1968

Leonora K. Weaver v. Robert G. Weaver : Brief of Defendant and Appellant

Utah Supreme Court

IN THE SUPREME COURT
of the
STATE OF UTAH

LEONORA K. WEAVER,
Plaintiff and Respondent,

-vs.-

ROBERT G. WEAVER,
Defendant and Appellant.

Case No.
11152

BRIEF OF DEFENDANT AND APPELLANT

Appeal from Judgment of the District
Court of Salt Lake County, Utah
The Honorable Aldon J. Anderson, Judge

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NATURE OF THE CASE

This is an action for divorce.

DISPOSITION IN LOWER COURT

The case was tried to the Honorable Aldon J. Anderson, District Judge, in the District Court of Salt Lake County, Utah. The plaintiff was awarded a divorce and a division of property decreeing one-half of all of the property of either of the parties to her.

RELIEF SOUGHT ON APPEAL

Defendant seeks an equitable division of property.

STATEMENT OF FACTS

The defendant in this case by professional excellence, diligence and frugality, accumulated a personal estate of $250,000. From his father and from his sister he received gifts of common stock of Combined Insurance Company of America having a value at time of trial, including stock converted to cash, of $500,000. The trial judge treated his inheritance and the fruits of his personal labors as one and divided the total down the middle.

The evidence disclosed that the defendant is a distinguished Urological Surgeon who, as a young intern, married the plaintiff in Chicago, Illinois, in 1935. (R. 96) He and his wife came to Ogden, Utah, in 1939 and in January, 1940, to save enough to receive specialized training in Urology, he and his wife moved to Wayne County where they lived for about two years. (R. 101)

They then moved to San Francisco where he studied his specialty. In 1945 he opened his office in Salt Lake as a Urological Surgeon. (R. 115, 6)

From 1950 until 1957 he was associated with another Urologist. Then he, accompanied by his wife, went to Norway as a Fulbright Scholar at the University of Oslo, (T. 113. Transition is due to duplication of Record Numbers) following which he returned to private practice.

Dr. Weaver has always been interested in medical research and while in private practice was on the faculty of the University of Utah teaching Urological Surgery for $1.00 a year. In 1963, he joined the University of Utah full time as Associate Professor and at the time of trial was Chairman of the Division of Urology at a salary of $17,500. It was his expectation that his salary would be reduced to between $13,000 and $15,000 after the first of 1968. (T. 116, 7)

The parties have three children, all of whom have attained their majority. (R. 97)

The plaintiff was a registered nurse when she married the defendant. She worked intermittently while he completed his internship and acted as his office nurse while they were in Wayne County. She had help in her home at that time and has not worked outside the home since 1941, except to assist with the family records which she enjoyed and wanted to do and to straighten his office files on occasion. (R. 91-116, 124)

All of the property acquired during the marriage other than by gift to Dr. Weaver can be traced to Dr. Weaver's earnings as a physician. (R. 118) Dr. Weaver's father was Western Sales Manager for Combined Insurance Company and, during his lifetime, made gifts of its stock to his son. (T. 130)

In 1962 Dr. Weaver created a revocable trust subject to his sole control and upon his death payable to his personal representative (D-7), depositing in it 1,448 shares of Combined Insurance Company stock acquired from his father. (D-10) After his father's death, his sister, Genrose, gave him 3,000 shares and $18,000 in cash which was also placed in his trust. (D-10) At the time of trial there were 4,320 shares. The difference is represented by stock from his father added, stock dividends and stock sold, the proceeds, after payment of taxes, being reinvested in government obligations. (D-10) Genrose also gave him $12,000 which he used to buy lots in Albian Basin. (T. 123, 4)

Mrs. Weaver said that Genrose "harrassed her." Dr. Weaver said that the relationship between his wife and his sister was bad. (R. 124, T. 124) Mrs. Weaver acknowledged it was not good.

Dr. Weaver received $3,000 from his sister which was invested for her in property described as the Eighth West property. (T. 126) This property was placed in his trust after the commencement of this action since it was thought advisable to sell it and the trustee was subject to a restraining order, thus protecting both parties.

Since his trust was created, Dr. Weaver has not used a cent of the money except to pay taxes on capital gains as stock was converted into government securities. (T. 128)

The health of both of the parties is uncertain. Dr. Weaver is 58, Mrs. Weaver is 55. (R. 111) Mrs. Weaver has had heart disease, blood clots and a breast removed for cancer. (R. 129) Dr. Weaver had his prostate gland removed because of carcinoma and suffers from a herniated disc. (T. 121)

Mrs. Weaver can, however, take care of herself, can perform in her home and with her friends, can do housework, secretarial work and bookkeeping and should have no difficulty as long as she does not unduly exert herself. (R. 132) Dr. Weaver is able to perform his teaching duties at the University.

ARGUMENT

POINT I

THE DIVISION OF PROPERTY DECREED BY THE TRIAL COURT IS NOT EQUITABLE.

Section 30-3-5, U.C.A. 1953, provides that the court may make such orders in relation to the property as may be equitable. In determining what is an equitable property division, lawyers and equity judges have long had this guide — the one-third general rule adjusted by consideration of how the property was acquired. In *Woolley v. Woolley,* 113 Utah 391, 195 P.2d 743 (1948), the court held:

> "In determining generally what a wife is entitled to when a divorce decree has been granted to the husband, we have considered one-third as being a fair proportion." (p. 745)

This formula was recently reaffirmed in *Anderson v. Anderson,* 18 Utah 2d 286, 422 P.2d 192 (1967), where the parties had been married 30 years and had three adult children, even though the divorce was awarded to the wife.

This guide derives from analogy to dissolution of the marriage by death where the widow would receive one-third of the estate and has been recognized in Utah at least since 1898. See *Griffin v. Griffin,* 18 Utah 98, 55 P. 84 (1898).

However, there are, of course, factors which may tend to decrease or increase the usual property division.

In *Pinion v. Pinion,* 92 Utah 255, 67 P. 2d (1937), the Supreme Court by Justice Wolfe, said that although each case must be decided on its own facts, the elements which should be taken into consideration by the court as governing its discretion in coming to a conclusion as to a property settlement are: (1) the amount and kind and property owned by each of the parties, (2) whether the property was his before coverture or accumulated jointly, (3) the ability and opportunity of each to earn money, (4) the financial condition and necessities

of each party, (5) the health of the parties, (6) the standard of living of the parties, (7) the duration of the marriage, (8) what did she give up by the marriage, (9) what age were they when they were married.

In *Wilson v. Wilson,* 5 Utah 2d 79, 296 P. 2d 977 (1956), the court said that among the relevant attendant facts and circumstances is "the money and property they possess and *how it was acquired.*" p. 980.

In that decision, reference was made to *MacDonald v. MacDonald,* 120 Utah 573, 236 P. 2d 1066, (1951), which contains a fuller treatment of this point. In the MacDonald case Justice Crockett stated the questions to be: "What money or property did each bring into the marriage? What is the property acquired during the marriage? Is it owned either jointly or by each now? How it was acquired and what were the efforts of each in doing so?" p. 1070.

In *Bullen v. Bullen,* 71 Utah 63, 262 P. 292, (1928), substantially all of the estate was traceable to an inheritance by the husband. However, if the husband were awarded all of the estate, the wife would be left without a home. Thus, the court awarded the wife the home despite the fact that it was part of the estate which the husband had inherited from his father. The significance is that the source of the estate was of controlling importance in the distribution of the property.

The case of *Sorenson v. Sorenson*, 14 Utah 2d 24, 376 P. 2d 547 (1963), involved a large estate, a portion of which was traceable to an inheritance by the husband.

Although not apparent from the decision, the briefs indicate that the wife was awarded about one-third of the marital estate and about one-fifth of the inherited property. Again, the source of the property played a significant role in determining the property division.

Cases from other jurisdictions reaffirm the proposition that the source of the property is significant in determining the proportions to be given to the parties and that the party who received the inheritance or gift is entitled to a greater share of that property than of property which was jointly acquired.

In *McGaughy v. McGaughy,* (Ill. 1951) 102 N.E. 2d 806, the wife filed and obtained a divorce against her husband. The court divided all the property in half. The defendant appealed to the Supreme Court of Illinois, asserting that this was an inequitable distribution. The Supreme Court agreed, one of the grounds for the decision being that the property was a gift to the defendant from his parents and represented no contribution by the plaintiff. That case involved a statute like ours which allowed the court to make a distribution of property "as the court deems equitable."

In *Trowbridge v. Trowbridge,* (Wis. 1962) 114 N.W. 2d 129, the husband was left a remainder interest in the testamentary trust of his father. The trial court divided all property equally except that property which was included within the trust. The trust property was treated separately from the other portions of the estate, the wife receiving only 30 per cent of it. The total amount of the trust was equal to the total amount of all other property in the estate. This was affirmed as an equitable distribution.

In *Longo v. Longo,* (Kan. 1964) 395 P. 2d 302, the sole question presented by the appeal was whether the trial court abused its discretion in failing to award the wife all the property and lands acquired by her during the marriage by inheritance and gift. The appellate court held that the distribution was inequitable and that all property acquired by the wife after the marriage by inheritance or gift must be restored to her. Although this is the reverse of that coin, the principle is the same. A party is entitled to retain gifts and devises from his family.

In *Green v. Green,* (Colo. 1959) 342 P. 2d 659, the wife had purchased stock valued at $48,000 from funds which she acquired by inheritance from her grandmother. It was held that the court did not abuse its discretion in permitting the wife to keep all property traceable to inheritance.

In *Nowoqurski v. Nowoqurski,* (Ill. 1949) 88 N.E. 2d 831, the plaintiff acquired a tract of real property through money inherited from her father, loans from her brother-in-law, and her wages earned during the marriage. The court held that it was not inequitable to grant her all right and title to the property and compel the defendant to convey his joint interest in the property since the funds came from gifts and inheritances from her family.

In *Walno v. Walno,* (Kan. 1948) 192 P. 2d 165, the Court upheld a division of property which gave the wife one-third of the total property and only a small fraction of the property inherited by the husband from his father. In the course of the opinion, the court noted that this was justified when considering the source of the inherited property.

In *Hall v. Hall,* (Ky. 1964) 380 S. W. 2d 231, the Court held that it was error not to consider gifts to the husband from his parents in determining the total estate subject to division. However, while stating that the gifts must be considered, the court held that the fact that the property came to the husband by inheritance was significant in considering the proportions which should be given to the wife. The import of the decision was that there should not be an equal division of inherited property.

In *Fuhrman v. Fuhrman,* (Tex. 1957) 302 S.W. 2d 205, the Court held that stock inherited by the husband from his brother and increases attributable to the stock are separate property and need not be divided with the wife. Although this case was decided in a community property jurisdiction, the underlying equitable concept is the same.

In *Friedlander v. Friedlander,* (Wash. 1962) 362 P. 2d 352, the husband started out as an employee of his father at the time of the marriage. Subsequently, his father executed a partnership agreement wherein he gave the husband $4,000 equity in the business and agreed to pay him 25 per cent of the income of the business. As the husband's interest in the business grew and as the business expanded he had $350,000 interest traceable to the gifts of his father at the time of the action. The statute in question stated that in divorce cases disposition of the property of the parties, either community or separate, should be made as the court deems just and equitable. The court held that inheritances and gifts from the husband's father and the appreciation of said gifts were his separate property and the wife was not entitled to a share in that property.

In applying these principles to the division of the property of the parties in this case, we find preliminarily that they have acquired the following property which could be termed the marital estate:

1.	Residence (joint)	$ 45,150.00
	Less Mortgage	1,811.32
	Equity	$ 43,338.68
2.	Contract on property at 151 East 17th South	$ 7,473.56
3.	Two unimproved building lots and one improved building lot at Alta, Utah	$ 18,500.00
	Less Balance Due	2,700.00
	Equity	$ 15,800.00
4.	Bank accounts	14,291.32
	100 Shares of Republic Steel Company	4,800.00
	1 Share Chesapeake Duck Club (Dr. Weaver)	2,200.00
	600 Shares Western Deep Level	6,000.00
	Various Mexican securities	7,200.00
	American South African stock	8,000.00
	Life Insurance	43,154.55
	1960 Mercedes Benz automobile	900.00
	1967 Ford Mustang	3,340.30
	South Mountain	7,168.48
	Far West	3,654.56
	Sno Cat	1,925.00
	Ski Doo	400.00
	Coin collection	200.00
	Checking account	722.00
	Savings account	143:00
	8th West Property	81,000.00
	Total	$251,711.45

The evidence clearly shows that Mrs. Weaver came to the marriage with no assets and that during the marriage she earned only about $4,000 and that between 1935 and 1939 Dr. Weaver's income on the other hand has been substantial. (P-2, P-3)

Dr. Weaver received from his father by inter vivos gift shares of Combined Insurance Company of America stock which were deposited to his trust during 1962 and 1963. In 1963, he received a gift from his sister of 3,000 shares having a then market value as reflected by the sales immediately before and immediately after (D-8, D-10) of approximately $150,000. This he placed in his trust. He received from his sister also a gift of $18,000 in 1962 which he placed in his trust and three gifts of $4,000 each in addition to the $3,000 she invested in the Eighth West property.

The present value of the trust is about $500,000. Except for the initial $25,000 almost this entire amount is traceable to appreciation in the value and stock dividends of the Combined Insurance Company stock acquired by Dr. Weaver by gift from his side of the family (D-8, D-9, D-10).

In this case, an equitable division of the property would be an award to Mrs. Weaver of approximately $125,000, being one-half of the marital estate, and an award to Dr. Weaver of his trust and the remaining one-

half of the marital estate. Mrs. Weaver should, in addition, receive alimony of $5,000 per year, one-third of Dr. Weaver's annual income.

CONCLUSION

Even in this day of equality between the sexes and the gospel of togetherness according to Ladies Home Journal, the male in our society is still the provider and the progenitor.

Dr. Weaver should be permitted to continue his selfless contributions to his fellow man, to continue his research, to continue his efforts to create a center for spinal cord injuries and to enjoy the satisfaction of his professional standing.

Dr. Weaver should be permitted the funds appropriate to endow his lineage. Although the reverse situation may apply in the Navahoe culture, children in Anglo-American societies look to their father rather than to their mother for their inheritance.

No one would deny that Mrs. Weaver is entitled to financial security but the equal division of all assets made by the court is affluence, not security. Cash or its equivalent of $125,000 and an annual income of $5,000 per year is more than fair. It is more financial security

than most people ever realize and, indeed, more than Mrs. Weaver could have anticipated five years before this marriage ended. She should not be the unintended beneficiary of gifts made to Dr. Weaver in the twilight of this union.

This court should reverse the property division made by the trial court and prescribe an equitable division of the property.

Respectfully submitted,

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