

1980

# John A. Georgedes v. Boni A. Georgedes : Brief of Plaintiff and Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

---

JOHN A. GEORGEDES, )  
 )  
Plaintiff and Respondent, )  
 )  
v. )  
 )  
BONI A. GEORGEDES, )  
 )  
Defendant and Appellant. )

---

No. 17073

BRIEF OF PLAINTIFF AND RESPONDENT

---

APPEAL FROM JUDGMENT OF THE  
SEVENTH DISTRICT COURT FOR  
CARBON COUNTY, STATE OF UTAH  
HONORABLE BOYD BUNNELL

---

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F I L E D

15 1980

IN THE SUPREME COURT OF THE STATE OF UTAH

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JOHN A. GEORGEDES,  
Plaintiff and Respondent,

v.

BONI A. GEORGEDES,  
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## CASES CITED

Barrett v. Barrett, 17 Utah 2d 1, 403 P.2d 649 (1965)  
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English v. English, 565 P.2d 409 (Utah 1977)  
Frank v. Frank, 585 P.2d 453 (Utah 1978)  
Mitchell v. Mitchell, 527 P.2d 1359 (Utah 1974)  
Weiss v. Weiss, 111 U. 353, 179 P.2d 1005 (1947)

## STATUTES CITED

30-3-3, Utah Code Annotated  
1953, as amended  
  
30-3-5, Utah Code Annotated  
1953, as amended

IN THE SUPREME COURT OF THE STATE OF UTAH

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Plaintiff and Respondent,	)	
	)	
v.	)	No. 17073
	)	
BONI A. GEORGEDES,	)	
	)	
Defendant and Appellant.	)	

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BRIEF OF PLAINTIFF-RESPONDENT

JOHN A. GEORGEDES

---

APPEAL FROM JUDGMENT OF THE  
SEVENTH DISTRICT COURT FOR  
CARBON COUNTY, STATE OF UTAH  
HONORABLE BOYD BUNNELL

---

STATEMENT OF THE NATURE OF THE CASE

This is an action in divorce.

DISPOSITION IN LOWER COURT

A Decree of Divorce was entered awarding each of the parties a Decree of Divorce from the other; awarding plaintiff all home and business real property and other business and personal assets; awarding defendant certain personal property and restoration of her former name.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmation of the trial court's decision and order.

STATEMENT OF FACTS

Respondent believes the following taken from the trial court's Memorandum Decision and Findings accurately and briefly states the

## Statement of Facts and the Nature of the Case:

The parties were married 15 April 1972. "[E]ven though the marriage lasted seven years there did not exist in fact the usual husband-wife and family association that makes a successful marriage for most of that period of time." (Trial Court Record, p. 92, hereinafter "R. 92"). Even though "[t]he Plaintiff worked hard and provided a comfortable standard of living for the Defendant [over a period of seven years] and made it possible for her to continue her education . . . he received little in return." (R. 92).

The court concluded that lack of communication may have contributed to this unusual lack of marital relations and therefore granted a divorce to both parties. It was not denied that one week after the marriage was concluded defendant moved her seven-year-old son into her bedroom with her and moved her husband into the basement. (R. 120). This became his bedroom for the duration of the marriage. (R. 121). The evidence also showed that even social relations were strained and limited during the entire marriage and that plaintiff, especially during the last three years of the marriage, took most of his meals away from home. (R. 121).

In determining the equities relative to distribution of assets the court concluded "the Defendant has an annual income of Nine Thousand (\$9,000.00) Dollars per year [She teaches at the College] . . . plus she receives Three Hundred Sixty Eight (\$368.00) Dollars per month for the support of her fifteen (15)

year old son and from which she is entitled to a contribution for his share of food and household and transportation expense." (This is Social Security for defendant's son by a prior marriage) (R. 93). Defendant's child is also the owner and beneficiary of a Trustee Passbook Savings Account as the result of an award by the Industrial Commission of Utah as a lump sum settlement awarded for the death of his father.

During the marriage plaintiff paid regularly to the defendant \$600.00 a month plus paying all the utilities and other incidental expenses. The defendant instead of using the money provided by social security banked it, together with a substantial portion of the support paid her by plaintiff, so that she accumulated assets during the marriage in excess of \$25,000. This accumulation was "made possible only as a result of the marriage." (R. 123). She also purchased an interest in property in Joe's Valley in the name of her son for which she paid \$4,500.00.

The income of plaintiff in 1978 shows \$11,000 with an expected income in 1979 of the same amount. "[H]e is required to pay under a prior Divorce Decree . . . Four Thousand One Hundred Sixty-Eight and 80/100 (\$4,068.80) Dollars per year leaving him . . . for his necessities . . . approximately Five Hundred Seventy (\$570.00) Dollars per month to live on. The business operated by the Plaintiff does not produce enough income to meet the monthly debts and obligations owed by the Plaintiff and he keeps the business operating because his father does not demand prompt payment of the obligations owed to him for the purchase of

the business which means in effect that Plaintiff is operating the business purely out of charity shown by his father." (R. 93). Because of the foregoing findings, the court concluded that the defendant was not entitled to alimony or attorney fees.

At the time of the marriage plaintiff was the owner of real estate and a cleaning business. "[T]he business and property . . . carried an indebtedness of approximately Fifty Two Thousand (\$52,000.00) Dollars . . . ." (R. 94). At the time of the divorce the same business and property carried an indebtedness of \$110,000.00. (R. 94). While the court recognized that the real property could have increased in value because of inflation he concluded "there is no evidence . . . of any increase in net worth that is not offset by the increase in indebtedness." (R. 94). Further, "The evidence shows that the business has little value from an income standpoint and remains open purely as a result of the charity of the Plaintiff's father." (R. 94).

At the time of trial plaintiff was indebted to banks, his father, and his former wife in the sum of \$123,446.20, an increase of about \$30,000 since his marriage in 1972. (R. 122).

The personal property was disposed of by giving defendant and plaintiff itemized personal property which neither party appears to seriously challenge.

The principal objection of defendant goes to the court's awarding all the real estate and the business (owned by plaintiff at the time of marriage) to plaintiff and refusing to grant defendant attorney fees or alimony.

## ARGUMENT

- I. THE TRIAL COURT IS VESTED WITH BROAD DISCRETION TO DETERMINE THE RIGHTS OF PARTIES TO A DIVORCE DECREE, AND THE TRIAL COURT'S DECISION WILL BE OVERTURNED ONLY IF SERIOUS INEQUITY HAS RESULTED FROM AN ABUSE OF DISCRETION BY THE TRIAL COURT.

Utah Code Ann. § 30-3-5(1) (1979 Supp.) reads, in relevant part, as follows:

When a decree of divorce is made, the court may make such orders in relation to the children, property and parties, and the maintenance of the parties and children, as may be equitable.

In making its order pursuant to a divorce decree, the trial court has "considerable latitude of discretion in adjusting financial and property interests." English v. English, 565 P.2d 409, 410 (Utah 1977). The trial court's decision will be overturned only where the trial court has clearly misunderstood or misapplied the law, resulting in substantial or prejudicial error; or where the evidence clearly preponderates against the trial court's decision; or where such a serious inequity has resulted as to demonstrate a clear abuse of discretion by the trial court. Id.

- II. THE BURDEN OF PROVING THAT THE TRIAL COURT HAS CLEARLY ABUSED ITS DISCRETION IS ON THE APPELLANT.

The trial court's order pursuant to a divorce decree is invested with a presumption of validity. Mitchell v. Mitchell, 527 P.2d 1359 (Utah 1974). On appeal from the trial court's decision, the burden is on the appellant to prove that the evidence clearly preponderates against the trial court's findings; that the trial court misunderstood or misapplied the law resulting in substantial and prejudicial error; or that such a serious

inequity has resulted as to manifest a clear abuse of discretion by the trial court. Id.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN MAKING ITS DECISION AND ORDER IN THIS CASE.

A. THE TRIAL COURT PROPERLY CONSIDERED THE NATURE OF THE MARRIAGE IN MAKING ITS DECISION.

In Point II of her brief, defendant claims that the trial court ignored the parties' marriage in making its award. The trial court in fact recognized the parties' lawful marriage. (R. 92). However, the court in its discretion took into account the nature of the marriage, along with all other relevant factors, in arriving at its decision. The nature of the parties' marriage "as far as the conduct of the parties was concerned [was] one of relative short duration." (R. 92). (Emphasis added.) Plaintiff supported defendant to the best of his ability and helped to finance her education, but the court acknowledged and properly considered the fact that the relationship between the parties was different from normal family relationships, and that the parties enjoyed a relatively short period of normal marital relations.

In support of her argument, defendant cites English v. English, 565 P.2d 409 (Utah 1977). That case held that the trial court had improperly considered the long duration of the marriage in fixing alimony, and the alimony award was cut in half. In Barrett v. Barrett, 17 Utah 2d 1, 403 P.2d 649, 651 (1965), on the other hand, the Utah Supreme Court recognized that the marriage of the parties in the case ". . . was a misadventure . . .

and was of comparatively short duration." On that basis the Court reduced the duration of the trial court's alimony award. Furthermore, the Utah Supreme Court recently recognized that despite its apparent statement to the contrary in English v. English, supra, " . . . the duration of the marriage is an appropriate factor to be considered in awarding alimony, . . . ." Frank v. Frank, 585 P.2d 453, 455 n. 1 (Utah 1978).

In the present case, the trial court properly considered not only the type of relationship the parties had during their marriage, but also the financial condition of the parties and their current and prospective financial needs. The trial court had all of the facts presented to it to consider in making its alimony award, and thus was in a unique position to determine the conditions and needs of the parties and the way in which their marital relationship had affected those conditions and needs. This Court should uphold the trial court's decision based on the trial court's discretion to consider all relevant facts.

B. THE TRIAL COURT PROPERLY CONSIDERED THE PARTIES' FINANCIAL CONDITIONS IN MAKING ITS PROPERTY AND ALIMONY AWARDS.

In Points III and IV of her brief, the defendant claims that the trial court improperly considered the savings account set up for defendant's child and the financial status of plaintiff in making its property division and alimony award. In so arguing the defendant ignores the main purpose of alimony, which is "to provide support for the wife as nearly as possible at the

standard of living she enjoyed during marriage, and to prevent the wife from becoming a public charge." English v. English, 565 P.2d 409, 411 (Utah 1977). The criteria to be used in making this determination include the wife's financial condition and needs, her ability to earn a sufficient income, and the husband's ability to provide support. English v. English, supra, 565 P.2d at 411-412. A review of the trial court's decision in this case reveals that the trial court properly exercised its discretion in disallowing alimony.

The defendant states that the plaintiff supported defendant with payments of \$600.00 per month during most of their marriage (Plaintiff's brief, p. 12). The trial court found that the defendant now has a net monthly income of \$600.00, in addition to the \$368.00 per month she receives for the support of her son, for a total of \$938.00. (R. 93). The trial court also found that the plaintiff has a net monthly income of \$570.00. (R. 93). Clearly the defendant is in no danger of becoming a "public charge." Furthermore, the defendant is able to support herself at a standard of living at least equal to that which she enjoyed during the marriage, and the plaintiff's ability to provide support is severely limited, if not nonexistent.

Under Utah Code Ann. § 30-3-5(1) (Supp. 1979), the trial court is given the power to make awards pursuant to a divorce decree "as may be equitable." The trial court exercised its discretion in this case by considering the parties' financial conditions, needs, and abilities in making its award. It was

proper for the trial court to consider all of the assets available to each of the parties in analyzing the relative financial positions of the parties. The purpose of awards pursuant to a divorce decree is not to punish either of the parties, but rather to assure that each of the parties is as well provided for as can equitably be ordered. The trial court accomplished that purpose in this case.

C. THE TRIAL COURT MADE A PROPER DIVISION OF PROPERTY BETWEEN THE PARTIES.

In Point II of her brief, the defendant argues that the trial court disregarded her joint tenancy interest in one of the businesses and in the parties' home in awarding the home and the business to the plaintiff. The fact that the defendant may have legally owned an interest in the home and business is irrelevant to the trial court's power to divide the property as it may deem equitable. Under Utah Code Ann. § 30-3-5(1) (Supp. 1979), "the Court may make such orders in relation to . . . property and parties . . . as may be equitable." The trial court recognized the nature of the defendant's interests in the property, and made its award on the basis of the evidence before it.

The defendant goes on to argue at length that the trial court's division of property was not in agreement with some of the evidence. However, the issue now before this Court is not whether the trial court's decision is in complete agreement with each part of the evidence, but whether the decision has resulted in such a serious inequity as to indicate a clear abuse

of discretion by the trial court. English v. English, 565 P.2d 409 (Utah 1977). The defendant now attempts to overturn the trial court's decision on the basis of the defendant's own appraisal of the home and the "apparent equity" in the laundry business (Defendant's brief, pp. 7-8). The trial court found that the home and business had realized little, if any, appreciable increases in value. (R. 121). Furthermore, the trial court found that the plaintiff's total indebtedness at the time of trial was approximately \$123,446.29, an increase of about \$30,000.00 from the beginning of the marriage. (R. 122).

The trial court was in a unique position to judge the quantity, quality, and validity of the evidence presented to it regarding the value of the property to be divided between the parties. It is clear that the parties' relationship during their marriage was not typical of marital relationships; that the plaintiff supported the defendant as well as could have been expected during the unusual and strained marital relationship; and that the defendant is now in a financial position as good as (if not better than) that of the plaintiff. The trial court did not abuse its discretion in awarding the home and business to the plaintiff, and the award has not resulted in a serious inequity. The trial court's property award should be upheld.

D. THE TRIAL COURT PROPERLY REFUSED TO GRANT  
ATTORNEY'S FEES TO THE DEFENDANT

Under Utah Code Ann. § 30-3-3 (1953), the trial court may require a party to a divorce proceeding to pay to the other party a sum of money to enable the other party to prosecute or

defend the action. In Weiss v. Weiss, 111 U. 353, 179 P.2d 1005, 1011 (1947), this Court interpreted that statute to permit awards of attorney's fees, "provided the necessity for such awards is found to exist." Thus the issue once again is whether the trial court abused its discretion in such a way as to result in a serious inequity by failing to require that the plaintiff pay the defendant's attorney's fees.

The trial court stated that the purpose of the statute is to assure that neither party is denied access to court because of inability to pay legal fees, and found that the defendant had not demonstrated an ability to pay legal fees. (R. 96). The defendant now claims that the trial court's award of the "income producing assets of the marriage" to the plaintiff left the defendant with no way to pay her attorney (Defendant's brief, p. 14). This is in direct contradiction to the trial court's finding that the property awarded to the plaintiff has little, if any, income-producing capacity. (R. 121). Furthermore, the trial court found that the defendant now has a monthly income of \$600.00 in addition to \$368.00 per month for child support from a prior marriage. (R. 93). The defendant's claim that she is unable to pay her attorney is without factual basis, and the trial court's decision not to require plaintiff to pay defendant's attorney's fees was not an abuse of discretion.

E. THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION FOR A NEW TRIAL.

The defendant originally moved for a new trial on the basis of surprise and inadequate damages. (R. 98). The defendant now

urges more specifically that the trial court was biased (Defendant's brief, p. 14). Regardless of the basis for the motion, the question of whether a new trial will be granted is within the broad discretion of the trial court, and the trial court's refusal to grant a new trial will be overturned on appeal only if the trial court abused its discretion. Crellin v. Thomas, 122 U. 122, 247 P.2d 264 (1952). The trial court did not abuse its discretion in this case.

The first basis for defendant's motion was surprise, in that the defendant was unaware of a fund set up for the use of defendant's minor child by the Industrial Commission of Utah. Defendant's motion was supported by an affidavit of her attorney stating that she had "simply forgotten about it." (R. 108). Furthermore, the fund is of little relevance to the case because, apart from the Industrial Commission fund, defendant is earning about \$600.00 per month in addition to a \$368.00 monthly support payment for her child. Thus the supposedly newly discovered evidence is not such "substantial material evidence, from which it appears there is at least a reasonable likelihood that it would affect the result in a new trial." Crellin v. Thomas, supra, 247 P.2d at 265.

The defendant has also based her appeal of the trial court's refusal to grant a new trial on several grounds not brought before the trial court, such as the trial court's setting of the trial date and several allegedly improper procedural matters. (Defendant's brief, pp. 15-16). The Supreme Court is limited in

its review of defendant's motion to the matters before the trial court, and will not consider matters brought for the first time before the Supreme Court. Corbet v. Corbet, 24 Utah 2d 378, 472 P.2d 430 (1970). The plaintiff has already rebutted the grounds alleged in defendant's original motion in plaintiff's Answer to Motion for New Trial. (R. 129-135). The new grounds alleged are not properly before this Court. The trial court determined in its broad discretion that defendant's allegations were insufficient to require a new trial. The trial court did not abuse that discretion, and its decision should not now be overturned.

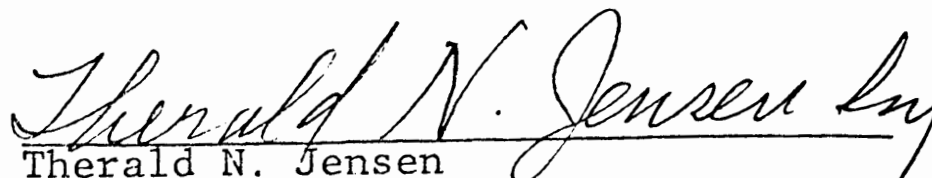
#### V. CONCLUSION.


The issue before the Court is whether the trial court in this case abused its discretion in making its award of property and alimony, causing a serious inequity to the defendant. The preceding discussion demonstrates that the parties had an unusual marital relationship. The plaintiff supported the defendant regularly during the marriage and helped to finance the defendant's education, despite the plaintiff's lack of a substantial income. The defendant now has a substantial income, supplemented by a monthly social security payment for the support of her child, and the plaintiff is earning a subsistence-level income. To require now that the plaintiff pay part of his limited income to the defendant as alimony would be to penalize the plaintiff and to award a windfall to the defendant. The trial court made its award and property division on the basis of all of the facts before it. The trial court did not abuse its discretion. The

plaintiff, therefore, requests that this Court affirm the decision of the trial court.

DATED this 15th day of September, 1980.

Respectfully submitted,

  
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#### CERTIFICATE OF MAILING

I hereby certify that on this 15th day of September, 1980, I mailed two true copies of the foregoing BRIEF OF PLAINTIFF-RESPONDENT to the attorney for the defendant-appellant herein, George H. Speciale, Attorney at Law, 44 Exchange Place, Salt Lake City, Utah 84111, by mailing said copies through the United States Mail, postage prepaid.

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