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Sylvia M. Torgerson v. Terry L. Torgerson : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

SYLVIA M. TORGERSON,

Plaintiff and Respondent,

vs.

Supreme Court No.
16814

TERRY L. TORGERSON,

Defendant and Appellant.

RESPONDENT'S BRIEF

Appeal from a Decree of Divorce of the
Third Judicial District for Salt Lake County
Honorable Homer F. Wilkinson

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NATURE OF THE CASE

This is an appeal from a final Decree of Divorce awarding, inter alia, Respondent the parties' real property, subject to a lien in favor of Appellant based upon an equitable adjustment of the financial and property interests of the parties including, inter alia, consideration of amounts paid into the Union Pacific Retirement Fund for Appellant's sole benefit.

DISPOSITION IN LOWER COURT

On October 25, 1979, the Honorable Homer F. Wilkinson, Third District Court Judge, of Salt Lake County, State of Utah, awarded Plaintiff a Decree of Divorce. In his Findings of Fact, the judge found that, inter alia, the equities in the parties' house and lot was Forty Thousand Eight Hundred and Ten Dollars (\$40,810.00), and that Plaintiff should be awarded this property subject to a lien in favor of the Defendant in the amount of Sixteen Thousand One Hundred Sixty-six Dollars and 45/100, (\$16,166.45). The lien amount represents one-half (1/2) the equity in the property, less one-half (1/2) of the amount paid into the Railroad Retirement Fund by Defendant during the course of the marriage. (R. 102)

RELIEF SOUGHT ON APPEAL

Respondent submits that the Court below did not award any portion of Defendant/Appellant's retirement benefits to her, and, rather, properly exercised its discretion with regard to the issues and facts before it, and its decision should be affirmed, therefore.

STATEMENT OF FACTS

Respondent agrees with Appellant's Statement of Facts, with the following corrections and supplementations:

1) As to Appellant's reference to the Memorandum Decision (R. 84-86) on page 2 of his brief, it is submitted that the quoted paragraph represents a ruling, rather than a finding, of the court. (R. 85)

2) The court more clearly set forth its decision with regard to Defendant's retirement fund contributions in its Findings of Fact (R. 100, et. seq.), Conclusions of Law (R. 103 et. seq.), and Decree of Divorce (R. 106, et. seq.). The Findings of Fact, in relevant part, provide:

That the parties stipulated in open Court that the equity in the parties' house and lot is \$40,810.00. Plaintiff should be awarded, as her sole and separate property, the parties' said house and lot, which is located at 12023 South 2240 West, Riverton, Utah, subject to a lien thereon in favor of defendant

in the amount of \$16,166.45, which amount represents 1/2 of the equity in the said house and lot, less 1/2 of the amount paid into the Union Pacific Retirement Fund by defendant from July 1, 1965, until April 1, 1978.

The Conclusions of Law provide, in relevant part:

That plaintiff is entitled to be awarded the parties' house and lot located at 12023 South 2240 West, Riverton, Utah, as her sole and separate property subject to a lien thereon in favor of defendant in the amount of \$16,166.45, and plaintiff should be ordered to pay defendant the said \$16,166.45, less 1/2 of the cost of sale of said property when said property is sold, ... (R. 104-105)

The Decree of Divorce awarded the property, accordingly (R. 108), decreasing the lien by one-half the amount paid into the fund, not one-half of any property right with regard thereto or benefit therefrom.

3) At no point in the proceedings below did Defendant-Appellant raise nor does he now claim to have raised the issue of the lawfulness of considering the retirement fund contributions as part of the financial and property interests of the parties; even though he was aware of the issue as a result of a communication from the Railroad Retirement Board (R. 94). Further, Appellant does not claim to have objected to the introduction of evidence with regard to his contributions.

ARGUMENT

I. THE ISSUE RAISED ON APPEAL WAS NOT RAISED BEFORE THE COURT BELOW, BUT, RATHER APPELLANT APPROVED OF WHAT HE NOW CLAIMS TO HAVE BEEN ERROR, AND THE APPEAL SHOULD, THEREFORE, BE DISMISSED.

It is well settled that a legal theory which was not raised at the trial Court, but is raised for the first time on appeal, must be disregarded by the Appellate Court. See Upton v. Heiselt 118 Utah 573, 223 P.2d 428, 432 (1950).

Nothing in the record indicates that the issue regarding the lawfulness of considering the contributions made under the Railroad Retirement Act was raised below, either by objection to the admission of evidence, objection to the Court's ruling, or any other method. And, Appellant has not otherwise claimed in this Court that the issue was raised in the trial Court.

The record clearly indicates that defendant affirmatively participated in the Court's consideration of the issue as to the amount of the contribution which was made during the course of the marriage. (R. 87, 88) At the time, Appellant knew of the case and holding upon which he bases his appeal. (R. 94)

It is submitted, therefore, that defendant is estopped from claiming on appeal that the Court below erred in even con-

sidering the contributions in making an equitable division of property. As was held by the Utah Supreme Court in Ludlow v. Colorado Animal By-Products Company 104 Utah 221, 137 P.2d 347, at 354, (1943) :

A party who takes a position which either leads a Court into error or by conduct approves the error committed by the Court, cannot later take advantage of such error in procedure.

Defendant's appeal to this Court must be dismissed, because the issue was not raised below, and, further, because defendant is estopped from claiming that the Court below erred in its ruling.

II. THE COURT PROPERLY CONSIDERED CONTRIBUTIONS MADE BY DEFENDANT TOWARD THE RETIREMENT FUND IN CONSIDERING AN EQUITABLE ADJUSTMENT OF THE FINANCIAL AND PROPERTY INTERESTS BETWEEN THE PARTIES.

In Utah, the trial Court in a divorce action has a considerable latitude of discretion in making a disposition of the property of the parties in a fashion which it deems to be fair, equitable and necessary for the protection and welfare of the parties. Naylor v. Naylor, 563 P.2d 184 (Utah, 1977). It is also settled that, in questioning the use of this discretion,

[t]he burden is upon the Appellant to prove that there was a misunderstanding or mis-

application of the law resulting in substantial and prejudicial error; or that evidence clearly preponderates against the findings as made; or a serious inequity has resulted as to manifest a clear abuse of discretion.

Hansen v. Hansen 537 P.2d 491, 493 (Utah, 1975). It has also been settled by this Court that the trial Court has a responsibility to provide a just and equitable adjustment of the financial and property interests so that the parties might reconstruct their lives on a happy and useful basis. See Searle v. Searle 522 P.2d 697, at 700 (Utah, 1974), and Baker v. Baker 551 P.2d 1263, 1265 (Utah, 1976).

Appellant does not contend that the award in question amounts to a manifest injustice or abuse of discretion. Rather, it is contended by Appellant that the trial Court " *** impermissably 'anticipated' Appellant's payment of benefits by offsetting one-half (1/2) of those benefits against the parties' equity in the home." See Appellant's Brief, page 6.

Appellant submits that such an award is contrary to the ruling of Hisquierdo v. Hisquierdo 439 U.S. 572, 59 L. Ed 2d 1, 99 S. Ct. _____ (1979). In the part of that opinion relevant to Appellant's contention, the United States Supreme Court ruled that an award of property, under California's community property laws, which anticipates the benefits which would be obtained from

the Railroad Retirement Fund is prohibited under the Railroad Retirement Act of 1974 (45 USCS Section 231, et. seq.). See Hisquierdo, Supra., 59 L. Ed 2d, at 15.

A review of the record, however, clearly reveals that the Court did not award an interest in any benefits which may be derived from defendant's retirement fund. (See Findings of Fact and Conclusions of Law, plus Decree of Divorce. R. 105 et. seq.). In fact, there is no indication in the record that the court considered what value those benefits might have. The only evidence before it was as to the amount of contributions during the marital period. (R. 91-92)

Further, there was no indication that the Court decided that a property interest had vested in the defendant as a result of his contributions.

Rather, the contributions, alone, were considered by the Court in equitably dividing the property. This is to be distinguished from the facts in Hisquierdo, wherein the California Court had anticipated benefits as a property right under its community property law and made its award according to that law. Hisquierdo, Supra., 59 L. Ed. 2d at 10.

The Utah Court properly, equitably, divided the property interests. To consider contributions into a fund from which the defendant, only, may benefit in the future, in the course of

making a division of the property does not constitute anticipation of a benefit in such a fashion as would be prevented under the Federal Statute. The Utah Court has considered the issue and so ruled in a case involving a comparable situation where it was contended that a bond, which was exempt from assignment, legal process or taxation under Federal law, could not be considered by the Court when dividing property in a divorce action.

Tremayne v. Tremayne, 116 Utah 483, 211 P.2d 452, 454, (1949).

To consider the contributions to the retirement fund and divide the amount thereof as a financial interest of the parties is not the same as anticipating the eventual benefit.

Likewise, a Court could consider amounts invested by one spouse in an investment which had not yet borne fruit, and which might possibly never bear fruit. In such a situation, the opposing spouse may not be able to share, or may not wish to share in the possible eventual return, the amount of which would be the subject of mere conjecture. In such a case, the Court might properly award the other spouse one-half of the invested dollars.

Similarly, if a spouse attended a school to gain a professional license during the marriage, and then the parties were divorced, a Court might properly make an award of one-half

of the amount of expense incurred in the schooling rather than forcing the second spouse to share the benefits which may or may not come in the future to the professional spouse as a result of the professional practice.

To make such an award in any of these situations would be to equitably consider the financial interests, but not anticipate the benefits.

It is submitted, therefore, that it was clearly within the discretion of the trial Court to make the award in question, based upon the amount of money contributed, in an equitable adjustment of the financial and property interests of the parties. Further, to do so is not the same as anticipating benefits which may come to defendant from the Railroad's Retirement Fund.

CONCLUSION

Respondent submits that Appellant's appeal to this Court cannot be considered for the reason that the issue raised was not raised below. Further, Appellant is estopped from bringing the appeal because he approved of the consideration of the contributions below and, for the first time, on appeal claims that said consideration was error. The appeal should, therefore, be dismissed.

Even if the Court considers the issue raised, it should find that the Court below properly exercised its equitable discretion in considering the contributions to the retirement fund as a financial interest and using the amount of said contributions as one basis for the equitable adjustment of the financial and property interests of the parties so that they may reconstruct their lives on a happy and useful basis. It is further submitted that to so consider the contributions actually made during the marriage is not the same as anticipating benefits which may come from the fund as a property right, at law, in a division of community property. For these reasons, the trial Court's findings, conclusion and decree should be affirmed.

Respectfully Submitted,
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CERTIFICATE OF DELIVERY

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief was hand delivered to the office of

JoAnn Blackburn, Jerome Mooney & JoAnn Blackburn, 356 South 300
East, Salt Lake City, Utah 84111 on this ____ day of February,
1980.
