

1989

Lynette D. Nielsen v. Russell Clyde Nielsen : Brief of Respondent

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

PLAINT
J

SECRET NO. 89-0659-CA IN THE UTAH COURT OF APPEALS

LYNETTE D. NIELSEN,

Plaintiff/Appellant,

v.

Civil No. 890659-CA

RUSSELL CLYDE NIELSEN,

Defendant/Respondent.

BRIEF OF RESPONDENT

Appeal of a Decree of Divorce
By The Honorable Gordon J. Low
First Judicial District Court
Cache County, Utah

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Priority No. 15

APR 20 1990

Mary J. ...
Clerk of the Court
Utah Court of Appeals

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JURISDICTION OF COURT

The Findings of Fact, Conclusions of Law, and the Decree of Divorce from which this appeal is taken, were entered by the First Judicial District Court Judge on October 11, 1989. The Notice of Appeal was filed November 3, 1989.

This Court has jurisdiction over this appeal pursuant to Article VIII Section 1 et seq., Utah Constitution; Section 78-2a-1 et seq. Utah Code Annotated (1953 as amended); and Rule 3, R. Utah Ct. App.

NATURE OF PROCEEDINGS

This is an appeal, by Plaintiff, from a Decree of Divorce signed by Judge Gordon J. Low of the First Judicial District Court, Cache County, State of Utah.

STATEMENT OF FACTS

(Respondent differs with some of the statement of facts set forth in the Appellant's Brief. The additional facts are set forth below. Paragraph numbers correspond with the numbers in Appellant's statement of the facts.)

4. Plaintiff testified that in a nine-week period she earned approximately \$2,147.00 or approximately \$238.50 a week, (May transcript, page 63, lines 9-20; page 64, lines 4-12).

5. Plaintiff is trained and has been a licensed beautician for thirteen years, and has made no effort to obtain employment at a beauty salon. (May transcript, page 75, lines 24-25; page 76, lines 1-7).

7. The Court calculated Plaintiff's income at \$800.00 plus (June transcript, page 19, lines 9-11). The Court felt she demonstrated employability at that rate (June transcript, page 20, lines 1-10).

8. Defendant currently has no over-time available at Thiokol and none is expected in the foreseeable future (June transcript, page 89, lines 14-22; Defendant's Exhibit #1). Defendant's salary, or base income, is \$14.53 an hour (May transcript, page 90, lines 2-6). The Court found Defendant's income at \$2,505.00 based on current and historical income (May transcript, page 173, line 13). Defendant testified that his take-home pay is \$1,719.00 (May transcript, page 130, lines 23-25; page 131, lines 1-12). Defendant works in the space division at Thiokol and is in some jeopardy in reference to Defendant's job position (May transcript, page 92, lines 1-10).

12. Defendant is presently living with his parents (May transcript, page 132, lines 22-25). Defendant testified that he can't afford to live anywhere else (May transcript, Page 133, lines 1-4). Defendant's sole source of transportation is a 1969 truck that gets approximately five to eight miles a gallon (May transcript, page 134, lines 18-23). Defendant testified that based on what he has been paying the Plaintiff (alimony and child support), and bills, he doesn't have any money to do anything else with (May transcript, page 136, lines 17-20). The Court found that Defendant's payment of child support and alimony obligation to Plaintiff didn't leave Defendant with what he needed to support himself (June transcript, page 43, lines 18-25; page 44, lines 1-6).

14. A retainer of \$500.00 was paid to Plaintiff's counsel by Plaintiff. (May transcript, page 33, lines 21-23; June transcript, page 46, lines 3-5; Plaintiff's Exhibit #1). Plaintiff was awarded \$800.00 in attorneys fees, execution stayed on the grounds that Defendant paid

Plaintiff \$50.00 per month (June transcript, page 63, lines 16-24). The Court stated that it was not sure Defendant had the ability to make the \$50.00 a month payment (June transcript, page 63, lines 21-24). The Court found that there were assets available by the parties for each to pay their own attorney fees (June transcript, page 63, lines 3-13).

Other pertinent facts omitted by Plaintiff.

1. The parties acquired a home during the marriage valued at \$76,000.00 (May transcript, page 44, lines 20-25; page 46, lines 18-19; Paragraph 11, Findings of Fact). The payoff of the home is \$25,902.59 (Paragraph 11, Findings of Fact). Possession of the home was awarded to Plaintiff. Equity in said home was to be split between the parties upon the following events: Plaintiff remarries, co-habitates, parties youngest child reaches the age of majority, or Plaintiff sells the home (May transcript, page 184, lines 18-22; Paragraph 11, Findings of Fact; Paragraph 6, Decree of Divorce). Plaintiff was awarded household furniture and appliances, which the Court placed at a value of \$3,500.00 (Paragraph 12, Findings of Fact; Paragraph 7, Decree of Divorce). Each party was awarded one-half of the First Security Bank CD and Savings Account (\$1,231.00 and \$513.26), (Paragraph 12, Decree of Divorce; Paragraph 8, Findings of Fact). Plaintiff was awarded a judgment against the Defendant in the sum of \$1,175.00 (Paragraph 14, Findings of Fact; Paragraph 10, Decree of Divorce). Plaintiff was also awarded one-half, or \$7,897.22, in Defendant's Savings Retirement (ESIP) at Morton Thiokol Inc., (Paragraph 9, Findings of Fact; Paragraph 15, Decree of Divorce).

SUMMARY OF THE ARGUMENT

1. The trial court findings and the evidentry records reflects that the trial court seriously weighed and considered the required three factors in formulating its alimony award of both amount and duration. The Court found Plaintiff to be an able-bodied person, age 35, with an employability rate of \$800.00 per month. The Court found that the Defendant did not have the ability to pay more than what was awarded Plaintiff for child support and alimony. Given these factors, the Court crafted an alimony award which would allow Plaintiff time to get back in the work force or obtain the necessary education to develop the necessary skills to enhance her employability. This alimony award was made for the purpose of ensuring the economic survival of both parties and to maintain a lifestyle for Plaintiff as near as possible to what she had experienced during the parties marriage, considering Defendant's ability to provide.

2. The recent Utah Court of Appeals decision of Motes v. Motes, 786 P.2d 232 (Utah App. 1989) does not require the trial court to order a custodial parent to execute a Section 152 Declaration. Nevertheless, the Court found that the Defendant had a greater income than the Plaintiff, Defendant provided the majority of the income to the children and Defendant could maximize the greatest financial benefit from the exemptions. The trial court clearly used discretion in awarding Defendant two of the children for tax exemption purposes.

3. The record reflects that Plaintiff has assets available to pay her costs and attorney fees. Defendant does not have additional monthly income to pay all of Plaintiff's costs or attorney fees. The trial court

did not abuse its discretion in so finding. Likewise, Plaintiff is not entitled to additional costs and attorney fees incurred on this appeal.

DETAIL OF ARGUMENT

POINT I.

THIS COURT WILL NOT INTERFERE WITH THE TRIAL COURT FINDINGS
ABSENT A SHOWING OF CLEAR AND PREJUDICIAL ABUSE OF
DISCRETION

The standard of reviewing alimony cases has been established by the Utah Supreme Court and adopted by the Utah Court of Appeals. The Utah Supreme Court in Paffell v. Paffell 732 P.2d 96, 100 (Utah 1986) stated:

"In an action for divorce, the trial court has considerable discretion to provide for spousal support, and this Court will not interfere with a trial court's award of such support in a divorce proceeding absent a showing of a clear and prejudicial abuse of discretion."

In Boyel v. Boyel 735 P.2d 669, 670 (Utah App. 1987), the Utah Court of Appeals reiterated the Supreme Court standard of review stating:

"This court will refrain from disturbing finding of the trial court in a divorce action unless a clear abuse of discretion is shown (cite omitted) the trial court is clearly in the best position to weigh the evidence, determine creditability and arrive at a factual conclusion . . ."

POINT II.

THE TRIAL COURT PROPERLY AWARDED APPELLANT A \$300 A MONTH
AWARD OF ALIMONY AFTER CONSIDERING ALL THE FACTORS

In setting an award of alimony, a trial court must consider three factors, (1) The financial condition and need of the receiving spouse; (2) the ability of the receiving spouse to produce sufficient income for

him/herself; and (3) the ability of the responding spouse to provide support Paffell v. Paffell, supra; Nobel v. Nobel 761 P.2d 1369, 1372 (Utah 1988); Throckmorton v. Throckmorton 767 P.2d 121, 124 (Utah App. 1988).

Failure to consider these factors is an abuse of the trial court's discretion Paffell 732 P.2d at 101.

(1) Financial Condition and Need of Receiving Spouse. Plaintiff testified before the trial court that her monthly living expenses for herself and the parties four children were \$2400.00. The trial court awarded Plaintiff \$715.00 per month child support for the parties minor children, and \$300.00 per month for alimony. Additionally, Plaintiff was awarded property settlements in the amount of \$1,231.05, First Security Bank CD, \$513.27 First Security Bank Savings Account, one-half, or \$7,897.22, of Defendant's ESIP from his employment at Morton Thiokol and a judgment in the sum of \$1,175.00 representing the difference in personal property settlements.

Although the testimony of Plaintiff shows her need to be greater than the amount of support awarded, this was taken into consideration when the trial court fixed an award of alimony stating:

"I have read the exhibit. One of the aims of alimony obviously used to be historically to allow the spouse to live in a lifestyle to which she was accustomed, if I can use the art, obviously that is impossible. There isn't income between those two parties." (June Transcript, page 42, lines 13-25)

(2) The ability of the receiving spouse to produce sufficient income for herself. The findings of the court were that the Plaintiff's computed income and demonstrated employability rate was approximately

\$800.00 per month. Plaintiff's testimony showed that she is a 35-year old high school graduate without any reference to any health problems, or inabilities. Plaintiff testified that she had been back in the work force the last few years of the parties marriage. Plaintiff also testified that she has received an income as high as \$1,000 per month in a given period. Plaintiff further testified she is a licensed beautician.

The evidence before the trial court shows that Plaintiff is capable of full-time employment and/or capable of obtaining the marketable skills or training necessary to enhance her earning ability.

Plaintiff's counsel stated:

"Certainly Ms. Nielsen does have the ability to earn the Eight hundred dollars a month that the Court has found, and it would be my hope that Ms. Nielsen, if she gets a decent alimony award would take advantage of the money to find a way to budget, and cut back, and do whatever she can do to get the schooling and then enhance her earning ability, and my hope would be that after a number of years she would be able to."
(June transcript, pages 34, lines 10-18)

(3) The ability of the responding spouse to provide support. The exhibits presented by Defendant, as well as his testimony at trial, demonstrated the Defendant's net take-home pay to be \$1,719.00 per month. Payment of child support in the amount of \$715.00 and alimony in the amount of \$300.00, along with \$50.00 per month paid towards Plaintiff's \$800.00 in attorney fees, leaves Defendant with \$654.00 for monthly living expenses and necessities. In the trial court findings:

"I . . . recognize the fact given in the exhibits I have before me. Mr. Nielsen's spendable income is extremely limited." (June transcript, page 43, lines 1-3)

"It doesn't give her (Plaintiff) what she has told this Court she needs to help her and the family." (June transcript, page 43, lines 24-25)

"It doesn't leave the Defendant with what he needs to support himself in his new situation. I can't create extra money." (June transcript, page 44, lines 1-3)

Plaintiff's assertion that the trial court erred in limiting the alimony award to \$300.00 is baseless. Given the Defendant's resources available, the trial court awarded Plaintiff the maximum amount of alimony which the Defendant had the ability to pay.

The trial court took into consideration the three factors necessary in computation of the alimony awarded to Plaintiff. Plaintiff's claim that the support award did not equalize her standard of living enjoyed during the marriage, is clearly one-sided. The divorce has obviously caused both parties economic hardship due to the limited amount of resources available to the parties. The trial court record reflects no abuse of discretion in awarding alimony. The trial court awarded support to Plaintiff that would equalize the parties standard of living given the income available.

POINT III.

APPELLANT DOES NOT MEET THE CRITERIA USED IN ESTABLISHING AN AWARD OF LONG-TERM ALIMONY AND THE TRIAL DID NOT ABUSE ITS DISCRETION IN SO FINDING

Considering the circumstances of the parties and the standard of Paffell v. Paffell Supra set forth above, the trial court properly awarded Plaintiff alimony for a three year duration.

In Jones v. Jones 700 P.2d 1072 (Utah 1985) the Utah Supreme Court attempted to establish a criteria for long-term alimony. In Jones the

court reversed a declining rehabilitative alimony award finding such award was inappropriate, and ordering permanent alimony, stating:

"It is entirely unrealistic to assume that a woman in her mid-50's with no substantial work experience or training will be able to enter the job market and support herself in anything even resembling the style in which the couple had been living.

Similarly, in Rasband v. Rasband, 752 P.2d 1331 (Utah App. 1988) the court rejected a decreasing alimony award and requested the trial court to award permanent alimony after a 30-year marriage during which the wife had remained at home and maintained a household and had held part-time, short-term, minimal-wage jobs during the marriage. See also Sampinos v. Sampinos, 705 P.2d 615, 618.

Unlike Jones and Rasband the circumstances of the Appellant does not meet the criteria for long-term alimony.

As stated previously, the evidence before the Court shows Plaintiff as a 35-year old woman with a high school education. Plaintiff has a current computed earning capacity of \$800.00 plus per month and has earned as high as \$1,000.00 per month. Plaintiff is a licensed beautician, but has not sought employment with salons. Plaintiff suffers no health problems or limitations and is capable and qualified of full-time employment, school, or training to enhance her earning ability.

Plaintiff incorrectly asserts that the trial court, limiting alimony to three years, is contrary to case law and is a clear and prejudicial abuse of discretion. The trend established by both the Supreme Court and the Court of Appeals and the circumstances of the parties in this situation make the award of temporary alimony

appropriate.

POINT IV.

THE TRIAL COURT PROPERLY AWARDED DEFENDANT TWO OF THE
CHILDREN FOR TAX DEPENDENCY EXEMPTIONS

The recent case of Motes v. Motes 786 P.2d 232 (Utah App. 1989) provides that the 1984 amendment to the Internal Revenue Code, which automatically entitles the custodial parent dependency exemptions unless custodial parent signs a written declaration (Section 152) to the contrary, did not vest courts of their traditional power to allocate tax dependency exemptions.

Under Motes Supra, this court held that State Courts retain their traditional authority to allocate dependency exemptions. There was no finding suggesting that a court must order an execution of a Section 152 Declaration.

The trial court could not have abused its discretion as suggested by Plaintiff because the trial court did not order Plaintiff to execute a Section 152 Declaration. (The parties Decree of Divorce was entered at the trial court level before Motes.)

Nevertheless, the trial court considered the financial resources of the parties by allowing Defendant only two of the parties children for tax deduction purposes until such time as alimony terminates:

" What weight do you give the fact that though he would have a net of \$2,000.00 net income after deducting his child support. The fact that ... she would also have a \$1,515.00 at that time plus she receives alimony and also the benefit of the deduction, deductions for tax exemptions of the children, he would not, and he would have the alimony tax deduction and she would not." (June transcript, page 35, lines 20-25; page 36, lines 1-3)

The trial court then awarded Defendant two of the parties children as tax deductions stating:

"I'm awarding alimony in the sum of \$300.00. That will be a period of three years. During that period of time, tax deduction will be divided two and two.

The record reflects that the trial court attempted to maximize Defendant's financial resources to meet his support obligations to Plaintiff, since the Defendant's income was greater than the Plaintiff and Defendant would be providing the majority of the financial support for the children, and since the deductions would have a greater value to Defendant than Plaintiff, the trial court used proper discretion in awarding Defendant two of the parties four children for tax deduction purposes.

POINT V.

PLAINTIFF IS NOT ENTITLED TO ADDITIONAL ATTORNEYS FEES OR COSTS AT THE TRIAL OR ON THIS APPEAL

An award of attorney fees in a divorce proceeding, and a decision to make such award, and the amount thereof, rests primarily in the sound discretion of the Court. However, an award must be based on evidence of both (1) financial need and (2) reasonableness. Rasband v. Rasband, 752 P.2d at 1336. Where either of these two factors have not been shown, the Court has reversed awards of attorneys fees, Beals v. Beals, 682 P.2d 862, 864 (Utah 1984).

(1) The moving party must show financial need.

The trial court awarded the Plaintiff \$800.00 of her \$2,200.00 in attorneys fees incurred. Execution upon Defendant's payment was stayed on the condition of payment of \$50.00 per month. Plaintiff had

previously paid Plaintiff's counsel a \$500.00 retainer (Plaintiff testified that her father loaned her the money) leaving her with a balance of \$900.00 due and owing Plaintiff's counsel.

\$2,200.00	Attorney fees
800.00	Defendant ordered to pay
500.00	Plaintiff's retainer
<u>\$ 900.00</u>	Balance

Based on support payments paid by the Defendant to the Plaintiff, Plaintiff's earning capacity, and the trial court's award of cash assets to Plaintiff, Plaintiff clearly has the ability to pay her remaining balance due on her costs and attorney fees.

Ongoing Monthly Support & Income

\$ 715.00	Child Support
300.00	Alimony
800.00	Computed Income
<u>\$1,815.00</u>	TOTAL

Property Award Which Produce Immediate Cash

\$ 1,231.05	First Security Bank CD
513.26	First Security Bank Savings Account
7,897.22	Plaintiff's half of Defendant's ESIP
1,175.00	Judgement for equity property settlement
<u>\$10,816.53</u>	TOTAL

In considering an award of attorney fees, the trial court took into consideration Plaintiff's assets and support, and the Defendant's ability to pay, stating:

"There's use of these assets which the parties may pay attorney fees also. So one of the factors, that's a major factor. I'm going to consider that to be as a factor. I am considering the fact of maybe some cash available to pay attorneys fees . . ." (June transcript, page 63, lines 6-10)

"Given the three years of alimony payment I'm going to award [Plaintiff] \$800.00 in attorneys fees. I'm going to stay execution on that however at \$50.00 a month . . . I'm not sure the Defendant has ability to

make that payment . . . I do, however, think Plaintiff has some ability to make immediate payment toward that" (June transcript, page 63, lines 16-25)

Given the evidence before the Court, the trial used sound discretion in making an award of attorneys fees to Plaintiff. Plaintiff's substantial property settlement and monthly support and income placed Plaintiff in a position to shoulder her own attorneys fees. See Gardner v. Gardner 748 P.2d 1076, 1082 (Utah 1988). Further, the trial court could not abuse its discretion as to costs of litigation. At no time in the proceeding was evidence addressed to whether Plaintiff would be able to cover costs of litigation and thereby none was awarded.

(2) The reasonableness of the amount of the reward.

At trial, counsel for Plaintiff stated the number of hours expended on the case, and the hourly rate charged was set forth. Evidence does reflect an attempt to characterize the Plaintiff's attorney fees as reasonable.

Plaintiff has failed to show a financial need or the inability to pay the remaining portion of her attorney fees. Although the fee seems to be reasonable, the record reflects that Defendant does not have the ability to pay the attorney fees already incurred, or Plaintiff's attorney fees incurred on this appeal.


CONCLUSION

The trial court heard and considered all the evidence. Plaintiff fails to show how the trial court abused its discretion in the amount or duration of the alimony awarded, fails to show how the trial court abused its discretion in awarding Defendant two of the children for tax

exemption purposes, and fails to show how the trial court abused its discretion in Plaintiff's partial award of attorney fees. Plaintiff is not entitled to additional costs or attorney fees on this appeal.

This Court should affirm the District Court's decision and dismiss this appeal.

DATED this 19 day of April, 1990.


Gregory Skabelund
Attorney for Defendant/Respondent

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the BRIEF OF RESPONDENT in the United States mail, postage prepaid, to the following:

Larry Jones
Hillyard, Anderson & Olsen
175 East 100 North
Logan, UT 84321

DATED this 19 day of April, 1990.

