

2005

Kristyna Diane Rose v. Donovan T. Rose : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

KRISTYNA DIANE ROSE,)	
Petitioner/Appellee,)	
vs.)	
DONOVAN T. ROSE,)	
Respondent/Appellant.)	Case No. 20050409-CA

STATE OF UTAH, Office of)	
Recovery Services,)	
Intervenor.)	

REPLY BRIEF OF APPELLANT

Appeal from the Third District Court, Salt Lake County
Honorable J. Dennis Frederick

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ARGUMENT

I. RESPONDENT HAS MET HIS BURDEN TO MARSHALL THE EVIDENCE WHERE REQUIRED TO DO SO AND IS NOT REQUIRED TO DO SO WHERE THE FINDINGS ARE LEGALLY INADEQUATE

Petitioner argues that the trial court's ruling must be affirmed because respondent has not marshaled the evidence in favor of the trial court's findings and then demonstrated that the evidence is insufficient to support the findings.

Petitioner misapprehends respondent's contention regarding the bulk of the trial court's findings. With the exception of the trial court's Finding of Fact No. 19, that "[n]o persuasive evidence was presented to the Court that the Petitioner is underemployed," which respondent argues is not supported by the evidence, respondent's contention is that the trial court's findings are legally inadequate to support its custody and alimony awards.

A. Findings Pertaining to Custody

This court has stated that "[t]rial courts are given broad discretion in making child custody awards." Barnes v. Barnes, 857 P.2d 257, 259 (Utah Ct. App. 1993) (quoting Sukin v. Sukin, 842 P.2d 922, 923 (Utah Ct. App. 1992)). However, in order for this court to ensure that the trial court acted within its broad discretion, "the facts and reasons for the court's decision must be set forth in appropriate findings and conclusions." Id. (quoting Sukin, 842 P.2d at 924).

On review, the appellate court's threshold consideration "is whether the trial court's findings are adequate to support its custody award." Id. (citing Roberts v. Roberts, 835 P.2d 193, 195 (Utah Ct. App. 1992)). "If the findings are legally inadequate the exercise of marshalling the evidence in support of the findings becomes futile and the appellant is under no obligation to marshal." Id. (citing Woodward v. Fazzio, 823 P.2d 474, 477 (Utah Ct. App. 1991)).

In this case, the trial court concluded that sole physical custody of the parties' minor child should be awarded to petitioner. In support of that conclusion – as opposed to the conclusion that the parties should not share joint physical custody of the child – the trial court made only one finding, namely, Finding of Fact 16.a., in which the trial court stated: "consistency of care provider arrangements is an important issue in this child's life. Surrogate care has been and continues to be provided by the child's maternal grandmother, which whom Petitioner and the minor child live, at the rate of some twelve (12) hours per week. If Respondent were granted primary custody of the minor child, the fact that he works forty (40) hours per week would require him to obtain considerably more surrogate care" (R.577).

For the reasons stated in respondent's opening brief, this finding is inadequate, as a matter of law, to support the trial court's conclusion that sole custody of the parties' child should be awarded to petitioner.

Finding of Fact 16.a. conflicts with the conclusions set forth in both of the custody evaluators' reports submitted to the court, which the court explicitly "acknowledge[d] and agree[d] with" (R.578, ¶ 16.b.i.). Therefore, to the extent the trial court incorporates the custody evaluation reports' findings and conclusions, the findings as a whole lack internal consistency and do not "demonstrate a rational factual basis for the ultimate decision." Linam v. King, 804 P.2d 1235, 1239 (Utah Ct. App. 1991).

On the other hand, if the finding is considered alone, and not incorporated together with the findings and conclusions from the custody evaluation reports, it cannot, as a matter of law support the conclusion that sole custody of the parties' child should be awarded to petitioner. The trial court is required to consider and make findings regarding, *inter alia*, "the past conduct and demonstrated moral standards of each of the parties" and "which parent is most likely to act in the best interest of the child, including allowing the child frequent and continuing contact with the noncustodial parent." Utah Code Ann. § 30-3-10 (1) (2005); Sukin v. Sukin, 842 P.2d 922, 924 (Utah Ct. App. 1992). The trial court did not make these required findings, even though both evaluators' reports expressed concern with petitioner's inability to place the child's interests above her own need to limit the child's contact with respondent.

Nor is the trial court's emphasis on "consistency of caregiving" – to the exclusion of all other factors – legally justified. This court has stated: "[T]he role of primary caretaker . . . must be put into appropriate context." Linam v. King, 804 P.2d 1235 (Utah Ct. App. 1991). The trial court failed to do so here, essentially failing to make any other findings relevant to the sole custody determination. Simply identifying one party as the child's primary caregiver during the interim period preceding trial and concluding that consistency of caregiving should dictate permanent custody is insufficient as a matter of law to support a custody award.

In this case, instead of being given dispositive weight, petitioner's alleged role as primary caregiver during the marriage should have been accorded particularly little weight. That is because, in this case, (1) the parties separated when the child was only seven months of age, and thus neither party had established a lengthy period of primary caregiving of the child during the effective term of the marriage; (2) the evidence before the trial court was sparse and conflicting as to respondent's role in the child's life during the seven-month effective term of the parties' marriage, compare Affidavit of Kristyna Diane Rose, R.59, ¶¶ 4-10 with Respondent's Response to Petitioner's Motion for Temporary Relief, R.74, ¶ 2; (3) respondent was relegated to a limited role in the child's life after the parties' separation by petitioner's active interference and the proffer-

based temporary custody order that allowed him only statutorily minimum parent-time with the child, thus precluding him from taking on a primary caretaking role; and (4) the trial court made no finding regarding the child's level of adjustment in petitioner's care, and there was evidence before the court that the child should be assessed for failure to thrive (R.652, at 10, ¶ 5.F.).

Under these circumstances, the trial court's findings are inadequate because they accord too much weight to the factor of consistency of caregiving with petitioner, and too little weight to other pertinent and statutorily mandated factors, in determining the child's best interests.

Finally, Finding of Fact 16.a. is legally inadequate because it evidences impermissible bias against parents who work full-time to support their children, rewarding petitioner for failing to work full-time to support herself and her child and punishing respondent for doing so.

The foregoing inadequacies in the trial court's findings in support of its custody award are legal in nature. Respondent does not argue that the findings are not supported by the evidence, but rather that the findings as a whole, if incorporated with the custody evaluator's findings and conclusions, are internally inconsistent and do not support the trial court's award of sole custody to petitioner. Or, if Finding of Fact 16.a. is taken alone as the trial court's only

finding pertaining to sole custody, that this finding is inadequate as a matter of law to support the trial court's award of sole custody to petitioner.

Because the trial court's findings supporting its custody award are legally inadequate, respondent is not required in this appeal to marshal the evidence in support of the findings, and petitioner's argument that the appeal fails for lack of marshaling is inapposite.

B. Findings Pertaining to Alimony

Petitioner also argues that respondent has failed to marshal the evidence pertaining to the court's alimony award, specifically, evidence supporting the trial court's Finding of Fact 19.a., in which the court declined to impute income to petitioner.

Respondent's argument regarding Finding of Fact 19.a. is two-fold. Respondent argues, first, that that portion of the finding that states that "[n]o persuasive evidence was presented to the Court that the Petitioner is underemployed" is clearly erroneous and against the uncontroverted evidence. Secondly, respondent argues that that portion of the finding wherein the court declines to impute full-time income to petitioner "in light of the fact that Petitioner has cared for and will continue to care for the two (2) year old minor child in her home" is legally inadequate.

Again, as to the legal inadequacy argument, respondent is not required to marshal the evidence. See Barnes v. Barnes, 857 P.2d 257, 259 (Utah Ct. App. 1993); Williamson v. Williamson, 1999 UT App 219, n.2, 983 P.2d 1103, n.2. Petitioner's argument that the argument fails because respondent has not marshaled the evidence is therefore misplaced.

With respect to the evidentiary argument, respondent submits that he has adequately marshaled the evidence pertaining to the court's finding that "no persuasive evidence was presented to the Court that the Petitioner is underemployed." As set forth in respondent's opening brief, the evidence regarding petitioner's employment consists entirely of petitioner's own testimony and is uncontroverted. Petitioner attempts to introduce some controversy into the evidence by citing to the record in which she testifies about her "Coloboma". Petitioner's testimony regarding Coloboma – which does not conflict with her clear and unequivocal testimony that she does not have a disability that would prevent her from working full-time, see R.646, at 20:16-18 – does not support the trial court's finding that petitioner is not underemployed.

Petitioner testified that it is hard for her to drive from South Salt Lake to North Salt Lake, and that she is comfortable driving between nine and four o'clock. See R.646, at 23-24. She clarifies: "I have lived with [Coloboma] my whole life, I don't consider it a disability." Id. at 23:20-21. This testimony does

not conflict with petitioner's testimony that she "[d]o[es] [not] have a disability that would prevent [her] from working full time now." Id. at 20:16-18.

In short, respondent has marshaled the evidence directly pertinent to whether petitioner is underemployed. The evidence is uncontroverted, is based entirely on petitioner's own testimony, and establishes that petitioner historically worked full-time, that she is capable of working full-time, and that she has instead chosen to work part-time. The trial court's finding, directly contrary to this evidence, that "[n]o persuasive evidence was presented to the Court that the Petitioner is underemployed" is therefore clearly erroneous.

Petitioner's argument that respondent has not met his marshaling burden should fail.

II. RESPONDENT'S ARGUMENTS WERE PRESERVED BELOW

Petitioner next contends that "[n]one of the arguments presented in Mr. Rose's brief that he now relies upon to attack the award of sole custody to Mrs. Rose were presented to the trial court, either at the trial itself, or in post decree proceedings readily available to him." Brief of Appellee, at 20, ¶ 3.

This contention is factually inaccurate. Respondent's argument attacking the award of sole custody to petitioner pertains solely to the legal insufficiency of the trial court's findings supporting the award. Respondent initially brought the legal insufficiency of the trial court's findings to the trial court's attention in his

Objection to Proposed Findings of Fact & Conclusions of Law and Proposed Decree of Divorce, filed in the trial court February 24, 2005. See R.490. The Objection sets forth respondent's precise arguments regarding the insufficiency of the trial court's findings of fact made in this appeal. The trial court was thus given an opportunity to correct its error, but declined to do so. Respondent is not precluded from raising this argument on appeal. Cf. In re K.H., 2004 UT App 483, ¶ 10-11, 105 P.3d 967.

As to petitioner's contention that respondent did not have a petition before the Court seeking joint custody, this is correct, but irrelevant. Respondent's petition requested that he be awarded sole custody, not joint custody, and respondent does not appeal the trial court's failure to award joint custody to the parties. Instead, he appeals the award of sole custody to petitioner, which is not supported by the trial court's findings.

Petitioner also contends that respondent's arguments regarding imputation of income to petitioner were not presented to the trial court. Again, petitioner's contention is factually inaccurate. In closing argument, counsel for respondent stated: "Child support should be in accordance with the guidelines, however, income should be computed at full time. I believe Mrs. Rose indicated that she earns \$8.17. She indicated that she's not disabled, she indicated that she, as far as working, and that she had worked full time in the past, that she worked in medical

offices and apparently has an expertise there. There is no reason why she cannot work full time and to help to provide for her own needs. Child support should, as well as the needs of the child, child support should be in accordance with the guidelines based on full time employment of both parties” (R.646, 44:21-45:8).

Clearly, the argument that income should be imputed to petitioner was made to the trial court and was properly preserved for appeal.

III. THE UNCONTROVERTED EVIDENCE ESTABLISHES THAT PETITIONER IS VOLUNTARILY UNDEREMPLOYED

Petitioner next argues that the trial court did not have sufficient evidence before it to impute income to petitioner. Petitioner cites Betteridge v. Betteridge, 2004 UT App 50, for this proposition. Betteridge, in turn, quotes Wiley v. Wiley, 866 P.2d 547 (Utah Ct. App. 1993), which states that imputation of income “cannot be premised upon mere conjecture; instead, it demands a careful and precise assessment requiring detailed findings.” Wiley, 866 P.2d at 554.

Petitioner’s argument fails for two reasons. First, imputation of income is a two-pronged analysis, the threshold inquiry being whether a situation of voluntary underemployment exists. See Utah Code Ann. § 78-45-7.5(7)(a) (2005); Hill v. Hill, 869 P.2d 963 (Utah Ct. App. 1994). Only if the trial court determines that there is voluntary underemployment does it reach the second prong of the analysis, namely, determining the amount of income to be imputed.

In this case, the trial court did not reach the second prong of the imputation analysis at all, and thus the Willey and Betteridge mandate – which is addressed to determination of income, not voluntary underemployment – is inapplicable. Instead, the trial court simply found that petitioner was not underemployed, despite her testimony that she works only 12 hours a week (R.646, at 8:17-22), that she worked full-time during the parties’ marriage, and that she is capable of continued full-time work (R.646 at 20:11-18).

The court grounded its determination of voluntary underemployment not on the question of whether petitioner was able to work full-time, but on “the fact that the Petitioner has cared for and will continue to care for the two (2) year old minor child in her home” (R.580, ¶ 19). Thus, the court implicitly concluded that a custodial parent of a young child may choose not to work full-time to support herself or her child, shifting the burden of support to the other parent or spouse.

Respondent assails this conclusion as contrary to the dictates of Sections 78-45-3 and -4 of the Utah Code. These statutory provisions mandate that every man and every woman shall support his or her child, who shall be presumed to be in need of the support of its mother and father, and that every man and every woman shall support his or her spouse when in need.

Thus petitioner’s argument fails for the primary reason that petitioner has misapprehended respondent’s argument. Respondent does not appeal the issue of

the amount of income imputed to petitioner – this issue not having been reached by the trial court – but rather the court’s threshold finding that petitioner is not underemployed. The evidentiary grounds referenced in Willey for determining an appropriate imputed income are not germane to this finding.

Petitioner’s argument fails for the additional reason that, insofar as respondent requests that income be imputed to petitioner consistent with her current hourly wage projected to full-time employment, Willey itself supports such an approach. In Willey, this court held that the trial court did not abuse its discretion “in setting Mrs. Willey’s earnings at \$860 per month based on a projection of full-time work at her present salary.” Willey v Willey, 866 P.2d 547, 553 (Utah Ct. App. 1993). The court held only that there was no evidentiary basis for the trial court’s additional finding that Mrs. Willey could earn substantially more than that amount within a year or two. Id. at 553-54.

Respondent has made no such argument and has not advocated that petitioner’s income should be imputed at any level other than her current wage-earning capacity projected to full-time employment. The amount is grounded in the evidence and is not “mere conjecture”. Petitioner’s argument to the contrary should be disregarded.

IV. PETITIONER, NOT RESPONDENT, HAS THE BURDEN TO ESTABLISH THAT PETITIONER IS ENTITLED TO AN AWARD OF ALIMONY

Finally, petitioner argues that it was somehow respondent's burden to have presented evidence to the trial court sufficient to allow the trial court to make the findings necessary to support an award of alimony to petitioner. Petitioner thus implicitly acknowledges that the trial court's findings cannot support its alimony award.

More importantly, petitioner errs in her assumption that it is respondent's burden to prove petitioner's entitlement to alimony. Clearly, petitioner, as the party who purportedly requested alimony – though in fact at trial petitioner requested alimony only if respondent did not pay the parties' marital debt – must establish that she is entitled to receive it. See Willey v. Willey, 951 P.2d 226, 231 (Utah 1997). Petitioner's failure to do so may not be swept aside by the trial court and alimony awarded anyway based on purely speculative and contradictory findings regarding petitioner's need and respondent's ability to pay.

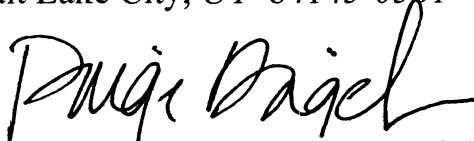
Petitioner did not make a proper request for alimony at trial and did not adduce evidence sufficient to establish entitlement to it. The trial court's failure to support its alimony award with adequate findings results from petitioner's failure, not respondent's. This court should not countenance petitioner's attempt to shift the burden of proof and should vacate the trial court's alimony award to petitioner.

CONCLUSION

For the foregoing reasons, and as set forth in respondent's opening brief, this court should reverse the trial court's award of sole physical custody to petitioner, should set aside the trial court's finding that income should not be imputed to petitioner, directing the trial court on remand to impute income to petitioner in an amount consistent with full-time employment at her current hourly wage, and should vacate the trial court's award of alimony to petitioner.

DATED this 4 day of January, 2006.

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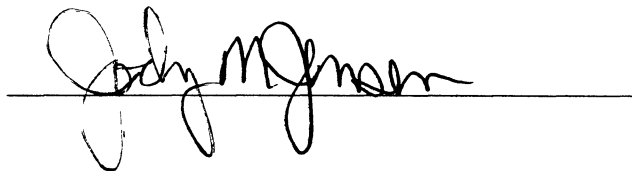
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CERTIFICATE OF SERVICE

I hereby certify that on this 4 day of January, 2006, I caused two true and correct copies of the foregoing REPLY BRIEF OF APPELLANT to be sent by United States mail, postage prepaid, to the following:

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A handwritten signature in black ink, appearing to read "Jody M. Jensen", is written over a horizontal line.