1982

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

Utah Supreme Court

Earl S. Spafford; Spafford, Dibb, Duffin & Jensen; Michael W. Park; Attorneys for Appellant;
Willard R. Bishop; Attorney for Respondent;

IN THE SUPREME COURT

OF THE STATE OF UTAH

JAN L. PRESTWICH, :

Plaintiff-Appellant, :

vs. :

RAMON G. PRESTWICH, : Case No. 18043

Defendant-Respondent. :

REPLY BRIEF OF APPELLANT

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

Earl S. Spafford
Oliver K. Myers
SPAFFORD, DIBB, DUFFIN & JENSEN
311 South State, Suite 380
Salt Lake City, Utah 84111
Telephone: (801) 531-8020

Michael W. Park
PARK & BRAITHWAITE
110 North Main Street
Cedar City, Utah 84720

Attorneys for Appellant

Willard R. Bishop
BISHOP & McKAY
172 North Main Street
Cedear City, Utah 84720

Attorney for Respondent

IN THE SUPREME COURT

OF THE STATE OF UTAH

JAN L. PRESTWICH, :

Plaintiff-Appellant, :

vs. :

RAMON G. PRESTWICH, : Case No. 18043

Defendant-Respondent. :

REPLY BRIEF OF APPELLANT

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

Earl S. Spafford
Oliver K. Myers
SPAFFORD, DIBB, DUFFIN & JENSEN
311 South State, Suite 380
Salt Lake City, Utah 84111
Telephone: (801) 531-8020

Michael W. Park
PARK & BRAITHWAITE
110 North Main Street
Cedar City, Utah 84720

Attorneys for Appellant

Willard R. Bishop
BISHOP & McKAY
172 North Main Street
Cedear City, Utah 84720

Attorney for Respondent

TABLE OF CONTENTS

TABLE OF CASES

STATUTES AND OTHER AUTHORITIES

IN THE SUPREME COURT

OF THE STATE OF UTAH

JAN L. PRESTWICH, :

Plaintiff-Appellant, :

vs. :

RAMON G. PRESTWICH, : Case No. 18043

Defendant-Respondent. :

REPLY BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

This is Appellant's reply brief in response to respondent's brief in a divorce case seeking reversal of the lower Court judgment and remand for reconsideration of the amount of child support.

ARGUMENT

I. THE CHILD SUPPORT AWARD IS INADEQUATE TO PROVIDE FOR THE CHILDREN'S MAINTENANCE AND AN ABUSE OF DISCRETION IN VIEW OF RESPONDENT'S SUBSTANTIAL ASSETS.

A. THE FAILURE TO TAKE INTO ACCOUNT RESPONDENT'S SEPARATE PROPERTY IS ERROR.

The respondent persists in focusing on the equities between the two spouses. Of course each party has a responsibility to provide for the children of the marriage.

Certainly separate property is excluded from consideration in division of marital property between spouses. But in the analysis determining child support, to quote respondent's brief:

> (T)he trial court should consider: "The total financial resources of both parents, including their monetary obligations, income and net worth, should be examined."
>
> Respondent's brief at 11 ,12 (Springola v. Springola, 580 P.2d 958 (N.M. 1978)

As demonstrated in appellant's brief, the judge considered earning capacity alone. The trial court did not take into account the total assets of the respondent. The respondent points to appellant's separate property, the "Fabric Care Center", but Exhibit D-4, which is the balance sheet for 1979, indicates the total assets of the business amount of $50,178.33, without taking into account liabilities, and appellant holds only a half interest. Such represents one-fifteenth the value of respondent's separate property land holdings as found by the trial court.

The application of separate property for the payment of child support is a well recognized concept in domestic law. Appellate courts frequently take into account real property assets in determining whether a child support award was adequate according to 1 ALR3d 346. American Juris prudence 2nd indicates that:

> "The size of a father's annual income is not the full test of his ability to pay for the suppport of a

> child; such ability to pay may also be measured by the size of his estate and net worth. The court may consider what the father is capable of earning if he attempts in good faith to secure proper employment, where he is temporarily unemployed or is engaged in work from which he does not receive the amount he is capable of earning."
>
> 21 Am Jur 2d 952

Therefore refusal to consider anything beyond earning capacity would be error and an abuse of discretion. In Dworkis v. Dworkis, 111 So.2d 70 (Fla. App. 1959), the court ruled that the size of a husband's annual income was not the full test of his ability to pay child suport and disapproved of the trial court's level of child support. The companion Florida case of Luedke v. Behringer, 143 So.2d 218 (Fla. App. 1962) is similar to the factual situation in this case. The appellate court observed that although the husband's current income was relatively small, his net worth was substantial. In Luedke, the court held that $125 per month for a child's support was an abuse of discretion in spite of the smallness of the husband's income. Moreover, it is instructive to consider that $125 per month was an abuse of discretion under the economic conditions of 1962.

Eaves v. Eaves, 286 S.W.2d 371 (Ky. 1956) is another case quite similar to the facts of this case. In Eaves, the husband owned a 650 acre farm and the reviewing court focused most of its attention to his assets in considering

the adequacy of the child support awarded. In spite of the fact that the wife had based her appeal on the refusal to award alimony, the Kentucky Supreme Court raised child support from $80 to $150 per month for two children on the husband's imcome of $3,000 per year.

In the current case of In Re Marriage of Brophy, 421 N.E.2d 1308 (Ill. App. 1981), an appellate court in Illinois declares:

> "It is an abuse of discretion to consider only the father's income when determing the issue of child support and to ignore the statutory language specifying that the circumstances of the parties should be considered in determining what arrangements would be reasonable and proper".

Louisiana agrees and reverses for failure to consider the father's assets as well as his income in determining child support in Mittlebronn v. Mittlebronn, 337 So.2d 608 (La. App. 1976). The policy of the State of California coincides with this concept that child support obligations extend to earning and separate property In Re the Marriage of Brown, 160 Cal. Reptr. 524, 99 Cal. App. 3d 702 (1979). The Vermont Supreme Court held that a court must look to the assets of the husband in child support matters even though he was currently unemployed, Colm v. Colm, 407 A.2d 184 (Ver. 1979). Clearly it is proper to take into consideration separate farm property to provide reasonable child support, and many states find reversible error in a

failure to take such into account. Do Utah statutes neglect to consider the total assets of parents in determining child support? Section 78-45-7(b) mandates consideration of the "relative wealth" of the parties in child support matters. Respondent suggests that this Act does not apply,but the Uniform Civil Liability for Support Act relates to duties of family support and the Act applies to "every man", Section 78-45-3, Utah Code Annotated (1953 as amended).

From the State of Texas comes the following statement of the law:

> "The duty to support is not limited to parents ability to pay from current earnings, but extends to his or her financial ability to pay from any and all sources that might be available."
> Hazelwood v. Jinkins, 580 S.W.2d 33, 37 (Tex. App. 1979)

Furthermore, the Texas Supreme Court in dealing with a situation of separate farming property indicates that while a divorce court may not divest title for the purpose of providing child support, it must take such property into account in determining the level of appropriate child support. In Eggemeyer v. Eggemeyer, 544 3.W.2d 137, 138 (Tex 1977) the Court states:

> "It has long been the law that upon divorce the rents, revenues, and income from a spouse's separate property may be set aside for the support of the minor children."

It is an abuse of discretion to eliminate a respondent's

separate property from consideration in setting a level of child support and look only to his earning capacity.

B. THE INADEQUACY OF THE SUPPORT AWARD TO MEET THE CHILDREN'S NEEDS IS ERROR.

The respondent is certainly correct that the welfare of the children is the key consideration in determining the level of child support. But the suggestion that some increase in the rate of $37.50 per child per month would represent "luxuries or fantastic notions of style", "extravagant expenditures" is ludicrous (respondent's brief at 12.) It is undisputed that appellant has $500 of spendable income per month with two children living in her home. In today's economy it is impossible to feed a child for a month on $37.50 much less fully support him. An appellate court can and should consider present conditions in reviewing the adequacy of child support awards. For example in the Florida case of Johnson v. Johnson, 367 So.2d 695, 697 (Fla App. 1979) the appellate court rejects the trial courts child support award on the following basis:

> "We find it impossible, however, to sustain the trial court's child support award of only $25 per week per child. In light of today's cost of living and the needs the wife will have to meet, this figure is totally unrealistic. The law gives the trial judge broad discretion in determining the amount of child support. Kahn v. Kahn, 78 So.2d 367 (Fla.1955). Nevertheless, an appellate court is justified in ordering an increase in support where, as here, it finds a clear abuse of discretion. McArthur v.

McArthur, 95 So.2d 521 (Fla.1957); Schultz v. Schultz, 290 So.2d 146 (Fla.2d DCA 1974). We think that $50 per week per child is the minimum realistic amount the trial court should have awarded as child support."

The South Dakota Supreme Court agrees;

"Obviously, the child support awarded to appellant is not adequate to maintain two maturing boys under present living conditions."

Hrdlicka v. Hrdlicka, 310 N.W.2d 160 (S.D.1981). In Hrdlicka the lower court had awarded $40 per month per child and in the same year the court rejected $130 per month on similar reasoning 309 N.W.2d 827 (S.D.1981). Finally in Vanier v. Vanier, 344 So.2d 1077, 1079 (La. App. 1977),

"We think an award of $150 per month is far below the amount necessary to support three young boys, and amounts to an abuse of the trial court's discretion."

Can a mother who has $500 to spend a month feed, clothe, and support two teenage children with $75 provided by the father? This court should hold such an award an abuse of discretion.

CONCLUSION

The trial court failed to consider respondent's substantial separate property in evaluating a child support award and such constitutes an abuse of discretion. To refuse to take into account the total assets of the parties goes against the wieght of authority in this country. Utah

statutes do mandate consideratin of both earnings and assets. Moreover, the award is inadequate and an abuse of discretion given today's cost of living and the children's reasonable needs.

RESPECTFULLY submitted this 21 day of April, 1982.

Earl S. Spafford

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foreoing Reply Brief 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 21 day of April, 1982.

Willard R. Bishop, Esq.
BISHOP & McKAY
110 North Main Street
Cedar City, Utah 84720