

2005

Vernon Ray Rigby v. Loralie Kemp Rigby : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

VERNON RAY RIGBY,

Petitioner/Appellant,

vs.

LORALIE KEMP RIGBY,

Respondent/Appellee.

Appellate Case No. 20050616

REPLY BRIEF OF APPELLANT

Reply Brief of Appellant from the Memorandum Decision and Findings of Fact and
Conclusions of Law and Decree of Divorce of the Third District Court, Judge Robert W.
Adkins, signed and entered on June 13, 2005.

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REPLY TO APPELLEE'S PERTINENT STATEMENT OF THE CASE

Ms. Rigby claims in her Statement of the Case that, "The Court of Appeals should dismiss this appeal due to the Findings of Fact and Conclusions of Law and Decree of Divorce supporting the trial record of analyzing the income, expenses, needs and equitable concerns, including the length of the marriage and Petitioner's contempt of court."

Ms. Rigby submits as Addendum A to her brief the Memorandum Decision of the Court signed by Judge Adkins on May 2, 2005. It is important to note that the trial was heard by Judge Adkins on April 27, 2005 and that just five days later Judge Adkins then prepared the Memorandum Decision signed on May 2, 2005 and mailed to the parties on May 4, 2005 (please see Memorandum Decision at Addendum A and transcript pages 223 - 241). These details are important because it seems as though the case was fresh in Judge Adkins' mind and in writing the Memorandum Decision, there are only 13 Findings of Fact that the trial judge specifically found that were stated in his Memorandum Decision. In the initial paragraph of his Memorandum Decision, the Judge said, "This matter came before the Court on April 27, 2005. The Court having taken the matter under advisement, now finds and rules as follows..." There were only 13 Findings by the Trial Court after 4 ½ hours of trial, witnesses and testimony. However, these limited Findings are crucial because Appellant is basing a majority of his case on the insufficiency of the Findings and

that the Findings did not support the Trial Court's decision to award alimony, orders of contempt, and other issues outlined in Appellant's initial brief.

The limited Findings of the Trial Court written in the Memorandum Decision include the following:

1. The Court finds that it has jurisdiction of this matter, and that both the Petitioner and the Respondent have established grounds for a divorce based on irreconcilable differences...;

2. The parties' personal property has been divided since their separation... Mrs. Rigby has possession of the Oldsmobile vehicle and Mr. Rigby has the Chevrolet truck...,

3. The parties own a home at 6993 Lochness Avenue in West Valley City, Utah, with a value of approximate \$100,000 to \$105,000 in its present condition... The legal description of said real property is Lot 32 Glen Heather # 1 Subdivision;

4. There is a mortgage on the home with an outstanding balance of \$76,405.14 as of March, 2005. After payment of realtor fees and other expenses owed against the home, there should be approximately \$18,000 to \$19,000 that the parties will receive from the sale;

5. Mr. Rigby has the following income per month: \$1,180 (gross) Granite School District/ \$776 (net) Federal Pension and Mrs. Rigby has gross monthly income of \$1,670;

6. At the present time, Mr. Rigby has monthly income that is approximately \$300 a month more than Mrs. Rigby. Based upon these figures, the Court will allow alimony to Mrs. Rigby in the amount of \$125 a month beginning May, 2005...;

7. Mrs. Rigby should be awarded a monthly survivor annuity to commence upon Mr. Rigby's death to the maximum extent permitted by law; and Mrs. Rigby has future retirement benefits from her employment with First Security Bank and Wells Fargo Bank;

8. Mr. Rigby has health insurance through his federal retirement. Mrs. Rigby may be able to obtain health coverage as a former spouse;

9. The Court finds that Mr. Rigby had the ability to comply with that portion of the Order (accounting for his 401(k))* has been deceptive in his responses and intentionally failed to comply;

10. The Court finds that Mr. Rigby had the ability to comply with that portion of the Order (accounting for cash value of his life insurance policy)* but intentionally failed to comply;

11. The Court finds that Mr. Rigby had the ability to comply with that portion of the Order (written accounting for personal property)* but intentionally failed to comply;

12. Mr. Rigby removed Mrs. Rigby from his Federal health insurance coverage in approximately January, 2004. The Court finds that Mr. Rigby had the ability to comply with that portion of the Order, but intentionally refused to comply;

13. Mr. Rigby's recalcitrance caused Mrs. Rigby to incur additional attorney fees. As a sanction for contempt, the Court would ordinarily impose an award of attorney fees against Mr. Rigby. However, the Court believes, that because of the financial condition of the parties, that a better sanction is to award Mrs. Rigby a greater portion of the sales proceeds from the home.

Keeping in mind that there are only 13 findings, the Utah Supreme Court has stated in the case of Smith v. Smith, 726 P.2d 423, 426 (Utah 1986) that, "The findings of fact must show that the court's judgment or decree flows logically from and is supported by the evidence." Further, the Supreme Court stated in Acton v. Deliran, 737 P.2d 996, 999 (Utah 1987) that, "The findings should be sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached." Ms. Rigby's contention is that the Findings and Decree support the trial record with the Court analyzing the various issues. Mr. Rigby contends that the limited Findings and Conclusions are not sufficiently detailed and they do not include enough subsidiary facts to disclose the steps which the Court relied on to make its decision.

It must also be noted that the Findings of Fact and Conclusions of Law are somewhat different from the Memorandum Decision and that the actual Findings and Decree were signed by Judge Deno Himonas and not Judge Adkins due to Judge Adkins' reassignment to the West Jordan Court shortly after signing the Memorandum Decision.

REPLY TO APPELLEE'S PERTINENT STATEMENT OF THE FACTS

Ms. Rigby admits at paragraph no. 2 of her Statement of the Facts that, “Although there is not a sub-paragraph denoted specifically toward the actual expenses of the parties, the District Court Judge calculated the expenses and subtracted them from the parties’ respective incomes and formulated the alimony award as outlined in the subsection entitled ‘Alimony.’” This is an admission that there were no Findings of Fact in relation to the parties’ actual expenses! The statement of Ms. Rigby that the trial Judge calculated the actual expenses and subtracted them from the parties’ respective incomes is simply speculative. The bottom line is that one is left to wonder if there were calculations and if there were calculations, what were the actual expenses? What weight was placed on the various testimony and evidence received by the Court? If Judge Adkins subtracted the actual expenses from the parties’ incomes, what were his findings? Ultimately, since Judge Adkins seemingly equalized the parties’ income, one is left to wonder if there were any calculations of actual expenses whatsoever and whether there were any actual expenses subtracted from the parties’ respective incomes. Even when coming up with the equalization of income order of \$125 per month, the Court did not properly take into account the actual net monthly incomes of the parties or the lion’s share of the debt load that was charged to Mr. Rigby. In fact, the Court ordered additional debt

with its decision regarding its order of how to handle the monthly survivor annuity issue which it assigned to Mr. Rigby and thus became additional debt.

Ms. Rigby further expects the Appellate Court to take a “leap of faith” with her statement in the third paragraph of the Statement of Facts wherein she claims, “Expenses were thoroughly discussed and was an integral part of formulating the alimony award as outlined in the trial record.” One is left to wonder why there were no literal Findings of the Trial Court in relation to the parties’ monthly expenses and since the Trial Court ordered alimony based on equalization of income, how Ms. Rigby can claim that in the formation of the alimony award, the Court intricately reviewed and discussed the expenses of the parties. If the Court is concerned that the \$125 per month amount reached by the Trial Court is a modest amount, the Court must also consider that the literal implementation of this Order creates a possible \$50,000 debt to Mr. Rigby if he pays alimony at \$125 per month for as long as the parties were married. This amount should not go unnoticed.

The Utah Supreme Court stated in Jones v. Jones, 700 P.2d 1072, 1075 (Utah 1985) that, “Three factors have long been considered, and must always be considered before awarding alimony: (1) the financial needs and condition of the recipient’s spouse; (2) the ability of the recipient spouse to provide a sufficient income for himself or herself; and (3) the ability of the payor spouse to provide support.” This was reaffirmed in the Utah Supreme Court’s case of Davis v. Davis, 749 P.2d 647, 649 (Utah 1998). Ms. Rigby

seems to rest a majority of her case on the Utah Court of Appeal's case of Haumont v. Haumont, 793 P.2d 421, 424 (Utah Ct. App1990) wherein the Court stated, "If the Trial Court considers these factors in setting an award of alimony, we will not disturb its award absence a showing that such a serious inequality has resulted as to manifest a clear abuse of discretion." A literal reading of this case then becomes an issue of how one can determine if the Trial Court "considers" certain factors. Just because the Trial Court heard evidence or admits a financial declaration into evidence, is that proof that the Court has considered issues? The only way to know if the Court has considered certain facts is if there is some specific finding. The Court has stated in Burt v. Burt, 799 P.2d 1166, 1170 (Utah Ct. App1990) that, "Where a trial Court fails to enter specific findings on the needs and condition of the recipient spouse, making effective review of the alimony award impossible, that omission is an abuse of discretion." The Court failed to calculate or make any finding regarding the needs and conditions of Ms. Rigby. The Court summarily entered an order of alimony based upon equalization of income.

REPLY TO APPELLEE'S SUMMARY AND ARGUMENTS

Ms. Rigby's question to the Court in her brief under the section of Summary and Argument poses the question, "Are the Findings of Fact, Conclusions of Law and Decree of Divorce sufficient in analyzing the parties' income, expenses, needs, and equitable concerns, such as the length of the marriage and contemptuous actions by the Petitioner,

to make an award of alimony which equalizes the parties' income?" Again, Ms. Rigby rests her case on Haumont wherein the Court stated, "In considering the above-listed factors, the Trial Court must make adequate factual findings on all material issues unless the facts in the record are clear, uncontroverted, incapable of supporting only a finding in favor of the judgment." Id. at 434. The problem with this analysis is that the Court did not enter specific Findings of Fact so one is left to wonder what exactly the Court relied on to come up with the equalization of income for alimony. Ms. Rigby stated at point 1 of page 17 of her brief that, "The Trial Court carefully considered the financial condition and needs of the receiving spouse." This is a statement is made without any facts to support it and there is absolutely no indication on the record or in the Findings that the Court made these considerations.

Still at page 17, paragraph 1 Ms. Rigby requests that the court consider that, "Ms. Rigby had no disposable income after her expenses were subtracted from her income, and certainly could not afford a place to live." The Court gave absolutely no indication of whether it adopted either parties' financial declaration. The statement that the Court "considered" Ms. Rigby to have no disposable income cannot be found anywhere on the record or in the Findings. Ms. Rigby gives us another indicator of the speculation she is asking this Court to consider by stating in the second full paragraph of point 1 at page 17 that, "The Court did not outline the math calculation in the Memorandum Decision or the

signed Findings of Fact and Conclusions of Law...” Again, these are admissions by Ms. Rigby that there were no calculations made by the Trial Court. Further, she states in the same paragraph that, “...the Trial Court record reflects that the Court came to these figures by carefully considering the income and expenses of the parties and their disposable income.” There is absolutely no indication on the record or in the Findings that the Court carefully considered the income and expenses of the parties and their disposable income as Ms. Rigby is claiming. The question must be asked, did the Court carefully consider the income and expenses of the parties? Is mere consideration enough? Can the Court magically transform possible considerations into the creation of a record that is “clear, uncontroverted, and capable of supporting only a finding in favor of judgment” as was stated in Haumont?

The claim that Mr. Rigby had more disposable income than Ms. Rigby is also problematic because there was no specific finding of the disposable income for either party. Mr. Rigby’s income at Granite School District was a gross monthly income figure as was Ms. Rigby’s income. Mr. Rigby’s federal pension income was a net figure so two of the three incomes used were gross incomes, therefore, the claim for disposable income is incorrect. The Utah Court of Appeals encountered the same problems as identified by Mr. Rigby in the case of Bakanowski v. Bakanowski, 80 P.3d 153, 2003 UT App 357 wherein the Court stated, “Here, the Trial Court never determined wife’s needs based on

the parties' historical standing of living. Instead, the Trial Court engaged in an effort to simply equalize income. In attempting to equalize the parties' incomes, rather than going through the traditional needs analysis, the Trial Court abused its discretion." Additionally, the Bakanowski Court quoted the Utah Supreme Court in Acton v. Deliran, 737 P.2d 996, 999 (Utah 1987) wherein the Court stated, "The absence of Findings of Fact is a fundamental defect that makes it impossible to review the issues that were briefed without invading the Trial Court's fact finding domain." The Trial Court was overturned in Bakanowski because, "The Trial Court found wife's monthly living expenses to be inflated, and then explicitly avoided evaluating her monthly needs and her independent ability to meet those needs. We therefore remand the case so that the Trial Court may enter appropriate Findings." Id at 156. Further, the Court stated in Davis that, "As long as the Trial Court exercises its discretion within the bounds and under the standards we have set and have supported its decision with adequate Findings and Conclusions, we will not disturb its ruling." Id at 649.

At Point 3 of Ms. Rigby's brief at page 18, the statement is made, "The Trial Court carefully weighed the ability of the responding spouse to provide support." There is absolutely no Findings or Conclusions to support the statement that the Trial Court carefully weighed this issue. Further, Ms. Rigby states in Point 3 that, "The Court...calculated that after expenses, Mr. Rigby would have \$300 in disposable dollars."

Once again, the Court made absolutely no calculation that is in the Memorandum Decision or in the Findings and the claim that the Court calculated that “after expenses” Mr. Rigby would have \$300 in disposable dollars is nowhere to be found. Ms. Rigby makes her third admission of insufficiency at page 19 of her brief in the first full paragraph stating, “**Even if the Trial Court did not show the calculations** in its Memorandum Decision, or in the Findings of Fact, clearly the record before the Court bares out that there was not a clear abuse of discretion.”

REPLY TO COURT’S FINDING OF CONTEMPT AGAINST MR. RIGBY

Ms. Rigby has cited In re: Cannetella, 2006 P.3d 89 (UT Ct. App March, 2006) stating, “In order to prove contempt for failure to comply with the court order, it must be shown that the person cited for contempt knew what was required, had the ability to comply, and intentionally failed or refused to do so.” Cannetella tracks with Van Hake v. Thomas, 759 P.2d 1162 (Utah 1988) as was cited by Mr. Rigby. Ms. Rigby fails to respond to the specific challenge to this finding of contempt as put forth in Mr. Rigby’s appeal brief, wherein Mr. Rigby quotes Van Hake stating, “The Trial Court must enter written Findings of Fact and Conclusions of Law with respect to each of the substantive elements.” Mr. Rigby was found in contempt by the Trial Court of four separate contempts. A thorough review of the Findings show that in each of the four findings of contempt, that the Court only dealt with the later two requirements which allow the Court to make a finding of

contempt. The Court did not annunciate or deal with the first requirement which required a Court finding that the individual knew of the specific order of the Court. Under the Van Hake test or even under Cannetella, the Court has once again not sufficiently put forth Findings of Fact and Conclusions of Law which would allow entry of a finding of contempt.

Therefore, the previous findings of contempt against Mr. Rigby must be dismissed which throws huge implications on how the Trial Court handled the equity issue in the martial home as well as attorney fees. Ms. Rigby's lengthy analysis in her brief does not deal with this issue of insufficient Findings regarding Mr. Rigby's knowledge of the specific orders of the Court.

Finally, there is absolutely no mention by the Trial Court of the standard of proof necessary to enter a finding of contempt. This heightened standard of clear and convincing proof was not dealt with or considered by the Trial Court. Therefore, the Trial Court's finding of the various contempts must be overturned.

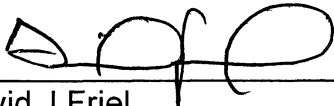
REPLY TO CLAIM OF FAILURE TO MARSHALL EVIDENCE

The claim that Mr. Rigby has not marshaled the evidence misses the mark because the Findings of Fact and Conclusions of Law as outlined in the Memorandum Decision and in the final documents are so deficient that one is not certain what considerations, if any, the Court made regarding the evidence and trial testimony. This is the reason that Mr. Rigby outlined the very few literal Findings of the Trial Court. As has already been

outlined, Ms. Rigby's brief admits to the numerous deficiencies. She states at page 12, last partial paragraph, "Although there is not a subparagraph denoted specifically toward the actual expenses of the parties..." She admits at page 17 in the third full paragraph that, "Although the Court did not outline the math calculations in the Memorandum Decision or the Findings of Fact and Conclusions of Law..." Additionally, she stated at page 19 in the first full paragraph that, "Even if the Trial Court did not show the calculations..." This is proof that the Memorandum Decision, Findings, and Decree were severely deficient and it is difficult to marshal evidence that is simply not there or that the finder of fact must speculate as to the real considerations of the Trial Court. The caselaw identified mandates that the Court enter specific Findings in relation to income, needs, expenses, debts, and all other financial data. Further, for the Court to enter a finding of contempt, certain specific findings must be analyzed and entered by the Court. The Court Memorandum, Findings, and Decree are all deficient in these areas.

Therefore, the Findings and Decree of the Trial Court must be overturned.

DATED this 15 day of MAY, 2006.

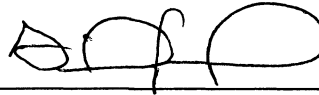


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CERTIFICATE OF MAILING

I hereby certify that I caused to be sent by U.S. mail, first class, postage pre-paid,
a true and correct copy of the foregoing document on this 15 day of May, MAY,
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