

1998

Wendalyn Smith v. Wendalyn Ence : Reply Brief

Utah Court of Appeals

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Recommended Citation

Reply Brief, *Smith v. Ence*, No. 981707 (Utah Court of Appeals, 1998).

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inadequate that the Appellate Court cannot know how the trial court reached its decision on the amount of alimony it awarded.

Since Findings of Facts are subject to a clearly erroneous standard of review, wife must show the findings are against the clear weight of the evidence. Woodward v. Fazio, 823 P.2d 474, 477 (Utah App. 1991). A finding is clearly erroneous when, even though there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been made. Schindler v. Schindler, 776 P.2d 84 (Utah App. 1989). The findings must be sufficiently detailed and include enough subsidiary facts to clearly show the steps the trial court took to reach its conclusion on each factual issue. Carlton v. Carlton, 756 P.2d 86, 89 (Utah App. 1988). In other words, there must be a logical and legal basis for the ultimate conclusion which set forth the basic facts, showing why that ultimate conclusion is justified. Smith v Smith, 726 P.2d 423, 426 (Utah 1986). If findings are inadequate, the broad deference owed to the trial court is no longer guaranteed and there is no need to marshal the evidence. Woodward v. Fazio, at 477. (holding that the conclusionary statements made by the trial court provided no insight to the evidentiary basis for the trial courts decision, making appellate review ineffective and there was no need to marshal the evidence when the findings were so inadequate.

Even though the specific findings on the parties' income during eight years of the marriage appear to be detailed and undisputed, there is no indication how the court reached its ultimate decision to award \$1,500.00 per month for four years and \$800.00 per month for seventeen more years. This total amount of alimony awarded has no discernable bases in the evidence other than the court believed it would give husband a

standard of living based on the income earned by the parties in 1987, a “fair benchmark” to establish the standard of living during the whole twenty-one years of marriage (Finding of Fact #25). The critical question concerning the amount of income husband will need each month is omitted. At a minimum, the court must establish need; it cannot logically conclude husband needs the amount of alimony awarded without first establishing what his needs are. This it failed to do. Even if the income earned in 1987 was somehow considered a fair benchmark of the parties’ standard of living, there is no insight to the evidentiary basis for the court’s decision on the alimony award. It cannot be assumed that the amount of alimony awarded is reasonable. A logical and legal basis for the award is lacking.

The facts addressing the issue of alimony as stated in the Amended Findings of Fact, numbers 16-24, do not provide a logical or legal basis for the alimony award, nor do they show the steps the court took to reach its ultimate conclusion. The court recites the facts from the testimony and exhibits at trial:

(#16) Since 1956, and throughout the parties’ marriage, Respondent has been employed full-time as a heavy equipment operator. Although his salary fluctuated, Respondent earned as much as \$18.52 per hour during the parties’ marriage. Petitioner supplemented the family income in secretarial positions prior to entering school full-time. While the parties’ children were young, Petitioner was the primary care giver and also worked part-time at home as a typist.

(#17) In January 1981, Petitioner entered college at Glendale Community College, later transferring to Grand Canyon University. After her first semester of college Petitioner did not work outside of the home until she graduated with her undergraduate degree in May of 1985. Petitioner’s undergraduate education was financed through two loans, totaling \$6,000.00 and some scholarships. Petitioner paid off the loans in December, 1991 with post residency earnings.

(#18) From 1985-1987, Petitioner worked as an estimator for an industrial trust company and as a substitute teacher. She earned approximately

\$15,000 per year. In 1987 the parties earned \$51,000 jointly. (Note: this is a two year period since wife graduated from college in May 1985 and entered medical school in June, 1987)

(#19) The parties lived in a mobile home until they purchased a small home when their children were young. When the parties moved to Phoenix, Arizona in 1980, they sold that home for approximately \$32,000.00 and purchased a single 14x70 mobile home. They lived together in the mobile home until Petitioner moved with the children to Tucson, Arizona, in 1987 to attend medical school.

(#20) Petitioner was accepted into medical school at the University of Arizona in Tucson in 1987. The parties purchased a home in Tucson and Petitioner moved there with the two children. During the week Respondent stayed in a travel trailer in phoenix and traveled home on weekends.

(#21) Petitioner borrowed approximately \$49,000.00 in student loans to finance her medical education, and contributed an average of \$6,500.00 per year from the loans to meet family expenses. The majority of family expenses were paid by the Respondent's earnings, which were approximately \$18.52 per hour when Petitioner began medical school and were \$15.00 per hour when Petitioner graduated and the parties moved to Ogden. The income history of the family during the Petitioner's time in medical school is as follows: \$41,000 in 1988, \$36,000 in 1989, \$36,000 in 1990, and \$30,000 in 1991.

(#22) Petitioner graduated from medical school in May 1991 and the parties moved to Ogden, Utah, to allow Petitioner to complete her internship and residency requirements at McKay Dee Hospital. The parties rented a home in Ogden for \$745.00 per month. Respondent was unable to find suitable employment in Utah and he then remained home to care for their teenage children. The parties' earned \$34,000 in 1992, \$57,000 in 1993, and \$100,000 in 1994.

(#23) Until the parties' 1994 vacation in Alaska, vacations were infrequent and were spent visiting relatives. They purchased moderately priced cars and did not buy expensive clothing. The parties' major asset at the time of trial was their home in Tucson, Arizona.

(#24) At the time of trial, Petitioner was living in the rented four bedroom Ogden home and Respondent was renting a camp trailer from a cousin in St. George, Utah for \$500.00 per month. Although Respondent argued he was unable to move into an apartment on his current income, the court questioned that assertion.

The findings state such facts as the work history and income of the parties during the last eight years, where they lived, wife's contribution to the family's income when she attended school and how their lifestyle was modest. (FOF #25) Some of these findings, are specific, detailed and not disputed. However, the findings give no indication how the court reached its ultimate decision on the alimony award or why it decided to base the award on the standard of living earned in 1987. The court only found that an award of alimony should allow husband to sustain a comparable standard of living. (FOF #25) Nowhere do the findings specify how much income husband needs on a monthly basis to sustain a comparable standard of living earned in 1987. The court's findings of fact, therefore, are inadequate and conclusionary and do not clearly show the steps the trial court took in arriving at the large alimony award.

The Amended Findings of Facts #26-29 may appear to justify the court's finding that husband was limited to earning \$12.00 per hour. The court noted that husband, 56 years old at the time of trial, worked as a heavy equipment operator since 1956 and had no formal education beyond high school. (FOF #26) The court found that husband gave up his union position in Arizona when he moved to Utah and, since he was no longer able to get his old job back or find similar union employment that he gave up when he moved to Utah, that he was limited to earning \$12.00 per hour or \$2,080.00 gross and \$1,600.00 net per month in St. George, Utah. (FOF #27) The court further found that husband's age and skills limit him to a position as heavy equipment operator and make him unable to produce income greater than \$12.00 per hour. (FOF #28) Yet, in an obvious contradiction, the court found “. . .but for the parties' move to Utah, Respondent would be earning between \$15 per hour, and \$17 per hour, or \$2,497 per month.” (FOF #29)

These findings are generally conclusionary, with no supporting facts showing why husband was not able to find suitable employment in Arizona and why he was limited to a job that would pay no more than \$12 per hour other than that his age and experience limited him. The court ignored the evidence showing husband's experience in various jobs for a long period of time. We do not even know whether or not \$12 per hour was top union pay in Utah at the time. Furthermore, the court adjusted for inflation when considering how much per hour husband would earn if he had stayed working in Arizona but failed to make the same adjustment when it found that husband was limited to earning \$12 per hour in St. George, Utah. Was it even necessary to stay in Utah?

In Finding of Fact #30, the court thoroughly considered husband's retirement benefits and awarded half to wife instead of awarding husband his full retirement benefits to offset any award of alimony that may have been fair and equitable.

The court anticipated that husband's monthly expenses would remain relatively constant even after his retirement and, therefore, it found it necessary to continue alimony past his retirement to continue for 21 years. (FOF #30) This finding is also conclusionary. There were no findings as to what husband's monthly expenses are or will be; the finding that expenses will remain relatively constant even after his retirement is pure speculation.

The court further found that the marriage was of long duration and that wife's earning capacity has been greatly enhanced through the efforts of both spouses during the marriage. (FOF #34) Even though the court found that wife earned her medical degree through personal determination and sacrifice, it found that it could not ignore husband's efforts to assist her. The court listed specific facts in support of husband's efforts such as

providing the infrastructure that supported her in her accustomed lifestyle while she attended school, paying for the bulk of the household expenses, including the payment on the house in Tucson, enabling wife to spend increased time at the school and hospital by hiring a nanny. (FOF #34a) The court further found that wife contributed less to the family income during her schooling than she had previously, (FOF #34b), and wife and the children lived in the family's home in Tucson while husband lived in a travel trailer on his parent's property in Phoenix. (FOF #34c) There was no evidence that husband supported two households as he contends, living on his parents property in a trailer.

Nowhere in the findings does the court consider the three and one-half years that husband did not work while wife was the sole support of the family and husband not only contribute less to the family income, he contributed nothing. Furthermore, the court failed to consider wife's sacrifices during the time she was in medical school, when husband stayed in Phoenix instead of helping her in Tucson where it was necessary to hire a live-in first year medical student to care for the children.

The court found that a compensating adjustment was appropriate without mentioning specific underlying facts in support of this finding including the amount it was awarding. It found the intangible emotional support or encouragement provided to wife, and the sacrifices husband made on wife's behalf, caused wife's earning capacity to be greatly enhanced due to the efforts of both spouses during the marriage. (FOF #35-36) Yet, while it found that joint efforts made wife's education possible, it emphasized that clearly wife's achievement is due in large part to her own extended efforts. (FOF #39) There is no way of knowing how it arrived at these findings.

The award of alimony was necessary to restore husband to the standard of living enjoyed during the marriage and to compensate him for his contribution to her increased earning capacity; it would enable him to establish a level of housing and personal property ownership that will allow him to maintain the lifestyle enjoyed by the parties during the marriage. (FOF #40-41) Again, these findings are conclusionary for they do not show how much income husband needs to restore him to an unspecified standard of living.

II. WIFE IS NOT PRECLUDED FROM CHALLENGING THE FINDINGS
ABSENT ALLEDGED FRAUD OF THE COURT.

Husband argues that wife is precluded from challenging the findings of the trial court apparently because wife drafted the findings adopted from the trial and included therein no mention of the material allegation of fact raised at trial, and, therefore, is deemed to have waived any objection to the failure of the trial court to make such a finding. (Appellee's Brief P.16-17) Husband's argument is misplaced.

The trial court actually prepared the amended findings of fact in its decision after remand from the Court of Appeals, which has been entered in the record. The Amended Findings of Fact prepared by wife incorporates verbatim the language of the court. Furthermore, and more importantly, the Utah Supreme Court has held that in a proceeding in equity, such as in this case, failure to object to the trial court's findings of fact is not fatal to appellant to appeal and the reviewing court is free to review both the facts and the law as found and applied by the trial court. Dugan v. Jones, 724 P.2d 955 (Utah 1986).

CONCLUSION

In light of the lack of evidence available to support the alimony award, this reviewing court should conclude that the trial court erroneously determined that husband was entitled to the amount of alimony awarded, if any. The present alimony award represents a long term interest in wife's earning potential. Husband did not suffer economic disadvantage by the divorce. Since the above findings of fact were the only evidence supporting husband's need and ability to earn, this court should reverse and remand for a dismissal of the alimony award.

Respectfully submitted this 9th day of July, 1999.


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CERTIFICATE OF MAILING

I hereby certify that I mailed, postage prepaid, two true and correct copies of the foregoing Reply Brief of Appellant, on this 9th day of July, 1999, to: Mary C. Corporon and Brian J. Gardner, CORPORON & WILLIAMS, P.C., 808 East South Temple, Salt Lake City, Utah 84102.


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