1986

Hugh P. Vonzell Ruhsam, Jr. v. Janet Elizabeth Ruhsam : Brief of Respondent

Utah Supreme Court

Pete N. Vlahos; Vlahos & Sharp; Attorney for Respondent.
B.L. Dart, John D. Parken; Dart, Adamson & Parken; Attorney for Appellant.

NO 860128-CA IN THE SUPREME COURT OF THE STATE OF UTAH

HUGH P. VONZELL RUHSAM, JR.,

Respondent,

vs.

JANET ELIZABETH RUHSAM,

Appellant.

860128-CA

Case No. 20727

RESPONDENT'S BRIEF

Appeal from the Judgment of the Second District Court
in and for Weber County
The Honorable John F. Wahlquist Presiding

PETE N. VLAHOS
Vlahos & Sharp
Legal Forum Building
2447 Kiesel Avenue
Ogden, Utah 84401

Attorneys for Respondent

B. L. DART
JOHN D. PARKEN
Dart, Adamson & Parken
Suite 1330, 310 South Main
Salt Lake City, Utah 84101

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

IN THE SUPREME COURT OF THE STATE OF UTAH

HUGH P. VONZELL RUHSAM, JR., Respondent, vs. JANET ELIZABETH RUHSAM, Appellant.	Case No. 20727

RESPONDENT'S BRIEF

ISSUES PRESENTED

1. Should the Judgment of the Lower Court prevail unless there is proof of an abuse of discretion or evidence of manifest injustice?

2. Did the Appellant receive an equitable division of the assets of the marriage?

STATEMENT OF THE CASE

This is an appeal from a decision of the Lower District Court, wherein the Court entered Findings of Fact and Decree of Divorce based upon the evidence heard by the Lower Court involving an action of divorce as between the Appellant and the Respondent, involving a fourteen (14) year old marriage, from which there were no children as issue of the marriage. Appeal by the Appellant is from the Decree of the Court

alleging that the alimony and property distributions decreed by the Lower Court constituted an abuse of discretion.

STATEMENT OF FACTS

At the time of the hearing for divorce before the Court, Appellant was forty-nine (49) years of age, (R. 109) and the Appelant was a retired Colonel from the U.S. Air Force, having retired April 30, 1979. (R. 106) The parties were intermarried on December 18, 1970 and no children were born as issue of the marriage. (R. 248) The total marriage of the parties was fourteen (14) years. (R. 104-105) Each of the parties was granted a Decree of Divorce. (R. 116)

The Court awarded to the Appellant a part of the Respondent's military retirement based upon the marriage of the parties December 18, 1970, and the retirement of the Respondent from the Air Force on April 30, 1979, which computed to 31.1% of Respondent's retirement occurring during the course of the marriage, for which the Appellant was awarded one-half (½), or the percentage of 15.55 of the monthly retirement of the Respondent, which is 15.55% of $2,941.00 monthly, (TR. 239) for a monthly retirement allowance to the Appellant in the sum of $457.32, together with a further award of alimony by the Respondent to the Appellant

in the sum of $600.00 monthly, for a total sum of $1,057.32 monthly. Previous to the order of the Decree of Divorce, the Appellant and Respondent divided equally precious metals and reserves with a value of $69,084.00. (TR 296) There are additional assets to be divided between the parties from the sale of two (2) homes, with the Respondent alleging the family home to be worth $98,000.00 and a Roy home having a value of $55,000.00. (TR 179, 181)

The respective health of the Appellant and the Respondent will be discussed under the issues.

SUMMARY OF ARGUMENT

There is no evidence whatsoever to support the allegations of the Appellant that there has been an abuse of discretion by the Court as to the division of the real and personal property assets of the parties and in the Court's awarding to the Appellant a fair share of the military retirement of the Respondent as dictated by the case law of the State of Utah, and as is more particularly set forth hereinafter in Respondent's Brief.

The property distribution ordered by the Court is a equal distribution of all of the real and personal property assets of the parties, and the award made by the Court as permanent alimony and as permanent retirement participation

by the Appellant, together with the assets awarded to the Appellant and even considering the previous earning capacity which has been admitted as earned by the Appellant, the Appellant's monthly income is substantially in excess of the needs of the Appellant as was set forth at R. 86 by the Appellant's Affidavit as to what the Appellant deemed was necessary for continued maintenance, without in any way invading or impairing the substantial assets which the Appellant has received by reason of the decree of the Court in dividing the assets of the parties.

ARGUMENT

POINT I.

THE LOWER COURT MADE AN EQUITABLE DIVISION OF ALL ASSETS OF THE MARRIAGE

There is no evidence whatsoever upon which to make allegation that the division of assets, as between the parties, was inequitable and an abuse of discretion of the Court.

This Court has held in Cox vs. Cox, 532 P.2d 1994 (Supreme Court of Utah, 1975) that there was no fixed formula which a Trial Judge must follow in making a division of properties. In Hamilton vs. Hamilton, 562 P.2d 235 (Supreme Court of Utah, 1977), this Court stated that it is the

prerogative of the Court to make whatever disposition of property it deems fair, equitable and necessary for the protection and welfare of the parties, and in Jesperson vs. Jesperson, 610 P.2d 326 (Supreme Court of Utah, 1980), this Court stated that the Lower Court's division of property and assets will not be disturbed on appeal unless the record shows there has been an abuse of discretion.

This is a marriage between two (2) adult persons who had each been previously marriage, (R. 96) and with no children as the issue of the marriage between the parties herein.

The parties were intermarried on December 18, 1970 and were married for a period of fourteen (14) years. (R. 96) At the time of the divorce, the Appellant was forty-nine (49) years of age, (R. 248) and the Respondent was fifty-six (56) years of age. (TR. 217)

The Appellant, in her Brief, seeks to show that at the age of forty-nine (49), she is practically totally incapacitated and requires the lifetime assistance of the Respondent because of the Appellant's practical total disability.

The Appellant produced an expert witness, Dr. Lyle H. Archibald, a general surgeon, who is a personal physician to the Appellant, as an expert witness in regards to the dis-

ability of the Appellant, and upon cross-examination by counsel for Respondent, the following dialogue was recorded:

> Question: Okay. Do you see any -- Do you see any problems physically from the operation you performed on Mrs. Ruhsam that would hinder her from gaining some type of employment? I am not talking about digging ditches, you understand that.
>
> Answer: No, I am sure she is physically capable of performing some kind of employment or being employed in some form of work.
>
> Question: Such as a secretary maybe? A receptionist?
>
> Answer: I think that some of those skills she would be able to do, yes. (R. 196-197)
>
> Question: In connection with people that have undergone the type of surgery you performed and with the prior surgery, do you know whether these people would be candidates to receive social security benefits?
>
> Answer: I don't.
>
> Question: Or SSI benefits?
>
> Answer: No I don't. (TR. 197)
>
> Question: Well, let me ask you this doctor, I would assume you have performed many of these operations?
>
> Answer: I have.
>
> Question: And do you recommend to people becoming active after the operation?

Answer: I recommend that they don't change their lifestyle, that they continue doing what they were doing pre-operatively.

Question: If they were working, they should work and do the things they use to do before?

Answer: Thats right.

Question: Would you make the same recommendation for Mrs. Ruhsam?

Answer: I would. (TR. 198)

The Respondent is fifty-six (56) years of age and retired from the Air Force with a VA disability rating of 10%. (TR. 217) At the time of Respondent's retirement from the Air Force, he had been married to the Appellant for eight (8) years and four and a half (4½) months, for a total of 100.5 months. (TR. 217)

The Court made an equitable division of the assets of the parties, by acknowledging that the items of gold, silver and cash reserve management accounts that have already been divided shall be accepted by the Court and considers it as each having received one-half (½) of those assets, which in accordance with Exhibit 11P, is a division of $34,542.00 to each of the parties.

The Appellant is possessed of gold coins and silver from a prior marriage, with a value in the sum of $18,950.00. (Exhibit 11P)

The Appellant will further receive the approximate sum of $45,500.00 from the sale of real estate divided at the time of the Decree of Divorce which added to the previous sums possessed or received by the Appellant makes a total share of the Appellant in the assets of the marriage in the amount of $98,992.00. (Exhibit 11P)

The Appellant's Affidavit of the funds deemed by the Appellant as necessary for her support as set forth in her sworn Affidavit, Exhibit R86, evidences a total need of the Appellant for the month in the sum of $1,326.50.

Considering the return on funds in the amount of $98,000.00 as set forth hereinabove, which the Appellant will possess, plus the participation in the retirement of the Respondent in the sum of $457.32, (which will increase with cost of living increases granted to retired personnel) and alimony in the sum of $600.00 monthly, would appear to be a more than equitable share of the earnings of the Respondent, where the Appellant is seven (7) years younger than the Respondent, has no issue to care for and in addition, admits earnings of $200.00 a month from the spare time selling of Avon products.

The calculation and division of the retirement of the Respondent was done in accordance with the formula set forth

by the Supreme Court in Woodward vs. Woodward, 656 P.2d 431 (Supreme Court of Utah, November 4, 1982).

In DeMard Jones vs. Harriet H. Jones, 8 UAR 14 _____ P.2d at _____, this Court ruled on a property distribution and alimony settlement, wherein the parties were married for twenty-eight (28) years, had four (4) children as the issue of the marriage, had a retail business as the primary income-producing asset of the marriage, where the husband was a licensed pharmacist and wherein the wife spent her time raising the children, and wherein the alimony was in a reducing amount, with the Court holding that the wife was awarded only a small portion of the marital assets, thereby making the distribution inequitable.

In the instant matter before the Court, none of the elements of the Jones case are present.

This Court has previously held in Higley vs. Higley, 676 P.2d 379 (Supreme Court of Utah, 1983); and Dority vs. Dority, 645 P.2d 56 (Supreme Court of Utah, 1982) and in English vs. English, 565 P.2d 409 (Supreme Court of Utah, 1977), that the Trial Court has broad latitude in such matters and the orders distributing property and setting alimony will not be lightly disturbed. There is no question of a 50/50 division of all of the assets of the marriage

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 manifest a clear abuse of discretion. (Mitchell vs. Mitchell, 527 P.2d 1359, Supreme Court of Utah, 1974)

The contention of the Appellant that the Court abused its discretion in giving to each party the exclusive right to the use and sale of the property six (6) months at a time so that the property might be sold and setting forth the division of the personal property in a manner that will effectively assist in division of such personal property was done in a manner by the Court to expedite and not prolong the hostility between the parties, and the Court stated:

> "The Court has considered at length how the division of properties might be made. The Court deems a suggested division of each side to be plagued by self-interest. The Court encourages the parties to attempt to negotiate the details of the division during the next thirty (30) days. If they have not arrived at a detail split in accordance with the general principle that everything is to be divided equally, the Court will attempt to make such an outline." (R. 95-99)

The Court further made a division on the basis of the Appellant's list of property submitted and used exclusively

the Appellant's list from which to make a divison of the personal property of the parties and set forth an alternate method, of each selecting an item until all items on the list of the Appellant had been selected, provided that there could not be an agreement between the parties within the thirty (30) days the Court allotted to the Appellant and Respondent to arrive at an agreement. (R. 100-101)

CONCLUSION

It is submitted to this Honorable Court that the Court has gone the last mile to make an equitable division of all of the assets of the marriage as between the parties, and that there has been no abuse of discretion by the Court, in that every element has been considered from the evidence introduced into Court, and there is no evidence whatsoever of bias or prejudice on the part of the Court or of any intent on the part of the Court to do other than make a just and equitable division of the assets of the parties and expedite same so that each may be divorced and separated from each other and have a continued happy and productive

life apart from each other.

Respectfully submitted this 25 day of September, 1985.

VLAHOS & SHARP

BY _____
PETE N. VLAHOS,
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify, as counsel for Respondent, that four (4) true and correct copies of the foregoing Respondent's Brief were served upon counsel for the Appellant, by mailing same on the 25 day of September, 1985, addressed to the attorney for the Appellant, B. L. Dart and John D. Parken, at Suite 1330, 310 South Main, Salt Lake City, Utah 84101.

PETE N. VLAHOS,
Attorney for Respondent