

2000

Linda Lou Coleman v. Kenneth Douglas Coleman : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LINDA LOU COLEMAN,

REPLY BRIEF

Petitioner/Appellant,

-vs-

Appellate Case No. 2000844-CA

KENNETH DOUGLAS COLEMAN,

Respondent/Appellee.

REPLY BRIEF OF APPELLANT

Appeal from the judgment and Amended Decree of Divorce entered
in the Fourth Judicial District Court of Utah County,
State of Utah, on or about August 30, 2000, the Honorable
Gary D. Stott, District Court Judge presiding.

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IN THE UTAH COURT OF APPEALS

LINDA LOU COLEMAN,

REPLY BRIEF

Petitioner/Appellant,

-vs-

Case No. 2000844-CA

Priority No. 15

KENNETH DOUGLAS COLEMAN,

Respondent/Appellee.

REPLY BRIEF OF APPELLANT

PETITIONER/APPELLANT (hereinafter "Petitioner" or "wife") submits the following as her Reply to the Responsive Brief of the Appellee (hereinafter "Respondent" or "husband") in the above matter:

JURISDICTIONAL AUTHORITY

Jurisdiction to review the final judgment and order herein, which is the Amended Decree of Divorce, is vested in the Utah Court of Appeals pursuant to the Rules of the Utah Court of Appeals, Rules 3 and 4, and Utah Code Annotated, §78-2a-3(2)(h).

NATURE OF THE PROCEEDING

The matter below is a divorce proceeding, and the order appealed from is an Amended Decree of Divorce.

STATEMENT OF THE ISSUES

A. Does the lack of a trial transcript prevent the issues at bar from being considered by the Court of Appeals?

B Are the trial court's findings of fact sufficient to support the trial court's conclusions regarding the amount and duration of alimony awarded to the Petitioner?

C Can this Court determine from the record of trial the basis of the trial court's alimony award?

DETERMINATIVE PROVISIONS, CASES, STATUTES AND RULES

There is no case law nor statutory authority believed by the Petitioner to be wholly dispositive of the issues raised on appeal. However, Utah Code Annotated §30-3-5 is relevant to this appeal.

STANDARD OF REVIEW

In *Griffith v. Griffith*, 985 P 2d 255 (Utah 1999), the Utah Supreme Court stated clearly that, if the Court of Appeals determines that the findings of fact are insufficient to support the legal conclusions of the trial court, the Court of Appeals should remand the matter for further proceedings. *Id.* "In formulating alimony awards, the trial court has broad discretion, and its decisions will not be overturned absent an abuse of discretion or manifest injustice." *Watson v. Watson*, 837 P 2d 1, 3 (Utah App 1992), (citing *Schindler v. Schindler*, 776 P 2d 84, 90 (Utah App 1989)). The courts will not disturb a trial court's alimony award so long as the trial court exercised its discretion within the appropriate legal standards, and "supported its decision with adequate findings and conclusions." *Naranjo v. Naranjo*, 751 P 2d 1144, 1147 (Utah App 1988).

STATEMENT OF THE CASE

This appeal is from the final judgment and Amended Decree of Divorce entered in the Fourth Judicial District Court in and for Utah County, Provo Division, State of Utah, the

Honorable Gary D. Stott, District Court Judge presiding, who, among other things, entered an order regarding alimony and attorney's fees.

The Amended Decree of Divorce from which this appeal arises was entered on or about August 30, 2000. A notice of appeal was timely filed on behalf of the Petitioner on or about September 20, 2000. The Petitioner filed for divorce in the trial court. Responsive pleadings were filed and the matter came before the lower court for trial on April 5, 2000. The court took the matter under advisement and issued its Memorandum Decision on April 10, 2000. The Findings of Fact and Conclusions of Law, as well as the Amended Decree of Divorce, were based on the Memorandum Decision and were entered on August 30, 2000. It is from the Amended Decree of Divorce that the Petitioner has brought her appeal.

There are no motions pending in the trial court pursuant to Rule 50(a) or 50(b), 52(b), 54(b), or 59, of the *Utah Rules of Civil Procedure*.

STATEMENT OF THE FACTS

The Petitioner has already stated the facts in her initial appellate brief to this Court. For the sake of brevity, those facts will not be restated here, but rather will be referred to in the Petitioner's brief as necessary.

SUMMARY OF THE ARGUMENT

1. The trial court abused its discretion in failing to state with specificity the basis of its decision in making an award of alimony to the Petitioner in the above-entitled case. The trial court mentions the factors necessary for determining alimony awards pursuant to *Utah Code Annotated* §30-3-5 (1988), however, the trial court failed to apply the requirements of that

statutory regime to the facts of the case at bar. The Respondent would have this Court believe that an absence of a trial transcript necessarily means that the presumption should enter that the findings of the trial court were supported by evidence in the record. However, the Respondent fails to focus on the adequacy of the findings, which is the central issue on appeal. It may well be that the evidence presented supports, or does not support, the determination of the trial judge in this matter. However, absent findings that clearly state a basis for an award of alimony, neither the Petitioner nor this Court can determine what issues of clear error may have been committed by the trial court. In short, it is the very nature of the Petitioner's claim on appeal that the Respondent would urge this Court to use as a basis for denying relief, that being a lack of clarity and specificity on the part of the trial court in fashioning the award of alimony granted the Petitioner.

The Respondent next urges this Court to consider the fact that the Petitioner's own counsel prepared the Findings of Fact and Conclusions of Law which was the basis of the Amended Decree of Divorce entered in this matter as being noteworthy. Respondent implies that the Petitioner's claim should be viewed negatively because of this fact. This argument has no merit. The factual identity of the party ordered by the Court to prepare the final documents reflecting the decision of the Court as stated in the Court's Memorandum Decision is a function of practicality, not one of merit based fault. The Petitioner's counsel had to prepare the pleadings as a matter of course, not as a matter of determining the adequacy of the trial court's actions. In fact, had Petitioner's counsel tried to "clarify" or "clean up" the trial court's rulings, it would have been grossly unethical. Further, given the fact that the Petitioner's counsel had only the

Memorandum Decision provided by Judge Gary D Stott to work with in fashioning the Findings of Fact and Conclusions of Law, it becomes clear why they so closely mirror the inadequate language found in that Memorandum Decision Judge Stott gave no insight as to the basis of his alimony award anywhere else but in that Memorandum Decision No information was given during the trial that would even remotely suggest what evidence presented by the parties was considered by the Court The Judge merely indicated at the close of evidence that he would carefully consider all the evidence presented before him and would do his best to make a fair decision in this matter, which would be delivered in written format to the parties' respective counsel at a later time

ARGUMENT

POINT 1.

THE LACK OF TRIAL TRANSCRIPT DOES NOT PREVENT THE COURT OF APPEALS FROM MAKING A DETERMINATION AS TO THE ADEQUACY OF FINDINGS AND NEED FOR REMAND.

A The Respondent relies primarily on *Sampson v. Richins*, 770 P 2d 998 (Utah Ct App 1989) in making his argument that the Court of Appeals must find that the trial court's findings and decision were supported by adequate evidence from the record (Brief of Appellee, pages 5-6) However, in doing so the Respondent has shown a misunderstanding of the Petitioner's position in this matter It is at the heart of the Petitioner's claim on appeal that the trial court failed to state specifically and sufficiently what the trial court's basis was for entering the ruling it made on the issue of alimony Thus, any argument in regards to factual disputes over the findings is useless until such time as sufficient findings on all relevant issues can be examined

Only then will a transcript of the trial court hearing will be needed. Until then, arguing over the facts and evidence submitted at trial is pointless as we cannot determine yet what facts the trial court found relevant.

The Court in *Sampson* stated specifically that "Where the record before us is incomplete, we are unable to review the evidence as a whole and must therefore presume that the verdict was supported by admissible and competent evidence." *Id.* at 1002 citing *Smith v. Vuicich*, 699 P 2d 763, 765 (Utah 1985). Accord *Bevan v. J.H. Constr. Co.*, 669 P 2d 442, 443 (Utah 1983).

However, *Sampson* went on further to state that "the findings must themselves be sufficient to provide a sound foundation for the judgment, and conversely 'any proper judgment can only be entered in accordance with the findings.'" *Forbush v. Forbush*, 578 P 2d 518, 519 (Utah 1978). Therefore, our review is strictly limited to whether the trial court's findings of fact support its conclusions of law and judgment." *Id.*

In ignoring the above-relevant portion of *Sampson*, the Respondent also failed to discuss other relevant cases on point, such as *Parks v. Zions First Nat'l Bank*, 673 P 2d 590 (Utah 1983), which held that Rule 52(a) of the Utah Rules of Civil Procedure requires that the trial court's "findings of fact must clearly indicate the 'mind of the court,' and must resolve all issues of material fact necessary to justify the conclusions of law and judgment entered thereon. Furthermore, failure of a trial court to enter adequate findings requires the judgment to be vacated." *Id.* at 601 citing *State ex rel. K.D.S.*, 578 P 2d 9, 11 (Utah 1978), *Romrell v. Zions First National Bank*, 611 P 2d 392, 394-95 (Utah, 1980), *Boyer Company v. Lignell*, 567 P 2d 1112, 1113 (Utah, 1977), and *Kinkella v. Baugh*, 660 P 2d 233, 236 (Utah, 1983).

It is clear from the discussion given in the initial brief of Appellant, and further discussion to be reviewed *infra*, that the trial court's findings in this matter do not "clearly indicate the mind of the court." Moreover, the reader has little ability to agree or disagree with the findings of the trial court in this matter as the findings are stated more from a standpoint of being conclusory statements as opposed to well articulated findings of fact. Of particular note in this regard would be what, if any, basis the trial court had for concluding that the Petitioner would be sufficiently able to provide for herself an adequate income equal to the standard of living enjoyed by the parties during the term of the marriage after the year 2005. (Memorandum Decision ¶ 4.) The trial court takes time to note the fact that length of marriage is one of the factors that should be considered in making an award of alimony (Memorandum Decision ¶ 4), but fails to describe how the court factored that requirement into making its decision regarding the alimony award, as stated above. The *Parks* decision discussed above states further as follows:

"In addition to the rules set forth above regarding the sufficiency of the trial court's findings of fact, this Court has observed:

The importance of complete, accurate and consistent findings of fact in a case tried by a judge is essential to the resolution of dispute under the proper rule of law. To that end the findings should be sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached."

Id citing Rucker v. Dalton, 598 P.2d 1336, 1338 (Utah 1979).

POINT 2.

THE WIFE CAN CHALLENGE THE TRIAL COURT'S LACK OF FINDINGS, EVEN WHERE HER COUNSEL PREPARED THE FINDINGS, SO LONG AS THE TRIAL COURT FAILED TO GIVE ADEQUATE INFORMATION WITH WHICH TO PREPARE THE FINDINGS .

The Respondent takes *Jones v. Jones*, 700 P.2d 1072 (Utah 1985) out of context in an attempt to discredit the Petitioner in this case. In *Jones*, the trial court failed to give insight into the values of some disputed property items, the value of which was later raised on appeal. There, the wife had an opportunity to assign a value in the findings based upon the wife's own estimation of the value, and yet failed to state what those values were in her findings which were prepared by her counsel. *Id* at 1073.

Jones is easily distinguished from the case at bar in that the Petitioner here has no way of divining from the conclusory statements made in the trial court's Memorandum Decision what formula for calculation the trial court used in arriving at the stated alimony award. Assigning value to one's marital property is within the purview of a party to estimate in making findings. The thought processes by which a judge makes an award of alimony is not. This is especially true considering that no insight was given by the court as to what weight the court gave the parties' relative lists of expenses as stated in their exhibits, what the court considered the parties' standards of living to be, or what the court considered the reasonable needs and ability to pay might be of both parties to this action. All of these factors are to be considered and stated with specificity for an award of alimony to be upheld. "We have held that the omission of particular findings in alimony awards is an abuse of discretion." *Burt v. Burt*, 799 P.2d 1167, 1170 (Utah App. 1990) (*citing Ruhsam v. Ruhsam*, 742 P.2d 123, 126 (Utah App 1987)). Further, "The payor spouse's reasonable needs are a necessary step in determining the ability to provide support." *Breinholt v. Breinholt*, 905 P.2d 877, 880 (Utah App. 1995) (*citing Willey v. Willey* 866 P.2d 547, 551 (Utah App. 1993)). "The trial court is required to enter sufficient findings on

the three enumerated [*Jones*] factors, and we will reverse if it fails to do so unless the relevant facts are 'clear, uncontroverted, and capable of supporting only a finding in favor of judgement.'" *Breinholt*, 905 P.2d at 880 (citing *Howell v. Howell*, 806 P.2d 1209, 1213 (Utah App. 1991), *cert. denied*, 817 P.2d 327 (Utah 1991)). As was shown earlier, the court in this matter stated which factors the court was to consider, but then gave no insight as to how the court considered these factors. No clearer example can be shown than the lack of insight given to the trial court's consideration of the duration for which the trial court awarded the Petitioner alimony. The trial court stated that alimony should terminate after 2005, (Memorandum Decision ¶ 4 page 4), and yet the trial court gives no basis for why alimony should terminate after the year 2005. Absent adequate findings, the Petitioner can only assume that no basis exists and the determination was arbitrary and capricious.

However, the Respondent would have the court hold that, because the Petitioner failed to invent reasons on her own, this court should penalize her for asking for clarification and review of the cryptic decision given to her by the trial court. The Findings of Fact and Conclusions of Law in this matter are only as vague and lacking as the source from which they flowed. Were this court to rule that the Petitioner is barred from seeking clarification and review of the decision of the trial court merely because her counsel prepared the Findings of Fact and Conclusions of Law that represent the trial court's flawed decision, this would have a significant "chilling effect" on the willingness of any party ever to prepare Findings of Fact and Conclusions of Law in any case for fear that by doing so they may be waiving their right to appeal some or all of the issues decided in that action.

POINT 3.

THE COURT OF APPEALS CANNOT ASSUME WHAT BASIS THE TRIAL COURT USED TO DETERMINE ITS AWARD OF ALIMONY TO THE WIFE, ABSENT A CLEAR INDICATION FROM THE TRIAL COURT.

The Respondent spends a great deal of time surmising on pages 8-12 of the Brief of Appellee what the Respondent assumes might be the basis for the trial court's determination of the award of alimony for the Petitioner in this matter. However, the Respondent's calculations are the stuff of fantasy. The Respondent discusses on page 10 of his Brief what the Respondent believes to be the reasonable basis for calculating expenses of the Petitioner and Respondent were at the time of trial, making deductions for his various debts and child support and alimony arrearage obligations, and arrives at figures that the Respondent hopes are in line with the thinking of the trial court in making the award of alimony. However, this entire line of reasoning is speculative because the trial court did not articulate this method of calculation anywhere in the Memorandum Decision, which was, as stated earlier, the only articulated information that the trial court gave on the issue of alimony. During the actual hearing in question, the Judge declined to comment on the sufficiency of any piece of evidence relating to the issue of alimony during trial, except to allow the evidence to be admitted into evidence. All comments regarding the evidence submitted in this matter were reserved for the Memorandum Decision delivered by the Judge on April 10, 2000.

The Respondent acknowledges that the trial court failed to explain why the court's award of alimony terminates in 2005. (Brief of Appellee page 11). However, the Respondent contends

that this is not a fatal flaw, as this Court can still affirm judgment of the trial court if all the relevant facts support a finding in favor of judgment. Furthermore, Respondent's urges this Court to assume the wife has admitted to the sufficiency of the findings of the trial court due to her failure to provide a transcript. As discussed above, the reasoning of the Respondent in this regard is flawed in that it requires this Court to ferret out from the exhibits of the trial court and the supposition of the Respondent the reasoning supporting the trial court's decisions. In short, the Respondent is asking this Court to fully support and explain and support the decision of the trial court instead of enforcing the policy that it is properly the job of the trial court to do its' own Findings of Fact and Conclusions of Law. Findings of Fact should "...clearly indicate the 'mind of the court.'" *Parks v. Zions First Nat'l Bank*, 673 P.2d 590 (Utah 1983), as discussed earlier.

The Respondent cites to *Childs v. Childs*, 967 P.2d 942, 947 (Utah App. 1998), in stating that no requirement exists for the court to make an award of alimony that lasts forever, or even the length of the marriage (Brief of Appellee page 12). However, the Respondent failed to address the critical distinction the Petitioner made in her initial brief between that case and the case at bar. To briefly restate the distinction, the court in *Childs* found that limiting the award to the recipient spouse to less than the length of the parties' marriage appropriate "...considering the duration of the marriage [approximately 6 years], [recipient's] excellent health, youth, and ability to improve her capacity to meet her own needs, and her fault in engaging in an extramarital affair." *Id.* The case at bar reflects that the Petitioner was involved in a long term marriage of 26 years, is 52 years old, and was found to have no marketable jobs skills other than those necessary to obtain a minimum wage job.

Further, the Respondent's Brief chooses to omit from his discussion the mandatory authority on the subject of alimony awards as they relate to the length of marriage found in *Gardner v. Gardner*, 748 P.2d 1076 (Utah 1988), which held that alimony awards in marriages of long duration should, to the extent possible, equalize the parties' standard of living as close as possible to that enjoyed during the marriage. *Id* at 1081.

Finally, the Respondent admits in his own brief that the trial court did not articulate specific findings in making its alimony award when the Respondent suggests that on remand, "[t]he trial court may be able to enter specific findings describing how it reached its decision." (Brief of Appellee page 12).

POINT 4. THE PETITIONER IS ENTITLED TO ATTORNEY'S FEES ON APPEAL

The Petitioner holds to her original argument for attorney's fees on appeal as stated in her Brief of Appellant found on pages 24-26. "Ordinarily, when fees in a divorce have been awarded to the party who then prevails on appeal, fees will also be awarded to that party on appeal." *Watson v. Watson*, 837 P.2d 1, 8 (Utah App. 1992) (quoting *Bell v. Bell*, 810 P.2d 489, 494 (Utah App. 1991) (quoting *Burt*, 799 P.2d at 1171 (Utah App. 1990)). See also *Munns v. Munns*, 790 P.2d 116, 122 (Utah App. 1990) (citing *Rasband v. Rasband*, 752 P.2d 1331, 1336 (Utah App. 1988).

Respondent argues that since all the Petitioner is looking for on appeal is a remand, she should not be entitled to fees unless she prevails on remand. However, if the Petitioner seeks remand from appeal, then a remand should be considered a prevailing circumstance. Thus her fees should be awarded. Further, in the event that the remand is with instructions consistent with an award that would allow the Petitioner to prevail, the court should grant fees now.

CONCLUSION

The decision in this case should be remanded for further hearing with specific instructions in regard to findings and the determination of the Petitioner's alimony award. The allegations of the Respondent that the Petitioner's arguments are fatally flawed by her failure to provide a written transcript of the trial is incorrect, as the thrust of Petitioner's claims is that the findings are not specifically articulated enough to give adequate insight or support for the trial court's decision. The Respondent uses circular reasoning to describe why the Petitioner should be penalized for not inventing her own factual support for an award of alimony that the Petitioner does not believe is valid, merely because the Petitioner's counsel was instructed to prepare the Findings of Fact and Conclusions of Law, and ignores the fact that the Petitioner's counsel was left inadequate resources to make proper findings because of the incomplete Memorandum Decision of the trial court.

The Respondent's arguments as to the adequacy of the alimony award determination are pure speculation. The Respondent's own brief acknowledges the lack of specificity in the trial court's decision regarding the lack of guidance as to why the trial court arbitrarily limited the payment of alimony by the Respondent to the year 2005, and arbitrarily reduced the amount after December 2000.

DATED this 29 day of MAY, 2001

CORPORON & WILLIAMS, P C



MARY C CORPORON
JARROD H JENNINGS

Attorneys for Petitioner/ Appellant


CERTIFICATE OF MAILING

I HEREBY CERTIFY that I am employed in the offices of Corporon & Williams, attorneys for the Petitioner/Appellant herein, and that I caused the foregoing REPLY BRIEF to be served upon Respondent/Appellee, by mailing two true and correct copies of the same in an envelope, postage pre-paid, and addressed to:

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