1979

Charles N. Bennet v. Donna Mae Bennett : Appellan's Petition For Rehearing and Brief In Support thereof

Utah Supreme Court

IN THE SUPREME COURT OF THE

STATE OF UTAH

CHARLES N. BENNETT, Plaintiff and Appellant, v. DONNA MAE BENNETT, Defendant and Respondent.	)	CASE NO. 16268

APPELLANT'S BRIEF

APPELLANT'S PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF

Appeal from the Judgment of the District Court of Davis County Honorable H. Maurice Harding, Judge

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APPELLANT'S BRIEF

PETITION FOR REHEARING

The Plaintiff and Appellant, Charles N. Bennett, hereinafter referred to as HUSBAND, herein petitions this Honorable Court for a rehearing on the Judgment rendered by the Supreme Court of the State of Utah on October 19, 1979, wherein this Honorable Court affirmed the Judgment of a lower District Court.

BRIEF IN SUPPORT OF PETITION FOR REHEARING

Appellant seeks reversal of the decision and findings of the Supreme Court of the State of Utah in the instant

action, by reason of the opinion by this Court on October 19, 1979, wherein it affirmed the Judgment of the lower Court.

ARGUMENT

POINT I.

IN DIVISION OF ASSETS THE COURT CAN CONSIDER ONLY SUCH ASSETS AS ARE VESTED IN THE APPELLANT AND CANNOT CONSIDER FUTURE RETIREMENT FUNDS THAT MAY BE PAID TO APPELLANT AS RETIREMENT FUNDS WHICH ARE CONTINGENT, SPECULATIVE AND UNKNOWN.

The issue which was submitted in the previous Brief of the Appellant to this Honorable Court, contained an issue which has never been decided by the Court, and which is a matter of great substance and import, and was not considered by this Honorable Court in the rendering of the decision and findings of the Court in its opinion of October 19, 1979.

This Court stated in Paragraph 1 of its Opinion, the issue before the trial Court was whether or not the Court could take into consideration an accumulated retirement fund of about $15,000.00 which would not be payable to the Plaintiff until he retires, the Appellant presently being of the age of 49 years.

It is submitted to this Honorable Court that the issue before the Court was not as to whether or not the $15,000.00 which had been earned and accumulated as retirement funds by the Appellant could be used in considering an equitable distribution of the property of the parties, in that the Appel-

lant had never raised that issue to the Court, and specifically admits that the $15,681.95 which the Appellant had earned could and was properly considered by the Judge and taken into consideration in determining the assets of the marital estate.

The issue before the Court was not whether or not the original $15,000.00 which had been accumulated and was payable to the Plaintiff could be considered by the Court as an asset, but whether or not a sum of an additional $15,000.00 which had not been accumulated and not accrued by the Appellant and which could never vest in the Appellant nor be considered as funds additional to the original $15,000.00, but is only a bookkeeping process of the Federal Government in its setting up of a retirement fund and is in effect matching funds of the federal government which never vests in the Appellant and could never become a part of the Estate of the Appellant unless:

(1) The Appellant should be eligible for retirement; and

(2) Survive to the age of retirement; and

(3) Commenced to withdraw retirement funds; and

(4) Use up first the accumulated monies which the Appellant had as earned retirement funds, which would be namely, the sum of $15,681.95; and

(5) After to the use of the sum of $15,681.95, the Appellant would then be drawing against general governmental

funds, which funds at the inception of his retirement is an amount equal to his earned retirement funds, and the additional sum matched by the government to the Appellant's retirement funds would, after being used up, then be additionally supplemented from general funds of the retirement fund without any consideration of the actual earned retirement funds of the Appellant.

The testimony on Page 5 of Appellant's Brief quotes the retirement officer of Hill Air Force Base who stated:

> The husband would have exhausted what he's paid into the fund after he retires, in about 2 1/2, 3 years at the most.

The Appellant's Brief sets forth on Page 4 thereof, the admission that the husband had an earned retirement fund in the amount of $15,681.95, which constituted the total deduction made from the pay to the husband during the course of his employment at Hill Air Force Base. As to these funds there is no argument or contest by the Appellant that they are not vested funds and an admission by the Appellant that they should be considered as part of the retirement funds.

The argument of the Appellant before this Court in its previous brief was, that the government matches the husband's $15,681.95 for bookkeeping purposes, with an additional sum of $15,581.95, or whatever funds may be in existence by the husband at the time he should elect retirement, and that these additional funds which the retirement funds sets up as a credit to the husband is a sum in addition to

the earned sum which the Appellant would have at the time of retirement, and these additional funds are established by the retirement fund only for bookkeeping purposes, but at no time do these additional matching funds vest in the Appellant.

If the Appellant should become demised, prior to retirement, the only funds that he or his estate would be entitled to, would be the funds which he earned and had vested in him, which is namely the amount he contributed in the sum of $15,681.95. The additional matching funds of the government are never vested in him, or could never be considered his property at any time as is illustrated by the dialogue between counsel and the retirement fund expert witness which stated as follows:

> Counsel: When is the earliest time he would be eligible to draw upon his share and the Federal Governments share?
>
> Witness: Well, Sir, he really doesn't, he really doesn't draw from both. The amount of money he has in the retirement fund does not have any bearing on what he would get under retirement monthly annuity.
>
> The only value of what he has in the retirement fund is for Income Tax purposes or Death Benefits purposes. (T-76)

In the instant matter before the Court, the issue before this Court is whether or not the Court can take into consideration the future retirement funds of the husband

which are not accrued by him, and whether or not an amount of monthly retirement funds that he would draw, if he survived, after he has used up his earned retirement funds, are subject to be considered by the lower Court as an asset of the the estate and deducted from real assets as of the time of the divorce.

In the instant matter before the lower Court, the Court took the sum of the retirement fund which had actually been earned by the Appellant at the time of the divorce, namely in the amount of $15,681.95, and awarded to the wife the sum of $30,000.00 to equal the Appellant's retirement funds when only $15,681.95 was vested in the Appellant and the additional amount up to $30,000.00 would be monies that he would receive only if he survived and retired and was able to use up his vested amount of $15,681.95, and then survived and was able to draw monthly retirement pay from that sum up to and including $30,000.00.

This Court cited Englert v. Englert, 576 P.2d 1274 (1978), Utah Supreme Court, in support of its opinion rendered on October 19, 1979, and there is no disagreement as to that opinion, and the awarding by the lower Court of the vested funds of $15,681.95 as assets possessed by the parties. But surely this Court did not state in that case, nor intend that the future retirement pay of a party who is forty-nine (49) years of age would be considered and deducted from the current marital assets in an action of divorce.

It is submitted to this Court that the matter that was appealed to this Court is a matter of great impact upon the divorce laws of the State of Utah, and upon the division of the assets and the estate of the parties seeking a divorce and a division of the assets of the martial estate that deals with contingent, unknown and speculative assets that are not yet vested in the husband at the time of the divorce, and there is no way in which that sum can be determined, nor should be determined, and this Court has continuously held as in Englert v. Englert, supra, that a division of the marital state is based upon "all of the assets possessed by the parties". (Emphasis added)

The lower Court understood that it was raising an issue that was new and that the case was worthy of appeal in that it had a vast and long-range effect in determining the assets of the parties in a divorce matter, and that the appeal by the Appellant to this Court was not of a frivolous nature. With the indulgence of the Court we will repeat again herein, the dialogue set forth on Page 7 of Appellant's Brief as follows:

> Mr. Vlahos: Your Honor, if I understand your Honors position in reference to this $5,000.00 lien, it is based on some $15,000.00 that the government has that he can't touch, has no control over, has never seen, rather than taking what the parties can have right now?

The Court:	Yes. That's taken into consideration. I want that understood, so that in case you do want to appeal, and have that matter raised, you can do so.
Mr. Vlahos:	In other words, you are basing it on the $15,000.00 he has no control over, can't touch, has never seen, and he can never get it.
The Court:	That he can only get if he lives long enough.
Mr. Vlahos:	Only if he lives. OK.
The Court:	Lives long enough to draw.
Mr. Vlahos:	I take it the $175.00 per child is based on his net income of $880.00. I think that is what the Court made a finding.
The Court:	Yes. (Emphasis added.)

It is further submitted to the Court that the amount which the lower Court awarded as child support was excessive and inequitable and was based upon the same kind of bias as was evidenced by the Court in its creating a new concept of what constitutes the marital estate, thereby compelling the Appellant to appeal to this Court. The Court manifested a clear abuse of discretion that was determined by this Court in Martinett v. Martinett, 8 Ut.2d 202, 331 P.2d 821 (1958), wherein this Court stated:

> If there is such a serious inequity as to manifest a clear abuse of discretion, this court will make the modification necesary to bring about a just result.

It is submitted to this Honorable Court that a divorce case is equitable in nature, and that this Court may review the evidence and substitute its Judgment for that of the trial court where it finds that in the division of property or the awards of alimony and child support, that the division and award in the lower Court was unjust and inequitable and was an abuse of discretion. (Tsoufakis v. Tsoufakis, 14 Ut.2d 273, 382 P.2d 412 (1963)

If this Court finds that unknown, contingent and speculative future retirement income of the spouse cannot be considered as an existing asset at the time of the decree of divorce, then it is submitted that there must be an entire revamping of the award made in the lower Court, in that the consideration by the lower Court of the sum of $30,000.00, instead of the actual retirement earned asset of the husband in the sum of $15,681.95 of the figure which was used in concluding the lien to be awarded to the husband as against the home, and that the Appellant would be entitled to at least the difference between the actual earned $15,681.95 retirement fund and the $30,000.00 sum which the Court used in its computations in considering the assets of the estate.

POINT II.

APPELLANT WAS ENTITLED TO NOTICE OF HEARING WITH THE RIGHT TO ORAL ARGUMENT IF REQUESTED.

It is submitted to this Honorable Court that the Appellant did not receive a notice of hearing in this entitled matter and did not have an opportunity to make a request for oral argument, and that such lack of notice of hearing is a deprivation of due process of law, in that the matter to be heard before this Court was of great import, not only to the present Appellant before the Court, but to all persons involved in matters of divorce in the future in the State of Utah, and that the Appellant was not given notice of hearing and have the right to oral argument, and had Appellant been given notice, would have elected to present the true issues before the Court.

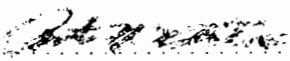
CONCLUSION

It is submitted to this Honorable Court that the Appellant is entitled to a rehearing with an opportunity to the Appellant to argue the specific issues before the Court, and in any event the opinion rendered by this Court of October 19, 1978 was not declaratory of the matter before the Court, and is of such great substance and import that this Court should grant a petition for rehearing, and allow argument before the Court on the original Brief of the

Plaintiff and Respondent, and that the Appellant requests the opportunity of argument before the Court by this Petition for rehearing, and respectfully requests the opportunity to be allowed to argue the matter before this Court.

Respectfully submitted by,

VLAHOS, KNOWLTON & PERKINS



BY .....

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that I mailed on this 24th day of October, 1979, a true and correct copy of the above and foregoing Appellant's Brief, by posting same in the U.S. Mails, postage prepaid and addressed to the following counsel of record, to-wit:

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Loren Barrett
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