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Karyl McKean v. Thomas M. McKean : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

KARYL McKEAN,

Plaintiff and Appellant

v.

THOMAS M. McKEAN,

Defendant and Respondent

CASE NO. 13954

RESPONDENT'S BRIEF

Appeal from the Decree of Divorce
of the Third District Court for
Salt Lake County
Honorable Ernest Baldwin, Jr.

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I certify that I served two (2)
signed copies of this Brief on
the attorney for the Plaintiff-
Appellant, George A. Easter,
520 Kearns Building, Salt Lake
City, Utah 84101, this 28th day
of August, 1975.

A handwritten signature in cursive script, appearing to read "Larry H. Hays", written over a horizontal line.

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IN THE SUPREME COURT
OF THE STATE OF UTAH

KARYL I. McKEAN,)	
Plaintiff-Appellant,)	
)	
v.)	CASE NO. 13954
)	
THOMAS M. McKEAN,)	
Defendant-Respondent.)	

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

This is an appeal by the plaintiff Karyl I. McKean from a decree of divorce entered in the Third District Court by the Honorable Ernest R. Baldwin and from his denial of her motion to alter or amend judgment, or in the alternative for a new trial.

DISPOSITION IN THE LOWER COURT

The trial court entered a decree of divorce for both

the Defendant and the Plaintiff in this action. Thereafter, Plaintiff filed a motion to alter or amend judgment or in the alternative for a new trial. Except for minor modifications, this motion is denied.

STATEMENT OF FACTS

Plaintiff and Defendant were married on April 3, 1948. This divorce action was filed in June, 1973, and the decree of divorce finally entered on the 18th of November, 1974. At the time of the divorce trial there were two minor children living at home, Scott T. McKean and Sara Liza McKean.

As pointed out in Appellant's brief, Defendant Thomas A. McKean is employed as a sales manager for Cate Equipment Company. Plaintiff Karyl I. McKean has been employed as a secretary to the Superintendent of Transportation in the Utah Parks and as a sales representative for Avon Products. The latter job was held by her from the summer of 1970 through February of 1973 (TR. 109). During a part of her employment with Avon Products, she enjoyed the position of team captain, charged with the supervision of seventeen representatives (TR. 167).

It is true that Plaintiff submitted a report letter from Dr. Boyd G. Holbrook, M.D. (Exhibit 21P) wherein the doctor noted that due to the fracture of Mrs. McKean's wrist, "she still has moderate stiffness of the wrist and fingers and some pain." The doctor then went on to find that he anticipated approximately a 10% permanent loss of function of the hand and wrist. Notwithstanding, this disability, it is apparent

Plaintiff's ability to type is not seriously impeded as she typed numerous trial exhibits including inventories of property and recapitulations of expenses (TR. 84-85, See Exhibits 5P, 6P, 7P, 8P, 11P, 12P, 15P and 17P).

In the decree of divorce the trial judge effectively divided the property of the parties with 50% awarded to the Plaintiff and 50% awarded to the Defendant. Plaintiff had the further right to remain in the home of the parties until the last minor child reaches majority or Plaintiff remarries, at which time the home is to be sold and Defendant is to receive his portion of the equity. The home is paid for and Plaintiff's only obligation while living there is for maintenance and taxes (TR. 52).

Defendant was found to be earning a net monthly income of \$1200 not including bonuses. Plaintiff was awarded alimony in the amount of \$300 per month plus child support in the amount of \$150 per child per month for a total of \$600 per month. In addition Plaintiff was awarded one-half of Defendant's future bonuses.

ARGUMENT

POINT I

THE DISTRICT COURT DID NOT ERR IN
ITS FINDINGS OF FACT WHICH SUPPORT
A DECREE OF DIVORCE IN FAVOR OF
DEFENDANT-RESPONDENT

The trial court's findings of fact are supported by the evidence and are sufficient to support the award of a decree of

divorce to Defendant.

The burden is upon the Appellant to show error in the court below, as in divorce proceedings, the trial court's order and findings are endowed with a presumption of validity. (Stone v. Stone, 19 Ut.2d 378, 380, 431 P.2d 802, 803 (1967)).

It has long been recognized that the presiding judge in the trial court is in the best position to judge the credibility of witnesses and to appropriately weigh the evidence introduced at trial. This rule of review was enunciated by the court in Greener v. Greener, 116 Ut.571, 212 P.2d 194 (1949), where the court stated:

The trial judge had the witnesses before him. He could note their demeanor on the stand, judge their ability to register and retain impressions and to transmit them intelligently and to their candor or lack of it. In cases in which the emotions of the parties are apt to influence their testimony, the opportunity to observe them in the courtroom and especially on the witness stand is of great importance. (116 Ut. at 585, 212 P.2d at 202).

Furthermore, in a case where the evidence is in conflict, an appellate court will assume that the trial court believed the evidence which supports the finding, and will view the evidence in the light most favorable to the prevailing party. (Stone, supra, 19 Ut.2d at 380, 431 P.2d at 803).

With these rules of review in mind, the findings and order of the trial court in a divorce proceeding will be modified only if the evidence clearly preponderates against them or unless the decree is grossly inequitable. (Christensen v.

Christensen, 21 Ut.2d 263, 265, 444 P.2d 511, 512 (1969)).

Plaintiff-Appellant alleges that the evidence does not support Finding No. 4 (TR. 61). This argument appears to be based on three allegations: (1) That Plaintiff's testimony effectively rebutted Defendant's testimony to the effect that she had not performed her marital duties; (2) That Defendant did not testify as to the emotional distress he suffered as a result of Plaintiff's denial of sexual relations; and (3) That explicit testimony about fights or arguments is absent.

As to the first allegation, when an appellate court is presented with a conflict in evidence, the court will assume the trial judge believed the evidence which supports the finding. Plaintiff concedes that Defendant gave testimony to support this finding. Thus, in this case, it must be assumed that the trial judge accepted the testimony of the Defendant, rather than that of the Plaintiff on this issue.

The fact that Defendant did not provide explicit testimony about the emotional distress suffered as a result of Plaintiff's denial of conjugal relations does not compel a modification of the trial court's finding. It would seem that the trial judge could take judicial notice of the fact that denial of sexual relations caused the Defendant emotional distress.

The trial judge was in a position to note the demeanor of the Defendant at the time he testified to the lack of physical affection on the part of his wife. Furthermore, the trial judge

could draw on his knowledge of the circumstances surrounding the dissolution of the marital relationship and upon any evidence which was relevant to the character of the relationship prior to its breakdown. Thus, the inference that Defendant suffered emotional distress is not unsupported.

Plaintiff-Appellant's third allegation, that the finding that Plaintiff upset Defendant in arguments and fights is without support, must likewise fail. The Plaintiff herself testified to the existence of severe marital discord (TR. 171).

Again, the advantaged position of the trial judge should be recognized, and the findings of the trial court will not be modified absent evidence which clearly preponderates against them.

Findings of Fact Nos. 3 and 4 are not in logical conflict with each other. Both parties testified that their amorous advances were refused by the other party. (TR. 122, 196, 197, 246). The testimony contemplates separate occurrences. As the refusals occurred at different times, each party could have suffered emotional distress upon refusal by the other party and yet have failed to respond to the other party's advances on a subsequent occasion.

The findings and judgment of the trial court should be modified only if the evidence clearly preponderates against them or the decree works such an injustice that equity and good conscience demand revision. Such is not the case here.

POINT II

THE AMOUNT OF ALIMONY AND CHILD SUPPORT AWARDED PLAINTIFF WAS BOTH PROPER AND WITHIN THE COURT'S DISCRETION

In an action for divorce, the trial court has wide discretion in fashioning an award of alimony and child support. Its decision will not be modified on appeal absent clear injustice or inequity which amounts to an abuse of discretion.

In Anderson v. Anderson, 18 Ut.2d 286, 422 P.2d 192 (1967) the court recognized the great degree of discretion allowed the trial court and noted the limited circumstances under which the judgment might be modified. The court stated:

...the policy to which we adhere...[is]... to the effect that the trial judge has considerable latitude of discretion in ...[divorce cases] ... and that his judgment should not be changed lightly, and in fact, not at all, unless it works such a manifest injustice or inequity as to indicate a clear abuse of discretion. (18 Ut.2d at 287, 422 P.2d at 192, 193) (emphasis added).

Although in Anderson, supra, the court considered only the division of property and an award of alimony, the standard is much the same for review of a child support award, as is reflected in Knighton v. Knighton, 15 Ut.2d 55, 387 P.2d 91 (1963). In Knighton, the court stated, in reference to the amount of child support:

... [t]his court should indulge every presumption in favor of sustaining the action of the trial court and will be reluctant to interfere therewith, doing so only for the clearest abuse of discretion or violation of established principles of law. (15 Ut.2d at 56, 387 P.2d at 92).

In this case Plaintiff argues, in essence, that modification of the decree is in order because Plaintiff may receive

less than one-half of Defendant's total net income because she has to pay taxes on a portion of what she receives.

What Plaintiff has failed to consider is that child support payments received by her from Defendant are taxable to Defendant, not the Plaintiff.

Even if it is assumed that Plaintiff will receive less than one-half of Defendant's income, this is not a basis for overturning the trial court's order.

The award of alimony and child support is based on various factors, including the duration of the marriage, the ages of the parties, their standard of living, considerations relative to the children, the money and property they possess and how it was acquired, and their present and potential incomes. (Anderson, supra, 18 U.2d at 287, 422 P.2d at 192). The trial court judge is in the best position to ascertain and evaluate these relevant circumstances.

At no time has this court called for calculation of alimony and child support solely on a proportionate basis. In each case the needs of the parties and the children are considered.

Plaintiff does not assert that the alimony and child support award of the trial court is inadequate in view of the needs of Plaintiff and her children, only that Defendant may retain more than one-half of his earnings.

The trial court considered the needs and requirements of the parties in calculating alimony and child support. Its

analysis should remain undisturbed absent an abuse of discretion.

POINT III

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ITS DIVISION OF MARITAL PROPERTY

An equitable division of marital property is developed through an examination of the relevant circumstances in each particular case rather than through application of an arithmetical percentage. (Wilson v. Wilson, 5 Ut.2d 79, 82, 296 P.2d 977, 979 (1956)).

Analysis of the relevant circumstances is within the province of the trial judge. Due to his advantaged position, he is given considerable latitude of discretion in the division of property. The decision of the trial court will not be modified unless it causes such clear injustice or inequity as to amount to an abuse of discretion. (Anderson v. Anderson, 18 Ut.2d 286, 287, 422 P.2d 192, 192, 193 (1967)).

This court has recognized the wide discretion of the trial court and the fact that differing circumstances require different allocations of marital property. In Blair v. Blair, 40 Ut.306, 121 P.19 (1912), the court affirmed a property division which awarded only \$4,500 to the wife while granting \$40,000 to the husband. At the other end of the spectrum, in Wilson v. Wilson, 5 Ut.2d 79, 296 P.2d 977 (1956), the court affirmed an award of in excess of \$20,000 to the wife and approximately \$500 to the husband. Clearly, division of marital property should not be bound to an inflexible percentage formula.

In the case at bar, the court effectively divided the property of the parties between them on the basis of 50% to the Plaintiff and 50% to the Defendant. The trial court did not accept the Plaintiff's contention that Defendant's interest in a retirement fund was an item of property which should be divided between the parties for a good reason. The retirement fund is not available to Mr. McKean until he retires at age 65 or becomes permanently disabled (TR. 105-106). It has most of its assets tied into the stock market and the value it will have at the time it is finally available to Mr. McKean is something which cannot be established until it is available. The trial court considered the retirement fund in the nature of a source of future income from Defendant to insure the continued payment of alimony upon his retirement. It is for this reason that the decree of divorce provided that "in the event that Defendant should quit his job or in any way effect his receipt of his vested interest in the said retirement fund with his present employer Cate Equipment Company, Defendant is ordered to notify the court and the Plaintiff immediately." (TR. 54). In a sense, the retirement fund may be considered as future income for Defendant to insure the continued payment of alimony upon his retirement. Thus, Plaintiff benefits from the retirement fund as does the Defendant. This was the thought stated by the trial court at the hearing on Plaintiff's motion to alter or amend the judgment when the judge made this statement, "What I have observed, I have heard 50 of these since, that his

retirement fund went to her benefit if he did retire with that retirement coming, the benefits of what are received will go to apply to the support payments to the wife." (TR. 273).

The division of the equity in the marital home with half to Plaintiff and half to Defendant and subject to her right of possession, is not inequitable. No evidence was presented at trial which indicates that Plaintiff must lower her standard of living upon sale of the home. Even if this were the case, division of marital property rests on numerous standards, rather than solely on the maintenance of one party at an accustomed social elevation. In this case the court took cognizance of those factors, and in the exercise of its discretion divided the marital property accordingly.

Plaintiff has not argued that the division of property is inequitable, only that it may cause inconvenience. Inconvenience does not compel modification of the decree of divorce. The discretion of the trial court has not been abused and the division of marital property should not be modified.

POINT IV

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN THE AWARD OF ATTORNEY'S FEES

The award of attorneys' fees lies within the wide discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. (Bader v. Bader, 18 Ut.2d 407, 409, 424 P.2d 150, 151 (1967)). In the case at hand there was no abuse of discretion.

In the exercise of its discretion the trial court may consider all factors relevant to a certain issue. In this case the division of marital property left each party on essentially an equal footing in regard to liquid assets. Plaintiff receives approximately one-half of all Defendant's income, actual and potential. Finally, the trial court found that neither party was without fault in this action (TR. 60, 61).

Under all of the foregoing circumstances, the order that each party be required to pay his or her own attorney's fees and costs is well within the discretion of the trial judge.

POINT V

THE DISTRICT COURT ACTED WITHIN THE BOUNDS
OF ITS DISCRETION IN DENYING PLAINTIFF'S
MOTION TO ALTER OR AMEND JUDGMENT OR IN
THE ALTERNATIVE FOR A NEW TRIAL

Denial of a motion for a new trial is reviewable only for abuse of discretion. (Uptown Appliance & Radio Co., Inc. v. Flint, 122 Ut. 298, 302-303, 249 P.2d 826, 828 (1952)).

The standards of review applicable to the various allegations contained in Plaintiff's motion are set out in the matters argued above. Through application of these rules of review to the present case, it is clear there was no abuse of discretion in the denial of Plaintiff's motion. The ruling of the trial court should remain undisturbed.

CONCLUSION

The trial court did not abuse its discretion in the division of marital property, the award of alimony, child

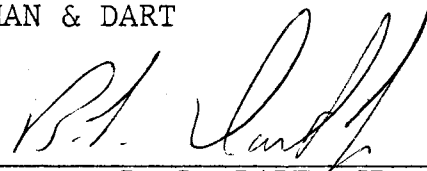
support or attorney's fees, nor in its denial of Plaintiff's motion for a new trial. The trial court did not err in its award of divorce to Defendant.

The above arguments make it clear that Plaintiff has not overcome the presumption of validity which attaches to the findings and judgment of the trial court in a divorce action. On this basis the judgment of the court below should be affirmed. Plaintiff-Appellant's request for a new trial should be denied.

Respectfully submitted,

JERMAN & DART

BY



B. L. DART, JR.

Attorney for Respondent