1978

Christine Cordova v. Daniel J. Cordova : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE

STATE OF UTAH

CHRISTINE CORDOVA,)

Plaintiff-Appellant,)

vs.) CASE NO. 15414

DANIEL J. CORDOVA,)

Defendant-Respondent.)

BRIEF OF APPELLANT

AN APPEAL FROM THE JUDGMENT OF THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY, STATE OF UTAH, THE HONORABLE GEORGE E. BALLIF, JUDGE PRESIDING.

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Section 30-3-5, Utah Code Annotated, as amended 1975

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NATURE OF CASE

This is an action for divorce. Plaintiff-Appellant is appealing the decision of the trial court with regard to the amount of alimony awarded her and the division of the property.

DISPOSITION IN THE LOWER COURT

The Honorable George E. Ballif, one of the judges of the Fourth District Court awarded both the Plaintiff-Appellant and the Defendant-Respondent a Decree of Divorce on the 27th day of June, 1977, (R-38). The trial court awarded Plaintiff-Appellant the sum of $150.00 per month per child

as child support for the two minor children and the sum of $75.00 per month as alimony to continue for a period of 36 months, commencing with the month of June, 1977, (R-39). The court further awarded each of the parties the furniture and other personal property which the parties had respectively divided before the trial with the exception of a loveseat and black chair which were awarded to the Plaintiff-Appellant, (R-40). The court's award of the personal property to the Defendant-Respondent included his retirement account with his employer, Grand Central Stores, and the bonus received by him one month prior to the trial of this matter, (R-40). The court further ordered the parties to divide equally the $588.00 income tax refund for the year 1976, (R-40). Plaintiff-Appellant filed her Motion for a New Trial or, in the Alternative, to Amend the Findings of Fact, Conclusions of Law and Decree of Divorce on the 27th day of June, 1977, (R-33), requesting the court to reconsider its decision limiting the Plaintiff-Appellant's alimony to $75.00 per month and the court's failure to award her one-half of Defendant-Respondent's April bonus of $1,800.00 gross and $1,255.00 net, its failure to consider future bonuses as income in the determination of a reasonable amount of support for Plaintiff-Appellant and one-half of the accumulated retirement fund account, all of

which were assets acquired by the parties during the course of the marriage. In accordance with the Rules of the Fourth District Court, Memorandums of Points and Authorities were filed by both Plaintiff-Appellant and Defendant-Respondent, (R-16-20 and R-21-30). The court entered its Minute Entry, (R-15), denying Plaintiff-Appellant's Motion on the 1st day of September, 1977 without hearing. Plaintiff-Appellant filed her Notice of Appeal, (R-13), on the 16th day of September, 1977.

RELIEF SOUGHT ON APPEAL

The judgment of the trial court should be reversed and Plaintiff-Appellant should be awarded the sum of $150.00 per month as alimony without limitation and should be awarded a cash sum equivalent to one-half of the net sum of the April bonus of $1,255.00 and one-half of the Defendant-Respondent's retirement fund of $2,104.90 plus accumulations as her share of the marital assets.

The Utah County Clerk failed to mark each page of the two transcripts, marking the entire transcript of the proceedings in two volumes, C-92 and C-93. Plaintiff-Appellant's references thereto will be to the transcript, either C-92 or

C-93 and the pages and lines referred therein.

STATEMENT OF FACTS

The parties were married on the 31st day of August, 1973 in Pocatello, Idaho, (C-93, page 3, lines 26-28), but had lived together for a total period of 5 1/2 years, (C-93, page 43, line 6). The parties have two children born as issue of this marriage, CHRISTOPHER JAKE CORDOVA, age 2 and ROBERT PAUL CORDOVA, age 10 weeks at the time of the trial, (C-93, page 4, lines 1-3). During the course of the marriage the Plaintiff-Appellant worked for approximately two years, (C-93, page 24, lines 11-23), and the Defendant-Respondent worked continuously for Grand Central Stores for approximately seven years. At the time of the trial in this matter, the parties owned a 1974 Pinto automobile driven by Plaintiff-Appellant, a 1974 Ford Galaxie driven by Defendant-Respondent, a profit sharing plan with Grand Central Stores in the sum of $2,104.09 through August 1, 1976, (C-92, page 11, lines 17-22). In addition, earnings had been accumulated in said account to the date of the trial but would not be posted until the end of July, 1977, (C-92, page 11, lines 23-30). Defendant-Respondent had further received a bonus from Grand Central Stores in April, 1977 of $1,800.00 gross

(C-92, page 9, line 28), which resulted in a net sum of $1,255.00, (C-92, page 37, line 13), all of which funds Defendant-Respondent had for his exclusive use and benefit, (C-92, page 37, lines 13-22 and page 38, lines 1-5). The parties further had received a tax refund of $558.00 for the year 1976, (C-93, page 10, line 21), with no part of said funds being given to the Plaintiff-Appellant upon receipt, (C-93, page 11, lines 6-21).

During the course of the trial, the Plaintiff-Appellant introduced exhibits with regard to her living expenses, numbered Plaintiff's Exhibits 6, 7, 8 and 11, indicating expenditures of $248.50, $370.14, $369.05 and $409.70 for the months of February, March, April and May, respectively, with a notation thereon that said sums did not include "expenditures for child care, gasoline, clothing, doctor, drugs and miscellaneous needs". Plaintiff-Appellant further introduced Exhibit No. 9 which set forth her monthly living expenses of $770.63 per month which she believed would be sufficient to support herself and the two minor children of the parties.

It was further disclosed by the testimony of Bill Donaldson, Personnel Director of Grand Central Stores, that the Defendant-Respondent had earned the sum of $18,264.51

during the year of 1976, (C-92, page 9, lines 18 and 19), and had earned from January through May 15, 1977 a gross sum of $8,151.00, (C-92, page 9, lines 10 and 11). Mr. Donaldson further indicated in his testimony that through May 15, 1977 the total gross federal tax deductions amount to $1,408.39, total state tax deductions amounted to $309.3 and the total FICA deductions amounted to $476.79, (C-92, page 19, line 5), leaving a net income available to Defend Respondent for a 19 week period of 1977 of $5,955.96 or an average of $313.47 per week. It was the further testimony of Mr. Donaldson that bonuses had been paid for the last three years to Grand Central Store managers, directors and assistant managers, (C-93, page 21, lines 18-20).

Plaintiff-Appellant, in her direct testimony, indicated she could not work at this time due to the young ages of the children (C-93, page 31, lines 2-7) and was relying upon her husband for support of herself and said children.

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN LIMITING PLAINTIFF'S ALIMONY TO $75.00 PER MONTH FOR THREE YEARS.

The uncontroverted testimony of Bill Donaldson, Personnel Director of Grand Central Stores, was that the Defendant-Respondent had earned $8,151.00 from January 1, 1977 to May 15, 1977 with total federal, state and FICA tax deductions amounting to $2,195.04 which resulted in a net income for that 19 week period of 1977 of $5,955.96 or a net monthly average of $1,323.55. On that basis, the trial court awarded the Plaintiff-Appellant a total sum of $375.00 per month, $75.00 alimony and $300.00 child support, which is insufficient for the support of Plaintiff-Appellant and the two minor children. Defendant-Respondent's 1976 income was $18,264.51 which should have been taken into consideration in determining the amount of alimony to be awarded in accordance with the holding in Anita Dumesnil Cummings vs. Patrick C. Cummings, 562 P.2d 229, (1977).

Plaintiff-Appellant, through Exhibits No. P-6, P-7, P-8 and P-11, showed the court that $375.00 per month alimony and child support was insufficient to support herself and the two minor children of the parties as said sum did not meet the basic needs of the family unit, let alone provide her funds for child care, gasoline, clothing, doctor, drugs and miscellaneous expenses. Further, Plaintiff-Appellant introduced Exhibit No. P-9 which indicated Plaintiff-Appellant

required $770.63 per month to properly support herself and the two minor children of the parties in a manner equivalent to the standard of living established by the parties during their marriage.

Considering the fact that the Plaintiff-Appellant had testified that the two children of the parties were two years and 10 weeks old, respectively, that she has no income, that she could not find work with children until they had attained the age of three years and could be cared for in a nursery school and, in light of the evidence of her living expenses and Defendant-Respondent's income, it is not unreasonable to require that this husband and father provide a suitable sum for support of the family, sufficient to keep them from becoming public charges of the State of Utah. The decision of the trial court, refusing to grant Plaintiff-Appellant alimony of $150.00 per month or more until her remarriage or death, is not only a clear abuse of the court's discretion and an error at law but totally ignores the uncontroverted fact that the Defendant-Respondent has the ability to support Plaintiff-Appellant and the two minor children of the parties in a manner equivalent to the standard of living established by the parties during their marriage.

In the recent decision of Janet M. English vs. W. Daniel English, 565 P.2d 409 (1977), the court set forth certain guidelines for the determination of a proper award of alimony:

> "The standard utilized by the trial court, viz., the length of the marriage and the contribution of each to their joint financial success, is not an appropriate measure to determine alimony. There is a distinction between the division of assets accumulated during the marriage which should be distributed upon an equitable basis and the post-marital duty of support maintenance.
>
> The purpose is to provide support for the wife and not to inflict punitive damages on the husband. Alimony is not intended as a penalty against the husband nor a reward to the wife". .2 Nelson Divorce and Annulment (2nd Edition, 1961 Rev. Vol., Section 14.06, pages 11 and 12).

In Nance vs. Nance, 107 Arizona 411, 489 P.2d 48,50 (1971), the Court stated:

> "The most important function of alimony is to provide support for the wife as nearly as possible to the standard of living she enjoyed during the marriage, and to prevent the wife from becoming a public charge. The Court observed that criteria considered in determining a reasonable award for support and maintenance included the financial conditions and needs of the wife, the ability of the wife to produce sufficient income for herself and the ability of the husband to provide support." (Emphasis added.) Stein vs. Stein, 196 Montana 496, 499 P.2d 794 (1972); Thompson vs. Thompson, 82 Wash.2d

352, 510 P.2d 827 (1973); Burnside vs. Burnside, 85 New Mexico 517, 514 P.2d 36 (1973); Carlton vs. Carlton, 217 Kansas 631, 583 P.2d 727 (1975).

In Hendricks vs. Hendricks, 91 Utah 553, 559, 63 P.2d 277 (1936), the Court stated:

> "The amount of alimony is measured by the wife's needs and requirements considering her station in life and upon the husband's ability to pay."

The English decision, supra, clearly establishes that alimony should be sufficient to prevent the wife from becoming a public charge and should support her as nearly as possible to the standard of living enjoyed during the marriage. The award of $75.00 per month alimony for the Plaintiff-Appellant and $300.00 child support out of a net income of $1,323.55 per month available to the Defendant-Respondent is an abuse of the court's discretion. Such a decision, if allowed to stand, will not only require Plaintiff-Appellant to seek assistance from the State of Utah to support herself and the two minor children of the parties but is such an unfair application of the principles of law and equity that it requires to be reversed and to have this court make its own findings as established in Nona W. Watson vs. Norman A. Watson, 561 P.2d 1072 (1977).

Upon a careful evaluation of the record, Plaintiff-

Appellant believes a fair and equitable amount that should have been awarded to her as alimony would be at least $150.00 per month.

POINT II.

THE COURT ERRED IN ITS FAILURE TO AWARD THE PLAINTIFF-APPELLANT A CASH SUM EQUIVALENT TO ONE-HALF OF THE BONUS AND THE ACCUMULATED RETIREMENT ACCOUNT OF THE DEFENDANT-RESPONDENT.

It is the Plaintiff-Appellant's position that Defendant-Respondent's retirement account of $2,104.09 plus the unposted accumulations and the bonus received by him on the 10th of April, 1977 of $1,800.00 gross and $1,255.00 net was a marital asset to be divided between the parties in accordance with §30-3-5 Utah Code Annotated, 1953:

> "When a decree of divorce is made, 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."

The Defendant-Respondent did not contradict that he received the bonus of $1,800.00 on the 10th day of April, 1977 and that he had accumulated in his retirement account $2,104.09 plus earnings to be posted in July of 1977.

The evidence clearly established that Defendant-Respondent had complete control of the bonus received

one month prior to the trial of this matter and did not consult with the Plaintiff-Appellant or take into consideration her needs or those of the two minor children of the parties in how the funds should be spent. The trial court should have considered the bonus received and those to be received by the Defendant-Respondent as income duri any taxable year and thus should have awarded her a greate sum as alimony or as a marital asset to be divided equall between the parties. The court's failure to award Plaint Appellant alimony of a sufficient sum to support herself the children or an equitable division of these assets effe tively denied Plaintiff-Appellant a fair and equitable dis tribution of this marital estate.

It is quite clear from case decisions being handed down throughout the country that courts are considering accumulations in retirement accounts as assets acquired by the parties during the marriage which constitute marital property to be divided between the parties, In re Marriage of Brown, 126 Ca.Rptr. 633, 544 P.2d 561 (1976); Smith vs. Lewis, 118 Ca.Rptr. 621, 530 P.2d 589, (1975); Ramsey vs. Ramsey, 96 Ida. 72, 535 P.2d 53, (1975); LeCler vs. LeClert, 88 N.Mex. 235, 453 P.2d 755, (1969); Morris

Morris, 419 P.2d 129 (1966); Payne vs. Payne, 82 Wash.2d 573, 512 P.2d 736 (1973) and Wilder vs. Wilder, 84 Wash.2d 364, 534 P.2d 1355 (1975). The Plaintiff-Appellant further cites the following equitable distribution state as having further supported her position that retirement plans are marital property to be divided between the parties at the time of the dissolution proceedings, In re Marriage of Powers, Missouri, 527 SW2d 944 (Mo. App. 1975) where the husband's interest in a private company profit sharing was determined as marital property to be divided between the parties, Callahan vs. Callahan, N.J. 2 Fam. L. Rptr. 2585 (N.J. super. Ct. June 16, 1976); Kruger vs. Kruger, 139 N.J. super. 413, 354 Atl.2d 340 (1976); Blitt vs. Blitt, 139 N.J. super. 213, 253 Atl.2d 144 (1976); White vs. White, 136 N.J. super. 552 (App. Div. 1975); Hughes vs. Hughes, 132 N.J. super. 559, 334 Atl.2d 379 (1975); Pinkowski vs. Pinkowski, 67 Wis.2d 176, 226 N.W.2d 518 (1975),(prior case decided). In the Brown decision, supra, the Court overruled its prior position that a retirement account was not a marital asset of the parties, stating:

> "As we shall explain, the French Rule cannot stand because non-vested pension rights are not an expectancy, but a contingent interest in property; furthermore, the French Rule compels an inequitable division of rights acquired

through a community effort. Pension rights, whether or not vested, represent a property interest. To the extent that such rights derive from employment during coverture, they comprise a community asset subject to division in a dissolution proceedings."

The Brown case, supra, further went on to deal with the de-

nition of the term vested and indicated that:

"In the divorce and dissolution cases following French vs. French, however, the term "vested" has acquired a special meaning; it refers to a pension right which is not subject to a condition of forfeiture if the employment relationship terminates before retirement.[1] We shall use the term "vested" in the latter sense as defining a pension right which survives a discharge or voluntary termination of employee."

"Depending upon the provisions of the retirement program, an employee's right may vest after a term of service even though it does not mature until he reaches retirement age and elects to retire."

The Brown case, supra, further went on to specifically sta-

that such pension plans represent a form of deferred compen-

sation for services rendered and the employees right to suc-

benefit is a contractual right derived from the terms of

his employment contract.

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1 See article, The Identification and Division of Entangible Community Property; Slicing The Invisible Pie, 1973 6 U.C. Davis Law Review 26, 29-31.

The cases have further indicated that a pension or retirement fund is in fact earned property by virtue of the years of work a person has placed in his employment and is in fact deferred compensation rather than a gratuity, Ramsey vs. Ramsey, supra; LeClert vs. LeClert, supra; Morris vs. Morris, supra; Marriage of Brown, supra.

In reviewing the various cases, Plaintiff-Respondent specifically refers the Court to Smith vs. Lewis, 118 Ca. Rptr. 621, 530 P.2d 589 (1975), wherein the wife had brought a malpractice action against her attorney for the divorce proceeding for his failure to assert her position with regard to her former husband's National Guard Federal and State Retirement Beneifts. The Court held:

> "That the retirement benefits which flow from the employment relationship, to the extent they are vested, are community property subject to equal division between the spouses in event the marriage is dissolved . . (additional case cited) because such benefits are part of the consideration earned by the employee, they are accorded community treatment regardless of whether they derive from the State, Federal or private source, or from a contributory or non-contributory plan."

This court, in Baker vs. Baker, 551 P.2d 1263 (1976) and in Hanson vs. Hanson, 537 P.2d 491, Utah 1975, has clearly stated:

> "That the trial court has considerable latitude and discretion in adjusting

> financial and property interests and it is the burden of the moving party to show that there was either a misunderstanding or misapplication of the laws resulting in a substantial or prejudicial error; or that the evidence clearly preponderated against the findings; or that such a serious inequity has resulted as to manifest a clear abuse of discretion.

In the particular case at hand, the parties, during the marriage, had acquired a 1974 Pinto automobile, a 1974 Ford Galaxie, furniture, a credit union savings account with Grand Central, Defendant-Respondent's semi-annual bonuses, a tax return of $588.00 and a profit sharing plan of $2,10[illegible] plus earnings from Defendant-Respondent's employer, Grand Central. The court, in its Memorandum Decision, divided the furniture between the parties pursuant to their agreement, awarded each of the parties one of the automobiles, divided the income tax refund between the parties, gave Plaintiff-Appellant the care, custody and control of the two minor children of the parties and the sum of $150.00 per child per month for child support and $75.00 per month alimony and awarded the Defendant-Respondent the April bonus of $1,800, all future bonuses and his profit sharing plan in the sum of $2,104.09 plus unposted earnings, without compensating Plaintiff-Appellant in any manner. Such an unequal distribution of the bonuses and profit sharing plan is a clear abuse of

the court's discretion.

CONCLUSION

It is respectively submitted by the Plaintiff-Appellant that the judgment of the trial court should be reversed and that she should be awarded at least the sum of $150.00 per month as alimony without any limitation and that she should be awarded a cash sum equivalent to one-half of Defendant-Respondent's retirement and net bonus together with attorney fees and costs associated with this appeal.

Respectfully submitted,

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