1978

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

Utah Supreme Court

Paul H. Liapis; Attorney for AppellantPete N. Vlahos; Attorney for Defendant

IN THE SUPREME COURT OF THE

STATE OF UTAH

CHRISTINE CORDOVA, /

Plaintiff and /
Appellant, /

vs. / Case No. 15[illegible]

DANIEL J. CORDOVA, /

Defendant and /
Respondent. /

BRIEF OF RESPONDENT

An Appeal from the Judgment of [illegible]
Judicial District Court of [illegible]
State of Utah, The Honorable [illegible]
Judge Presiding.

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BRIEF OF RESPONDENT

STATEMENT OF THE KIND OF CASE

This is an action for divorce brought by the Plaintiff and Appellant, Christine Cordova, against the Defendant and Respondent, Daniel J. Cordova.

DISPOSITION IN LOWER COURT

Upon an evidentiary trial held before the Honorable George E. Ballif, one of the Judges of the Fourth District Court, the Court found sufficient fault to award a Decree of Divorce to both the Appellant and the Respondent (R-38). The Trial Court awarded to the wife, who is the Appellant herein,

the sum of $300.00 for both of the children who were issue of this marriage, and in addition, awarded to the Appellant $75.00 per month as alimony to continue for a period of 36 months (R-39).

In addition, the Court awarded to the Appellant a $40,000.00 life insurance policy on the life of the Respondent, with the Respondent to maintain the premiums thereon and made a division of the household furniture. The Court ordered the parties to divide equally a $588.00 income tax refund for the year 1976. Upon a Motion for New Trial, or in the Alternative, to Amend the Findings of Fact and Conclusions of Law and Decree of Divorce, the Court reaffirmed its original Findings of Fact and Judgment, whereupon the Appellant filed a Notice of Appeal to this Honorable Court.

RELIEF SOUGHT ON APPEAL

The Appellant seeks to reverse the Findings of Fact, Judgment and Decree of the Lower Court, and the Respondent seeks reaffirmation of the Findings and Judgment of the Lower Court.

STATEMENT OF FACTS

The Clerk of the Lower Court having failed to mark each page of the two Transcripts with consecutive numbers, the Respondent will refer to the two Transcripts by references

first to the volume, C-92 or C-93, and the page number thereof.

The parties were married on the 21st day of August, 1973, and the marital relationship between the parties were severed in November, 1976, for a total period of approximately 39 months (R-22). There was born as issue of this marriage two children (C-93, p.4).

During the course of the marriage, the Appellant worked for two years out of the 39-month marriage (C-93,p.24) and the Respondent is an employee of Grand Central Stores for approximately seven years.

The Appellant was employed prior to the marriage to the Respondent, and during the 39-month marriage worked for two years as an employee of 7-Eleven Stores, as a cashier for Grand Central, and as a forklift driver for Grand Central Warehouse (R-25), and stated as a witness, that she was presently in good health (R-26).

The Appellant was awarded all of the household furniture and furnishings, other than a color TV set and stereo, which the Respondent owned prior to the marriage (R-33), and the Respondent was possessed only of a loveseat and a black chair which the Court ordered should be turned over to the Appellant (R-38). The Appellant was awarded the 1974 Pinto automobile and the Respondent, a 1974 Ford Galaxie, (R-40), and the Court further divided between the Appellant and

Respondent a federal income tax refund in the amount of $588.00, as well as payment by the Respondent of all the debts of the marriage, except for the payments on the motor vehicle awarded to the Appellant and $30.00 owing State Department of Unemployment Security.

ARGUMENT

POINT I

DISCRETION OF TRIAL COURT IN ADJUSTING FINANCIAL AND PROPERTY INTEREST OF PARTIES SHOULD BE UPHELD.

The Trial Court heard all of the testimony offered by all of the witnesses presented by the Appellant and the Respondent, and the Court made a Finding of Facts (R-41) and entered a Decree of Divorce (R-38) granting to each of the parties a Decree of Divorce, thereby evidencing that the Court believed that both of the parties were equally at fault.

The Court then, upon having heard all of the evidence presented by the parties, entered a Decree of Divorce awarding to the Appellant $300.00 a month for the two minor children; $75.00 alimony for a period of 36 months (R-38), even though the marriage had existed only for a period of 39 months (R-22); awarding all of the household items of furniture and furnishings; awarding to the Appellant a Pinto motor vehicle; ordering the

Respondent to maintain a $40,000.00 life insurance policy on the life of the Respondent with the beneficiaries being the children; ordering the Respondent to maintain health and accident insurance on the children; awarding to the Appellant attorney's fees of $450.00 and costs; and dividing a $588.00 federal tax refund equally between the Appellant and the Respondent (R-44,-45).

In the English v. English case, 565 P.2d 409, Supreme Court of Utah (June 2, 1977), this Court stated:

> The Trial Court, in a divorce action, has considerable latitude of discretion in adjusting financial and property interests. A party appealing therefrom has the burden to prove there was a misunderstanding or misapplication of the law resulting in substantial and prejudicial error; or the evidence clearly preponderates against the findings; or such a serious inequity has resulted as to manifest a clear abuse of discretion.

The Court properly found that the Appellant is capable of working and the evidence showed that the Appellant worked prior to the marriage and for a two-year period of the short period of time during which the parties were married (C-92,p.26), and based upon the evidence presented as to the earnings of the Respondent, determined that a total sum of $375.00 as and for child support and alimony was in the Court's judgment a fair and equitable distribution of income to the Appellant.

Testimony was taken from the Personnel Director of the Respondent's employer, together with the introduction of

Plaintiff's Exhibit 12, evidencing gross earnings by the Respondent for the period of January 1 through May 15 of $8,151.00, which includes a bonus payment (C-92,p.9), from the gross earnings would be federal taxes deductible in the amount of $1,408.39, state taxes in the amount of $309.86, and F.I.C.A. in the amount of $476.79, with a net earnings of $5,955.96.

The total accumulated profit sharing of the Respondent for a period of seven years employment evidence as of August 1, 1976, an accumulation of the sum of $2,104.09 (C-92,p.14). The parties having been married for a period of only approximately three years would mean that approximately $1,000.00 of the profit sharing was earned during the course of the marriage, and it was further testified to that the funds can be withdrawn only upon the termination from employment or death of the Respondent (C-92,p.14).

The reference to bonuses to be paid in the future to the Respondent is by the very nature of the testimony of the Personnel Director of the employer a highly speculative consideration, in that a determination of the particular bonus of the Respondent is determined by the employer setting aside five percent of its profits before taxes and determining those who are qualified to receive participation therein, and do so by considering the gross profits, payroll, period of time,

sales volume, turn over of the merchandise, the people he has trained and his contribution to a team effort (C-92,p.15). In addition, the testimony was that the bonus is not a guaranteed bonus and that it varies with the store, and the performance and the profit of a company, and that the company has no obligation to pay, even if it should have a profit. (C-92,p.19)

The total wages received by the Respondent for the year 1976 was in the gross amount of $18,264.51, but included therein is the bonus paid and approximately $1,900.00 in moving expenses, travel expenses, and expenses for allowances (C-92, p.18).

Plaintiff's Exhibit 12 further shows that included in the gross earnings is the amount of $1,800.00 from which was deducted federal and state taxes and F.I.C.A., leaving a net $1,255.50.

In Hansen v. Hansen, 537 P.2d 491, Supreme Court of Utah (June 25, 1975), the Court restated its holdings in Mitchell v. Mitchell, 527 P.2d 1359, Supreme Court of Utah (1974), wherein the Court stated:

> In a divorce action, the Trial Court has considerable latitude of discretion in adjusting financial and property interest. The burden is upon the Appellant to prove that there was a misunderstanding or misapplication of the law resulting in substantial and prejudicial error; or that the evidence clearly preponderates against the findings as made; or a serious inequity has resulted as to manifested clear abuse of discretion.

In MacDonald v. MacDonald, 236 P.2d 1066, Supreme Court of Utah (Nov., 1951), this Court stated that based upon the opinion of Chief Justice Wolfe in the case of Pinion v. Pinion, 92 Ut. 255, 67 P.2d 265, the Court developed a general formula for attempting to get all of the factors together in perspective and compare and evaluate them in adjusting the rights and obligations of the parties; and the Court further stated:

> The first six points relate to conditions existing at the time of the marriage: (1) The social position and standard of living of each before marriage; (2) the respective ages of the parties; (3) What each may have given up for the marriage; (4) What money or property each brought into the marriage; (5) The physical and mental health of the parties; (6) The relative ability, training, and education of the parties.

In reference to (1), both of the parties lived together prior to the marriage (C-93,p.30), and the Court in its Findings of Fact found that the parties failed to adopt to the particular problems presented by the other, including prior life style and different family backgrounds.

In reference to (2), there is no testimony as to the respective ages of the parties, however, the age of the children and general record indicates the parties are not old.

In reference to (3), the Record will show that nothing significant was given up by either of the parties prior to the marriage.

In reference to (4), it would appear that both of the

parties were employed and there is nothing in the Record to show anything of substance was brought into the marriage, other than the fact that the Respondent owned a TV set and a stereo (R-33).

In reference to (5), there is specific testimony as to the good health of the Appellant and there is no testimony showing any disability as to the Respondent. (R-26)

In reference to (6), it would appear that both of the parties had no particular training and education, but are capable of employment and have the ability to make a living independent of each other.

The Court in the MacDonald case, supra, stated that the following points relate to conditions to be appraised at the time of the divorce and stated the points as follows:

(7) The time of duration of the marriage.

(8) The present income of the parties and the property acquired during the marriage and owned either jointly or by each now.

(9) How it was acquired and the efforts of each in doing so.

(10) Children reared and their present ages and obligations to them or help which may, in some instances, be expected.

(11) The present mental and physical health of the

parties.

(12) The present age and life expectancy of the parties.

(13) The happiness and pleasure or lack of it experienced during marriage.

(14) Any extra ordinary sacrifice, devotion, or care which may have been given by the spouse or others, such as mother, father, etc., and obligations to other dependents having a secondary right to support.

(15) The present standards of living and needs of each, including the cost of living.

In reference to (7), the Record evidences that the duration of the marriage was approximately three years (C-92,p.2

In reference to (8), the evidence of the income of the Respondent has been previously set forth hereinabove and the Appellant, while unemployed, is in good health as set forth hereinabove and has been previously employed, and in fact the Respondent stated, that he can obtain employment for the Appellant forthwith (C-93,p.34).

In reference to (9), it would appear that there is not much in the way of real assets acquired by either of the parties, but that the major contribution was by the Respondent, and the Order of the Court through its Judgment and Findings of Fact (R-39,-46) awarded to the wife all of

the furniture, one-half of the federal withholding, practically all of the debts to be paid by the Respondent, including the attorney's fees and Court costs for the Appellant, the equity in the Pinto automobile with the balance to be paid by the Appellant, the maintenance of health and accident insurance, a life insurance policy for $40,000.00, and $375.00 a month as and for child support and alimony, with same substantially compensatory for a marriage of approximately three years.

In reference to (10), the two children of the present marriage are of the ages presently of approximately one year and three years (R-68) and was considered by the Lower Court in the setting of support in the total sum of $300.00, together with the continuing obligation of the Respondent for a prior child for whom he pays the sum of $75.00 a month. (C-92,p.37)

In reference to (11), the present mental and physical health of both of the parties appears to be good.

In reference to (12), it would appear that both of the parties are young and should have a substantial life expectancy.

In reference to (13), the comments of the Court (R-42) and the awarding by the Court of a Decree of Divorce to both of the parties would evidence that there was a lack of happiness and pleasure experienced during the marriage by both of the parties.

In reference to (14), there is nothing extraordinary in the present action before the Court as would justify any consideration of this element in consideration of the Appeal of the Appellant.

In reference to (15), it would appear that the parties are average people having average standards of living and that the support and alimony awarded, together with the personal property awarded to the Appellant and the Appellant's ability to be employed in a reasonable paying job, would create no extra ordinary situation as to the standards of (15).

In the MacDonald case, the Court again reiterated the accepted position of the Court, that a divorce Judgment will not be disturbed unless the evidence clearly preponderates against the findings of the Trial Court where there has been a plain abuse of discretion or where there is a manifest injustice or inequity brought by reason of the decision of the Lower Court.

It is further submitted to the Court, that any present interest of the Respondent in the profit sharing plan is first based upon his obtaining same by death or termination of employment, and is secondly of such an insignificant amount and is payable at such a long future indeterminate point of time as to not jusitfy penalizing the Respondent by compelling him to make any greater sacrifice out of pending and present

income as could be justified based upon the nature of the employment of the Respondent and the demands of his employer in compelling the Respondent to continuously move from area to area, together with the payment of existing debts, together with child support and alimony.

In Wilson v. Wilson, 5 Ut.2d 79, 296 P.2d 977, (May, 1956), this Court set forth the duty of the Court in granting a divorce to the parties and stated:

> The Court's responsibility is to endeavor to provide a just and equitable adjustment of their economic resources so that the parties can reconstruct their lives on a happy and usual basis.

This Court then again referred to the Pinion v. Pinion, supra, and MacDonald v. MacDonald, supra, as a consideration to be undertaken by the Court in achieving this end.

POINT II

THE COURT CANNOT CREATE ESTATE FOR MINOR CHILDREN.

The Court in its Decree of Divorce decreed that the Respondent must maintain his minor children as the beneficiaries of his term insurance in the face amount of $40,000.00 without limitation as to time, thereby creating an estate in the minor children.

In English v. English, supra, the Supreme Court of Utah held:

> Since the record does not reveal that any of the children have an incapacity or disability, the

> Defendant's duty to support them terminates at the age of 21. A Court may not, under a Decree of Divorce, attempt to transfer any property of either parent to the children, for the purpose of creating an estate for their permanent benefit. Furthermore, the Court may not make provision out of the property of either of the parties for the maintenance of children who are of age, and who are not physically incapacitated.

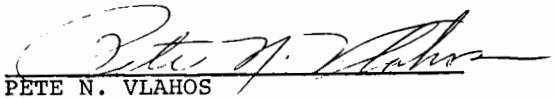
There is no testimony in the Record before the Court indicating any disability or incapacity of the children, and it is submitted to the Court that the ruling of the Utah Supreme Court in English v. English, supra, wherein the Decree was modified to provide that the children shall remain beneficiaries until each shall attain the age of 21 would be at most the length of the award for the children as to being beneficiaries of the term insurance of the Respondent herein.

CONCLUSION

It is submitted to this Honorable Court, that the Lower Court considered all of the evidence and facts presented by testimony of both the Appellant and the Respondent and their witnesses and that there has been no preponderance of evidence submitted by the Appellant herein, that the Lower Court misunderstood or misapplied the laws of the State of Utah, and that there was a resulting substantial or prejudicial error or a clear abuse of discretion or a serious inequity as a result of the Judgment of the Lower Court, and

that the Lower Court's Judgment should be upheld; except that there should be a modification of the award of the term insurance of the Respondent to the minor beneficiaries wherein there was created an estate for said minor beneficiaries, and that there should be a limitation on the award of the term insurance until the minor beneficiaries shall have been emancipated, or at most, until they have reached the age of 21.

Respectfully submitted,



PETE N. VLAHOS
Attorney for Respondent

CERTIFICATE OF MAILING

A copy of the foregoing Brief of Respondent was posted in the U.S. mail postage prepaid and addressed to the Attorney for the Appellant, Paul H. Liapis of Gustin and Gustin, 1610 Walker Bank Building, Salt Lake City, Utah 84111, on this 1 day of March, 1978.

Jeannine Stowell, Secretary