

1979

Charles N. Bennet v. Donna Mae Bennett : Respondent's Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

CHARLES N. BENNETT, :
Plaintiff-Appellant, :

-vs- : Case No. 16268

DONNA MAE BENNETT, :
Defendant-Respondent. :

RESPONDENT'S BRIEF

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RELIEF SOUGHT ON APPEAL

Respondent seeks to have this Honorable Court sustain the judgment of the Lower Court and an award of attorney's fees and costs of this appeal on the grounds that the record made in the Lower Court amply supports the exercise of the sound discretion of the Honorable H. Maurice Harding in dealing with the complex questions presented by the division of property in domestic cases.

STATEMENT OF FACTS

Defendant-Respondent herein will be referred to hereafter as "Wife" and Plaintiff-Appellant as "Husband."

The Husband and Wife herein were married May 31, 1947, (R-3) and the Wife devoted almost a lifetime to the bearing and rearing of the parties' four children (R-36) two of whom were still minors when the Husband initiated (R-11) a complaint for divorce in the Lower Court. (R-66).

In the property settlement, the Husband's prior disposition of two family vehicles as a down payment on a newer 1973 station wagon for his exclusive use was approved together with the Husband's spending of the family savings account for his own purposes. (R-5 and R-6). The Wife was left with the older family sedan as her only means of transportation to and from work. (R-5).

The Wife was awarded the family residence subject to a lien in favor of the Husband for \$5,000.00, the lien to be

paid the Husband under the usual conditions but in no event later than January 13, 1986. In addition to the award of a \$5,000.00 lien on the equity in the parties' residence, the Husband was awarded all of his personal contributions to his Civil Service retirement, \$15,681.95 (P-75), bringing his total cash award to \$20,681.95. In performing the difficult task of apportioning the various equities, the trial court considered the \$9,603.25 of mortgage debt that the Wife was required to pay to protect her equity award (R-47), the disparity of earning power between the Husband's \$18,254.00 annually (R-73) and the Wife's annual income exclusive of mandatory overtime of \$290.00 x 26 pay periods = \$7,540.00 (R-53), the overwhelming difference between the Wife's retirement income not available until January 27, 1994, in the sum of \$289.20 per month, \$3,468.00 annually (R-64) and the Husband's \$1,215.00 per month, or \$14,400.00 annually, available at his age 65, or even the Husband's smaller retirement of \$1,042.00 per month, annually \$12,504.00 (R-77). The court received uncontroverted testimony from an expert witness that the Husband would also be entitled to draw Social Security retirement benefits (R-82). It was the Husband's testimony that he had worked a second job in addition to his Civil Service job for 29 of the 31 years of the marriage (R-24).

What the court had to evaluate was the 49-year old

Husband, in good health (R-76), who has unrestricted access prior to April 7, 1984 (R-77 and R-80), to \$15,681.00 and the fact that in approximately 15 months after retirement at age 55 with 37 years and two months of Federal service (R-78), will have exhausted his contribution and will, for his remaining life expectancy, continue to draw \$1,070.00 per month which he must treat as reportable income for Federal and State income tax purposes. If the husband elects an option to retire, which is wholly within his own control, at age 55, he will draw totally tax-free income of \$1,070.00 per month until he is approximately 56 1/2 years of age and will have this income supplemented by further Social Security retirement benefits upon his achieving a suitable age (R-82). The Wife's testimony and documents submitted as exhibits was that she will be entitled to a retirement of \$289.20 per month (R-67). Contrary to the statement made in the Husband's Brief that, "She would also be entitled to Social Security Benefits," the Wife testified that she did not know if this would be in addition to Social Security benefits (R-67 and R-68).

In establishing the level of child support, the court had the varying estimates of the Husband's income provided by the Husband (R-24) at \$15,300.00 and his reading of the pay level of a GS8, Step 9 from the Utah Wage Area Schedule effective October 29, 1977, of \$17,302.00 (R-24) and the

final testimony of the Wife's expert witness that effective October 5, 1978, the Husband's gross annual salary is \$18,254.00 (R-73). The court had the Husband's unsubstantiated affidavit of expenses submitted at trial and the sworn testimony provided by cross examination of the Husband. The amount owed ZCMI, \$200.00 (R-29). The amount owed for the Husband's 1973 station wagon approximately \$1,000.00 (R-29). The amount owed the Federal Employees Credit Union, \$900.00 approximately (R-29). The amount owed Mental Health, \$225.00 (R-29). On the question of mandatory deductions for Federal taxes, the Husband equivocated (R-30).

The parties' residence was variously appraised at \$46,500.00, Husband's appraisal, and \$48,300.00, Wife's appraisal (R-5), with the Husband testifying in response to questions by his counsel he would be satisfied to split the difference to arrive at a fair-market value (R-5). The fair-market value of equitable solution suggested by Husband's counsel and accepted by Husband and not subsequently controverted by the Wife being \$47,400.00 (R-5), the unpaid mortgage balance of \$9,603.27 (R-46) leaving a total equity of \$37,796.75.

ARGUMENT

POINT I

THE TRIAL COURT CONSIDERED THE TWO PRINCIPAL ASSETS ACQUIRED DURING THE PARTIES' THIRTY-ONE YEAR MARRIAGE. THOSE ASSETS WERE THE HUSBAND'S FEDERAL CIVIL SERVICE RETIREMENT AND THE EQUITY IN THE PARTIES' RESIDENCE. THE TRIAL JUDGE EXERCISED PROPER DISCRETION IN APPORTIONING THE ASSETS BETWEEN THE PARTIES.

The indisputable evidence presented by Margaret Wood, Hill Air Force Base Benefits and Entitlements Officer, was that the Husband, upon reaching age 55, would be past his maximum with 37 years of Federal service and would be eligible to retire. (R-78). Computing his retirement benefits on the basis of his October 5, 1978, salary of \$18,254.00 produced a monthly retirement at age 55 of \$1,070.00 for the rest of the Husband's life. The same witness testified that at age 65, the Husband would be eligible to receive a retirement equal to 80% of his base pay which, if the Husband received no further increases in pay, would be an annual sum of \$14,400.00. (R-78).

The expert witness testified that the Husband's retirement benefits could start as early as May 7, 1984, at which point the Husband would be beyond his maximum. The testimony was that the Husband's retirement income would be tax free until he had been repaid the \$15,861.95 which he had contributed by payroll deduction. (R-78).

The trial judge stated that he was considering the Husband's contributions and "the money that had been paid into Civil Service retirement which the Husband could only get if he lived long enough." (R-94).

Utah statutory authority for the trial court taking into consideration the Husband's present interest in an annuity income to be paid him beginning in May of 1984 is found in 30-3-5 UCA 1957 as amended:

"When a decree of divorce is made, the court may make such orders in relation to the children, property, and the parties and the maintenance of the parties and children as may be equitable***"

The most recent case squarely on point which also dealt with the consideration of a Federal retirement plan having a value of \$29,000.00 is Englert v. Englert, 576 P2d 1274 at 1276 (February 1978). Interpreting 30-3-5 UCA 1957 this court said,

"It is our opinion that the correct view under our law is that this encompasses all of the assets of every nature possessed by the parties whenever obtained and from whatever source derived and that this includes such pension fund or insurance. These should be given due consideration along with all other assets, income earnings and the potential earning capacity of the parties in determining what is the most practical, just and equitable way to serve the best interests of the parties and their children. (Citing Wilson v. Wilson, 5 Utah 2d 79, 296 P2d 977)."

That a Federal Civil Service retirement plan is property which the parties possess and, in the present case, which was acquired during the 31 years of their marriage cannot be seriously disputed.

The trial judge had clear evidence of the differences between the parties' incomes. From the testimony provided by the expert witness from Hill Air Force Base, the Husband's annual salary as of October 5, 1978, was \$18,254.00. The Wife provided evidence which was not controverted at trial that her gross, bi-weekly pay was \$290.00. The true nature of the disparity between the parties' future earning capacity or retirement income was illustrated by the Hill Air Force Base expert who testified that the Husband's retirement income at age 65 would be 80% of salary. On a current salary basis, the court verified that the Husband would, at age 65, be entitled to an annual retirement benefit of \$14,400.00. (R-78). The Wife, on the other hand, would achieve a maximum of \$289.00 monthly retirement based on a projected salary still five years in the future. The Wife must wait until May 27, 1994, before such benefits would be payable. (R-67). At present the Wife is 49 years old. There is, then, a substantial record to support the modest adjustment of equity which the trial judge made between the parties.

The question of the 49-year-old Husband being disabled is raised here for the first time on appeal. At trial, the Husband affirmed that while his health was basically good, he was not able to work sixteen hours per day as he alleged he had done up until two years before he initiated his com-

plaint for divorce. The trial judge who heard the Husband's voice inflections and observed his demeanor in response to questions from his counsel, believed the Husband when he asserted that his health was good. Two excerpts from the record are illustrative. (R-22).

Counsel (for Husband): "Basically your health is good, but not such that you could work sixteen hours a day?"

Husband: "Well, not really. I have emphysema, Pete, some, yes, and it bothers me quite a bit."

At a later point when counsel for the Wife attempted to elicit from the Hill Air Force Base Benefits and Entitlements Officer information regarding whether or not the Husband would gain additional advantages by seeking a disability retirement, the Husband's counsel again affirmed the Husband's good health. (R-76).

Counsel (for Wife): "If he were to take a disability retirement today, can you tell me what his benefits would be?"

Counsel (for Husband): "It's irrelevant. Has no bearing. There's no testimony before this court as to the plan of taking a disability. Quite the contrary. His health is good." (Emphasis supplied.)

The court: "Sustained."

The Husband appears to object to the trial judge considering any value to him in his Federal Civil Service retirement beyond that expressed by the \$15,861.95 which he paid into the plan. The Husband is, on the other hand,

quite willing to claim half of the original \$12,500.00 paid for the home, half of the improvements and half of the appreciation. (R-5). Such a position is clearly ambivalent. The record strongly supports the division made by the trial judge. (R-33 and R-34).

The court: "How much did your home cost?"

Husband: "Originally?"

The court: "Yes."

Husband: "I think we paid twelve-five originally for the home."

The court: "It is now appraised for nearly four times that." (Emphasis supplied.)

Husband: "Yes."

The court: "Have you made lots of improvements?"

Husband: "We put on a family room at the expense of over thirteen thousand: new roof, new siding, storm windows and doors, a new fence in back, cinder block fence."

The court: "Very well, thank you."

The trial judge exercised logical discretion in dealing with the complex decision necessary to arrive at an equitable apportionment of the parties' two major assets, and his judgment should be sustained by this court.

At page seven of the Husband's Brief, it is asserted that the Wife's Telephone Company retirement of \$3,468.00 per year will be supplemented by Social Security. The Husband adduced no such evidence at trial. The only reference to the question in the trial record is a statement

from the Wife on cross examination that she does not know whether or not her retirement plan is coordinated with Social Security. (R-67 and R-68).

The trial judge demonstrated a grasp of both of the parties' potential for additional income from Social Security. The question of the value of the Husband's contributions to Social Security during the 29 years he worked a second job was before the court at R-79.

The court: "I will take judicial notice that Social Security is 6.15%."

Counsel (for Husband): "I think it's a little higher than six now."

The court: "6.15."

Counsel (for Husband): "Would the court also take judicial notice that back in 1947 it was probably about 3 1/2%?"

The court: "It was a whole lot less."

Counsel (for Husband): "Yes."

The court: "It starts out, I think, at one percent."

The Hill Air Force Base Benefits and Entitlements Officer testified regarding the Husband's right to draw both Civil Service retirement and Social Security as follows: (R-82),

Counsel (for Wife): "To your knowledge, is there anything in the Federal Retirement Regulations that would preclude an employee from drawing both his Federal retirement, at over \$1,200.00 a month, and whatever Social Security he might be eligible for?"

Mrs. Woods: "He may draw both, sir, if he's eligible for both."

Counsel (for Wife): "Are you sure of that?"

Mrs. Woods: "Yes, sir, I am."

Considering all of the facts, the modest award made by the trial judge to the Wife, who had not sought to terminate the marriage nor threatened the Husband, takes into account the relative guilt of the parties as it was perceived by the trier of fact from statements and demeanor of the parties. It was the Husband who indicated to the court that the matter would go forward with each party alleging minimum grounds. (R-2). The lower court's approval of the agreement as to grounds precludes the issue raised for the first time on appeal as to the relative guilt or innocence of the parties for the collapse of the marriage. The Husband having raised the issue of relative guilt, here should be noted that when he was questioned by his counsel regarding the Wife's possession of his handguns and ammunition, the Husband did not deny having threatened the Wife. The Husband limited his denial to having threatened the Wife with a gun. (R-15).

Counsel (for Husband): "Have you ever threatened your wife physically, or threatened her with a gun, that she would have any fear of that?" (Emphasis supplied.)

Husband: "Not with a gun, no. Besides, the ammunition that she has taken with this pistol doesn't fit this pistol, anyhow. So the ammunition that she took was 500 rounds of .357 ammunition, and the pistol she took was a .22 calibre, so they won't even fit."

The Wife abided by the prior agreement as to minimum

grounds and offered no detailed history of marital conflict or physical violence relying on the trial judge's opportunity to observe the demeanor of both parties as they gave their testimonies.

The trial judge followed the established case law in appraising all of the circumstances of the parties. The case on which both parties rely is Wilson v. Wilson, 5 Utah 2d. 79, 296 P 2d 177 (1956) at page 979 and 980.

"In doing so it is necessary for the court to consider, in addition to the relative guilt or innocence of the parties, an appraisal of all of the attendant facts and circumstances; the duration of the marriage; the ages of the parties; their social positions and standards of living; their health; consideration relative to children; the money and property they possess and training and their present and potential incomes." (Citing for other lists of factors to be considered Pinion v. Pinion, 92 Utah 255, 67 P2d 265; MacDonald v. MacDonald, 120 Utah 573, 236 P2d 1066, 1071). (Emphasis supplied.)

The Husband cites in his Brief the case of Martinett v. Martinett, 8 Utah 2d 202, 331 P2d 821 (1958), for the proposition that the trial judge was unjust in his ruling. The Husband's Brief admits at page 9 that equity and justice are determined by the facts of each case. In the present case, evidence supports the determination made by the trier of fact.

The National Insurance Commissioners Standard Ordinary Mortality Table, 1958, indicates a life expectancy at the Husband's age 55 of an additional 21 years. By exercising his option to retire at age 55, the Husband will receive a

monthly income of \$1,070.00. In the first fifteen months after retiring, the Husband will have withdrawn an amount in excess of his present contribution of \$15,281.95. Every fifteen months thereafter the Husband will be paid an additional \$16,050.00. In less than three years from age 55 to 58, the Husband will have withdrawn \$32,100.00 in monthly retirement benefits. The total potential withdrawal over the 21 years of the Husband's life expectancy exceeds \$269,000.00. The taking into account by the trial judge of money that the Husband could receive only if he lives long enough is well founded in the evidence adduced at trial and should be sustained. Nothing in Tsoufakis v. Tsoufakis, 14 Utah 2d 273, 382 P2d 412, suggests any other result.

The Husband seeks to characterize the trial judge's balancing of the relative equities between the parties in the property settlement as a deduction of \$15,682.00 from the Husband's share of the \$38,000.00 equity in the parties' home. (R-89). It would be vastly more accurate to characterize the settlement as the lower court's view of the present value of the Husband's future benefits from Federal Civil Service retirement. (R-92 and R-94).

The fact that the Husband will have been repaid all of his contributions to Civil Service retirement and his remaining income will become reportable income for State and Federal tax purposes within as little as fifteen months

after he retires shows the wisdom of the trial judge in taking into account "money which he will receive only if he lives long enough." (R-80). It is more advantages to have a large retirement income on which one pays State and Federal tax than a small income from whatever source that provides a bare existence but is tax exempt.

POINT II

THE TRIAL COURT'S AWARD OF CHILD SUPPORT MEETS BOTH STATUTORY AND EVIDENTUARY REQUIREMENTS, IS EQUITABLE AND SHOULD BE SUSTAINED.

The Utah Uniform Civil Liabilities for Support Act specifies, without imposing a limitation, certain matters to be considered by a trial judge in setting a level of support. 78-45-7(2) UCA 1957 as amended 1977 provides in part:

"***the court in determining the amount of prospective support, shall consider all relevant factors including but not limited to:

- (a) the standard of living and situation of the parties;
- (b) the relative wealth and income of the parties;
- (c) the ability of the obligor to earn;
- (d) the ability of the obligee to earn;
- (e) the need of the obligee;
- (f) the age of the parties;
- (g) the responsibility of the obligor for the support of others."

The trial record shows that in addition to the factors enumerated above, the court had evidence as to the marital debts assumed by each of the parties albeit the Husband did not supply evidence as to whether or not the monthly payments of marital debts which he claimed would last for more

than one month at the rate of repayment claimed. The ability of each of the parties to earn was before the court in the case of the Husband on his recollection that he earned \$15,300.00 annually, then upon his reading of his salary from the chart at \$17,302.00 (R-24) and finally on the testimony of the Hill Air Force Base Benefits and Entitlements Officer that the Husband's earnings as of October 5, 1978, were \$18,254.00. (R-73).

Evidence given by the Wife established the family's living standard, her regular and limited overtime earnings and the needs of the children. In particular, the uncontested evidence from the Wife was that the family's basic necessity budget was currently being supplemented by the earnings of the parties' 15-year-old son. The record and statute fully support the trial judge's increase of the prior temporary order for support from \$300.00 per month to a total award of \$350.00 per month.

CONCLUSIONS

The Husband has failed to meet his burden of proof regarding his claim that the trial judge abused his discretion in making an award of \$5,000.00 as the Husband's share of the equity in the parties' residence rather than the \$11,159.00 which the Husband seeks on appeal. The record made in the lower court is totally consistent with prior case law and

fully supports the exercise of discretion by the trial judge in evaluating the money that the Husband will receive from Civil Service retirement in addition to that which he has paid by way of employee contributions.

The increase in child support from \$300.00 per month total to \$350.00 per month taken together with the clear evidence that the Wife was working to support the children, the Husband had received an increase in annual salary of nearly \$1,000.00 more than at the time the temporary order was entered, and the children were in need of additional support for necessities not possible at \$300.00 per month is on all fours with the most recent pronouncements of this court.

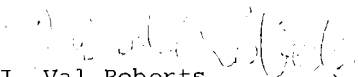
The Husband has construed the specificity with which the trial judge stated the basis for his award of more of the equity in the parties' home to the Wife than to the Husband as a challenge to this court. The particularity of the trial judge in apportioning the two principal assets between the parties is more accurately an invitation to both counsel to consider carefully the case of Englert v. Englert, 576 P2d 1274 at 1276 (February 1978).

In view of the disproportionate financial circumstances of the parties, the fact that the Husband takes the position of plaintiff in seeking to dissolve a marriage of 31 years, and the fact that the instant case is so completely within

the holding of the Englert case, it is requested that the sum of \$500.00 as attorney's fees on appeal plus costs on appeal be awarded the Wife.


For the reasons previously set out in the several paragraphs above, the judgment of the District Court should be affirmed in its entirety.

Respectfully submitted,


J. Val Roberts
Attorney for Defendant-Respondent

CERTIFICATE OF DELIVERY

I certify that I delivered to Pete N. Vlahos, Attorney at Law, 3 copies of Respondent's Brief in case no. 16268, Charles N. Bennett, Plaintiff and Appellant, vs. Donna Mae Bennett, Defendant and Respondent, this 10th day of July, 1979.


J. VAL ROBERTS
Attorney for Defendant and
Respondent