

1994

Marie Penrod v. Dale Penrod : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MARIE PENROD)	
)	
Plaintiff and Appellee,)	
vs.)	Case No. 940383-CA
)	
DALE PENROD)	
)	Priority No. 2
Defendant and Appellant.)	

APPELLANT'S REPLY BRIEF

APPEAL FROM THE FOURTH JUDICIAL COURT, UTAH

COUNTY, STATE OF UTAH

JUDGE GUY R. BURNINGHAM

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The Defendant submits the following reply brief in accordance with the Utah Rules of Appellate Procedure.

SUMMARY OF ARGUMENT

The trial court should award alimony only after considering the financial condition and need of the receiving spouse, the ability of the receiving spouse to provide for herself and the ability of the payor spouse to provide support. Any such finding of the trial court should be based upon evidence adduced in the case with sufficient clarity to allow the litigants and this Court to review the same. In this case, the trial court's findings with regard to the amount of money earned by the Plaintiff are erroneous and contradicted by the earning records of the parties. The trial court's findings with regard to the Defendants's ability to pay are totally unsubstantiated by the record. The testimony and historical earnings of the parties establishes that the income of the Plaintiff far exceeds that of the Defendant. Accordingly, the award of alimony in this case should be set aside.

The trial court increased the alimony award based upon the

Plaintiff's voluntary contribution to an adult child on a church mission. The court did so without any finding of necessity or special circumstance. Because the trial court failed to make findings pursuant to the child support statutes and because the voluntary contribution has nothing to do with the Plaintiff becoming a public charge or her standard of living, the findings relating to the increased alimony and need of the Plaintiff should be set aside.

The Findings of Fact requiring the Defendant to maintain a life insurance policy in the face amount of \$100,000.00 are improper for two reasons. First, counsel for the Plaintiff failed to include the trial court's ruling that the face amount of the policy was to reflect only the present value of the Plaintiff's alimony award. Secondly, inasmuch as the Plaintiff was awarded alimony, this provision meant to insure the award, should be stricken.

The court's finding with regard to the one-acre parcel was erroneous. The one-acre parcel was given to the Defendant by his father as a gift. The Plaintiff's name was added to the deed only to facilitate financing. Inasmuch as the Plaintiff did not enhance the value of the lot and inasmuch as the identity of the lot was lost through commingling or exchange, the value of the lot should have been awarded to the Defendant.

ARGUMENT

POINT I: THE TRIAL COURT COMMITTED ERROR IN AWARDING ALIMONY TO THE PLAINTIFF

A. Standard of Appellate Review.

The Plaintiff has misstated the appellate standard of review regarding alimony awards. There is no question that the trial court is endowed with considerable discretion in awarding alimony and that the award will not be over-turned unless there has been a clear and prejudicial abuse of discretion. Bingham v. Bingham, 872 P.2d 1065 (Utah App. 1994); Paffell v. Paffell, 732 P.2d 96, 100 (Utah 1986).

However, in ruling on the adequacy of the trial court's findings, the test is as follows:

Where a trial court has considered these three factors [(1) financial conditions and needs of the receiving spouse; (2) ability of receiving spouse to provide for herself; and, (3) the ability of the payor to provide support] and has supported its rulings with adequate findings based on sufficient evidence, we will not disturb its determination unless it has clearly abused its discretion. Willey v. Willey, 866 P.2d 547, 550 (Utah App. 1993); Chambers v. Chambers, 840 P.2d 841, 843 (Utah App. 1992).

"Findings are adequate only if they are 'sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached.'" Hall v. Hall, 858 P.2d 1018, 1021 (Utah App. 1993) (quoting Allred v. Allred, 797 P.2d 1108, 1111 (Utah App. 1990)). (Emphasis added).

See Cox v. Cox, 877 P.2d 1262 (Utah App. 1994).

There is no question that findings of fact that are without adequately evidentiary foundation must be set aside. Interior Contracting, Inc. v. Smith, 247 Utah Adv. Rep. 6 (Utah App. 1994); Western Capital & Sacs., Inc. v. Kanudsvig, 768 P.2d 989, 991 (Utah App. 1989).

B. Criteria for the Award of Alimony.

The parties agree that the general purpose of alimony is to prevent the receiving spouse from becoming a public charge and to maintain to the extent possible the standard of living enjoyed during the marriage. Appellee's Brief at 6; Schaumberg v. Schaumberg, 240 Utah Adv. Rep. 11 (1994); Rosendahl v. Rosendahl, 240 Utah Adv. Rep. 25 (1994); Howell v. Howell, 806 P.2d 1209, 1212 (Utah App. 1991).

In determining to award alimony and in setting the amount, the trial court must consider (1) the financial conditions and needs of the receiving spouse; (2) the ability of the receiving spouse to provide for him or herself; and (3) the ability of the payor or spouse to provide support. Chambers v. Chambers, 840 P.2d 841, 843 (Utah App. 1992); Schindler v. Schindler, 776 P.2d 84 (Utah App. 1989).

C. The Trial Court's Findings with Regard to the Financial Conditions and Needs of the Plaintiff and Ability of the Defendant to Pay Alimony are Inadequate.

The relevant sections of the Findings of Fact, Conclusions of Law and Decree that relate to alimony are paragraphs 5 and 15 of the Findings which are mirrored in paragraph 2 of the

Conclusions and paragraph 2 of the Decree. Findings numbered 5 and 15 are as follows:

5. The Court finds that the Plaintiff's monthly income is \$1,779.00 and imputes to the Defendant monthly income in the sum of \$2,383.00. Defendant's income is calculated based upon the testimony given at trial by the Defendant which showed that he worked twenty (20) hours per week, that sixty percent (60%) of his employment was billed at the rate of \$65.00/hour and forty percent (40%) of his employment billed at the rate of \$40.00/hour, that he worked nine (9) months during the year and that one-third (1/3) of his gross income was attributable to expenses and therefore that his yearly income amounted to \$28,600.00 or \$2,383.00 per month. The Court further finds that Defendant earns \$7,732.00 more than Plaintiff each year.

15. The Court finds that Plaintiff and Defendant were married for over twenty-seven (27) years and that Plaintiff is in need of alimony and that Defendant should pay to Plaintiff as alimony the sum of \$672.00/month said alimony to be permanent. This finding is based upon the additional expenses which Plaintiff presently incurs as reflected on her Financial Declaration and which she anticipates will be reduced after ten (10) months and upon the Defendant's minimal expenses and his ability to pay.

There is no question that the court had a proper evidentiary basis to determine that the Plaintiff's gross monthly income was \$1,731.00 and that her net monthly income was \$1,230.00 (R. 61). The figures outlined above came from the Plaintiff's financial declaration introduced at trial (R. 61). This Court should be aware however that the Plaintiff on cross-examination conceded that she had worked over the past ten years and had made \$19,851.29 (\$1,654.27 per month) in 1986 which had grown by 1992 to \$26,188.41 (\$2,182.37 per month) (Defendant's Exhibit No. 12; R. 103 at 47, 48).

There is no question that the Plaintiff testified that her monthly expenses were \$2,494.00 of which \$350.00 per month was spent on a voluntary contribution to her adult son that was on a mission for his church (R. 58; 103 at 39-41).

Aside from the \$350.00 voluntary contribution, the monthly needs were established by her testimony. The evidence therefor showed that the Plaintiff had between \$1,739.00 and \$2,182.37 per month in gross income. The evidence establish that her monthly needs were \$2,994.00 minus the \$350.00 voluntary contribution or \$2,144.00.

The major error committed by the trial court related to its findings of the Defendant's ability to pay. In her brief, the Plaintiff simply recites pages out of the transcript and makes generalizations (Appellee's Brief 11-13).

The parties both signed income tax returns from 1986 to 1992 which revealed the following income for the parties:

<u>Year</u>	<u>Plaintiff</u>	<u>Defendant</u>
1992	\$26,188.41	\$ 2,890.00
1991	\$23,650.10	\$ 7,231.00
1990	\$21,358.22	\$ 6,387.00
1989	\$22,854.73	\$14,562.00
1988	\$19,573.81	\$17,295.00
1987	\$19,071.95	\$13,724.00
1986	\$19,851.29	\$19,530.00

Defendant's Exhibit Nos. 12 and 13; R. 103 at 49-53, 74-79.

The Appellee does not dispute the record of earnings established by the tax returns (Appellee's Brief at 7-13).

Most importantly, the Plaintiff continues to misconstrue the record with regard to the Defendant's testimony of the amount of time that he worked. Finding of Fact No. 5, in which the trial court attributes \$2,283.00 to the Defendant is without any basis:

Defendant's income is calculated based upon the testimony given at trial by the Defendant which showed that he worked twenty (20) hours per week, that sixty percent (60%) of his employment was billed at the rate of \$65.00/hour and forty percent (40%) of his employment billed at the rate of \$40.00/hour, that he worked nine (9) months during the year and that one-third (1/3) of his gross income was attributable to expenses and therefore that his yearly income amounted to \$28,600.00 or \$2,383.00 per month. The Court further finds that Defendant earns \$7,732.00 more than Plaintiff each year.

R. 85.

The Defendant testified that to the time of trial, his net

income for five and a half months was \$6,002.62 or \$1,091.38 per month (R. Defendant's Exhibit Nos. 12, 13 and 15; R. 103 at 49-43, 74-79).

The findings of the trial court came from the cross-examination of the Defendant in which he testified:

A. He had worked for five hours the day before the trial (R. 103 at 94);

B. That he billed \$65.00 per hour for the cat and tried to charge \$35.00 to \$40.00 per hour for the truck (R. 103 at 100);

C. When asked if he could estimate the percentage of time he worked at \$65.00 per hour versus \$35.00 to \$40.00 per hour, the Defendant testified that he worked a little over half to two-thirds with the cat and the other with the truck (R. 103 at 100-101);

D. When asked to give an average of the number of hours the Defendant worked a week, the Defendant testified that he could not. He stated that some weeks he worked and some weeks he didn't (R. 103 at 102);

E. Only when counsel for the Plaintiff asked the Defendant the number of hours he worked the previous week, was the Defendant able to answer that he worked approximately 20 hours (R. 102 at 103).

It is apparently from that testimony that the court extrapolated the ability of the Defendant to work 20 hours every

week of the year. As clearly set forth in the transcript, the Defendant testified that he had worked only 20 hours the week before the trial which occurred in the month of July, 1993. There is no testimony in the record to establish that the Defendant could work 20 hours every week of the year. In fact the Plaintiff herself testified that the Defendant's work was confined to Spring and Summer (R. 103 at 9-10).

Accordingly, there is no evidence in the record to establish any income on the part of the Defendant other than the average of \$1,091.38 for the five and a half months before the trial and the amounts of income indicated on the tax returns.

The Appellee's brief also improperly uses the term "imputed income." (Appellee's Brief at 7). The trial court did not impute income to the Defendant. The court was attempting to determine the wages actually made by the Defendant. The findings of the trial court are completely inadequate to support a finding of imputed income. As this Court has explained:

"Imputing income to an unemployed or underemployed spouse when setting an alimony award is conceptually appropriate as part of the determination of that spouses's ability to produce a sufficient income." Willey, 866 P.2d at 554. However, a court should not impute income for child or spousal support until it first determines, "as a threshold matter, that income should be imputed because the [spouse] is voluntarily unemployed or underemployed." Hall, 858 P.2d at 1024.

Cox v. Cox, 877 P.2d 1262, 1254 (Utah App. 1994).

The findings of the trial court do not even attempt to establish that the Defendant was voluntarily underemployed or unemployed and therefore the findings of income must be supported by evidence.

In summary, the evidence does not support the court's findings with regard to the ability of the Defendant to earn. The evidence in the case established that historically the Defendant has made a small percentage of the income generated by the Plaintiff. Inasmuch as the findings are clearly insupportable, they must be set aside.

**POINT II: THE TRIAL COURT COMMITTED ERROR IN FINDING THAT
VOLUNTARILY CONTRIBUTIONS TO AN ADULT CHILD
CONSTITUTED A LEGITIMATE LIVING EXPENSE OF
THE PLAINTIFF**

The trial court ordered the Defendant to pay an increased alimony award for ten months of \$672.00 per month which then was reduced to \$322.00 per month which was to be permanent alimony. The court made that award based upon the Plaintiff's voluntary contribution of \$350.00 to an adult child on a church mission (R. 103 at 146-148).

The Defendant contends that the court was compelling the Defendant to pay child support through the Plaintiff to an adult child. As outlined in the Appellant's original brief, the trial court may order support of a child to age 21 but may do so only upon a finding of "necessity" and "special or unusual circumstances." Utah Code Annotated 15-2-1 (1953 as Amended); Balls v. Hackele, 745 P.2d 836 (Utah App. 1987); Jackman v.

Jackman, 696 P.2d 1191 (Utah 1985); Thornblad v. Thornblad, 849 P.2d 1197 (Utah App. 1994).

In response, the Plaintiff does not dispute that the \$350.00 represents a voluntary contribution to an adult child an a church mission (Appellee's Brief at 12). The Plaintiff contends that because the Plaintiff had been incurring the expense prior to the divorce, it was fairly considered as part of the Plaintiff's needs and expenses during the marriage (Appellee's Brief at 12-13).

First, voluntary contributions to any third party can not be considered as a need or expense of the receiving spouse. As acknowledged by both parties, the general purpose of alimony is to prevent the receiving spouse from becoming a public charge and to maintain to the extent possible the standard of living enjoyed during the marriage. Howell v. Howell, 806 P.2d 1209, 1212 (Utah App. 1991). The voluntary contribution to an adult child has nothing to do with keeping the Plaintiff from becoming a public charge and has no correlation to the Plaintiff's standard of living.

The impropriety of the court's ruling is two-fold. First, the trial court was attempting to compel the Defendant to pay child support for an adult child without making any finding of necessity and using an award of alimony simply as a guise. Secondly, the order is an unjustified personal affront to the Defendant. The court required the Defendant to pay by way of alimony every dime that the parties had contributed to the

missionary son. By increasing the alimony award \$350.00, the Defendant was responsible for all of the contribution to the missionary which is totally unjustified based upon the relative earning ability of the parties. Additionally, the court order usurped the right of the Defendant to provide voluntarily for his adult son.

Because the order of the trial court is violative of the rules and case law regarding child support and because the voluntary contribution has nothing to do with becoming a public charge or standard of living, the order of increased alimony for ten months must be set aside.

**POINT III: THE TRIAL COURT ABUSED ITS DISCRETION IN
REQUIRING THE DEFENDANT TO MAINTAIN A \$100,000 LIFE
INSURANCE POLICY**

The trial court ordered the Defendant to maintain the \$100,000.00 life insurance policy for the benefit of the Plaintiff in order to protect the Plaintiff's alimony award should the Defendant die. In fact, the court stated:

MR. PETRO: So what's the holding then with regard to life insurance?

THE COURT: That up to the \$100,000.00 amount be maintained to protect Mrs. Penrod's interest in alimony for the rest of her life, \$322.00 a month. If the present value of that is less than \$100,000.00, I'll simply require him to maintain a sufficient amount to make sure that should something happen to Mr. Penrod, that she still receives the \$322.00 a month.

R. 103 at 149.

As outlined in the original brief, the Defendant has two objections. First, inasmuch as the life insurance was meant to protect the Plaintiff's alimony award, the ruling of this Court with regard to the abatement of alimony should also abate any requirement for life insurance.

Secondly, Judge Burningham explicitly ordered the amount of insurance required only to reflect the value of the monthly alimony award over Mrs. Penrod's expected life. Paragraph 16 of the Findings of Fact prepared by Plaintiff's counsel totally omits Judge Burningham's ruling that the face amount of the policy only had to reflect the present value of the alimony award, which is obviously is significantly less than \$100,000.00.

The response of the Plaintiff totally misses the issues raised by the Defendant (Appellee's Brief at 13-15). The Plaintiff does not dispute that the life insurance order was to insure the Plaintiff's alimony award and does not dispute that Judge Burningham ordered that the face amount of the policy only reflect the present value of the life insurance.

Accordingly, the order relating to life insurance, as with the alimony award, should be abated. In any regard, the findings should be amended to reflect Judge Burningham's ruling that the life insurance only represent the present value of the alimony award.

**POINT IV: THE TRIAL COURT ABUSED ITS DISCRETION IN
FAILING TO COMPENSATE THE DEFENDANT FOR THE ONE-ACRE
PARCEL RECEIVED AS PART OF HIS INHERITANCE**

There is very little dispute in the evidence relating to the one-acre parcel on which the family home was built. There is no question that the one-acre parcel was deeded to the parties by the Defendant's father, Leroy W. Penrod. The transfer of the deed was a gift inasmuch as the parties gave no consideration for the land.

Likewise, there is no question that the conveyance of the land was made to allow the parties to build a home. Although the Plaintiff testified that she thought the piece of property was given to both the Plaintiff and Defendant, she did not have any conversation with the Defendant's father upon which that assumption could be made. The Defendant testified that the one-acre parcel, as with the other land, was given to him by his father. The Defendant testified that the only reason the Plaintiff's name was placed on the deed was to facilitate financing on the home. The value of the lot at the time the Defendant received it from his father was \$15,000.00 and at the time of trial was \$35,000.00.

The Plaintiff, in her response, does not refute the case law cited by the Appellant. The Court in Mortensen v. Mortensen, 760 P.2d 304, 308 (Utah 1988), held that property acquired by one spouse through gift or inheritance during the marriage should be awarded to that spouse together with any appreciation of its value. The only exception relates to when the other spouse contributes to the enhancement of the property or the property has lost its identity through commingling or exchange.

In this case, the lot was given to the Defendant by his father as a gift. The Plaintiff's testimony that she thought the property was given to her also is without any foundation. The Plaintiff had not been told by either the Defendant or the Defendant's father that the gift of the property was to include her. On the other hand, the Defendant testified that his father gifted the property to him on only put the Plaintiff's name on the deed to facilitate financing. The Plaintiff did not enhance the value of the lot by her efforts and the identity of the property was not lost through commingling or exchange.

Accordingly, the value of the one-acre parcel should be awarded to the Defendant based upon the clear evidence in the case.

CONCLUSION


Although there is some evidence to support the Plaintiff's expenses and income as found by the trial court, there is no evidence to support the trial court's findings as it relates to the Defendant's income and ability to pay. The historical earnings of the parties as established by their tax returns demonstrates that the Plaintiff's income has far exceeded that of the Defendant. Accordingly, the order requiring the Defendant to pay alimony should be set aside.

The trial court's finding that the Defendant should pay an additional \$350.00 in alimony to offset the Plaintiff's voluntary contribution to an adult child is violative of child support guidelines and totally inappropriate.

The Findings of Fact that relate to the \$100,000.00 life insurance policy should be amended to include the trial court's instruction that the value of the policy should not exceed the present value of the Plaintiff's alimony award. Inasmuch as the findings justifying the award of alimony are insufficient, the provision relating to life insurance should likewise be stricken.

Lastly, the court erred in failing to award the value of the one-acre parcel to the Defendant as a gift from his father.

DATED this 13th day of January, 1995.



Michael J. Petro, Esq.
Attorney for Appellant

MAILING CERTIFICATE

I certify that 2 copies of the Appellant's Reply Brief were mailed, postage prepaid to Mr. Brian C. Harrison, Attorney at Law, 3319 North University Avenue, Suite 200, Provo, Utah 84604 on the 13th day of January, 1995.

