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Utah Court of Appeals

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BRIEF
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DOCKET NO. 89-0129

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

FAYE DORIS HURST,	)	
Plaintiff and Respondent.	)	
	)	
-vs-		Case No. 890129-CA
	)	
LARRY W. HURST,		
	)	#14
Defendant and Appellant.	)	

APPELLANT'S BRIEF

****

DEPOSITED BY THE STATE OF UTAH
AUG 17 1990

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Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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	)	
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	)	
Defendant and Appellant.	)	

APPELLANT'S BRIEF

****

APPEAL FROM A JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
THE HONORABLE RAYMOND S. UNO, DISTRICT JUDGE

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH

FAYE DORIS HURST, Plaintiff and Respondent. -vs- LARRY W. HURST, Defendant and Appellant.	))))))	Case No. 890129-CA

APPELLANT'S BRIEF

STATEMENT OF JURISDICTION

Rules 3(a) and 4(a) of the Utah Court Of Appeals confer Jurisdiction upon this court to hear this Appeal.

STATEMENT OF NATURE OF PROCEEDINGS

This is an Appeal from a Decree Of Divorce and Judgment entered January 30, 1989 by the Honorable Raymond S. Uno, one of the Judges of the Third Judicial District Court of Salt Lake County, State of Utah.

STATEMENT OF ISSUES PRESENTED UPON APPEAL

This Appeal raises the following issues:

1. Was the child visitation granted to Appellant proper?

2. Is the amount of child support awarded to Respondent excessive?

3. Was the Restraining Order against Appellant proper?

4. Was the requirement that Appellant provide life insurance proper?

5. Was the award of the entirety of the real property to Respondent proper?

6. Was the award of $294.72 of Appellant's monthly retirement benefits to Respondent proper?

7. Was the awarding of $1,500.00 attorney fees and $82.00 costs of Court from Appellant to Respondent proper?

8. Was the award of a Judgment in the amount of $1,100.72 against appellant and in favor of Respondent proper?

STATEMENT OF FACTS

Appellant was born March 15, 1934. Respondent was born March 4, 1938. Appellant and Respondent were married June 21, 1957 and separated August 9, 1986. KAYLENE HURST, the only natural born child of Appellant and Respondent, was born May 15, 1978. Respondent began the divorce action August 13, 1987.

Appellant was employed at Kennecott Copper Corporation from September, 1956 until the Kennecott Copper layoff on April 1, 1985. On January 1, 1985, Appellant began receiving monthly Kennecott Copper pension in the sum of $454.41, which amount included a monthly reduction of $50.50 from pension benefits to provide for a $249.98 monthly benefit payable to Respondent upon Appellant's death, but did not include a monthly supplemental sum of $300.00, payable to Appellant until Appellant's attainment of the age of 62, or until Appellant receives an unreduced Social Security Award, which ever occurs first.

The total monthly sums being received by Appellant from Kennecott Copper pension and supplement is $754.51, before taxes. (R 119).

At the commencement of the divorce action, and continuing through date of trial, Appellant and Respondent were employed at Newspaper Agency Corporation. Appellant, at the time of trial, worked six (6) hours per day, six (6) days per week and was paid $5.05 per hour or $30.30 per day. (TR. 19). Respondent claimed a gross monthly income of $1,119.00. (R 84).

At trial, Appellant and Respondent stipulated that Respondent would have custody of the minor daughter, KAYLENE HURST, and that Appellant's visitation with KAYLENE would be under the direction and supervision of Judith Pugh of Intermountain Sexual Abuse Treatment Center. (TR. 4 and 21).

The major marital asset is the family residence which was free of encumbrances and which Appellant and Respondent stipulated, at trial, to have a value of $37,000.00. (TR. 6 and 7).

The trial Court, at the conclusion of the trial, made no independent Findings Of Fact and Conclusions Of Law relating to the following matters:

(a) Appellant's visitation with KAYLENE HURST, beyond the Stipulation of Appellant and Respondent.

(b) Child support.

(c) Maintenance of life insurance.

(d) Division of the family residence between Appellant and Respondent.

(e) Division of Appellant's retirement benefits.

(f) The award of attorney's fees of $1,500.00 and costs of $82.00 to Respondent from Appellant.

(g) The Judgment of $1,100.70 against Appellant in favor of Respondent.

The trial Court, clearly allowed Respondent's attorney to substitute his (Respondent's attorney) judgments for those of the Court.

ARGUMENT

POINT I

WAS APPELLANT'S VISITATION WITH KAYLENE HURST BEYOND THE STIPULATION OF APPELLANT AND RESPONDENT

Appellant and Respondent Stipulated that Judith Pugh would supervise Appellant's visitation with KAYLENE HURST and that such supervised visitation would continue until further recommendations were made by Judith Pugh. (TR. 4 and 21). In Title 30 Chapter 3 Section 4, Utah Code Annotated, 1953, as amended, it is provided that "The Court or the Commissioner in all divorce cases shall make and file findings and decree upon the evidence." In the instant case, the record is barren of any evidence to support the restraints placed upon Appellant as stated in Paragraph 46 of the Findings Of Fact (R 325) and Paragraph 2 of the Decree Of Divorce. (R 331).

The Findings Of Fact placing restraints upon Appellant's visitation was clearly erroneous and supported by no evidence and requires reversal of the trial Court. Jefferies vs. Jefferies, 752 Pa2d 909.

POINT II

WAS THE TRIAL COURT'S ASSESSMENT OF THE APPELLANT'S CHILD SUPPORT PROPER

The trial Court left the matter of child support to be resolved. (TR. 23 and 24). The matter was never resolved between counsel and by confirmation from the Director Of Human Resources as suggested by the Court. But, Appellant's child support obligation of $205.00 per month was found, based upon Appellant's unsubstantiated gross income of $1,371.91 per month and Respondent's likewise unsubstantiated gross income of $1,413.72 per month. No evidence appears that the trial Court paid any mind to the provisions of Title 78 Chapter 45 Section 7, Utah Code Annotated, 1953, as amended, and the amount of child support set by the trial Court should be set aside. Bake vs. Bake, 772 Pa2d 461.

POINT III

WAS THE REQUIREMENT THAT APPELLANT PROVIDE LIFE INSURANCE APPROPRIATE

The matter of Appellant's life insurance was a subject of discussion at trial. (TR. 14 and 15). No mention was made of Appellant's life insurance at the time of commencement of the divorce action and the only mention of insurance by the Court was in reference to medical insurance. (TR. 23 and 24).

Findings Of Fact, Paragraph 55 (R 328), deals with the matter of Appellant's life insurance. No evidence was adduced at trial as to

what life insurance Appellant did or did not have - only the life insurance available to Appellant in connection with his employment. Paragraph 55 of the Findings Of Fact, signed by the court, and appearing in Paragraph 8 of the Decree Of Divorce and Judgment is not supported by the evidence and should be stricken.

POINT IV

WAS THE AWARD OF THE FAMILY RESIDENCE IN ITS ENTIRETY TO RESPONDENT APPROPRIATE

Appellant and Respondent Stipulated that the family residence had a value of $37,000.00. (TR. 6 and 7). No mention was made at trial by the Court as to disposition of the family residence. In the Findings Of Fact, Paragraph 25 (R 320 and 321), the Court awarded the entirety of the family residence to Respondent, with the qualifying language, "and that such award be set off from any award of marital property being awarded to Defendant." Where the Appellant (Defendant) received a "set off from an award of marital property" (emphasis added) is a mystery to this writer; however, the number manipulating relating to Appellant's pension benefits appearing in Findings Of Fact, Paragraphs 7 through 20 (R 316 to 320), would seem to contain the clues to the mystery.

In making a division of marital property in a divorce proceeding, the trial Court is governed by general principles of equity. Title 30 Chapter 3 Section 5, Utah Code Annotated, 1953, as amended, Land vs. Land, 605 Pa2d 1248. This writer submits that there is no semblance of equity in the awarding of a $37,000.00 asset to the Respondent and no part of that asset to the Appellant.

POINT V

WAS THE TRIAL COURT'S DIVISION OF APPELLANT'S RETIREMENT BENEFITS PROPER

At trial, the court was silent as to a division of Appellant's retirement benefits. Proffer was made as to what this testimony of one Charles E. Peterson, Respondent's witness, would be, namely that Appellant's pension plan would have a future value of $81,042.00, the post-retirement spouse allowance would have a present value of $3,072.00, the present value of future flow of pension benefits to Appellant would be $76,328.00 and that Appellant received pension amounts between August 9, 1986 (date of separation of Appellant and Respondent) and September 26, 1988 (date of trial) in the total amount of $19,617.00 but increased to $21,343.00 with an 8% interest factor added. (TR. 4 and 5). With all deference to Mr. Peterson, the foregoing figures are senseless as socks on a rooster when one applies a little common sense to undisputed facts.

Simply stated, Appellant's monthly, before taxes, pension amounts to $454.51 and is supplemented by an additional $300.00 until Appellant attains the age of 62 on March 15, 1998, or to such date as Appellant receives an unreduced Social Security Award, if received before Appellant's 62nd birthday. Appellant is going to live until he dies and Respondent is going to live until she dies in spite of all of the fancy charts and table of Charles E. Peterson. Appellant's monthly pension is no different than a monthly paycheck of $454.51, with taxes deducted. A pension being considered as marital property (Woodward vs.

Woodward, 656 Pa2d 431), a portion of Appellant's monthly pension benefits should be considered as an entitlement of Respondent.

Pension payments received by Appellant from date of separation to date of trial should not be considered a marital asset to be divided in that there was absolutely no evidence presented to the Court that this income was hidden and not accounted for by Appellant. Johnson vs. Johnson, 771 Pa2d 696.

POINT VI

WAS AWARD OF ATTORNEY'S FEES AND COSTS TO RESPONDENT PROPER

No mention of Respondent's Attorney's fees and costs of court appears in the trial transcript but nevertheless Attorney's fees of $1,500.00 and Court costs of $82.00 were included in The Findings Of Fact, Paragraphs 56 and 57. (TR. 328 and 329).

In the case of Sorensen vs. Sorensen, 769 Pa2d 820, this Court, at page 832, set forth the requirements for recovery of attorney fees in a divorce action, none of which appear in the trial transcript of this case, and Respondent's need being most noticeably absent from the Findings Of Fact. (R 328 and 329).

Concerning the matter of Respondent's costs, Rule 54(d)(2), Utah Rule Of Civil Procedure, provides the method of recovering costs by a party claiming costs. This method is by filing and serving a memorandum of costs, which was never done by Respondent in the case before this Court, and Respondent should be denied recovery of costs of Court.

POINT VII

WAS JUDGMENT OF $1,100.70 AGAINST APPELLANT PROPER

The trial transcript makes no mention of the Court's determination of any portion of Appellant's pension benefits to which Respondent was entitled nor was mention made of when payment was to begin. Paragraph 41 of the Findings Of Fact states $1,100.70 is due Respondent for the months of October, 1988 through January, 1989. (R 324). But, in granting Respondent a Decree Of Divorce, the Court, referring to the Decree Of Divorce, stated, "and become effective upon entering." (TR. 24). For the reasons that the Decree Of Divorce and Judgment was not entered until January 30, 1989 (R 330 and 336) and that Paragraph 41 of the Findings Of Fact was not supported by the evidence, the Judgment of $1,100.70 against Appellant should be set aside.

CONCLUSION

This Court, in the exercise of its equity powers conferred by Graziano vs. Graziano, 7 Utah 2d 1987, 321 Pa2d 931, in the review of this case, should substitute its Judgment for the Judgments of the trial Court in allowing the inequity of a Decree Of Divorce and Judgment as to child visitation restraints, child support, life insurance, property division, attorney fees and costs place undue destruction and hardship upon Appellant, LARRY W. HURST. Costs should be awarded to Appellant.

Respectfully submitted,

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MAILING CERTIFICATE

I, DON BLACKHAM, do hereby certify that on the 30th day of June, 1989, I mailed four (4) true and correct copy of the foregoing APPELLANT'S BRIEF, postage prepaid, and addressed as follows:

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(APPEAL.BRF)