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Barbara J. Warren v. Robert L. Warren : Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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BARBARA J. WARREN, :
Plaintiff-Appellant, :
v. : Case No. 17514
ROBERT L. WARREN, :
Defendant-Respondent. :

---oooOooo---

REPLY BRIEF

Appeal from the Judgment of the Third District Court
in and for Salt Lake County
Honorable Peter F. Leary, Judge

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TABLE OF CONTENTS

	Page
STATEMENT OF FACTS.	1
ARGUMENT	3
POINT I	
RESPONDENT GROSSLY OVERSTATES THE ACTUAL INCOME AVAILABLE TO APPELLANT.	3
POINT II	
THE PROPERTY DISTRIBUTION EFFECTED BY THE TRIAL COURT IS INEQUITABLE.	9
CONCLUSION	16

CASES CITED

	Page
Balsam v. Balsam 589 P.2d 652 (Mont. 1979)	14
Dubois v. Dubois 29 Utah 2d 75, 504 P.2d 1380 (2973)	11
Fletcher v. Fletcher 615 P.2d 1218 (Utah 1980)	4-5
Gramme v. Gramme 587 P.2d 144 (Utah 1979)	5
Herron v. Herron 608 P.2d 97 (Mont. 1980)	13-14
Jespersion v. Jespersen 610 P.2d 326 (Utah 1980)	12-13
Lundgreen v. Lundgreen 112 Utah 31, 184 P.2d 670 (1947)	9-10
MacDonald v. MacDonald 120 Utah 573, 236 P.2d 1066 (1951)	6-7
Searle v. Searle 522 P.2d 697 (Utah 1974)	10-11
Wilson v. Wilson 5 Utah 2d 79, 296 P.2d 977 (1956)	5-6

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REPLY BRIEF

Appellant Barbara J. Warren submits the following Reply Brief in order to demonstrate certain factual errors contained within the brief of respondent Robert L. Warren and to respond to new issues raised in that Brief.

STATEMENT OF FACTS

In his Brief, Mr. Warren grossly overstates the income available to Appellant. Beginning with the second paragraph of his Statement of Facts (Resp. Br. at 3), Mr. Warren insistently claims that Mrs. Warren has available to her "a gross monthly income of \$1,800." He calculates this amount as being the sum of \$800 per month from her trust (inherited from her father), the \$400 per month short-term alimony awarded by the trial court, and "\$600 per month in stock dividends from

shares of National Bancshares stock". There is absolutely no evidence in the Record to support any finding that Mrs. Warren receives \$600 per month in stock dividends on top of her trust income. In fact, these bank shares have produced, at most, \$600 per year. (Exhibit 32-P and R. at 575-581, Tr. at 201-207.)

Moreover, Mr. Warren claims in his brief (Resp. Br. at 4) that Mrs. Warren's inheritance amounted to only \$66,386.01 at the time of her marriage. The unrefuted testimony at the trial was, however, that Mrs. Warren inherited approximately \$200,000. (R. at 416, Tr. at 42.) This inheritance was comprised of savings accounts, stocks, life insurance policies, and a rental lot. (Id.) It was from these inherited funds that the parties purchased their first home in 1954 and a second home in 1969. (R. at 432, Tr. at 58.) The downpayment on the second home was \$48,500 and was provided solely from funds withdrawn from Mrs. Warren's inheritance. (Id.) Eventually, the sales proceeds from this second home were used to create substantial equity in the parties' present residence. It was also Mrs. Warren's inheritance that made possible the publication of Mr. Warren's book, "Utah's Biggest Bucks". (R. at 438, Tr. at 64.) In short, as Mr. Warren acknowledges in his Brief, Mrs. Warren was compelled during the tenure of this marriage to contribute well in excess of \$146,000 from her inheritance,

much of which was used to provide the necessities of life, including food, shelter, and utilities.

In attempting to justify the imposition upon Mrs. Warren of more than two-thirds of the parties' outstanding obligations, Mr. Warren asserts that these were charge card debts for which he was not responsible. (Resp. Br. at 21.) In so doing, Mr. Warren conveniently overlooks in his Brief that which he admitted in his testimony. At trial, he admitted that the obligations to Valley Bank and Trust consisted of "check protection" advances to cover checking account overdrafts. (R. at 572, Tr. at 198.) Mr. Warren further insists in his brief that his pension and profit sharing, retirement and ESOP plans are unavailable to him until retirement and as such have no present value. However, they are available at the termination of his employment with E-Systems, which has occurred in connection with his attempt to enter a void and prohibited marriage.

ARGUMENT

POINT I. RESPONDENT GROSSLY OVERSTATES THE ACTUAL INCOME AVAILABLE TO APPELLANT.

Through some mathematical hocus-pocus, Mr. Warren attempts in his Brief to demonstrate that Mrs. Warren actually has available to her monthly income of \$1,800. As noted in the Statement of Facts, above,

this assertion is based, in part, upon the fallacious assumption that Mrs. Warren receives \$600 per month in dividends on bank stock. There is no evidence to support that assumption. Moreover, the supposed \$1,800 per month includes \$400 per month in short-term alimony, which will be discontinued in less than three years. In fact, the evidence presented at trial was that in 1979 Mrs. Warren's National Bancshares generated interest income for the year of \$568.40 and her trust generated interest and dividends of \$7,479.69 for a total gross income of \$8,048.09 or \$670.67 per month. (Exhibit 32-P.) Also, as Mrs. Warren has been required to expend the principal of her trust to pay debts (such as one-half of approximately \$5,000 in 1979 federal taxes, as ordered by Judge Leary), the monthly income from the legacy has actually been further diminished.

Respondent then unfairly compares the supposed pre-tax \$1,800 per month (which is actually never more than \$1,100 per month and will drop to a paltry \$700 per month in less than three years) with his after-tax net income. (Resp. Br. at 24.) Mr. Warren carefully refrains from mentioning that he actually has a gross income of in excess of \$40,000 per year. (R. at 562, Tr. at 188.) This amount does not include bonuses, fringe benefits, and stock options, all of which have been of considerable value to Mr. Warren in the past.

In actuality, a fair comparison indicates that Mr. Warren has monthly net income substantially in excess of \$3,300 while Mrs. Warren

has monthly income (at the present time) of less than \$1,100, which will drop to \$700 in the near future. In view of the fact that Mr. Warren was able to obtain a professional education by relying upon his wife's inheritance and is now a lucratively employed professional while his wife is a 49-year-old housewife and mother who has not been gainfully employed in the last quarter century and has no marketable skills whatsoever, the alimony awarded by the trial court is so insufficient as to constitute an abuse of discretion.

As this Court has frequently recognized, it is the necessary function of alimony to provide support for the wife as nearly as possible at the standard of living she enjoyed during the marriage. For example, this Court noted in Fletcher v. Fletcher, 615 P.2d 1218 (Utah 1980), that:

The function of alimony is to provide support for the wife as nearly as possible at the standard of living she enjoyed during the marriage and to prevent the wife from becoming a public charge. Criteria considered in determining a reasonable award of support include the financial conditions and needs of the wife, the ability of the wife to provide a sufficient income for herself, and the ability of the husband to provide support.

615 P.2d at 1223 (footnote citation omitted). In this case, Mr. Warren has the demonstrated ability to provide a lucrative income. On the other hand, Mrs. Warren, who is now almost 50 years of age, has no employable skills and has not been employed in the past quarter century.

Both factors militate strongly in favor of a substantial alimony award. In view of the long duration of the marriage, a long-term alimony award is not only appropriate but essential to an equitable decree.

Similarly, in Gramme v. Gramme, 587 P.2d 144 (Utah 1979), this Court observed that the function of alimony

is to provide support for the wife as nearly as possible at the standard of living she enjoyed during the marriage Important criteria determining a reasonable award for support and maintenance are the financial conditions and needs of the wife, considering her station in life; her ability to produce sufficient income for herself; and the ability of her husband to provide support.

587 P.2d 147 (footnote citation omitted). Likewise, in Wilson v. Wilson, 5 Utah 2d 79, 296 P.2d 977 (1956), this Court, faced with a 15-year marriage, held that:

The court's responsibility is to endeavor to provide a just and equitable adjustment of [the parties'] economic resources so that the parties can reconstruct their lives on a happy and useful basis. In doing so, it is necessary for the court to consider . . . an appraisal of all of the attendant facts and circumstances; the duration of the marriage; the ages of the parties; their social positions and standards of living; their health; considerations relative to children; the money and property they possess and how it was acquired; their capabilities and training and their present and potential incomes.

296 P.2d at 979-80 (footnote citation omitted). Again, each of these factors demands a substantial and long-term award of alimony in view of

the length of this marriage, the employability of Mrs. Warren, and the demonstrated earning potential of Mr. Warren.

A similarly long-term marriage was before this Court in MacDonald v. MacDonald, 120 Utah 573, 236 P.2d 1066 (1951). This Court articulated several factors to be considered in determining alimony:

- (1) The social position and standard of living of each before the marriage
- (2) The respective ages of the parties [at the time of the marriage.]
- (3) What each may have given up for the marriage
- (4) What money or property each brought into the marriage
- (6) The relative ability, training and education of the parties
- (7) The duration of the marriage
- (8) The present income of the parties and the property acquired during the marriage
- (14) Any extraordinary sacrifice, devotion or care which may have been given to the spouse or others
- (15) The present standards of living and needs of each including the cost of living

236 P.2d at 1070. Application of these factors to the present case clearly demonstrates the necessity of a substantial alimony award in favor of Mrs. Warren. At the time of the marriage, Mr. Warren had

little education and little earning power. As a result of Mrs. Warren's financial abilities, he was able to obtain a professional education and dramatically increase his earning potential. It was Mrs. Warren who brought into the marriage over \$200,000 worth of property, which has been relied upon heavily by the parties during the marriage, literally to provide food and shelter. This was a long-term marriage of almost thirty-years' duration. The present earning capabilities of the parties reflect their sacrifices and achievements during the marriage:

Mrs. Warren, who remained at home, raising a family and caring for the home, has no employable skills; whereas Mr. Warren, who financed a professional education through his wife's inheritance, now has a lucrative job and enjoys substantial earning capabilities. The parties' most substantial assets (the home and its furnishings) were acquired with Mrs. Warren's inheritance. It was her inheritance that was used to make a substantial downpayment on the parties' second home, the proceeds from the sale of which were used to purchase their present home. It is Mrs. Warren's inherited antiques and furnishings that have furnished the present home. Equally important, it was Mrs. Warren who supported the household and provided her husband with an education, both of which permitted Mr. Warren to amass a considerable sum in investments, all of which were awarded to him.

The modest and very short-term alimony awarded by the trial court, particularly when taken together with the property distribution effected, constitutes an abuse of discretion and a gross injustice to Mrs. Warren.

POINT II. THE PROPERTY DISTRIBUTION EFFECTED BY THE TRIAL COURT IS INEQUITABLE.

In an attempt to justify an inequitable distribution of the parties' properties, Mr. Warren relies upon grossly inflated values. His testimony, accepted by the trial court, was almost \$20,000 above the highest amounts testified to by his "experts". The values established by these "experts" were, however, not fair market values, but replacement cost values. The replacement cost of an item is not an accurate indicator of its value or worth. When the question is the fairness of the distribution of the parties' properties, it is not relevant how much it would cost either party to replace the property. What is relevant is the actual value of the property; that is to say what is the actual worth of the property received by each of the parties. The trial court abused its discretion in valuing the property awarded to Mrs. Warren on the basis of the replacement cost of those items.

The trial court also abused its discretion in failing to reimburse Mrs. Warren for her tremendous contributions to the assets acquired during the marriage. This Court has, in domestic relations actions, long recognized and adhered to the principle that logic and equity both compel restoration or reimbursement to a spouse for value brought into the marriage, whether from pre-marital sources or inheritances. For example, in Lundgreen v. Lundgreen, 112 Utah 31, 184 P.2d 670 (1947), this Court was faced with the dissolution of a relatively short-term marriage between older persons. The major asset of the parties was a home, which had been purchased shortly after their marriage. The evidence demonstrated that while the husband had purchased the residence, the wife had made significant contributions from her pre-marital funds. The trial court awarded the house exclusively to the husband. In reversing this decision, this Court observed:

The [husband] testified that he paid the original purchase price [for the home], but the testimony of [the wife] shows that some of her funds were used for remodeling the house, and that she did considerable work to aid in the improvement of the property to make the house liveable. . . .

184 P.2d at 672. Based upon these facts, this Court held that the trial court had erred in not properly reimbursing both spouses for their respective contributions to the marital estate:

We think that a more equitable division of the property than made below is suggested by the

record, whereby [the wife] would receive the benefit of the value which she contributed to the realty. The value of the real estate should therefore be determined and [the wife] should be awarded one-half of the market value in excess of the original price; and [the husband] should be permitted either to pay [the wife] one-half of such enhanced value retain the property, or the property should be sold under court order and after reimbursing [the husband] for the amount of the original purchase price which he testified that he paid, the balance, after deducting the costs of sale, should be divided equally.

Id. (emphasis added). In the present action, the trial court wholly overlooked the fact that the parties' equity in their present home was attributable in large measure to the payment against its purchase price of the proceeds from the parties' second home in Texas. The very substantial downpayment on that home had been made solely from Mrs. Warren's inherited funds.

More recently, the same principle was applied by this Court in Searle v. Searle, 522 P.2d 697 (Utah 1974). Before the court in that case was a long-term marriage between relatively young parties. Nevertheless, this Court again articulated and approved the principle that the spouses' respective contributions to the marital estate should be reimbursed before the ultimate division of the property. The trial court in Searle found that the husband had brought to the marriage real and personal property with an aggregate value of approximately \$50,000. The trial court then proceeded to award to the husband "assets

equivalent in value to the \$50,000 that he owned at the time of the marriage." 522 P.2d at 698. On appeal, this Court found that the trial court had acted properly and affirmed the property distribution fashioned by the trial court. 522 P.2d at 700.

In Dubois v. Dubois, 29 Utah 2d 75, 504 P.2d 1380 (1973), this Court again noted that "the source of the assets" was one of the factors to be taken into consideration in effecting a property distribution. In that case, substantially all of the assets had come from gifts from the wife's family; however, it was through the husband's "careful and prudent investment" of those assets that the parties' substantial estate was developed. Even though in that case (directly contrary to the case now before this Court) it was the husband's talents that had caused the assets contributed by the wife to increase dramatically in value, this Court held that it was appropriate to award approximately two-thirds of the marital property to the wife. A fortiori in a case such as the present where the husband's talents have not been used to obtain an increase in the inherited property, the trial court must be particularly careful to restore to the wife her contributions from inherited property. Merely awarding to Mrs. Warren (as the trial court did) the remaining principal of her inheritance does not reimburse her for the vast amounts she has contributed to the marriage. The trial court abused its discretion in refusing to award to Mrs. Warren additional

property to compensate her for her contributions and then compounded that error by utilizing grossly inflated replacement cost values proffered by the husband.

Most recently, this Court has again emphasized the necessity of the reimbursement to a spouse of his or her contribution to the marriage from pre-marital assets. In Jesperson v. Jespersen, 610 P.2d 326 (Utah 1980), this Court first made clear that the major asset of the marriage had been acquired with funds brought to the marriage by the wife. In fashioning its property distribution, the trial court reimbursed to her, on a dollar-for-dollar basis, the funds she had contributed from pre-marital assets. The trial court then distributed the remaining equity in the assets on a percentage basis, with approximately three-quarters of the equity going to the wife. On appeal, this Court affirmed, holding that the trial court was well within its discretion:

It was not unreasonable for the court to permit [the wife] to withdraw from the marital property the equivalent of those assets [she] brought into the marriage. All that may be considered to be marital property acquired through the joint efforts of the parties was therefore the proceeds [sic] from the sale of the St. George home over and above its purchase price [which had been contributed exclusively by the wife].

610 P.2d at 328. Having contributed a substantial amount of money to this marriage from funds received through inheritances from her family,

appellant is entitled to the reimbursement of those funds, together with an equitable share of the appreciation in value of those funds and the other marital assets.

In its adherence to the proposition that a spouse is entitled to the reimbursement of assets contributed to the marriage, this Court is not alone. For example, the Montana Supreme Court recently held in Herron v. Herron, 608 P.2d 97 (Mont. 1980), that the trial court had seriously abused its discretion in failing to distribute additional property to the wife in order to restore to her the substantial contributions to the marriage that she had made from funds received as gifts and inheritances from her wealthy father. The trial court had divided the property equally between the spouses. In reversing this distribution, the Montana Supreme Court noted:

The inequity of the 50/50 property distribution becomes apparent after considering the source of the marital assets of the parties. Almost all of the property accumulated by the Herrons can be traced to gifts or bequests from the [wife's father].

. . . .

Given the fact that most of the marital assets were accumulated via gifts from Mrs. Herron's father, [the husband's] contributions to the marriage from other sources would have to substantially outweigh Mrs. Herron's to render equitable a 50/50 distribution of the couple's

assets. That simply is not the case here. . . .

. . . .

Both of the parties here should share equally in the portion of the value of the gift property attributable to contribution from the marriage and appreciation during the marriage. The Herrons should not, however, share equally in the total value of the property since the marital assets came to the marriage principally as gifts for Mrs. Herron's benefit.

608 P.2d at 100-02 (emphasis added). Similarly, the Montana Supreme Court held in Balsam v. Balsam, 589 P.2d 652 (Mont. 1979), that the district court had properly reimbursed to the husband funds that he had contributed to the marriage from his pre-marital assets. In so holding, the Montana Supreme court approved the property distribution fashioned by the trial court even though it gave to the wife only \$50,000 from the quarter million dollars in assets owned by the parties at the time of their divorce.

In the present case, Mrs. Warren contributed freely to the marriage from her substantial inheritances. The trial court has not only failed to reimburse her for those contributions, it has compounded its error by placing a totally unrealistic value on the property distributed to Mrs. Warren. The trial court blindly accepted self-serving values offered by the husband which were both improperly

based upon replacement cost and greatly in excess even of the values speculatively offered by his own "experts".

CONCLUSION

During the tenure of this marriage, which endured for more than a quarter century, Mrs. Warren made it financially possible for her husband to obtain a professional education. Having provided a fine education for her husband, Mrs. Warren remained at home, where she dutifully raised their family and kept house. Although she had financed a professional education for her husband, she did not have the opportunity to gain any employable skills herself. Now, almost 50 years of age and with a chronic health problem of her hands, she has been compelled by the small and very short-term alimony award of the trial court to do that which she has never done before--to seek employment in order to provide for her support, or to dissipate the legacy which would have provided for her retirement.

Such a result is as unfair and inequitable as it is unrealistic and unwarranted. This Court has consistently adhered to the just proposition that it is the function of alimony to support a woman at that standard of living to which she has become accustomed during marriage. Not only has Mrs. Warren not been forced to seek employment during her marriage, she is now at a stage of life and health where it

is unrealistic for her to do so. By failing to recognize and deal with these realities, the district court has abused its discretion and misapplied Utah law.

During her marriage, Mrs. Warren not only financed an education for her husband, but she generously contributed from her inheritances from the family finances. It was through her substantial contributions of capital that the parties' home was acquired and financed and many of the daily expenses were met. The district court has failed not only to recognize and reimburse adequately these contributions, it has compounded this error through the blind acceptance of grossly overstated values proposed by the husband for the property actually distributed to Mrs. Warren. The husband's valuation of these items is substantially in excess even of the amounts speculatively testified to by the so-called "experts" who appeared at trial. More fundamentally, even these values were based upon replacement cost of the items concerned; no effort was made by any witness--except Mrs. Warren herself--to evaluate the property on the basis of its actual present market value. In so doing, the trial court has misapplied the law and abused its discretion resulting in a property distribution grossly unfair to Mrs. Warren.

This case must be remanded to the district court so that the support and property distribution aspects of this divorce action may be

properly considered and a decree be entered in accordance with the principles so frequently articulated by this Court.

RESEPECTFULLY SUBMITTED this 13 day of March, 1982.

DART & STEGALL

By *Paul H. Proctor*
Paul H. Proctor

CERTIFICATE OF SERVICE

I certify that on this ____ day of March, 1982, I placed with
The Runner Service two copies of the foregoing Reply Brief to be
delivered to Nicolaas de Jonge, Suite 14, Intrade Building, 1399 South
700 East, Salt Lake City, Utah 48105.
