

1998

Victor E. Shade v. Delores C. Shade : Brief of Respondent

Utah Court of Appeals

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APPEALS

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DOCKET NO. 981386

IN THE UTAH COURT OF APPEALS

IN AND FOR THE STATE OF UTAH

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VICTOR E. SHADE,

:

Petitioner/Appellee,

:

vs.

:

Case No 981386-CA

Priority 15

DELORES C. SHADE,

:

Respondent/Appellant :

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BRIEF OF RESPONDENT

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RESPONSE TO AN APPEAL FROM A DECISION OF THE
THIRD DISTRICT COURT OF SALT LAKE COUNTY, UTAH

HONORABLE WILLIAM A THORNE

---000000---

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TABLE OF AUTHORITIES

Utah Statutes & Rules

Section 30-3-5, UCA

UTAH CASES

Burke v. Burke, 733 P. 2d 133 (Ut 87)

Dunn v. Dunn 802 P 2d 1314 (Ut app 90)

Jefferies v. Jefferies 895 P2d 835 (Ut app 95)

Schaumberg v. Schaumberg 875 P2d 598 (Ut app 94

FEDERAL CASES

Taylor v. IRS 69 F 3rd 411 (10th Cir 95)

In re Mama D'Angelo, Inc 55 F 3d 552 (10th Cir 95)

STATEMENT OF ISSUES PRESENTED

- I. The appellant asks the court to reverse the Divorce Decree while admitting that the standard of review is that the appeals court will not overturn the trial court's decision unless there is a "misunderstanding or misapplication of the law resulting in substantial and prejudicial error, the evidence clearly preponderates against the findings, or such a serious inequity has resulted as to manifest a clear abuse of discretion"
Schaumbert v. Schaumberg, 875 P.2d 598, 602 (Utah App. 1994)
- II. The appellant asks the Court to adopt retrospectively a formalistic approach to the equitable distribution of marital assets.
- III. The appellant asks that more complete findings be made as to why no alimony was awarded either party. They do not ask for alimony. The Findings were prepared by counsel after the fact and are an attempt to interpret the thinking of the court and there must be some showing the Court abused its discretion by failing to make adequate findings. Burt v. Burt, 799 P.2d 1170 (Utah App. 1990)
- IV. The appellant asks more detailed findings why no attorney fees were awarded to either party.
- V. The appellant asks error in the court determining that each party be awarded their own retirement accounts.

STATEMENT OF FACTS

A. Procedural History

1. The parties were husband and wife having married each other on or about June 14, 1985..

2. The procedural outline stated by appellant is essentially correct.

B. Factual History

3. The parties were married June 14, 1985 and no children were born of the marriage. The divorce was finally granted May 8, 1998 although defendant was locked out of the home before, initiated divorce proceedings but was not able to proceed due to disabling depression. (R 1, 7 & 84-85) R 90 1 2

4. The value of the homes was stipulated (TT.4)

5. Victor was employed as a Postal worker for 33 years until his retirement for disability at age 59. (TT.8,14 and R.50)

6. Delores was also employed at the Poatal Service and made wages equal to or greater than Victor (TT 117-121) She retired due to election at the same time Victor did.

7. Delores admitted \$977.00 per month retirement (TT. 135) and with her other investments the Court found she had \$1,460.00 per month income. with his paying off her debts of \$4,902.46 her expenses were reduced by \$395.00 per month leaving her discretionary money.

8. Victor admitted \$1,672 civil service retirement and an application for \$100 social security makes it necessary for him to find part time employment which he has not found in more than 15 months. (Findings #15) Not available to 2000.

9. Delores could work but refuses to do so but Victor is willing to work if he can find some (R 86 - 87)

10 Delores stated she let her first two husbands off on alimony but the next one was going to pay (R 171 15)

11. Delores testified Victor contributed nothing to the marriage (TT 109 1 16)

12. Deloes brought a home into the marriage worth \$115,000 at marriage and \$140,000 at trial with \$78,000 mortgage (TT 3 - 4) which was awarded to her and he delivered a deed but she refuses to remove him from the mortgage or a deed to his St George property now worth less than the stipulated \$60,000.

13. Victor contributed \$20,000 (equity from a prior marriage)(for refinancing) so pay down mortgage. Later he paid \$1,000.00 to put down payment on St George property to free title to 1/2 acre so she could sell it and keep the \$14,000 and got \$10,000 home improvement contract both awarded to her. He also constructed a business building she gotworth \$10,000. (TT p 43 l 20 TT p 47 L 8)

14. The Court stated its determination not to rearrange the unique history of accounting TT 205 - 206) He further stated "I am not going to award fees because I don't find him the ability to pay after I stick him with all of the debt"(TT p207 L1 & 2)

15. The parties stipulated each had \$3,700.00 in thrift savings and each should be awarded their own.

16. Victor had a business which showed no profit and in fact cost \$11,000 which business went to her son (TT 37) which was sold for \$9,000 but which he never got paid, in full.

17. Delores said Victor offered in negotiations to pay \$35,000 which she refused and the court did not admit that in evidence and she never saw the money, and he did not have it.

18. Victor withdrew his money from his accounts and applied it to debts and trips for both (TT 143)but the court already said he would not rearrange the accounting (14 above)

ARGUMENT

In review of orders from the trial court the courts factual determinations will not be set aside unless they are "clearly erroneous." Taylor v. IRS 69 F.3d 411 (10th Cir 1995) A finding of fact is clearly erroneous only if the court has a definite and firm conviction that a mistake has been committed. In re Mama D'Angelo, Inc 55 F 3d 552 (10th Cir 1995. The courts ruling involving findings of fact may be overturned if the findings are premised on improper legal standards or on proper legal standards improperly applied.

The trial court had the parties before him and was in the best position to determine whom and what he would believe. The standard of review in this court is that the Court will not overturn the trial court's distribution of property, refusal to award attorney fees or to apply a formula approach

proposed in the Utah Law Journal and which is not and was not the law at the time of trial in this matter.

It is the law in this state that premarital property is normally awarded to the party who brought that property into the marriage. The exception applies in this case as Victor contributed to the assets, maintenance and the enhancement of value. There was considerable controversy about the maintenance and enhancement but not about the \$20,000 contribution so she could reduce the mortgage and later the rewriting of the mortgage so she could sell 1/2 acre and pocket the money from property in both their names (partially). They also argued to the court the value of the \$10,000 home improvement contract and the \$10,000 building as well as his providing furnace, cars, maintenance, insurance, fuel, swamp cooler, sprinkler, cutting of hay, tree removal, painting power installation, sewer and water lines, etc.

The marital property was evenly divided with each getting their thrift investment and accounts, personal effects retirement and with him paying her debts. The cars balance out the bonds and value of the shed.

The Court clearly stated that Victor did not have the ability to pay attorney fees nor alimony. He clearly addressed the fact that she had sufficient income to meet the allowed expenses particularly where Victor was ordered to pay her debts of \$4,902. Thus she was placed in a position where her income is sufficient to meet her needs and he is left in a position where he will have to find employment to meet his ongoing expenses. That is clear from the record and the statements of the Court. That meets the requirement of the Jefferies case.

CONCLUSION

The trial court heard the evidence, observed the parties and made an equitable division of the assets and debts. No alimony or attorney fees were awarded as Victor has no way to pay more and This court should require appellant to pay \$3,000 for this appeal and \$4,000 for the trial and dismiss this appeal.

RESPECTFULLY SUBMITTED this February 25, 1999.

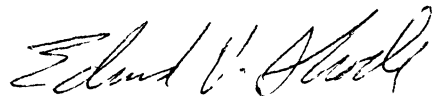
A handwritten signature in cursive script, appearing to read "Victor E. Shade".

Victor E. Shade pro se

MAILING CERTIFICATE

This is to certify I served the foregoing on the
appellant's attorney Steven C. Tycksen by placing a true copy
in the United States mail addressed to him at P.O. Box 480,
Draper, Utah 84020-0480 postage prepaid this February 25, 1999.

Victor E. Shade

A handwritten signature in cursive script, appearing to read "Victor E. Shade".