

1980

Sue Lacy Olsen v. Reed J. Olsen : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

SUE LACY OLSEN

Plaintiff-Respondent

vs.

No. 17040

REED J. OLSEN

Defendant-Appellant

RESPONDENT'S BRIEF

Appeal from the First District Court
Judge Ted S. Perry

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TABLE OF CONTENTS

Point I	(The Defendant is in error in stating that Defendant has a right to have a full and complete hearing including a contest as to the grounds of divorce, even though Defendant has failed to file an answer or counterclaim in the above entitled matter).....	3
Point II	(The trial court did not err in accepting the Plaintiff's unsupported evidence of the value of the house acquired by the parties during their marriage at \$100,000).....	8
Point III	(The trial court did not err in allocating the personal property of the parties and the debts of the parties).....	12

STATUTES CITED

Utah Rules of Civil Procedure 7.....	4
Utah Rules of Civil Procedure 8.....	4
Utah Rules of Civil Procedure 8(d).....	5

AUTHORITIES CITED

Moore's Federal Practice, Rule 7(a).....	5
Moore's Federal Practice, Rule 8(d).....	5

CASES CITED

Anderson vs. State Farm Fire, 583 P2d. 101.....	10
Barber vs. Calder, 572 P2d. 700 Utah 1974.....	7
Cline vs. Cline, 511 P2d. 1284.....	13
English vs. English, 565 P2d. 409.....	18
Hansen vs. Hansen, 537 P2d. 491.....	18
Iverson vs. Iverson, 526 P2d. 1127, Utah.....	10
Lahr vs. Lahr, 478 P2d. 551 New Mexico.....	12, 13
Mitchel vs. Mitchel, 527 P2d. 1369.....	18
Pope vs. Pope, 589 P2d. 752.....	18
Reed vs. Reed, 594 P2d. 871.....	13
State Road Commission vs. Johnson, 550 P2d. 260.....	9
Stucki vs. Stucki, 562 P2d. 240.....	18
Watson vs.,. Watson, 561 P2d. 1072.....	11

IN THE SUPREME COURT OF THE STATE OF UTAH

SUE LACY OLSEN

Plaintiff - Respondent

vs.

No. 17040

REED J. OLSEN

Defendant - Appellant

RESPONDENT'S BRIEF

STATEMENT OF NATURE OF CASE

This is an action by the Plaintiff seeking a divorce from the Defendant. The District Court of Cache County granted Plaintiff a divorce and entered its judgment and decree of divorce which divided the property acquired by the parties during their marriage.

RELIEF SOUGHT ON APPEAL

The Respondent seeks to sustain the Judgment and order of the Trial Court.

STATEMENT OF FACTS

The Plaintiff and the Defendant were married at Elko, Nevada on April 14, 1976.

No children have been born as a result of this marriage. Each of the parties are middle-age individuals, having acquired

property prior to their marriage from other sources. During their marriage, the parties each contributed, in varying degrees income towards the support of the family unit.

The Plaintiff filed this action for divorce on September 1, 1978 and a chronology of the divorce proceeding is as follows;

- a. September 1, 1978, Plaintiff files divorce.
- b. Defendant served with Summons, September 1, 1978.
- c. Court issues Order to Show Cause, September 1, 1978.
- d. September 10, 1978, attempted reconciliation between the parties.
- e. February 22, 1979, Plaintiff filed a Motion and Affidavit for Order to Show Cause and Restraining Order.
- f. March 19, 1979, District Court enters temporary restraining order.
- g. April 1, 1979, attempted second reconciliation.
- h. August 21, 1979, second reconciliation fails.
- i. October 2, 1979, Plaintiff forwards Interrogatories to Defendant.
- j. October 17, 1979, Plaintiff forwards Notice of Readiness for Trial to the Defendant.
- k. November____, 1979, Plaintiff filed an affidavit and Motion to Compel Answers to Interrogatories, set case for trial and award attorney's fees. Court issues Order to Show Cause to Defendant's attorney.

l. December 6, 1979, Defendant files answers to interrogatories.

m. December, 1979, Plaintiff makes second request for trial setting.

n. December 19, 1979, Court sets trial for March 7, 1980 as a Second setting, August 26, 1980 as a First setting.

o. February 21, 1980, Plaintiff answers Defendants interrogatories.

p. February 29, 1980, the Court advises Defendant, case will be tried on March 7, 1980.

q. March 5, 1980, Defendant moves for a continuance hearing March 5, 1980. Case continued until March 13, 1980.
R. Trial March 13, 1980.

Plaintiff proceeded at the time of trial for hearing in this matter without the Defendant filing an answer. The Court heard evidence from Plaintiff relating to grounds and evidence from both parties relating to the division of the property. Findings of Fact and Conclusions of Law and a Decree of Divorce were submitted to the Court and the Court on the 26th day of March, 1980, after amending the decree, entered the Decree of Divorce.

POINT I

THE DEFENDANT IS IN ERROR IN STATING THAT DEFENDANT HAS A

RIGHT TO HAVE A FULL AND COMPLETE HEARING INCLUDING A CONTEST AS TO THE GROUNDS OF DIVORCE, EVEN THOUGH DEFENDANT HAS FAILED TO FILE AN ANSWER OR COUNTERCLAIM IN THE ABOVE ENTITLED MATTER.

The transcript of proceedings commencing at page 46 shows at line 11 an objection by Plaintiff's counsel as to questions concerning grounds for divorce. The Court indicates at line 13 that there is no answer filed in the case and in response thereto the counsel for the Defendant indicates that the filing of an answer has been waived and the following colloquy between Court and counsel occurred. (See T47)

The Court: You really haven't filed an answer and set up that he denies that she has been treated cruel. So what difference does it make. Mr. Malouf: Well, I think he should be able to state his version of the allegations since she has made them. The Court: Well, had you filed an answer, denying the allegation saying that there is no grounds for divorce, then I would agree with you. Mr. Malouf: That's true. No answer has been filed. No answer has been demanded either. We say that Plaintiff has waived the right to insist on an answer being filed. The Court: Well the court hasn't waived the right and I see no reason to go into it.

Rule 7 of the Utah Rules of Civil Procedure provides that there shall be a complaint and an answer.

Rule 8 of the Utah Rules of Civil Procedure provides a pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross claim or third party claim shall contain a short and plain statement of the claim showing that

the pleader is entitled to relief and a demand for judgment for relief to which he deems himself entitled.

Rule 8D states as follows: "Averments in a pleading to which a responsive pleading is required other than those as to the amount of damage are admitted when not denied in the responsive pleading." "Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided." An allegation in this matter claiming mental cruelty as found in paragraph 3 of Plaintiff's Complaint would appear to be the type of an allegation requiring an answer. Moore's Federal Practice, Volume 2A page 1531 relating to Rule 7A states as follows:

"Rule 7A is patterned on but not identical with former Equity Rule 31. That rule did away with the necessity of a reply or of further pleadings after the answer was filed except that a reply was required to a set-off or counter claim.

Rule 7A contemplates that in the normal situation of a claim and a defense, the pleading shall consist only of a complaint and an answer".

Moore's Federal Practice, Volume 2A Rule 8D (page 1875) states with respect to interpretation of Rule 8D as follows:

"The pleadings which are required or permitted to be made are listed in Rule 7A, which has been discussed in Chapter 7 Supra. It was there pointed out that an earlier joinder of issue was desirable and had been provided for by Rule; that in many cases pleadings would stop with the answer. Subdivision D of this rule is to compliment Rule 7A.

For example, all averments of the complaint other than those as to the amount of damage, will stand unless the Defendant answers and even if the Defendant answers, averments not denied by him will stand admitted. If, in his answer, the Defendant pleads in affirmative defense such as the statute of limitations, the affirmative defense will be taken as denied or avoided by the Defendant without a reply since under Rule 7A no reply is permitted to an affirmative defense."

Divorce actions are probably the most commonly filed action in the District Courts of the State of Utah. It is the Defendant's position that by reason of the fact that a divorce is an equitable proceeding, no answer is required from the Defendant. The authorities cited above hold contrary to the position taken by the Defendant. To hold otherwise would not only jeopardize the status of every default divorce rendered in the State of Utah, but also question the validity of re-marriages and the issue thereof.

The position taken by the Defendant is not only untenable but unreasonable.

Plaintiff's alternative prior to the trial of this matter, obviously, was to file a default and take a default judgment against the Defendant. Such a proceeding has its merits and also has its faults. The Plaintiff's dilemma was to attempt to get the matter before the court and resolved because the Defendant

had control of the assets of the parties and the Plaintiff was financially unable to meet her obligations, such as the car payments, and other household necessities. A resolution by trial or stipulation was imperative. Obtaining a default judgment, although expedient, has the problems of fostering motions to set aside the default, and delays in filing briefs and subsequent interlocutory appeals. The Plaintiff elected to proceed with the matter as expeditiously as possible incurring along the way, only those attorney's fees which are reasonably necessary for the prosecution of the case and the determination of the case upon its merits.

The Defendant cites the case of Barber vs. Calder, 522 P2d, 700, Utah 1974 as authority for the proposition that courts should exercise discretion liberally in favor of giving the parties an opportunity for a hearing.

The facts of the Barber case are completely different from the facts of this case. The holding in that case should not be used as authority for the proposition in this case. The citation of the case by the Defendant adds nothing to this case by reason of the fact that the fact situation does not deal with answers to complaints but deals with the striking of an answer for failure to comply with the Rules of Civil Procedure and

affirms the trial court's decision in doing so denying the Defendant any right for a hearing.

Notwithstanding the fact the Defendant failed to file an answer in the above entitled matter the Defendant was still afforded an opportunity to fully and completely investigate this case, discover any facts pursuant to the Rules of Civil Procedure, hire experts, and do any other act in furtherance of this case. The Defendant was afforded a complete hearing as evidenced by the transcript with the exception of grounds for divorce which consisted of a short plain statement by the Plaintiff as to why she desired a divorce. See Transcript Page 5 line 18 - 25, Page 6 line 1 - 3, none of which was objected to by the Defendant.

The Defendant could have filed an answer and litigated the grounds at any time before trial as he was never foreclosed from doing so by the Plaintiff.

POINT II

THE TRIAL COURT DID NOT ERR IN ACCEPTING THE PLAINTIFF'S UNSUPPORTED EVIDENCE OF THE VALUE OF THE HOUSE ACQUIRED BY THE PARTIES DURING THEIR MARRIAGE AT \$100,000.00.

The Plaintiff and the Defendant acquired, during their

marriage, a house situated at 1155 East 50 South, Logan, Utah, which home was in a home show prior to the purchase by the parties. The Defendant made a contribution of \$8,000.00 toward the purchase price of the house. (TR 9,10)

Plaintiff testified that in her opinion the present estimate of the value of the residence would be \$100,000.00 (TR page 14, 15.) The Plaintiff then went on to justify her opinion by virtue of the valuation of the lot, the natural appreciation of homes, and improvements made to the real estate. The Plaintiff was asked the following question:

"Now then, do you have a present estimate of the value of this residence?" She stated: " I would say \$100,000.00."

The case of State Road Commission vs. Johnson, 550 P2d, 260, where the landowner was asked for his valuation of the property and upon indicating its value, indicated that the property was his life's work and that his valuation was based upon what it was worth to him. This case must be distinguished from the present case in which the Plaintiff gave very definitive reasons for her valuation of the property as a market value rather than a value to her as a sentimental item. The Defendant, at page 96 of the transcript, was asked by his attorney what he thought the value of the house to be, and the Defendant indicated that it

was \$85,000.00. The Defendant then, at page 97 of the transcript, indicated that he thought both parties should get out of the house what they had put into the house and then divide the equity in proportion to their contribution. However, on page 109 of the transcript Defendant admits Plaintiff is owner of one-half of the house. Essentially the Defendant gave testimony concerning his valuation of the property, yet now in Point II complains that the trial court erred in accepting the Plaintiff's unsupported estimate of the value of the house. The Defendant gave no other credible testimony which the court could have supported his opinion as to value, and in reading the comparison of Defendant's testimony to the Plaintiff's testimony, it is obvious that the Plaintiff's testimony is more credible by reason of the facts and details given by the Plaintiff. The Defendant cites the case of Anderson vs. State Farm Fire Insurance for the proposition that testimony of an owner as to value is not conclusive even if it is not contradicted. Defendant quotes from the case but fails to include the next paragraph which states as follows:

"His testimony is to be given such weight and credibility as the trier of fact finds reasonable under the circumstances.

Then he further cites the case of Iverson vs. Iverson, 526

P2d 1127 for the proposition that notwithstanding equitable powers vested in the District Court, the Court cannot act arbitrarily or on supposition or conjecture as to fact. Plaintiff cannot argue with either case.

The District Court took into consideration the various factors listed by the Plaintiff for the appreciation and value of the house and valued it at \$100,000.00. The Trial Court returned to the Plaintiff her investment of \$8,000.00 together with the sum of \$7,000.00 as Plaintiff's share of the equity in the house. Such an award is a common daily practice of the Courts in divorce cases and certainly does not show an arbitrary act nor one made by supposition or conjecture as to the facts.

The Defendant cites the case of Watson vs. Watson, 561 P2d 1072 Utah 1977, in which the trial court erred in failing to take post judgment evidence as a result of a motion for a new trial by reason of the fact that Plaintiff claimed she was not entitled to properly make discovery as to the value of the indian jewelry because it was taken by the Defendant along with other personal papers.

The Defendant in this case has always had the right to obtain for himself a valuation of the residence of the parties, and if there is fault in failing to obtain such an appraisal of

the residence, it must lie in this case with the Defendant.

The cases cited by the Defendant do not meet the proposition the Defendant advances, other cases have, however, addressed this question. See Lahr vs. Lahr 478 P2d 551, New Mexico 1970,

where the Court held as follows:

1. In determining whether Findings of Fact are supported by substantial evidence, we resolve all disputed facts and indulge in all reasonable inferences in favor of a successful party and disregard inferences to the contrary.
2. We presume the correctness of the judgment of the trial court who had the advantage of evaluating the demeanor of the parties and of the witnesses.
3. Plaintiff acknowledges that and owner of property may always testify as to its value.....This testimony alone constitutes substantial evidence to support the trial courts valuation at that figure.

The valuation on its face is reasonable taking into consideration the past two years of inflation and appreciation in the cost of building materials and labor.

The Defendant also gave his valuation, however, the trial court elected to treat the Plaintiff as more credible and chose her testimony.

POINT III

THE TRIAL COURT DID NOT ERR IN ALLOCATING THE PERSONAL PROPERTY OF THE PARTIES AND THE DEBTS OF THE PARTIES.

As stated by the New Mexico Court in the case of Lahr vs. Lahr, Supra, a decision of a trial court is not to be upset unless the decision was manifestly unjust, inequitable and an abuse of discretion warranting the Supreme Court to substitute its judgment therefore. The Defendant cites the case of Reed vs. Reed, Utah 594 P2d, 871, where the trial court awarded the wife - Plaintiff 90% of the assets of the parties. This was a marriage of long duration and the Supreme Court remanded the case back to the trial court stating, "if it appears that the decree is so discordant with an equitable allocation, that it will more likely lead to further difficulties and distress than to serve the desired objective, then a re-appraisal of the decree must be undertaken." Plaintiff does not disagree with the fact situation or the holding of the court. See also Cline vs. Cline, Utah 511, P2d, 1284, as cited by the Defendant. Each of those cases are pertinent only to their fact situation. The facts of this case are different.

Exhibits 8 and 9 entered into evidence in the above entitled matter by the Plaintiff, is a list of the property acquired by the parties during their 2 year marriage and an allocation of that property. Each of the parties have had an opportunity to value the various assets and their valuation was attached thereto. The

trial court, in making a division of the property, used such valuation in making an equitable division of the property of the parties.

With respect to the debts and obligations of the parties, the Defendant claims a contribution to the marriage of \$60,523.88 to be subtracted from this contribution is a contribution of \$28,118.26 for the house, leaving an approximate balance of \$32,000.00 as the Defendant's alleged contribution during the course of their marriage in contrast to the \$7,000.00 contribution by the Plaintiff.

The evidence reflects that the Plaintiff's only liquid assets at the time of the trial was \$32.00 in her checking account. (See TR. page 121, line 25) She was employed at the time of the trial by General Implement Distributors in Salt Lake City, Utah (TR page 4) at a salary of approximately \$600.00 per month. (TR page 115, line 5).

Plaintiff did not have her own transportation to come to trial, and, therefore, came from Salt Lake to Logan in a borrowed car (TR page 8, line 9 - 12). Plaintiff gave up her only transportation to the Defendant by reason of the fact that it was to be repossessed by the bank inasmuch as Plaintiff couldn't maintain the payments. (TR page 18, line 22, 23) From

the foregoing, the Court could reasonably find that the Plaintiff did not have the ability to pay any debts and obligations or attorney's fees for her own representation.

On the other hand, the outstanding debts and obligations as claimed by the Defendant are not, in fact, the debts and obligations incurred by the parties. Although it is conceded that there is evidence that some of the debts and obligations may have been incurred by the parties, however, those debts were, by in large, for the purchase of property in the Defendant's possession or debts or charge cards used by the Defendant after the separation.

The debt through Forseys in the amount of \$375.00 was for furniture the Defendant had in his living room (TR page 72). The debt to Federal Employees Credit Union was for a motorcycle in the Defendant's possession and it is curious to note that in the year since their separation, the debt has not been substantially reduced by the Defendant. (TR 73, TR 74, TR 75, TR 109)

Claiming the first mortgage loan payment on the house, since separation as a debt yet, the Defendant admits that he is living in the house and seeks to charge it as a joint debt or expense. However, the Defendant does concede at page 109 of the transcript that the Defendant lived in the house and complained

he is paying the mortgage balance on a home she is "one-half the owner of."

Apparently, the Court felt the Defendant's concession was of some importance.

With regards to the Visa account, the Defendant sought to have the Plaintiff pay half of the indebtedness claiming he had very accurate records at page 102 of the transcript. However, he could not detail to the Court, the balance of Visa, current charges since his separation, nor the amount of the account at the time of the separation. He did, however, concede that the Plaintiff paid \$200.00 on the account stating at page 103 of the transcript, "I think \$200.00, but I may be wrong."

With respect to Master Charge, Defendant indicates he has paid \$1,562.00 (Tr. 77) and that there remains a balance on the Master Charge of \$1,524.00. No attempt is made on the part of the Defendant to determine the indebtedness on Master Charge by the parties during their marriage, the items purchased with the Master Charge for which he may or may not have received or which Plaintiff may or may not have received, but does concede at page 103 of the transcript that the Plaintiff paid \$450.00 in May of 1979.

At page 103 of the transcript the Defendant was asked

"Now that you indicate what you want to do, the only fair thing to do is divide the Master Charge and the Visa equally as of February, 1980, is that correct: Answer: Yes. And how much have you paid on the Master Charge or how much have you charged to the Master Charge since your separation. Answer: I have no idea".

The ZCMI debt, Defendant wishes to divide of \$153.42 is for furniture in his possession. (TR 79 - TR 85)

A review of the record in an effort to determine from the Defendant's testimony the debts incurred by the parties and the property which relates to the debt, leaves the reader with the inescapable conclusion that from the evidence introduced by the Defendant, it is impossible to determine the outstanding debts and obligations attributable to the parties and the property which was purchased by that debt and obligation in the Plaintiff's possession.

It appears that the trial court, taking into consideration the evidence introduced by the Defendant, allocated the property to the parties and the debts and obligations of the parties fairly and equitably. Had the Defendant clearly defined debts related to property in the Plaintiff's possession such as the automobile taken by the Plaintiff subject to the indebtedness thereon, it may have been possible for the court to allocate

debts to the Plaintiff which she had in her possession. However, the record leaves much to be desired by way of definition as it relates to the Defendant's claimed error of distributing property to the Plaintiff and the bills to the Defendant.

The trial court, in a divorce action, has considerable latitude of discretion in adjusting financial and property interests and the party appealing therefrom has the burden of proving that there was a misunderstanding or misapplication of law resulting in substantial and prejudicial error or that the evidence clearly preponderates against the findings or that such a serious inequity resulted as to manifest a clear abuse of discretion. Pope vs. Pope, Utah 589 P2d, 752; English vs. English, Utah 565 P2d , 409; Hansen vs. Hansen, Utah 537 P2d 491; Mitchell vs. Mitchell, Utah 527, P2d, 1359. The evidence in this case should be reviewed most favorable to the findings of the trial court. Stucki vs. Stucki, Utah 562, P2d, 240.

Literally, hundreds of other cases could be cited for the propositions stated above.

CONCLUSION

The Defendant's principal contention as evidenced by his brief, is that the Court did not choose to believe his client as it relates to the value of the house, allocation of debts, and

the division of property. The record reflects the Defendant's inconsistencies and inaccuracies.

The Defendant would like to have the Court consider the number of marriages of the Plaintiff and the fact that the Plaintiff, may in the future, inherit some property from her mother, none of which is pertinent to this case. On the other hand, the Plaintiff's testimony contains a statement as to the value of the house based upon a market value and the grounds for the making of the estimate of value. Plaintiff's evidence contains an allocation of the property of the parties, (See Exhibits 8 and 9) which has a definiteness attached to it and in which the court could make a reasonable division of the property. Plaintiff essentially introduced no evidence as to indebtedness by reason of the fact that the Defendant, had at the time of the separation of the parties, removed into his possession the books and records of the parties making it impossible for the Plaintiff to introduce any evidence as to indebtedness. The record, as introduced by the Defendant leaves much to be desired in the way of accuracy, certainty, and clarity.

The Defendant complains that he was not allowed to introduce evidence as to grounds for divorce, yet the pleadings do

not even reflect an answer filed by the Defendant. (TR 46, 47)
The record further illustrates the Plaintiff's reason for not objecting to the absence of an answer filed and why a default was not filed. (TR page 99, lines 13 - 25)

The Plaintiff's financial position at the time of trial was evidenced by the fact that she had lost her automobile because she could not pay the monthly payments and that she had a nominal sum of \$32.00 in her checking account on December 5th.

The tenor of the trial was established by the Defendant on re-cross examination of the Plaintiff when he asked as follows:

Question: Isn't it true that you have your mother as a source of income. Answer: That's not true.

The Plaintiff, at the time of the trial, had been denied payment of a \$150.00 a month temporary support and, was unable to maintain current her debts and obligations particularly her automobile. She had no money to pay her attorney, she had invested her funds in the residence in which the Defendant was living. It was important to the Plaintiff that the Trial Court render a decision in the matter. This appeal has had the same effect upon Plaintiff's financial status, she has no return of her money, no attorney's fees to perfect the appeal, she has lost the car for a second time. The Plaintiff's only request is a resolution

of this case with attorney's fees and costs to be paid.

The trial court correctly allocated the property and the debts between the parties taking into consideration the evidence introduced by the parties.

DATED this 29 day of August, 1980.

HARRIS, PRESTON & GUTKE

By: Geo. W. Preston

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MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Brief to the Defendant's attorney, Raymond N. Malouf, MALOUF, MALOUF & JENKINS, 21 West Center Street, Logan, Utah 84321, on this 29 day of August, 1980.

Geo. W. Preston
George W. Preston