

1998

Van Winder v. Brenda Kathy Winder : Reply Brief

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



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.

Rosalie Reilly; Attorney for Appellant.

William Schultz; Attorney for Appellee.

Recommended Citation

Reply Brief, *Winder v. Winder*, No. 981764 (Utah Court of Appeals, 1998).

https://digitalcommons.law.byu.edu/byu_ca2/1896

This Reply Brief 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.

UTAH COURT OF APPEALS
BRIEF

COURT

MENT

ET NO. 98174-CA

IN THE UTAH COURT OF APPEALS

VAN WINDER,
Plaintiff/Appellee,

vs.

BRENDA KATHY WINDER,
Defendant/Appellant.

*
*
*
*
*
*
*
*

Case No. 981764 -CA

Priority No. 15

REPLY BRIEF OF APPELLANT

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

ROSALIE REILLY (SBN 6637)
148 South Main, #1
Post Office Box 404
Monticello, Utah 84535
Telephone: (435) 587-3266

Attorney for Appellant

WILLIAM SCHULTZ (SBN 3626)
Post Office Box 937
Moab, Utah 84532
Telephone: (435) 250-5914

Attorney for Appellee

FILED

SEP 22 1999

COURT OF APPEALS

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	ii
I. <u>INTRODUCTION</u>	1
II. <u>STATEMENT OF FACTS</u>	1
III. <u>ARGUMENT</u>	2
POINT I. <u>THE NECESSITY OF AN APPRAISAL</u> <u>JUSTIFIED A CONTINUANCE.</u>	2
POINT II. <u>NO CIRCUMSTANCES EXIST</u> <u>WHICH WOULD JUSTIFY A DEPARTURE FROM</u> <u>THE GENERAL RULE REGARDING MARITAL</u> <u>PROPERTY.</u>	4
V. <u>CONCLUSION</u>	7

TABLE OF AUTHORITIES

<i>Maxwell v. Maxwell</i> , 754 P.2d 84 (Utah Ct. App. 1988)	4
Rule 24, Utah Rules of Appellate Procedure	1

IN THE UTAH COURT OF APPEALS

IVAN WINDER,
Plaintiff/Appellee,

vs.

BRENDA KATHY WINDER,
Defendant/Appellant.

*
*
*
*
*
*
*
*

Case No. 981764 -CA

Priority No. 15

REPLY BRIEF OF APPELLANT

INTRODUCTION

Pursuant to Rule 24, of the Utah Rules of Appellate Procedure, Appellant replies to Appellee's brief as follows.

STATEMENT OF FACTS

Appellant (hereinafter "Brenda") takes issue with Appellee's (hereinafter "Ivan") statement of facts as follows:

Ivan insinuates that the Zion loan was used solely for improvements on the marital residence (Appellee's Brief at p. 5). Although Brenda concedes that the loan was for twenty five-thousand dollars, not all of the monies were used for the improvements (R. 73, trial transcript at p. 24, 55). By his own testimony, Ivan also used that money for a 'cushion' and on furniture that he claimed that he built to sell (R. 73, trial transcript at p. 39, 55).

Ivan's focus on Brenda using marital funds on her trailer is misleading. Brenda's trailer was always her separate property and she expended her own

earnings on her trailer after she and Ivan separated (R. 73 at p. 82-85).

Contrary to the assertion that “Brenda concedes that ‘it’s clear from the Complaint that respondent has no interest whatsoever in the residence they shared’,” there was never a concession of this sort (Appellee’s Brief at p. 8). Ivan has taken out of context of an otherwise poorly worded statement by the undersigned.¹ From the beginning, when the answer was filed, and through the trial, Brenda claimed an interest in the marital residence (R. 5 at ¶ 7).

ARGUMENT

POINT I: THE NECESSITY OF AN APPRAISAL JUSTIFIED A CONTINUANCE.

This Court should reject Ivan's position that Brenda failed to act with due diligence (Appellee’s Brief at p.8). The trial court never stated or even suggested that the denial of the continuance was due to Brenda’s failure to be diligent. Rather, the trial court considered the parties’ proffer and simply concluded that it could reach a decision about the division without an appraisal, rendering a continuance unnecessary:

¹The following is the sentence in context:

I know that it is going to be the petitioner’s position, and it’s clear from the Complaint that respondent has no interest whatsoever in the residence that they shared. I believe it is a martial residence that she is entitled--- under the law is entitled to have an equity [interest] in that home.

You've both been in these cases where someone is claiming an interest in a marital residence. I think you both have an idea where I am going to come out on that. Just because something is used as a place for two people who are married to live doesn't make it a marital property. But just because somebody pays something out of his own pay check, doesn't mean it isn't marital property. Everything they earn during the term of their marriage is "marital." So she may have a claim for the extent for which the mortgage was reduced during the term of the marriage. That would probably be the extent of it. That may be offset by his claim if there is some equity in the other direction with respect to her residence. I haven't heard that. So I'm prepared to go ahead and try this case.

(R. 73 at p. 11-12).

The problem with not having an appraisal was apparent when the value of the home became disputed. At trial, Ivan claimed that the value was between sixty and seventy thousand dollars (R. 73, trial transcript at p. 52). In his brief, Ivan claims that the value is "impossible" to determine the value since "the value of something is its fair market value, not what you pay your family for it."

(Appellee's Brief at p. 10).

Ivan's criticism of Brenda's failure to introduce evidence of the value of the home during the marriage should be rejected (Appellee's Brief at p. 10). This is precisely what an appraisal would have addressed.²

²Although Brenda did present some evidence by way of a market analysis, an appraisal would have been much more desirable for the reasons stated to the trial court and for the reasons set forth in Ivan's brief (R. 73, trial transcript at p. 7; Appellee's Brief at 10-11).

POINT II: NO CIRCUMSTANCES EXIST WHICH WOULD JUSTIFY A DEPARTURE FROM THE GENERAL RULE REGARDING MARITAL PROPERTY.

There were no circumstances presented by Ivan justifying departure from the general rule that each party is presumed to be entitled to 50% of the marital property *See generally, Maxwell v Maxwell*, 754 P 2d 84 (Utah Ct App 1988)

Brenda is asking is that this Court look to what had been realized as a result of their joint efforts and allow both to share equally in that result That Brenda kept her trailer separate from the marital property adds nothing to the analysis (Appellee's Brief at p 3) That the parties were advanced in age adds nothing to the analysis (Appellee's Brief at p 3) That the parties were married for a short time adds nothing to this analysis (Appellee's Brief at p 3) That the parties had an unhappy marriage adds nothing to the analysis (Appellee's Brief at p 3)

Ivan disregards the general rule and simply starts arguing about Brenda's trailer (Appellee's brief at p 5) Ivan takes the position that since Brenda allowed her son to live in her trailer, she deprived him of a marital asset (Appellee's brief at p 5) The only evidence presented to support this was Ivan's testimony that there had been a discussion about fixing up the trailer and renting it "when we decided to get married we were going to fix it up and to rent But that never did come about" (R 73, trial transcript at p 63)

There is no basis for Ivan to claim any interest in Brenda's trailer. The trailer was her premarital property which Brenda chose to keep separate from the marriage. All of the substantial changes made on the trailer were done post separation so that Brenda would have a place to live (R. 73, trial transcript at p. 83-85). There is absolutely no evidence that the trailer lost its identity as separate property.

The circumstances about the trailer stand in sharp contrast to the marital residence. The marital residence is where both Ivan and Brenda devoted their time and energy: In Ivan's own words, "it was a real dump, it wasn't liveable" (R. 73, trial transcript at p. 60). Brenda's significant contributions to that home should not be ignored.

The trial court's conclusion that Ivan's interest in Brenda's pension or retirement plan and Brenda's interest in the marital home was a "wash" is not supported by the evidence (R. 73, trial transcript at p. 126-127). This is especially true since Ivan waived, in the complaint, an interest in each other's pension and/or retirement plans (R. 2). Yet, the only waiver that was addressed by the trial court was Ivan's waiver.

Not only did Ivan waive his interest in Brenda's pension plan in the Complaint, but the trial court only speculated as to the increase in value either the pension and/or the marital residence (R. 2 at ¶6). Consider the following:

[Brenda] has an arguable claim there because she

moved in there, she helped to make it a nice place. She helped with the landscaping, she may have helped him with the work that he was doing to actually improve the property, and she was there with him as a marriage entity while the mortgage on the property was being reduced. I would say parenthetically that I've just done some rough calculations and it appears to me that the mortgage was probably reduced by around \$6,000, \$7,000, maybe \$8,000 during the term of the marriage, from what I know about interest rates and the terms of this mortgage, and she may have added with her landscaping efforts something like \$2,000 or \$3,000 to the value. And she may have---it's almost impossible to quantify what it meant that he was able to devote his time to this because she was doing other things. He was able to devote his time to improving the property because she was doing other things . . . She may be entitled to something if (the parties' income) was the only thing that I was looking and it might be something in the order of under \$5,000. But at the same time, she was accruing pension benefits at her work that he is making no claim on. If those are seven percent of her earnings, and if she was making \$1,200 a month . . . that's going to be about \$1,000 a year. I think it may not entirely offset it, but we're not talking about a big difference here.

(R. 73, trial transcript at p. 126-127).

The trial court's speculation as to the decrease in the mortgage, the increase in the value of Ivan's home and the increase in the value of only Brenda's pension plan is not sufficient justification to deny Brenda the right to share in the benefit to Ivan's home. That Brenda had a pension plan for which Ivan made no claim is not sufficient justification to deny Brenda the right to share in the benefit to Ivan's home. In sum, there are no circumstances presented by

the Court which would justify departing from the general rule that each party is entitled to one-half of the marital assets.

CONCLUSION

Based on the foregoing, the Defendant/Appellant respectfully requests that this Court reverse the trial court's distribution of the property and remand for an equitable distribution.

DATED this 22nd day of September, 1999.



ROSALIE REILLY
Attorney for Appellant

CERTIFICATE OF MAILING

I hereby certify that I hand-delivered two true and correct copies of the foregoing Brief of Appellant to William Schultz, P.O. Box 937, Moab, Utah 84532, postage prepaid, this 22nd day of September, 1999.



ROSALIE REILLY