2000

Tonyia B. Jensen v. Clark Evon Jensen : Brief of Respondent

Utah Supreme Court

Ray H. Ivie; Ivie and Young; Attorney for Respondent.
Gary H. Weight; Aldrich and Nelson; Attorney for Appellant.

IN THE SUPREME COURT

OF THE STATE OF UTAH

TONYIA B. JENSEN,	)	
Plaintiff and Respondent,	)	
vs.	)	Case No. 14458
CLARK EVON JENSEN,	)	
Defendant and Appellant.	)	

BRIEF OF RESPONDENT

Appeal from the Judgment of the Fourth Judicial District Court for Utah County, Honorable George E. Ballif, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

TONYIA B. JENSEN, :

Plaintiff and Respondent, :

vs. : Case No. 11458

CLARK EVON JENSEN, :

Defendant and Appellant. :

BRIEF OF RESPONDENT

NATURE OF THE CASE

This is an action for divorce.

DISPOSITION IN THE LOWER COURT

Respondent agrees with appellant's statement as to the disposition of the case in the lower court.

RELIEF SOUGHT ON APPEAL

Respondent seeks to have the court affirm the lower court's judgment.

STATEMENT OF FACTS

The decree of the lower court dissolved a marriage of twenty-one and one-half years duration. Three children were born as issue of the marriage. The oldest child, a girl, was 18; the second child, a girl, was a few days short of 16; and Tony, the boy, was nine and one-half.

The parties were married when the husband was 20 and the wife was 16. At the time of the marriage the husband was a high school

graduate, and the wife was still in high school. After the marriage the husband went on continuing four years of technical training at the technical college. (Tr. 7). The wife continued on with her education and obtained a degree in nursing and practiced as a registered nurse. (Tr. 7). Twenty of the 21 years the parties were married the wife worked outside of the home. (Tr. 7). The parties income was never big, but the wife took a real estate course at Stevens Henager College, and then engaged in real estate transactions. The wife claims that this is how their money was accumulated. (Tr. 12).

The marriage deteriorated to the extent that the wife was threatened with guns and physical violence. (Tr. 9).

Paragraph four of the Findings of Fact, states:

> "The Court finds that the marriage between the parties has deteriorated because the difference in interests and goals which have developed between the parties over the past years, and that the differences in the plaintiff seeking work outside the home and the defendant demanding domestic obedience and service from her have caused mental and physical anguish and suffering to both parties entitling each to a decree of divorce from the other."

It was suggested at trial that both parties should be awarded a divorce. (Tr. 46). The court found that certain property had been acquired during the marriage and distributed the property approximately equal between the parties. (To visualize refer to Findings of Fact and Conclusions of Law, paragraph 6.)

ARGUMENT

POINT I

THE TRIAL COURT WAS CORRECT IN AWARDING PROPERTY AND CASH TO THE PLAINTIFF IN AN AMOUNT EQUAL TO FIFTY (50%) PERCENT OF THE TOTAL PROPERTY ACQUIRED BY THE PARTIES DURING THEIR MARRIAGE.

"When a decree of divorce is made the court may make such

orders in relation to the children, property and parties, . . . as may be equitable." Section 30-3-5, Utah Code Annotated (1953). This court has said repeatedly that each divorce case is a unique fact situation and that the lower courts are permitted to do that which is equitable and just within the broad range of facts presented to them.

In a per curiam opinion by this court, Anderson v. Anderson, 18 U.2d 286, 422 P.2d 192, it was said that:

> The court frequently emphasized that 'no firm rule can be uniformly applied in all divorce cases, * * * each must be determined upon the basis of the immediate fact situation. * * * 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.'
>
> The extent of this discretion is emphasized by the great disparity of results allowed in differing factual situations. In Blair v. Blair, 40 Utah 306, 121 P. 19 38 L.R.A.N.S., 269 (1912), the court upheld a property division awarding $40,000 to the husband and $4,500 to the wife, even though the divorce had been granted in her favor. At the other extreme, in Wilson v. Wilson, 5 Utah 2d 79, 296 P.2d 977 (1956) where 'the court awarded her substantially all of the property possessed by the parties' (in excess of $20,000 to the wife and approximately $500 to the husband), the decree was also affirmed. The court has sustained the one-third, two-thirds property division used by the trial court in the present case, without regard to which party was granted the divorce. Wooley v. Wooley, 113 Utah 391, 195 P.2d 743 (1948); Griffin v. Griffin, 18 Utah 98, 55 P. 84 (1898) (In Griffin this proportion was approved by analogy to the rights of the widow to succeed to one-third of her deceased husband's estate at common law).

This case indicates the outward extremes which have been approved by the court as well as the middle ground of the one-third, two-thirds property division. All of this, however, is prefaced by the thought that there can be no firm rule in divorce cases because of the diversity of facts and the discretion of the court with respect to those facts.

This court in Searle v. Searle, 522 P.2d 697, approved an award to a wife of real and personal property, in lieu of permanent alimony, representing approximately one-half of the property accumulated during 27 years of marriage.

In the case now being considered by the court, Tonyia Jensen had worked outside the home and contributed her earnings toward the estate accumulated, and further had taken a course in real estate management and according to her testimony, which was not disputed by the defendant, most of the estate the parties had was accumulated by dealing in real property.

POINT II

THE TRIAL COURT DID NOT ERROR IN DENYING DEFENDANT'S MOTION FOR A NEW TRIAL.

Rule 59 of Utah Rules of Civil Procedure provides as follows:

> (a) Grounds. Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes; provided, however, that on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment:
>
> (1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial.
>
> (2) Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by resort to a determination by chance or as a result of bribery, such misconduct may be proved by the affidavit of any one of the jurors.
>
> (3) Accident or surprise, which ordinary prudence could not have guarded against.
>
> (4) Newly discovered evidence, material for the party making the application, which he could not, with reasonable

diligence, have discovered and produced at the trial.

(5) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.

(6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

(7) Error in law.

(b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) Affidavits; Time for Filing. When the application for a new trial is made under subdivision (1), (2), (3), or (4), it shall be supported by affidavit. Whenever a motion for a new trial is based upon affidvits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits. The time within which the affidavits or opposing affidavits shall be served may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) On Initiative of Court. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Respondent's position to appellant's claim of error in denying defendant's motion for a new trial is that the evidence is sufficient to justify the decision and if specific errors of law are claimed such errors should be pointed out.

Appellant says in affect, maybe my evidence wasn't strong enough at the trial to persuade the judge, but if you will give me another chance I'll produce better evidence.

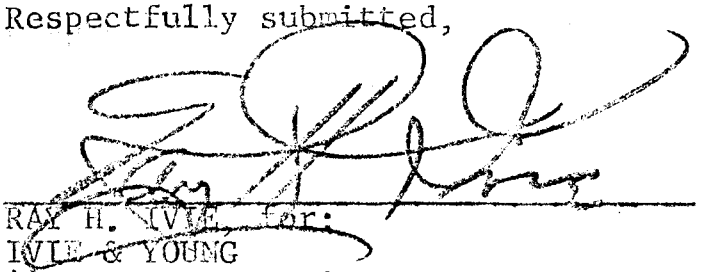
CONCLUSION

The lower court handled in a fair and equitable manner the property distribution in this case

Respondent feels that the trial court has rendered a fair result

for both parties and would, therefore, ask this court to affirm the judgment.

Respectfully submitted,



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STATE OF UTAH)
:ss
COUNTY OF UTAH)

Ruth Nehring being first duly sworn, says: That she is employed in the office of IVIE & YOUNG, Attorneys herein for Plaintiff and Respondent,

that she served the attached Brief of Respondent

upon Supreme Court and Defendant

by placing a correct copy thereof in an envelope addressed to:

Michael Rodak, Jr.
Supreme Court Clerk
State Capital Building
Salt Lake City, Utah 84114

Gary H. Weight
Attorney at Law
43 East 200 North
Provo, Utah 84601

That she deposited the same, sealed with first class postage prepaid thereon, in the United States mail at Provo, Utah, on the 10th day of June, 1976.

Ruth Nehring
SECRETARY

Subscribed and sworn to before me this 10th day of June, 1976.

Irma M. Mitchell
NOTARY PUBLIC
Residing in Utah County, Utah
My Commission Expires: 5-13-79