

1983

Calla E. Jackman v. Dale L. Jackman : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

* * * * *

CALLA E. JACKMAN,)
Plaintiff and Appellant,)
v.) No. 18369
DALE L. JACKMAN,)
Defendant and Respondent.)

* * * * *

RESPONDENT'S BRIEF

* * * * *

Appeal from Decree of Divorce

Third District Court
In and For Salt Lake County, State of Utah

Honorable Jay E. Banks, Presiding

* * * * *

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Clk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

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CALLA E. JACKMAN,)
Plaintiff and Appellant,) RESPONDENT'S BRIEF
v.) No. 18369
DALE L. JACKMAN,)
Defendant and Respondent.)

* * * * *

NATURE OF THE CASE

This is an appeal from the provisions of the Decree of Divorce dividing the marital property and awarding support.

DISPOSITION IN THE LOWER COURT

The trial court awarded appellant alimony in the sum of \$850.00 per month (R. 157) after determining respondent had an annual gross income of \$29,000 and a net annual income, after taxes, of \$19,600 (R. 151), a 1979 Oldsmobile, the household furniture, fixtures and furnishings located in the family home at 2156 Elaine Drive and the family home subject to a \$10,000 lien in favor of the respondent which was not to bear interest or be payable until the death of the plaintiff or sale of the home (R.156-157). Appellant was also awarded such:

Interests, if any, as the Plaintiff has, or may have had, in Future Development Company, a Utah Corporation; in the Salt Lake International Center; in any Bara Corporation or Bara Partnership; and/or in any profits from any of those corporations or partnerships.

(R. 157).

Respondent was awarded the 1980 Chrysler LeBaron, the 1972 Ford pick-up truck, the Kawasaki motorcycle, the office equipment and furnishings at Baseline Appraisal (his business), the Pacific Mutual Life Insurance policy with its cash value, the \$10,000 money market certificate at Valley Bank and Trust Company, the \$13,500 in receivables of Baseline Appraisal, the funds in his IRA account (\$3,608.00), all right, title and interest of the parties in Lot 84, Brown's Park Subdivision, Bountiful, Davis County, Utah and the \$10,000 lien on the family home. (R. 156).

Respondent was ordered to pay all debts incurred by the parties during the course of their marriage (R. 156), \$1,500.00 for the benefit of plaintiff's attorney (R. 157) and costs of \$1,066.65 (R. 179).

NATURE OF RELIEF SOUGHT ON APPEAL

Respondent seeks affirmation of the trial court's decision and an award of his costs and attorney fees on appeal.

STATEMENT OF FACTS

Appellant set forth a statement of facts in great length and detail. Respondent would accept that statement as supplemented by the following specific additions.

Appellant takes the position that defendant had some interest in the Salt Lake International Center, Bara

partnerships or Bara corporations, and/or Future Development Company. It was over this issue that the matter went into such extended, complex discovery and trial. Respondent testified on direct and cross examination, repeatedly, that he had no interest in Future Development Company, although he tried, by every means he knew how, to raise the money or secure enough savings from the construction to create such an interest for himself (R.262-276, 278-280, 283-321, 345-354, 360-371, 373-383, 392, 395-6, and 404-407). Gordon Gregson, the primary owner of Future Development Company, testified that respondent had no interest in Future Development Company (R. 480) as he was never able to do what was required of him in order to obtain such an interest (R. 481).

Mr. Jackman further testified that he had been able to secure no interest in any Bara entity, although he tried to do so and documents were executed which apparently gave him such an interest (R. 267, 321-344, 392-393, 396-398).

Finally, respondent testified that he had no interest in any of the Salt Lake International Center partnerships (R. 371-373, 387-389, 393-395, 399-402).

The trial court found respondent had no interest in these entities but awarded appellant all interest respondent owned, may have owned or may ever own in those entities (R. 157). Appellant makes this ruling the primary issue in her

appeal. She feels the Court should have found respondent owned such interests awarded them to him and ordered respondent to pay her an appropriate equalizing sum of money. She does not accept the ruling or award of the court and asserts this is error - assertions presented to and not accepted by the trial court.

The problem is probably best underscored by Judge Banks explaining what he understood transpired and the appellant's response thereto (R. 314). The Court stated that the appellant may have demonstrated inconsistent statements by the respondent, but that did not constitute substantive evidence of an ownership in the business entities (R. 425-427).

Respondent consistently maintained in all testimony and on all cross examination that he tried to obtain interests in Future Development and various Bara entities, but was never able to do so. The testimony of Mr. Gregson and the failure of appellant to produce any direct contrary evidence negate the argument of Appellant.

Appellant also raises the issue of the court's decision refusing to award child support. Respondent testified, without rebuttal, that the minor child was emancipated and employed (R. 384).

Appellant further raises an issue as to the amount of

alimony awarded. Before the court were copies of the tax returns of the parties (R. 54-102). The testimony of the respondent as to the income produced by Baseline Appraisal, his sole source of earnings at the time of trial are in accord with the finding of the court (R.386-388, 483-494). Respondent testified that it took him two years to build up the extraordinary income that appeared in 1979 (R. 261-262).

While the appellant testified that she needed \$1,600 per month, she admitted that she had not been spending that sum as she had been living and supporting herself and the minor child of the parties on the temporary support of \$1,000.00 per month (R. 253).

ARGUMENT

I.

THE TRIAL COURT'S RULINGS, DETERMINATIONS AND DECISIONS ARE CORRECT

This Court has repeatedly held that the trial court has an advantaged position in considering the evidence before it, has had the opportunity to hear witnesses testify, watch their demeanor and view nonverbal testimony. Thus, absent a clear abuse of discretion in division of the marital property and income the trial court's determinations should be affirmed. Turner v. Turner 649 P.2d 6 (Utah 1982); Dority v. Dority, 645 P.2d 56 (Utah 1982); Despain v. Despain, 610 P.2d 1303 (Utah 1980); Jorgenson v. Jorgenson, 599 P.2d 510 (Utah 1979). In the instant case, the wisdom of this rule is apparent.

The appellant asserts error in that the trial court allowed the respondent to hide assets from the appellant. Counsel for respondent, throughout the pretrial proceedings and the trial itself, constantly pointed out to the counsel for the appellant, as well as the court, that the respondent had no interest in any of the claimed business entities. Respondent not only said that he did not have these assets (if he did, respondent would be entitled to half, and appellant would be entitled to half), but, both in comment and formal proffer, he stated that appellant could have all interest that he might have or ever could have in the businesses, Future Development Company, any Bara partnership or corporation and the Salt Lake International Center (R. 180, 191, 192-193, 313, 392, 394, 395). The trial court and respondent, nevertheless, were forced to endure several days of trial while appellant tried to establish that respondent owned some hidden interest in these entities.

Ironically, appellant even raises the point that respondent refused a polygraph test and makes an issue of that action but does not make a correct representation of what occurred. Examination of the transcript (R. 189-192) demonstrates that respondent felt and asserted to the court through his counsel, that if he took a polygraph test as appellant insisted, it was because he was trying to prove he was not lying. This would denegate the role of the trial court

as the finder of fact which included the issue of his veracity (R. 189-190). Accordingly, he made the offer that he would take a polygraph examination if appellant, when it demonstrated that respondent was telling the truth, would then accept the proposed settlement made by respondent (R. 190). This was rejected by appellant (R. 190).

The crucial issue in this case was credibility. This was established at the outset of trial as an issue and remained such throughout the trial. This court can determine only through examination of testimony as reported on the pages of the transcript and the documents admitted into evidence what occurred. The trial court saw and heard the witnesses, observed their demeanor and could consider their nonverbal conduct while testifying. That is all denied to this Court -- yet it is critical to a determination of veracity and credibility.

Respondent, throughout his testimony, stated that the documents were correct, that they demonstrated an effort on his part to secure an interest in some business so that he would own a "piece of the action." However, they also demonstrate that he was never able to do so. The issue of the credibility of this testimony as well as the issue of the burden of proving that respondent did own some interest in these business entities was thus the major issue presented to the trial.

court. On those questions the trial court ruled against appellant. She now attacks both the decision and Judge Banks, insisting that he was sick and did not pay attention to her evidence. This she places in her brief but cites no authority as this is not part of the record.

Respondent would point to four specific exchanges which demonstrate what occurred.

Early in her testimony appellant offered, through a written exhibit, a description of her medical history. Counsel for respondent agreed to stipulate to its admission as illustrative of her testimony. After accepting that stipulation, appellant insisted upon going item by item through the history and explaining it in detail (R. 221-225). The trial court asked the appellant to please deal with her present medical condition as that was what was relevant but continued to have difficulty in obtaining that information as appellant wanted to repeat a complete history (R. 225-226).

A similar exchange dealt with the work history of the respondent. The appellant tried to go through that in detail and when the court advised counsel for the appellant that he understood, having heard numerous condemnation actions that was involved in the training of an MAI appraiser, counsel for the appellant wanted to proceed with the historical presentation of his case, anyway (R. 257-258).

After all parties and the court had to sit through a very repetitious examination, the court observed to counsel for the appellant that he was being repetitious. This was acknowledged by counsel for the appellant, who kept doing so (R.326).

The final example is the court's observation that counsel for the appellant may have demonstrated that respondent in some way had not told the truth in executing certain documents or in taking actions on behalf of the businesses in which he was trying to secure an interest but that did not establish that he had an interest in that business. The colloquy between court and counsel speaks eloquently for itself in demonstrating that this was a distinction appellant was never able to discern (R. 425-427). It is that failure which produced the extensive discovery, the prolonged trial and this appeal.

In fact, examination of the transcript demonstrates the extreme patience of the court in allowing counsel for the appellant to spend the better part of two days going into matters which were totally irrelevant in order to give appellant an opportunity to establish that the respondent had some interest in the business entities which he denied that he owned. This was pursued, not in order to secure an interest of the appellant in these properties, because that had been offered to her repeatedly (R. 180, 191, 192-193, 313, 392, 394,

395); it was to try to have some other property or money awarded to the appellant.

Under these circumstances, the ability to observe the parties, the conduct of counsel and the testimony and demeanor of the witnesses is critical. In order to cover her failure in the trial court to meet that burden, appellant has chosen to attack the trial judge and his conduct of the trial in the brief without making any record at the time that this was occurring or indicating any prejudice at the time. Now, it is simply asserted by appellant, through her counsel in his brief, not only with no support in the record, but to obfuscate the fact that the trial court ruled correctly on the evidence and should be affirmed by this Court. There is no evidence contrary to the findings of the Court -- only appellant's assertions.

II.

PROPERTY SHOULD BE FAIRLY AND EQUITABLY DIVIDED BETWEEN THE PARTIES.

This court has repeatedly held that marital property and income should be fairly and equitably divided between the parties. Savage v. Savage, 658 P.2d 201 (Utah 1983); Turner v. Turner, 649 P.2d 6 (Utah 1982) and authorities cited and discussed (649 P.2d at 6). In the instant matter, the trial court did so. It awarded the "disputed property" pursuant to the proffer of respondent, fully and completely to appellant.

Then, looking at the remaining properties and income, it divided them fairly and equitably. The most substantial asset of the parties, their home, was awarded to the appellant. Properties of a cumulative, slightly less value, were awarded to the respondent.

Although the respondent received slightly less in value than appellant, he makes no challenge to this award, believing that it is well within the rules of fair and equitable division established by this court. Respondent recognized that the only way the trial court's award could be attacked was if this court determined that respondent, in some way, owned interest in some other property as asserted by the appellant. This is not true, was never established by her, and was continually denied by respondent and by the witnesses as called by the appellant in the presentation of her case, particularly, Mr. Gregson, the principal of Future Development Company.

The alimony award was fair. This court has ruled repeatedly that alimony is to maintain a spouse in as nearly as possible the same condition as she was during the marriage. It is not to punish the other party nor reward a spouse. Savage v. Savage, 658 P.2d 1201 (Utah 1983); Warren v. Warren, 655 P.2d 684, 687-698 (Utah 1982); Dority v. Dority, 645 P.2d 56, 58-59 (Utah 1982). As the trial court said in summing up

. . . (T)he Court has to look at it as the need and the ability to pay and in no instance to I know of a justification to go over fifty-fifty and really, with her getting the home, the expenses of him being able to live, being practical, is going to cost him more than it is her to occupy the house and in effect she is paying rent for \$220 a month and it's pretty hard for him to even get a place for 220 of any practicality.

(R. 528-529.)

The court, after hearing the evidence and considering the tax returns, found that the respondent had net income of \$19,600 a year. That was the court's finding after hearing the evidence as to respondent's present earnings. The respondent had a gross income of \$29,000 and a net income of \$19,600. If the net is divided by the 12 months of the year, it can be seen the court determined that respondent had net income of \$1,633.33 per month and yet (violating his own declaration), awarded slightly more than 50 percent of that, or \$850.00 per month, to the appellant.

Respondent would admit that he had earned more money in the past and he would certainly hope that he could earn more in the future. His earnings in the past had come from dual occupations -- employment plus appraisal fees. Employment had been terminated and he was now making his living solely by appraisal fees at the time of trial.

Respondent had attempted to secure an interest for himself in business by use of his skill as he did not have

money for investment. His efforts did not come to fruition and, as a result, his income dropped as he had substantial uncompensated work. This is described in his testimony in response to appellant's repeated questions about his interests in the business entities, Future Development Company, the Bara partnerships, and the Salt Lake International Center. The appellant, without offering any evidence of present income or assets other than those found to exist, challenges their division. The assertions are without basis or merit and this court should affirm the trial court.

III.

THE APPELLANT IS NOT ENTITLED TO ADDITIONAL ATTORNEY'S FEES.

Counsel for the appellant testified at the conclusion of appellant's case as to the extent of his work in preparing for trial and in conducting the trial (R. 483-485). He sought more than \$10,000 in attorney's fees for this effort. The trial court most succinctly described the situation and the request for attorney's fees:

As to the time spent in this, I think it is ridiculous. As to the costs incurred, I think it's ridiculous. She is entitled to attorney's fees. I can't fix what you charge her, but I can make an award toward those attorney's fees, which I intend to do, but they're not going to be within the realm of what -- and the costs, the same way. They're not going to be within the realm of what you think you're entitled to. \$10,000 attorney's fees and 15, \$1,600 costs. You

have to look at the situation of what you are able to accomplish and what was necessary in order to do this.

(R. 527).

If anyone is entitled to attorney fees in this matter, it would be respondent. The appellant has taken evidence of a series of business efforts which failed on the part of respondent and tried to project those into successes. When supporting evidence was not developed, the matter was dragged out interminably. Attorney's fees have been incurred by respondent who had no choice but to defend himself from what the trial court recognized was a ridiculous attack. It was bad enough that this matter was so extensively tried; it was also appealed. Now appellant seeks further attorney's fees for prosecuting this appeal. Not only should these be denied, respondent should be awarded his attorney's fees and costs as incurred in this frivolous appeal.

CONCLUSION

This is a matter that has been blown out of all proportion by the appellant. It is a case which should have been a simple divorce but has been expanded beyond all reason. Eighteen depositions of people or for documents were taken (R. 109-116, 124-127, 131, 136). Two envelopes in the record on appeal are required to hold all of the paper exhibits in this matter. All of them demonstrate precisely what the respondent

told counsel for the appellant at the beginning and throughout the case -- that the only assets held by the parties were their home and an investment lot and some cash. The cash, ironically, was burned up in paying bills of the parties and trying to handle the costs of the litigation.

This court observed in Savage v. Savage, 658 P.2d 1201, 1205-1206 (Utah 1983), that to award substantial attorney's fees decreases the property awarded to one party or another. Respondent, to pay his own fees has suffered this injury. The matter has been blown out of all proportion and pursued to a ridiculous extent by appellant which her request for attorney's fees clearly demonstrates. The appellant was awarded slightly over one-half of the net income of the respondent and property of the parties. He did not appeal, as he felt the matter should be over and he could live with it.

The property was divided fairly and equitably between the parties and the respondent accepted the fact that he would have to pay some of the attorneys' fees and some of his property would have to be liquidated to pay debts and expenses. He knew he could earn a living and more income than appellant so he accepted the ruling as falling within the guidelines established by this Court. The appeal of the appellant is frivolous. She seeks to be awarded property never owned by the parties. She refuses to accept the facts as they

exist. Accordingly, this Court should affirm the trial court and award the respondent both his costs and the attorney's fees he has been forced to incur in defending this appeal.

DATED this 17th day of May, 1983.


DAVID S. DOLOWITZ
Attorney for Respondent

MAILING CERTIFICATE

I hereby certify that two true and correct copies of the foregoing Brief have been mailed, this 17th day of May, 1983, to Joel Allred, 500 American Savings Building, 61 South Main Street, Salt Lake City, Utah, 84111, attorney for appellant.


DAVID S. DOLOWITZ