1978

Connie Rae Pope v. Dan L. Pope : Brief of Defendant-Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

CONNIE RAE POPE,

Plaintiff-Respondent
and Cross-Appellant,

vs.

Case No. 15538

DAN L. POPE,

Defendant-Appellant
and Cross-Respondent.

Brief of Defendant-Appellant

APPEAL FROM JUDGMENT, DECISION AND DECREE OF DIVORCE OF THE DISTRICT COURT OF CACHE COUNTY, UTAH, HONORABLE VENOY CHRISTOFFERSEN, JUDGE

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NATURE OF THE CASE

This is a divorce case in which the district court, after a trial on the merits, entered a Decree of Divorce, from which the Defendant takes this appeal. Plaintiff-Respondent has cross-appealed from the trial court's failure to award alimony.

DISPOSITION IN THE LOWER COURT

The trial herein began on June 9, 1977. In the first session of the trial, the court, by minute entry, granted mutual decrees of divorce to the parties, awarded custody of their two minor children to the Plaintiff, Connie Rae Pope, and continued the trial to June 14, 1977 (R.37). On June 14, 1977 the court, after taking testimony, ordered that certain records be delivered to Plaintiff's accountant, and continued the case to June 16, 1977 for a third session (R.42). On June 16, 1977, the court heard further testimony and again continued the matter (r.44). After the lapse of more than one month, the fourth session of the trial was held on July 21, 1977, after which the case was taken under advisement until the following

day (R.46). No decision was rendered the following day, but the court filed a Memorandum Decision dated August 1, 1977 on August 2, 1977 (R.51). Counsel for Defendant-Appellant then filed specific objections to the Memorandum Decision and to the Findings and Conclusions tendered by Plaintiff's counsel (R.55). Counsel for Plaintiff then moved for clarification of the Memorandum Decision with respect to certain matters in issue with which the Memorandum Decision did not deal (R.61). In an apparent attempt to resolve all matters which had been raised by counsel after the court's Memorandum Decision, a fifth session was held on October 3, 1977, when a minute entry order was made and the Findings of Fact, Conclusions of Law and Decree of Divorce were finally filed (R.73,74,79). Defendant-Appellant moved for a new trial on October 12, 1977 (R.84), and the motion was denied both by Memorandum Decision filed October 31, 1977 (R.99) and by formal Order filed November 11, 1977 (R.103).

RELIEF SOUGHT ON APPEAL

The Defendant-Appellant here seeks reversal of the district court's Decree and remand of the case for a new trial or for the entry of Findings, Conclusions and a Decree which fairly, justly and equitably adjudicate the property rights of the parties.

STATEMENT OF FACTS

The parties were married on September 16, 1968 and have two children, born September 22, 1969 and November 11, 1972 (T.22). In the eight years following their marriage, the parties acquired real and personal property having substantial value. In June of 1977 when the trial in this case began, the parties' assets were as follows:

1. A combination permanent mobile home park — temporary trailer and camper park — campground known as the Western Park Campground, located in the City of Logan, Utah. The district court found the value of this property to be $154,500.00 (R.51).

2. A mobile home sales facility known as Four Seasons Mobile Home Sales, also located in Logan, Utah. It was stipulated that this property had a value of

$39,500.00 (T.46).

3. A trailer park-campground located near Bear Lake in Garden City, Rich County, Utah. The value of this property was stipulated to be $25,500.00 (T.46).

4. A residence in the city of Logan, Utah. Although the value of this property was sharply in dispute (T.50,84), the court below fixed its value at $46,500.00 (R.51).

5. Four mobile homes located in Smithfield, Utah, and used by the parties as rental properties. The value of these properties was also disputed; the district court fixed their value at $10,000.00 (R.52).

6. Equipment, trade fixtures and inventory connected with the Western Park Campground facility (no. 1, above); the court below fixed the value of this property at $2500.00 (R.52).

7. Equipment, trade fixtures and inventory connected with the Four Seasons Mobile Home Sales property (no. 2, above). In the court's Memorandum Decision, this property was valued at $9,728.00.

8. Household furniture and furnishings which the district court valued at $2500.00 (R.52).

9. Corporate stock in a business known as Crystal Hot Springs. This stock was purchased for $7500.00 (T.285), and the court below appears to have valued it at that figure (R.52).

10. A 1973 Chevrolet Corvette automobile which the district court erroneously believed was listed in the income tax depreciation schedule as inventory of Four Seasons Mobile Home Sales (R.52) (no. 7, above). Defendant-Appellant testified that he had paid $6,000.00 for this automobile in October of 1976 (T.141, 414). Because the district judge erroneously included this car in the inventory of one of the businesses, he did not fix its value. The only evidence in the record as to the value of this automobile is Defendant's Exhibit 23, where the car is valued $5,000.00.

11. A Toyota automobile purchased by Plaintiff-Respondent after the parties'

separation (T.283). The district court made no mention of this automobile in its Memorandum Decision (R.51) and the Findings of Fact, Conclusions of Law and Decree (R.74) also fail to take this vehicle into account. There was no testimony as to the value of this car except that Plaintiff-Respondent owed $1,500.00 on it (T.283) and the value of $1,000.00 shown in Defendant's Exhibit 23.

12. A Jaguar automobile (R.100), the value of which appears to have been set by the court at $400.00 (T.451), although the only evidence in the record as to the value of this vehicle is Defendant's Exhibit 23, stating that it was worth $500.00.

13. A Suzuki motorcycle which the lower court valued at $400.00 (R.52).

The parties' debts at the time of trial consisted of the following:

1. A total of $239,353.00 as listed in Defendant's Exhibit 23 (T.383).
2. The following additional debts:
   A. The sum of $1,500.00 owed on the Toyota automobile (T.283).
   B. The sum of $499.00 owed for a refrigerator purchased by Plaintiff-Respondent (T.338).
   C. A Sears charge account balance of $500.00 (T.302).
   D. A Montgomery-Ward charge account balance of $180.00 (T.303).

ARGUMENT

POINT I

THE TRIAL COURT'S DIVISION OF PROPERTY WAS BASED UPON A SERIES OF ERRORS AND OMMISSIONS THAT ARE NOT SUPPORTED BY THE EVIDENCE.

It would appear from the trial court's Memorandum Decision (R.54) and from subsequent proceedings below (T.451) that the trial judge decided to divide the parties' property equally, awarding to each one-half of that which they had acquired through their joint effort during the marriage. However, the court erred seriously in arriving at its attempt to divide the property. These errors include the following:

1. *Valuation of the equipment, trade fixtures and inventory of Four Seasons Mobile*

Home Sales. The district judge relied entirely upon the depreciation schedule of the parties' 1976 federal income tax return (Plaintiff's Exhibit 7) to determine both the composition and value of this property (R.52). The depreciation schedule, however, lists two items of "transportation equipment" which were clearly established by the testimony to have been sold prior to the trial. The first of these items was a Buick automobile which was sold in April of 1977 (T.142; Plaintiff's Exhibit 9); the other was a one-half interest in an airplane which was sold in November of 1976 (T.7, 147, 416; Defendant's Exhibit 1). The lower court further erred in fixing the value of this property in its assumption (R.52) that the Corvette automobile was included somewhere on the depreciation schedule (Plaintiff's Exhibit 7), which it plainly is not.

2. *Valuation of the parties' equity in the trailer park—campground at Garden City, Utah.* In its Memorandum Decision, the district court fixed the parties' equity in this property at $17,273.00 (R.51). The court seems to have arrived at this figure by subtracting the stipulated unpaid mortgage balance of $7,226.71 (T.164) from the stipulated value of $25,500.00 (T.45), leaving an "equity" of $18,273.00; the court below obviously made an error of $1,000.00 in making this subtraction. Of greater importance, however, is the lower court's failure to take into consideration the undisputed testimony of Defendant-Appellant (T.356) that this land at Bear Lake was owned jointly with his brother and sister, and that he had agreed with them that, in exchange for their conveyance of their interest to him, he owed each of them one-third the value of the land. Trial counsel attempted to rectify the court's failure to consider the interests of the brother and sister, first by objecting (R.57) to the Memorandum Decision and thereafter by motion for a new trial (R.84) supported by the affidavits of Defendant-Appellant (R.86), the brother (R.91) and the sister (R.92). The motion was summarily denied with no reason given (R.99, 103).

3. *Valuation of the parties' total "equity" in all properties.* The trial judge found that the parties' net "equity" in all properties was $88,187.00, and ruled that each party was entitled to one-half this sum or $44,093.00 (R.53). After awarding to Plaintiff-Respondent the home and household furnishings, the court subtracted the "equity" value of this property (amounting to $16,609.00 for the home and $2500.00 for the furnishings) from

one-half the total "equity", and ruled that Plaintiff-Respondent was entitled to the difference, or a lump sum cash award of $24,984.00 (R.82). In arriving at this figure, the trial judge made the errors that have been discussed in the two immediately preceding paragraphs. The court also made the following errors, all of which are completely contrary to the evidence:

A. *Omission of Assets:* The court below, in computing the parties' net "equity" in their property taken as a collective whole, failed to include assets which the evidence clearly proved existed. These assets include the Jaguar automobile (R.100), the Toyota automobile (T.283), the Corvette automobile (t.141) and the stock in Crystal Hot Springs (T.285).

B. *Inclusion of Non-Existent Assets:* As discussed above, the trial judge included a Buick automobile and a one-half interest in an airplane, both of which assets had been sold prior to the trial (T.7, 142, 147, 416; Plaintiff's Exhibits 7 and 9).

C. *Ommission of Debts:* The trial court completely ignored undisputed evidence in the record which established the existence of several debts owed by the parties:

1. The loan on Plaintiff-Respondent's automobile in the amount of $1,500.00 (T.283).

2. The debt owed to Defendant-Appellant's brother and sister on the Bear Lake property, amounting to $9,333.00 (T.356.413, R. 86, 91, 92).

3. Security deposits of $2,420.00 which had been collected by the parties from tenants of the various rental properties (Defendant's Exhibit 23; T. 383, 409).

4. Sales tax of $482.00 collected but not yet remitted to the State of Utah (Defendant's Exhibit 23, T.383, 410).

5. Debt arising from the operation of Western Park Campground, amountint at the time of trial to $1,501.00 (Defendant's Exhibit 23; T.393, 410).

6. Debt arising from the operation of Four Seasons Mobile Home Sales in

the sum of $7,371.00 (Defendant's Exhibit 23; T.393, 411).

7. A student loan of $597.00 (Defendant's Exhibit 23; T.393, 412).

8. A loan secured by the Corvette automobile in the amount of $4,304.00 (Defendant's Exhibit 23; T.383, 414).

9. A loan of $6,081.00 for operating expenses of Four Seasons Mobile Homes (Defendant's Exhibit 23; T.383, 415).

10. A shortage of $4,152.00 on the floor planning payments owed by Four Seasons Mobile Homes (Defendant's Exhibit 23; T.383, 416).

11. Interest payment of $645.00 owed on the Four Seasons floor planning (Defendant's Exhibit 23; T.383).

12. Property taxes of $976.00 owed by the businesses (Defendant's Exhibit 23; T.383).

Although the court attempted to place "equity" values on the various businesses, it is clear from the above that these debts, omitted in the court's computations of the "equity" values, are, except for numbers 1 and 7, additional debts against the various businesses, and must be considered.

It is fundamental to the approach taken by the trial judge, i.e., a determination of the "equity" the parties have acquired in their various properties, that such "equity" cannot exceed the difference between the total value of the parties' assets and their total liabilities. By omitting certain assets which existed, by including certain assets which had been sold long before trial, and by omitting debts totalling $39,362.00 (numbers 1 through 12 *supra*), from its computations, the court acted contrary to uncontradicted testimony and so arbitrarily that the result it reached is pervaded by error and omission.

The law in Utah is settled that where, as here, the trial court's decision is not supported by any evidence whatever, or is not supported by a fair preponderance of the evidence, this Court has the power to correct obvious errors made in the disposition of property. *Dahlberg v. Dahlberg,* 77 Utah 157, 292 Pac. 214 (1930); *Friedli v. Friedli,* 65 Utah 605, 238 Pac. 647 (1919).

POINT II

THE TRIAL COURT'S DIVISION OF PROPERTY AND ITS ORDERS REGARDING THE PAYMENT OF DEBTS WORK SUCH A SEVERE INEQUITY AS TO MANIFEST CLEARLY AN ABUSE OF DISCRETION.

In the decree of divorce (R.79) and in a subsequent order (R.100), the trial court awarded various properties to each party and ordered each party to pay certain obligations. Following is a summary of the distribution made:

CONNIE RAE POPE

PROPERTY AWARDED	VALUE	DEBTS ORDERED PAID	
Home	$46,500	Home	$29,891
Furniture	2,500		-0-
Jaguar	400		-0-
Stock	7,500		-0-
Toyota [1]	1,000	Automobile	1,500
Cash	24,984	Montgomery-Ward	180
TOTAL	$82,884	Refrigerator	499
		TOTAL	$32,070

DAN L. POPE

PROPERTY AWARDED	VALUE	DEBTS ORDERED PAID	
Bear Lake Facility	$ 25,500	1. All debts incurred during marriage (except home mortgage) . . .	$209,462 [3]
Western Park Campground	154,500		
Four Seasons Mobile Home Sales	39,500		
Mobile home-rental units	10,000		
Suzuki motorcycle	400		
Corvette automobile	5,000	2. Sears, Roebuck	500
Four Seasons inventory	9,278		
Western Park inventory	2,500	3. Cash to Plaintiff	24,984
Cash [2]	7,500		
TOTAL	$254,178	TOTAL	$234,946

These tables illustrate the effect of the trial court's errors and ommissions; Plaintiff-Respondent's net worth (assets minus liabilities) after the decree is $50,814.00, whereas that of Defendant-Appellant is $19,232, even assuming that the $7,500.00 cash

[1] No mention is made of this vehicle in the Decree or later orders; however, Defendant-Appellant has asserted no interest in this vehicle, so it is here considered to have been awarded to Plaintiff-Respondent.

[2] The district court, in its Memorandum Decision, "awarded" this to Defendant-Appellant, although there is no testimony that this fund existed at the time of trial.

[3] Summarized in Defendant's Exhibit 23.

which the court "awarded" to him existed (see note 2). This result is the very sort of manifest injustice to which this court has referred in prior decisions, and because the decision was founded in large part upon the errors and omissions discussed above, the division is, indeed, plainly arbitrary. In such cases, this Court must correct the trial court's abuse of its discretion. *Curry v. Curry,* 7 Utah 2d 198, 321 P.2d 939 (1958); *Pfaff v. Pfaff,* 121 Utah 277, 241 P.2d 156 (1952); *Allen v. Allen,* 109 Utah 99, 165 P.2d 872 (1946); *Anderson v. Anderson,* 104 Utah 104, 138 P.2d 252 (1943).

The inequity which results from the lower court's decision is even more apparent in view of the fact that Defendant-Appellant will be forced to liquidate one or more of his businesses in order to obtain the cash award he has been ordered to pay to Plaintiff-Respondent (R.90). It seems clear that to force Defendant-Appellant to sell his business is completely contradictory to the principle that the court's responsibility is to endeavor to provide a just and equitable adjustment of the parties' economic resources so that they may reconstruct their lives on a useful basis. *Wilson v. Wilson,* 5 Utah 2d 79, 296 P.2d 977 (1956).

POINT III

THE AWARDS OF ATTORNEY'S FEES AND COSTS ARE NOT SUPPORTED BY THE PLEADINGS AND THEREFORE CANNOT BE SUSTAINED.

The trial court awarded Plaintiff-Respondent the sum of $1,500.00 attorney's fees and $30.00 costs. These awards cannot be upheld by this Court because the pleadings in the record do not support them. The complaint filed on Plaintiff-Respondent's behalf by her first attorney in this matter alleges that Plaintiff should be awarded a reasonable attorney's fee, and it specifically states that " . . . a reasonable attorney's fee in this matter is $1,000.00" (R.2). Moreover, the complaint neither alleges nor prays for costs, and there is no prayer for general relief. It is fundamental law that a judgment must be consistent with and limited to that sought by the pleadings. 49 C.J.S., Judgments, § 49. It is submitted that the judgment for attorney's fees herein is limited by the complaint to the sum of $1,000.00, and that the award of $30.00 costs is not supported by any pleading whatsoever.

Accordingly, the judgment for attorney's fees should be reduced by remittitur to $1,000.00, and the judgment for costs should be eliminated entirely. The rule is concisely stated in *Voyles v. Straka,* 77 Utah 171, 292 Pac. 913 (1930): " . . . it would be improper in any case to award a judgment for what is not demanded." 292 Pac. at 914.

POINT IV

THE AWARD OF TEN PERCENT INTEREST ON THE JUDGMENT IN FAVOR OF PLAINTIFF-RESPONDENT IS EXCESSIVE AND CONTRARY TO LAW.

A judgment in the sum of $24,984.00 was awarded to Plaintiff-Respondent, and the trial court ordered that this judgment bear interest after six months at the rate of ten percent (10%) per year (R.82). The lower court may have had discretion to award this rate of interest, which is higher than the statutory rate of eight percent (8%) on judgments, if there had been some evidence in the record to support a finding that such an increase over the statutory rate was reasonable. However, there is nothing in the evidence to support such a finding; indeed, no such finding was made (R.74). Accordingly, the judgment should bear interest at the statutory maximum of eight percent (8%). The statutory language is mandatory: " . . . judgments shall bear interest at the rate of eight percent." § 15-1-4, Utah Code Annotated (1953). *See also* Rule 54(e), Utah Rules of Civil Procedure.

CONCLUSION

The decision of the district court rests upon many errors and omissions, and is manifestly unfair to Defendant-Appellant. If the Decree remain in force, he will be forced to sell one or more of the business enterprises which serve as the basis for his livelihood and the source of support for the parties and their children. The decision of the lower court should be reversed and the case remanded for a new trial, or with directions to enter findings and a decree consistent with such modifications as this Court may determine are necessary to effect a just and equitable division of the parties' property and debts.

Respectfully submitted this ___day of March, 1978.

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CERTIFICATE

I hereby certify that I mailed three (3) copies of the foregoing Brief of Defendant-Appellant to Pete N. Vlahos, Attorney for Plaintiff-Respondent, Legal Forum Building, 2447 Kiesel Avenue, Ogden, Utah 84401, postage prepaid, this ___day of March, 1978.

JAY D. EDMONDS