

2006

Cathy Child v. David N. Child : Reply Brief

Utah Court of Appeals

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Recommended Citation

Reply Brief, *Child v. Child*, No. 20060998 (Utah Court of Appeals, 2006).

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Calendared
August 25, 2008
COO

IN THE UTAH COURT OF APPEALS

CATHY CHILD,)	CASE NO. 20060998-CA
)	
<i>Petitioner/ Appellant/ Cross-Appellee,</i>)	DISTRICT CT. NO. 024700194
)	
v.)	
)	
DAVID N. CHILD,)	
)	
<i>Respondent/ Appellee/ Cross- Appellant.</i>)	
)	
)	

REPLY BRIEF OF
CROSS-APPELLANT/APPELLEE

APPEAL FROM A DECISION OF THE SEVENTH JUDICIAL DISTRICT COURT
HONORABLE BRUCE K. HALLIDAY

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UTAH APPELLATE C

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CROSS-APPELLANT'S REPLY ARGUMENT

POINT ONE: THE TRIAL COURT DID NOT ENTER ANY SPECIAL FINDING OF EXCEPTIONAL CIRCUMSTANCES TO JUSTIFY AWARDING PART OF DAVE'S SOLE AND SEPARATE PREMARITAL PROPERTY TO CATHY.

Before addressing the trial court's standards for a distribution of property between the parties in this case, it should be noted that the trial court first had to identify and separate out the property owned by third persons whose titles were clouded by Cathy's unsupported claims of ownership, but over whom the trial court had no jurisdiction, since Cathy did not join them in the divorce action. The trial court entered express findings that Neil Child had always owned 75% of the stock in A-1 Rental and that Blue Water Marine was the owner of the boat which Cathy had locked away until it was freed via a replevin action. Yet, even after the entry of the trial court's ruling on ownership, the return of the property to the possession of its owners, and the lack of jurisdiction of the trial court over assets that were never part of the marital estate, Cathy still asserts that this Court should award her property owned by those third persons. Neither the standard for distribution of sole and separate property nor the standard for distribution of marital property has any application to property belonging to non-party third persons. The trial court acted correctly when it removed those properties from further consideration.

A. Dave contends that Cathy cannot ignore her duty to marshal all of the evidence in support of the trial court's findings concerning property distribution by merely asserting that the weight of the evidence "clearly preponderates" against those findings.

Both parties cite *Burt v. Burt*, 799 P.2d 1166, 1990 UT App. 224 (Utah App. 1990) as the leading case which instructs the trial court with respect to the treatment of sole and separate property versus marital property in a divorce distribution. *Burt* provides that the trial court should first identify, label and then remove from division all sole and separate property before the court attempts to make the presumptive equal distribution of marital assets. Cathy directs this Court to *Elman v. Elman*, 2002 UT App 83; 45 P.3d 176 and argues that she does not have to marshal all of the evidence in support of the trial court's finding because *Elman* provides an equitable exception in cases where the "weight of the evidence clearly preponderates against the finding".

Dave contends (1) that neither *Burt* or *Elman* have any application to property belonging to third parties and Cathy is required to meet the standard of review for challenging any finding of the trial court, (2) as to the marital and sole and separate property distributions, an equitable exception only exists if the trial court enters express findings that create and explain the equitable exception and (3) without such express findings of special equitable circumstances by the court, it is Cathy's burden to marshal all of the evidence that supports the trial court's ruling and then demonstrate that the weight of all of said evidence "clearly preponderates" against the ruling of the trial court. Until the evidence has been properly marshaled for the

appellate court, it is impossible for it to determine whether the weight of the evidence clearly preponderates for or against the trial court's findings.

Dave does acknowledge that there can be exceptional circumstances that would justify a trial court's decision to fashion an equitable exception to either the presumptive marital or sole and separate distributions; however, in those cases, the trial court **must** enter specific findings concerning those exceptional circumstances. It is not up to the party to decide that she is entitled to a different standard of review.

In *Hall v. Hall*, 858 P.2d 1018, (Utah App 1993), the court held:

Thus, under *Burt*, once a court makes a finding that a specific item is marital property, the law presumes that it will be shared equally between the parties unless unusual circumstances, memorialized in adequate findings, require otherwise. *See also Watson v. Watson*, 837 P.2d 1, (Utah App.1992) (premarital property and inheritances are viewed as separate property, and, normally, equity requires that each party retain the separate property brought to the marriage).

Additionally, *Kelley v. Kelley*, 2000 Utah App 236, 9 P.3d 171 provided a particularly helpful explanation of the requirement of special findings when a court varies from the presumptive distributions:

The court must approach that allocation in accordance with our decision in *Burt v Burt*, 799 P 2d 1166 (Utah Ct.App. 1990). [T]he court should first properly categorize the parties' property as part of the marital estate or as the separate property of one or the other.

Each party is presumed to be entitled to all of his or her separate property and fifty percent of the marital property. But rather than simply enter such a decree, the court should then consider the existence of exceptional circumstances....*Id.* at 1172; accord *Hall v. Hall*, 858 P 2d 1018, 1022 (Utah Ct App.1993).

Because the court allocated property pursuant to the decree dissolving the common law marriage without applying the *Burt* systematic approach or addressing

exceptional circumstances, we reverse that part of the order and remand for further findings in accordance with *Burt*.

In the current case, the trial court did not enter any finding of exceptional circumstances concerning its division of the marital estate and, therefore, Cathy must challenge the trial court's findings concerning the distribution of marital property as she would be required to challenge any other finding of the trial court on an appellate review, namely, by marshaling all the evidence which supports the ruling so that the appellate court can determine if the weight of the evidence, in its totality, clearly preponderates for or against the finding of the trial court. Cathy admits that she has not done the marshaling and has therefore not met her burden under the standard of review.

B. Once the trial court found that Dave's interest in A-1 Rental was his sole and separate property, the court should have returned that property to him since the court did not enter any special findings to justify an alternative award.

The trial court in the case at bar committed the exact error that had been committed by the trial court in the *Kelley* case, namely, "the court allocated property . . . without applying the *Burt* systematic approach or addressing exceptional circumstances", (*Kelley*, *supra*).

The court entered the express finding that Dave was the owner of 25% of A-1 Rental before he married Cathy and that he still owned that same 25% of A-1 Rental at the time of the divorce. (FF 9, R. 883). Having made that finding, the court should have returned that property to Dave because the court did not find any special circumstances which justified its departure from the presumptive distribution.

Cathy argues that she provided the court with evidence from which the court **could** have made a special finding that she “augmented, maintained or protected Dave’s sole and separate, inherited or donated property”. However, the trial court did **not** make any special findings that support her position. Dave contends that is because the court also heard extensive evidence that neither Cathy, nor the marital estate, did anything that augmented, maintained or protected Dave’s premarital stock in A-1 Rental, a “C” corporation.

It is undisputed that Cathy’s name was never placed on Dave’s interest in A-1 Rental. It was also undisputed that Cathy never produced any corporate documents that showed her name as a share holder in said corporation.

In the case at bar, all the benefit of the family’s association with the corporation has flowed from A-1 Rental to Dave and Cathy’s personal family and provided them with the funds to purchase their personal assets. Dave and Cathy never loaned any money to the corporation nor did their personal family business ever loan any money to A-1 Rental. (Trans. p. 1751 line 24 through p. 1752 line). They never paid any taxes for the corporation or its property from their personal assets. (Trans. p. 1751 line 24 through p. 1753 line 13).

Particularly significant was the testimony of Kurt Rich, the CPA for A-1 Rental, as well as for Dave and Cathy and their personal family business, for over 15 years. He testified that neither Dave, nor the Dave and Cathy business interests, ever contributed to A-1 Rental in any way. (Trans. p. 1751 line 24 through p. 1753 line 13)

Although Cathy claimed that she had supported Dave while he was earning a lesser income from A-1, her support did nothing to enhance the value of the corporation or even Dave’s share in same as the undisputed testimony was that A-1’s growth came as a result of

Brad Child's fortuitous meeting of the project foreman for the power plant construction project in East Carbon in the early 1990's and the resulting work with the mining and construction business that grew out of that encounter. (Trans. p.2419 lines 14-16; Trans. p. 2492 line 24 through p. 2494 line 21).

Cross-appellant asks that this Court overturn the allocation of the trial court concerning Dave's premarital business interest since the court did not make any findings that would justify a deviation from the presumptive distribution and award Dave his interest sole and separate 25% interest in A-1 Rental, as well as the increased value of same (not just the original \$5000 investment returned to him by the trial court).

POINT TWO: THE COURT CREATED SOLE AND SEPARATE PROPERTY OUT OF THE CORVETTE WHEN NEITHER PARTY RAISED THE ISSUE AND WHEN NO EVIDENCE SUPPORTED THE RULING.

Cathy's response to Dave's Point Two indicates that both parties agree that the Corvette was never intended to be Dave's sole and separate property, even though it was purchased for his birthday. Both parties appear to agree that the down payment and all of the monthly payments were paid from the joint family business account known as the Dave and Cathy Family Rental account, as indicated in the accounting provided by Dave at trial. Pursuant to the temporary order of the court in this case, each payment was made and the corvette's loan was paid off on schedule from the family account. It appears that both parties agree the Corvette was always a marital asset. Dave asks that the court award the Corvette to Cathy who has been in total possession of the car for 6 years because she asked for the Corvette at trial and Dave

had no objection as long as its value was equalized in the distribution. Dave further asks that no one be required to repay the family account that made the payments on the car as it was paid for pursuant to the temporary order with funds from the family account. Dave requests that an equalization in the marital award be made by adjusting Cathy's award from the family business account downward based on the value of the car at the time of the trial and awarding Dave funds in the family business account that will equalize the value for this alteration made between the parties.

CONCLUSION

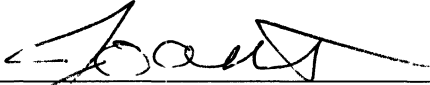
Since Appellant has failed to marshal all of the evidence in support of the trial court's findings of fact and demonstrate why the challenged findings of fact are erroneous or constitute an abuse of discretion, this Court should decline reviewing Appellant's Issues on Appeal and affirm the findings of the trial court.

With respect to Cross-Appellant's arguments, this Court should determine that the trial court applied the wrong legal standard to the distribution of Dave Child's pre-marital, sole and separate interests in A-1 Rental. This Court should declare his interest pre-marital and remove same from distribution. Dave is entitled to his pre-marital property and also to its appreciated value.

Finally, both parties acknowledge that the court's ruling with respect to the Corvette was inconsistent with any of the testimony and it now appears that the parties are in agreement that this Court should overturn the findings and the award of the trial court with respect to the Corvette. This Court should award Cathy the Corvette and Dave funds from

the family account, equivalent to the value of the Corvette at the time of trial, before the balance of said account is distributed between the parties pursuant to the Decree.

DATED this 11th day of August, 2008.



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CERTIFICATE OF MAILING

I hereby certify that two true and correct of the foregoing REPLY BRIEF OF CROSS-APPELLANT/APPELLEE were sent, postage prepaid, by U.S. Mail, on August 11, 2008, addressed as follows:

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