

2006

Joye Van Dyke v. Wesley G. Van Dyke : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JOYE VAN DYKE,

Petitioner/Appellee,

vs.

WESLEY G. VAN DYKE,

Respondent/Appellant.

**REPLY BRIEF OF
THE APPELLANT**

Appellate Case No.: 20061084-CA

Second District Court No. 910902969

Appeal from Order Modifying the Decree of Divorce (filed October 24, 2006) and
the Findings of Fact Conclusions of Law (filed November 30, 2005) by the
Honorable Stanton M. Taylor of the Second Judicial District Court,
State of Utah, Weber County, Ogden Division

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Respondent/Appellant requests oral argument.

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ARGUMENT

By way of introduction and to promote clarity, the Appellant is continually referred to below as “Wesley.” Wesley’s current spouse which he married subsequent to the parties’ divorce is referred to as “Jana.” The Appellee will be referred to as “Joye.”

I. UTAH LAW IS CLEAR THAT CHILD SUPPORT CANNOT BE INCLUDED IN A PARTY’S INCOME WHEN DETERMINING AN ALIMONY AWARD.

Utah law clearly provides a payor spouse with deductions in gross income for tax liabilities and reasonable expenses. Montoya v. Montoya, 2002 WL 1870282, ¶ 1-2 (Utah App. 2002) (a copy of which was attached to the Brief of the Appellant as Addendum “C” in accordance with Utah Rules of Appellate Procedure Rule 30(f)). Trial courts who fail to allow such reductions improperly overstate the payor spouse’s income which may result in a mistake creating grounds for reversal on appeal. Id.

Utah law is equally clear that one deduction available is based upon any child support received. *See* Moon v. Moon, 973 P.2d 431, 433 (Utah App. 1999) (where the court provided for “deductions for state and federal taxes, social security, health care premiums, child support and alimony”); Williamson v. Williamson, 983 P.2d 1103, 1106 (Utah App. 1999) (“the child support paid [to the payor spouse] is earmarked for the parties’ minor child and should not be considered as income to [the payor spouse] for purposes of calculating alimony”); and Reick v. Reick, 652 P.2d 916, 917 (Utah 1982) (stating “the basic and unalienable right to child support ... is vested in the minor”).

Despite this clear line of authority, Joye provides summary statements throughout the Brief of Appellee that Jana’s child support received should be included as income

when determining alimony. Specifically, Brief of Appellee continually states Wesley's available monthly income at \$4,541.00. Brief of Appellee, 7, 8-9, 10. This figure is composed of the \$3,941.00 of combined net income and an additional \$600.00¹ to account for the child support received by Jana. Id.

Joye's only citation to any authority on this issue is to Utah Code Ann. § 30-3-5(8)(g)(iii)(A),² which simply provides that a trial court "may consider the subsequent spouse's financial ability to share living expenses." The application of this statute is restricted to considering Jana's income and expenses in conjunction with Wesley's. It provides no specific insight helpful to support Joye's statement that Jana's child support should be included as income for either Jana or Wesley. There is, however, very clear authority which explicitly states that child support cannot be considered income of either Jana or Wesley.

II. ISSUES BASED ON EVIDENCE NOT PRESENTED AT TRIAL CANNOT BE ADDRESSED OR RELIED UPON ON APPEAL.

With a few exceptions,³ "[i]t is a well-established rule that a defendant who fails to bring an issue before the trial court is generally barred from raising it for the first time on appeal." State v. Irwin, 924 P.2d 5, 7 (Utah App. 1996) (Citing State v. Lopez, 886

¹ Testimony at trial evidenced that Jana received between \$600.00 and \$800.00 per month in child support. (R. 246 at 81:10-16; 246 at 71:2-11). However, based on relevant Utah case law cited above, the amount is completely irrelevant as no amount of child support can be included in a payor spouse's income.

² The Brief of Appellee incorrectly provides an out-dated citation to Utah Code Ann. § 30-3-5(7)(g)(iii)(A)(2001)," the correct citation is Utah Code Ann. § 30-3-5(8)(g)(iii)(A).

³ The three exceptions stated in Irwin are (1) if the trial court committed plain error, (2) if "exceptional circumstances" exist or (3) if a claim of ineffective assistance of counsel is made.

P.2d 1105, 1113 (Utah 1994); State v. Archambeau, 820 P.2d 920, 922 (Utah App.1991)). Under State v. Law, 75 P.3d 923, 924 (Utah App. 2003), the parties to an appeal are restricted to the evidence contained in the trial record. Any attempt by the parties to offer new evidence not admitted at trial should not be considered during the appeal. Low v. Bonacci, 788 P.2d 512, 513 (Utah 1990).

In the instant matter, Page 8 of the Appellee's Brief states, "Furthermore, the evidence at trial indicated Wesley had \$100,000.00 in savings. Wesley is able to earn a[t] least 4% to 5% interest per annum on his savings." Joye continues by stating "[c]onsidering Wesley earns 4% to 5% per annum interest on his savings of \$100,000.00 he earns an additional \$400.00 to \$500.00 per month." Id. at 11. Such statements are both false and are also not contained on the trial court's record. The only testimony at trial concerning this matter was stated in an extremely brief exchange by Wesley during questions from Joye's trial counsel as follows:

Q On this inheritance from your deceased parents of \$100,000, what was the actual amount you received?

A \$95,000.

Q So you've increased it by \$5,000?

A Yes, it's in stocks.

Q Pardon me?

A It's stocks.

Q Right, and you just didn't cash those in or take any money at the time?

A No.

(R. 246 at 59:21-60:5). No other testimony at trial by any witness addressed this topic.

Joye's statements in her Brief of Appellee are problematic for at least two reasons: First, Joye has incorrectly characterized these stocks, stating that they are part of Wesley's

savings and continue to generate a monthly or annual income. These stocks are not immediately available as an income generating vehicle which provides liquid funds as Joye suggests. In fact, Wesley's testimony is evidence that these stocks are an appreciable asset as opposed to an income generating vehicle. When asked whether he has cashed his stocks or taken any money out, Wesley answered in the negative. (R. 246 at 60:2-5). They are an asset which has appreciated in value over time (as opposed to generating a monthly income for Wesley).

Second, the trial court record was completely devoid of sufficient information to support Joye's statement that "Wesley is able to earn a[t] lease 4% to 5% interest per annum on his savings." As stated previously, the above-referenced short exchange is the only testimony available and preserved on the record on this issue. Nothing at trial mentioned anything at all about any interest rates, neither did the witnesses testify about how long it took for the stocks to appreciate from \$95,000.00 to \$100,000.00. As Joye's statements concerning Wesley's inherited stock are false and/or are not contained on the trial court's record, this court should not be required to participate in guess-work which would lead to fabrication of evidence which was never presented to the trial court.

III. THIS COURT IS PERMITTED TO TERMINATE THE ALIMONY AWARD SINCE WESLEY'S REASONABLE EXPENSES EXCEED HIS AVAILABLE INCOME.

At a bare minimum, this Court should remand this matter for further proceedings because the trial court has only provided cursory statements and have failed to include sufficient detail and subsidiary facts to disclose the steps by which the ultimate conclusion was reached. *See Van Dyke v. Van Dyke*, 86 P.3d 767, 770 (Utah App. 2004)

(citations omitted); and McKenzie v. McKenzie, 2001 WL 333089, ¶ 1 (Utah App. 2001) (a copy of which was attached to the Brief of the Appellant as Addendum “B” in accordance with Utah Rules of Appellate Procedure Rule 30(f) (“the trial court cannot simply state the obligor's earnings. ‘To be sufficient the findings should also address [the obligor's] needs and expenditures, such as housing, payment of debts, and other living expenses’”) (citing Rehn v. Rehn, 1999 UT App 41, ¶ 10, 974 P.2d 306, 311 (Utah App. 1999))).

However, if “pertinent facts in the record are clear, uncontroverted, and capable of supporting only a finding in favor of the judgment,” this Court may vacate and terminate the alimony award as a matter of law. Davis v. Davis, 2001 WL 1340747, ¶ 1 (Utah App. 2001) (a copy of which was attached to the Brief of the Appellant as Addendum “A” in accordance with Utah Rules of Appellate Procedure Rule 30(f); (see also Marshall v. Marshall, 915 P.2d 508, 516 (Utah App. 1996); and McKenzie, 2001 WL 333089 at ¶ 1 (stating that the appellate court “must reverse unless the record is clear and uncontroverted as to allow us to apply the factors as a matter of law”))).

Uncontroverted evidence presented at trial shows that Wesley and Jana’s combined net income is \$3,941.00. (R. 246 at 57:16-20). Joye’s Brief of Appellee readily adopts the fact that Wesley and Jana’s combined net income is \$3,941.00, but then attempts to improperly inflate this figure by inappropriately including \$600.00 of Jana’s child support (which would raise Wesley’s combined net income to \$4,541.00). Brief of Appellee, 7, 8-9, 10. As provided above, child support cannot be included in a payor spouse’s income when determining an alimony award and Wesley’s combined net

income should remain at \$3,941.00.

Further, uncontroverted evidence presented at trial shows that Wesley's combined reasonable expenses were not less than \$4,058.62.⁴ Again, this figure covers only the absolute bare minimum of their reasonable expenses which Wesley and Jana pay each month to provide for a family of five individuals. There are several other categories of expenses in Wesley and Jana's budget that could quite easily be categorized as "reasonable." By using this figure (\$4,058.62), Wesley is not acknowledging that only \$4,000.00 in his budget is reasonable. Rather, its purpose is to show that even the bare and necessary expenses, without including all "reasonable expenses," exceeds Wesley and Jana's combined income. This figure (which is \$1,068.33 lower than the budget presented at trial and supported by testimony) is used by way of example alone as surely their "reasonable expenses" are greater than \$4,058.62.

For the first time on appeal, Joye argues that Wesley's expenses should be reduced by an additional \$210.00 to account for Jana's tithing (\$180.00) and fast offerings paid as charitable contributions (\$30.00) because these expenses are not reasonable. Brief of Appellee, 8. Although it appears that this specific issue (whether tithing and fast offerings and other charitable contributions are a reasonable expense when determining an alimony award) is an issue of first impression, such expenses can quite easily be considered reasonable expenses.

However, even assuming *arguendo* that these expenses are not reasonable, this

⁴ Wesley and Jana's reasonable expenses are more fully discussed in Brief of the Appellant, 7-11.

adjustment would only reduce Wesley's expenses to a minimum of \$3,848.62 ($\$4,058.62 - \$210.00 = \$3,848.62$). Based on Wesley's combined net income of \$3,941.00, Joye's best case scenario (of excluding charitable contributions) would only provide Wesley with \$92.38 ($\$3,941.00 - \$3,848.62 = \92.38) to pay an alimony award of \$400.00, not taking into account the additional monthly expenses that could also be considered as reasonable for a family of five. The trial court allowed Joye several reasonable expenses (entertainment and incidentals), yet failed to specify whether Wesley was granted deductions for the same categories. A non-exclusive list of reasonable expenses incurred by Wesley which are not included in the \$4,058.62 are: home maintenance and repairs, automobile or medical accidents, life insurance, homeowner's insurance, temporary loss of income, vacations, entertainment expenses, basic cable/satellite television plan, cellular telephones, health club subscription, a newspaper subscription, and other miscellaneous expenses.

Joye's proposed budget (which was found to be "reasonable" in the trial court's FFCL; R. 313-314) included \$630.00 of estimated expenses that Joye testified she was not, in fact, paying for at the time of trial. *See* Budget of Joye Felt, a copy of which is attached to the Brief of the Appellant as Addendum "R". Joye's expenses also included \$50.00 per month for "Entertainment" (for only one person), \$275.00 for "Car (estimated payment, insurance)" since Joye did not have a car payment at the time, and \$50.00 for "Incidentals." *Id.* *If these types of expenses (entertainment and incidentals), including hypothetical expenses, are considered reasonable for Joye, it would be inequitable to view these exact same expenses in a different light when Wesley attempts to claim them*

as reasonable expenses. Evidence presented at trial stated that Wesley spent \$182.00 for “All Other Expenses” or incidentals⁵ and \$120.00 per month on Entertainment.⁶ Joye’s trial counsel even allowed Wesley’s entertainment as a reasonable expense in her closing argument to the trial court. (R. 246 at 80:24).

In sum, at a bare minimum, Wesley must be granted the same categories of reasonable expenses that Joy was. If Wesley’s combined expenses were reduced by \$210.00 to cover charitable contributions (as Joye argues), Wesley must be allowed to include the same reasonable expenses which Joye was permitted to use (entertainment and incidentals). This would mean that Wesley’s combined income of \$3,941.00 would still be swallowed by his combined expenses of \$4,150.62 (calculated by the original expenses of \$4,058.62, minus charitable contributions of \$210.00, plus Wesley’s entertainment of \$120.00 and incidentals of \$182.00), leaving him a deficit of \$209.62 each month and 2,515.44 per year. Again, these are only two possible categories (entertainment and incidentals) out of many which may be considered reasonable expenses. This situation alone permits this Court to vacate and terminate the alimony award in favor of Wesley as a matter of law.

CONCLUSION AND REQUEST FOR RELIEF

In conclusion, Wesley respectfully requests that this Court determine that the Order dated October 24, 2006 and FFCL of November 30, 2005 be vacated and the

⁵ R. 246 at 56:10-14; 57:3-7; 69:21-70:3, see also Wesley’s Financial Declaration which is attached to the Brief of Appellant as Addendum “E”.

⁶ R. 246 at 53:23-25, a copy of Wesley’s Financial Declaration is attached to the Brief of the Appellant as Addendum “E”.

alimony award be terminated in favor of Wesley as a matter of law pursuant to Marshall, 915 P.2d at 516 (Utah App. 1996) and McKenzie, 2001 WL 333089 at ¶ 1. However, this Court should vacate the trial court's order and remand this matter to the trial court (for a second time) with another set of additional instructions.

Respectfully submitted this 14th day of August, 2007.

ASCIONE, HEIDEMAN, AND MCKAY, L.L.C.

A handwritten signature in black ink, appearing to read "Jeremy M. Shorts", is written over a horizontal line.

Jeremy M. Shorts
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CERTIFICATE OF SERVICE

In accordance with Utah R. App. P. 26(b), I hereby certify that on this 14th day of August, 2007, two (2) true and correct copies of the foregoing **Reply Brief of the Appellant** were served by the following method on the person(s) indicated below:

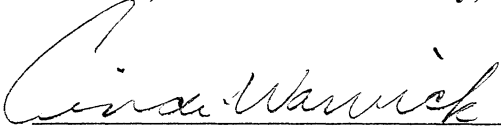
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