

1989

Jeanette Osguthorpe v. Jerry Osguthorpe : Reply Brief

Utah Court of Appeals

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DOCKET NO. 890219-CA IN THE COURT OF APPEALS
STATE OF UTAH

JEANETTE OSGUTHORPE,)
)
 Plaintiff/Respondent,)
)
 v.) APPELLANT' S REPLY BRIEF
)
 JERRY OSGUTHORPE,)
)
 Defendant/Appellant.) Trial Ct. No. D87-4967
) Ct. App. No. 890219-CA
)
) Priority Class. 14b
)
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APPEAL FROM THE FINDINGS OF FACT,
CONCLUSIONS OF LAW AND DECREE OF DIVORCE
EXECUTED AND ENTERED BY THE
THIRD JUDICIAL DISTRICT COURT, IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH,
THE HONORABLE HOMER F. WILKINSON, PRESIDING.

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REPLY ARGUMENTS

I. RESPONDENT IS NOT ENTITLED TO AN AWARD OF PERMANENT ALIMONY.

Respondent raises the issue in Point IV. of her brief that the trial court erred in limiting the duration of alimony awarded to her. (Respondent's brief at 9, 24-27). She requests that the court of appeals affirm the trial court decision; or in the alternative, modify the alimony award to provide that that award be made permanent. (Id. at 2, 27). An award of permanent alimony is not appropriate in this case on both procedural and substantive grounds.

A. PROCEDURAL GROUNDS.

This court must decline on procedural grounds to address respondent's request that the alimony award be modified because respondent has not filed a cross appeal on this issue. Kinsman v. Kinsman, 748 P.2d 210, 211 (Utah App. 1988); Wiese v. Wiese, 699 P.2d 700, 703 (Utah 1985).

B. SUBSTANTIVE GROUNDS.

This court must decline to extend the trial court's award of alimony on substantive grounds for the reason that the facts in this case do not meet the criteria established by this court in awarding permanent alimony. In Fullmer v. Fullmer, 761 P.2d 942, 951 (Utah App. 1988), this court stated that alimony is properly terminated where the court determines that the recipient is able to support herself at a standard of living to which she was accustomed during the marriage, or the obligor is unable to pay. See also Bridenbaugh v. Bridenbaugh, ____ P.2d ____, 125 Utah

Adv. Rep. 52, 53 (Utah App. 1990); Jones v. Jones, 700 P.2d 1072, 1075 (Utah 1985).

In this case, respondent is capable of self-support at a level consistent with the standard of living she enjoyed during the marriage. (A detailed discussion of this issue is found at 13, 18-19 and 29 of appellant's brief). Appellant, on the other hand, is unable to pay alimony of any duration as a result of the trial court's abuse of discretion in awarding respondent over one-half of appellant's net earnings, all of respondent's premarital assets which included income-producing property, the overwhelming majority of the marital assets, the property given appellant by his father and over one-half of the attorney fees requested by the respondent at the time of trial. (A detailed discussion of this issue is found at 16-18, 22-24 and 27-28).

The trial court's allocation of the parties' financial and material resources is particularly inequitable in this case in that appellant is without sufficient sums with which to support himself, and will be required to expend substantial money in establishing his own separate household. (See discussion at 16-21 of appellant's brief).

The trial court's error in this case was not in failing to award permanent alimony to the respondent, but rather, in awarding alimony at all.

II. RESPONDENT IS NOT ENTITLED TO AN AWARD
OF ATTORNEY FEES ON APPEAL.

Respondent requests in Point VIII. of her brief that this court award her attorney's fees on appeal. (Respondent's brief

at 2, 10, 39-40). She bases her claim on the argument that appellant's claims on appeal are without merit and on the argument that she is without sufficient financial means with which to pay her fees in connection with this appeal. (Id. at 10).

A. FRIVOLOUS APPEAL CLAIM.

In response to her first claim, this court has stated that an appeal having no reasonable legal or factual basis is frivolous and may result in the imposition of costs and attorney fees against the appellant. Riche v. Riche, ___ P.2d ___, 123 Utah Adv. Rep. 31, 33 (Utah App. 1989). Sanctions are permitted under Rule 33 of the Rules of the Utah Court of Appeals, but caution is applied so as to impose such sanctions only in "egregious cases, lest there be an improper chilling of the right to appeal erroneous lower court decisions." Porco v. Porco, 752 P.2d 369, 369 (Utah App. 1988). Accordingly, sanctions are imposed only when:

[A]n appeal is obviously without any merit and has been taken with no reasonable likelihood of prevailing, and results in delayed implementation of the judgment of the lower court; increased costs in litigation; and dissipation of the time and resources of the Law Court.

Id. (Citations omitted).

The thrust of respondent's arguments against the appellant in support of her claim for attorney fees under rule 33 are that: (1) the respondent successfully proved at trial that the appellant testified falsely (Respondent's brief at 8, 14-17);

(2) the trial court may elect not to impose interest on the judgment (Respondent's brief at 10, 31-32); (3) the evidence and application of the law supports only an interpretation that gifts made by appellant's father were intended for the benefit of both parties and should be awarded to respondent (Respondent's brief at 9-10, 27-31); and, (4) the evidence presented met all elements necessary to sustain an award of attorney fees by the trial court (Respondent's brief at 10, 32- 39).

Regrettably, respondent also includes as part of her argument numerous ad hominem remarks (Respondent's brief at 2-3, 13, 41), as well as matters not admitted into evidence before the trial court, which must not be considered on appeal to this court (Respondent's brief at 21-23; Vol. I. Transcript of proceedings at ii.; Ebbert v. Ebbert, 744 P.2d 1019, 1023 (Utah App. 1987)).

Responding to each argument made by the respondent, appellant first addresses the issue of credibility. The findings of fact, which were drafted by the respondent, are instructive on this issue. Paragraph six of the findings concludes, in part, that either appellant was underpaid or overpaid by his employer. Paragraph seven of the findings concludes, in part, that conflicting testimony was presented about the accuracy of the parties' tax returns (which respondent admitted she prepared (Vol. I. Transcript of proceedings at 302)). Paragraph fifteen concludes, in part, that the court believed that appellant was paid not more than \$ 2,000.00 during the time that appellant's father gifted certain sums of money. Finally, paragraph eighteen

refers the reader to the judge's ruling from the bench, who, from page 347 through 349, points the finger of disbelief at both parties.

The second argument raised by respondent concerning the trial court's discretion to modify or abate interest on the judgment may be disposed summarily on the basis of this court's decision in Marchant v. Marchant, 743 P.2d 199, 206-07 (Utah App. 1987). Inasmuch as this issue alone justifies an appeal from the decision of the trial court, respondent is not entitled to attorney fees under rule 33.

The third argument raised by respondent concerns the trial court's assessment of the evidence and its application of law to the distribution of marital assets acquired by gifted money from appellant's father. Assuming for argument purposes that respondent's position is correct; that is, that the trial court properly concluded that the money gifted by appellant's father was given to both parties and that the Mortensen decision does not apply to this case, this court on appeal must still address the issues raised by appellant in Point I. of his brief, that is, that the trial court inequitably divided the income and property of the parties, leaving appellant without sufficient means to support himself. (See appellant's brief at 10-21).

The trial court's division of marital assets, debts and income leaves respondent with \$ 1,680.00 per month income compared to appellant's \$ 442.00. (Id. at 17). In addition, respondent was awarded the marital home; the rental home; all of

the household furniture, fixtures and appliances; the family vehicle; and, approximately \$ 4,000.00 in attorney fees. (Id.; Respondent's brief at 7). Appellant received one-half of the equity in the marital home without interest, a boat, a vehicle owned by his employer and certain items of personal property. (Respondent's brief at 7; Findings of Fact, paragraph 14). On the face of the findings, this court can determine that the distribution was inequitable.

The offsetting factor for the trial court's lopsided award is presumably the trial court's belief that appellant had more income than reflected in the parties' tax returns, (Vol. II. Transcript of proceedings at 349; Respondent's brief at 21-24), even though the trial court was unable to determine what amount that might be. (Id. 349-50). The problem with this analysis is that whether appellant earned a nominal or substantial amount more than the evidence depicted is not known. There is no baseline from which this court may determine the fairness of the trial court's division now, or in the future should either party come before this court on a modification of the decree.

The fourth argument raised by the respondent concerns the sufficiency of the evidence to determine the reasonableness and need for attorney fees requested by the respondent at the time of trial. The element of reasonableness is addressed in detail in pages 24-27 of appellant's brief and will not be repeated here. There is, however, an aspect of the need for attorney fees which has not been addressed in respondent's brief. The evidence and

argument discussed at pages 36-37 of respondent's brief does not address the fact that respondent has been awarded a disproportionate share of the parties' income and property and is in better financial position than the appellant to pay her costs and attorney fees incurred at trial.

Appellant has asserted reasonable legal and factual arguments in support of his claim that the trial court erred. If there are numerous arguments in his claim, it is for the reason and fact that the trial court made numerous errors. Appellant's claim has merit and therefore respondent is not entitled to an award of attorney fees under rule 33.

B. INSUFFICIENT MEANS CLAIM.

The final argument made by respondent in support of her claim for attorney fees on appeal is that she is without sufficient means with which to pay her fees on appeal. Respondent has the option of reducing the rental property awarded to her to cash, if she so chooses, or of mortgaging either home awarded to her. Instead, she requests that appellant pay her fees on appeal. The unfairness of her approach is demonstrated in the final paragraph on page 40 of her brief. Respondent asks this court that she not be required to expend her assets to pay her attorney, and that the court require appellant to come up with the funds, but does not refer this court to a source from which appellant can draw to pay her obligation.

CONCLUSION

This court must reappraise the decision of the trial court in this case because the allocation of the parties' financial and material possessions is so discordant that appellant is unable to pursue his separate life. Appellant's appeal to this court for relief from the trial's court erroneous decision should not result in sanctions against him or in an award of permanent alimony in favor of the respondent on an issue which has not been brought properly before this court.

DATED this 1st day of February, 1990.

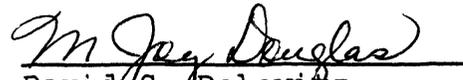


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CERTIFICATE OF MAILING

The undersigned hereby certifies that on this 1st day of February, 1990, four (4) true and accurate copy of the foregoing Reply Brief was caused to be mailed, first class, postage fully prepaid, in the United States mail, to the following:

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