

1978

Sharron Kathleen Robertson v. Donald Lee Robertson : Brief of Respondent

Utah Supreme Court

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P. Keith Nelson; George Sutton; Attorneys for Respondent;

Paul N. Cotro-Manes; Attorney for Appellant;

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SHARRON KATHLEEN ROBERTSON,)
)
 Plaintiff and Respondant,)
)
 -vs-) Civil No. 15719
)
 DONALD LEE ROBERTSON,)
)
 Defendant and Appellant.)

APPEAL FROM DECREE OF DIVORCE OF THE FOURTH
JUDICIAL DISTRICT COURT OF UINTAH COUNTY
HON. J. ROBERT BULLOCK, JUDGE

Attorneys for Respondant

Attorney for Appellant

FILED

JUN 16 1978

IN THE SUPREME COURT OF THE STATE OF UTAH

SHARRON KATHLEEN ROBERTSON,)	
)	
Plaintiff and Respondant,)	
)	
-vs-)	Civil No. 15719
)	
DONALD LEE ROBERTSON,)	
)	
Defendant and Appellant.)	

RESPONDANT'S BRIEF

APPEAL FROM DECREE OF DIVORCE OF THE FOURTH
JUDICIAL DISTRICT COURT OF UTAH COUNTY
HON. J. ROBERT BULLOCK, JUDGE

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IN THE SUPREME COURT OF THE STATE OF UTAH

SHARRON KATHLEEN ROBERTSON,)
)
Plaintiff and Respondant,)
)
-vs-)
)
DONALD LEE ROBERTSON,)
)
Defendant and Appellant.)

Civil No. 15719

BRIEF OF RESPONDANT

STATEMENT OF NATURE OF THE CASE

Respondant adopts Appellant's characterization of the nature of the case.

DISPOSITION IN THE LOWER COURT

The trial court granted plaintiff a decree of divorce from defendant and awarded her certain real and personal property. Defendant was awarded certain personal property and an equitable lien on the parties real property, and was ordered to pay child support and the debts incurred by the parties during their marriage except for the mortgage upon the parties' real property. Contrary to the statement contained in Appellant's brief, defendant was not ordered to pay alimony to the plaintiff.

STATEMENT OF THE FACTS

Respondant adopts Appellant's characterization of the facts.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the judgment of the trial court except in regard to vesting of appellant's equity in the parties' real property which respondent stipulates may be amended to provide for vesting eighteen (18) months following entry of the Decree of Divorce.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DEDUCTING FINANCIAL CONTRIBUTIONS FROM THE PLAINTIFF'S FAMILY FROM THE GROSS EQUITY IN THE PARTIES' REAL PROPERTY.

This Court recently described the standard applicable to appeal of a trial courts division of property in a divorce action as follows:

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 preponderated against the findings; or such a serious inequity has resulted as to manifest a clear abuse of discretion. English v. English, 565 P.2d 409, 410 (Utah 1977).

See also, Hansen v. Hansen, 537 P.2d 491, 492 - 493 (Utah 1975) which applies the same standard verbatim.

Appellant attempts to meet this burden by arguing that the trial court abused its discretion in charging

defendant with the payment of loans which were unenforceable under the statute of limitations. Specifically, the Court found that plaintiff's family had loaned or counter-signed for loans to the plaintiff in the approximate sum of \$7,500.00 to help purchase and maintain the parties' real property. This sum was deducted from the gross equity in that real property and the balance was divided between the parties. The Court explained its reasoning as follows:

The Twenty-four Hundred Dollars which has been paid down on the house seems to me, and I don't want to argue about it at this point and I may change my mind, but it seems to me that that ought to be a deductible from the equity, so that each of them are responsible for half of it. And the \$395.00, there isn't any question about that. The amount paid to her mother for board and room or whatever it was during the period they lived there and the amounts advanced by her father and brother for living expenses, etc., it's true I think that if they were bringing the action there would be no recovery because I think it would be barred by the statute of limitations. On the other hand, in awarding, because he's in school studying diesel mechanics, etc., and she's foregoing alimony, it seems to me that maybe some kind of consideration ought to be made in awarding her a little bit more of the equity in that house than him under those circumstances, since her people apparently have contributed more to it. (Tr. 84).

This demonstrates that Appellant is wrong to characterize the Court's action as charging him with the payment of unenforceable loans. On the contrary, these loans were treated as contributions to the purchase and maintenance of the home and the court was merely denying the defendant an equal share of something to which he did not equally contribute. If these sums had been gifts or if the home had been inherited from the plaintiff's family, the Court would clearly not have abused its discretion in making such a deduction from the gross equity. Therefore, the technical enforceability of these loans is completely irrelevant and the Appellant's argument a misrepresentation of the trial court's actions.

The statute of limitations argument is immaterial even if these contributions are viewed solely as loans. The mere fact that legal enforcement of these debts is time barred affects only that remedy, not their inherent validity or plaintiff's intent to repay them. Plaintiff's unrebutted testimony was that she regarded all such advances as loans to be repaid as soon as possible. (Tr. 12-19). If these loans are repaid, Respondent will have made a highly disproportionate contribution to that which Appellant demands be shared equally. The fundamental unfairness of that result is obvious and renders the decision below the only distribution which would avoid inequity.

Appellant also fails to point out that certain of these loans must be permitted in any event since they are not barred by the statute of limitations. For example, one loan was from the plaintiff's brother, Ray Kier, and consists of a written second mortgage upon the parties' home, signed by both parties and recorded with the Uintah County Recorder. (Tr. 14 - 15). In another instance, respondent took a personal loan from Zions Bank in Vernal to pay delinquent mortgage payments and utility bills. This loan is in respondent's name alone, is co-signed by her father, E. L. "Jack" Kier, and was due in April, 1978. (Tr. 19). Nor is it clear that all remaining debts would be barred by the statute of limitations since the evidence was that many advances were made in small amounts over " . . . the past five or six years. . ." (Tr. 14, line 2) and it is not possible to determine with accuracy what sums were advanced beyond the statutory period.

Defendant at no time denied that these sums were advanced by plaintiff's family. He admitted that plaintiff's father gave them money to use for a down-payment on their first house, that plaintiff's mother gave them board and room for approximately one year and that he signed the second mortgage note to plaintiff's brother. In regard to the remainder he denied only that he was aware of the advances or that he received any of it. (Tr. 36 - 37). Viewing defendant's testimony as a whole, it is clear that his

denial is based on a lack of knowledge, not a specific awareness that any loan was not made. The defendant simply did not bother himself with the family's financial affairs to such an extent he didn't even know how much money he made when working for Tomahawk Trucking, his employment while the parties resided in Vernal. (Tr. 37).

The situation herein would be different if the court had actually specified these debts and ordered the defendant to assume responsibility for their payment. But the fact is, that the Court did not. Instead, it merely stated that it was not inclined to award the defendant half the equity in something to which he did not equally contribute. Under the rule in English, Supra, this does not point to an abuse of discretion or any other reason for reversing the decision below.

POINT II

THE COURT DID NOT ERR IN SIGNING THE FINDINGS OF FACT AND CONCLUSIONS OF LAW CONTAINING PROVISIONS AT VARIANCE WITH THE COURT'S MEMORANDUM DECISION.

Prior to and during trial the parties had discussed a formula for vesting defendant with any equity he might be awarded in the parties' home and it was the impression of plaintiff's counsel that agreement had been reached that such equity would become due and payable when plaintiff remarried, sold the home, or the children both reached a

certain age, whichever occurred first. Defense counsel himself proposed that formula at the hearing in an apparently unrecorded portion of the proceeding. The Court's subsequent Memorandum Decision provided for vesting of the equity 18 months following the entry of the decree. Plaintiff's counsel thought that the Court did not understand the parties' agreement on this point and so contacted Judge Bullock by phone who stated that if counsel for defendant agreed to using the parties' formula the Court would go along. The Findings of Fact and Conclusions of Law were then drawn according to the parties' formula and submitted to defense counsel on February 6, 1978 with a cover letter indicating the originals had not been sent pending his review and approval. Defense counsel did not respond and Judge Bullock signed these papers on February 21, 1978. Defense counsel did eventually notify the plaintiff of his objection to the modification in a letter dated March 28, 1978, a copy of which is attached hereto as Exhibit "A". Plaintiff replied by letter on March 30, 1978, stipulating to restoring the terms outlined in the Court's Memorandum Decision. A copy of that letter is attached hereto as Exhibit "B". Defense counsel made no response until filing of Appellant's brief herein where it is alleged that plaintiff refused to so stipulate.

The plaintiff's stipulation has not been withdrawn and no objection is made at this time--or has been at any

other time--to providing that defendant's equity shall become due and payable 18 months following entry of the Decree of Divorce as provided in the courts Memorandum Decision.

SUMMARY

The decision of the trial court to deduct contributions from the plaintiff's family from the gross equity in the parties' real property was not an abuse of discretion and so must be sustained on appeal. The Appellant's argument that these deductions were improper because they reflected debts barred by the statute of limitation is invalid because the defendant was not being charged with payment of these debts at all. Rather, he was being denied a right to share equally in something to which he did not equally contribute. The Appellant has previously stipulated to a modification of the Findings of Fact and Conclusions of Law and Decree of Divorce to provide that defendant's equity in the parties' real property shall vest 18 months following entry of the Decree of Divorce so this is a point not in dispute at this time. Since the deduction of plaintiff's family's contributions should not be reversed and plaintiff agreed to the modification sought by defendant regarding vesting of the equity awarded, costs should be awarded to the Respondant.

Respectfully submitted,

P. KEITH NELSON

GEORGE R. SUTTON
Attorneys for Respondant
48 Post Office Place
Salt Lake City, Utah 84111

MAILING CETIFICATE

I hereby certify that I mailed two true and correct
copies of the foregoing Brief of Respondant to Paul N.
Cotro-Manes, Attorney for Appellant, 430 Judge Building,
Salt Lake City, Utah 84111, postage prepaid, this _____
day of _____, 1978.

EXHIBIT "A"

COTRO-MANES, WARR, FANKHAUSER & BEASLEY

Attorneys at Law

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SALT LAKE CITY, UTAH 84111
PHONE (801) 531-1300

March 28, 1978

WILLIAM J. M. DALGLIESH
JOHN C. GREEN
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BRUCE W. SHAND

COTRO-MANES (1922-1964)
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Dear Mr. Sutton:

We are in receipt of your letter of March 22, 1978, and the enclosed stipulation.

As the matter has been appealed to the Supreme Court for the State of Utah, we do not believe that the Court has any jurisdiction to hear your proposed motion to modify the decree of divorce.

With respect to the order to show cause for failure to comply, we have advised our client immediately to make sure that the blanket together with the photographs are returned to Mrs. Robertson and that he get the child support current.

You will recall that I talked with you relative to the decree of divorce in the first place which was unilaterally modified from the Judge's memorandum decision with respect to the house and the equity therein. We never did hear back from you relative to modifying the decree back to what the Judge ruled in his memorandum decision.

My client does not wish to file a joint tax return, and we do not believe that the court has jurisdiction to order him to do so, as this is a matter involving the Internal Revenue Service and the laws of the United States, and not the divorce court.

Be it as it may, as the matter is on appeal, the Court has no jurisdiction to modify its decree.

Very truly yours,

COTRO-MANES, WARR, FANKHAUSER & BEASLEY

Paul N. Cotro-Manes
✓ Paul N. Cotro-Manes

PNC:jh

EXHIBIT "B"

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WASHINGTON, D.C. 20006

March 30, 1978

Mr. Paul N. Cotro-Manes
Attorney at Law
Suite 430 Judge Building
Salt Lake City, UT 84111

Re: Robertson vs. Robertson

Dear Paul:

Responding to your letter of March 28, it is my impression after reading rule 73(d) that only a supersedeas bond will stay a judgment on appeal. If so, then the present decree is in effect and therefore subject to modification. In addition, the court retains jurisdiction over the divorce itself and can make additional rulings it deems proper despite the appeal. Accordingly, we intend to submit our petition at this time.

In regard to Don and Sherrie's income tax returns, I agree that a Utah District Court cannot specify the manner in which a Federal Income Tax Return shall be filed. Whether they file jointly or separately might well be a moot point anyway since their deductions could be great enough to result in a complete refund of all withholding either way. However, I disagree that the court has no authority over the refund. It is certainly our intent to seek an award of the full amount or an equitable portion thereof. Moreover, if Don does not want to file a joint return so as to realize the greatest possible refund, you should advise him that Sherrie will claim all deductions pertaining to the house when filing her individual return. While so doing she will advise the IRS that Don might also be claiming the same deductions, but that she considers them to be rightfully hers alone. This information would be provided for the sole purpose of eliminating any suspicion by the IRS of fraud or bad faith on her part.

Another matter has come up in the interim which we must add to the Petition for Modification and the Order to Show Cause. Last Saturday, March 25, an agent of the Salt Lake Teacher's Credit Union appeared at Sherrie's house to repossess her car for nonpayment of a loan which she and Don took out to purchase a truck for him some years back. Sherrie owned this automobile free and clear at that time and they offered it as collateral. Defaults were numerous and the truck was eventually repossessed but left an

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\$800.00 deficiency when resold. The car was not actually repossessed because it is not presently operable, and arrangements have now been made with the credit union to have Tex Gines assume full responsibility for that loan in exchange for more time to avoid repossession. Since under the terms of the decree this is Don's debt, we will ask that the court charge this balance to his equity in the house and relieve him of further responsibility. At the same time, we will ask the court to caution Don about possible future contempt for failure to pay these debts pursuant to the decree.

Finally, I disagree that our modification of the judge's decree was "unilateral". I was suprised when I read that provision in Judge Bullock's Memorandum Decision since, to my recollection, your proposals regarding the house equity throughout the trial were those which we wrote into the final decree. As such, this struck me as a misunderstanding on the judge's part. To insure that was the case I sent you a copy of all the proposed documents for your review and comment before sending the originals to the judge. I also stated the date when I would mail the original so you could comment before that time, but heard nothing from you until some time later. Your lack of response lead me to assume that you had no objection. Be that as it may, we have no serious objection to going back to the judge's original idea regarding the equity and will so stipulate if you will draw up the necessary papers.

Since it appears that we will at least have to argue whether the court has authority to modify its decree while the appeal is pending, I would again request that you sign the stipulation allowing these hearings to be held in Provo and return it to me within five (5) days of this letter. Otherwise, I will schedule the hearing for Vernal at the earliest opportunity.

Sincerely,

NELSON, HARDING, RICHARDS,
LEONARD & TATE

George Sutton
Attorney at Law

GRS:clj