

1987

Jerry Ann Nunley v. Kenneth R. Nunley : Brief of Respondent

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Paul R. Frischknecht; Attorney for Respondent.

Kent T. Yano; Attorney for Appellant.

Recommended Citation

Brief of Respondent, *Jerry Ann Nunley v. Kenneth R. Nunley*, No. 870285 (Utah Court of Appeals, 1987).
https://digitalcommons.law.byu.edu/byu_ca1/509

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH
DOCUMENT
KFU
50
.A10

DOCKET NO. **870285-CA**
IN THE UTAH COURT OF APPEALS

JERRY ANN NUNLEY,	:	
	:	
Plaintiff & Respondent,	:	
	:	Case No. 870285-CA
vs.	:	
	:	
KENNETH R. NUNLEY,	:	
	:	
Defendant & Appellant.	:	

146

BRIEF OF THE RESPONDENT

Appeal From a Final Order of The
Sixth Judicial District Court, Sanpete County
Honorable Don V. Tibbs, Presiding

Paul R. Frischknecht
50 North Main Street
Manti, Utah 84642
Attorney for Respondent

Kent T. Yano
Highland Park Plaza
3098 South Highland Drive
Suite 300
Salt Lake City, Utah 84106
Attorney for Appellant

RECEIVED

DEC 18 1987

Court of Appeals

IN THE UTAH COURT OF APPEALS

JERRY ANN NUNLEY,

Plaintiff & Respondent :

Case No. 870285-CA

vs. :

KENNETH R. NUNLEY,

Defendant & Appellant :

BRIEF OF THE RESPONDENT

Appeal From a Final Order of The
Sixth Judicial District Court, Sanpete County
Honorable Don V. Tibbs, Presiding

Paul R. Frischknecht
50 North Main Street
Manti, Utah 84642
Attorney for the Respondent

Kent T. Yano
Highland Park Plaza
3098 South Highland Drive
Suite 300
Salt Lake City, Utah 84106
Attorney for the Appellant

TABLE OF CONTENTS

	<u>Page</u>
Table of Contents	i
Table of Authorities	ii
Statement of Court of Appeal Jurisdiction	1
Statement of Nature of the Proceedings	1
Statement of Issues Presented	1
Statement of the Case	1
Statement of the Facts	5
Summary of Argument	7
Argument	
POINT I -- THE LOWER COURT HAD JURISDICTION OVER THE APPELLANT TO MODIFY THE PARTIES WAIVER, STIPULATION AND AGREEMENT	8
POINT II -- THE LOWER COURT DID NOT ABUSE ITS DISCRETION IN MODIFYING THE WAIVER, STIPULATION AND AGREEMENT, AND AWARDING ALIMONY ARREARAGES	9
POINT III -- THE MARITAL RESIDENCE IS NOT PROPERLY BEFORE THE APPELLANT COURT	11
Conclusion	12

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Coleman vs. Coleman</u> , 67 Utah Adv. Rep. 7 (1987)	9
<u>Rushman vs. Rushman</u> , 742 P.2d 113, 65 Utah Adv. Rep. 29 (1987)	9
<u>Talley vs. Talley</u> , 739 P.2d 83, 61 Utah Adv. Rep. 31 (1987)	9
<u>Huck vs. Huck</u> , 734 P.2d 417, 45 Utah Adv. Rep. 12 (1986)	9
<u>Naylor vs. Naylor</u> , 700 P.2d 707, 10 Utah Adv. Rep. 27 (1986)	9
<u>Burke vs. Burke</u> , 51 Utah Adv. Rep. 10 (1987)	11

STATEMENT OF COURT OF APPEALS JURISDICTION

This is an appeal from the final order of the Sixth Judicial District Court in and for the State of Utah.

STATEMENT OF NATURE OF THE PROCEEDINGS

This is an action for divorce with a subsequent Petition to Modify Divorce Decree.

STATEMENT OF ISSUES PRESENTED

1. Whether the lower court had jurisdiction over the appellant to modify the Waiver, Stipulation and Agreement without Appellant's consent or without his appearance in court.

2. Whether the lower court abused its discretion in the following particulars:

(a) -- by modifying the parties Waiver, Stipulation and Agreement concerning alimony and the marital residence.

(b) -- by awarding a judgment against the Appellant for alimony arrearages.

3. Whether the issue of disposition of the marital residence is properly before the court.

STATEMENT OF THE CASE

Plaintiff, Jerry Ann Nunley filed a complaint for divorce against the defendant, Kenneth R. Nunley in the

Sixth Judicial District Court of Sanpete County, State of Utah on September 11, 1985.

Subsequent to the filing of the complaint, four different proceedings were held in the lower court, February 19, 1986, March 19, 1986, December 10, 1986 and May 20, 1987. The proceedings are hereinafter referred to Transcripts, TR 1, 2, 3 or 4, respectively.

The allegations of the complaint and the prayer requested an award of alimony and the marital residence, (see complaint).

A Waiver, Stipulation and Property Settlement Agreement was also filed which provided that the marital residence would revert to the Appellant upon the parties youngest child attaining the age of 18 years, and there was no provision to pay alimony from the Appellant to the Respondent in the Agreement, (see Waiver, Stipulation and Agreement).

On the 19th day of February, 1986, the plaintiff appeared with her attorney before the court for the purpose of obtaining a Default Divorce from the Appellant pursuant to the terms of the Stipulation. At the court proceeding, the Agreement was rejected by the court on the basis that given Appellant's earning power in contrast to Respondent's earning power, the Waiver, Stipulation and Agreement was not fair as determined by the court, (T

1, P.7 L. 16-19). The lower court continued the matter until March 19, 1986, and requested notice be given to Appellant with instructions to present on that day to the court income tax returns, (T. 1, P.11, L. 5-13).

On the 19th day of March, 1986, the Respondent appeared personally with her attorney, the Appellant did not appear nor was he represented by counsel.

Counsel for the Respondent informed the court that notice had been sent to Appellant, (see attached Exhibit "A"). Between February 19, 1986 and March 19, 1986, Appellant and Respondent discussed the February 19, 1986 court proceedings on several occasions, and Respondent personally advised Appellant of the March 19, 1986 hearing date. (T.2, P.3, L 12-13).

On March 19, 1986, the court having heard evidence from the Respondent, made its Findings of Fact and Conclusions of Law, and Decree of Divorce, wherein Appellant was ordered to pay \$250.00 per month as child support for the parties two minor children; \$400.00 per month alimony, based on Appellant's \$35,000 per year earning power and Respondent's \$6,000 per year earning power, (T.2, P.8, L. 4-17). The court further ordered a one-half interest in the marital residence to each of the parties, and ordered Respondent's counsel to serve the Findings and

Decree on the Appellant and permitting him 30 days after service to file any pleadings before the court concerning the Decree. Subsequent to March 19, 1986, Respondent advised Appellant of the court's action.

On December 10, 1986, Appellant filed a motion to conform Decree to Stipulation. The Appellant was never served with Findings and Decree but was mailed and received a copy of the Decree in August of 1986, (T.4, P.22, L. 13). Appellant's motion to conform Decree to Stipulation was denied by the court but the court granted Appellant an opportunity to file a motion to modify Decree, (T. 3, P.9, L. 18-25).

Subsequently, Appellant filed a petition to modify Decree wherein only the issue of alimony was addressed and no request was made in the petition to modify Decree to change the court's award of the marital residence, (see Petition to Modify).

On May 20th, 1987, the court heard Appellant's petition to modify Decree and Respondent's Order to Show Cause for an award of delinquent alimony.

The court ruled that the Decree would not be modified based on the evidence heard and awarded delinquent alimony in the amount of \$3,758.00, calculated from March 20, 1986, after considering various credits that were granted

to Appellant, (T.4, P.64, L. 10-18). 14 months (March 20, 1986 through May, 1987) x \$400.00 = \$5,600 - \$1,100 - \$742.00 = \$3,758.00.

STATEMENT OF THE FACTS

The lower court in considering Appellant's motion to conform Decree to Stipulation denied the same on December 10, 1986. However, the court granted Appellant the right to file a Petition to Modify Decree which petition was filed. The Petition to Modify Decree only requested a change as to the issue of alimony and made no mention of the marital residence.

On May 20th, 1987, at the hearing on the motion to modification and Respondent's Order to Show Cause for accrued delinquencies, counsel for Appellant attempted to raise the issue of the marital residence whereupon Respondent's counsel objected, (T.4, P.17, L.1-3). The lower court overruled the objection and permitted Respondent to testify with regard to the marital residence, (T.4, P.17, L.15).

Appellant had notice of the March 19, 1986 hearing, (see attached Exhibit "A"). Respondent stated that she wanted an interest in the marital residence, (T.4, P.39 L.2; T.4, P.38, L.25). Respondent also testified she

desired an award of alimony and could not survive on \$500.00 per month, child support, without an award of alimony, (T.4, P.39, L.7-11).

At the filing of the divorce complaint, Appellant paid to Respondent the sum of \$500.00 per month for a couple of months and then began paying \$600.00 per month throughout the proceeding. While the court allowed \$100.00 per month of that \$600.00 as alimony, Appellant testified he did not know what alimony was for sure and paid the extra \$100.00 as family support, (T.4, P.35, L.19).

On March 19, 1986 the court directed service of the Findings and Decree on the Appellant. The Findings and Decree were not served on the Appellant but were mailed to him in August of 1986 as acknowledged by the Appellant. Appellant filed his motion to conform Decree to the Stipulation on December 10, 1986.

After hearing the evidence in the matter, the court made a determination that Appellant had an earning power of \$35,000 per year, (T.4, P.26, L.3, 12, 22). The court further made a finding that Respondent's earning power was \$6,000 per year, (T.2, P.8, L.17).

Respondent had extraordinary expense due to a serious accident of one of the children, (T.4, P.48, L.14-17). From time to time, Respondent had received welfare assistance

as a means of supporting herself and her family, (T.4, P.57, L.13-19).

SUMMARY OF ARGUMENT

The lower court had jurisdiction over the Appellant and was justified in modifying the parties original Waiver, Stipulation and Agreement. The lower court did not abuse its discretion in awarding alimony to the Respondent as well as an interest in the marital home given the fact that Appellant's earning power was determined to be \$35,000 per year and Respondent's earning power of \$6,000 per year.

While Respondent made some assertions in the proceedings she did not really want alimony or the marital residence. She subsequently testified she wanted alimony and an interest in the marital home.

The Appellant was given notice of the March 19, 1986 hearing, failed to appear and accordingly alimony should accrue from March 19, 1986.

Appellant's petition to modify the Decree of Divorce only set forth allegations of alimony with no mention of the marital residence. The lower court erred in overruling Respondent's counsel's objection and accordingly the issue of the marital residence is not properly before the court on appeal.

ARGUMENT

POINT I

THE LOWER COURT HAD JURISDICTION OVER THE APPELLANT TO MODIFY THE PARTIES WAIVER, STIPULATION AND AGREEMENT.

Appellant and Respondent executed a Waiver, Stipulation and Agreement wherein Appellant acknowledged he had received a copy of the divorce complaint and agreed to file no responsive pleadings.

Appellant was given notice of the February 19, 1986 court action, Appellant was given notice of the disposition at the February 19, 1986 hearing and also of continuation of the matter to March 19, 1986 and requesting his presence and 1983, 1984 and 1985 income tax returns, (see Exhibit "A").

On March 19, 1986 Appellant did not appear in person nor was he represented by counsel. Appellant received a copy of the Divorce Decree in August, 1986, wherein he was given 30 days to file any responsive pleadings. Appellant waited until December 10th to file any pleadings and throughout the entire proceeding made no Rule 60B motion.

Based on Appellant's execution of the Waiver, Stipulation and Agreement and notice given to him of the March 19, 1986 hearing, the court had jurisdiction over the Appellant to proceed with the matter.

POINT II

THE LOWER COURT DID NOT ABUSE ITS DISCRETION IN MODIFYING THE WAIVER, STIPULATION AND AGREEMENT, AND AWARDING ALIMONY ARREARAGES.

Utah Law is clear that the trial court has a wide discretion in dividing marital property, and awarding alimony in a fair and reasonable manner. The trial court's Findings and Decree are not to be disturbed by an appellant court unless there is proof of a misunderstanding or misapplication of law resulting in substantial and prejudicial error. Coleman vs. Coleman, 67 Utah Adv. Rep. 7 (1987); Rushman vs. Rushman, 742 P.2d 113, 65 Utah Adv. Rep. 29 (1987).

The Utah Appellant Court will not interfere with an alimony award unless there is a showing on appeal of clear and prejudicial abuse of the trial court's discretion. Talley vs. Talley, 739 P.2d 83, 61 Utah Adv. Rep. 31 (1987).

The trial court clearly had discretion not to accept the Waiver, Stipulation and Agreement as in Utah a stipulation and agreement serves only as a recommendation to the court. The court may reject the stipulation and agreement and enter findings and a decree that are fair and reasonable. Huck vs. Huck, 734 P.2d 417, 45 Utah Adv. Rep. 12 (1986); Naylor vs. Naylor, 700 P.2d 707,

10 Utah Adv. Rep. 27 (1986).

The court certainly did not abuse its discretion by not accepting the parties Stipulation and Agreement considering the court's determination that Appellant had an earning power of \$35,000 per year, and Respondent had an earning power of \$6,000 per year. The court determined that the Stipulation and Agreement was not fair and reasonable, (T.1, P.11, L.1-2).

The parties had a marriage of 20 years, four children were born as issue of their marriage. One of the minor children was seriously injured in a motor vehicle accident and required significant care and therapy.

Respondent from time to time received church welfare to provide for herself and her family and was only a seasonal employee at a local sewing plant and turkey processing plant.

While not conceding the jurisdictional point, assuming the court initially had no jurisdiction over the Appellant, the Appellant had his day in court on May 20, 1987, when the court considered Appellant's Petition to Modify the Divorce Decree, heard the evidence on the merits and was certainly within its discretion in making an award of alimony and a half interest in the marital residence based on the Respondent's need, her ability to produce

income and Appellant's ability to pay alimony.

Utah Law is clear that under certain circumstances separate property may be awarded by the trial court to the other spouse upon consideration of all pertinent circumstances. Such a consideration was made by the trial court determining that the parties were married over 20 years, four children were born as issue of the marriage, one seriously injured in an automobile accident, and at the time of the hearing, requiring substantial medical assistance and therapy. Respondent's seasonal employment, the respective parties earnings' capacity and the fact that Respondent had periodically received church welfare in order to support herself and her family. Burke vs. Burke, 51 Utah Adv. Rep. 10 (1987).

Respondent testified that she wanted alimony, (T.4, P.39, L.7-11). Respondent testified that she wanted an interest in the marital residence, (T.4, P.39, L.2).

POINT III

THE MARITAL RESIDENCE IS NOT PROPERLY BEFORE
THE APPELLANT COURT.

Upon denial of Appellant's motion to conform Decree to Stipulation, Appellant filed a Petition to Modify Divorce Decree. The allegations of the petition requested only a modification as to alimony. Nowhere in the petition

to Modify Divorce Decree is the issue of the marital residence raised, (see Petition to Modify Divorce Decree).

In the May 20, 1987 hearing, when counsel for Appellant attempted to offer testimony concerning the marital residence, Respondent objected to the same as not being within the pleadings, (T.4, P.17, L.1-3). The trial court overruled the objection and heard evidence on the marital residence. The lower court erred in allowing evidence on the marital residence as beyond the pleadings and accordingly the marital residence is not properly before the court.

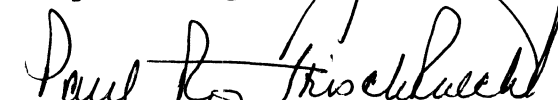
CONCLUSION

The trial court has a broad discretion in awarding marital property and alimony. The trial court was within its discretion in rejecting the Waiver, Stipulation and Agreement as not fair or reasonable. The trial court did not abuse its discretion in awarding alimony and an interest to Respondent in the marital residence.

The Court of Appeals should affirm the judgment of the lower court.

DATED this 17 day of December, 1987.

Respectfully Submitted,



PAUL R. FRISCHKNECHT
Attorney for the Respondent

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct
copy of the above and foregoing, postage prepaid thereon
this 17 day of December, 1987, to the following:

Kent T. Yano, Attorney at Law, Highland Park Plaza, 3098
South Highland Drive, Suite 300, Salt Lake City, Utah 84106.


PAUL R. FRISCHKNECHT

PAUL R. FRISCHKNECHT
ATTORNEY AT LAW
50 NORTH MAIN STREET
MANTI, UTAH 84042

BUS PHONE 835-4391
OFFICE HOURS 9 TO 5

RES. PHONE 835-9601

February 19, 1986

Kenneth R. Nunley
c/o Main Terminal
4800 West 5th South
Salt Lake City, Utah

Re: Nunley vs. Nunley

Dear Mr. Nunley:

The above matter came before the court on this day. Judge Tibbs would not grant the divorce due to the conditions in the stipulation you and your wife signed. Judge Tibbs continued the matter to the 19th day of March, 1986, commencing at 10:00 A.M. Your presence is required to be present before the judge on that day.

Also, please provide for the court's review at that time, copies of your 1983 and 1984 income tax returns.

Yours very truly,

Paul R. Frischknecht

PRF:wmk

cc. Sanpete County Clerk
File No. 9052

EXHIBIT "A"

FILED

Wm. Beck CLERK
SIXTH JUDICIAL DISTRICT COURT
SANPETE COUNTY, UTAH

Wm. Beck
2-19-86