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

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

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BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

KARYL MCKEAN,

Plaintiff and Appellant

vs.

THOMAS M. MCKEAN,

Defendant and Respondent

CASE NO. 13954

APPELLANT'S BRIEF

Appeal from the Decree of Divorce
of the 3rd District Court for
Salt Lake County.

Honorable Ernest Baldwin, Jr.

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Clk. Supreme Court, Utah

I certify that I served two (2) signed
copies of this Brief on the attorney
for the Defendant-Respondent, Bert L.
Dart, Jr., 10 Broadway Building, #430,
Salt Lake City, Utah this 28th day of
July, 1975.

George A. Easter

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IN THE SUPREME COURT
OF THE STATE OF UTAH

KARYL I. McKEAN,

Plaintiff-Appellant,

vs.

THOMAS M. McKEAN,

Defendant-Respondent.

CASE NO. 13954

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

The Plaintiff-Appellant, Karyl I. McKean, appeals from the Decree of Divorce entered against her in the Third Judicial District Court and from the denial of her Motion to Alter or Amend Judgment, or In The Alternative For A

New Trial in the Third Judicial District Court of Salt Lake County, State of Utah, the Honorable Ernest F. Baldwin, Judge, presiding.

DISPOSITION IN THE LOWER COURT

The lower court found grounds for divorce pursuant to Section 30-3-1, U.C.A. (1953), as amended, and entered a Decree of Divorce against both the Defendant-Respondent and the Plaintiff-Appellant. Subsequently the Plaintiff-Appellant filed a Motion To Alter or Amend Judgment, or In The Alternative, For A New Trial, which Motion was denied, except for minor modifications that were made in the Decree. (TR. 73-74).

RELIEF SOUGHT ON APPEAL

Plaintiff-Appellant seeks a reversal of the Decree of Divorce granted Defendant-Respondent and a new trial to determine an equitable property settlement and sufficient payment of alimony, child support and attorney's fees.

STATEMENT OF THE FACTS

The Plaintiff-Appellant and Defendant-Respondent are

husband and wife, having been married at Salt Lake City, State of Utah on April 3, 1948. (TR. 27). There are six children born of the marriage, two of which are dependent children, living at home: Scott T. McKean, age 19, born December 15, 1955 and Sara Liza McKean, age 9, born August 5, 1965 (Trial Trans. 27). The Defendant is presently employed as Sales Manager for a heavy construction equipment sales firm (Trial Trans. 113).

After 26 years of marriage, Plaintiff filed for divorce on June 11, 1973 and Defendant answered and counterclaimed on July 9, 1973. Defendant alleged in his counterclaim that Plaintiff had treated him cruelly, causing him great mental suffering and distress (TR. 27).

On November 18, 1974, a Decree of Divorce was entered, granting both Plaintiff and Defendant a divorce. Plaintiff was awarded the care and custody of the minor dependent children, subject to the reasonable visitation rights of Defendant (TR. 51). Plaintiff was further awarded: (1) the use of the home of the parties, subject to all liens and taxes; (2) one-half of the equity of said home, which has been ordered to be sold upon Plaintiff's remarriage, or upon Plaintiff's removal from said home, or upon the last

minor child attaining an age of majority; (3) one-half of all Defendant's future bonuses, if any, less any Federal and State withholding and FICA deductions; (4) one-half of the savings of the parties, in the amount of \$2,071.50; (5) one-half of Defendant's 1974 bonus in the amount of \$1,337.00; (6) the 1964 Ford station wagon (subject to use by the son, Scott) and the 1972 Ford Truck and camper; (7) automotive tools; (8) some household furniture, personal effects and clothing; (9) alimony in the amount of \$300.00 per month; (10) child support in the amount of \$150.00 per child per month. Plaintiff was ordered to pay her own attorney's fees and the BankAmericard obligation. (TR. 51-55).

The Divorce Decree awarded Defendant: (1) one-half of the equity of the home when sold; (2) one-half of Defendant's future bonuses, if any; (3) one-half of the savings of the parties, in the amount of \$2,071.50; (4) some household furniture and appliances; (5) personal effects, clothing, television set, rifle, workbench, movie camera and projector; (6) carpentry tools, including bench saw; (7) retirement fund of \$20,615.00; (8) insurance policies with cash surrender values totaling \$4,675.44. (TR. 51-55).

Defendant was found to be earning a net income of

approximately \$1,200.00 per month after Federal and State tax withholding, FICA Retirement, and Medical Insurance deductions. This amount of monthly income did not reflect any actual or potential bonuses that Defendant would receive. (Trial Trans. 156).

Plaintiff has suffered a hand and wrist injury which has resulted in permanent partial disability (Trial Trans. 30). Plaintiff is unemployed and unskilled, having devoted her 26 years of marriage to being a wife and a mother. Her only employment was as a secretary during the first two years of marriage and as an Avon representative for approximately three years (Trial Trans. 28). The disability in Plaintiff's hand and wrist interferes with her ability to type (Trial Trans. 30).

ARGUMENT

POINT 1.

THE DISTRICT COURT ERRED IN ITS FINDING OF FACTS TO SUPPORT A DECREE OF DIVORCE IN FAVOR OF DEFENDANT-RESPONDENT.

Defendant sought and was granted a divorce decree

o

pursuant to Section 30-3-1(7) U.C.A. (1953), as amended, which sets out as one of the grounds for divorce: "Cruel treatment of the Plaintiff by the Defendant to the extent of causing bodily injury or great mental distress to the Plaintiff." The Findings of Fact state in paragraph 4 that [d]uring the marriage the Plaintiff has treated the Defendant cruelly, upsetting him in arguments and fights and refusing to perform her marriage duties as a wife, which has caused him to be nervous and upset and distressed." (TR. 61). Testimony was elicited from the Defendant to support the allegation that Plaintiff refused to perform her marriage duties (Trial Trans. 115-116). Said testimony was later effectively rebutted by the Plaintiff (Trial Trans. 165, 170-171). There was no testimony elicited from Defendant to show that Plaintiff's alleged denial of sexual relations with Defendant caused Defendant any emotional distress at all or caused Defendant "to be nervous and upset and distressed," as found by the Court (TR. 61).

There is no testimony or evidence in the record to support the Findings of Fact that Plaintiff upset Defendant in arguments and fights. Defendant did testify that "it

had been a rather rocky marriage," but such testimony is vague and does not warrant a finding by the Court that Plaintiff upset Defendant in arguments and fights causing him to be nervous and upset (Trial Trans. 115, line 5).

Courts are not authorized to grant divorces except for particular cause prescribed by law and then only when grounds or cause for divorce are proved by substantial and satisfactory evidence. Greener v. Greener, 116 Utah 571, 212 P. 2d 194 (1949). There was neither substantial nor satisfactory evidence to support Finding No. 4 (TR. 61).

Furthermore, the lower court in its Findings of Fact 3 and 4 found that each party denied sexual relations to the other party, thus causing great mental distress to each other. If, in fact, each party intentionally refused to have marital relations with the other, then each party was the cause of his or her own mental distress resulting from any such denials, and said mental distress cannot possibly be blamed on the other. Findings 3 and 4 are in logical conflict with each other.

POINT II.

THE DISTRICT COURT ABUSED ITS DISCRETION IN
THE AMOUNT OF ALIMONY AND CHILD SUPPORT
AWARDED PLAINTIFF.

The trial court awarded Plaintiff the sum of Three Hundred Dollars (\$300.00) per month as alimony and One Hundred Fifty Dollars (\$150.00) per month per dependent child. (TR. 55). Plaintiff was also awarded one-half of all future bonuses of Defendant subject to deductions for taxes and social security. (TR. 52). However, Defendant's bonuses are not guaranteed in amount or payment and are dependent either upon the discretion of the employer of Defendant, or upon the Defendant attaining a certain sales goal in his department (TR. 122-123). Effectively, all that Plaintiff can rely on getting is the alimony and child support mentioned above.

It was found by the Court that Defendant has a net earning of approximately \$1,200.00 per month. It would appear that in paying Plaintiff Six Hundred Dollars (\$600.00) per month in alimony and child support, Defendant would be equally dividing his net income between himself and Plaintiff. However, the \$600.00 he would net is after

taxes, social security, retirement and medical insurance, and would be subject to a tax refund because of the \$3,600.00 yearly tax deduction he would have for payment of alimony. Furthermore, Plaintiff's receipt of \$3,600.00 per year in alimony is before taxes, medical insurance and any savings for later years, and hence will net her far less in net income than the gross amount of \$3,600.00. Also, the lower court took into account Defendant's total yearly payment of Social Security for purposes of determining Defendant's net pay (Trial Trans. 121-122). His net pay was used as a basis for determining the award of alimony and child support to Plaintiff. In the Decree, Plaintiff was awarded one-half of all future bonuses subject to State and Federal withholding tax and social security deductions. The social security deduction from his 1974 bonus was shown to be substantial (Trial Trans. 156), to such an extent that his social security was paid up by mid-year in 1974 (Trial Trans. 155). Hence, on the one hand, Defendant was allowed to deduct his full yearly payment of social security in determining his net take-home pay for purposes of showing the sum from which alimony and child support payments could be

made. On the other hand, Defendant was also allowed a credit for social security taken out of all future bonuses, in spite of a showing that a significant amount of his yearly social security was taken from his bonus rather than his periodic pay checks throughout the entire year. In other words, Defendant received more credit for his social security than he should have.

The lower court clearly abused its discretion by requiring Plaintiff to maintain herself and her two dependent children on less than Defendant is awarded to maintain himself, a single man.

In Bullen v. Bullen, 71 Utah 63, 262 PU 292 (1928), The allocation to the wife was held to be inequitable and unjust in view of property owned by the husband and the cause was remanded with instructions to modify the decree. Such is the case in this instance.

POINT III.

THE DISTRICT COURT ABUSED ITS DISCRETION IN ITS DIVISION OF THE MARITAL PROPERTY.

An equitable division of the marital property would be an award of 50% of the jointly owned property to each

of the parties. The lower court appears to have followed this formula in dividing most of the marital property in this case. However, the lower court failed to award Plaintiff any interest in Defendant's retirement fund, which had a vested interest of \$20,615.00 as of March 31, 1974. This retirement fund was accumulated over the years of the marriage and should have been considered as marital property in making a division of the total property of the parties. An equitable solution would have been to award Defendant the entire vested interest in the Retirement Fund and award Plaintiff something of equivalent value, such as the one-half of the equity in the home of the parties, which was awarded to Defendant. This solution would have also eliminated (1) the necessity for Plaintiff to leave her home in nine years, when her youngest child reached the age of majority, and (2) the necessity for her to seek a new life elsewhere at a substantially and unjustifiably lower standard of living due to the fact that she would not be able to afford a home such as she is presently living in because she would receive only one-half of the equity in the present home at the time of sale.

Furthermore, Defendant was ordered by the Court to

refrain from spending any income received above and beyond his salary during the pendency of the divorce action (TR. p. 36). Defendant testified that he spent his Christmas bonus in violation of the court Order (Trial Trans. 141). No provision was made in the Decree for the splitting of that bonus between the parties as was done in the case of all other funds except the Retirement Fund.

The decree of the lower court was reversed in Stewart v. Stewart, 66 Utah 366, 242 Pac. 947 (1925), on the ground that the division of the property as made by the trial court was "clearly inequitable and unfair."

POINT IV.

THE DISTRICT COURT ABUSED ITS DISCRETION
IN ITS FAILURE TO AWARD PLAINTIFF ATTORNEY
FEES.

The Plaintiff is partially disabled, unemployed and unskilled, having spent her 26 years of married life as a housewife and a mother. In the property settlement, as it now stands, the only liquid assets awarded to Plaintiff were a share of the family savings, in the amount of \$2,071.50, and a share of Defendant's 1974 bonus, in the amount of \$1,337.00, which provides Plaintiff with the only security she will

have against emergency expenses which are an everyday part of life.

The Utah Supreme Court in Griffiths v. Griffiths, 3 Utah 2d 82, 278 P. 2d 983 (1955) stated that "...where it appears that the husband is better able to bear the costs of the divorce, and no gross or immoral conduct has been proved against the defendant, the wife although the losing party, should be allowed suit money." Id. at P. 85.

Furthermore, the Court in Allredge v. Allredge, 119 Utah 504, 229 P. 2d 681 (1951) explained that "[t]he reason for permitting a wife suit money to defend an action for divorce rests on the ground that the wife normally has no separate estate from which to pay for bringing or defending the action...Not to allow the wife expenses and counsel fees would in the majority of cases work an injustice by denying her the power to enforce any marital rights she may have." Id. at pp. 686-687.

In the case at hand, there was no showing of gross or immoral conduct on the part of the Plaintiff. The defendant was clearly shown to be the party better able to bear the costs of the divorce since he was gainfully em-

ployed at a good paying job and she was unemployed. Furthermore, her net liquid "estate" from the divorce was of such a small size by today's standards that to require the Plaintiff to pay her own attorney's fees, in the amount of \$796.00, would be to substantially reduce that already small estate, and hence to all but eliminate Plaintiff's security and ability to handle emergency expenses.

POINT V.

THE DISTRICT COURT ERRED IN NOT GRANTING PLAINTIFF'S MOTION TO ALTER OR AMEND JUDGMENT, OR IN THE ALTERNATIVE, FOR A NEW TRIAL.

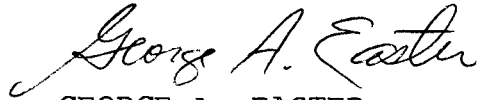
The various grounds for Plaintiff's Motion To Alter or Amend Judgment, or in the Alternative, For a New Trial are included within the matters heretofore argued in this Brief and are fully set out in the Trial Record on page 57. The errors of the trial court were such as to require a new trial to hear the issues.

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CONCLUSION

Based on the above arguments, the lower court erred: (1) in granting Defendant a Decree of Divorce; (2) in its division of the marital property; (3) in its award of inadequate alimony and child support; (4) in its failure to award Plaintiff her attorneys fees and; (5) in its failure to grant Plaintiff a new trial upon her motion. Hence, Plaintiff should be granted a new trial to determine an equitable solution to these errors.

Respectfully submitted,



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