

1982

Jan L. Prestwich v. Ramon G. Prestwich : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

JAN L. PRESTWICH, :
Plaintiff-Appellant, :
vs. :
RAMON G. PRESTWICH, : Case No. 18043
Defendant-Respondent. :

BRIEF OF APPELLANT

Appeal from Judgment of the Fifth Judicial District
Court of Iron County
Honorable Robert F. Owens

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Defendant-Respondent. :

BRIEF OF APPELLANT

The appellant appeals from the Decree of Divorce of the Fifth District Court of Iron County, the Honorable Robert F. Owens, District Judge Pro Tem, and the decision denying the appellant a new trial after non-jury trial on appellant's complaint and respondent's counterclaim.

DISPOSITION IN THE LOWER COURT

The lower Court granted a divorce to each party, one from the other, and judgment was entered on September 21, 1981. Plaintiff's motion for new trial was heard on August 13, 1981, and denied.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the order denying a new trial, and asks this Court remand the case to the District

Court for a reconsideration of the amount of child support.

STATEMENT OF FACTS

There are four (4) children born as issue of the marriage. The appellant was awarded custody of the three (3) minor children but both parties were found to be fit and proper parents. The Court concluded that each party had an earning capacity between \$800 and \$900 per month (Court record 92). The Court implicitly found that each party has an equal obligation of support for the minor children. The respondent was ordered to pay the monthly sum of \$75 to the appellant, for the support of one minor child. The Court felt that since one child was living with the respondent, this "offset" his obligation of support as to one of the minor children living with the appellant. The Court refused to grant any further amounts because the oldest minor child is residing with the respondent. The appellant has two (2) minor children residing with her, and has the burden of providing for their sustenance and well being, but receives only \$75 per month for child support (Court record 92).

In the property settlement, respondent was awarded marital estate property with a net value determined by the Court of \$104,700.00. Appellant was awarded marital estate property valued at \$84,537.00. With respect to non-marital estate property, the Court did not place a value on appellant's separate property. Respondent's non-marital estate property

award was valued at \$383,000.00 (Court record 92).

ARGUMENT

I. THE COURT ERRED IN AWARDING ONLY SEVENTY-FIVE DOLLARS PER MONTH TOTAL CHILD SUPPORT TO APPELLANT.

A. THE COURT FAILED TO CONSIDER THE RELATIVE WEALTH OF THE PARTIES.

It is submitted that the lower Court award of \$75 child support was an abuse of discretion because the award was clearly inadequate under the evidence. The Court made its determination without consideration of all the relevant factors. The Uniform Civil Liability for Support Act, Chapter 45 of Title 78, Utah Code Annotated 1953 as amended, sets forth the essential factors in determining the proper amount of support in each circumstance. Section 78-45-7(b) indicates that the "relative wealth" of the parties must be considered in conjunction with a comparison of incomes of the parties.

However the Court refused to consider the respondent's substantial wealth in the form of real estate in making its determination of the proper amount of child support. The Court indicates:

"Well, earning capacity, as I understand it, means the capacity of the individual to generate money from his own skills and talent and doesn't necessarily include the return from property that he may own, although that is, as you point out, something the Court

should consider. This finding does relate primarily to earning capacity from the defendant's own ability, sometimes people are wiped out as far as property is concerned and this would be the bedrock figure that I found the defendant could earn based on the last several years of history now."

(Transcript 104 p. 10-11)

The problem is, of course, with farm land, that even though there may be a large paper net worth, translating that into cash flow this year is sometimes quite another problem. Again, that was based on findings of the actual income the last several years. It's true that the defendant could undoubtedly sell part of this land and double his income, easily, in a particular year. I don't think that the child support award should be based on that assumption".

(Transcript 104 p. 18)

Thus the Court's yardstick of "earning capacity" does not take into account the respondent's substantial real estate separate property, and is contrary to the intent, purpose and language of the Uniform Civil Liability for Support Act. Earning capacity was the only factor and was the foundation for the Court's determination of the amount of child support respondent must pay.

"THE COURT: No. I'm considering that each child costs \$150 to support. I have found, whether erroneously or not, that both parties, at this time, at least, have substantially equivalent earning capacity and therefore, that each party owes half of the support."

(Transcript 106, p. 24)

Since the basis of the child support award was a comparison of the incomes of the parties, the disproportionate assets of the parties did not appear in the calculation and the decision on child support. Therefore, the conclusion of the Court is erroneous, and is contrary to the statutes of the State of

Utah.

Moreover, the evidence demonstrates that respondent has substantial assets from which to draw in order to pay a reasonable amount as child support. The legislature has indicated in the Uniform Civil Liability for Support Act, cited previously, that such assets should be drawn on to meet the needs of children. The relative wealth of the respondent should be drawn upon for the subsistence of the two minor children residing with appellant. Idaho statutes specifically subject separate marital property to child support obligations. Voss v. Voss, 91 Idaho 17, 415 P. 2d 303, 305 (1966). Utah's Uniform Civil Liability for Support Act assures that assets can, and should be drawn upon for the support of children.

B. THE AWARD IS UNREASONABLE AND INADEQUATE TO MEET THE NEEDS OF TWO MINOR CHILDREN.

An independent foundation for error, is the inadequacy of the child support award, and its failure to meet the actual needs of the children. The entire purpose of such an award is for the maintenance of the minor children. The Courts have always held need to be a key factor (Anderson v. Anderson, 110 U. 300, 172 P2d 132 (1946)). The Uniform Civil Liability for Support Act echoes this conclusion (see 78-45-7(e)).

In this case, the Court "offset" the respondent's support obligation because the older minor child resides in the respondent's home. This results in the award of only \$75 child support even though two minor children reside with the appellant (Court record 92). Under current conditions \$75 a month is simply not enough where the appellant nets only \$500 a month (Transcript 103, P. 37-38 and Court record 107, Plaintiff's Exhibit 1) and two children must be supported out of this amount. In Peterson v. Peterson, 112 U. 542, 189 P.2d 961 (1948) the Utah Supreme Court relied on the relative smallness of the award given current economic conditions in questioning the reasonableness of the lower Court's decision. This is a case where the amount of the award is an abuse of discretion.

II. THE COURT ERRED IN FINDING THE PARTIES HAD EQUAL EARNING CAPACITIES.

The award of child support is based on the conclusion that both appellant and respondent have equal incomes. The finding that appellant had an earning capacity between \$800 and \$900 per month is not supported by the evidence. Plaintiff's Exhibit 1 shows a net monthly income of \$500 after taxes were paid by the business (Court record 107). The \$500 figure remained uncontradicted after testimony (Transcript 103, p. 37-38). The monthly draw of \$500 from the


dry cleaning business is the best indication of the amount of money actually available for appellant's use. The financial declaration represents the best and most current financial information about appellant. Respondent's use of adjusted gross income figures (see Court record 107, Defendant's Exhibits 3 and 4 and Defendant's Financial Declaration P-2) was contradicted in defendant's testimony (Transcript 103 P. 75-76). Moreover, plaintiff's witness, Kenneth Darby, C.P.A. cast significant doubt on the accuracy of income tax figures as an illustration of actual income (Transcript 103, p. 110-117).

CONCLUSION

The Uniform Civil Liability for Support Act requires an avaluation of the relative wealth of the parties. The Court erred in awarding \$75 per month child support by discounting large amounts of productive real estate owned by respondent. While it is true that most of this property derives from respondent's family, the issue is not alimony or property distribution. The children are the real parties in interest here, and need the fruits of that property for their support. As a practical matter, the \$75 award is spent for two so that it amounts to \$37.50 per month per child. Such an award is an abuse of discretion because it cannot meet the actual needs of the children. In addition the Court erred in finding that the earning capacity of the

parties was equal. To the extent the child support award is based on this finding, it is also in error. The decision of the lower Court should be reversed and the case remanded for a new trial.

RESPECTFULLY submitted this 11 day of February, 1982.


EARL S. SPAFFORD
Attorney for Appellant

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Brief of Appellant was served upon the Respondent by mailing two copies to his attorney of record, Willard R. Bishop in the U.S. mail, postage prepaid, and addressed as follows this _____ day of February, 1982.

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