

1995

Dale P. Holt v. Vickie L. Holt : Reply Brief

Utah Court of Appeals

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**UTAH COURT OF APPEALS
BRIEF**

UTAH
DISTRICT COURT
CLERK

IN THE UTAH COURT OF APPEALS

950169-CA

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DALE P. HOLT,	:	
	:	
Plaintiff/Appellee	:	
/Cross-Appellant,	:	
	:	
v.	:	
	:	
VICKIE L. HOLT,	:	
	:	
Defendant/Appellant	:	
/Cross-Appellee.	:	Case No. 950169-CA
	:	Priority Classification 15

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REPLY BRIEF OF CROSS APPELLANT

ON APPEAL FROM THE SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY,

STATE OF UTAH

HONORABLE W. BRENT WEST, DISTRICT COURT JUDGE PRESIDING

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FILED

SEP 16 1996

COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

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DALE P. HOLT,	:
	:
Plaintiff/Appellee	:
/Cross-Appellant,	:
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v.	:
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TABLE OF CONTENTS

TABLE OF CASES	i
ARGUMENT	1
CONCLUSION	4

TABLE OF CASES

English v. English, 564 P.2d 409, 411-12 (Utah 1977) 2

Schindler v. Schindler, 776 P.2d 84, 90 (Utah App. 1989) 1

ARGUMENT

In her Brief on Cross Appeal, Appellant Mrs. Holt has failed to rebut in any respect Mr. Holt's primary argument on appeal that Mrs. Holt cannot meet the threshold requirements of Utah law that a spouse must demonstrate need as a basis for an alimony award. Mrs. Holt dismisses the fundamental legal principal by simply stating, "Husband's argument misses the point." (Appellant/Cross Appellee's Brief, page 18, para. 8). Mrs. Holt does not deny that she will receive income substantially in excess of her demonstrated need.

Based upon the evidence introduced at trial, the alimony award is contrary to fundamental principal of Utah law. In Schindler v. Schindler 776 P.2d 84, 90 (Utah App. 1989), the Utah Court of Appeal outlines factors to be considered by a trial court in determining alimony:

In awarding alimony, appellate courts require the trial courts to consider each of the following three factors:

- (1) the financial conditions and needs of the receiving spouse;
- (2) the ability of the receiving spouse to produce a sufficient income for him or herself; and
- (3) the ability of the responding spouse to provide support.

If these three factors have been considered, we will not disturb the trial court's alimony award unless such a serious inequity has resulted as to manifest a clear abuse of discretion. The ultimate test of an alimony is whether the party receiving alimony will be

able to support him or herself "as nearly as possible as the standard of living ... enjoyed during the marriage."

English v. English 565 P.2d 409, 411 (Utah 1977).

The trial court found that the money from the property settlement would earn six percent (6%) tax free income (Finding of Fact 25). The tax free income from the property award (\$1,344,509, Order and Judgment para. 16; R. 373) and child support (\$975; Order and Judgment, para. 5; R. 369) exceeds the amount upon which the family lived when all five family members were living together (\$3,800 to \$4,200 per month, Finding of Fact 24). Mrs. Holt's "needs" are reduced by the absence of Mr. Holt and their son Nick, who lives with Mr. Holt. Mrs. Holt cites no facts in her Brief to rebut these statements.

Mrs. Holt erroneously asserts that the court erred in finding that Mr. Holt's income is \$80,000 per year based upon the competent evidence of tax returns of 1991 through 1994. Alternatively, and without any legal support, Mrs. Holt asserts that for purposes of determining alimony and child support, Mr. Holt's income should be the value of services to Codale Electric as determined by Mr. Dave Dorton, the CPA expert who testified on behalf of Mr. Holt. The obvious defect in this line of reasoning is that the "value of services" does not reflect the reality of the income generated to support the standard of living of the parties during the marriage which is the "ultimate measure of an award of

alimony." Additionally, employing the "value of services" benchmark opens a Pandora's Box on issues of child support and alimony. One can easily envision an expert testifying that the "value of services" is less than the actual income of a spouse. If the trial court uses the "value of services" to determine spousal income in this context, the alimony and child support awards could create a much lower standard of living for the spouse and family than that to which they were accustomed during the marriage based upon the actual income of the spouse. Such a concept is clearly contrary to social policies encouraging on-going support and maintenance of the family at the highest possible level given the circumstances of the parties and is plainly contrary to Utah law regarding determination of income for alimony and child support.

Mrs. Holt further complains that all of the funds which could have been paid to Dale Holt as salary were "plowed back into the business". However, Mrs. Holt was awarded fifty percent (50%) of the parties stock in Codale Electric and paid over 1.3 million dollars for the stock. Mrs. Holt received substantial compensation for the monies which were "plowed back into the business" but in effect asserts she is entitled to double payment, i.e. both for compensation for her 50% interest of Codale Electric and additional alimony based on monies which Mr. Holt did not receive as income but which was "plowed back into the business" and substantially increased the value of the business.

The most prominent point is that, based upon the evidence introduced at trial, Mrs. Holt cannot show a need for alimony. Mrs. Holt has produced neither fact nor law to rebut that position in her Brief.

CONCLUSION

This court should reverse the trial court's award of alimony based upon Mrs. Holt's inability to make the required threshold showing of need.

DATED this 16 day of September, 1996.

LITTLEFIELD & PETERSON



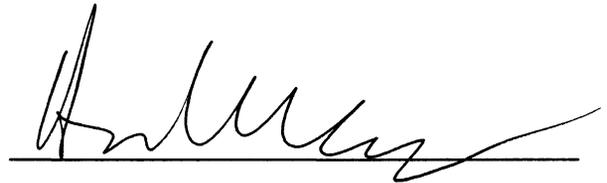
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CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed, two (2) true and correct copies of the foregoing, Reply Brief of Cross Appellant, this 16 day of September, 1996, to:

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A handwritten signature in black ink, appearing to read "David Paul White", is written over a horizontal line.

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