1978

Connie Rae Pope v. Dan L. Pope : Brief of Plaintiff-Respondent

Utah Supreme Court

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Pete N. Vlanos; Attorney for Plaintiff-Respondent;

IN THE SUPREME COURT FOR THE

STATE OF UTAH

CONNIE RAE POPE, /

Plaintiff and Respondent, /

vs. Case No. 15538

DAN L. POPE, /

Defendant and Appellant. /

BRIEF OF PLAINTIFF-RESPONDENT

Appeal from Judgment, Decision, and Decree of Divorce of the District Court of Cache County, Utah, Honorable VeNoy Christoffersen, Judge

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BRIEF OF PLAINTIFF-RESPONDENT

STATEMENT OF THE KIND OF CASE

This is an action of divorce brought by Connie Rae Pope, Plaintiff and Respondent, against Dan L. Pope, Defendant and Appellant, where an action was joined by the Answer and Counter-claim of the Appellant.

DISPOSITION IN LOWER COURT

The Court granted a Judgment of Decree of Divorce to the Appellant and the Respondent making a division of the property of the parties and awarding a Judgment of child support and attorney's fees as against the Appellant.

RELIEF SOUGHT ON APPEAL

Respondent seeks an affirmation of the Judgment and Decree of the Lower Court arrived at after a voluminous hearing and weighing of the evidence presented by the Appellant and the Respondent. The Judgment of the Court being determined upon the evidence presented to the Court and the Court's determination of the credibility of the witnesses heard.

STATEMENT OF FACTS

The parties were intermarried on September 16, 1968, with two children being born, one on September 22, 1969, and one on November 11, 1972 (T-22). The Appellant attended college obtaining a Bachelor Degree in Engineering and a Masters Degree in Business Administration (T-167).

The Respondent assisted the husband-Appellant in obtaining his education and had to terminate her education after a year and one-half of college (R-298), and worked part time and through the summer, saving money to pay off the bills and for the Appellant to be able to go back to school. (T-298)

The Appellant and Respondent moved into the Respondent's parent's home and the Respondent's father employed the Appellant so that he could earn more money to go back to school on, and through the industry, aid, and encouragement of the Respondent, the Appellant obtained his college degrees (T-298,-299)

The Appellant and Respondent through their combined efforts acquired assets as follows:

1. A Mobile Home Park known as Western Park Campground located in the City of Logan, Utah. The campground has 16 permanent pads, 50 overnight spaces, a residence, a lodge, laundry facilities, and a store. (T-282) The campground was purchased approximately a year prior to the day of the trial for $155,000.00. (T-76) It was determined by the Court to have a value of $154,500.00. (R-51) This property was awarded to the Appellant. (R-51)

2. The Appellant was awarded a business known as Four Seasons Mobile Home Sales of Logan, Utah. (R-80) A Stipulation between the parties stated that this property had a value of $39,500.00. (T-46)

3. The Appellant was awarded a business near Bear Lake and Garden City, Rich County, Utah, consisting of a trailer park campground (R-80), with the value of the property being stipulated as being valued at $25,500.00 (T-46).

4. The Appellant was awarded a mobile home rental business at Smithfield, Utah, consisting of four mobile homes (R-81), with a value of these properties being fixed by the District Court at a value of $10,000.00 (R-52).

5. The Appellant was awarded a Suzuki motorcycle (R-81) with a value of $400.00 as determined by the Court (R-52).

6. The Appellant was awarded a Corvette automobile (R-81) which the Appellant testified was a 1973 model and that he had paid $6,000.00 for the vehicle in October, 1976. (T-141, -414)

7. The Court awarded all of the inventory and equipment used in connection with the business to the Appellant. The Respondent testified that the Appellant was the owner of a service van used in connection with the Four Seasons business, as well as a tractor and a trailer mover, which was also awarded to Appellant. (T-282)

8. The inventory awarded to the Appellant was appraised at $9,278.00 for the Four Seasons inventory, although the inventory items, including the office equipment, had a book value of $18,557.00 and had been depreciated for reasons of taxes to the value set by the Court of approximately one-half of the value of the items to the figure herein set forth of $9,278.00. (R-52)

9. The Court awarded the inventory of Western Park Trailer Court to the Appellant in the amount of $2,500.00, which sum was determined by the Court as a reasonable value. (R-52)

10. The Court awarded to the Appellant all of the cash of the business, including the sum of $7,500.00 paid to

the Appellant from funds which were in the possession of the Respondent. (R-52) (App.Br., p.8)

11. The Court made an award to the Respondent of the home, which at the time of its appraisal was stated to be more then sixty years old (T-94), and arrived at by the Court to be valued at $46,500.00 with a balance due and owing as and for a mortgage on said home in the amount of $29,891.00 (R-51), together with the household furniture which was never itemized and which the Court arrived at as having a value of $2,500.00. (R-52)

12. The Court ordered the Respondent to have the liability for the paying off of the balance of the loan on the home (R-53). The Court further awarded to the Respondent a Jaguar motor vehicle valued at $400.00 (App.Br.,p.8), in exchange for the Respondent paying for a refrigerator necessitated by the Respondent for which there was an indebtedness of $495.00 (R-73).

13. The Court awarded to the Respondent stock valued by the Court at $7,500.00 (R-52), which the Respondent testified as being a bad investment, wherein she would suffer a total loss as the stock is now worthless (T-285). The Appellant characterized the purchase of the $7,500.00 of stock in Crystal Hot Springs as a "terrible investment." (T-387) Mr. Vlahos had previous to Respondent's purchase of the stock advised the

Respondent that in his professional opinion it was a bad investment. (T-285)

14. The Court awarded to the Respondent the sum of $24,984.00 as a cash property settlement (R-53), giving to the Appellant the opportunity to pay off the cash settlement to the Respondent within six months, and in the event it was not paid off in six months, that the Court would award to the Respondent interest on the unpaid balance at the rate of 10 percent per year until paid. (R-53)

15. The Court awarded the custody of the children to the Respondent, as well as child support in the amount of $135.00 per month per child, but awarded no alimony to the Respondent. (R-51,-54)

16. There was an obligation due and owing to Sears, Roebuck & Company and an obligation owing to Montgomery Wards and the Court ordered the Appellant to pay the Sears, Roebuck & Company account and the Respondent to pay the Montgomery Wards account. The Appellant was ordered to pay the business debts and obligations for the properties and liabilities of the businesses awarded to Appellant. (R-51,-54)

ARGUMENT

POINT I

JUDGMENT RENDERED IN THE LOWER COURT WAS WITHIN THE SOUND DISCRETION OF THE TRIER OF FACTS.

The opportunity granted to each of the parties of this

cause of action for presentation of its witnesses and any evidence available to each of the parties is amply illustrated by the number of days over which the cause of action was tried before the Lower Court and by the voluminous record as evidenced by a transcript consisting of 455 pages of testimony and argument before the Court.

The Utah Supreme Court has consistently applied the general standards as set forth in Pinion v. Pinion, 67 P.2d 265, as reaffirmed in McDonald v. McDonald, 236 P.2d 1066 (1951), wherein the Court set forth its guidelines for a proper evaluation and perspective in determining and adjusting the rights of the parties in divorce actions. The Court established as basic guidelines points 1 through 6 below as the conditions existing at the time of the marriage, and points 7 through 15 below concerning conditions to be appraised at the time of the divorce as follows:

1. The social position and standard of living of each before the 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.

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 the property was acquired by the parties and the efforts of each in doing so.

10. Children reared, 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 the marriage.

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

15. The present standard of living and the needs of each, including the cost of living;**

The Statement of Facts contains the record evidencing that each of the parties were in college prior to the marriage and that the Respondent-wife gave up her college education so that the Appellant could acquire two college degrees, with a

Batchelor Degree in Engineering and a Masters Degree in Business Administration (T-167) to better prepare him for the role of breadwinner for the family.

The record further reveals that the division of property as awarded by the Court gave to the Appellant the business activities of the parties, namely the Bear Lake facility, the Western Park Campground, the Four Seasons Mobile Home Sales, and the Mobile Home rental units, all to better enable the Appellant to continue to have an assured future of earnings and profits from business activities, with the Court awarding to the Respondent's wife the home with a mortgage balance of $29,891.00, together with its furnishings, $7,500.00 in stock in Healthy Hot Springs (a/k/a Crystal Hot Springs), and a cash award of $24,984.00 (App.Br.,p.8), and without any award of alimony to the Respondent, and child support for the two minor children of $135.00 each per month. (R-52)

This Court stated in English v. English, 565 P.2d 409 (June 2, 1977):

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

the Utah Supreme Court is in reaffirmation of the number of previous cases, including Baker v. Baker, 551 P.2d 1263 (1976); Tremayne v. Tremayne, 211 P.2d 452 (Nov., 1949); Clissold v. Clissold, 30 Ut.2d 430, 519 P.2d 241.

It is submitted that the Court having heard all of the evidence presented by the parties over a long and prolonged trial and hearing considered all of the evidence before it rendered a Judgment based upon the established principles as hereinabove set forth as the case law established by the Supreme Court of Utah in making a determination as to a division of the assets of a marriage at time of divorce.

The Court in Mitchell v. Mitchell, 527 P.2d 1359 (Nov., 1974), established as a basic principle, that the burden is upon the Appellant to prove that the evidence clearly preponderates against the findings as made by the Lower Court or that there was a misunderstanding or misapplication of law which would have resulted in substantial prejudicial error or serious inequity as resulted from the decision of the Lower Court so as to manifest a clear abuse of discretion.

The position of this Court in Steiger v. Steiger, 293 P.2d 418 (Feb., 1956), established as a principle:

> **This Court has often declared itself unwilling to overturn the decision of the Court which observed the demeanor of the witnesses.

This same principle was established in Lawlor v. Lawlor, 240 P.2d 271; McDonald v. McDonald, supra; Stewart v. Stewart, 66 Ut. 366, 242 P. 947. The Judgment of the demeanor of the witnesses is best illustrated by the decision and Judgment rendered by the Lower Court, wherein the Court stated in reference to the testimony of the Appellant when the Court upon hearing the argument of counsel for the Appellant and counsel for the Respondent replied to the Attorney for the Appellant:

> The Court: Maybe I don't believe him. How is that? (T-452)

In McKean v. McKean, 544 P.2d 1238 (Dec., 1975), the Court awarded to the Plaintiff-wife care and custody of the minor children; the use of the home of the parties; one-half of the savings of the parties; one-half of the Defendant's 1974 bonus; a 1964 Ford stationwagon; a 1972 Ford truck and camper, together with the household furniture and other personal items and clothing, in addition to awarding $300.00 per month as alimony and $150.00 per month as child support; together with one-half of the husband's retirement fund accumulated in connection with his employment and certain insurance policies; and the Court stating as the basis for its Judgment:

> We have carefully reviewed the record in this case and we conclude that the record supports the Court's finding, that each of the parties were entitled to a divorce. The prior decisions of this Court have not enunciated a rule, that the property of the marriage must be divided

> by some formula, nor has the Court ruled that the wife is entitled to a fixed percentage of the husband's income as alimony or support money. This Court has recognized the principle, that the Trial Court is entitled to a wide discretion in these matters and that the discretion is not interferred with unless it appears from the record that the Trial Court has abused the discretion.

The Court then found that there was not an abuse of discretion and that the findings of the Trial Court were within the established guidelines of prior decisions of the Court.

It is submitted to this Honorable Court, that the instant matter before the Court is a proper action to invoke the statement and principle of this Court as was set forth in Pfaff v. Pfaff, 241 P.2d 156, where the Court stated:

> Suffice it to say that we have examined the record carefully and find both contradicted and uncontradicted testimony therein, of such nature factually as to bring this case directly within the principles heretofore enunciated by this Court relating to affirmance where a fair preponderance of the evidence supports the Trial Court's findings and decision, and relating to division of property in divorce actions, and to exclude it from the rules stated by this Court relating to our power of review where manifest injustice has resulted from the unfair and arbitrary action of the Trial Court.

The same principle as the Pfaff case, supra, has been recently reiterated by this Court in Hansen v. Hansen, 537 P.2d 491 (1975), wherein the Court stated:

> The Trial Court has considerable latitude and discretion in adjusting financial and property interest, 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 finding; or that such a serious inequity has resulted as to manifest a clear abuse of discretion.

The Appellant seeks to make issue out of the discretion of the Court in having made a division of the property in the manner as has been previously set forth herein by giving all of the operational businesses and assets of the business to the Appellant and awarding to the spouse the home and its furnishings and made a lump sum cash award to the Respondent, giving to the Appellant an opportunity to pay off the lump sum amount in six months without any interest whatsoever, or upon failure of the Appellant to so make payment, provided that as an inducement to compel the Appellant to pay over the lump sum amount, that such amount as would remain unpaid after six months would be subject to 10 percent interest. (R-52)

Considering that the Court did not award to the unemployed Respondent any alimony and that the child support is only $135.00 per month (R-52), and the Court not having established any specific perimeter of time or penalty for nonpayment by the husband to the Respondent of the lump sum payment, that an interest at least comparable to existing commercial loan interest might serve as an inducement for the Appellant to make payment of the monies ordered by the Court to be paid within a reasonable

period, and should fall clearly within the previous cited cases of the sound discretion of the Court in making a division of the assets of the parties.

POINT II

THE COURT HAS DISCRETION IN THE AWARDING OF ATTORNEY'S FEES AND IS NOT BOUND BY THE PLEADINGS.

The original counsel of the Respondent was replaced by the present counsel (R-36), and the pleadings originally filed and the Complaint of the Respondent was prepared by the previous attorney who obviously could not anticipate the marathon divorce proceedings which was visited upon the current counsel for the Respondent.

This Court held in Ferguson v. Ferguson, 564 P.2d 1380 (May, 1977):

> Except in cases of Default Judgment, the prayer for relief does not necessary limit recovery, but the Courts have the authority and should grant the relief to which the proof shows the party is entitled.

The Court awarded the instant counsel for the Respondent the sum of $1,500.00 as and for attorney's fees following testimony in Court by the counsel for the Respondent as to time expended by counsel on behalf of the Respondent of approximately 45 hours (T-345-346), whereupon the Court awarded the attorney's fees of $1,500.00 instead of the sum of $1,000.00 as was originally pleaded by the prior counsel for the Respondent, and which pleadin

of course, was prior to the actual rendering of services other than the filing of the Complaint which was the product of the prior counsel.

CONCLUSION

It is submitted to this Honorable Court, that the Lower Court used its sound discretion as the Trier of Facts in rendering a distribution of the assets of the parties, Plaintiff and Respondent, and that it cannot be said that by a preponderance of the evidence the Court manifested an abuse of discretion and that the alleged mathematical error claimed by Appellant in the matter of the $1,000.00 addition or subtraction by the Court as claimed in Appellant's Brief is trivial as compared to the consideration of the value of $7,500.00 of worthless stock awarded to the Respondent as off-setting equities awarded to the Appellant, and that the Court should affirm the decision and Judgment rendered by the Lower Court.

Respectfully submitted,

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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, Jay D. Edmonds, Ten Exchange Place, Suite 309, Salt Lake City, Utah 84111, on this 1 day of May, 1978.

Jeannine Stowell, Secretary