

1992

Kathryn Tuck Coats v. Peter M. Coats : Reply Brief

Utah Court of Appeals

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Recommended Citation

Reply Brief, *Coats v. Coats*, No. 920588 (Utah Court of Appeals, 1992).
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UTAH COURT OF APPEALS
BRIEF

UTAH
DO
F. J.
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A. D.

DOCKET NO.

920588

IN THE UTAH COURT OF APPEALS

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KATHRYN TUCK COATS,	:	REPLY BRIEF OF
	:	CROSS-APPELLANT
Plaintiff, Appellee,	:	
and Cross-Appellant,	:	
	:	
v.	:	
	:	
PETER M. COATS,	:	
	:	
Defendant, Appellant,	:	
and Cross-Appellee.	:	Case No. 920588-CA
	:	Category No. 15

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Appeal From an Order in the Third Judicial District Court,
in and for Salt Lake County, State of Utah,
Honorable Homer F. Wilkinson

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Utah Court of Appeals

APR 27 1994

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KATHRYN TUCK COATS,	:	REPLY BRIEF OF
	:	CROSS-APPELLANT
Plaintiff, Appellee,	:	
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v.	:	
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PETER M. COATS,	:	
	:	
Defendant, Appellant,	:	
and Cross-Appellee.	:	Case No. 920588-CA
	:	Category No. 15

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This Brief is filed by Appellee in Reply to arguments raised by Appellant in his Reply Brief of Cross-Appellee.

I.

THE COURT COMMITTED ERROR BY AWARDING
DEFENDANT RIGHTS OF VISITATION WITHOUT
SUPERVISION IN CONTRADICTION TO THE EXPERT
TESTIMONY PRESENTED TO THE COURT.

The Appellant argues that the lower Court was not required to follow the recommendations of the Court appointed expert, Dr. Mercedes Reisinger, or the children's therapist, Thomas Harrison. However, the standard that the lower Court must apply

when weighing the evidence is the preponderance of evidence. Dr. Reisinger's report was admitted without objection or cross-examination and is the preponderance of evidence. Further, Mr. Harrison testified that Appellant is in need of significant treatment individually and is in need of treatment with his children conjointly before he should be allowed to visit them without supervision. [Transcript 664] Mr. Harrison further testified that he believed there is a potential for danger to the children if visitation occurred without supervision. [Transcript 665]

The Appellee argues in his Reply Brief of Appellant and Cross-Appellee, page 15, that the Court had the opportunity to observe Kathryn Coats in her testimony and, based upon that observation, the lower Court was justified in ignoring the preponderance of evidence and awarding the Defendant rights of visitation without supervision.

The lower Court made a finding that "there is concern about the father's dysfunction and the mother informing the children of this dysfunction." [Findings of Fact No. 2, pages 2 and 3] However, this issue was addressed by Dr. Mercedes Reisinger as follows:

The children appear to derive the problems as outlined as a result of three primary factors:
(1) there are no emotional problems to varying degrees; (2) their father has serious

personality problems which foster his aggressive insistence on changing the visitation without resolution of the existing conflicts. Mr. Coats tends to be disregarding of the children's needs due to his own strong emotional needs. He has difficulty interacting with them without disclosing too much information and is unable to remain in parental control of the interactions. (3) their mother's own overly dramatic and overly reactive personality style with her overly candid approach in relation to the children and the conflicts that have existed with their father in terms of the information which Mrs. Coats reportedly discussed with the children, it appears that it reflects her own fears in relation to her ex-husband. It seems that Mrs. Coats' approach towards the children has occurred as a result of her misrepresentation of what Mr. Tom Harrison counseled in combination with her personality style. As a result of these factors, the children in this case are being placed in the middle of adult conflicts which they have inadequate skills coping with. This exacerbates the children's emotional problems. [P-14]

And, even after considering the shortcomings of Kathryn Coats, Dr. Reisinger still recommends that Defendant have supervised visitation.

The Appellant argues that now the children reside in Virginia, the Appellant is only able to see them on an infrequent occasion and this limited time together is an additional reason to allow unsupervised visits so that he can attempt to rebuild his relationship with his children. [Reply Brief of Appellant and Cross-Appellee, page 16] However, since the Appellant only sees the children on an infrequent occasion, this supports the position

that visitation should be supervised, as the Appellant and the children have not had the opportunity to rebuild a healthy and positive relationship. The lower Court made the finding that the children do have fear toward their father [Findings of Fact, page 2] and Appellant's infrequent visitation clearly does not alleviate the children's fear.

It is clear that by not following the recommendations of the experts, the lower Court ignored the statutory standard of allowing visitation which is in the best interests of the child. The matter should be remanded with instructions to follow the recommendations of the experts.

II.

THE COURT COMMITTED ERROR BY DIRECTING THE PLAINTIFF TO REPLACE MR. TOM HARRISON WITH ANOTHER COUNSELOR AS THE CHILDREN'S COUNSELOR.

The Appellant argues that the lower Court did not abuse its discretion in determining that another counselor would be more appropriate. The Appellant argues that if antagonism existed between the counselor and the Appellant, a non-productive session would result. [Reply Brief of Appellant and Cross-Appellant, page 17] Appellant ignores the fact that Mr. Harrison had been treating the children for almost two years and that Dr. Mercedes Reisinger recommended that the children should continue therapy with Tom Harrison. Both the Appellant and the lower Court failed to take

into consideration the best interests of the child and only considered the interest of the Appellant. This matter should be reversed.

III.

THE LOWER COURT COMMITTED ERROR BY DIRECTING
THAT ALIMONY WOULD TERMINATE TEN YEARS FROM
THE DATE OF COMMENCEMENT WHICH WAS JUNE 16,
1992.

The Appellant argues that with the substantial property award given to the Appellee by the Court together with her age and earning ability, an award of \$240,000 over a ten-year period cannot be said to be an abuse of discretion. [Reply Brief of Appellant and Cross-Appellee] However, the Appellant ignores the fact that these parties were married over thirteen years constituting a long-term marriage. The Appellant's argument also fails to recognize the Court's decision in Watson v. Watson, 837 P.2d 1 (Utah App. 1992), wherein the Court upheld an award of permanent alimony based upon a six-year marriage in a factually similar case.

The Appellant further argues that based on Appellee's remarriage in the summer of 1993, the issue would be moot and not be subject to appellate review. However, the Appellee has filed for an annulment, and pursuant to 30-3-5(5), Utah Code Annotated, if the remarriage is annulled and found to be void ab initio, payment of alimony shall resume if the party paying alimony is made

a party to the action of annulment and his rights are determined. Thus, the issue is not moot and is subject to appellate review.

IV.

THE LOWER COURT COMMITTED ERROR BY VALUING
NORTHRIDGE FURNISHINGS AT \$4,500 EVEN THOUGH
THE DEFENDANT TESTIFIED THAT THE VALUE OF SAID
PROPERTY WAS \$18,000.

The Appellant argues that based upon the testimony of Appellee's own appraiser, John Davis, the lower Court was justified in concluding that the retail value suggested by the Appellant was only approximately one-fourth of the actual market value that these items would sell for in a commercial setting. [Reply Brief of Appellant and Cross-Appellee, page 21] However, the lower Court did not rely upon the testimony of John Davis when making its ruling on the Northridge property. The only evidence before the Court was the testimony of the Appellant valuing the Northridge furnishings at \$18,000 [TR 456] which is clearly the preponderance of evidence. The Court was clearly in error by arbitrarily reducing the amount from \$18,000 to \$4,500. The case should be reversed with instructions that the value of the Northridge personal property is \$18,000.

V.

THE LOWER COURT COMMITTED ERROR BY ELIMINATING
TARGET CAPITOL AS AN ASSET EVEN THOUGH THE
PARTIES STIPULATED THAT IT WAS AN ASSET.

The Appellant argues that the lower Court was correct in completely discarding Target Capitol as a non-existent asset. However, even though there was no testimony regarding this asset, the parties agreed that Target Capitol was an asset of the marital estate and agreed on its value. [Exhibits D-59 and P-91]

The Court refused to include Target Capitol in the marital estate, and the case should be reversed on this issue with instructions to set the value stipulated by the parties and include Target Capitol as an asset of the marriage which is awarded to Defendant.

VI.

THE LOWER COURT ERRED BY FAILING TO RECOGNIZE
THE ENTIRE LIABILITY OF THE PLAINTIFF TO HER
FATHER WHICH WAS INCURRED DURING THE DIVORCE
PROCEEDINGS TO PAY ATTORNEY'S FEES, EXPERT
FEES AND TO MAINTAIN THE FAMILY.

The Appellant makes the argument that the Appellee wishes the Appellant to pay the entire liability to her father and then to pay her separately for attorney's fees and witness fees which she claims are due. The Appellant claims that such double-dipping cannot be allowed. [Reply Brief of Appellant and Cross-Appellee, page 21] However, Appellant mischaracterizes the argument raised

in the Brief of Respondent and Cross-Appellant which specifically states at pages 42 and 43, that when determining the issue of the liability owed to Mr. Tuck, the Court must also consider the subsections of that Brief relating to attorney's fees and costs. Consequently, Appellee is not double-dipping as the Appellant has suggested. The Appellant also fails to recognize the argument made by Appellee in her Brief of Respondent and Cross-Appellant, pages 42 and 43. Appellee is not making the argument that Mr. Tuck has a direct claim against Mr. Coats for payment of the Promissory Notes. Rather, that the lower Court failed to recognize the entire liability owed by Plaintiff to her father, which was incurred during the divorce proceedings to pay attorney's fees, Muir v. Muir, 847 P.2d 736 (Utah App. 1992), expert witness fees, Peterson v. Peterson 818 P.2d 1305-1309 (Utah App. 1991), and to maintain the family. The Court was clearly in error by failing to recognize the undisputed liability owed to Mr. Tuck, and the case should be reversed with instructions to recognize the liability owed to Mr. Tuck.

VII.

THE LOWER COURT ERRED IN FAILING TO AWARD THE
PLAINTIFF ALL ATTORNEY'S FEES AND COSTS
INCURRED IN THESE PROCEEDINGS.

The Appellant argues that the Court took into account the financial need of the receiving spouse and the ability of the other

spouse to pay, together with the conduct of both spouses in generating the fees, and correctly awarded the Appellee only \$20,000 in attorney's fees. However, the Court ignores Martindale v. Adams, 777 P.2d 514, 517-518 (Utah App. 1989) which states that "where the evidence supporting the reasonableness of the requested fees is both adequate and entirely undisputed...the court abuses its discretion in awarding less than the amount requested unless the reduction is warranted by one or more of the established factors." [emphasis added] The Court offered no explanation for the reduction in fees. Because the evidence of Plaintiff's attorney's fees is adequate and entirely undisputed, the Court abused its discretion. All of the fees paid by the Plaintiff's father and all the fees incurred for the trial should be awarded to the Plaintiff.

VIII.

THE LOWER COURT ERRED IN FAILING TO AWARD THE PLAINTIFF REASONABLE FEES FOR EXPERTS, I.E., ACCOUNTANTS, APPRAISERS, ENGINEER AND OTHER EXPERTS WHO APPEARED ON HER BEHALF AND ASSISTED HER IN THE PREPARATION AND PRESENTATION OF HER CASE.

The Appellant argues that the lower Court denied Appellee's request for expert witness fees on the basis that her request was overly broad under Utah law. However, this argument is unsupported by the record. The Judge stated from the bench that he was not going to award fees because he was not persuaded that

Peterson v. Peterson, 818 P.2d 1305 (Utah App. 1991), applied to professional experts such as accountants. [TR 506] However, it is clear that the Court misapplied the holding in Peterson as it clearly states that Utah Code Annotated, § 30-3-3, "empowers a court to use its sound discretion to define costs as those reasonable amounts that are reasonably expended to prosecute or defend a divorce action." [emphasis added] In Rappleye v. Rappleye, 855 P.2d 260 (Utah App. 1993), Mrs. Rappleye sought reimbursement of accounting costs that had been incurred in prosecuting the divorce. The trial Court rejected her claim. The lower Court's determination was vacated and the matter remanded for further findings regarding the propriety of awarding accounting costs to Mrs. Rappleye under Utah Code Annotated, § 30-3-3 (1989).

The Appellant argues that there was insufficient evidence before the Court to justify such fees. However, the Plaintiff testified that she incurred expert fees in the case and it was her desire to be awarded 100% of those expert fees. [TR 780-781] She further testified that experts in this case were necessary because of Defendant's failure to cooperate in discovery, valuation of the assets, and payment of support. [TR 778-779] Utah Code Annotated, § 30-3-3, requires that fees and costs be awarded pursuant to need and ability to pay. As such, the statutory requirements of § 30-3-3 were satisfied, and the lower Court's decision to deny expert

fees in this case should be reversed and the Court instructed to award \$14,200 in expert fees.

CONCLUSION

The Appellant has failed to refute any of the arguments presented to this Court for review. Consequently, the Court committed error:

a. By awarding Defendant rights of visitation without supervision in contradiction to the expert testimony presented to the Court.

b. Directing the Plaintiff to replace Mr. Thomas Harrison with another counselor as the children's counselor when Dr. Reisinger recommended that the children continue in therapy with Mr. Harrison had been treating the children for almost two years.

c. Directing that alimony would terminate in ten years when in fact this marriage constituted a long-term marriage that should have resulted in an award of permanent alimony.

d. Valuing the Northridge furnishings at \$4,500 even though the only evidence before the Court was Defendant's testimony that the value of said property was \$18,000.

e. Eliminating Target Capitol as an asset of the marital estate even though the parties agreed that it was an asset.


f. Failing to recognize the entire liability of the Plaintiff to her father which was incurred during the divorce proceedings to pay attorney's fees, expert witness fees, and to maintain the family.

g. Failing to award the Plaintiff all attorney's fees and costs incurred in these proceedings.

h. Failing to award the Plaintiff reasonable fees for experts, i.e., accountants, engineers, appraisers, and other experts who appeared on her behalf and assisted her in the preparation and presentation of the case.

DATED this 27 day of April, 1994.

LITTLEFIELD & PETERSON


JOANNA B. SAGERS
Attorney for Plaintiff/Appellee

CERTIFICATE OF HAND DELIVERY

I hereby certify that I caused to be hand-delivered, a true and correct copy of the foregoing, REPLY BRIEF OF CROSS-APPELLANT, this 27 day of April, 1994, to:

Craig S. Cook, Esq.
3645 East 3100 South
Salt Lake City, Utah 84109

A handwritten signature in cursive script, appearing to read "Dana Seyd", is written over a horizontal line.

J4\coats.rep