

1986

Jon E. Holderman v. Shirley Ann Holderman : Brief of Respondent

Utah Court of Appeals

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Bettie J. Marsh; Attorney for Respondent.

Scott W. Holt; Attorney for Appellant.

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 860207 IN THE UTAH COURT OF APPEALS

STATE OF UTAH

JON E. HOLDERMAN,	/	
Plaintiff-Respondent,	/	BRIEF OF
vs.	/	PLAINTIFF-RESPONDENT
SHIRLEY ANN HOLDERMAN,	/	Case No. <u>860207-CA</u>
Defendant-Appellant.	/	13-B

BRIEF OF RESPONDENT, JON E. HOLDERMAN

Appeal from Judgment of the Second
District Court, Davis County
HONORABLE DOUGLAS L. CORNABY, DISTRICT JUDGE

BETTIE J. MARSH, #2088
Legal Forum Building
2447 Kiesel Avenue
Ogden, Utah 84401
(801) 621-2464

(Attorney for Respondent)

SCOTT W. HOLT
44 North Main, Suite 101
Layton, Utah 84041
(801) 546-1264

(Attorney for Appellant)

FILED
JUN 24 1987

Timothy M. Stiles
Clerk of the Court
Utah Court of Appeals

SUMMARY OF ARGUMENT

The lower Court did not abuse its discretion in denying Appellant part of Respondent's military retirement by concluding the parties intended to resolve all property distribution and alimony issues in their Stipulation incorporated into the Decree of Divorce.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT PART OF RESPONDENT'S MILITARY RETIREMENT.

The appellate Court in a divorce proceeding should indulge in all reasonable presumptions in favor of the regularity and correctness of the actions of the lower Court. The lower Court Judgment should not be reversed unless it is clearly shown that the discretionary power of the Court was improperly exercised. 27A C.J.S., Divorce, Section 194, 817-822; Bambrough vs. Bethers, 522 P.2d 1286 (Utah 1976). The general rule in determining whether judicial discretion has been abused is whether the trial Judge correctly perceived the law and demonstrated due consideration of the facts and circumstances. Sheets vs. Agro-Nest, Inc., 644 P.2d 787 (Idaho 1983).

POINT II

THE FEDERALLY ENACTED SPOUSES' PROTECTION ACT ALLOWS FOR DISCRETION OF A STATE COURT IN AN AWARD OF RETIREMENT BENEFITS.

Appellant's counsel argues that the Act required the Court to modify the Divorce Decree and determine the allocation of military benefits (Appellant's Brief, page 4, next to last line). This is incorrect for the Uniform Services Former Spouses' Protection Act, (10 U.S.C. Section 1408) provides:

"Subject to the limitations of this Section, the Court may treat disposable retired or retainer pay payable to a member for pay periods beginning June 25, 1981 either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such Court."
[Emphasis added]

In Wallace vs. Wallace, 671 P.2d 711 (Or. Appl. 1983), the wife appealed from a decision where her retired husband received all his military retirement. The appellate Court stated:

"The Act permits, but does not require, state courts to consider military retirement as marital property." (p. 715)

The lower Court did not fail to properly apply the Act itself. It merely interpreted the "Stipulation" entered into by the parties and then ruled that the evidence and

pleadings before it did not justify a modification of the terms of the divorce in this particular case.

POINT III

THE COURT MADE A REASONABLE INTERPRETATION OF THE STIPULATION BETWEEN THE PARTIES.

The lower Court did not treat alimony and military retirement as being the same thing. The Court's remarks were directed more to the general purpose of alimony and property distribution in divorce cases. In the Summary of Utah Family Law, author James Vander Roest states that one of the common purposes for an award of alimony is:

"...allocation of the parties' resources (income) to enable them to reconstruct their lives as happily as possible. This carries with it an implicit recognition that property settlements and alimony awards are interdependent." B.Y.U.J. Legal Stud., Summary of Utah Family Law, Sec. 13.6, p. 314.

One example of such interdependency is in Dubois vs. Dubois, 29 Utah. 2d 75, 504 P.2d 1380 (Utah 1973), wherein the Utah Supreme Court affirmed a lower Court's decision to reduce alimony to \$1.00 per year. The Court held:

"It is quite evident that the Court in its decision took into account the source of the assets which comprised the marital estate...it appears that the income from the assets awarded to the Plaintiff is sufficient to maintain her in the manner to which she is accustomed

without periodic payments from the
Defendant." p. 1381

The lower Court in the present case examined paragraph eight of the parties' "Stipulation" which combines and finalizes, by its wording, both property distribution and alimony. The Court stated that it believed the parties "intended full well" that Appellant's receipt of "the \$8,500.00 in Savings" concluded the retirement issue. Counsel for Appellant now argues that the only intention of the parties was to pay a "lump sum alimony settlement".

It is submitted that only Appellant's sworn testimony as to her intentions could have refuted the written document as the Court interpreted it. After the passage of nearly four (4) years since the divorce, it would be guesswork to re-adjust the terms of the Stipulation by awarding Appellant part of the military retirement. Would Respondent have agreed to give Appellant the \$8,500.00 which possibly comprised their only savings with any cash value at that time? Would the personal property have been distributed in the same way?

Appellant chose to litigate the matter in Utah although both she and Respondent live thousands of miles away. Appellant set the date and time for hearing. Respondent filed a detailed Answer to Appellant's Affidavit and sup-

porting Memorandum of Points and Authorities on November 7, 1985.

The hearing was not held for another five (5) months (April 8, 1986). Appellant had ample time to make arrangements to be present on her Court date. She chose not to appear and testify at the Court hearing. Given these facts, the lower Court had no choice but to interpret the intent of the parties by the words they agreed to in their Stipulation, and it did so in a fair and reasonable manner.

The Colorado Court of Appeals reversed a lower Court which had granted an ex-husband's motion to reduce alimony. It held that the trial Court could not modify a 1971 Decree where the Stipulation was entered into so that both parties could settle their property rights and resolve all their duties and obligations to each other. The Colorado Court found monthly payments of alimony and property settlement were so inseparable that it would be impossible to revise one without the other. Steines vs. Steines, 583 P.2d 491 (Colo. 1975).

POINT IV

THE UTAH SUPREME COURT MADE A DECISION
ON THE SAME ISSUES ON FEBRUARY 27, 1986.

The Utah Supreme Court addressed the same issues presently before this Court in Sayman vs. Sayman, Utah Supreme Court No. 19826, filed February 27, 1986.

In that case, Plaintiff/Wife filed an Order to Show Cause and Affidavit in Re Modification of the Divorce Decree in April, 1983. The basis of the show cause order was that the trial court had not considered the issue of military retirement in the original Decree. Plaintiff alleged that the material change in circumstances consisted of the adoption of the Uniform Services Former Spouses' Protection Act in August, 1982.

The trial Court had ruled that the military retirement was taken into consideration in the distribution of the marital property, in that the wife was given "an inordinate amount of furniture". The lower Court also ruled that the new Federal legislation did not constitute a material or substantial change of circumstances that would warrant modification of the Decree.

The Utah Supreme Court held that:


"Under traditional rules of appellate review, the trial court has wide discretion in cases of this type. The court's judgment as to property division will be disturbed only on a showing of abuse of discretion... There is substantial evidence in the record to support the trial court's ruling in the instant case and there was no abuse of discretion."
[This opinion was not published in the Utah Reporter or the Pacific Reporter].

The Judgment of the trial Court was then affirmed.

CONCLUSION

It is submitted that the lower Court properly exercised its discretion in determining that the parties intended to resolve all issues of property and alimony in their Stipulation. That a fair and equitable distribution of the assets was made in the opinion of the Court, and that the Court is not compelled to make a specific award of retirement participation by a spouse when property is awarded to the spouse in consideration of all property claims. Therefore, this Court should uphold the Judgment of the lower Court.

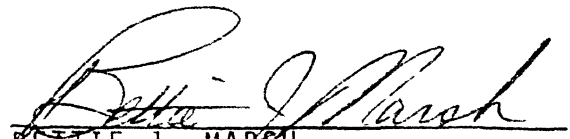
DATED this 24th day of June, 1987.


BETTIE J. MARSH,
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that I served four (4) copies of the above and foregoing by posting in the United States mail, postage pre-paid and addressed to Attorney Scott Holt, attorney for Defendant-Appellant, at 44 North Main, Suite 101, Layton, Utah 84041.

DATED this 24th day of June, 1987.


BETTIE J. MARSH,
Attorney for Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

-----oo00o-----

Erlinda T. Sayman,
Plaintiff and Appellant,

No. 19826

F I L E D
February 27, 1986

Radford A. Sayman,
Defendant and Respondent.

Geoffrey J. Butler, Clerk

PER CURIAM:

Plaintiff appeals the denial of her petition for modification of a divorce decree.

Trial in this matter was held in February, 1982. The parties had been married for eleven years and had one child. Plaintiff worked for Max Factor, earning \$887 per month, and defendant was in the Air Force, earning \$1,815 per month.¹ No alimony was awarded, but defendant was ordered to pay \$225 per month as child support. Plaintiff was awarded the family home (subject to a lien awarded to defendant in the amount of \$3,500) and most of the household furnishings. Each party was awarded one of two automobiles. Defendant was to assume all debts and obligations incurred during the course of the marriage.

In April, 1983, plaintiff filed an "order to show cause and affidavit in re modification" of the divorce decree. The sole basis of the show cause order was that the trial court had allegedly refused to consider the issue of retirement in the original decree. Plaintiff alleged that the changed circumstances (required for modification) consisted of a change in federal law.² Following a hearing in November, 1983, the

1. There was evidence adduced that plaintiff had worked as an air traffic controller in the Phillipines and also had a college degree in medical technology. Defendant was due to retire in November, 1982, at which time his military pay was expected to be about \$825 per month.

2. In *McCarty V. McCarty*, 453 U.S. 210 (1981), the United States Supreme Court ruled that state courts are precluded from dividing military retirement pay pursuant to state property laws upon dissolution of marriage. In August, 1982, Congress adopted the Uniform Services Former Spouses' Protection Act, which provided that "a court may treat disposable retired pay payable to a member for periods

(Continued on page 2.)

trial court ruled that plaintiff's retirement was taken into consideration in the distribution of the marital property in that plaintiff was given "an inordinate amount of furniture." The court also ruled that the new federal legislation did not constitute a material or substantial change of circumstances which would warrant modification of the decree.

On appeal, without making any reference whatsoever to the record,³ plaintiff urges that the trial court erred in refusing to modify the divorce decree. In denying the requested modification, the court reviewed the transcript of the divorce trial and ruled that defendant's retirement was considered in the property division. The transcript shows that the parties both freely testified as to monthly income defendant would receive upon retirement. The record suggests that although the judge could not have awarded plaintiff a direct interest in defendant's retirement (under McCarty), he could and did offset that by awarding plaintiff a disproportionate share of the other marital property.

Under traditional rules of appellate review, the trial court has wide discretion in cases of this type. The court's judgment as to property division will be disturbed only on a showing of abuse of discretion. Bushell v. Bushell, Utah, 649 P.2d 85 (1982); Fogg v. Fogg, Utah, 671 P.2d 184 (1983). There is substantial evidence in the record to support the trial court's ruling in the instant case, and there was no abuse of discretion.

The judgment of the trial court is therefore affirmed. Costs to defendant.

This opinion is not regarded as adding anything significant to existing law and hence is not to be published in the Utah Reporter or the Pacific Reporter.

(Footnote 2 continued.)

beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court." 10 U.S.C. § 1408(c)(1). Utah treats retirement benefits accrued during marriage as marital property. Woodward v. Woodward, Utah, 656 P.2d 431 (1982).

3. Such deficiency renders an appeal subject to dismissal. State v. Hutchings, Utah, 672 P.2d 404 (1983).

STATEMENT OF FACTS

Appellant and Respondent were married on June 4, 1960. The parties were granted a divorce, which was heard on December 1, 1981. An Amended Decree of Divorce was signed by the lower Court on December 11, 1981.

Respondent makes objection to the assertion in Appellant's Statement of Facts that "he (Respondent) had over twenty (20) years in military service." This was not determined at the hearing before the lower Court and there is nothing in the record to substantiate the actual amount of time served by Respondent in the military.

The parties entered into a "Stipulation" dated October 30, 1981, which was incorporated into the Amended Decree of Divorce. The key provision considered by the lower Court was:

"8. The Defendant shall take the \$8,500.00 in savings as and for full and final property settlement and thereby waives any present and future right to alimony."

Neither party was present at the hearing on Appellant's Order to Show Cause. Appellant was residing in Florida and Respondent was residing in Georgia. The lower Court heard proffers of evidence by the parties' respective counsel and examined the pleadings submitted to the Court's file during the history of the case.

IN THE UTAH COURT OF APPEALS
STATE OF UTAH

JON E. HOLDERMAN,	/	
Respondent,	/	Case No. <u>860207-CA</u>
vs.	/	13-B
SHIRLEY ANN HOLDERMAN,	/	
Appellant.	/	

BRIEF OF RESPONDENT

STATEMENT OF ISSUES PRESENTED ON APPEAL

Respondent seeks affirmation of the decision of the lower Court denying the modification of the Decree of Divorce to include additional benefits based upon Federal Legislation concerning military retirement benefits.

STATEMENT OF THE CASE

This is an action brought as part of a prior divorce proceeding by an Order to Show Cause, wherein Appellant seeks modification of the Decree to divide Respondent's military retirement. The lower Court denied Appellant's request for division of Respondent's military retirement.

TABLE OF AUTHORITIES

STATUTES CITED

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CASES CITED

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OTHER AUTHORITIES

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