

1992

Glen P. Willey v. Rosalind Ann Johnson Willey : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

GLEN P. WILLEY,

Plaintiff/Appellee,

vs.

ROSALIND ANN JOHNSON WILLEY,

Defendant/Appellant.

Case No. 920091CA

District Court
No. D91-490-0101
Category No. 16

REPLY BRIEF OF APPELLANT
ROSALIND ANN JOHNSON WILLEY

Appeal From a Final Decree of Divorce Entered by
Third Judicial District Court for Salt Lake County,
State of Utah
Honorable David S. Young, District Judge

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RESPONSE TO APPELLEE'S FACTS

1. Mr. Willey complains that appellant is simply attempting to retry this matter by using only her versions of the facts to support her arguments. Yet Mr. Willey does exactly the same when he recites as a matter of fact that "the parties lived beyond their means". He then supports this unfounded conclusion by claiming that "the parties bought a Mercedes in 1987" (which only he drove and continues to drive); "they refinanced"; "they borrowed"; "they liquidated"; "they borrowed again". (Pg. 3 and 4 of Appellee's Brief.)

The facts speak to a more successful and traditional marital relationship where Mrs. Willey stayed home and acted as the homemaker, and Mr. Willey earned substantial income and controlled the finances. A comparison of income earned as set forth in Exhibit 34D, (portions of which are restated on page 6 of Appellant's Brief) demonstrate this relationship. After their first year of marriage, Mrs. Willey earned approximately \$5,000.00 per year for three years, and then averaged \$1,550.00 gross per year for the next five years until their first full year of separation. During that same time frame, Mr. Willey initially averaged \$63,500.00 per year, and then, as found by the Court, \$110,000.00 for the next five years. Contrast those facts with Mr. Willey's expected assertion at trial that he "urged Mrs. Willey to work full-time" during the marriage and that her

refusal to do so was a cause of major disagreement. Appellee's Brief at p. 3.

2. The facts further demonstrate that both parties voluntarily lived a high standard of living well within their ability on the substantial income earned during this marriage. As indicated, they had numerous parties, entertained frequently, traveled together, lived in a large expensive home, dressed well, and drove expensive automobiles. All of this lavish lifestyle required some degree of financing which was easily satisfied out of current income. In the two "lean" years of 1989 and 1990 when Mr. Willey only made \$73,000.00 and \$98,000.00, respectively, Mr. Willey was able to maintain his lifestyle through available credit and the use of substantial accumulated savings and other assets. To suggest that they lived far beyond their means is not consistent with either the evidence or any finding entered by the trial court.

3. When the parties separated, Mrs. Willey did go back to work at two jobs, the equivalent of full-time work. She has always maintained that she would work to support herself full-time. Her two jobs included retail sales in a book shop, three days per week and teaching numerous literature groups at night. Had Mrs. Willey not required surgery in August of 1991 her gross earnings would have been the equivalent of full-time wages at \$5.00 per hour. (TR. p. 58).

4. Finally, at page 12 of Mr. Willey's Brief where it is stated, "it is clear that Mr. Willey did much to benefit Mrs. Willey's children during this marriage," it should be noted that neither party was allowed by the trial court to offer any evidence concerning Mrs. Willey's children or Mr. Willey's relationship to them. This being the case, it is inappropriate for Mr. Willey to benefit from an unsubstantiated conclusion. In fact, there was much Mrs. Willey would like to have advised the trial court concerning additional costs and problems she now must face because of Mr. Willey's relationship to the children, but was unable to do so.

REPLY TO ARGUMENTS

I. The "Jones" Factors Were Not Properly Applied.

Mr. Willey attempts to justify the trial court's failure to make findings regarding Mrs. Willey's needs on the theory that she presented conflicting evidence and failed to ask the court to make any such findings.

If conflicting evidence was offered (which Appellant denies), then it is incumbent upon the trial court to make findings of fact supported by the evidence on a material issue. Since the court failed to make such findings on an essential element, the trial court abused its discretion. Bell v. Bell, 810 P.2d 489 (Utah App. 1991).

All of the three "Jones" factors critical to the alimony issue are closely interrelated. The first essential material element, the needs of the recipient spouse, drive the consideration of the remaining factors. Do the spouse's needs include obligations to pay creditors? Do her needs include obligations for the primary care of her natural children?

If Mrs. Willey's needs and the critical elements of those needs are never considered, a trial court cannot assess the remaining "Jones" considerations. Since it was unknown prior to a sale of their marital home and prior to trial if a deficiency would be owed on the second mortgage, Mrs. Willey requested, but the trial court denied, her motion to continue the trial pending a sale of the home, since to do otherwise invites the court to engage in unsubstantiated speculation related to her possible obligations (TR. pp 4-6). That is exactly what happened.

Mr. Willey's notation at page 13, footnote 1 of his Brief criticizing Mrs. Willey's speculation of the debt owed by her on the note formerly secured by their home is well taken. For the same reason, the trial court should not have speculated on what Mrs. Willey's debts would be or on her ability to pay those debts. Appellant was attempting to argue the best known facts available at the time her brief was written, but she agrees that on this record the size of her obligation and ability to pay is unknown.

This appeal embraces two critical issues, both of which are focused by the parties briefs: 1) How does Mrs. Willey's primary financial obligation to her children affect her needs? 2) How should these obligations be considered, if at all, in analyzing her ability to support herself and Mr. Willey's contribution to that support?

Mr. Willey relies upon Utah Code Ann. § 78-45-4.1 (1953 as amended) to respond that he has no obligation for Mrs. Willey's children, and therefore, the issue need not be addressed. That provision, however, speaks not to a husband's obligation to his wife, but to his separate obligation to her children.

Mrs. Willey strongly believes, and thus argues, that while Mr. Willey has no separate legal obligation to Mrs. Willey's children as a step-parent, he continues to have an obligation to her as a divorcing spouse. Mrs. Willey's legal obligations to her children is just as material to the court's needs analysis as are her debts and obligations to any other creditors. The trial court should not employ a fiction to disregard her legal obligations in considering her post-divorce circumstances.

Evidence of Need Not Conflicting. Exhibit 36D was submitted by Mrs. Willey to demonstrate to the trial court what Mrs. Willey's expenses might be if individually considered, in

comparison with expenses for herself and her children for whom she has a legal obligation. The exhibit assumed, for argument purposes, that she would only be entitled to expend exactly what Mr. Willey required in his exhibit of monthly expenses (Exhibit 10-P). Mrs. Willey's comparison exhibit 36-D was intended simply for argument purposes to demonstrate at least equal needs if the court was only going to consider her needs alone and not those of her children. The only difference between Exhibit 27-D and 36-D are adjustments made for the sale of the marital home and for discretionary child care expenses, such as allowances, extracurricular activities, and other amounts associated only with the children's care. Otherwise, Mrs. Willey's needs remain the same, now and throughout the trial.

Had the trial court made findings related to Mrs. Willey's financial needs, the mistakes of fact which the court made in assessing her ability to contribute to those needs and the amount her husband should contribute, would have become apparent. It is reversible error if the trial court fails to make specific findings on all material issues unless the facts in the record are "clear, uncontroverted and capable of supporting only a finding in favor of the judgment." Throckmorton v. Throckmorton, 767 P.2d 121, 124 (Utah App. 1988).

Standard of Living. Mrs. Willey's responses and arguments rests heavily on a recurring theme that Mrs. Willey

ought to be returned to that standard of living enjoyed by her prior to her marriage to Mr. Willey in 1980. She and her children enjoyed the benefits as long as it lasted; she ought to return to the life and job skills she knew then. In Dunn v. Dunn, 802 P.2d 1314 (Utah App. 1990), this Court rejected the argument that because the wife could not have achieved on her own a standard enjoyed by her during her marriage, she was accordingly not entitled to an equal share or consideration of substantial marital assets. The various factors to be considered in fashioning equitable property and support provisions do not include a consideration that one partner was more economically productive than the other.

While the Dunn holding applied to a division of marital assets, its holding bears equal weight upon the implication that Mrs. Willey return to a standard of the 1980's while Mr. Willey be free to move forward with substantial resources.

Mrs. Willey supported her husband's move toward greater financial success during the prime years of her life, giving up in return employment opportunities which could have been just as rewarding to her.

Because he now has the opportunity to earn tremendous income and she does not, why must the court impose a standard for her which is far below his standard of living?

II. Reply to Reasonableness of Attorney Fee.

Mrs. Willey also believes it unfortunate that both parties had to expend significant fees in the presentation of this matter before the trial court. Nowhere, however, did the trial court find that the fees expended by either party were unreasonable. What may be "implicit" to appellee is not implicit to appellant. It is unfortunate that Mr. Willey can pay all of his fees from marital funds, or divert earnings that could have been used to pay marital debt, without scrutiny of the trial court, yet Mrs. Willey must demonstrate reasonableness, need and financial inability to recognize that her expenditures for attorney fees went to the same purpose and end, to wit: the dissolution of the marriage. Mrs. Willey met that burden, but the court failed to award her all her fees. The trial court did not find, implicitly or explicitly, that her fees were unreasonable.

III. Reply to Other Issues.

Mr. Willey asserts that Appellant's brief violates the Utah Rules of Appellate Procedure in three respects:

- i) that it fails to indicate the standard of review,
 - ii) does not contain a summary of the arguments;
- and

iii) it contains references to the transcript of trial rather than the official record.

Appellant's counsel apologizes to the Court for inadvertently omitting the Summary of Argument section when compiling the Appellant's Brief in its final version. That section is now contained in the Addendum to this brief, with the well known standards of review which were previously contained in the docketing statement and which have been correctly recited by Appellee's Brief.

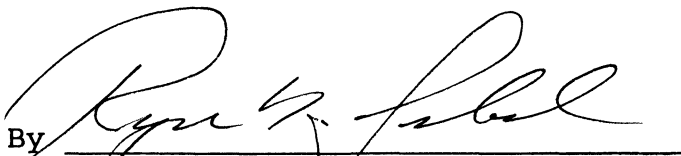
References to the trial transcript were recited from the copy which Appellant obtained from the official reporter. The copy did not have the record pagination and for that, counsel seeks your forgiveness.

CONCLUSION

Since few assets remained following the dissolution of this marriage and the liquidation of marital assets, virtually all of the court's determinations concerning alimony, division of property, division of debts and award of attorney's fee affect Mrs. Willey's ability to continue her post-marital life. Virtually all of the other equitable determinations made by the trial court have adverse impact upon Mrs. Willey's need for support and upon a fair determination of Mr. Willey's

contribution to that need. Accordingly, it is respectfully urged that this matter be reversed and remanded for re-trial on all issues.

DATED this 23rd day of October, 1992.

By 
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ADDENDUM

ADDENDUM

SUMMARY OF ARGUMENTS AND STANDARD OF REVIEW

1. The trial court improperly applied the Jones v. Jones, 700 P.2d 1072, 1075 (Utah App. 1985), considerations by failing to make findings concerning Mrs. Willey's needs including her obligations to her children. The court's failure affected not only the other Jones factors, but also a fair consideration of property and debt distribution. The standard of review is an abuse of discretion by the trial court.

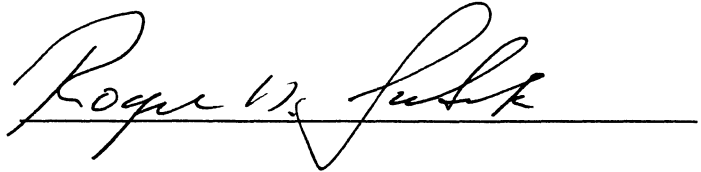
2. The trial court erred in failing to provide Mrs. Willey consideration for premarital contribution to the parties' home. Mrs. Willey alleges an error of law in the application of the District Court's findings.

3. Whether the court erred by failing to award a larger contribution towards necessary attorney's fees and costs. The standard of review is an abuse of discretion.

CERTIFICATE OF SERVICE

On the 23rd day of October, 1992, true and correct copies of the foregoing REPLY BRIEF OF APPELLANT ROSALIND ANN JOHNSON WILLEY were hand-delivered to the following:

Ellen Maycock
KRUSE, LANDA & MAYCOCK
50 West 300 South, #800
Salt Lake City, UT 84101

A handwritten signature in cursive script, appearing to read "Roger W. Felt", is written over a horizontal line.

cmw\18075