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Rick L. Stonehocker v. Jacqueline F.M. Stonehocker

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Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

RICK L. STONEHOCKER,)	
)	
Petitioner/Appellant/Cross-Appellee,)	Appellate Court No. 20060292
)	
vs.)	
)	
JACQUELINE F.M. STONEHOCKER,)	
)	
Respondent/Appellee/Cross-Appellant)	
)	

REPLY BRIEF OF APPELLEE/CROSS-APPELLANT

APPEAL FROM A DECREE OF DIVORCE ENTERED BY THE
SECOND JUDICIAL DISTRICT COURT IN AND FOR THE
COUNTY OF WEBER, STATE OF UTAH
HONORABLE ERNIE W. JONES, DISTRICT COURT JUDGE, PRESIDING

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REPLY BRIEF OF THE APPELLEE/CROSS-APPELLANT

SUMMARY OF ARGUMENTS

I

The wife should be awarded an interest in the business known as Stoney Motors.

The Husband's and Wife's business, Stoney Motors, was created during the marriage and should have been equitably divided by the Court, regardless of whether or not it included good will attributed to the husband. The Trial Court inappropriately relied upon the reasoning in the case of Sorenson v. Sorenson, 839 P.2d 774 (Utah 1992) which applied to a professional corporation where the income was used to pay significant amounts of alimony and child support. The Court should have equitably divided the value of the business, including its good will, in accordance with the rule of the Court in Gardner v. Gardner, 748 P.2d 1076, 1079 (Utah App. 1991).

II

The Husband should be required to pay one-half (½) of the \$52,000.00 loan owed to

Mr. Carl Manzel

The Husband and Wife paid off their credit card debts in 2001 with a loan from the wife's father. The credit card debts were for bills the parties jointly incurred and included debts incurred from gambling. Both the wife and husband were present during the time these gambling debts were incurred. The parties separated twice after this loan was made and each time reconciled their marriage. The Trial Court found that the husband knew about the debts and by reconciling with the wife, forgave her of any debts that were incurred prior to the date of reconciliation. The Court denied the husband's claim that he should be excused from paying a portion of the marital debts because of dissipation and found that any debts incurred during the marriage before the final separation, which was in July 31, 2003, should be divided equally. The Court's conclusion that the Wife should be solely responsible for the \$52,000.00 dollar loan to her father is inconsistent with the Court's findings and should be reversed.

III

Attorney's Fees

The Wife was awarded attorney's fees at the Trial level and should be awarded attorney's fees on Appeal.

ARGUMENTS

I

The wife should be awarded an interest in the business known as Stoney Motors.

The Trial Court concluded that Stoney Motors, a car dealership, should not be divided as a marital asset because its value included the good will of the husband. The Court found “The Petitioner claims the dealership has no value for good will, and therefore, the wife is not entitled to any monetary compensation from the dealership.” (F. of Fct. ¶ 13). The Court concluded “The court finds that the Respondent is not entitled to receive any portion of Stoney Motors as a marital asset. The court finds that the good will of Stoney Motors is solely attributable to the Petitioner’s personal, professional reputation. The Respondent is not awarded anything for the good will of Stoney Motors.” (F. of Fct. ¶ 24) . An Appellant Court gives deference to a Finding of Fact because the Trial Court judges the creditability of witnesses. However, a Conclusion on Law is reviewed for correctness and given no special deference. *Howell v. Howell* 806 P.2d 1209, 1211 (Utah App. 1991).

The Court did not find that the dealership had no value because of good will. Paragraph 13 of the Court’s Findings of Fact, states that the Husband claims that it has no value for good will. The Court found that Chuck Ulrich an accountant testifying on behalf of the Wife valued the business at \$200,000.00. (F. of Fct. ¶ 14) The Court concluded that the good will of Stoney Motors resulted solely from the Husband’s

personal and professional reputation, and that the Wife should not be awarded anything for the good will of Stoney Motors. (F. of Fct. ¶ 24) The Court did not conclude that the entire value of Stoney Motors was good will. The wife's accountant, Chuck Ulrich took into consideration that the business was run personally by the husband in his evaluation of the business. (Vol V. Tr. 829-831) The Court made no determination of what portion of the value of Stoney Motors was for good will.

Stoney Motors is a used car dealership that was created in the year 2001 as a Limited Liability Company. The wife was a 50% owner of Stoney Motors. (F. of Fct. ¶ 7, 8, and 10) The husband in his reply brief argues the facts related to the evaluation of the business. If the husband wants to challenge the factual findings of the Court, he must marshal all evidence in favor of the position of the wife. *Moon v. Moon*, 973 P.2d 431, 437 (Utah App.1999) The value of the business is not the issue before this Court on the wife's cross appeal. The issue is whether or not good will in a non-professional business should be divided by the Trial Court. That is an issue of law. An issue of law is not entitled to any deference on Appeal. *Howell* Supra.

The Supreme Court in the case of *Gardner v. Gardner* 748.P2 1076, 1079 (Utah App. 1988) stated "...Thus, marital property 'encompasses all of the assets of every nature possessed by the parties, whenever obtained and from whatever source derived; and this includes any such pension fund or insurance.' *Englert v Englert*, 576 P.2d 1274 (Utah 1978)." The Court also stated in the second paragraph of footnote 1, on page 1080 "The

ability of a business to generate income from its continued patronage is commonly referred to as good will. Good will is properly subject to equitable distribution upon divorce. “see, e.g., *Dugan v. Dugan*, 92 N.J. 423, 457 A.2 1 (1983); *Matter of Marriage of Fleege*, 91 Wash. 2d 324, 588 P.2d 1136 (1979). *But see The Treatment of Good Will in Divorce Proceedings*, 18 Fam.L.Q. 213 (1984).” The same statement of law was made by the Court of Appeals in the case of *Dunn v. Dunn* 802 P.2d 1314, 1317 (Utah App. 1990). This rule has long been the law in the State of Utah. The Supreme Court in case of *Sorenson v. Sorenson*, 839 P.2d 774 (Utah 1992) made an exception to this rule when the company was a professional corporation where the income of that corporation was used to pay significant amounts of alimony and child support to the spouse. That case is discussed in detail in point nine of the Appellee’s Cross Appeal.

The question before this Court is a legal question as to whether or not good will in a non professional business is subject to division by the Trial Court. Most small non-professional businesses include a significant value for good will. The fact that a business contains good will should not be a basis upon which a Trial Court can refuse to divide the value of the business. Otherwise, in many divorce actions, a Court would have to exclude the value of businesses that are created during the course of the marriage.

The failure of this Court to reverse the Trial Court’s decision would result in the decision of the Court in the *Sorenson* case, which specifically related to a professional corporation, being extended to all small business that involves good will. The wife

contends that was not the intent nor the ruling in the Sorenson case, and that the Trial Court's reliance upon the Sorenson case to deny the wife any portion of the automobile business, created by the parties during the course of their marriage, is an incorrect application of law.

II

The Husband should be required to pay one-half (½) of the \$52,000.00 loan owed to Mr. Carl Manzel.

The loan from the wife's father, Carl Manzel was made in 2001 to pay off credit cards of both the Wife and Husband. (Vol VI Tr. 1090:10-1092:22) The loan was made to the parties before their first and second separation. (Vol IV Tr. 652) The Trial Court in its findings denied the husband's claim that he should be excused from paying a portion of the marital debts because of dissipation. (F. of Fct. ¶ 51) The Court also found that any debts incurred during the marriage and before the final separation, which was July 31, 2003, should be divided equally regardless of who incurred the debt or loan. (F of Fct. ¶ 73) The Court found that the husband knew about the debts incurred during the marriage. (F of Fct. ¶ 74) The Court found that the parties reconciled after their first and second separation and that the husband forgave the wife for any debts incurred during those separations and thus those debts became marital debts to be divided equally. (F of Fct. ¶ 75 and 76)

The husband claims that the \$52,000.00 loan from Carl Manzel was for gambling

debts. The Court made so such finding. The husband's accountant prepared a document entitled "Jackie Stonehocker's Cash Flow 1999-2004" which is attached as Exhibit 3 to the husband's Appeal Brief. The wife disputed much of the information in that document. However, that document shows that monies were expended for gambling in 1999 in the sum of \$43,130.00, in 2000 in the sum of \$10,300, in 2001 in the sum of \$1,675.00, and additional amounts for the years 2002, 2003, and 2004. That document shows that there were credit card payments in 1999 in the sum of \$30,921.00, in 2000 in the sum of \$8,925.00 and in 2001 in the sum of \$6,992.00. It is clear that these debts were incurred prior to the loan from the wife's father, Carl Manzel in the 2001. The wife's testimony during the course of the trial was that the husband was present with her when she went to Wendover and that the parties not only experienced losses but gains from gambling which were reported on their income tax returns. (Vol IV Tr. 694 line 7 - 697 line 18) The Court found that the husband forgave the wife for any of those debts and they were to be divided equally.

The husband in his Reply Brief cites language from the Court in the September 25, 2005 hearing that the Court got the impression that the loan was to pay off gambling debts. The Court did not receive any evidence at the September 25, 2005 hearing. During the course of the trial, the Wife's attorney objected to the husband's questions concerning the debts that were paid off with the loan from the wife's father. In commenting on relevance, the Court stated "It isn't to me. It may be the grounds for the

Divorce, but I don't know why it makes any difference.” (Vol VI Tr. 1193 Line 19-20)
“See, I guess my question is, if they loaned her \$52,000.00, does it really matter what it was spent for?” (Vol VI Tr. 1194 line 19-21) The Court also commented that not all the loan was for gambling debts. (Vol V Tr. 1196 line 6) Based upon findings made by the Court there is no basis for the Court to require the wife to be solely responsible for the \$52,000.00 debt to her father. The Court's conclusion that the wife is solely responsible for the \$52,000.00 loan to her father is inconsistent with the finding and should be reversed by this Court.

III

Attorney's Fees

The wife was awarded attorney fees by the Trial Court and she has requested that this Court awarded her attorney's fees on appeal. The husband in his Reply Brief raises for the first time that the motion which resulted in the July 5, 2005, hearing was not brought under Rules 54(a), 59(a) or 60(b) of the Utah Rules of Civil Procedure. The husband in his Reply Brief Statement of Facts acknowledges that a Memorandum Decision was signed by Judge Jones on the 5th day of July 2005 and thereafter the wife filed a Motion for Clarification on the 10th day of August 2005 and the husband filed a Motion for Clarification and to Review the Memorandum Decision on the 11th day of August 2005. (Page 3 of the husband's Reply Brief). The same information is contained in the wife's Brief under Statements of the Case on pages three and four. The husband and wife both

joined in Motions asking the Court to clarify, review, and/or modify its Memorandum Decision. The husband relies upon the Trial Court's comments in the September 25, 2005 hearing to support point two in his Reply Memorandum, where he quotes comments made by the Trial Judge at that hearing.

The husband cannot participate in an agreed upon hearing to clarify and/or modify the Court Memorandum Decision and then on Appeal for the first time claim that the Court's Clarification of its Memorandum Decision cannot be relied upon or is not binding on the parties.

CONCLUSIONS

The Trial Court committed an error of Law in failing to divide the business known as Stoney Motors because it included good will of the husband. The Court's reasoning in the case of Sorenson Supra, which applied to a professional corporation where the income of the corporation was used to pay a significant amount of alimony and child support is not applicable to the Stoney Motors' business which buys and sells used automobiles.

The Court made no findings which justified its conclusion that the wife should be solely responsible for a debt from her father in the sum of \$52,000.00 which was used to pay off credit cards incurred by both the wife and husband. The findings all support a conclusion that each party should be responsible for one-half (1/2) of the debt owed to the wife's father.

The Wife was awarded attorney's fees by the Trial Court. The Wife requests that this Court award her attorney's fees on Appeal.

DATED this ___ day of June 2007.

Respectfully submitted,

ROBERT A. ECHARD
Attorney for Respondent/Appellee/
Cross Appellant

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CERTIFICATE OF SERVICE

I, Robert A. Echard, certify that on June ____ 2007, I served two copies of the Reply Brief of the Appellee/Cross Appellant upon Steven R. Bailey, counsel for the Petitioner/Appellant/Cross Appellee, Rick L. Stonehocker, by personally delivered two copies of the Reply Brief of the Appellee/Cross Appellant, to the following address: 2454 Washington Boulevard, Ogden, UT 84401.

DATED this ____ day of June 2007.

ROBERT A. ECHARD
Attorney for Respondent/Appellee
Cross Appellant