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Evan Garth Westenskow v. Glora Westenskow : Brief of Respondent

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

THE

ME COURT

OF THE

STATE OF UTAH

EVAN GARTH WESTENSKOW,

Plaintiff and Appellant,

vs.

GLORA WESTENSKOW,

Defendant and Respondent.

Case No. 14436

RESPONDENT'S BRIEF

Appeal from the Judgment of the District Court of Weber County, Hon. Ronald O. Hyde, Judge

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STATEMENT OF KIND OF CASE

This is a divorce action brought by Appellant against Respondent with Respondent filing a Counterclaim against Appellant.

DISPOSITION IN LOWER COURT

The District Court of Weber County, the Honorable Ronald O. Hyde, presiding, awarded a Decree of Divorce in favor of Respondent, awarded Respondent alimony and child support, and equitably divided the marital estate in accordance with the law and the evidence.

RELIEF SOUGHT ON APPEAL

Respondent seeks an affirmation of the trial court's Judgment and Decree of Divorce.

STATEMENT OF FACTS

Appellant's Statement of Facts does not fully set forth the facts established at the trial of this matter by leaving out vital testimony having a bearing upon the issues on appeal.

The parties were married in December, 1969 (R. 174). At the time of the marriage, Appellant was an undergraduate at the University of Utah and Respondent was a recent business education graduate with a teaching certificate (R. 173-4). Appellant subsequently obtained a degree in marketing in 1972 (R. 119). After graduation, Appellant was employed by Burroughs Corporation as a marketing representative (R. 120).

During the time that Appellant was completing his schooling, Respondent taught school and did secretarial work contributing $13,021.00 to the marriage (R. 174-5). In addition, she brought into the marriage $741.00 in her savings account, a 1969 Camaro automobile with an equity value of $3,000.00, her life insurance purchased by her parents with a cash value of $584.00 and cashed in during the marriage, and a $2,000.00 gift from Respondent's parents making a total financial contribution into the marriage by Respondent of $19,346.00 (R. 175-76).

Two children were born to the parties and were one year and two years old at the time of trial (R. 179). In 1974, the year prior to the divorce trial, Appellant earned a salary from Burroughs Corporation of $17,924.00 (R. 162). The parties purchased a new home in 1972 for a sum of $28,600.00 (R. 180).

In the spring of 1975 Appellant learned that a girl he knew in high school had recently been divorced (R. 146-47). In March of 1975 Appellant filed the subject divorce proceedings and advised Respondent that he did not love her (R. 1 and 184). After the parties separated Respondent found a letter from Appellant's high school sweetheart indicating "if you ever need me here I am" (R. 183). Respondent testified at the trial that she did not want the divorce (R. 178).

About two months prior to trial, Appellant intentionally terminated his employment with Burroughs Corporation in August of 1975, and incorporated his own business designated as Brute of Utah, Incorporated (R. 120 and 123). The business consists of a distributorship for an industrial cleaning company (R. 122). The business started generating income in September, 1975 (R. 124). Two new vans were leased to transport machines to be sold and to be used by Appellant and one employee (R. 170). Two weeks prior to the trial of this matter, Appellant purchased a 1976 Pontiac Grand Prix and testified that the purchase of this new car would affect his ability to pay alimony and child support

during the next five years (R. 15960). At the time of trial, Appellant projected his gross income for the next three months at $800.00 per month with a net of $680.00 per month (Ex. E).

The residence of the parties was purchased in 1972 at a cost of $28,600.00 (R. 180). Its present value at the time of trial was between $36,000.00 and $38,000.00 (R. 84 and 180). The equity in the house was approximately $8,300.00 after deducting the first mortgage and 10 percent of the gross value for selling costs (R. 84). Respondent was awarded the residence subject to a $5,000.00 lien in favor of Appellant payable in five years from the date of the Decree, marriage of Respondent or at the time Respondent decided to sell the residence, whichever came earlier (R. 95). The formula followed by the Court was as requested by Appellant (R. 202). Respondent had requested the Court to award her the residence and all equity therein (Ex. 5).

Respondent was further awarded all household furniture, fixtures and appliances excepting certain items awarded to Appellant which will hereafter be itemized (R. 95). Respondent was further awarded the 1972 Jeep, one bicycle, sewing machine, typewriter, piano and one-half of the stock of the parties in Burroughs and McCulloch Oil (R. 95 and Ex. A). A one-half interest of said stock would be worth approximately $1,630.87 (Ex. A).

Appellant received one bedroom set, one desk, two chairs, 1976 Pontiac, one-half of the shares of stock in Burroughs and McCulloch Oil, 1974 Gulf Stream boat, 1974 Yamaha motorcycle, one-sixth interest of 390 acres in Wayne County, Utah, all stock transferred to Appellant from his grandmother, skis, golf clubs, guns, archery set, camera, tape deck, and $5,000.00 lien against the residence of the parties (R. 95). Appellant further was awarded commissions due from his former employer in the amount of $1,781.00 together with all stock in Appellant's new business (R. 95).

Appellant's one-sixth interest in 390 acres in Wayne County was valued by Appellant at $200.00 to $300.00 per acre (R. 150). This was a vested interest in Appellant at the time of trial having been conveyed to Appellant by special Warranty Deed (R. 150 and Ex. 1).

Gifts of stock from Appellant's grandmother and vested in Appellant at the time of trial are as follows: One-half interest in one share East Mill Creek Water Company, 100 shares Dynapac, Inc., an undivided one-third interest in Parker Mountain grazing privileges and an undivided one-third interest in Producers Livestock Marketing Association (R. 149, 150, 151, 170, 171, Exs. 3, 6 and 7).

Respondent was required to assume and pay the first mortgage on the residence in the approximate sum

of $25,000.00 (R. 95 and 180). Respondent was further required to pay the Beckstead Oil Company indebtedness in the approximate sum of $300.00 to $400.00 (R. 95 and 182).

Appellant was required to pay all other outstanding indebtedness which included payment of the second mortgage on the residence in the sum of $3,000.00 and represented a loan for an investment in the publication of a book on gold, miscellaneous loans in the total sum of $930.00, and loans connected with indebtedness incurred by Appellant in the start of his new business (R. 95, 149, Exs. B, C and 2).

Appellant was further ordered to pay any indebtedness owing to his grandmother, if any there be (R. 95 and Ex. B).

Respondent was awarded alimony in the sum of $75.00 per month for a period of six months and then to increase to $100.00 per month for a period of six months and then to increase to $150.00 per month for a period of 4 years and then terminate (R. 95). This coincides with the time the youngest child will start school.

Respondent was awarded child support in the sum of $75.00 per month per child for a period of 3 months after which it increased to $125.00 per month per child to remain at that level until Appellant's income reached $15,000.00 per year at which time it was to increase to $150.00 per month per child. In the event Appellant's income reached $18,000.00 per year, child support was set at $180.00 per month per child (R. 95).

Each party was ordered to pay his and her own attorney's fees (R. 95).

ARGUMENT

POINT I.

THE ALIMONY AND CHILD SUPPORT AWARDED BY THE COURT AND THE DIVISION OF THE MARITAL ESTATE WAS WITHIN THE EVIDENCE AND THE LAW.

It is with some reluctance that Respondent undertakes the task of citing statutory law and case law in the subject case because of the frequent appeals in divorce proceedings. Therefore, brevity will be the goal.

The legislature, in 30-3-5, U.C.A. 1953, as amended, has provided that "...the Court may make such orders in relation to the children, property and parties, and the maintenance of the parties and children, as may be equitable..."

In Wilson v. Wilson, 296 P.2d 977, 5 Utah 2d 79, involving a wife who was awarded a divorce from a husband who was in love with another woman and wanted to marry her, and where the court awarded her substantially all of the property possessed by the parties, this court observed as follows:

> "Reference to the facts of that case emphasizes that no firm rule can be uniformly applied in all divorce cases, and that each must be determined upon the basis of the immediate fact situation."

> "The more recent pronouncements of this court, and the policy to which we adhere, are to the effect that the trial judge has considerable latitude of discretion in such matters 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."

A recent pronouncement of this court in McKean v. McKean (1975), 544 P.2d 1238, this court observed as follows:

> "The prior decisions of this court have not enunciated a rule that the property of a marriage must be divided by some formula nor has the court ruled that the wife is entitled to a fixed percentage of the husband's income as alimony and support money. This court has recognized the principle that the trial court is entitled to a wide discretion in these matters and that discretion is not interfered with unless it appears from the record that the trial court has abused this discretion."

As recently as April, 1976, in Leftwich v. Leftwich, 549 P.2d 447, this court held that the trial court had not abused its discretion in dividing the marital estate not in accordance with the one-third, two-third formula.

In McBroom v. McBroom, 384 P.2d 961, 14 Utah 2d 393, this court commented on the difficult task the court has in trying to look into the future and determine the effect that alternative courses of action will have on the lives, happiness and well being of the children and observed as follows:

> "In the instant case, as is usual in child custody cases, this court is burdened with the dual task of determining not only the equity of the property settlement, but also the more important, yet uncertain and controversial task of trying to look into the future and determine the effect which each alternative course of action will have on the lives, happiness and well being of the children."

This is undoubtedly what Judge Hyde had in mind in the subject case when he responded to the suggestion by Appellant's counsel that the estate should be divided down the middle (R. 201)

> "THE COURT: The only problem with that proposition is that it overlooks the interest of these children. It is not a two-party matter. It is four."

In the landmark case of MacDonald v. MacDonald, 236 P.2d 1066, this court, in an opinion written by Justice Crockett, indicated that in dividing property and awarding alimony in a divorce case, factors to be considered are as follows:

1. Social position.
2. Standard of living.
3. What each gave up for the marriage.
4. What money or property each brought into the marriage.
5. Ages of the parties.
6. Physical and mental health.
7. Relative ability.
8. Training and education.

9. Income of the parties and property acquired.

10. How property was acquired and efforts of each in doing so.

11. Children to be reared, their ages, and obligations.

12. Life expectancy.

13. Extraordinary sacrifice, devotion or care given.

14. Present standards of living and needs of each including cost of living.

The onerous burden of the trial judge, as just described, must have been felt by Justice Henroid in the case of Broadbent v. Broadbent, 425 P.2d 784, 19 Utah 2d 48, when he observed:

> "The veil of mathematical data woven by both sides as to assets and income, effectively and with commendable common sense, were pierced by a sabre wielded by a practical, logical and humanly comprehending conclusion."

This, we contend, was the duty attempted and accomplished by Judge Hyde in the subject case. His first consideration was to the children in keeping them in a home and providing them with the bare necessities of life.

The judge's next concern was balancing the interests of the husband and wife as best he could.

Alimony and child support started out at nominal sums with the court considering that Appellant's business was in its infancy.

Appellant had realized $600.00 gross in the first full month of operation and anticipated that the next three months would be $800.00 gross per month. The court further considered that Appellant was able to afford a $175.00 per month apartment, two new vans for his business and a 1976 Pontiac Grand Prix two weeks before trial.

Appellant in his Answers to Interrogatories, signed one month before trial, indicated that his monthly living expenses were $839.00 (R. 46 and 163). Respondent testified that the living expenses per month for her and the two children were $600.00 (R. 178 and Ex. 4).

The trial court, using a conservative and equitable approach, provided for Appellant to pay only $225.00 for the maintenance of Respondent and her two children for the first three months following the trial. For the next three months, Appellant was ordered to pay the total sum of $325.00. For the following six months, Appellant was ordered to pay $350.00 and then the total sum of $400.00 for four years unless his income reached $15,000.00. It hardly seems that Appellant is the victim of a harsh and unconscionable trial judge.

Appellant argues strenuously that graduated increases for alimony and child support are improper. Appellant argues that a fixed sum should be set and later proceedings used

if circumstances warrant. It is true that this is one option that the trial court has. However, there is another option available, i.e. the option of providing increases in alimony and child support based upon increases in the income of Appellant. In either case, either party has the option of petitioning the court to change the award if the circumstances warrant such change.

This situation was faced by the Court of Appeals of Oregon In the Matter of the Dissolution of the MARRIAGE OF Patricia Ann TYERMAN (1975) 534 P.2d 998, where the husband appealed from a decree awarding to the wife $150.00 per month for support of each of the parties four children and $500.00 per month for support of the wife for ten years and then $300.00 per month indefinitely. The court, in holding that this formula was proper, observed as follows:

> "We think the evidence is too indefinite to be assured what husband's income will be after two years in the service.
>
> "If what counsel asserts proves to be so, an adjustment probably should be made in two years in the amount of the wife's support. The indefiniteness of the evidence appears to reflect as much an inability to determine what the husband's pay will be in two years as it does a failure to produce available evidence. Hence a determination of what the payments should be then may be determined by future unpredictable events.
>
> "We do not find that any of the court's decree with reference to disposition of property was improper. Therefore, we affirm

> the court's decree but observe that, if the husband's income drops as his counsel forecasts it will in two years, that will be a change of circumstances which will then justify a reappraisal of the amount of support for the wife if proper motion is made therefor."

Judge Hyde was faced with Appellant's new business and the reasonably good prospects of substantial income in the future and he chose a similar formula as the trial judge did in the Oregon case.

In Berg v. Berg (1967), 434 P.2d 1, the Supreme Court of Washington held similarly to the Oregon court and held that an alimony award to the wife of $375.00 per month until June 30, 1966, and thereafter of $200.00 per month until July 1, 1971, was proper.

It is axiomatic that it is a common practice among attorneys to provide for various levels of alimony and child support as they relate to fluctuations in the husband's earnings level. This procedure provides flexibility and a safeguard against future litigation when the earnings of the husband reach higher levels and it is obvious that the needs of the wife and children are at least the amount ordered or agreed upon.

The claim of Appellant that Respondent received 85 percent of the marital assets is surprising and inaccurate. Appellant asked for a $5,000.00 lien on the residence of the parties

and was granted this by the court with a limit in years when said lien was to be paid. No purpose would be served in reiterating the division of the marital estate except to say that each party paid his own attorney's fees, Respondent received the household furniture and appliances and Appellant received the new car, the new business, virtually all recreational equipment including Gulf Stream boat and motorcycle, etc., and the one-sixth interest in the 390 acres in Wayne County.

The bulk of the indebtedness Appellant assumed was business indebtedness as shown by Exhibits B and C. This is particularly the case when one realizes that Respondent assumed the first mortgage on the residence in the sum of $25,107.00. Further, the trial court was not disposed to burden Respondent with paying back the $3,000.00 invested in the publication of a book on gold, or the questionable indebtedness to Appellant's grandmother.

Appellant argues that he was put upon by the trial court in that the court gave Respondent everything she asked for including the payment of a debt owing to the Bank of Utah which was not in the record. On the contrary, the indebtedness to the Bank of Utah was referred to in Appellant's testimony at page 131 of the Record wherein Appellant testified in part as follows:

> "A. Notes payable to banks is to the Bank of Utah, a six month note that I acquired to make the initial purchase of the business."

The court is further referred to Plaintiff's Answers to Defendant's Interrogatories wherein in the answer to Interrogatory No. 20 Appellant listed the Bank of Utah as a creditor (R. 46).

Appellant urges that Respondent was awarded everything she asked for which, of course, is not so. Respondent requested the court to award the residence of the parties to her including all equity. She also requested the court to award child support in the sum of $200.00 per month per child and alimony in the sum of $200.00 per month. None of these were granted by the court.

It is interesting to note that Appellant requests the court to divide the marital estate on a 50 percent - 50 percent basis when none of the Exhibits he submitted to the court contained the Wayne County property or the corporate stock incident thereto. While advocating that everything be divided down the middle, Appellant was not willing to include the Wayne County property as indicated at pages 203-4 of the Record as follows:

> "Q. Would you also be willing to give her half of the Wayne County property when that is sold?
>
> "A. No. I have no idea what that is."

A shortcut through this maze of data and argument can be had by referring to the trial court's Memorandum Decision (R. 66) and the trial court's Memorandum Decision Regarding Plaintiff's Request for Reconsideration (R. 84). The trial judge observed:

1. Appellant had quit a job paying $18,000.00 a year to go into business himself.

2. That certain expenses could be placed into Appellant's new business thereby minimizing his net income. For example, a 1976 Pontiac to be paid by the business.

3. That a 50-50 division of the property would make sense except for the needs of the two minor children of tender years.

4. That Respondent is unable to immediately take employment commensurate with her training in education.

5. That Appellant's suggestions would immediately place Respondent and the children at a poverty level to get by the best way they could while Appellant goes on his way.

6. That it was obvious under the circumstances that the Respondent needed assistance by way of alimony.

7. That in distributing the property, the children were entitled to something better than some cheap apartment.

8. That each party could pay their own attorney's fees out of the stock that was equally divided.

9. That Appellant, in his Request for Reconsideration, did exactly as he did in court. That he totally ignored the interests and the needs of the two children.

10. That the interests of the children come before either of the parties.

11. That the exhibits of Appellant are on the basis that Respondent is a school teacher. That the evidence before the court was that Respondent was giving piano lessons with a monthly income of approximately $200.00.

12. That Appellant ignores the interests of the children and would penalize them by dumping them in a nursery school. That Respondent is to be commended for her attempts to grant the children of tender years a parent's care in placing their interests before her own pecuniary gain.

13. That Appellant's position is unreasonable, i.e. Appellant's Schedule (A) lists Appellant's food cost at exactly the same figure as food costs for the Respondent and the two children. That the Appellant does the same thing with the clothing cost.

14. That the court valued the home at $37,000.00 and found an equity of $8,300.00 after deducting the first mortgage and a 10 percent factor for selling costs.

15. That considering Appellant's lien of $5,000.00, Respondent received $3,300.00 and not the figure of $9,500.00 as set out in Appellant's Schedule (G).

16. That the $3,000.00 second mortgage on the residence was a bad investment and Appellant should suffer the loss.

17. That one of the reasons Appellant received a $5,000.00 lien on the residence was the obligation to Appellant's grandmother which the court questions will ever even be paid.

18. That Appellant's loss to determine how the court reached the result it did will probably always remain so long as Appellant interprets the action as involving only two parties.

19. That Respondent and her two children have been reduced to a proverty level by this divorce.

CONCLUSION

It is respectfully submitted that the action of the trial court in the awarding of alimony and child support and the division of the marital estate was well within the evidence and the applicable legal principles and that the same should be affirmed.

Respectfully submitted,

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