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Kathy J. Baum v. Michael Hayes : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

KATHY J. BAUM,

Petitioner/Appellee,

CASE NO. 20091028

vs.

MICHAEL HAYES,

Respondent/Appellant.

REPLY BRIEF OF RESPONDENT/APPELLANT MICHAEL HAYES

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH (ON REMAND)
HONORABLE TYRONE E. MEDLEY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES i

ARGUMENT.....1

 THE ISSUES ON APPEAL WERE PROPERLY PRESERVED IN THE
 TRIAL COURT ON REMAND.....1

 THE APPELLANT PROPERLY MARSHALED EVIDENCE TO SHOW
 THAT THE FINDINGS OF THE TRIAL COURT ON REMAND ARE
 UNSUPPORTED BY SUBSTANTIAL EVIDENCE.2

 THE TRIAL COURT ON REMAND ABUSED ITS DISCRETION IN
 ALTERING THE CHILD SUPPORT AWARD BY INCLUDING
 APPELLANT’S SECONDARY INCOME.....6

 THE LAW OF THE CASE DOCTRINE IS APPLICABLE IN THIS CASE
 8

CONCLUSION.....9

TABLE OF AUTHORITIES

Baum v. Hayes, 196 P.3d 612 (Utah App. 2008).....5

Breinholt v. Breinholt, 905 P.2d 877 (Utah Ct. App. 1995).....7

Chambers v. Chambers, 840 P.2d 841 (Utah App. 1992).....2

Cox v. Cox, 877 P.2d 1262 (Utah Ct. App. 1994).....7

Hall v. Hall, 858 P.2d 1018 (Utah App. 1993).....2

Howell v. Howell, 806 p.2d 1209, 1213 (Utah App. 1991).....7

Jensen v. Bowcut, 892 P.2d 1053 (Utah Ct. App. 1995).....7

Paffel v. Paffel, 732 P.2d 96 (Utah 1986)5,6

Rehn v. Rehn, 1999 UT App 41 (Utah App. 1999).....3

Reinhart v. Reinhart, 963 P.2d 757 (Utah App 1998).....7

Schaumberg v. Schaumberg, 875 P.2d 598 (Utah App. 1994).....2

Young v. Young, 2009 UT App 3 (Utah App. 2009).....3

UTAH CODE ANNOTATED §78-45-7.5(2)6

UTAH CODE ANNOTATED §78B-12-203(2)6

ARGUMENT

THE ISSUES ON APPEAL WERE PROPERLY PRESERVED IN THE TRIAL COURT ON REMAND.

Contrary to Appellee's assertion, Appellant properly preserved the previously stated issues in the trial court on remand.

On March 24, 2009 Appellant filed a Motion to Strike Petitioner's Proposed Supplemental Findings of Fact and Conclusions of Law. In the Motion the Appellant made the argument that the Petitioner had completely rewritten the Court's decision to conform to what she requested at trial instead of following the mandate of the Appellate Court for more detailed findings concerning petitioner's financial needs and the Court's rationale for excluding Appellant's salary from Walden University from the calculation of Appellant's income. (*See* Motion to Strike Petitioner's proposed Supplemental Findings of Fact and Conclusions of Law).

Additionally, on July 15, 2009, during oral arguments pertaining to the Findings of Fact and Conclusions of Law from the trial court on remand, counsel for Appellant stated,

I don't think it's appropriate to come in here and talk about new evidence, developments that may or may not have occurred since the trial in March of 2007. Rather, the clock stopped in March of 2007. We have a record, and the question now before the Court is, is there sufficient evidence in *that* record to support the findings and conclusion and the order that judge Cornaby entered? (emphasis added) Tr. 22: 14-20.

These timely objections at the trial court on remand effectively preserved the right of the Appellant, Dr. Hayes, to appeal the trial court on remand under the “law of the case doctrine” as well as the “mandate rule.” Additionally, the timely Motion to Strike Petitioner’s Proposed Supplemental Findings of Fact and Conclusions of Law made available to Dr. Hayes the challenge to the Findings of Fact and Conclusions of law that the trial court on remand entered.

THE APPELLANT PROPERLY MARSHALED EVIDENCE TO SHOW THAT THE FINDINGS OF THE TRIAL COURT ON REMAND ARE UNSUPPORTED BY SUBSTANTIAL EVIDENCE.

In a case that involves the adequacy of alimony award the trial court is to consider several factors. Those are (i) the financial condition and needs of the recipient spouse; (ii) the recipient’s earning capacity or ability to produce income, and (iii) the ability of the payor spouse to provide support. Schaumberg v. Schaumberg, 875 P.2d 598, 602 (Utah App. 1994) citing, Chambers v. Chambers, 840 P.2d 841, 843 (Utah App. 1992). When a challenge to the alimony amount is made the Appellate Court will look to see if the trial court has made adequate findings as to the factors listed above and when insufficient findings have been made the Appellate Court has generally reversed the alimony amount, unless pertinent facts in the record are clear, uncontroverted, and capable of supporting only a finding in favor of the judgment. Hall v. Hall, 858 P.2d 1018, 1025 (Utah App. 1993). Appellant in the case at hand is challenging the first and second

factors in the award for alimony, particularly in light of the Appellate Court's mandate to the trial court on remand to do exactly that.

The trial court on remand must state that the calculation of monthly expenses and financial needs for the recipient is reasonable and must explain how it arrived at the monthly amount, or at least from the record, allow us to make the determination for ourselves. Young v. Young, 2009 UT App 3 ¶ 17 (Utah App. 2009) citing, Rehn v. Rehn, 1999 UT App 41, ¶ 7 (Utah App. 1999).

The following table is based on the Findings of Fact and Conclusions of Law of both Judge Cornaby and Judge Medley:

Dr. Hayes Findings of Fact		Ms. Baum's Findings of Fact	
Judge Cornaby	Judge Medley	Judge Cornaby	Judge Medley
Annual salary of \$75,000 or \$6,250 per month	Annual Salary of \$91,000 \$66,600 from Primary job and summer job \$21,000 from Walden University	Her claim of paying \$800 on her hypothetical alimony award and other expenses that while ideal are not actually being paid was not be included in reasonable needs.	Her after tax reasonable needs of \$3,715 and, after imputed income, \$2,265
To pay \$1,200 per month in alimony to Ms. Baum	To pay \$2,475 per month in alimony to Ms. Baum	Imputed income of \$750 per month	Imputed income of \$750 per month
\$565 per month for child support The court will not structure a property award based on the parties relative contributions	Judge Medley then introduced new evidence that was not present at the first trial about the name on the website	She received 85% of the parties' home and contents thereof	Even though there are costs not being paid the only costs that will be excluded are the \$409 claimed for prescriptions without insurance.
	After tax needs of \$2,369		
	Dr. Hayes has been able to pay for many lifestyle amenities during this trial.		
	Pay child support in the amount of \$700		
	This alimony cost does exceed Ms. Baum's reasonable needs ¹		

(See Findings of Fact and Conclusions of Law and Supplemental Findings of Fact and Conclusions of Law).

The Appellate Court determined that the trial court needed to make more detailed findings regarding the Appellee's financial needs and why the income from Walden University was excluded. Baum v. Hayes, 196 P.3d 612, 616 (Utah App. 2008). However, the trial court on remand made *less* findings regarding the financial needs of the Appellee than were made at the first trial. Instead the trial court on remand accepted the list of reasonable needs as submitted by the Appellee. Even though the trial court on remand did say that those needs were reasonable, the court did not explain how it arrived at that conclusion nor did the trial court on remand explain why its ruling was different from the first trial.

More importantly, the trial court on remand highly scrutinized the expenses of the Appellant and seemed to base his award for alimony on the way that the Appellant was living his life and not on any detailed findings regarding the financial needs for the Appellee. In other words, the trial court on remand did NOT follow the Appellate Court's mandate and followed its own path to determine alimony.

The failure to adequately consider the financial condition and needs of the recipient and her ability to support herself is an abuse of discretion. Paffel v.

Paffel, 732 P.2d 96, 101 (Utah 1986). The trial court on remand also included information that the Appellant's name was still on Walden University's website. This information was not present at the trial and not evidence before the court. It appears the trial court on remand relied heavily upon that information. Use of that information in its Findings of Fact is a prejudicial abuse of discretion.

In conclusion, the trial court on remand did not do what it was directed to do by the Appellate court: to make specific findings of the financial conditions and needs of the receiving spouse.

Furthermore, the Appellant has properly marshaled evidence that substantially support the conclusion that the trial court on remand abused their discretion in determining the alimony amount.

THE TRIAL COURT ON REMAND ABUSED ITS DISCRETION IN ALTERING THE CHILD SUPPORT AWARD BY INCLUDING APPELLANT'S SECONDARY INCOME.

The trial court on remand determined that Appellant's secondary income should be included in determining the alimony and child support amounts. The court then used the same income figures in re-calculating child support.

Typically, a court only looks at income derived from "the equivalent of one full-time 40-hour job." Utah Code Ann. § 78-45-7.5(2), now Utah Code Ann. § 78B-12-203(2). There can be exceptions, but the court needs to make specific

findings to justify the variance. *See, e.g., Reinhart v. Reinhart*, 963 P.2d 757, 759 (Utah App 1998).

Appellee points out that income from a secondary job, overtime work or past earnings may be used in determining the amounts of alimony and child support. Breinholt v. Breinholt, 905 P.2d 877, 880-81 (Utah Ct. App. 1995), and Cox v. Cox, 877 P.2d 1262, 1267-68 (Utah Ct. App. 1994). However, just because these other sources of income should be considered does not mean that they are always included.

The current case differs from the facts in Jensen v. Bowcut, 892 P.2d 1053, 1057 (Utah Ct. App. 1995), where the husband's second job was virtually required and was, in essence, a necessary extension of his professional duties. Also, the second job did not jeopardize his primary job. However, in the current case Appellant's second job is contrary to the conditions of his primary job at Washington State University and as such may jeopardize his primary job.

The Appellee also makes the argument that revised alimony and child support amounts are based off of the Appellee's financial contributions during the parties' marriage; her diminished ability to work due to her disability; her needs as the custodial parent; and the disparity in the share of the Appellant's income. *See* Howell v. Howell, 806 p.2d 1209, 1213 (Utah App. 1991). However, in Howell v. Howell, the parties in that case had not lived beyond their means and there was

enough income from the husband to still meet the necessities of both parties. In the case at hand it has been established that both parties have lived beyond their means even during the marriage. *See* Findings of Fact and Conclusions of Law ¶9. As well as in the case at hand there is not enough income to meet either of the parties to live as they did prior to their separation. Id.

Here, the trial court on remand made no findings of fact at all to address the change in child support. While a court may look at income in addition to 40 hours in some circumstances, the trial court on remand gave no indication what that circumstance may be.

It does appear that the Court was relying heavily upon the anticipation that Appellant would continue to enjoy his second job at Walden University. That anticipation was based largely upon the court's finding that Appellant was still listed on the website. In other words, much of the trial court on remand's basis for increasing the child support (including the supplemental income) was information which was not in evidence before the court.

THE LAW OF THE CASE DOCTRINE IS APPLICABLE IN THIS CASE.

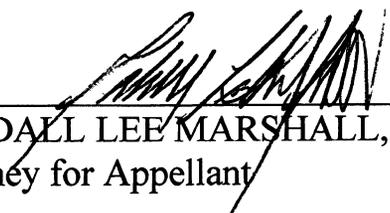
Appellee suggests that Appellant is arguing the trial court on remand had no discretion to make new findings. That is not correct. Appellant is arguing, however, that, *if* the trial court on remand is intending to change its ruling, it must first make adequate findings of fact and then explain in detail why it is choosing to,

in effect, reverse itself. The trial court on remand did NOT make any explanation of why it opted to completely change its ruling.

CONCLUSION

Based on the foregoing, Appellant respectfully asks that this Court reverse and remand this case to make actual detailed findings about Appellee's claimed expenses as well as reasoning for excluding the Appellant's second income from Walden University as was mandated by the first appeal in this case. Further, Appellant requests this court to determine that any findings made by the trial court on remand which relied upon Appellant's name being on Walden University's website to be prejudicial and an abuse of discretion.

DATED this 20th day of August, 2010.



RANDALL LEE MARSHALL,
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MAILING CERTIFICATE

I hereby certify that, on this 23rd day of August, 2010, I caused a true and correct copy of the foregoing Appellant's Reply Brief to be mailed, postage pre-paid, to:

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A handwritten signature in black ink, appearing to read "R. M. [unclear]", is written over the right side of the recipient's address.