1982

Jan L. Prestwich v. Ramon G. Prestwich : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

JAN L. PRESTWICH, Plaintiff/Appellant vs RAMON G. PRESTWICH, Defendant/Respondent.	)	Case No. 18043

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BRIEF OF RESPONDENT

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Appeal from Judgment of the Fifth Judicial District Court of Iron County, State of Utah, the Honorable Robert F. Owens, Presiding.

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STATUTES AND OTHER AUTHORITIES

CASES CITED

NATURE OF THE CASE

Plaintiff/Appellant sued Defendant/Respondent for divorce alleging mental cruelty. Defendant/Respondent counterclaimed for divorce on the same grounds.

DISPOSITION OF THE CASE IN THE LOWER COURT

The parties were awarded a divorce, each from the other. The trial court made appropriate orders with respect to child custody, child support, property division and debt division. Both parties were found to be fit and proper parents.

RELIEF SOUGHT ON APPEAL

This court should affirm the trial court's Findings of Fact and Conclusions of Law and Decree of Divorce.

STATEMENT OF FACTS

There were four (4) children born as issue of the marriage. Appellant was awarded custody of the three (3) minor children, although both parents were found to be fit and proper parents. (Court Record 92).

The two (2) older children born to the parties, reside with Respondent, pursuant to the provision that allowed for agreement in the Decree of Divorce. The children residing with Respondent are Shane, age 19, and Sy, age 16. The two younger children, being Sam, age 12, and Janae, age 11, reside with Appellant. All four of the children reside with Respondent during one-half of the summer and every other

weekend and holiday. (Court Record 92). With this arrangement, all four of the children spend more than one-fourth of each year in Respondent's home.

The trial court found that each party had an earning capacity of between $800.00 and $900.00 per month. (Court Record 91).

The court expressly found that each party had an equal obligation of support for the minor children. The court further determined that the total cost for the support of one child was $150.00. The court therefore determined that the cost of supporting a child should be equally split between the parties, so that each would be providing $75.00 per month of the monthly support requirement of $150.00 for each child. In calculating the total amount to be paid by Respondent to Appellant, the court dealt with the de facto arrangement between the parties, where the husband had one of the minor children with him, and the wife had two. The court considered, therefore, that the total amount needed to support the three minor children of the parties was the sum of $450.00 per month. The court considered the fact that Respondent was supporting one minor child completely, and was therefore entitled to a credit of $150.00 per month. This amount was therefore offset against the $150.00 per month which would be required for one of the remaining two minor children living with Appellant. This method of calculation left only one minor for whom support should be paid. Since

the amount required to support the remaining minor child living with Appellant was $150.00, and since the trial court determined that the parties bore an equal obligation of support, the trial court split the remaining $150.00 and required Respondent to pay Appellant child support in the amount of $75.00 per month. (Court record 106; page 23, lines 3 through 25; page 24, and page 25, lines 1 through 12. Also Court Records 91 and 92).

In the property settlement, Respondent was awarded marital property with a net value determined by the court of $104,700.00. Appellant was awarded marital estate property valued at $84,537.00. Respondent was required to assume and pay debts of the marriage in the amount of $102,893.91, save and except the mortgage on the home awarded to and occupied by Appellant, and debts incident to ownership of property awarded to Appellant. (Court Record 92).

Respondent's non-marital estate property award was valued at approximately $373,000.00. The court did not place a value on Appellant's non-marital property. (Court Record 92). Although the court failed to place a value on Appellant's separate property, such property did exist. One example was the "Fabric Care Center" a commercial dry cleaning and laundry business which had substantial value as indicated by Appellant in her testimony. (Court Record 103, pages 33-34).

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN MAKING ITS AWARD OF CHILD SUPPORT. THE TRIAL COURT CONSIDERED THE PARTIES' TOTAL CIRCUMSTANCES INCLUDING THEIR RELATIVE WEALTH.

Appellant asserts that the provisions of the Uniform Civil Liabilities for Support Act, UCA 78-45-1, et seq (1953, as amended), govern this action. Actually, the governing section is UCA 30-3-6 (1953, as amended). In any event, the record clearly shows that the Court carefully considered the total financial circumstances of the parties, including their "relative wealth".

There is extensive evidence and oral testimony in the record regarding the financial circumstances, including income and expenses for both Appellant and Respondent. This case was before the lower court on six (6) separate occasions, including the pretrial support hearing on 30 April 1980, and the trial on 17 July 1980 and 21 August 1980. From the evidence, a summary of Appellant's earning capacity and benefits can be obtained as follows:

1. $500.00 cash, take home pay from Appellant's business of the "Fabric Care Center". (Court Record 103, page 18).

2. Payment of Appellant's taxes by the "Fabric Care Center". (Court Record 103, page 37).

3. Free use of the "Fabric Care Center" vehicle

as Appellant's primary transportation, and free use of washing, drying and dry cleaning facilities. (Court Record 103, page 65).

4. Distribution of profits from the "Fabric Care Center". (Exhibits D-3 and D-4, being "The Fabric Care Center" balance sheets for 1978 and 1979).

It is undisputed that Appellant's adjusted gross incomes were $9,057.98 in 1978 and $10,708.85 in 1979. (Exhibits D-5 and D-6, being Appellant's income tax returns for 1978 and 1979, respectively.).

Respondent's adjusted gross incomes dating from 1970 were as follows: 1970, $11,662.00; 1971, $6,619.68; 1972, $12,302.16; 1973, $21,653.62; 1974, $9,855.57; 1975, $11,880.86; 1976, $15,480.84; 1977, $10,907.05; 1978, $16,131.12; and 1979, $8,340.36. The figures used by Respondent at the time of trial were an average of his 1978 and 1979 income, but previous years' earnings were listed in order to render a true picture. (Defendant's exhibit # 2, dated 8/21/80).

At trial on 17 July 1980, Appellant's witness Darby stated that "based on my review of the tax returns (Respondent's returns) there are a number of items that could affect cash flow". (Court Record 103, page 110 through 117). Under cross-examination, Darby gave no quantitative data to actually determine the amount of the alleged income benefits to Respondent, but inferred that there might "very easily" be

some benefit (Court Record 103, page 115). Because of this insinuation and innuendo, the subject of possible hidden tax benefits was raised by Respondent at the continuation of the trial on 13 August 1980. All personal, partnership and corporate records and documents were made available in the courtroom by Respondent for examination by Appellant. (Court Record 103, page 168). Despite the availability of such information, no items affecting cash flow were shown by Appellant.

The "cash flow benefits" accruing from balancing of farm inventories year to year cannot accrue endlessly throughout the years. Therefore, Respondent's citing of adjusted gross incomes over a ten (10) year period eliminates the possibility of a short term income shelter for the Respondent, despite Appellant's unfounded claims.

An examination of Appellant and Respondent's tax returns and accompanying data, based on the testimony of Darby, helps clarify cash flow benefits for both parties, as follows:

1978

ITEM EFFECTING INCOME	APPELLANT	RESPONDENT
Depreciation	$ 6,272.60 (1)	$2,549.92 (4)
Partnership losses	None	None
Subchapter S losses	None	37.06 (4)
Capital gains income	None	873.18 (4)

1979

Depreciation	$ 5,914.32 (2)	$1,585.67 (4)
Partnership losses	None	889.30 (4)
Subchapter S losses	None	37.06 (4)
Capital gains income	1,975.00 (3)	2,635.55 (4)

The parenthetical references in the above tables are to the following items shown on the record:

(1). Exhibit D-5, Jan Prestwich 1978 1040 Income Tax Form and Exhibit D-3, Fabric Care Center Balance Sheet 1978 (one-half of $11,878.51).

(2). Exhibit D-4, Fabric Care Center Balance Sheet 1979 (one-half of $11,828.65).

(3). Exhibit D-6, Jan Prestwich 1979 1040 Income Tax Form.

(4). Ramon Prestwich, Full Disclosure Financial Declaration, and 1978, 1979 1040 Income Tax Returns.

A comparison of the living expense of the parties shows that they are substantially similar. The basic difference in the living expenses of Appellant and Respondent is found in the cost of housing. Appellant was awarded the home, together with a mortgage payment of $113.00 per month. Respondent was awarded a condominimum, with a housing payment of $313.00 per month for equivalent housing. (Full Disclosure Financial Declarations for Appellant and Respondent).

Utah State law is very well settled to the point that the custodial parent has as much obligation to support the children of the parties as does the non-custodial parent. In the case of Owen v Owen, 579 P.2d 911 (Utah, 1978), this court held:

". . . both the mother and the father are

> responsible for the support of the children. Therefore, even though in the decree the duty of support was placed primarily and mostly on the defendant, the trial court is not necessarily obliged to continue that burden entirely and exclusively upon him. Second, the issue for the court to adjudicate was the needs of the children and not necessarily the manner and standard of living desired by the plaintiff."

In accordance with this view are Ericson v Ericson, 335 P.2d 618 (Utah, 1959), Mitchell v Mitchell, 527 P.2d 1359; and Forbush v Forbush, 578 P.2d 518 (Utah, 1978).

It is apparent from the cited authorities that both parents bear responsibility for the support of their minor children. It seems appropriate that the child support burden be split between the parties in this case as was done by the trial court.

The Appellant has contended that the Respondent's use of adjusted gross income figures (Court Record 107, Defendant's Exhibits 3 and 4, and Defendant's Financial Declaration P-2), was contradicted in Defendant's testimony (Court Record 103, page 75-76). Defendant's Exhibits 3 and 4 are cited by Appellant as proof of the "contradiction". The exhibits are balance sheets for Appellant's business and affect Appellant's gross income, not Respondent's. With this clarification it becomes obvious that there are no "contradictions", but it does lead us to the conclusion stated in Pinion v Pinion, 67 P.2d 265 (Utah, 1937), at page 268, which has been echoed many times in subsequent cases:

"Even in an equity case, we do not overturn the judgment unless it is fairly against the preponderance of the evidence. The writer believes that every intendment should be in favor of the trial court, for not only does he in a divorce case have the parties before him, enabling him to test credibility by demeanor, but the conduct and manner of the parties in the courtroom sometimes gives much aid in solving who really is at fault. Moreover, a trial judge may "live with" a divorce proceeding in its preliminary stages and know it from angles which the record does not disclose."

POINT II

THE AWARD OF CHILD SUPPORT IS REASONABLE AND ADEQUATE TO MEET THE NEEDS OF THE CHILDREN.

The trial court specifically found that the total support requirements of the children were $150.00 per month per child. The trial court also concluded, as a matter of law, that the parties had an equal responsibility to support the children. In other words, in a situation where the income of the parties is roughly equal, each should contribute the same amount to the support of the children. Appellant has two (2) minor children living with her, while Respondent has one (1) minor child living with him. Under these circumstances, Respondent was and is entitled to a credit in the amount of $150.00 per month for the support being furnished entirely by him to the minor child which is living with him. Appellant is, of course, entitled to a credit of $150.00 per month for one of the minor children living with her, for which she furnishes total support. That leaves only $150.00 per month to be divided between the parties for the support of the remaining

minor child, who is living with Appellant. The court determined that Appellant, through having the minor child live with her, would be providing one-half of that child's support. The court therefore required that Respondent pay to Appellant the sum of $75.00 per month, as one-half of the support due for that particular child.

The income of the six (6) member family during the marriage was moderate but adequate. This income, after taxes, during the last several years was generally less than $900.00 per month. (Defendant's Exhibit No. 2, 8/21/80). If you divide $900.00 among six persons, it amounts to $150.00 per person per month. When the children have wanted to better their individual financial positions, they have had that opportunity. (Court Record 103, pages 134-136). They have worked for both Appellant and Respondent and they have benefited themselves financially in addition to gaining working skills, improving their own self-image, and increasing their self-confidence. However, the basic support for the children remains with the parents.

A general statement of the law as to the amount of child support which should be awarded is found in 59 Am Jur 2d., page 146, Section 56. There we find the following:

> The primary consideration is the economic circumstances of the child and of the parent against whom support is sought. The age, health, or physical condition of the father, mother, or child may also be of substantial importance. The element of fault, as between the parents has no

> bearing on the amount to be awarded for support of the child."

The law of Utah is in accord with the general statement of law set forth above. In the case of Forbush v Forbush, 578 P.2d 518 (Utah, 1978), this court held:

> The principal considerations in making such a determination are the needs of the child and the ability of the parent to provide such support."

The Forbush case also stands for the proposition that either the mother or the father may be required to support the child and that both are equally responsible for support.

There are many Utah cases which deal with specific awards, but each turns on its individual facts and none are particularly helpful to the inquiry of the court in this case. It is apparent, however, that the trial court has wide discretion in deciding how much child support should be awarded in any individual case.

Other states are in accord with this proposition of law. Of particular interest is the case of Spingola v Spingola, 508 P.2d 958 (New Mexico, 1978). The Supreme Court of New Mexico was considering the petition of a mother to increase child support based on the fact that her husband had increased his earning capacity since the original decree was entered. The New Mexico Court went on to set down some very helpful guidelines in determining what should be considered in deciding the amount of child support. It held that the welfare of the children was of primary importance and in

providing for this welfare, stated that the trial court should consider:

> "The total financial resources of both parents, including their monetary obligations, income and net worth, should be carefully examined. The Court should remember that the obligation of the mother to support the children is no different from that of the father. (Citations omitted). Consideration should be given to what life style the children would be enjoying if the father and mother were not divorced and the non-custodial parent had his present level of income. (Citations omitted). Where the income, surrounding financial circumstances and station in life of the father demonstrate an ability on his part to furnish additional advantages to his children above their actual needs, the trial court should provide such advantages within reason. This does not mean providing "luxuries or fantastic notions of style . . . not normal for the stable, conservative, and natural upbringing of a child, according to the comfort, dignity and manner in which the father over the years has been accustomed to live. (Citations omitted). A reasonable regard for the real welfare of the children would dictate an avoidance of extravagant expenditures no matter what the wealth of the parents may be." (Citations omitted) (Emphasis added).

The New Mexico Supreme Court goes on to provide other guidelines which the trial court should consider in determining the amount of child support, but it is aparent from the language quoted above that it is the obligation of both parents to provide reasonably for the welfare of their children. Even though one parent may have extensive resources, that parent should not be required to provide a lavish or extravagant life style, particularly in view of the fact that the children were not previously used to such a life

style. The language of this case is particularly appropriate to the case at bar. The trial court determined the level of support required by the children. This level was the same level at which the children were being supported prior to the separation of the parties. The trial court then made appropriate provision for the support of the children at the same level.

From the evidence in this case it is clear that the parties, before the separation and divorce, did not have an extravagant life style. Indeed, they lived in rather modest circumstances with the bulk of the wealth of the parents being tied up in properties which were received in one form or another from the children's grandparents, with a majority of the property being held in undivided fractional interests.

POINT III

THE COURT DID NOT ERR IN FINDING THE PARTIES HAD EQUAL EARNING CAPACITIES.

The trial court's determination of the earning capacities of the parties is well supported by the record. Appellant's take-home income was supplemented by payment of her taxes by her business, her free use of business vehicle, free use of cleaning and washing facilities, the distribution of profits to her from the business, and the regular substantial increase in Appellant's equity in her business as shown by her own balance sheets. See Point I above for a detailed review of Appellant's income. On the other hand, unrebutted evidence

shows the determination of Respondent's income to be accurate, despite unsupported innuendoes raised by Appellant to the contrary.

CONCLUSION

The issue in this case is child support. The monthly support from Respondent to Appellant is paid every month of the year, even though the children reside with Respondent during a substantial portion of each year. The support is adequate to maintain the standard of living the children enjoyed prior to the divorce. The decision and award of the trial court are amply supported by the entire record, and the trial court had full opportunity to determine the truth of the circumstances of the parties, having before it the parties and all necessary information to do so. Appellant has failed to establish any legal or proper reason for overturning the decree of the trial court, and the judgment of the trial court should be affirmed.

RESPECTFULLY SUBMITTED this 30th day of March 1982.

WILLARD R. BISHOP
Attorney for Respondent

CERTIFICATE OF MAILING

I hereby certify that the foregoing Brief of Respondent was served upon the Appellant by mailing two copies to each of her counsel of record by first class mail, postage fully prepaid, this 30th day of May 1982, at the following addresses:

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