

1992

Marcus P. Randolph v. Mary E. Randolph : Reply Brief

Utah Court of Appeals

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BRIEF

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IN THE UTAH COURT OF APPEALS

MARCUS P. RANDOLPH, :
 :
 Plaintiff/Appellee, and :
 Cross-Appellant, :
 :
 vs. : Case No. 920623-CA
 :
 MARY E. RANDOLPH, :
 :
 Defendant/Appellee, and :
 Cross-Appellee. : Priority No. ¹⁵/₁₆

REPLY BRIEF OF APPELLEE AND CROSS-APPELLANT

APPEAL FROM SUPPLEMENTAL DECREE OF DIVORCE
ENTERED ON AUGUST 21, 1992, THIRD JUDICIAL DISTRICT COURT,
SALT LAKE COUNTY, STATE OF UTAH,
THE HONORABLE JUDGE JAMES S. SAWAYA PRESIDING.

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FILED
Utah Court of Appeals

JUL 7 1993

Mary Noonan
Mary T. Noonan
Clerk of the Court

IN THE UTAH COURT OF APPEALS

MARCUS P. RANDOLPH, :
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Addendum "A"

Order and Restraining Order, dated September
5, 1991

ARGUMENT

- I. THE PLAINTIFF'S STATEMENT OF FACT WAS NOT DISPUTED OR CONTRADICTED BY DEFENDANT'S TESTIMONY OR EVIDENCE AND IS COMPLETELY SUPPORTIVE OF THE ARGUMENTS OF PLAINTIFF CONTAINED IN THE BRIEF OF APPELLEE AND CROSS-APPELLANT

The Defendant asserts in her reply brief that the Plaintiff's statement of facts contained errors and misstatements. It is true that the term "commissions" should not have been used and the term "bonus" should have been used, but other than that mischaracterization of income, there have been no factual misstatements or errors in the statements of fact as contained in the Brief of Appellee and Cross-Appellant. In each instance, throughout the statement of facts, the Plaintiff has cited to the transcript of trial and cited to the testimony of the Defendant, also in the transcript of trial.

The Defendant has brought to the Court's attention issues relating to the income of the Plaintiff. It was stipulated at the time of trial and undisputed that the 1992 income received by the Plaintiff was \$114,500.00, which included a substantial bonus of \$14,500.00. (See TR, p. 18, ll. 21-32; TR, p. 21, ll. 18-24.) The Plaintiff's bonus received was included in his monthly gross income for the purposes of calculating both child support and alimony. Nowhere in the transcript of trial did the Defendant attempt to assert that the income as set forth by Plaintiff in his statement of facts was other than his correct and true income.

Again, the Defendant's characterization of Plaintiff's statements as being misleading and contrary to testimony is inappropriate and incorrect. As cited in the facts of the case in the Brief of Appellee and Cross-Appellant, the Plaintiff testified that Defendant worked at different jobs during the marriage. (TR, p. 19, ll. 4-8.) The Plaintiff specifically referred to a period of two years from 1988 through 1990 that the Defendant ran a day care center from the parties' home. None of the testimony of the Defendant disputed that; and, in fact, confirmed Plaintiff's testimony. (See TR, p. 154, ll. 5-18.)

The Defendant has attempted to attack Plaintiff's statements regarding his agreeability to paying for private schooling. It is clear from the transcript of trial and the testimony of the Plaintiff, that he believed that the payment of child support on his part to Defendant in the sum of \$1,361.00 would be adequate to meet the needs of the children, including the cost of private school. (TR, pp. 22-23.) That in itself disputes that he agreed to pay for private schooling of the children.

Lastly, the Plaintiff's statement that the ReadAccess loan and tax liability that he listed as marital debts is disputed by the record is completely incorrect. The Plaintiff testified that during the later stages of the parties' separation, the Defendant ran up a number of expenses requiring that Plaintiff take out a

loan for \$7,500.00 in order to pay off those expenses. He also testified that he had an income tax obligation of approximately \$4,300.00, which was accrued during the period of the parties' marriage. (See TR, p. 32, ll. 2-11.) The Plaintiff specifically stated that the overdraft account or loan was a debt incurred to pay for the expenses of the Defendant and was incurred during the marriage and that the account was opened to cover the expenses that were incurred during the marriage. (See TR, p. 32, ll. 21-35, p. 33, ll. 1-7.)

There is absolutely no evidence that the Plaintiff raided or closed bank accounts and used funds for his own use and benefit and the allegations of the Defendant otherwise, were not supported by the evidence. It is clear that the Defendant has not appealed any decision of the trial court relating to "reimbursement" to Defendant of any funds that Defendant perceives Plaintiff absconded with from the joint marital assets. Again, therefore, the Defendant's statements regarding the Plaintiff's handling of the finances really does misconstrue the facts as set forth at the time of trial as contained in the transcript of trial.

II. PLAINTIFF AT NO TIME AGREED TO PAY THE COST OF PRIVATE SCHOOLING FOR THE MINOR CHILDREN AND IT WAS AN ABUSE OF DISCRETION TO MAKE THE AWARD IN ADDITION TO BASE SUPPORT.

The Defendant is asserting in the Defendant's reply brief that the Plaintiff agreed, before the separation and after the

separation, to pay the costs of private schooling. The Defendant has asserted that the Plaintiff agreed to share the cost after separation to the time of trial. However, the Defendant has provided no evidence of the same. In fact, no evidence of the same exists. The outstanding court order regarding temporary relief ordered the Plaintiff to pay child support, only, and day care and made no specific orders regarding the payment of the cost of private school. A copy of that order, which governed the behavior of the parties pending trial on this matter is appended hereto as Addendum "A". That Order and Restraining Order, which entered all orders relating to the payment of support and/or private school, states in paragraph 9 that the Plaintiff would pay child support of \$1,169.00 and one-half of any work or education related child care costs. Again, there was no order in place ordering that Plaintiff bear the expense of a private school.

The Defendant has stated in her reply brief that the Uniform Child Support Act contained in §78-45-7, et seq., is adjusted for taxes and the claiming of tax exemptions. However, the Defendant cites no support for that assertion. In addition, the Defendant has attempted to state that since Plaintiff was awarded the tax exemption that somehow gave the court authority to deviate from the guidelines without setting forth the reasoning and basis for that

deviation as required by the guidelines. (See Utah Code Annotated §78-45-7.2.)

The Defendant's argument that since child care expenses and uninsured medical and dental expenses are not included in the base child support guidelines, that private school expenses are also a separate issue is nonsensical. If our legislature believed that the private school cost was a separate issue that needed to be addressed by it and was not contained within the base support, it would make sense that there would be a specific statute as there is with child care expenses and uninsured medical and dental expenses.

III. THE PLAINTIFF'S APPEAL TO THE COURT'S DENIAL OF PLAINTIFF'S MOTION TO SET ASIDE THE STIPULATION TO CUSTODY MAY BE MOOT.

Plaintiff has argued in his Brief of Appellee and Cross-Appellant that the court erred or abused its discretion in denying Plaintiff's Motion to Set Aside the Stipulation in Re: Child Custody. The Plaintiff believes that the arguments and reasoning set forth in his Brief of Appellee and Cross-Appellant adequately address that issue.

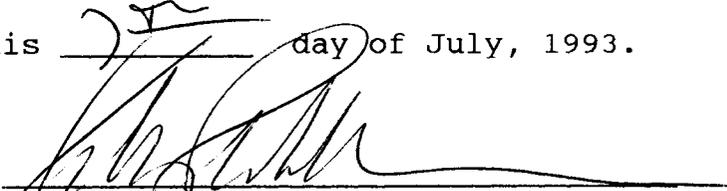
However, commencing with November, 1992, the minor children have been in the physical care and custody of the Plaintiff and his spouse, Merrilee Caldwell, pursuant to an order of temporary custody, and they remain in his temporary care and custody as of

the date of this response. Therefore, the Court may deem that issue moot.

CONCLUSION

The relief sought by the Plaintiff on his cross-appeal seeks an order from this Court reversing the requirement that Plaintiff pay one-half of the cost of private schooling and reversing the court's order requiring him to maintain life insurance naming the Defendant as beneficiary. Further, Plaintiff asks that the Court affirm the trial court's determination regarding alimony and attorney's fees. Given the physical custody of the minor children with the Plaintiff, however, the Plaintiff withdraws his request that the Court remand any issues to the trial court, particularly relating to the best interests of the minor children, as that issue is currently before the Court. Further, the Plaintiff respectfully requests that each party be responsible for his or her own court costs and attorney's fees on appeal.

Respectfully submitted this 27 day of July, 1993.


KELLIE F. WILLIAMS
Attorney for Plaintiff

CERTIFICATE OF HAND DELIVERY

I, KELLIE F. WILLIAMS, hereby certify that two copies of the foregoing Appellee's Reply Brief, were HAND DELIVERED to E. H. Fankhauser, 243 East 400 South, Salt Lake City, Utah 84111, this 2nd day of July, 1993.



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SALT LAKE COUNTY
By S. Gray DEPUTY CLERK

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

MARCUS P. RANDOLPH,
Plaintiff,

vs.

MARY E. RANDOLPH,
Defendant.

*
* ORDER AND RESTRAINING ORDER
* Civil No. 914902308 DA
* Judge Sawaya
*

Hearing on Plaintiff's Motion for Temporary Relief and Restraining Order and the Cross Motion for Temporary Relief of the Defendant, was held at a regular term of the above entitled Court, pursuant to notice, July 18, 1991, before Domestic Relations Commissioner, Thomas N. Arnett, Jr. The Motion of the Plaintiff for authorization to close sale of residence and to sell automobile, together with the Temporary Restraining Order of the Defendant was heard at a regular term of the above entitled Court, pursuant to notice on August 14, 1991 before Domestic Relations Commissioner, Thomas N. Arnett, Jr. Plaintiff appeared at both

hearings in person and was represented by his attorney, H. Russell Hettinger. Defendant appeared in person at both hearings and was represented by her attorney, E. H. Fankhauser. The issues were argued to the Court by proffer and submitted to the Commissioner for recommendation. The Commissioner, having recommended approval of the matters stipulated to by the parties through their respective counsel, and having taken the contested matters and issues under advisement; and the Commissioner, having reviewed the pleadings, respective Motions and Affidavits of the parties on file herein, and being fully advised in the premises, made the following recommendations:

1. By stipulation of the parties the marital home and residence be sold and the net proceeds divided equally, except that the Plaintiff is to pay \$2,900.00 toward the roof replacement and/or repairs from his share of the proceeds.

2. That Plaintiff may have the possession and use of the 1972 Porsche automobile and Defendant is awarded the exclusive temporary possession and use of the 1988 Dodge Caravan during the pendency of this action. Plaintiff shall have the right to sell the 1972 Porsche automobile during the pendency of this action on condition that he provide a complete accounting of the sale of said vehicle to the Defendant, through counsel.

3. Plaintiff is to pay to the Defendant the sum of \$1,500.00 advance on support obligation, which sum is to be credited against any temporary child support or alimony awarded Defendant.

4. The parties are to divide the personal property between them when moving and provide inventories to the other party. Any item of personal property in dispute should be placed in storage until the parties can agree or until further order of the Court.

5. Plaintiff is to continue to maintain his health and accident insurance coverage for the benefit of the Defendant and the minor children of the parties during the pendency of this action. In that Defendant is currently a student with no income, the Plaintiff should be ordered to pay any medical or dental expenses incurred for the benefit of the minor children which is not paid by insurance.

6. Plaintiff is to maintain his present life insurance coverage on his life in force during the pendency of this action without change of beneficiary. Plaintiff is to notify Defendant of any recent changes of beneficiary.

7. A mutual Restraining Order is to issue that neither party is to harass, annoy, touch, harm or injure the other and further that with the exception of the sale of the marital home and 1972 Porsche automobile, neither party is to sell, encumber, dispose, transfer or otherwise dissipate any of the marital property or assets without mutual consent of the parties or order of the Court.

8. The Commissioner finds that Defendant has been the primary caretaker of the minor children during the marriage. Defendant is currently unemployed and attending school and is therefore able to provide personal care rather than surrogate care for the minor

[REDACTED]

at the present time, is a fit and proper person to be awarded temporary care, custody and control of the minor children and the Commissioner so recommends. The Plaintiff should be awarded liberal and reasonable visitation rights with the minor children. Should the parties be unable to agree, then visitation should be interpreted in accordance with the Court's standard schedule. Each party should be ordered to provide the other party with a current residence address and phone number.

9. Child support should be based on Plaintiff's current gross monthly income of \$7,125.00 per month and zero (0) income for Defendant, resulting in a child support obligation of \$1,169.00 per month. Plaintiff should also be ordered to pay one-half (1/2) of any work or education related child care costs actually incurred by Defendant. Child support and work related or education child care costs are to be paid 1/2 on or before the 5th of the month and 1/2 on or before the 20th of the month commencing with July 20, 1991.

10. The Commissioner finds that Defendant is in need of temporary alimony during the pendency of this action. The Commissioner finds that Defendant's monthly living expenses are inflated and over stated by approximately one-third. Therefore, the Plaintiff should pay temporary alimony to Defendant in the sum of \$1,000.00 per month. Alimony is to be payable with the child support and child care costs, 1/2 on or before the 5th of the month and 1/2 on or before the 20th of the month commencing July 20,

1991ence address and telephone number during the pendency of this

11. In that Defendant is currently a student with no income, the Plaintiff should be ordered to assume and pay any marital indebtedness incurred prior to the filing of Plaintiff's Complaint.

12. Each party expects to receive in excess of \$20,000.00 at the closing on the sale of the marital home and it appears fair and equitable that each party should pay 1/2 of the moving expenses, with a final determination of apportionment of these expenses to be made at the time of trial or settlement.

Pursuant to Article 4, "DOMESTIC RELATIONS" Section 6-401(2)(E), Utah Code of Judicial Administration, each party shall have ten (10) days of the date of the recommended Order made by Minute Entry to file written objections thereto; and further, the recommendations of the Commissioner shall be in effect as an Order until such time as the Court modifies or changes an Order, now, therefore,

IT IS HEREBY ORDERED AND ADJUDGED AS FOLLOWS:

1. Defendant be and is hereby awarded the temporary care, custody and control of the two (2) minor children of the parties, to-wit: KIRA, age 9 and ERIKA, age 5, during the pendency of this action, subject to the right of Plaintiff to visit with the children at reasonable times and places. If the parties cannot agree on visitation, then visitation should be interpreted in accordance with the Court's standard schedule.

2. Each party is ordered to provide the other with a current

residence address and telephone number during the pendency of this action.

3. Plaintiff be and is hereby ordered to pay to Plaintiff as temporary child support the sum of \$1,169.00 per month. Plaintiff is ordered to pay 1/2 of any work or education related child care costs actually incurred by Defendant during the pendency of this action. Child support and work or education related child care costs are to be paid 1/2 on or before the 5th of the month and 1/2 on or before 20th of the month commencing July 20, 1991.

4. Plaintiff is ordered to pay to Defendant as temporary alimony during the pendency of this action the sum of \$1,000.00 per month. Alimony is to be paid 1/2 on or before the 5th of the month and 1/2 on or before the 20th of the month commencing July 20, 1991.

5. The marital home of the parties is to be sold and the proceeds divided equally except that Plaintiff is to pay \$2,900.00 toward roof replacement and/or repairs from his share of the proceeds.

6. Plaintiff is awarded the exclusive possession and use of the 1972 Porsche automobile during the pendency of this action. Plaintiff is given the option to sell this vehicle and provide an accounting to Defendant of the sale proceeds.

7. Defendant is awarded the exclusive possession and use of the 1988 Dodge Caravan during the pendency of this action.

8. Plaintiff is to provide to Defendant \$1,500.00 as an

advance on the support obligation to be paid by the Plaintiff to Defendant which is to be credited against the child support and/or alimony awarded Defendant.

9. The parties are to divide the personal property between them when moving and provide inventories to the other party. Any item of personal property in dispute should be placed in storage until the parties can agree or until further order of the Court.

10. Plaintiff is to maintain health and accident insurance coverage for the Defendant and the minor children during the pendency of this action, and is ordered to pay all hospital, medical, dental, orthodontia and optical expenses of the minor children not paid by insurance.

11. Plaintiff is ordered to assume and pay all marital indebtedness incurred prior to the filing of Plaintiff's Complaint.

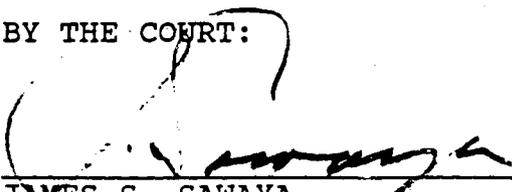
12. Each party is to be responsible to pay 1/2 of the moving expenses, with the final determination of apportionment of these expenses to be made at the time of trial or settlement of this case.

13. Each party is hereby restrained from annoying, harassing, touching, harming, or injuring the other and from interfering with the other during the pendency of this action at their place of residence or at any other time and place. Further, with exception of sale of the marital home and the 1972 Porsche, neither party is to sell, encumber, transfer, dispose or otherwise dissipate any of the marital property during the pendency of this action without the

mutual consent of both parties or order of the Court.

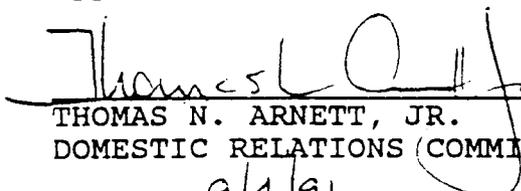
DATED this 5 day of ~~August~~ ^{Sept.}, 1991.

BY THE COURT:



JAMES S. SAWAYA
DISTRICT JUDGE

Approved:



THOMAS N. ARNETT, JR.
DOMESTIC RELATIONS COMMISSIONER

9/4/91

MAILING CERTIFICATE

I certify a true and correct copy of the foregoing was mailed to H. Russell Hettinger, Attorney for Plaintiff, 800 Kennecott Building, Salt Lake City, Utah 84133 pursuant to Rule 4-504(2), Code of Judicial Administration, on this 20th day of August, 1991.

