

1980

## Sue Lacy Olsen v. Reed J. Olsen : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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SUE LACY OLSEN,

Plaintiff, Respondent

SCT #17040

vs.

REED J. OLSEN,

Civil No. 17377

Defendant, Appellant

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APPELLANT'S BRIEF

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Appeal from the First District Court  
Judge Ted S. Perry

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BRIEF OF APPELLANT

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STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a Memorandum Decision and Order signed April 24, 1978 denying Appellant's Motion for a New Trial; and is also an appeal of the Decree of Divorce entered March 26, 1980 in the First Judicial District Court of Cache County, State of Utah, by the Honorable Ted S. Perry, District Court Judge pro tem.

RELIEF SOUGHT ON APPEAL

Appellant seeks an equitable result reforming or remanding the District Court's judgment concerning distribution of the property.

STATEMENT OF FACTS

Plaintiff's Complaint for divorce was filed September 1, 1978 seeking divorce, alimony, payment of debts, temporary support, and the distribution of the parties' residence and furniture with the proceeds divided between the parties, in

an "equitable" division of the property "taking into consideration each parties' (sic) contribution towards the purchase of said property." The parties were married in Elko, Nevada April 14, 1976, both having been previously married and divorced and having children by their previous spouses. The Plaintiff had been married more than one other time. Two of Plaintiff's children and none of Defendant's children resided with the parties.

That Plaintiff obtained a restraining order at the time of filing the Complaint, but did not serve it or the Complaint on the Defendant and thereafter reconciled with the Defendant. Some six months thereafter, she left the residence and went to live with her mother and sought an Order ordering Defendant out of the residence. The Order only was served on Defendant. Neither the Complaint nor the Summons were served.

In responding to the Order to Show Cause, Defendant alleged Plaintiff left of her own volition, that he had not received a copy of the Complaint and that it would not be equitable to require him to leave the dwelling in which he was living and where he was making the payments. An order to vacate the Order to Show Cause insofar as it required the Defendant to leave the premises, based on Defendant's affidavit, was entered in March of 1979 prior to a hearing.

The Court entered a temporary order after hearing at which both parties were represented with counsel and required the Defendant to maintain the residence and the property acquired by the parties during the marriage until the matter was tried or the parties negotiated a property settlement, allowing the Plaintiff to retrieve any personal effects owned prior to the marriage of the parties, requiring the payment of temporary support money to be taken into consideration

at final resolution of the case, holding in abeyance the matter of attorney's fees, requiring Defendant to pay debts and obligations of the parties incurred during the marriage, and to maintain the monthly obligations on the premises and requiring the Plaintiff to make payments on the Alpha Romeo automobile in the event she obtained possession because she had no other transportation. The automobile was jointly owned.

Thereafter, the parties had at least one additional reconciliation in which they lived together but later separated. Correspondence flowed between the attorneys representing the respective parties in which the sole issue was a matter of distribution of the residence, the automobile and personal property of the parties. The proposals became quite detailed but the parties were unable to agree or resolve their differences.

October 3, 1979 Plaintiff submitted Interrogatories to Defendant. Plaintiff moved to compel answers in November of 1979. Defendant's answers were filed December 6, 1979. December 12 Plaintiff requested a trial setting. December 18 the Court said the case would be set after appropriate rules had been followed. December 21, the Court set the matter for trial after Plaintiff and Defendant had agreed at the hearing on the 19th of December, 1979 that a trial day setting could be made provided Defendant could continue discovery through the time of trial. The trial was set for March 7 as a second setting and August 26, 1980 as a first setting. Plaintiff finally answered Defendant's Interrogatories February 21. February 29, the parties were advised that the second setting would become a first setting, and Defendant objected to the trial setting because of the need for additional discovery. A continuance was granted without allowing Defendant's counsel to get to the hastily called hearing, but only until March 13, 1980 making it impossible to pursue the additional discovery. Trial was held March 13, 1980



without prior notice that a different judge (than had presided at the Show Cause hearing) was assigned to the case.

Plaintiff's proposed form of Findings of Fact and Conclusions of Law were altered somewhat after Defendant objected to the form as not complying with the actual findings, but were not altered to Defendant's satisfaction. The Court particularly refused to make a finding of the value of the real property as shown by the evidence believed by the Court at the trial; refused to make a finding of the amount of money each party put into the house at the time the property was bought and refused to reflect the evidence introduced at trial that Plaintiff had contributed \$8,000.00 and Defendant had put in \$28,118.26 towards the down payment of the house; or that in addition Defendant had contributed \$60,523.88 and Plaintiff \$7,728.13 to the marriage. The Court did consider that bank interest rates were high at the time and said he increased Plaintiff's equity to compensate, without any party having requested the same and without making specific findings. The Court further refused to require the Plaintiff to return property removed from the premises in Defendant's absence prior to the entry of the order. The interlineated findings and decree were entered March 26, 1980, without curing the Defendant's enumerated deficiencies and some others.

During the course of the trial the Court refused the Defendant opportunity to introduce testimony of his version of the treatment between the parties, and found that agreements not actually made between the parties regarding disposal of personal property were made; refused to accept the testimony of the Defendant relative to the value of the premises; refused to reflect in the judgment that during the course of the marriage the Defendant had contributed some \$88,642.74 to the house and living expenses whereas the Plaintiff had contributed \$15,728.75; refused to consider in awarding the

personal property to the Plaintiff that he awarded all the outstanding debts that went with it to the Defendant; refused to consider that Defendant had paid all the debts of the parties during the time pending divorce while they were separated except for Plaintiff's separate living expenses. The Court also failed to consider testimony by the Defendant of the extra cost of support experienced on Defendant's part by supporting Plaintiff's children who lived in the house. In short, the Court did not permit an oral answer or defenses during trial or ignored Defendant's evidence and regarded the Defendant as if he had waived any right to equitable considerations by the Court because not filing a formal written during the proceedings. The Court made a finding that the Plaintiff was entitled to share in the increased value of the home off the top, and found the value to be exactly what the Plaintiff said it was but did not apportion the "share" according to the amount of money contributed initially and as requested by the Complaint. The Court also made a finding of the Plaintiff's income which was not supported by evidence. The Court falsely found that the distribution of the personal property had been agreed to by the parties notwithstanding testimony from both parties as to the non-agreement. Transcript, page 36 lines 3-17; page 82 line 12 to page 93 line 5; page 113 line 18 to page 114 line 6. The Court also found after having refused Defendant's testimony regarding income that, nevertheless, Defendant should pay all the bills even though the personal property was given to the Plaintiff for which many of the bills were being paid. Finally, the Court refused to permit the Defendant to enter testimony regarding defenses to allegations Plaintiff made that she had been subjected to mental or physical cruelty. The Court appeared to base its memorandum decision, denying the motion for a new trial, on Defendant's failure to file a formal answer notwithstanding the fact that he had never been served, appeared to neither give the Defendant equitable rights in conformance with the complaint (according



to the contribution of each party) nor to give the Defendant opportunity to testify fully to make the evidence conform with his position.

#### POINT I

The Defendant has a right to present testimony at the trial and have it fully considered even though no formal written answer was ever filed.

1 "All aspects of proceedings in divorce matters are equitable." Iverson v. Iverson, 526 P2d 1126 (Utah 1974).

This matter is in equity. It is believed that Rule 8(d) of the Utah Rules of Civil Procedure does not demand a written answer and the only issue in this situation is the amount of damage:

"...Averments in a pleading to which no response or pleading is required or permitted shall be taken as denied or avoided." U.R.C.P. Rule 8(d)

It is, therefore, asserted that Defendant should have had full consideration and right to testify as to the cruel treatment alleged by the Plaintiff in her Complaint. Defendant had considerable dealings with the Plaintiff and the Plaintiff's counsel and Rule 8(f) should be construed so as to do substantial justice for the Defendant who did not contest the right of the Plaintiff to seek divorce or division of property according to each party's contribution, but only contested the amount of damages:

". . .the prevailing rule of equity pleading is that allegations of the bill are not to be deemed to have been admitted simply because the statements are ignored by the answer. If the facts which the complainant has alleged are material to his case, they must be established by evidence." 27 Am Jur 2nd Sect. 202

The remedy of the Complainant in the event the Defendant

fails to file an answer is ordinarily to take a decree pro confesso. The Plaintiff failed to do this and the Defendant vigorously resisted her restraining order and otherwise refused to play dead. Thus, the prevailing rule of equity rules in this situation and should be interpreted as the Defendant having denied all the allegations that the Plaintiff made.

"Generally, whenever interests of justice and fair play will be served thereby, the trial court should exercise its discretion liberally in favor of giving the parties an opportunity for a hearing on the merits of the case." Barber v. Calder, 522 P2d 700 (Utah 1974).

The Trial Court in this situation should have used a liberal interpretation of the pleadings and considered the equity arguments in this situation so as to allow an opportunity for a hearing on the merits of the case. This was not complied with. Defendant was not given a fair opportunity to have his opinion considered in this situation.

Even if the Defendant was deemed to have accepted the allegations in the Plaintiff's Complaint, no evidentiary facts were alleged in the Complaint. The Complaint asked for equity. This is all the Defendant wants on appeal.

"Whether the award of the division of property (in a divorce case) is unjust or inequitable must necessarily depend on the facts and circumstances of each particular case." Tsoufakis v. Tsoufakis, 382 P2d 412 (Utah 1963)

Plaintiff's Complaint for divorce filed September 1, 1978 seeks divorce, alimony, payment of debts, temporary support, and the distribution of the parties' residence and furniture with the proceeds divided between the parties, in an "equitable division of the property" taking into consideration each parties' (sic) contribution towards the purchase of the said property." Equity is a fact situation in each circumstance and the Plaintiff's complaint wanted an equitable division of the property on terms the Defendant could accept, as stated in the complaint. He had contributed a lot more

property to the marriage than had the Plaintiff, who introduced the rule of division she wanted in the complaint. The Trial Court failed to do this. It granted the Plaintiff the possession of many items while requiring Defendant to pay the indebtedness on them. It granted Plaintiff an inequitable amount in the house, unjustified by the fact situation.

Because the Olsen divorce is an equitable matter, and because the Court has failed to apply equity to the Olsen fact situation, the Supreme Court should modify or remand the judgment.

## POINT II

The Trial Court erred in accepting the Plaintiff's unsupported estimate of the value of the house at \$100,000.

An owner of property may certainly testify as to its worth. The Supreme Court reasoned in Utah State Road Commission v Johnson, 550 P2d 216 (Utah 1976) that the owner of real estate is not presumed adequately qualified to express an opinion of the market value by reason of his ownership alone. The Plaintiff in this situation was certainly entitled to express her opinion as to what the property value of the house was. The Defendant was equally entitled to his opinion. These opinions conflicted. The Plaintiff believed the house to be worth \$100,000, while the Defendant thought the value of the home was around \$85,000. Testimony of this type is not conclusive, even if not contradicted. Anderson v. State Farm Fire and Casualty Company 583 P2d 101 (Utah 1973).

The Plaintiff and her counsel asked for an appraisal of the house. "I think that the house should be appraised and I think that the Defendant ought to be ordered to pay - - return her investment plus give her a share of the appreciation on the house." Trial transcript page 137, lines 12 to 15.

Because the Plaintiff asked for an appraisal of the house and the Defendant felt it was worth much less than the Plaintiff felt it was worth, the Trial Court should have awarded an appraisal of the house before it divided or decided what equity the Defendant could derive therefrom.

"Notwithstanding the equitable powers of district court in interfamily controversies in divorce matters, and the acknowledged broad latitude of discretion allowed therein, the court cannot act arbitrarily, or on supposition or conjecture as to facts upon which to justify its order." Iverson v. Iverson, 526 P2d 1127 (Utah 1974)

The District Court in this situation simply assumed the house was worth \$100,000 and then somehow determined that fact and granted the Plaintiff \$15,000 equity therein to be paid off the top by the Defendant, or enforced as a lien, without any apparent regard to who contributed what percentage of the supposed equity, selling commission, or Defendant's right to get a fair equity off the top. If the house is worth less, which the Defendant alleges, he has effectively lost a considerable amount of money because of the Trial Court's refusal to grant an appraisal of the house. The Trial Court acted on supposition and conjecture when it assumed the house was worth \$100,000.

When a judgment has so failed to do equity that it manifests a clear abuse of discretion, the Supreme Court on review will take appropriate corrective action in the interest of justice. Waston v. Watson, 561 P2d 1072 (Utah 1977). In Watson the Supreme Court stated that granting a motion for a new trial does not necessarily need to involve setting aside the resolution of all the issues but can be limited to reopening the case to just whatever extent the Court deems necessary and desirable in the interest of justice. In Watson there was serious discrepancy as to the true value of the husband's investment in silver and turquoise Indian jewelry and to his income and pensions. The Supreme Court



remanded the case for the purpose of giving both parties an opportunity to make further disclosures and for an opportunity to determine the actual value of these items.

Our situation is parallel to Watson. The District Court failed to do equity in the case at hand. The Court may grant a motion for a new trial on the issues that were not resolved adequately at the District Court. Serious differences of opinion exist as to the actual value of the house. The Defendant/Appellant desires to have an equitable distribution of the property. He, in good faith, feels that the house is worth less and that, in any event, the equity given to his wife was not in accordance with the amount contributed throughout the marriage or the house directly. Because of the serious discrepancies involved in this situation, the Appellant prays for relief and a re-trial to determine the value of the house.

### POINT III

The Trial Court erred by awarding certain property to the Plaintiff and distributing the bills to the Defendant for those items. Evidence showed that the Defendant contributed \$60,523.88 to the marriage exclusive of his \$28,118.26 of the \$36,118.26 down payment while the Plaintiff added \$7,728.13. The Court did not give adequate consideration to the fact that the Defendant made numerous payments to joint debts during the course of the marriage before and after separation which reduced the joint obligations of the parties prior to trial. Because the Defendant reduced the debts on these certain items and no longer had the value or benefit from them, the Plaintiff should now be required to take over payments on these items or reimburse Defendant. Just as the Court decided that the car which the Plaintiff and Defendant paid on while they were married went to the Plaintiff in the award, the Court also decided that the payments would go along with that car. It would only be just and equitable to

in this situation to allow the Plaintiff to pay for the items that she is getting the benefits of. The case should be remanded for this purpose also, particularly where the record shows Defendant did not agree to the distribution awarded and which the Court justified by finding the parties had agreed. Transcript page 82 line 12 to page 87 line 15.

If it appears that a divorce decree is not an equitable allocation and is more likely to lead to further difficulties and distress than to serve the desired objective, then a reappraisal of the decree must be taken. Reed v. Reed, 594 P2d 871 (Utah 1979). The Defendant in this situation cannot make payments on all the items the Plaintiff now has in her possession plus the excessive equity in the house. If a decree (divorce) causes financial distress, the ruling can be reviewed if within a year after the final judgment either party requests it. Klein v. Klein, 511 P2d 1284 (Utah 1973). The Defendant is or will experience financial distress attempting to pay for several items the Plaintiff has in her possession plus the exorbitant amount of equity the Trial Court awarded to the Plaintiff in the house. Because of this financial distress, the Supreme Court should review the situation and grant relief to the Defendant/Appellant concerning the payments on items not now in his possession being enjoyed by the Plaintiff/Respondent and the excessive amount of equity found in the house.

#### CONCLUSION

The Trial Court particularly refused to make a finding of the value of the real property involved as was shown by the evidence believed by the Court at the trial. The Court refused to make a finding of the amount of money each party put into the house at the time the property was bought and



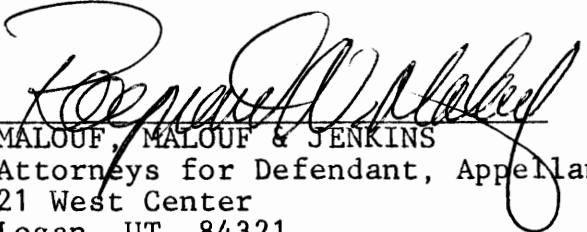
refused to reflect the evidence introduced at the trial that the Plaintiff had contributed \$8,000 and the Defendant had put in \$28,118.26 towards the down payment of the house. The Court also refused to take into account that the Defendant had contributed \$60,523.88 and the Plaintiff \$7,728.13 to the marriage when it came to dividing up the furniture and debts and other items. The Court further refused to require the Plaintiff to return property removed to the premises prior to the entry of the order. The interlineated findings and decree were entered March 26, 1980 without curing the enumerated deficiencies and some other things.

The Trial Court erred when not allowing sufficient consideration of Defendant's evidence because of failure to file an answer in equity. The Court also erred because it did not apply reasonable means to determine the actual value of the home. The Court further erred in awarding the Plaintiff several items that Defendant was required to pay bills on without receiving benefit thereof and thereby creating financial difficulties for the Defendant. Because of the problems that have arisen in this case and because equity was not served, Defendant prays for relief, reform and remanding of this case to the Trial Court to determine the value of the house in question and the equity of allowing the Plaintiff to have the benefits of items that Defendant must pay for.

Plaintiff sued asking for distribution according to the contribution of each party. Defendant only sought that result in the hearing. The Court should have granted the property distribution according to that scheme and should now be so ordered.

RESPECTFULLY SUBMITTED this 23 day of July, 1980.

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