

1986

# Kathleen Clontz v. Harvey James Clontz : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_sc1](https://digitalcommons.law.byu.edu/byu_sc1)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Pete N. Vlahos; Vlahos & Sharp; Attorney for Respondent.

Dierdre A. Gorman; Farr, Kaufman & Hamilton; Attorney for Appellant.

---

## Recommended Citation

Brief of Respondent, *Clontz v. Clontz*, No. 860200.00 (Utah Supreme Court, 1986).  
[https://digitalcommons.law.byu.edu/byu\\_sc1/1081](https://digitalcommons.law.byu.edu/byu_sc1/1081)

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

**BRIEF**

UTAH  
SUPREME COURT  
DOCKET NO. 860200-CA

IN THE SUPREME COURT FOR THE  
STATE OF UTAH

KATHLEEN CLONTZ,  
Plaintiff & Respondent,  
vs.  
HARVEY JAMES CLONTZ,  
Defendant & Appellant.

CASE NO. 860254 <sup>860200-CA</sup>

**BRIEF OF RESPONDENT**

Appeal  
From the Judgment of the Second Judicial  
District Court of Weber County, State of Utah  
THE HONORABLE DAVID E. ROTH  
DISTRICT COURT JUDGE

PETE N. VLAHOS of  
VLAHOS & SHARP  
Legal Forum Building  
2447 Kiesel Avenue  
Ogden, Utah 84401  
(801) 621-2464

Attorney for Plaintiff/Respondent

DEIRDRE A. GORMAN of  
FARR, KAUFMAN & HAMILTON  
Bamberger Square, Building 1  
205 26th Street, #34  
Ogden, Utah 84401  
(801) 394-5526

Attorney for Defendant/Appellant

FILED

JUL 29 1986

TABLE OF CONTENTS

TABLE OF CONTENTS . . . . .	i
TABLE OF AUTHORITIES . . . . .	ii
STATEMENT OF THE KIND OF CASE . . . . .	1
DISPOSITION OF LOWER COURT . . . . .	1
RELIEF SOUGHT ON APPEAL . . . . .	1
STATEMENT ON FACTS . . . . .	2
SUMMARY OF ARGUMENT . . . . .	3
ARGUMENT . . . . .	4
Point I   THE JUDGMENT OF THE LOWER COURT SHOULD PREVAIL UNLESS THERE HAS BEEN AN ABUSE OF DISCRETION OR EVIDENCE THAT MANIFESTS INJUSTICE OR INEQUITY . . . . .	4
CONCLUSION . . . . .	9
CERTIFICATE OF MAILING . . . . .	11

## TABLE OF AUTHORITIES

<u>Bennett vs. Bennett</u> , 607 P.2d 839 (1980) . . . . .	7
<u>Dogu vs. Dogu</u> , 652 P.2d 1308 (1982) . . . . .	7
<u>Englert vs. Englert</u> , 576 P.2d 1274, Supreme Court of Utah, 1978 . . . . .	7
<u>Hansen vs. Hansen</u> , 537 P.2d 491 (Supreme Court of Utah, June 25, 1975) . . . . .	4
<u>Harding vs. Harding</u> , 26 Utah 2d 277, 488 P.2d 308 (1971) . . . . .	7
<u>Jeppson vs. Jeppson</u> , 684 P.2d 69 (Supreme Court of Utah, 1984) . . . . .	4
<u>Kikkert vs. Kikkert</u> , 177 New Jersey, Super., 471, 427 A.2d 76 (1981) . . . . .	8
<u>Mitchell vs. Mitchell</u> , 527 P.2d 1359, Utah Supreme Court, 1974 . . . . .	7
<u>Tremayne vs. Tremayne</u> , 211 P.2d 452, Supreme Court of Utah, November 18, 1949 . . . . .	7
<u>Wiese vs. Wiese</u> , 24 Utah 2nd 236, 469 P.2d 504 (1970) . . . . .	7
<u>Woodward vs. Woodward</u> , 656 P.2d 431 (November 4, 1982) . . . . .	7

IN THE SUPREME COURT FOR THE  
STATE OF UTAH

KATHLEEN CLONTZ,	)	
	)	
Plaintiff & Respondent,	)	BRIEF OF RESPONDENT
	)	
vs.	)	CASE NO. <u>860254</u>
	)	
HARVEY JAMES CLONTZ,	)	
	)	
Defendant & Appellant.	)	
	)	

---

STATEMENT OF THE KIND OF CASE

This is an action for divorce and for division of assets of the parties.

DISPOSITION OF LOWER COURT

On a hearing held in the Lower Court before the Honorable David E. Roth, the Court decreed a Decree of Divorce to the Respondent and made a division of all of the assets of the parties, Appellant and Respondent, after a complete due process hearing, with both parties testifying and being represented by competent counsel.

RELIEF SOUGHT ON APPEAL

The Respondent seeks affirmation of the Judgment of the Lower Court as to the granting to the Respondent of a Decree of Divorce and as to the division of the property, including real, personal and retirement benefits of the parties as decided by the Court.

### STATEMENT OF FACTS

The Plaintiff and Respondent is the wife, and will be hereinafter referred to as "wife", while the Defendant and Appellant is the husband and will hereinafter be referred to herein as "husband".

The wife and husband were intermarried on the 7th day of March, 1959 in Sunset, Davis County, Utah, and there was born as issue of the marriage five (5) children, all of whom are now emancipated. (TR-93)

The husband is retired from Hill Field and is receiving the sum of \$650.00 a month for retirement. (R-65)

The husband was employed as a security guard since his retirement in 1984 and 1985 and terminated his employment as the husband did not feel he was earning enough to bother working, although he made \$1,300.00 in three (3) months employment, and has not since obtained any employment. (TR-123-124)

In 1960, a home was built by the parties, which property is presently toally unencumbered and has an appraised value agreed upon, after professional appriasal, as valued at \$61,500.00. (TR-96-108)

The Findings of Fact and Conclusions of Law set forth an equitable division of all of the assets of the parties,

including the equity in the home, the real and personal property and the denial of alimony to either of the parties and evaluated the retirement of both of the parties, finding that the present value of the wife's retirement was approximately \$15,000.00, and that the value of the husband's retirement was \$50,000.00. (R-62-70)

The Court thereupon did then issue a Decree of Divorce which was drafted by the attorney for the wife, Pete N. Vlahos, and approved as to form by the attorney for the husband, John Blair Hutchison.

#### SUMMARY OF ARGUMENT

There is no evidence whatsoever to support the allegation of the husband 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 awarding to each of the parties the benefits of each of the parties retaining their own retirement funds.

The property distribution ordered by the Court was an equal distribution of all of the real and personal property assets of the parties, and the award made by the Court in denying alimony, either temporary or permanent, to each of the parties and in ordering each of the parties to be allowed to retain their retirement benefits, with the Court

equating the known value of the retirement of the husband, together with his ability to earn additional funds and being employable as against the present value of the wife's retirement.

#### ARGUMENT

##### POINT I.

THE JUDGMENT OF THE LOWER COURT SHOULD PREVAIL UNLESS THERE HAS BEEN AN ABUSE OF DISCRETION OR EVIDENCE THAT MANIFESTS INJUSTICE OR INEQUITY.

This Court stated in Hansen vs. Hansen, 537 P.2d 491 (Supreme Court of Utah, June 25, 1975):

"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 manifest a clear abuse of discretion."

This Court in Jeppson vs. Jeppson, 684 P.2d 69 (Supreme Court of Utah, 1984) stated the position that the Judgment of the Lower Court will not be disturbed unless the evidence clearly preponderates to the contrary or unless the Trial Court abuses its discretion or misapplies principles of law.



The Court, in the instant matter before it, granted the divorce to the wife and issued a Restraining Order as against the husband, finding adequate grounds for granting of a divorce to the wife and not to the husband.

The Court, using the valuation of the property as determined by a competent appraiser and recognized by counsel for both parties as an acceptable appraiser, showed the property to be valued at \$65,576.00, the Court found that the value of the land, which was given to both of the parties in 1960, had a value of \$600.00, but the Court allowed a deduction of \$16,000.00 from the value of the property in granting the husband the additional value of the land, arriving at a net equity, in computing the division of the value of the home, at \$46,500.00, and awarding the home to the husband and giving the wife a lien against the property in the amount of \$23,250.00. (TR-135)

The Court finding that there is no lien against the home and that there were no minor children, in that all five (5) children were emancipated, that the wife would be entitled to her money out of the home within six (6) months, the Court finding that the husband could either mortgage the house, which has no lien against it and was valued at \$61,500.00, or do whatever was necessary to cash out the

wife so she could acquire a place of residence of her own.  
(TR-135)

The Court having found that the husband is employable and has been employed since his retirement to add to his retirement income, ordered the wife to pay the husband's \$800.00 attorney's fees and to maintain the husband on the wife's health and accident insurance as long as available through her employment. (TR-136)

The Court further found, looking at the list of personal property and the values placed there by the parties, that each should keep the properties which they have listed and each should pay for their own motor vehicles, and found that the values of the properties awarded to each of the parties was approximately a wash out. (TR-136-140)

This Court in Burger vs. Burger declared that although a divorce action is an action in equity and that the Supreme Court is free to review both the law and the facts, that the Utah Constitution, Article VIII., Section 9 thereof, requires a Court to place a presumption of validity upon the Trial Court's action in divorce cases, thereby throwing the burden on the Appellant (husband) to show error, and that the Court will not overturn the Trial Court's Findings of Fact unless they are found to be contrary to the clear

preponderance of the evidence. The Court thereafter cited Mitchell vs. Mitchell, 527 P.2d 1359, Utah Supreme Court, 1974; Harding vs. Harding, 26 Utah 2d 277, 488 P.2d 308 (1971); Wiese vs. Wiese, 24 Utah 2nd 236, 469 P.2d 504 (1970).

Unlike the case of Burger vs. Burger, there was no corporate stock, business partnerships or other controversial items to be divided as between the parties.

This Court in Tremayne vs. Tremayne, 211 P.2d 452, Supreme Court of Utah, November 18, 1949, decreed that where a divorce is granted, the Court may make such order in relation to the property as may be equitable. The matter is in the discretion of the Trial Court, which will not be disturbed unless the Court abuses its discretion. The facts in each divorce case are different and each may be determined on what is equitable to the parties under the facts of the case.

This Court in Woodward vs. Woodward, 656 P.2d 431 (November 4, 1982), in arriving at its conclusions in the Woodward case, reversed the Bennett vs. Bennett case, 607 P.2d 839 (1980), and also made distinctive modifications in Dogu vs. Dogu, 652 P.2d 1308 (1982) and in Englert vs. Englert, 576 P.2d 1274, Supreme Court of Utah, 1978. The

Court, in the instant matter, considered the retirement fund of the husband, who had been retired for a period of time and was receiving a specific sum of money, and considered the value of the husband's retirement at being \$50,000.00, (R-65) and the present value of the vested retirement of the wife being in the sum of \$15,000.00, (R-65) and in so considering both, recognized the right of the parties to consider, as an economic resource, the retirement of each of the parties, and this Court stated the essential criterion is whether right to the benefit of a retirement or asset is accrued in whole or in part during the marriage and to that extent that the right is so accrued, that it is subject to equitable distribution. This Court further stated in the Woodward case by adopting the criterion of the case of Kikkert vs. Kikkert, 177 New Jersey, super., 471, 427 A.2d 76 (1981), with the Court stating:

"We agree that with the discussion in Kikkert, supra, where it was stated:

Long term and deferred sharing of financial interests are obviously too susceptible to continued strife and hostility, circumstances which are of course traditionally strived to avoid to the greatest extent possible. This goal may be best accomplished, if a present value of the pension plan is ascertainable, by fixing the other spouses's

share thereof, as adjusted for all appropriate considerations, including the length of time the pensionor must survive to enjoy its benefits, to be satisfied out of other assets, leaving all pension benefits to the employee himself."

This is a position which the Court in the instant matter has taken by determining the value of the retirement, which was determinable, and allowing each of the parties to retain their retirement funds. The Court in Woodward further stated:

"On the other hand, where other assets for equitable distribution are inadequate or lacking all together, or where no present value can be established and the parties are unable to reach an agreement, resort must be had to a form of deferred distribution based upon fixed percentages."

It is submitted to the Court that the values was determined determinable, and there was not an inadequacy of other assets to distribute as between the parties, with the husband, as a matter of fact, getting a greater share of the equity in the home than the wife, as well as there being an equitable distribution and division of all of the other assets of the marriage.

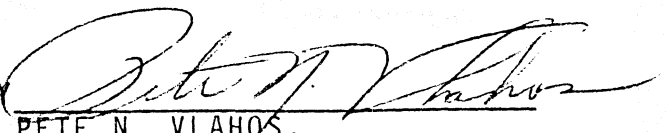
#### CONCLUSION

It is submitted to the Court that the Trial Court considered all of the elements and assets of the parties and

did not abuse its discretion, where the record before the Court evidenced that the wife had been contributing a substantial part of the income of the family for a long period of time, and that all of the children had been emancipated, and that the granting of the home to the husband as an asset, with the wife receiving less than 50% of the equity in the home, together with awarding to the husband of his attorney fees in the amount of \$800.00 to be paid by the wife, and the Court equating the retirement of the parties in allowing each to continue to own their own retirement fund, wherein the husband was already drawing his and the wife had an equity of only \$15,000.00 at time of trial, indicating that the Lower Court did not abuse its discretion and made an equitable division of all of the assets before the Court, with full evidence and consideration of all assets and with each of the parties being represented by competent counsel, and that the decision rendered by the Lower Court should be upheld.

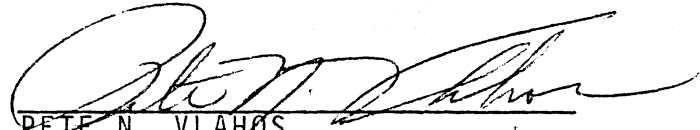
Respectfully submitted this 22 day of September, 1986.

VLAHOS & SHARP

BY   
PETE N. VLAHOS,  
Attorney for Plaintiff &  
Respondent

CERTIFICATE OF MAILING

Four (4) copies of the foregoing Brief of the Respondent was posted in the U.S. mail, postage prepaid and addressed to the attorney for the Appellant, Deirdre A. Gorman, Bamberger Square, Building 1, 205 26th Street, #34, Ogden, Utah 84401 on this 22 day of September, 1986.

  
PETE N. VLAHOS,  
Attorney for Plaintiff &  
Respondent