

1998

Ivan Winder v. Brenda Kathy Winder : Brief of Appellee

Utah Court of Appeals

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William Schultz; Attorney for Appellee.

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**UTAH COURT OF APPEALS
BRIEF**

MENT

SET NO. 981764-CA IN THE UTAH COURT OF APPEALS

**IVAN WINDER,
Plaintiff/Appellee,**

Case No. 981764-CA

Vs.

Priority No. 15

**BRENDA KATHY WINDER
Defendant/Appellant.**

BRIEF OF THE APPELLEE

**APPEAL FROM THE JUDGMENT OF THE SEVENTH DISTRICT COURT
IN AND FOR GRAND COUNTY, STATE, OF UTAH
THE HONORABLE LYLE R. ANDERSON, PRESIDING**

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FILED

AUG 28 1999

COURT OF APPEALS

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IN THE UTAH COURT OF APPEALS

IVAN WINDER,
Plaintiff/Appellee,

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*

BRIEF OF THE APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a final judgement/Decree of Divorce entered by the Seventh District Court in and for Grand County, Utah, on October 21st, 1998. A Notice of Appeal was filed on November 17, 1998.

This Court has jurisdiction pursuant to Section 78-2a- 3(h) U.C.A.

STATEMENT OF THE ISSUES ON APPEAL

Appellee does not disagree with Appellant's Statement of the Issues Presented.

Appellee would like an award of costs and attorney's fees.

DETERMINATIVE LAW

Utah Code Section 30-3-5(1) provides in relevant part, that:

When a decree of divorce is rendered, the court may include in it equitable orders relating to the...property, debts or obligations and parties.

Rule 40, Utah Rules of Civil Procedure provides:

Upon motion of a party, the court may in its discretion, and upon such terms as are just, including the payment of cost occasioned by such postponement, postpone a trial or proceeding upon good cause shown. If the motion is made upon the ground of absence of evidence, such motion shall also set forth the materiality of the evidence expected to procure it. The court may also require the party seeking the continuance to state upon affidavit or under oath, the evidence he expects to obtain, and if the adverse party thereupon admits that such evidence would be given, and that it may be considered as actually given on the trial, or offered and excluded as improper, the trial shall not be postponed on that ground.

STATEMENT OF THE CASE

Appellee agrees with Appellant's Statement of the case as set forth in her brief with the addition in the "Course of Proceedings" section that Appellee submitted Discovery to Appellant on April 2, 1998 [R.9], filed a Motion to Compel on May 8, 1998, [R.10], and received responses on May 13, 1998. [R.11].

STATEMENT OF FACTS

Appellee will continue Appellant's use of the parties first names.

Brenda is Appellant. Ivan is Appellee.

This case concerns the property award after a divorce trial between two people who were married for a short period of time. They were married on July 29, 1995 [R.1]. Appellee filed for divorce on February 26, 1998. [R.1]. The marriage was a happy one for about a year. [TR-14], but it deteriorated so that Appellant moved from the marital residence in October or November 1997 [TR-26; 66]. (The first page of the trial transcript in the court file is numbered "73." The following pages are not numbered separately by the court. All references to the transcript are indicated "TR" and refer to the court reporters page number.)

Although there is no testimony about the ages of the parties, that they were advanced in years is supported in the record of Ivan's references to his Social Security payments [TR-19] and the fact that this was Ivan's third marriage and Brenda's fourth. [TR-16; 65].

Both parties owned a residence that had been acquired beforehand from non-marital assets. Ivan had 1.25 acres with a trailer that his mother gave to him and a brother and a sister. Ivan purchased their interest prior to the marriage [TR-21-2]. Brenda owned a trailer [TR-28; 67]. She had lived in it for at least eight years before marrying Ivan. It was habitable [TR-67].

The parties moved into Ivan's trailer after their marriage [TR-20; 68].

During the marriage the parties kept their finances separate [TR-30]. They maintained separate bank accounts and credit cards [TR-30-1; 53; 71-6]. They each kept their separate vehicle [TR-32].

Each had their own source of income. Brenda worked at Allen Memorial Hospital [TR-20;57]. Although Brenda characterizes Ivan as self-employed in her brief, he worked only part-time. He was restricted in the amount of money he could earn by Social Security [TR-19]. His major source of income was payments for the property he had acquired and sold before the marriage [TR-19].

After moving into Ivan's trailer, improvements were made to make it habitable. (It was a 1956 ten-wide trailer with a room on the side [TR-20]).

marriage [TR-72-3], and that she would not make any payments on the \$25,000.00 loan for home improvements [TR-76].

SUMMARY OF ARGUMENT

The trial court did not abuse its discretion when it refused to grant Brenda another continuance. The point is moot since Appellant only requested an extension to allow time to obtain an appraisal and the Court allowed the introduction of Appellant's value of the trailer. Appellee should not be penalized for Appellant's failure to exercise due diligence in preparing for trial.

The division of the personal and real property was fair and equitable.

ARGUMENT I

POINT I: THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION FOR A CONTINUANCE.

Appellee takes virtually no exception to the general principles of caselaw cited by Appellant in this argument or the issue of property divisions. His position is that the even conceding the equitable bases for

Ivan took out a loan for \$25,000 for the improvements [TR-9]. He introduced Exhibits 1 and 2 showing the home improvement expenses. Brenda never made loan payments [TR-23; 74]. She is not willing to make any future payments or assume any obligation for the loan payments [TR-75-6]. Ivan has made 38 payments of \$338. 41 on the loan and has 82 more payments of the same amount that he was ordered to pay [TR-23]. Ivan made all of the payments for taxes and insurance on his property [TR-22]. He paid the utilities [TR-53].

The parties intended to fix Brenda's trailer up and rent it [TR-63]. Instead, Brenda allowed her son to live there rent-free during the marriage [TR-69]. She paid the property tax on the trailer [TR-69]. She made some space rent payments of \$150.00 each for the trailer [TR-69-70]. During the marriage Brenda had replaced or repaired a water heater, stove, air conditioner, carpeting and countertops in the trailer [TR-83-4]. Total improvements were at least \$3500.00 [TR-85].

Brenda's position is that Ivan had no equity or interest in her mobile home [TR-71-2], no interest in her retirement benefits accrued during the

The argument that Brenda was surprised by failure to reach an agreement on her share of the equity is contrary to her arguments to the trial court. Brenda concedes that “it’s clear from the Complaint that respondent has no interest whatsoever in the residence they shared.” [TR-7]. See also paragraph 7 of the Complaint. [R.2] Brenda has produced no evidence that a settlement was close. To the contrary, Ivan invited contact trying to settle the case by letters dated August 21 and September 11th (See Addendum). There was no response.

The cases Brenda cites support Ivan’s position. Hill v. Dickerson, 839 P.2d 1018, (Utah App 1992). Held there was no abuse of discretion in failing to grant a continuance when movant had failed to obtain a witness in a timely matter, exactly Brenda’s situation.

The instant case is distinguished from Christensen v. Christensen, 619 P.2d 1372 (Utah 1980). In that case Appellee had wrongfully withheld promised evidence from Appellant. There is no indication here that Appellee withheld anything from Appellant through nonfeasance, misfeasance or malfeasance. Indeed, the record supports a total lack of Brenda to pursue information or evidence through either of her attorneys.

relief cited by Appellant there is no abuse by the trial court. Further, in considering harm to Appellant by denial of the continuance, it is apparent she suffered none. She wanted a continuance to introduce testimony about the appraised value of Ivan's trailer [TR-4]. She introduced such testimony. Brenda takes the position that the trial court abused its discretion on the bald assertions that the matter was continued based on a stipulation of the parties and that she was unfairly surprised when an anticipated settlement was not reached.

The record does not support a stipulated first continuance. Appellant filed a Motion on July 17, 1998. Although the record does not support it, the clear inference is that Brenda obtained a continuance to obtain new counsel. This point is conceded by Brenda on page 9 of her brief. See also #3 under Course of Proceedings, page 3, Appellant's Brief.

The balance of Brenda's argument is that she exercised due diligence, that she believed the matter would be settled, and that she was surprised at having to go to trial. The matter to be settled was Brenda's share of equity in Ivan's house.

POINT II: THE TRIAL COURT'S DIVISION OF THE REAL AND PERSONAL PROPERTY IS FAIR AND EQUITABLE.

Again, Appellee does not quibble with Appellant's caselaw on equitable division of marital property or her characterizations of a marriage as a partnership. However, the trial court's division was fair.

The Utah Supreme Court discussed in Burke v. Burke, 733 P.2d 133, (Utah 1987) at 135 the fact that premarital property is viewed as separate property. It sets out several criteria to use in determining if the other spouse should receive an interest in such property including joint enhancement of the property. The Court indicated consideration of whether the property was acquired before the marriage, age, the standard of living, duration of marriage, and what the parties gave up are relevant. The Burke Court did not award an interest.

Applying the Burke criteria and equitable standards to the real estate, the trial court's division of the real property was fair. It was Ivan's separate property before the marriage. Brenda did not give up her trailer to live with Ivan and in fact, allowed her son to live in it rent-free, waiving a benefit to the marriage. Brenda did not assume any of the financial burden of Ivan's house and was not willing to do so. She valued her share of the equity at

\$4000.00 in her interrogatories [TR- 77] and had put \$3500.00 of improvements into her own trailer. Brenda did not seem to be interested in giving equity to Ivan in an increase in value to her trailer. She objected to testimony concerning projects Ivan had done for her [TR-30]. The parties kept all their finances separate. Brenda did not feel Ivan had an interest in her retirement accrued during the marriage.

It is impossible to say what the value of the increase of equity is in Ivan's home during the marriage. Brenda's contention is that the original value of \$15,000 is not accurate. The value of something is its fair market value, not what you pay your family for it. Brenda did not introduce, and never sought to introduce, any evidence of the value of Ivan's property at the time of the marriage.

It need also be noted that since the parties kept their finances separate and that Ivan made all of the loan payments, any increase in the equity of his trailer was paid for from his separate pre-marital estate. The majority of his income came from the pre-marital sale of real estate [TR-19; 127].

The evidence of a market analysis by a part-time real estate agent provides no indication of the increase of value during the marriage. Any

such evidence needs to be considered unreliable. The agent never entered the home or made an effort to. Her analysis is flawed since she did not enter the home, a point she conceded [TR-107]. She is not aware of the interior deficiencies Ivan testified about [TR-52-3]. The Court returned \$2500.00 of landscaping improvements to Brenda when she indicated she wanted them [TR-110;126;128-9].

Likewise, Brenda has not shown this Court that the division of the personal property was capricious. She did not testify nor has she argued over monetary values. The record indicates that Ivan was not present when Brenda moved out of the home. She had free rein in removing whatever she wanted and did so. Items were removed from the house by her family without her knowledge [TR-78-80]. The Court's award merely returned to Ivan his share of the property and items he had made for the home [TR-37-40].

Brenda's attitude toward the equity seems to be the classic "what's his is mine and what's mine is mine." She had no desire to allow Ivan an interest in anything of hers. She had not given Ivan any benefit from renting her residence while she lived in his trailer. She is not willing to make any

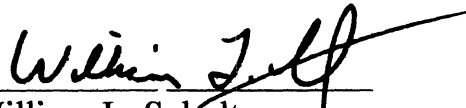
payments on the loan she argues was used to increase the trailer's equity. If this Court finds Brenda is entitled to an interest in Ivan's trailer, it should order her to assume half of the payments.

CONCLUSION

It is unfair to Appellee to penalize Ivan for Appellant's failure to exercise due diligence in preparing for trial. Once negotiations have failed and a trial date is scheduled, a party is remiss in not making adequate preparations. There is no evidence that Appellant's supposed expectations of a settlement was realistic.

The division of the real and personal property was equitable. Appellant has not shown any abuse of discretion that would allow a reversal of the trial court.

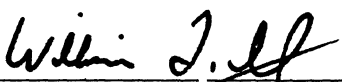
DATED this 28th of August, 1999.



William L. Schultz
Attorney for Appellee

CERTIFICATE OF MAILING

I hereby certify that I mailed two true and correct copies of the foregoing Brief of Appellant to Rosalie Reilly, 148 South Main, #1, P.O. Box 404, Monticello, Utah 84532, postage prepaid, this 28~~4~~ of August, 1999.



WILLIAM SCHULTZ
Attorney for Appellee

ADDENDUM

TABLE OF AUTHORITIES

A. Cases Cited

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Utah Code Section 78-2a-3(h).....	1

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August 21, 1998

Rosalie Reilly
Attorney at Law
P.O. Box 404
Monticello, UT 84535


RE: Winder v. Winder

Dear Rose:

Please advise regarding the status of discussions with your client regarding a settlement in the above-entitled divorce action. The matter is set for hearing on October 6.

Thank you.

Cordially,



William L. Schultz

WLS/ak
Ince;070298ltr.wp

Please direct all correspondence to the above Moab office. Thank you.

WILLIAM L. SCHULTZ
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September 11, 1998

Rosalie Reilly
Attorney at Law
P.O. Box 404
Monticello, UT 84535

RE: Winder v. Winder

Dear Rose:

I have not received a response from you to my letter of August 21 regarding attempting to settle the above matter before the divorce hearing on October 6. Please let me know your standing in this matter. Thank you.

Cordially,

A handwritten signature in dark ink, appearing to read 'WLS/ak', written in a cursive, slanted style.

William L. Schultz

WLS/ak

Please direct all correspondence to the above Moab office. Thank you.