

1993

Lynda Smith v. Richard Raymond Smith, Sr. : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

930162 CA

LYNDA SMITH,)	
)	Case No. 930162-CA
Plaintiff/Appellee,)	
)	
vs.)	
)	
RICHARD RAYMOND SMITH, SR.,)	Priority No. 15
)	
Defendant/Appellant)	

REPLY BRIEF OF APPELLANT AND CROSS APPELLEE'S BRIEF

APPEAL FROM THE DECREE OF DIVORCE AND RULING ON POST JUDGMENT
MOTIONS ENTERED BY THE HONORABLE ROBERT T. BRAITHWAITE
OF THE FIFTH JUDICIAL DISTRICT COURT, IN AND FOR
IRON COUNTY, STATE OF UTAH

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Utah Court of Appeals

OCT 22 1993

W. Michael Westfall

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APPELLANT'S REPLY BRIEF AND CROSS-APPELLEE'S BRIEF

APPELLANT'S REPLY BRIEF

**CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES,
RULES AND REGULATIONS**

**Utah Code Annotated §30-3-5
Utah Code Annotated §78-32-1**

ARGUMENT

A. THE TRIAL COURT'S FINDING THAT THE HOME IN CEDAR CITY, HAD BEEN "COMMINGLED" INTO THE MARITAL ESTATE IS NOT SUPPORTED BY THE TESTIMONY OR EVIDENCE PRESENTED AT TRIAL.

The initial sentence in Appellee's "Statement of the Case" has no relevance to the issues briefed and presented to the Court for review and misstates the evidence. Defendant therefore objects to that claim. Although Plaintiff had signed an affidavit, in an attempt to obtain a temporary restraining order, in which she claimed that the Defendant had apparently "pinned" her to the wall and "knocked" her to the ground in a violent display of anger, when she testified about that incident at trial, she said that, in the

course of an argument about whether she and Defendant should go to dinner or not he came toward her, and as she backed up she hit her head on a wall and fell down on her tailbone. ¹(T. at 234-235). Characterizing that incident as "violent...spousal abuse" is misleading at best.

The Appellee's Statement of Facts as it relates to the Court's decision regarding distribution of property includes statements for which there is no evidentiary support. Appellee claims that she had a "prior home... in Aqua Dulce, California," and it is true that the trial court made that finding (T. at 750-751). However, prior to the parties' marriage Plaintiff did not have a home; she was the beneficiary of two trust deeds secured by a home (T. at 341) and only realized the benefit of that asset after considerable time and effort were spent during the marriage. (T. at 369-370) In addition, Plaintiff did not testify that the proceeds from the sale of Defendant's home were commingled. She "believed" that the money to purchase the home came from the parties' joint account (T. at 71). However, on cross examination Plaintiff freely admitted that she did not know where the funds came from to make the down payment on the home in Cedar City (T. at 345-346).

The home in Cedar City, Utah, was purchased with the proceeds from the sale of Defendant's premarital home (T. at 518-519), in which Plaintiff had no interest (T. at 399), and

¹Throughout the brief the literal "R" will stand for Record of the case and the literal "T" will stand for the transcript of the trial. The numbers following the literals will indicate the page where the material referenced can be located.

Defendant's premarital retirement account. (T. at 396, 601-602) That asset cannot be equated with Plaintiff's interest as beneficiary of two trust deeds on the home in Aqua Dulce, where the value of that asset was preserved and enhanced as a direct result of Defendant's efforts during the marriage. (T. at 583-586). Such a simplistic view of the assets of this marriage ignores decisions of this Court relating to treatment of premarital property and inequitably awards to the Plaintiff a windfall by giving her an interest in Defendant's premarital asset for no other reason than that she lived in and enjoyed the use of that asset during the marriage.

Although the trial court did find that "the assets," apparently referring to the proceeds of the sale of Defendant's home and sale of the home which was security for the Plaintiff's two trust deeds, "were commingled" (T. at 751), there was no credible evidence on which the trial court could base that finding. The proceeds from the sale of Defendant's home can be directly traced into the down payment for purchase of the home in Cedar City both with reference to the amount of the down payment (T. at 518) and the date the home was purchased. Defendant sold his home on June 9th, received the check on June 13th (T. at 518) and purchased the home in Cedar City on June 20, 1988. (T. at 39)

B. ALTHOUGH THE MARITAL ESTATE MAY HAVE AN INTEREST IN THE JAGUAR AUTOMOBILE, THE TRIAL COURT ERRED WHEN IT FAILED TO ACKNOWLEDGE THAT DEFENDANT ALSO HAS A PREMARITAL INTEREST IN THAT ASSET.

Defendant had a separate property interest in the Jaguar automobile. Testimony with reference to a 1984 Corvette established that it had been purchased by the Defendant and driven back and forth by him from Burbank, California to Cedar City, Utah. (T. at 559) That automobile had been purchased with \$6,000.00 which the Defendant had saved from the proceeds of his premarital retirement account. That asset in which Defendant had a premarital interest, was sold and the funds were applied toward purchase of the 1988 Jaguar automobile. (T. at 559-560). The trial court had no contrary evidence before it with reference to the source of the funds with which the 1988 Jaguar automobile was purchased. Accordingly, the trial court abused its discretion in failing to acknowledge a premarital interest in that asset at least with reference to use of the proceeds from the sale of the 1984 Corvette.

In light of Defendant's claim that the home in Cedar City is his premarital property, he also maintains that the debts associated with that asset are his personal debts as well. Approximately half of the purchase price for the Jaguar automobile was acquired with a loan secured by the Defendant's home in Cedar City, (T. at 554, 557) and approximately that same amount remains outstanding (T. at 560). This is approximately one-half of the purchase price of the vehicle (T. at 560). The trial court could and should have recognized Defendant's premarital interest in the asset by awarding Defendant either his premarital contribution or at least a percentage of the sale proceeds based on the

relationship of premarital assets used to purchase the automobile to the total purchase price. The trial court erred when it did neither, ignoring Defendant's separate property interest.

C. THE TRIAL COURT ERRED WHEN IT FAILED TO ACKNOWLEDGE A MARITAL INTEREST IN THE PLAINTIFF'S PREMARITAL PORSCHE AUTOMOBILE.

While it is true that there was testimony presented at trial that Defendant had been reimbursed from the proceeds of the sale of the Aqua Dulce home for expenses to renovate Plaintiff's Porsche automobile, (T. at 670) those funds, according to the findings of the trial court, were not "premarital funds." The trial court correctly found that the proceeds of the sale of the Aqua Dulce home were marital funds (T. at 750-751). Accordingly, the funds used to reimburse the Defendant for improvements to the Plaintiff's premarital automobile were paid for with marital funds. The marital estate has an interest in that automobile what the trial court should have recognized and awarded to Plaintiff with an award of other marital assets of equal value to Defendant.

D. THE LAW OF THE STATE IN WHICH AN ASSET IS, AND THROUGHOUT THE ENTIRE MARRIAGE, HAS BEEN LOCATED, GOVERNS DISPOSITION OF THAT ASSET EVEN WHEN A COURT IN THIS STATE HAS JURISDICTION OVER THE SUBJECT MATTER AND PARTIES IN THE DIVORCE.

Jurisdiction over the subject matter or parties in a lawsuit does not require that the law of the forum govern resolution of the dispute. In Forsman v. Forsman 779 P.2d 218 (Utah 1989) a California couple filed a lawsuit in Utah which would have been barred under Utah's doctrine of interspousal immunity.

However, the Supreme Court determined that California law, which does not recognize the doctrine of interspousal immunity for a negligent tort, should have been applied although the lawsuit was pending in this state.

Where the law of the situs of an asset is in conflict with Utah law, the trial court must determine which state's law to apply.

The 401K Salaried Savings plan is located, as is Defendant's employment, solely in the state of California. Section 6 of the Restatement (Second) of Conflict of Laws provides, as a general guide to choice of law selection, that the following factors, insofar as they may be relevant to the analysis, should be considered: (a) The needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of results, and (g) ease in the determination of and application of the law to be applied.

Although the policy of this state that assets be valued at the time of the divorce may appear, at first blush, to suggest that Utah law be applied to this matter, competing policies mandate that California law be followed when coupled with the apparent policy of the state of California that acknowledges a separate property interest in post separation earnings (See California Civil

Code §5118), the certainty, predictability and uniformity of results inherent in application of a California law which allows each party to keep his or her earnings following separation, and the ease in determining and applying the California law to this controversy.

In this case Defendant tried to obtain a trial setting in this matter by requesting a Scheduling Conference and Trial Setting on August 13, 1992 (R. at 63-64). The trial, set for October 30, 1992, was subsequently continued, consistent with Plaintiff's motion filed on or about August 24th (R. at 96-97). Ultimately trial was held in December. Following the parties' separation, Defendant paid temporary alimony, Plaintiff diverted marital funds to her own use despite a court order prohibiting her from doing so (See page 34 of Appellant's Brief), Defendant contributed his post separation earnings to increase the value of his 401K Salaried Savings plan and Defendant was actively seeking to obtain a final resolution of the matter. There is public policy in favor of recognizing Defendant's post separation earnings as his separate property under those circumstances.

Utah has no "significant relationship" to the California 401K Salaried Savings plan. This is especially so where, as here, following the parties' separation, the Defendant was denied access to his home in the state of Utah and has resided in the state of California, earning income and contributing additional funds toward his 401K Salaried Savings Plan in that state.

E. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ALLOWED THE

PLAINTIFF TO RETAIN MARITAL FUNDS WITHDRAWN FROM THE PARTIES' JOINT BUSINESS AND THEREBY PROFIT FROM HER VIOLATION OF A COURT ORDER, ESPECIALLY WHILE DEFENDANT WAS PAYING HER THE ALIMONY THAT HAD BEEN ORDERED.

Regardless of whether Plaintiff was successful in her efforts to manage the parties' jointly owned business, the Sportsmen's Lounge, her conduct in withdrawing funds from income generated by that business violated the law of this case. The Domestic Commissioner had ordered that she not withdraw funds from the Lounge (R at 42). The rulings of the Domestic Commissioner are binding upon the parties until modified by the District Court Judge (Utah Code of Judicial Administration, Rule 6-402(4)). There is no justification in the record for the trial court to excuse Plaintiff's blatantly contemptuous conduct. She should have been ordered to account to the marital estate for her illegal diversion of marital funds by repaying those funds to the marital estate.

F. THE TRIAL COURT'S DECISION TO IGNORE DAMAGE TO DEFENDANT'S FIREARMS WHICH OCCURRED WHILE THE PLAINTIFF HAD THOSE ITEMS IN HER CARE WAS AN ABUSE OF DISCRETION.

In response to Defendant's argument that the trial court abused its discretion by not awarding him compensation for damage to his firearms while in the Plaintiff's possession and care, Plaintiff argues that "there was no independent evidence that damage resulted from the use" by Plaintiff's son. Plaintiff then suggests that the Court's decision was reached after it "weighed the credibility" of the witnesses. In order to weigh the

credibility of witnesses, there ought to at least be contrary evidence presented. Here there was none. The guns were used by Plaintiff's son. (T. at 268). The guns were damaged while they were in Plaintiff's possession (T. at 645). The trial court's failure to make any award to the Appellant to compensate him for damage to those firearms ignored the evidence and was an abuse of the trial court's discretion.

G. CHILD SUPPORT ACCRUED DURING THE MARRIAGE IS AN ASSET THAT SHOULD HAVE BEEN CONSIDERED BY THE TRIAL COURT.

Following termination of these parties' marriage, Plaintiff, in addition to other assets awarded her, has the right to collect approximately \$64,250.00 in delinquent child support from her exhusband. The trial court totally ignored that asset, failing even to address what value it may have. In doing so the trial court abused its discretion. In light of the preferred status of a child support debt the trial court should have determined the value of that asset to the marital estate and should have awarded that asset to the Plaintiff.

H. THE TRIAL COURT'S TREATMENT OF THE PRESEPARATION TRAVEL EXPENSE AND ITS FINDING THE DEFENDANT IN CONTEMPT FOR HIS RETAINING A PORTION OF THE INCOME TAX REFUND UNTIL THE COURT HAD RULED ON THE STATUS OF THAT DEBT WAS AN ABUSE OF DISCRETION.

At the time these parties separated there was an outstanding credit card debt of \$4,882.35 for travel expenses associated with the Defendant's commute between California and Cedar City, Utah. That debt had been historically paid as a debt

of the marital business. (T. at 592-593) The Defendant had been ordered to use the income tax refund to pay business debts. He paid certain of those debts. However, he retained the balance of the income tax refund and did not pay any specific business debt because there was a dispute pending regarding the status of the credit card debt (T. at 594). Until the trial court had resolved that dispute and acknowledged that obligation as a business debt Defendant did not know what he was required to do. In order to be held in contempt a party must know what the court has ordered him to do, have the ability to comply, and then fail to comply. UCA §78-32-1, Von Hake v. Thomas, 759 P.2d 1162 (Utah 1988). In this case, although Defendant asked for a ruling on that issue (T. at 719) the trial court did not address the debt in its initial findings, and only entered findings and an order relating to that credit card debt after Defendant had filed a Motion to Supplement Findings and Order. (R. at 283-187, 406-411) The Defendant understood that he was to use the funds to pay debts of the business, without any debt having been specifically specified. His waiting until an issue with regard to the status of a specific debt had been resolved is not contemptuous.

CONCLUSION

The trial court's findings and legal conclusions regarding those issues presented in Appellant's brief are not supported by the law or the facts. The trial court's ruling should be reversed and the relief requested in Appellant's Brief on Appeal granted.

BRIEF OF CROSS-APPELLEE

JURISDICTIONAL AUTHORITY

Jurisdiction is vested with the Court of Appeals pursuant to Utah Code Annotated § 78-2a-3(2)(i) (1992).

ISSUES AND STANDARDS OF REVIEW

The issues presented for review in Cross-Appellant's Brief are as follows:

1. Is the trial court required to award alimony if the party requesting the same is capable of providing for his or her own needs and will receive substantial assets pursuant to the trial court's division of marital property, just because his or her ex-spouse earns substantially more income than she or he does, where the parties' respective abilities to generate earned income has essentially remained the same during the parties' seven year marriage. As to the Court's factual finding concerning the Plaintiff's needs and ability to support herself, the "clearly erroneous" standard should apply. Hagan v. Hagan, 810 P.2d 478, 481 (Ut. Ct. App. 1991). As to the court's decision to award no alimony based on those factual findings, the "clear abuse of discretion" standard of review should apply. Kerr v. Kerr, 610 P.2d 1380, 1382 (Utah 1980).

2. Is the trial court required to award attorney's fees in a divorce proceeding just because there is a disparity in the

parties' respective abilities to earn income despite the fact that the party requesting attorney's fees has been awarded substantial assets from which those attorney's fees could be paid. As to the Court's factual finding concerning the Plaintiff's financial need, the "clearly erroneous" standard should apply. Hagan v. Hagan, 810 P.2d 478, 481 (Ut. Ct. App. 1991). As to the court's decision to award no attorney's fees based on those factual findings, the "clear abuse of discretion" standard of review should apply. Kerr v. Kerr, 610 P.2d 1380, 1382 (Utah 1980).

**CONSTITUTIONAL PROVISIONS, STATUTES,
ORDINANCES, RULES, AND REGULATIONS**

Utah Code Annotated § 30-3-3.

STATEMENT OF THE CASE

Cross-Appellee incorporates herein by reference the statement of the case as set forth in Appellant's Brief, on file herein.

STATEMENT OF FACTS

Cross-Appellee incorporates herein by reference the statement of facts as set forth in Appellant's Brief, on file herein, together with the following:

1. At trial, Plaintiff testified that her net monthly living expenses, excluding housing, and including the living expenses for her minor son, totalled \$675.00 per month (T. at 202). The trial court found that Plaintiff needs \$605.00 per month to satisfy her financial needs plus housing costs (R. at 360) as claimed in her Financial Declaration (T. at 759).

2. Plaintiff will be responsible to pay the approximately \$450.00 per month mortgage on the home she is

occupying until it sells. (R. at 360)

3. Plaintiff has earned income, until the Sportsmen's Lounge sells, of \$1,150.00 per month (R. at 361, T. at 760) which is what she had been earning at the time of trial (T. at 192, 362) from the Lounge and her part time work at Wendys.

4. Prior to her marriage to Defendant, Plaintiff was employed, earning \$6.00 per hour. (T. at 205)

5. Defendant obtained his current employment prior to the marriage to Plaintiff. (T. at 482)

6. After the Sportsmen's Lounge is sold, Plaintiff will be capable of earning \$800-\$900 per month gross income (R. at 361) and will receive substantial cash upon sale of the assets the Court ordered sold (R. at 361), of approximately \$95,000.00, if she receives half the equity realized upon sale of the home in Cedar City (R. at 361), plus other assets, including almost half of Defendant's 401K Salaried Savings plan. (R. at 371)

SUMMARY OF ARGUMENT

In determining whether an award of alimony is appropriate, the trial court is required to consider three factors. The trial court did so in this case and correctly determined that, regardless of whether the Defendant had the ability to pay some support, Plaintiff had no need for alimony from the Defendant. Her ability to produce income, both prior to and following sale of the marital business, a sale which would net payment of a substantial sum to Plaintiff, is sufficient to meet her needs. Especially in a marriage of relatively short duration--seven years--where neither

parties' earning ability has substantially changed, the trial court's decision was correct. To rule otherwise would, in essence, grant a windfall to one who, in middle age, enters into a second marriage with someone who, at the time of that second marriage, already had a substantially greater earning ability. Where, as here, the Plaintiff still has the ability to support herself at the termination of this second marriage, of relatively short duration, it is not at all inappropriate for the court to place the parties in essentially the same position to support him or herself as each was in at the time the marriage began.

In determining whether an award of attorney's fees is appropriate, the court is not required to focus its attention exclusively on the earning ability of the parties. In this case, the trial court correctly determined that, in light of all of the circumstances, including the property awarded to each party, the Plaintiff did not need financial assistance from the Defendant to pay her attorney's fees. It was not necessary for the trial court to determine the reasonableness of attorney's fees for which assistance in payment was not necessary.

ARGUMENT

A. THE TRIAL COURT PROPERLY FOUND THAT THE PLAINTIFF HAD NO NEED FOR ALIMONY AND THEREFORE APPROPRIATELY DECLINED PLAINTIFF'S REQUEST FOR AN AWARD OF THE SAME.

Throughout her brief on this issue, Plaintiff cites several cases in support of what she identifies as the "Jones test". The trial court is required to consider the following three factors in

awarding alimony: "(1) The financial conditions and needs of the receiving spouse; (2) the ability of the receiving spouse to produce sufficient income for himself or herself; and (3) the ability of the responding spouse to provide support." Watson v. Watson, 837 P.2d 1,3 (Ut. App. 1992), Jones v. Jones, 700 P.2d 1072, 1075 (Ut. 1985). Despite acknowledging those three factors, Plaintiff focuses her entire argument on the third factor and appears to suggest that, regardless of the needs of the requesting spouse or her ability to produce sufficient income for herself, the Court should award alimony if there is a disparity in the parties' earning abilities. That argument is clearly contrary to the law of this state as it relates to the issue of alimony.

In this case the trial court properly determined, based on the evidence presented, that the Plaintiff has a monthly financial need of approximately \$1,055.00 (T. at 759). At the present time, with the earnings Plaintiff generates from the parties' joint business, she is earning approximately \$1,150.00. That exceeds her monthly need. (T. at 760).

When the Sportsmen's Lounge, the parties' joint business, is sold the Plaintiff will receive substantial assets. She will receive at least one half of the equity in the Sportsmen's Lounge (R at 368-369) and may receive more in the event the Defendant elects to trade his equity in the Sportsmen's Lounge for Plaintiff's claim to his retirement benefit. (R. at 371). In addition to the substantial funds Plaintiff will have upon sale of the Sportsmen's Lounge, she will still have the ability to produce

income of \$800-\$900 per month even if she is not able to take advantage of skills she acquired while managing the Sportsmen's Lounge. That amount will at least meet her needs in light of one additional factor: Her "needs" as testified to at trial include some living expenses for her then minor son. He has now reached the age of majority, thereby relieving Plaintiff of the legal responsibility for his support.

In this case, the trial court adopted as its finding the Plaintiff's statement concerning her financial needs as set forth in her financial declaration (T. at 759). The trial court properly found that Plaintiff was capable of meeting those needs with her own resources and through her own employment efforts. (T at 759-762): Therefore, the cases cited by Plaintiff in which the requesting spouse's needs exceeded her income, including Howell v. Howell, 806 P.2d 1209 (Utah App. 1991) and Bell v. Bell, 810 P.2d 489 (Utah Ct. App. 1991), have no application to this case, except insofar as they reaffirm the rule that all three factors must be considered by the trial court before awarding alimony.

The trial court's findings on the issue of alimony are adequately supported by the record.

Plaintiff points out that women generally earn less than men do and that men experience an improvement in their post divorce standard of living while women experience a decline. (Cross Appellant's Brief at 39-40) However, Plaintiff fails to cite any studies to suggest to what extent those statistics may be affected by short term marriages which do not affect the wife's

employability, or in which the wife has not invested "her resources jointly in the husband's 'human capital'."

In this case, the Plaintiff clearly experienced a substantial increase in her standard of living when she married the Defendant. At that time she was earning \$6.00 per hour (T. at 205) and the Defendant was employed as an engineer at Lockheed. (T. at 482) To suggest that the Plaintiff's standard of living, for purposes of an alimony award, should be measured exclusively by her spouse's income, especially where he has maintained the same job throughout the parties' marriage and the marriage was of relatively short duration, suggests an approach to spousal support which, in essence, would encourage a person who has married into favorable circumstances to enter into and then terminate that marriage in order to enjoy the benefit of the other spouses already established earning ability. Marriage is not an institution and divorce is not a procedure by which one party is entitled to a windfall.

B. THE TRIAL COURT PROPERLY DETERMINED THAT, TAKING INTO CONSIDERATION THE ASSETS AWARDED TO PLAINTIFF, SHE HAS THE ABILITY TO PAY HER OWN ATTORNEY'S FEES.

As this Court pointed out in Muir v. Muir, 831 P.2d 736 (Utah App. 1992) the initial inquiry in determining whether attorney's fees should be awarded is whether the party seeking reimbursement for attorney's fees has the financial need for assistance in paying his or her fees and whether the other party has the ability to pay those fees. If the Court finds need and the ability to pay then the Court should move to the next level of

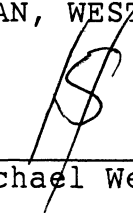
inquiry, that is, whether the fees requested are reasonable. In this case the trial court properly found that, in light of other assets awarded to the Plaintiff, she had the ability to pay her own attorney's fees. Plaintiff has failed to marshall the evidence in support of the Court's ruling in that regard to demonstrate that the evidence does not support the trial court's finding and appears to base her entire argument in this regard on the disparity in the parties' earning ability. The trial court is not required to focus its attention exclusively on the parties' earning abilities. In this case, the trial court properly considered all factors, including property awarded to the Plaintiff, and appropriately declined to award attorney's fees in light of the Plaintiff's ability to pay her own fees from assets awarded her.

CONCLUSION

The trial court's decision with regard to the issue of alimony and attorney's fees is properly supported by the evidence. Plaintiff's argument that the trial court should have focused its inquiry on the disparity in the parties' earning abilities has no support in the law of this jurisdiction or in the record. The trial court's denial of Plaintiff's request for alimony and attorney's fees should be affirmed.

DATED this 19 day of Oct, 1993.

GALLIAN, WESTFALL, WILCOX & WRIGHT



G. Michael Westfall

CERTIFICATE OF MAILING

I hereby certify that on the 19th day of October, 1993, I caused to be mailed two (2) true and exact copies of the within and foregoing Reply Brief of Appellant and Reply Brief of Cross Appellee to the following, first-class mail postage prepaid.

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