1980

Lorraine Jane Wilcke v. Leonard theodore Wilcken : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT

OF THE STATE OF UTAH

LORRAINE JANE WILCKEN, :

Plaintiff-Appellant, :

vs. : CASE NO. 16,772

LEONARD THEODORE WILCKEN, :

Defendant-Respondent. :

BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR DUCHESNE COUNTY, STATE OF UTAH, THE HONORABLE GEORGE E. BALLIF, JUDGE, PRESIDING

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vs. : CASE NO. 16,772

LEONARD THEODORE WILCKEN, :

Defendant-Respondent. :

BRIEF OF APPELLANT

NATURE OF THE CASE

This is an action by the plaintiff for Divorce with the attendant issues of property settlement, debt allocation and alimony.

DISPOSITION IN THE LOWER COURT

The plaintiff's complaint in this action was filed on May 11, 1978, with the court entering its temporary order on June 22, 1978. (R. 1-3, 10). The matter was heard by the court on the merits for the first time on November 27, 1978. (R. 17-19). The court concluded the trial on December 13, 1978. (R. 17, 21-22). At the conclusion of the December 13, 1978, hearing, the court granted each of the parties a divorce to become final upon entry. (R. 18). The court signed the findings of fact and conclusions of law granting the divorce on January 8, 1979. (R. 26-27). The court retained jurisdiction over the property of the parties pending the order of the court dividing the same. (R. 18). Counsel for both sides were ordered to submit proposed findings of fact and conclusions of law.

(R.18).

The court made its decision relating to the property of the parties by an Order dated May 17, 1979. (R. 31-34). The court signed the amended findings of fact, conclusions of law and decree incorporating the property distribution on the 10th day of July, 1979. (R. 69-80).

The plaintiff made its first motion to amend the Decree on June 19, 1979, (R. 67) which was heard on August 14, 1979. (R. 97). The court partially granted the plaintiff's motion to amend by its ruling dated September 13, 1979 (R. 24-26) and signed the second amended findings of fact, conclusions of law and decree on October 4, 1979. (R. 131-144).

The plaintiff moved the court for a new trial on September 23, 1979, on the basis of newly discovered evidence, the insufficiency of the evidence to support the verdict and the error of the court in applying the law. (R. 128).

The court heard oral arguments on the plaintiff's motion on November 9, 1979, (R. 183) and the Court made its ruling amending again its prior decree on November 13, 1979. (R. 184, 186-87).

The plaintiff filed her Notice of Appeal on November 20, 1979. (R. 194).

RELIEF SOUGHT ON APPEAL

The appellant requests this Court to amend the judgment to conform to the appellant's position on appeal, or, in the alternative, remand the case for a new trial.

STATEMENT OF FACTS

The appellant and respondent were married on November 22, 1972, in Salt Lake City, Utah. There were no children born as issue of the marriage. (T. 1,26). The appellant is in her late fifties and the respondent in his early sixties. (T. 209). The appellant had been single for eighteen years prior to her marriage to the respondent. (T. 214). The appellant owned a home in Wisconsin prior to coming to Utah and applied the monthly rental receipts in the amount of $300.00 to the marriage endeavor. (T. 213-4). At the time of their marriage the respondent was living with his brother in a trailer. (T. 215). The respondent was employed by the Utah Department of Transportation where he had a substantial retirement benefit. (R. 39, 45). During the early part of the marriage, the appellant was responsible for paying for common living expenses which she estimated to be $8,500.00 the first year. (T. 243, 277). The appellant spent $6,626.13 over the marriage term from her separate monies to maintain the household. (T. 282).

The parties acquired various pieces of real property during the course of their marriage which are set out in the second amended findings of fact and conclusions of law. (R. 131-44). The dispute on appeal is centered around the distribution of real property, the failure of the trial court to debit the respondent's pre-marital assets with his pre-marital debits, the denial of appellant's motion for a new trial and the error of the court in debiting the plaintiff's pre-marital assets in the amount of $10,000.00.

POINT I

THE COURT ERRED IN DISTRIBUTING THE REAL PROPERTY OF THE PARTIES.

It is well established that a party seeking a reversal of the trial court's distribution of property must prove a

> misunderstanding or misapplication of the law resulting in substantial and prejudicial error, or that such a serious inequity resulted from the order as to constitute an abuse of the trial court's discretion.

McCrary v. McCrary, 599 P.2d 1248, 1250 (Utah, 1979); Mitchell v. Mitchell, 527 P.2d 1359 (Utah, 1974). Once that test is met the Court may either exercise its own prerogative of making a modification in the decree or remand for entry of a modified decree by the trial court. Read v. Read, 594 P.2d 871, 873 (Utah, 1979), Utah Const. Art. VIII, Sec. 9; Humphreys v. Humphreys, 520 P.2d 193 (Utah, 1974); Harding v. Harding, 26 Utah 2d 277, 488 P.2d 308 (1971).

The trial court has the obligation of making a fair and equitable distribution of property so as to allow for the protection and welfare of the parties to a divorce proceeding. Utah Code Annotated, §30-3-5 (1953); Pearson v. Pearson, 561 P.2d 1080 (Utah, 1977); Searle v. Searle, 522 P.2d 697 (Utah 1974).

The Court in this case divided the assets of the marriage by first determining what property the parties had kept as separate property and thus not commingled with the assets of the marriage. The appellant claims no error with respect to the determination of separate property. The Court accordingly allowed each party to retain their own separate property which

is delineated in the findings of fact. (R. 132-133, paragraphs 1, 3, 4, 5a).

The Court then valued the pre-marital assets of the parties and gave each party a credit to be used as an off-set when the property was sold or divided. The Court gave each party the right to retain their pre-marital property and deduct the fair market value of the property from the total value of their pre-marital assets. (R. 132-34, paragraphs 2, 10; R. 185, paragraph 2).

The real property which the parties owned at one time or another is described as follows: 1) Independence Property, composed of approximately 160 acres; 2) White Rocks Property, broken into two pieces comprising approximately 16 acres; 3) Gusher Property, which was approximately 26 acres; 4) The North Fork Property composed of approximately 10 acres; 5) and the North Fork Property composed of 11 acres with a cabin situated thereon; and 6) the Bluebell Property comprised of approximately 114 acres. (Pl. Ex. 1).

The Court ordered all the real property sold and the proceeds divided evenly between the parties with the exception of the Independence property which was given almost entirely to the respondent. It is the plaintiff's contention that the distribution of the trial court in that regard was inequitable and effectually ignored the $23,000.00 contribution to the property of the parties by the appellant.

The Independence property was acquired by the respondent prior to marriage for the price of $14,250.00. (Pl. Exhibit 1).

At the time of the marriage, November 22, 1972, the respondent had paid $10,000.00. (Pl. Exhibit 1). Then from the joint funds of the marriage $1,178.75 was paid in 1973, $1,123.25 on November 5, 1974, $1,178.75 on March 1, 1974 and the remaining balance on February 27, 1976. (Pl. Exhibit 1)

The Independence Property was sold on March 7, 1976 for the price of $43,500.00. The buyers paid $12,615.00 down with payments of $5,000.00 to be paid annually through 1983. (Pl. Exhibit 1).

The Court allowed the defendant a credit on his pre-marital assets of $33,522.50 for the value of the Independence property at the time of divorce and ruled that the portion of the sales price of the Independence property attributed to the joint efforts of the parties during the marriage was only $10,027.50, which sum would be divided between the parties, leaving the appellant with $5,013.75 out of the total profit which did not include interest. (R. 133, paragraph 5a).

There is no dispute that the sales contract to the Independence property ran to both parties jointly, yet the appellant is to receive only a miniscule portion of the total profit. The Court established the amount of the proceeds to be given the respondent from the Independence property by determining the percentage of the $14,250.00 purchase price, that had been paid by the respondent before marriage. There are several gross inadequacies created by the apportionment made by the Court.

First, even though the property appreciated in value durin

the time the couple was married, the respondent's portion of that increase was established by the relationship of the down payment to the sales price irrespective of the amount of appreciation during the course of the marriage. Further, even though the property's sale value was not reached until the marriage was over, the respondent is allowed to take the appreciated value, in its entirety, as a pre-marital asset. For example, if a piece of property was purchased for $1,000.00, and $900.00 was paid, before marriage, by one of the parties, it would be unfair to award that party ninety percent (90%) of the proceeds of the sale when the appreciation, accruing during marriage, belongs to both parties. Otherwise, the party not credited with the initial purchase would essentially gain nothing from the investment during the marriage term.

Most amazingly, even though the Independence property was only worth approximately $14,250.00 at the time of the marriage, the court has allowed the respondent to take the value of years of appreciation, most of which occurred during the marriage with the appellant, and retroactively apply the post-marital appreciated amount as a pre-marital asset which can be credited against any asset of the marriage.

It is submitted that if, after a couple was married, a decision was made to sell the Independence property, and the proceeds invested somewhere else, the parties would be entitled to share equally in the return on the proceeds of the new investment. But, as structured by the Court, the increase in the value of the Independence property, ran almost exclusively

to the defendant. If the property outlined in the hypothetical above appreciated from $1,000.00 to $15,000.00 in value during the course of the marriage, it would be inequitable, to say the least, to allow the party purchasing the property for $900.00, before marriage, to receive approximately ninety perce (90%) of the proceeds when the real increase in value was joint property in that the appreciation accrued during marriage, in which both parties should share equally.

Second, under the formula created by the Court, the defendant not only retains, under the hypothetical set out above, ninety percent (90%) of the proceeds of the sale outright, he is entitled to one-half of the remaining percentage because the court termed the remainder as joint property. Reference to the hypothetical above sets out and clarifies the inadequacies of the formula employed by the Court. If the property, used as an illustration above, was sold for $15,000.0 the party purchasing the property before marriage gets ninety percent (90%) of the proceeds which is $13,500.00. Then, out of the remaining $1,500.00, termed joint property, the party purchasing the property before marriage shares equally and gets an additional $750.00, leaving the other party with only $750.0

Third, the Court credited the respondent's pre-marital assets with the amount of down payment that he made on the Independence property, (R. 132, paragraph 2), which, under the hypothetical, would exhaust all the funds. Thus, the responder in this case is allowed approximately eighty percent (80%) of the proceeds of the sale of the Independence property outright

Since the Court termed the remaining twenty percent (20%) of the profit as joint property, the defendant is allowed one-half of that amount, thus bringing the total to ninety percent (90%). Then, the defendant is given credit for the $10,000.00 down payment which he made prior to marriage, reducing the appellant's share in the property to almost nothing. By the Court's computation, the respondent was allowed to isolate for himself almost One hundred percent of a significant asset belonging to both parties.

In stark contrast to the method used by the Court in allocating the proceeds from the Independence property, the Court allowed the parties to share equally in the proceeds of all the other real property despite the fact that the appellant had contributed over $23,000.00 of pre-marital assets towards the purchase of that property. As stated above, the parties were married on November 22, 1972. The parties purchased the White Rocks property, one month prior, on October 25, 1972. (T. 220). The purchase price was $68,500.00. (Pl. Exhibit 1). The appellant paid $20,000.00 down which was derived solely from the appellant's pre-marital assets. (T. 221). It is undisputed that none of the assets belonging to Mr. Wilcken, the respondent, were used in the down payment on this property. After the marriage, the parties contributed an additional $5,000.00 which was paid in October, 1973. (T. 221). The property was sold on April 10, 1974 for $102,700.00, netting a profit to the parties in the amount of $40,126.00.

In its Findings of Fact #6, the Court found that the proceeds of the sale of the White Rocks property:

> went to the purchase of the Gusher and Bluebell property, and although not all the money was specifically accounted for the Court feels that some of it probably went into the woodshed business and that some probably went to miscellaneous and personal expenses of the parties.
>
> Paragraph #7:
>
> The Court further finds that some of the profit from the sale of the Gusher property went to the purchase of the North Fork property and that a portion of the capital investment of the Gusher property went into the Bluebell property, but that in any event the profit and capital invested in the White Rocks and Gusher properties has been reinvested by the parties in properties they continue to hold on the North Fork of the Duchesne and in the Bluebell ranch. The Court finds that these properties represent the joint efforts of the parties during their marriage and that the same should be sold and the proceeds divided as above indicated.

(R. 133-34). In respect to the other real property owned by the parties, the Court found:

> 5) During their marriage, the parties have acquired certain real and personal property, to-wit: the Bluebell ranch; the 10 acre tract on the Duchesne river; the 11 acre tract on the Duchesne river; a cabin on said acreage on the Duchesne river; the woodshed; bank accounts; and other miscellaneous property, all of which should be equally divided between the parties except as hereinafter adjusted and set forth by the Court. In particular, the Court finds:
>
> a. the portion of the Independence property attributed to the joint efforts of the parties during the marriage is in the sum of $10,027.50 and that sum should

be equally divided between the parties.

b. the 10 acre tract and 11 acre tract on the North Fork of the Duchesne river, together with any improvements thereon should be sold and the proceeds divided equally between the plaintiff and defendant.

(R. 133-34).

Under the Court's calculations, the appellant was credited with $23,000.00 of pre-marital assets, representing the amounts of money used by the plaintiff to purchase the White Rocks property. The similarity between how the Court calculated the distribution of the Independence property and the rest of the property ends with that similarity. There is no calculation, on the part of the Court, to calculate the percentage of the total purchase price represented by the appellant's down payment. Thus, even though the plaintiff provided $23,000.00 of her pre-marital assets for the purchase of property, which amount is twice that invested by the defendant, the plaintiff receives nothing more than a credit to her pre-marital assets in the amount of $23,000.00 and recognizes no percentage of the appreciation of the various pieces of property. There can be little doubt that the method by which the Court used to distribute the real properties of the parties, was grossly unjust and inequitable. Accordingly, all of the real property of the parties should either be sold and both be allowed to join equally in the proceeds, or, the plaintiff should receive the same benefit on her $23,000.00 investment as the defendant recognized on his $10,000.00.

POINT II

THE COURT ERRED IN NOT DEDUCTING FROM THE RESPONDENT'S PRE-MARITAL ASSETS, THE AMOUNT OF HIS PRE-MARITAL DEBTS.

The respondent's pre-marital assets are listed in paragrap 2 of the second amended findings of fact as follows:

PRE-MARITAL PROPERTY OF THE DEFENDANT, LEONARD THEODORE WILCKEN

1958 International Tractor		$ 500.00
1969 GMC Pickup		1,100.00
Horse Tack		300.00
2-Horse Trailer		800.00
1 Hay Wagon		800.00
Savings Bonds		400.00
50 Head of Cattle plus 45 head Forest permit		31,500.00
2 bulls at $500.00 each		1,000.00
		$36,400.00
less cost of raising stock		-5,500.00
	sub-total	$30,900.00
The following property having an aggregate value of $33,522.50, based upon the percentage of the original purchase price paid by defendant prior to marriage and the percentage of the purchase price paid by the parties after marriage, in relationship to the total sales price of the property.		$33,522.50
	TOTAL CONTRIBUTION	$64,422.50

(R. 132).

The respondent testified that he commented to friends duri 1974, that the period of time the plaintiff was married was the first time in his life he had ever been out of debt. (T. 334). The respondent testified that at the time he was married to the appellant he had a debt at G.M.A.C. of $900.00; $2,500.00 to th Credit Union; $3,198.00 to Kamas State Bank and about $2,000.00 on the stock for a total of $8,598.00. (T. 334-5). The Court simply did not deduct from the respondent's pre-marital assets, the substantial debt owing thereon which was clearly error.

In addition, the appellant furnished newly discovered evidence in post-trial motions that the respondent took out a loan for $19,100.00 from the Utah Farm Production Credit. The documents indicate that the loan was taken out on November 14, 1972, eight days before the marriage in the name of the defendant only. (R. 155-6, 171-4). It seems inconceivable that the Court would allow the respondent a credit in the amount of $31,500.00 for his cattle yet not deduct the substantial farm debt that was retired by the parties during the course of the marriage.

POINT III

THE TRIAL COURT ERRED IN DENYING THE PLAINTIFF'S MOTION FOR A NEW TRIAL.

Rule 59 of the Utah Rules of Civil Procedure deals with the granting of new trials. The grounds upon which a new trial may be granted are designated in subsection (a) of that rule. One of these grounds is newly discovered evidence, which is set out as follows:

> [a] a new trial may be granted to all or any of the parties in and on all or part of the issues, for any of the following causes: . . . (4) newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at trial.

Plaintiff produced, in post-trial motions, evidence which tested the defendant's credulity.

The respondent testified that he received the sum of $31,500.00 for a grazing permit and cows owned by him prior to marriage. (T. 296-8). Despite Mr. Wilcken's testimony, the defendant's tax

returns for the years 1972 and 1973 indicate that in fact, the defendant owned 48 cows at the time of his marriage to the plaintiff and not the 50 cows indicated in his testimony. The value given to those 48 cows on his income tax, however, is only $4,900.00. Nowhere in the defendant's tax returns for the years 1972 through 1976 is there any income listed from the sale of cows acquired before marriage which supports the defendant's figure of $3,500.00 Nowhere in the defendant's tax returns are there any figures which would support the defendant's claims that cows were sold for anything near the $700.00 a head testified on direct examination. The defendant admitted that his statements were not reflected on the income tax. (T. 330-33). The evidence proferred to the Court took the form of sales receipts given by Zane Christensen to the respondent upon the sale of the cows that the defendant brought to the marriage and the bank records concerning the sale to Joe Curry of the forest grazing permit that was also brought to the marriage. Those receipts show that contrary to the defendant's testimony that the sale of the cows brought receipts of $31,500. the actual value received for the cows and the forest permit was only $9,200.00. (R. 154, 155, 162-168; Pl. Ex. 2, 3, 4, and 5). The highest sale reflected in the defendant's tax returns is in the year 1974 which lists the sale of cows at approximately $400 a head. The most the defendant could have possibly grossed on the 48 cattle owned at the time of marriage was accordingly $11,000.00 as compared to the $31,500.00 testified to by the defendant.

In toto, the evidence produced both during the trial and in plaintiff's motion for a new trial, based on new evidence, illustrate that the two largest items of pre-martial assets, the amount given for the Independence property and the amount credited for the cows, were highly disproportionate to the true value.

POINT IV

THE COURT ERRED IN DEBITING THE APPELLANT'S PRE-MARITAL ASSETS IN THE SUM OF $10,000.00.

The Court in paragraph 11 of the second amended findings of fact, debited the plaintiff's account by reason of the $10,000.00 that the plaintiff allegedly gave her daughter by a previous marriage from the joint funds of the parties. (R. 135).

The Court assumed that the dispursement to the daughter was a gift but the evidence was contrary to that conclusion.

The Wood Shed is a business in Roosevelt which the parties owned jointly with the appellant's daughter and husband. (T. 234). The parties were in the business of refinishing furniture, and selling various inventory items. (T. 235). The evidence indicated that the business was worth approximately $20,000.00. (T. 385, 314. 350).

The appellant testified that the $9,000.00 payment was to buy out her daughter and son-in-law's interest in the Wood Shed. (T. 386). Even the defendant testified to that effect. (T. 314-15). The Court was unjustified in concluding that the payment was a gift in that both parties agreed that the business included the daughter and son-in-law who were entitled to half the proceeds.

It is the appellant's contention that the debiting of her pre-marital assets by $10,000.00 because she allegedly gave that amount to her daughter during the course of the marriage, is wholly unsupported by the evidence. The only evidence offer on the subject was the testimony of the plaintiff who said that this amount, $9,000.00 instead of $10,000.00, was given to her daughter not as a gift, but as consideration for her daughter's and son-in-law's one-half interest in the Wood Shed business. (T. 386). The appellant testified further that the Wood Shed business was not capitalized by the joint funds of the parties, but was established by the institutional loan money which was paid back out of the proceeds of the business. (T. 363). Plaintiff also testified that her daughter and son-in-law invested substantial time and effort in the Wood Shed business for which they received no salary. Thus, for the court to hold that the appellant's account must be debited by $10,000.00 which was not a gift, is wholly unsupported by any evidence adduced at trial.

CONCLUSION

It is the appellant's contention that the large disparity in the pre-marital assets of the parties is accounted for by the three substantial errors of the lower court in making the distribution of the property. It is hard to imagine the ration employed by the lower court in preferentially treating the Independence property over the other properties owned by the parties. Yet, the court by its calculations, gave the respondent over a $30,000.00 windfall. Second, the trial court simp

did not make an attempt to debit the respondent's pre-marital assets by the amount of his pre-marital debt. As outlined in the argument, there was very little that the respondent brought into the marriage that was not encumbered. Lastly, the debiting of the appellant's pre-martial assets by the alleged gift in the amount of $10,000.00 is totally contrary to the evidence. The only person testifying substantively on the issue was the appellant who testified that the money was paid to sever the joint ownership of the Wood Shed business. Any other construction of the evidence simply has no support in the record. It is respectfully submitted that this court must correct the three tragic errors committed by the trial court which led to such a devastating and inequitable result for the appellant.

Respectfully submitted this 21st day of April, 1980.

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MAILED a copy of the foregoing Brief to Mr. George E. Mangan, Attorney for Defendant-Respondent, P.O. Box 246, Roosevelt, Utah 84066; dated this 21st day of April, 1980.

SECRETARY