

2006

Michael Hodge v. Diane Hodge : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MICHAEL HODGE,	:	
Appellant/Respondent,	:	REPLY BRIEF OF APPELLANT
	:	
v.	:	Case No. 20060789-CA
DIANE HODGE,	:	
Appellee/Petitioner.	:	

REPLY BRIEF OF APPELLANT MICHAEL HODGE

Appeal From a Decree of Divorce Entered by the Third Judicial District Court,
Summit County, Utah, Honorable Bruce C. Lubeck Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
ARGUMENT	1
I. THE TRIAL COURT MISAPPLIED UTAH LAW WHEN IT FAILED TO CATEGORIZE SEPARATE PROPERTY FROM MARITAL PROPERTY BEFORE DISTRIBUTING THE ESTATE	1
II. THE TRIAL COURT ABUSED ITS DISCRETION BY DISTRIBUTING THE MARITAL ESTATE IN WIFE’S FAVOR BASED SOLELY ON HUSBAND’S ALLEGED RESPONSIBILITY FOR INVESTMENT LOSSES	3
III. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO ENTER SPECIFIC AND DETAILED FINDINGS SUPPORTING ITS PROPERTY DISTRIBUTION	6
IV. THE TRIAL COURT’S FINDINGS ARE NOT SUPPORTED BY THE EVIDENCE	8
V. WIFE IS NOT ENTITLED TO ATTORNEY FEES ON APPEAL	9
CONCLUSION	10

TABLE OF AUTHORITIES

Cases

<i>Bradford v. Bradford</i> , 993 P.2d 887 (Utah Ct. App. 1999)	4, 5
<i>Burt v. Burt</i> , 799 P.2d 1166 (Utah Ct. App. 1990)	1, 2, 3, 4, 5
<i>Davis v. Davis</i> , 138 P.3d 84 (Utah Ct. App. 2003)	4, 7
<i>Dunn v. Dunn</i> , 802 P.2d 1314 (Utah Ct. App. 1990)	1, 4, 5, 6
<i>Elman v. Elman</i> , 45 P.3d 176, 180 (Utah Ct. App. 2002)	1, 4
<i>Riley v. Riley</i> , 138 P.3d 84 (Utah Ct. App. 2006)	4
<i>Wilde v. Wilde</i> , 35 P.3d 341 (Utah Ct. App. 2007)	9

Statutes

Utah Code Ann. § 30-3-5(8)(c)	2
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ARGUMENT

I. THE TRIAL COURT MISAPPLIED UTAH LAW WHEN IT FAILED TO CATEGORIZE SEPARATE PROPERTY FROM MARITAL PROPERTY BEFORE DISTRIBUTING THE ESTATE.

The trial court misapplied Utah case law, and this misapplication has resulted in a substantial and prejudicial award in favor of Wife. Specifically, the trial court failed to categorize the parties' property as separate or marital before it distributed the property. The court's misapplication of the law represents an abuse of discretion. "The trial court is allowed considerable discretion in the division of marital property, so long as it exercises this discretion in accordance with the standards set by this state's appellate courts." *Dunn v. Dunn*, 802 P.2d 1314, 1322 (Utah Ct. App. 1990).

The Utah Court of Appeals, in *Burt v. Burt*, 799 P.2d 1166 (Utah Ct. App. 1990), prescribed a "systematic approach" for the trial court's disposition of property. *Id.* at 1172. Trial courts must first "properly categorize the parties' property as part of the marital estate or as the separate property of one or the other [party]." *Id.*; *see also Elman v. Elman*, 45 P.3d 176, 180 (Utah Ct. App. 2002); *Dunn*, 802 P.2d at 1323. This approach must be followed *before* the court reaches the presumption that each party is entitled to all of his or her separate property and fifty percent of the marital property. *See Burt*, 799 P.2d. at 1172. Likewise, this approach must be followed *before* the court considers whether exceptional circumstances exist that might affect an equitable division of property. *See id.*

In this matter, the trial court did not follow this two-step process because it failed to first determine what property remained separate and what property had become commingled. Although the trial court entered a finding that "each of the parties brought

pre-marital assets into the marriage,” (R. 460), it failed to make specific and complete findings as to what these assets were. In particular, the trial court failed to account for the fact that most of these pre-marital assets were commingled, and it failed to identify, categorize, and value the parties’ separate property that retained its separate character throughout the marriage. Instead, the court grouped all of the property together and distributed it according to the percentage that each party had brought into the marriage, regardless of whether it had become marital property or had retained its separate character. (R. 457-462).

The trial court abused its discretion by instead employing a ratio methodology totally unsupported in Utah case law. The trial court determined, based on the value of Wife’s pre-marital home and her trust account, that Wife brought 2.3 times more property into the marriage than Husband. (R. 458). The trial court then applied this ratio to divide the entire estate at the time of the divorce, without first categorizing and setting aside the respective pre-marital and/or separate property of the parties, an outcome that resulted in Wife leaving the marriage with the same proportion of property she had brought to the marriage. Although the trial court found that the parties’ marriage was not of such a short duration that the parties should be restored to their pre-marital position, (R. 457), it restored Wife with the same proportion of property she possessed before the marriage so that she was not damaged by Husband’s alleged principle responsibility for the investment losses. (R. 457). *See* Utah Code Ann. section 30-3-5(8)(c).

The trial court highlighted the fact that the marital property that was lost originated from Wife’s premarital trust, even though it also acknowledged that it had *become* marital property. (R. 458). By focusing on the fact that the marital property that was ultimately

lost was *formerly* Wife's, instead of categorizing it as the marital property it had become, the court departed from taking the systematic approach set forth in case law. *See Burt*, 799 P.2d at 1172. The significance to the trial court of each party's pre-marital property should not have been to ensure that the parties were restored to their pre-marriage economic situations. Instead, the significance should have been to determine what had become marital property and what had retained its separate character.

In short, the trial court exceeded its admittedly broad discretion to fashion a fair and equitable property distribution when it misapplied Utah law and disregarded the systematic two-step approach set forth in *Burt*, resulting in substantial prejudice to Husband. *See Burt*, 799 P.2d at 1171-72. The trial court should have categorized Husband's separate property in the amount of \$166,215, and Wife's separate property in the amount of \$111,148, before valuing and distributing the marital estate. *See Addendum B*. The marital estate would then have been reduced by a total of \$277,363, leaving a balance of \$1,149,997.60 to be equally divided by the parties. Husband would have been awarded his premarital/separate property, plus his one-half portion of the marital estate, for a total award of \$741,213.80.

II. THE TRIAL COURT ABUSED ITS DISCRETION BY DISTRIBUTING THE MARITAL ESTATE IN WIFE'S FAVOR BASED SOLELY ON HUSBAND'S ALLEGED RESPONSIBILITY FOR INVESTMENT LOSSES.

The trial court exceeded its discretion when it relied solely on the fact that Husband was allegedly principally responsible for investment losses in its unequal distribution of the parties' marital property in Wife's favor. The trial court's property distribution will be upheld "unless a clear and prejudicial abuse of discretion is demonstrated." *Bradford v. Bradford*, 993 P.2d 887, 891-92 (Utah Ct. App. 1999).

The Utah Court of Appeals has long held that “[e]ach party is presumed to be entitled to all of his or her separate property and fifty percent of the marital property.” *Burt v. Burt*, 799 P.2d 1166, 1172 (Utah Ct. App. 1990). See also *Dunn v. Dunn*, 802 P.2d 1314, 1323 (Utah Ct. App. 1990); *Bradford*, 993 P.2d at 893 (Utah Ct. App. 1999). A trial court may elect to depart from this presumption and divide separate property only in “extraordinary situations where equity so demands,” *Burt*, 799 P.2d at 1169, and to distribute marital property unequally only “when the circumstances and needs of the parties dictate departure,” *Bradford*, 993 P.2d at 894. Such a departure was not warranted or mandated here.

The court of appeals has identified several instances of extraordinary circumstances that justify a departure from the presumed award of separate property and an equal split of marital property; however, none are found in this case. See e.g. *Davis v. Davis*, 76 P.3d 716, 720 (Utah Ct. App. 2003) (finding that husband’s ability to ensure adequate retirement funds, wife’s inability to do so, and wife’s more significant marital contributions, amounted to an exceptional circumstance that justified an unequal division of the retirement accounts in the wife’s favor); *Riley v. Riley*, 138 P.3d 84, 90 (Utah Ct. App. 2006) (finding an exceptional circumstance where family had relocated for husband’s career, where wife liquidated her premarital assets to further husband’s career, and where husband’s, but not wife’s, income had substantially increased); *Elman v. Elman*, 45 P.3d 176, 181 (Utah Ct. App. 2002) (awarding wife the husband’s separate property where she assumed responsibilities that allowed him to appreciate his property).

As the above instances demonstrate, the most important consideration for the trial court when identifying an extraordinary circumstance that justifies a departure from the

presumption is “the ultimate division be equitable-that property be fairly divided between the parties given their contributions during the marriage and their circumstances at the time of the divorce.” *Burt*, 799 P.2d at 1172. In other words, equity is ensured with a distribution that “best serves the needs of the parties and best permits them to pursue their separate lives.” *Bradford*, 993 P.2d at 894.

In this matter, the contributions of Wife during the marriage did not justify an unequal distribution in her favor; the trial court noted that Husband had supported the family during most of the marriage and that the duration of the marriage was not so short that this should be discounted. (R. 457; 461). Moreover, the needs or circumstances of Wife at the time of divorce did not justify an unequal distribution in her favor because, as the trial court recognized, she was able to support herself and pursue a separate life. (R. 444).

Instead of relying on the contributions of the parties and on their needs at the time of divorce, the trial court allowed Husband’s alleged responsibility in losing marital assets to dictate its distribution. In *Dunn*, the court of appeals reversed the trial court’s unequal distribution of marital property because the trial court had failed to find an exceptional circumstance and instead relied solely on one factor: that the husband had been more economically productive. *See Dunn*, 802 P.2d at 1322. The court in this matter similarly abused its discretion by relying solely on one economic factor: that Husband was principally responsible for investment losses.

Wife’s separate property, consisting of the sale of a premarital house, became commingled, and thus marital property,¹ when she decided to put it into the joint

¹When a party’s separate property has become commingled, it will be considered

Ameritrade investment account with the intention that she and Husband would ultimately see a return from it. At the point it became marital property, it necessarily ceased to exist as Wife's separate property. Although it was Husband who made the day-to-day investment decisions that resulted in significant loss, it was Wife and Husband's joint decision to make the investments. Because it was marital property, the investment losses were marital losses, as the trial court indicated in its findings. (R. 452-53). Just as any gains on the account would have been considered in equally distributing the marital property, any losses should also be equally distributed. The trial court concluded exactly this in its findings: "a gain would be attributable to Petitioner and so was the loss." (R. 452).

And just as the trial court should not distribute marital property based "solely on the parties' economic contributions to the marriage," *Id.* at 1323, it also should not distribute marital property based *solely* on the parties' economic losses. And yet, this is the only factor the court considered in its unequal distribution. The trial court thus abused its discretion when it relied solely on Husband's alleged responsibility in losing the investment funds. Husband was prejudiced as a result, which is demonstrated in the trial court's overall property distribution.

III. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO ENTER SPECIFIC AND DETAILED FINDINGS SUPPORTING ITS PROPERTY DISTRIBUTION.

The court did not sufficiently detail any findings that Husband's alleged responsibility for losing part of the marital estate in the stock market provided an exceptional circumstance that justified an unequal distribution of property. "An unequal

marital property. *See Dunn v. Dunn*, 802 P.2d 1314, 1321 (Utah Ct. Ap. 1990).

division of marital property . . . is only justified when the trial court memorializes *in commendably detailed findings* the exceptional circumstances supporting the distribution.” *Davis v. Davis*, 76 P.3d 716, 720 (Utah Ct. App. 2003) (emphasis added). First, it is not clear from the findings that the trial court considered Husband’s alleged responsibility to be an exceptional circumstance that justified unequal distribution. Second, the trial court failed to explain how Husband’s alleged responsibility for the loss of marital property justified a distribution of property regardless of whether it was separate or marital.

Not only did the court fail to refer to an “exceptional circumstance,” the trial court also failed to sufficiently demonstrate that it considered the investment losses an exceptional circumstance warranting an unequal distribution of property. The trial court, in its findings, noted numerous times that although it considered Husband principally responsible for the investment losses, Wife was fully aware of Husband’s activities. (R. 450; 451; 452). Specifically, the trial court concluded that the assets, although it had been Wife’s premarital property, had become commingled and marital property when she “unwisely allowed [Husband] to use it to trade in the stock market,” (R. 453); that the decision to invest the assets was a joint decision, just as the decision to invest Husband’s premarital property into the marital home was a joint decision, (R. 452); that she had to have known what Husband was doing, (R. 450); and that she sat by while it happened, (R. 452). Although the court intended for Husband to bear the brunt of the losses, it also noted that “the decision to ‘lose’ the money was not a decision anyone made, but the decision to invest, was in reality the decision of both parties.” (R. 452). Finally, the trial

court determined that the loss carryover from the investments should be equally awarded to each party, suggesting that the marital loss should be distributed equally. (R. 456).

Therefore, from the trial court's own language in its findings, it is not clear that it intended Husband's alleged responsibility, considering Wife's knowledge of the investment of marital assets and her failure to intervene, to be an exceptional circumstance that would justify an unequal distribution of property.

In addition, the court was so intent on its ratio methodology that it disregarded the fact that certain property of Wife and Husband maintained its separate character throughout the marriage, while other property became commingled during marriage. The court failed to detail in its findings why it did not first categorize the property, why it instead lumped all of the property together as marital, and why it failed to award the parties their separate property. It was an abuse of the court's discretion to become so preoccupied with its perceived equity of restoring Wife to her pre-marriage condition that it failed to memorialize in its findings why it failed to categorize the property and account for the parties' separate property.

IV. THE TRIAL COURT'S FINDINGS ARE NOT SUPPORTED BY THE EVIDENCE.

The trial court's factual findings are clearly erroneous. The trial court made several accounting errors both in its valuation of what each party brought into the marriage and with regard to what each party received when they divorced. Certain valuation errors may be corrected if this Court follows the presumptive rule for dividing the marital estate on a fifty-fifty basis, but if this Court does not, the ratio approach used by the trial court is still riddled with clear error. These points are more fully discussed in the Brief of the Appellant, and are summarized below. First, the trial court made

numerous valuation errors in its determination of the value of both Wife's and Husband's pre-marital contributions. Even if this Court adopts the trial court's ratio approach, using the correct value of the pre-marital assets, Wife brought only 1.3 times, rather than 2.3 times the value into the marriage. Second, at the time of divorce, the trial court erred in its valuation of the marital residence. In addition, at the time of divorce, the trial court erred by miscalculating the values of property it ascribed to Wife and Husband. By its own theory of ensuring that Wife left the marriage with the same proportion of property with which she entered it, the trial court awarded Wife over \$300,000 more than it should have and Husband over \$100,000 less than it should have. The result of the trial court's errors is a substantial inequity in the property distribution in favor of Wife.

V. WIFE IS NOT ENTITLED TO ATTORNEY FEES ON APPEAL

Even if Wife prevails on the main issues in this appeal, because the trial court declined to award attorney fees for either party at the trial level, Wife is not entitled to attorney fees on appeal. *See Wilde v. Wilde*, 35 P.3d 341, 350 (Utah Ct. App. 2007) (“[W]hen the trial court does not award fees to either party below, then regardless of which party prevails on appeal, absent a showing of changed circumstances following the trial court's decision warranting such award on appeal, both parties must bear their own fees on appeal.”). The intent of the Court is not to award attorney fees on appeal to the party who was awarded attorney fees on a post-trial motion, but rather to the party who was awarded attorney fees at the trial. In this matter, the trial court specifically declined to award attorney fees for the trial because it found that both parties were capable of paying his and her own. (R. 463). The trial court's subsequent denial of Husband's

Motion to Amend Memorandum Decision and award to Wife of attorney fees were solely directed toward Wife's fees in responding to Husband's Motion. (R. 471-72).

CONCLUSION

This Court should reverse the trial court's Findings of Fact and Conclusions of Law and Decree of Divorce in favor of Husband because the trial court failed to divide the marital estate as required under Utah Law. It failed to enter specific and detailed findings to justify its property distribution, and it made several critical factual errors when it determined the parties' pre-marital and separate assets as well as the value of the marital estate at the time of divorce. .

Dated this 6 day of July, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th of July, 2007, two true and correct copies of the foregoing REPLY BRIEF OF APPELLANT were hand delivered to:

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