ROMERO

PATRICIA L. LATULIPPE
NIELSEN & SENIOR
5217 South State Street #400
Salt Lake City, Utah 84107
Telephone: 801-327-8200
Attorney for Appellant
Manual Romero

Richard S. Nemelka
NEMELKA & NEMELKA
6806 South 1300 East
Salt Lake City, Utah 84121
Telephone: (801) 568-9191
Attorney for Appellee
Alice Romero

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	3
STATEMENT OF JURISDICTION	4
STATEMENT OF ISSUES ON APPEAL	4
ADDITIONAL STATEMENT OF FACTS.....	4
SUMMARY OF ARGUMENTS.....	5
ARGUMENT.....	5
I. THE TRIAL COURT MADE ADEQUATE FINDINGS OF FACT WHEN AWARDING THE PARTIES THE REAL ESTATE	5
II. THE ABSENCE OF A FINDING AS TO THE SECOND MORTGAGE IS HARMLESS ERROR	8
CONCLUSION.....	9

TABLE OF AUTHORITIES

Cited in Brief

STATUTES AND RULES

Utah Rules of Civil Procedure, Rule 61	8
--	---

CASES

Burnham v. Burnham, 716 P.2d 781 (Utah 1986).....	4,5
Kesler v. Rogers, 1975, 542 P.2d 354.	4
Kunzler v. Kunzler, 2008 UT App 263	6
Munns v. Munns, 790 P.2d 116 (Utah Ct. App. 1990).....	6
<i>Promax Development v. Mattson</i> , 1997, 943 P.2d 247	8
Rasband v. Rasband, 752 P.2d 1331 (Utah Ct. App. 1988)	6
Rosendahl v. Rosendahl, 876 P.2d 880 (Utah Ct. App. 1994)	6

STATEMENT OF JURISDICTION

The Court of Appeals has jurisdiction over this matter pursuant to Utah Code Ann. 78-2a-3(2)(h)(1953 as amended)

STATEMENT OF ISSUES ON APPEAL AND STANDARD OF REVIEW

I. The trial court made adequate findings of fact when awarding the marital real property to the parties.

Standard of Review: "Trial courts have considerable discretion in adjusting the property interests of the parties." *Bumham v. Bumham*, 716 P.2d 781 (Utah 1986)

II. The absence of a finding in regard to the second mortgage was harmless error.

Standard of Review: "The appellate court does not reverse for mere error, but only if error is substantial and prejudicial." *Kesler v. Rogers*, 1975, 542 P.2d 354.

ADDITIONAL STATEMENT OF FACTS

The following additional facts should be added to the Statement of Facts in Appellant's Brief.

1. The clear intent of the parties was to put both properties, Mrs. Romero's home and Mr. Romero's condo, in both names, but only Mrs. Romero's home was put in both names. (R. 379 p. 27)

2. Both parties came into the marriage, which was rather short in duration, less than three years living together, with a home or condo with no equity. (R. 319)

3. Mr. Romero received \$650 per month rent from his condo while he lived in Mrs. Romero's home and put it in his own separate bank account so he obtained all of the equity in that property. (R. 397 p. 101)

4. At the time of the trial in this matter the value of Mr. Romero's condo was \$121,000 and the balance owing on his condo was \$76,000 leaving equity of \$46,000. (R. 397 p. 110)

SUMMARY OF ARGUMENT

The trial court had adequate findings as to marital assets, but found that Mr. Romero's condo was his separate property and not a marital asset. Therefore, there was no need for the trial court to include in its findings the alleged second mortgage.

The absence of a finding as to Mr. Romero's alleged second mortgage was harmless error

ARGUMENT

I. THE TRIAL COURT MADE ADEQUATE FINDINGS OF FACT WHEN AWARDING THE MARITAL REAL PROPERTY TO THE PARTIES

Trial courts have considerable discretion in adjusting the financial and property interest of the parties, and its actions are entitled to a presumption of validity. *Burnham v. Burnham*, 719 P.2d 781 (Utah 1986) Further, because the trial court's distribution of property is presumed valid, the Court of Appeals will not disturb the trial court's distribution of property on appeal unless it is clearly unjust or a clear abuse of

discretion. *Rasband v. Rasband*, 752 P.2d 1331 (Utah Ct. App. 1988) and *Munns v. Munns*, 790 P.2d 116 (Utah Ct. App. 1990) Lastly, a trial court does not consider property division in isolation. *Rosendahl v. Rosendahl*, 876 P.2d 880 (Utah Ct. App. 1994)

In the present case, the trial court considered all of the evidence as to marital assets and equity. Specifically, the trial court found that Mr. Romero's condo was separate property and not a marital asset. (R. 320 paragraph 12) Although the trial court found the values and debts on both Mrs. Romero's home which was found to be a marital asset and on Mr. Romero's condo which was not, (R. 320 paragraph 11) the trial court was not required to do the same. Since Mr. Romero's condo was not a marital asset, it was not necessary to make a finding as to value or debt. Contrary to Mr. Romero's argument it is not reversible error to not value a non marital asset. *Kunzler v. Kunzler*, 2008 UT App 263. However, the trial court felt it was necessary to do the same to apparently add another reason for the trial court's deviation from the general presumption that marital property be divided equally. But, the trial court did not need to rely upon the equity in Mr. Romero's condo since the trial court found that he had already received the \$650 per month rent from his condo. (R. 321 paragraph 13B)

More importantly, the trial court had the right to find, based upon Mr. Romero's testimony, that at the time of the trial the condo was valued at \$121,000 and the balance owed on the condo was \$76,000, leaving equity of \$46,000. (R. 379 p.109-110) Although, Mr. Romero on appeal claims that his alleged second mortgage of \$23,000 was not taken into consideration by the court, Mr. Romero specifically testified that the balance of the debt on the condo at the time of trial was only \$76,000. (R. 379 p. 110)

He further testified that the condo had increased in value during the marriage of approximately \$36,000. (R. 379 p.112) It is true that later in his testimony, Mr. Romero discussed his second mortgage that he obtained in 2003, but he never changed his testimony as to the debt on the condo at the time of the trial of being \$76,000. In Mr. Romero's brief he submits his testimony in the Addendum on page 124 of the transcript that he had a first mortgage of \$85,000 and a second mortgage of \$23,000, but offered no exhibits to substantiate the same. The trial court had the discretion to believe his first stated testimony as to the debt only being \$76,000. (R. 379 p. 110)

The trial court found that there were sufficient exceptional circumstances that supported the trial court's deviation in awarding to Mrs. Romero all of the equity in her home. (R. 321-321) On appeal Mr. Romero does not argue that the trial court abused its discretion in awarding all of the equity in Mrs. Romero's home to her, but only argues that the trial court failed to make a finding as to the second mortgage. Again, since Mr. Romero's condo was not a marital asset the trial court was not required to make said finding for the distribution of marital assets.

Apparently Mr. Romero is also trying to argue that the trial court should have considered that the equity in his condo was only \$23,000 rather than the \$46,000 when the trial court awarded him his separate property, and Mrs. Romero all the equity in her home but this argument is not presented in his brief so Mrs. Romero is not quite sure. In any event said argument is misplaced, since Mr. Romero would have to marshal all of the evidence to show that the trial court did not have any basis to make said property division. This he could not do, since the trial court had sufficient evidence as stated in

the findings to support the distribution regardless of whether Mr. Romero's equity in his condo was \$23,000 or \$46,000. (R. 317-325)

II. THE ABSENCE OF A FINDING REGARDING THE SECOND MORTGAGE WAS HARMLESS ERROR.

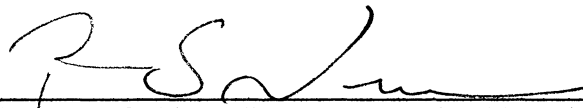
Mr. Romero argues that the trial court erred in not making a finding as to his second mortgage. However, as stated above, Mr. Romero's second mortgage was on his condo which the trial court found was his separate property and not a marital asset. Notwithstanding the same, the trial court did make a finding as to the debt on Mr. Romero's condo at the time of trial which was based upon his own testimony that it was \$76,000. (R. 397 p. 110) Rule 61 of the Utah Rules of Civil Procedure states in part, "The Court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." Further, "to succeed on appeal, appellant must show not only that error occurred, but that it was substantial and prejudicial in that appellant was deprived in some manner of a full and fair consideration of disputed issues. *ProMax Development v. Mattson*, 1997, 943 P.2d 247. Mr. Romero cannot show this. First of all an error did not occur, since the trial court did not have to make a finding as to a non marital asset, and in fact knew about the second mortgage and discussed the same and decided to accept Mr. Romero's initial testimony as to the 2007 value and the debt of only \$76,000. (R. 397 p. 206-207, Addendum to Mr. Romero's brief) Further, Mr. Romero was given a full and fair consideration of the issue of the division of marital assets and the trial court was aware

of his position regarding the second mortgage, but based upon all of the evidence and within its discretion decided to award Mrs. Romero all of the equity in her home.

CONCLUSION

Accordingly, the order of the trial court should be affirmed.

Respectfully submitted this 28 day of January, 2010.



Richard S. Nemelka, Attorney for Alice Romero

CERTIFICATE OF SERVICE

I hereby certify that I mailed a true copy of the foregoing Brief of Appellee, Alice Romero, this ~~28~~ day of ~~June, 2009~~, postage prepaid and addressed as follows:

28th JAN. 2010

Patricia LaTulippe
5217 South State Street, #400
Salt Lake City, Utah 84107

