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Karen Penrose v. Jeffrey Penrose : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

KAREN PENROSE, Plaintiff/Appellant, vs. JEFFREY PENROSE, Defendant/Appellee.	**REPLY BRIEF OF APPELLANT** Case No. 950774-CA Priority No. 15

APPEAL FROM THE DECREE OF DIVORCE ENTERED BY THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH, JUDGE SANDRA N. PEULER

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I.

THE TRIAL COURT'S ALIMONY AWARD IGNORES EVIDENCE WHICH WAS PRESENTED REGARDING THE PARTIES' MARITAL LIFESTYLE AND MS. PENROSE'S NEED

In making its woefully insufficient alimony award, the trial court obviously failed to consider Mr. Penrose's own testimony regarding the parties' marital standard of living, and Ms. Penrose's established financial needs. In his brief, Mr. Penrose attempts to support the trial court's award by arguing that Ms. Penrose's father provided extensive financial support to the couple, and that Ms. Penrose's claimed expenses were "excessive." Mr. Penrose not only ignores evidence which was presented regarding the parties' marital standard of living and Ms. Penrose's reasonable monthly needs, but he also completely disregards the trial court's express finding regarding his own monthly income.

Mr. Penrose claims that the alimony awarded by the trial court is appropriate because the parties' admittedly lavish marital lifestyle was financed largely by Ms. Penrose's parents. This assertion mischaracterizes the evidence which was presented at trial. The trial court did find that Ms. Penrose's parents assisted the parties financially. This finding was apparently based on Mr. Penrose's testimony that Ms. Penrose's father, Lloyd Hansen, financed trips for the parties during their marriage, and provided the use of his condominium in Hawaii during the early

years of the parties' marriage, which allowed them to concentrate the development of their business. (Tr.Vol. II, p. 295-297).

However, the trial court also found that the parties' lifestyle was based, at least in part, on "the parties' own income from their businesses" and "savings accrued from their Hawaiian business." (Findings of Fact and Conclusions of Law, ¶ 9).

Furthermore, Mr. Penrose admitted that much of the parties' lifestyle, particularly after they returned to Utah, was financed not by Ms. Penrose's father, but by his own income and resources. Specifically, it was the parties themselves, not Ms. Penrose's father, who purchased the parties' vehicles (including a Porsche and a $56,000.00 Mercedes), their $500,000.00 home in Holladay, their business, Designers Carpet Showroom, their interest in Utah Water Sports, and expensive gifts and jewelry, such as Rolex watches. (Tr.Vol. II, p. 384-387). The parties, through their marital income and assets, also were able to finance nannies and household help to assist in the care of their son. (Tr.Vol. II, p. 379-380; Tr.Vol. I, p. 46).

In light of Mr. Penrose's own testimony, this Court should disregard his argument that the parties' marital lifestyle was financed primarily by Ms. Penrose's parents. Rather, it was largely Mr. Penrose's own income from the parties' business, along with their savings from the business which they operated in Hawaii, that allowed the parties a somewhat lavish marital lifestyle.

Mr. Penrose also argues that Ms. Penrose's claimed monthly expenses were inflated. The trial court found that Ms. Penrose's average monthly expenses were approximately $3,800.00, despite the fact that the evidence established that her monthly expenses, based upon her marital standard of living, totalled not less than $5,974.04. In support of its finding, the trial court stated only that Ms. Penrose's claimed expenses were "excessive." (Findings of Fact and Conclusions of Law, ¶ 9). Mr. Penrose claims that "the trial court had ample justification for finding that these expenses were inflated." See Brief, at p. 14. However, not only did the trial court fail to offer support for its Finding, it also failed to address the fact that Ms. Penrose's uncontroverted[1] testimony established expenses of $5,974.04.

In his brief, Mr. Penrose attempted to support the trial court's alimony award by stating that, based upon testimony by his accountant, Bret Wynn, his average monthly net income is only $5,833.00. See Brief, at p. 14. This assertion is directly contrary to the trial court's express finding that Mr. Penrose's income for purposes of determining awards of child support and alimony was $8,932.00 per month. (Findings of Fact and Conclusions of Law, ¶ 5). Mr. Penrose's claimed monthly income cannot be unsupported by the evidence.

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[1] Although Mr. Penrose stated that he thought some of Ms. Penrose's claimed expenses were "high," he offered no support for this conclusion, and had not seen any of her bills. (Tr. Vol. II, p. 244-246.

Based upon the trial court's finding regarding Mr. Penrose's established monthly income in the amount of $8,932.00, and Mr. Penrose's own testimony regarding the parties' marital lifestyle, this Court should overturn the trial court's award of alimony and direct that an award more commensurate with Mr. Penrose's income, Ms. Penrose's established expenses, and the parties' marital standard of living be entered.

II.

THE TRIAL COURT'S VALUATION AND DIVISION OF MARITAL DEBTS AND PROPERTY IS PATENTLY INEQUITABLE

In his Brief, Mr. Penrose also attempts to justify the trial court's improper valuation and inequitable distribution of property. The trial court awarded the parties' business, Designers Carpet Showroom, to Mr. Penrose, and valued the business at $0 for purposes of property division, despite its proven growth and earnings potential[2]. The trial court also awarded Mr. Penrose a cash asset to repay family debt, without doing the same for Ms. Penrose. Given the trial court's property and debt allocation, Ms. Penrose will be left with virtually no property after payment of debt she was ordered to assume.

The trial court valued the parties' business at $0 for purposes of property division, due to a contingent sales tax

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[2] In its Findings of Fact and Conclusions of Law, the trial court specifically stated that Designers Carpet Showroom has "significant value as evidenced by historical and present earnings." (See Findings of Fact and Conclusions of Law, ¶ 13(a)).

liability, the amount, if any, of which has yet to be determined. However, Mr. Penrose stipulated to Mr. Stephen Nicolatus's valuation of the business at $194,000.00 without consideration of the contingent tax liability, which is a far cry from the $0 figure assigned by the trial court. As Bret Wynn, a certified public accountant called to testify by Mr. Penrose stated, "a portion of the sales tax, one of the components of the sales tax is in question or, rather, is in negotiation and we feel fairly comfortable that the amount will be reduced, or a reduction of the existing liability." (Tr.Vol. II, p. 343). Additionally, exhibits "D" and "E" to Mr. Penrose's Brief state that the tax liability is only an "estimate."

Furthermore, the trial court itself found that the business has significant value and earning potential. (Findings of Fact and Conclusions of Law, ¶ 13(a)). Consequently, although testimony regarding the contingent sales tax liability may support the trial court's finding, the trial court utterly failed to consider the stipulated present fair market value of the business and its own statement regarding the business's future earnings potential, as well as the contingent nature of the tax liability, in valuing the business for property distribution purposes.

Nor is there any evidence in favor of the trial court's valuation of the Key Bank certificate of deposit at $29,000.00 for property division purposes when it, in fact, has a value of $69,000.00 as established by the uncontroverted evidence.

(Findings of Fact and Conclusions of Law, ¶ 13(c)). The trial court offered no rationale for valuing the asset at less than one half its value for property division purposes, other than the fact that Mr. Penrose owed $40,000.00 to his grandmother[3].

The trial court's failure to render a more equitable distribution and valuation of assets place Ms. Penrose at a substantial disadvantage. Mr. Penrose argues that the trial court's award effected an equal distribution of assets between the parties. What this argument fails to recognize is the fact that Ms. Penrose's debts amount to $107,981.31[4]. Her property award consists of $109,000.00 from the parties' escrow account, her leased vehicle, and furniture. After payment of debts, then, Ms. Penrose will have little more than $1,000.00 in liquid assets.

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[3] Furthermore, the only evidence that was presented in support of Mr. Penrose's claim that he had in fact borrowed $40,000.00 from his grandmother was Mr. Penrose's own testimony, and the copy of a check from his grandmother's account. (Tr. Vol. II, p. 309-310). Mr. Penrose admitted that there is no written documentation evidencing the loan. Nor is there a written repayment agreement. (Tr.Vol. II, p. 381).

[4] Mr. Penrose argues that Ms. Penrose's debt to her father should not be considered because it was incurred mainly after the parties' separation. See Brief of Appellee, p. 17. However, this argument ignores the fact that the date for determining valuation of assets is ordinarily the date of divorce, not separation, unless the court provides otherwise in the Findings of Fact or Decree of Divorce. Rappleye v. Rappleye, 855 P.2d 260 (Utah Ct.App. 1993) (valuation of asset at date of separation, rather than divorce, improper). Here, the court made no such finding. In fact, the court made absolutely no finding as to whether Ms. Penrose's debt constituted marital or separate debt. The absence of such a finding constitutes reversible error.

Mr. Penrose, on the other hand, will have an asset of significant earning potential valued at $0, plus an asset to pay his debt, a certificate of deposit valued at $29,000.00 with an actual value of $69,000.00 as established by uncontroverted evidence, $69,000.00 from the parties' escrow account, and a Bronco, snowmobiles and a trailer, none of which are leased, as is Ms. Penrose's vehicle. The court's patently inequitable distribution of property and debt results in significant prejudice to Ms. Penrose; she is left with virtually no liquid assets, while Mr. Penrose, even after payment of debts, is left with assets in excess of $100,000.00. Such an inequitable division requires reversal on this ground alone.

III.

THE TRIAL COURT'S CHILD SUPPORT AWARD DOES NOT INCLUDE CONSIDERATION OF FACTORS REQUIRED BY UTAH LAW AND THE FACTS OF THIS CASE

Despite the fact that the parties' combined monthly income exceeds the highest guideline amount, and testimony which was presented regarding the benefits and opportunities enjoyed by the parties' minor child during the marriage, the court made no findings regarding the financial needs of the parties' child. Mr. Penrose's argument fails to address these factors.

The trial court merely calculated the amount of the parties' combined monthly income, and set a base child support award based upon the guidelines. Clearly, the court was required to make specific findings as to the financial needs of Miles Penrose,

because extensive evidence was presented at trial regarding the parties' marital lifestyle, which included extensive travel, recreational opportunities, and private education for their son. (Tr. Vol. I, p. 28, 29, 188, 189). The court utterly failed to address the issue of whether Miles may continue such a lifestyle on a child support award of $669.00 per month, even though Mr. Penrose's income allows a higher amount.

Mr. Penrose argues, based on Ball v. Peterson, 912 P.2d 1006 (Utah Ct.App. 1996), that such specific findings were not necessary. However, the Ball court merely held that "linear extrapolation" from the guidelines is not appropriate where income exceeds the highest guideline amount. Id. at 1014. Ms. Penrose is not requesting such linear extrapolation; rather, she merely asks that the court "consider and make specific findings on all "appropriate and just" factors," as required by the Ball court. Id. at 1014.

IV.

THE TRIAL COURT'S ORDER REGARDING ATTORNEY FEES DOES NOT PROPERLY CONSIDER MS. PENROSE'S NEED

The trial court ordered the parties to bear their own attorney fees and costs. Such an order given the facts of this case does not conform to the requirements of Utah law, which requires the trial court to consider of the parties' need and ability to pay in determining whether to award attorney fees.

The Findings of Fact state conclusorily, and erroneously, that Ms. Penrose has sufficient monetary assets, based upon the property division, to pay her own attorney fees. (Findings of Fact and Conclusions of Law, ¶ 15). The trial court's decision is apparently based on the property award, which granted Ms. Penrose $109,000.00 from the parties' escrowed funds. This is essentially the only asset awarded Ms. Penrose, other than her leased vehicle.

However, the trial court's decision ignores the fact that Ms. Penrose is ordered to repay a debt to her father of over $100,000.00 out of her property award, of which legal fees constitute approximately one-third of the total amount. Ms. Penrose's father, Mr. Hansen, paid approximately $32,000.00 of her attorney fees. However, Ms. Penrose's claimed attorney fees total $89,239.02. Mr. Penrose's accusation of "double-dipping" simply is not supported by the facts.

The trial court also failed to consider the fact that Ms. Penrose's imputed monthly income is much lower than Mr. Penrose's actual monthly income, a fact which is relevant both to Ms. Penrose's need and Mr. Penrose's ability to pay, two of the factors required to be considered by Bell v. Bell, 810 P.2d 489 (Utah Ct.App. 1991), which were ignored by the trial court.

Furthermore, Mr. Penrose's argument regarding the reasonableness of the requested fees is inapposite. Here, the trial court made absolutely no finding regarding the reasonableness of the requested fees. In determining reasonableness of requested

fees, a trial court may consider "the difficulty of the litigation, the efficiency of the attorneys, the reasonableness of the number of hours spent on the case, the fee customarily charged in the locality, the amount involved in the case and the result attained, and the expertise and experience of the attorneys involved." Bell, at 493-94.

Here, Mr. Penrose's attempt to compare Ms. Penrose's claimed attorney fees with his own fails to recognize the fact that Ms. Penrose presented extensive testimony regarding her unique circumstances; specifically, that she was forced to retain new counsel at a late date in the proceedings due to the untimely death of her prior counsel[5].

CONCLUSION

The trial court's award of alimony fails to allow Ms. Penrose to maintain the same standard of living she enjoyed during her marriage, which was sustained largely by the parties' own income and savings. Furthermore, the trial court presented no support for its finding that Ms. Penrose's claimed expenses were "excessive," nor has Mr. Penrose advanced such support.

The trial court's division of debts and property leaves Ms. Penrose with essentially no property, other than a leased vehicle, after payment of her debt. Mr. Penrose, on the other hand, was

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[5] Furthermore, although Mr. Penrose was allowed to present a proffer of his own attorney fees, no documentation regarding such fees was offered or received into evidence. (Tr.Vol. II, p. 409-410).

given a significant asset with which to pay his debt, as well as a business of proven economic value, both valued at $0 for purposes of property division.

In setting the child support award, the court failed to consider the specific needs of the parties' minor child, an omission which is objectionable because the parties' combined monthly income exceeds the statutory guidelines.

Finally, the court erred in requiring the parties to bear their own attorney fees without considering Ms. Penrose's need; specifically, the fact that Mr. Penrose's monthly income is significantly higher than Ms. Penrose's, and Ms. Penrose will be left with virtually no assets from the property division after payment of debt.

DATED this 6th day of September, 1996.

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CERTIFICATE OF SERVICE

I hereby certify that on the 6 day of September 1996, a true and correct copy of the foregoing **REPLY BRIEF OF APPELLANT** was mailed, postage prepaid, first-class, to:

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