

1981

## Shirlene Rae Turner v. Thomas De Lan Turner : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT FOR THE STATE OF UTAH

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SHIRLENE RAE TURNER,	:	Case No. 17257
	:	
Plaintiff and Appellant,	:	
	:	
vs.	:	BRIEF OF APPELLANT
	:	
THOMAS DE LAN TURNER,	:	
	:	
Defendant and Respondent.	:	

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Appeal from the Judgment of the District  
Court of the Fourth Judicial District in  
and for Juab County, The State of Utah,  
the Honorable J. Robert Bullock, Judge.

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FILED

FEB 2 1981

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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT FOR THE STATE OF UTAH

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SHIRLENE RAE TURNER,	)	
	)	
Plaintiff and Appellant,	)	Case No. 17257
	)	
vs.	)	
	)	BRIEF OF APPELLANT
THOMAS DE LAN TURNER,	)	
	)	
Defendant and Respondent.	)	
	)	

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NATURE OF THE CASE

This is an action for divorce not involving children, in which questions of property distribution, alimony and attorney fees are presented to the Court for consideration.

DISPOSITION IN THE LOWER COURT

Trial on the issues was had on the 21st day of May, 1980, and following additional argument and motions, the Court entered its Findings of Fact and Conclusions of Law and Judgment on the 3rd day of July, 1980. The Decree granted the divorce to the plaintiff, provided for certain support, division of property and attorney fees.

RELIEF SOUGHT ON APPEAL

The appellant seeks amendment of the trial court's determination as to property distribution, alimony, and attorney fees, and an Order from the Court remanding the case to the District Court for revision

with respect to all of such items in conformance with the Order of the Court, with a requested Order of the Supreme Court directing that the property acquired by the parties during the marriage be distributed in approximately one-half value to the plaintiff and one-half value to the defendant; ordering that the plaintiff be granted additional amounts for alimony, and for attorney fees.

#### STATEMENT OF FACTS

For simplicity in reference, the titles "Plaintiff" and "Defendant" will be used herein.

The plaintiff and the defendant were inter-married at San Leandro, California on the 26th day of June, 1971. Each of the parties had been previously divorced from other spouses. T. 32-24. The plaintiff brought into the marriage, household furnishings and fixtures, and a vehicle acquired from her first marriage; the defendant lost most of his property to his prior wife, T. 33-4, but did have household furnishings and fixtures, some savings, interest in real estate, interest in his mother's estate, and work tools, having a value based upon defendant's testimony, of approximately \$23,000. At the time of their marriage, each of the parties were employed, with the plaintiff working at the Bank of America, and the defendant working as an officer for the Oakland City Police Department.

Just several weeks prior to their marriage, the parties acquired a house, and the down payment was made from the defendant's funds. As the parties entered into the marriage, the plaintiff brought her minor child, who was approximately 9 years of age at the time. The defendant did not have children which he brought into the marriage, and the parties to this action did not have children during the course of their marriage.

From the time of their marriage, the parties pooled their mutual assets and also pooled their earnings. Their mutual goal was to acquire sufficient cash assets so that they could move to Utah and acquire farm property and locate themselves here. T. 49-17. This goal was eventually consummated and the parties began to purchase real estate in Utah in 1974, and continued to purchase several years thereafter, eventually acquiring in Utah, property generally described as the Malmgren home, Horton home, Christensen farm, and Bendixen farm. A complete analysis of the assets acquired by the parties during their marriage was submitted to the Court, and is found at Page 31 of the record. Based upon that analysis, the parties paid for the assets acquired \$111,929.00, and these assets had a net value at the time of the divorce proceedings of \$190,700.00. T. 8-11. During the marriage the parties had acquired from the wages of each, together with certain pension benefits and sales of property, and loans, total

disposable income in the sum of \$290,949.00. The values for the property as specified by the plaintiff were determined by consultation with her attorney and by using the multiple listing catalog provided by the Real Estate Association serving the Juab County area, where the parties' property is located. T. 11-16. Further, by using depreciation tax schedules, and based upon joint values and values placed upon the property by the defendant. T. 12-12, T. 13-19, T. 14-21, T. 23-18, T. 51-29.

As the property was acquired it was acquired by the jointly pooled money of the parties, and the property was placed in their joint names. T. 54-25, R. 87.

During the time of their marriage, the defendant continued his employment at the Oakland City Police Department, even past a retirement point, so as to qualify his wife for certain pension benefits. T. 55-25. However, these pension benefits, in so far as the plaintiff is concerned, terminated at the divorce, but the defendant continued to receive the benefits as established by the marriage. R. 89. Further, the pension benefits acquired by the plaintiff through her employment, were terminated through the property investments by reason of her withdrawing of those pension funds and withdrawing from her work with Bank of America. R. 89.

As the parties acquired their Utah property, they then made plans to move to Utah and eventually did so; and with the move from California



to Utah the plaintiff terminated her employment outside the family business, and stayed in Utah, worked on the farm, managed the family home and functioned as the manager of the family business. R. 88, T. 64-11. The defendant, on the other hand, secured employment as an iron worker with Kennecott Copper, working in the Huntington, Utah area, and worked as an instructor at Snow College, and at the time of the divorce was working essentially with the farm. At the time of the divorce the plaintiff was employed as a receptionist at a local medical clinic.

The Court found that the plaintiff was entitled to a divorce from the defendant on grounds of mental cruelty, there being evidence introduced that there were numerous arguments between the parties; that the defendant often resorted to threatening divorce action and that finally he transferred his affections from the plaintiff to another woman; that he presented himself in public with a woman other than the plaintiff, and even went to the Clinic where the plaintiff was employed in the company of his lady friend, and there secured blood tests for a marriage contemplated in the future. And that the same was humiliating to the plaintiff. T. 4-27, T. 6-26, T. 8-5.

At the time of the divorce the defendant's income consisted of cash coming from his pension with the Oakland City Police Department, which brought a net income of \$923 per month; in addition to that, he had whatever income he was able to derive from the farm, but the

defendant refused to testify as to same, but did indicate that his health was sufficient to allow him to continue his farming operation. T. 73-21. T. 74-17. The plaintiff testified that she was employed at the medical clinic in Nephi, Utah where her net monthly income was approximately \$540. The plaintiff testified that her present monthly expenses were \$763, and would shortly increase to approximately \$1000 per month. T. 26-20, R. 38. And based upon such analysis, she had an immediate need of \$225 per month alimony, and that amount would increase in the year of 1981 to approximately \$500 per month. Based upon the financial analysis of earnings during the marriage, R. 34, the parties had in addition to the monies spent for the purchase of their property, disposable income of approximately \$20,000 per year. T. 21-16, R. 36. It was upon this income that the plaintiff's standard of living was established.

There was undisputed testimony that the reasonable attorney fees for the efforts of plaintiff's attorney, was the sum of \$1500. T. 87-18, and the Court so found, R. 90.

With this factual background, the Court distributed the property according to the values placed thereon by the plaintiff, so as to give to the plaintiff a net distribution of \$52,642.00, and to the defendant a net distribution of \$146,050.00; or, 27% of the assets to the plaintiff and 73% of the assets to the defendant. Or on the other hand, based upon

the values placed upon the property by the defendant, the plaintiff received a net distribution of \$60,274.00, and the defendant received a net distribution of \$115,850.00; or, 33% to the plaintiff and 67% to the defendant.

The Court granted the plaintiff alimony in the sum of \$50 per month, for 24 consecutive months. And the Court granted the plaintiff judgment against the defendant for reasonable attorney fees in the sum of \$500.

#### ARGUMENT

POINT I. A MARITAL ESTATE SHOULD BE DIVIDED EQUALLY BETWEEN THE PARTIES WHERE EACH PARTY HAS CONTRIBUTED SIMILAR TIME AND EFFORT TO THE ACCUMULATION AND MAINTENANCE OF THE PROPERTY WHICH IS ACQUIRED IN THEIR JOINT NAMES.

The authority of a trial court to dispose of property in a divorce proceeding is specified statutorily in U.C.A. 1953 Section 30-3-5(1):

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. The court shall have continuing jurisdiction to make subsequent changes or new orders with respect to the support and maintenance of the parties, the custody of the children and their support and maintenance, or the distribution of property as shall be reasonable and necessary. . . .

The requirement that court orders concerning property disposition be equitable was likewise contained in earlier statutes.

Comp. Laws Utah 1917, Section 3000; U.C.A. 1943 Section 40-3-5.

The Utah Supreme Court has been quite consistent through the years in its pronouncements concerning property distribution in divorce cases. In almost all its opinions discussing the issue on appeal, the Court has variously noted that the trial judge has considerable latitude of discretion in the matter. Naylor v. Naylor, 563 P.2d 184 (Utah 1977). This means that even though the trial court's judgment may be reviewed on appeal, it will not be disturbed "unless the evidence clearly preponderates against the finding of the trial court; or there has been a plain abuse of discretion; or where a manifest injustice or inequity is wrought." MacDonald v. MacDonald, 120 Utah 573, 236 P.2d 1066 (1951).

The Supreme Court has gone further to provide guidelines regarding the trial court's discretion. Several opinions focus generally on the equity that the trial court should seek in its judgment.

[A] court's duty is . . . to arrange the best possible allocation of the property and the economic resources of the parties so that the parties and their children can pursue their lives in as happy and useful a manner as possible. If it appears that the decree is so discordant with an equitable allocation that it will likely lead to further difficulties and distress than to serve the desired objective, then a reappraisal of the decree must be undertaken. (Read v. Read, 594 P.2d 871, 872 (Utah 1979))

The responsibility of the trial court is to endeavor to provide a just and equitable adjustment of their economic resources so that the parties might reconstruct their lives on a happy and useful basis. (Gramme v. Gramme, 587 P.2d 144, 148 (Utah 1978), rehearing denied (1979))

These seem to be statements of the policy seen behind U.C.A.  
1953 30-3-5(1).

Although the Court has dealt often with divorce cases and property distribution, it has recently reaffirmed that, "in the distribution of the marital estate, there is no fixed rule or formula." Gramme v. Gramme, supra, at 148. This does not mean that the trial court's discretion is unlimited, because the Court has often listed factors a court might consider when they are pertinent to the case being tried. The most inclusive listing of such factors was made by (then) Mr. Justice Crockett in MacDonald v. MacDonald, 120 Utah 573, 236 P.2d 1066 (1951). Because most of the factors suggested in other cases are included in that list, it is duplicated here for the sake of convenience:

The first six relate to conditions existing at the time of the marriage.

- (1) The social position and standard of living of each before marriage.
- (2) The respective ages of the parties.
- (3) What each may have given up for the marriage.
- (4) What money or property each brought into the marriage.
- (5) The physical and mental health of the parties.
- (6) The relative ability, training, and education of the parties.

The rest are conditions to be appraised at the time of the divorce.

(7) The time of duration of the marriage.

(8) The present income of the parties and the property acquired during marriage and owned either jointly or by each now.

(9) How it was acquired and the efforts of each in doing so.

(10) Children reared, their present ages, and obligations to them or help which may in some instances be expected.

(11) The present mental and physical health of the parties.

(12) The present age and life expectancy of the parties.

(13) The happiness and pleasure or lack of it, experienced during the marriage.

(14) Any extraordinary sacrifice, devotion or care which may have been given to the spouse or others, such as mother, father, etc., and obligations to other dependents having a secondary right to support.

(15) The present standards of living and needs of each including the cost of living.

In addition to this list of factors, brief mention should be made of a "rule of thumb" some courts have occasionally resorted to, namely that, in dividing the marital estate, one-third thereof should go to the wife and two-thirds to the husband. This concept apparently has its basis in an early Utah Supreme Court opinion that compares the dissolution of marriage by divorce to dissolution of marriage by death, in which case the common law would require that the widow receive one-third of her husband's estate. Griffin v. Griffin 18 Utah 98, 55 P.84(1898) The Court noted, however, that the amount

awarded should be varied "in view of the particular facts and circumstances." This qualification seems to undo whatever value the one-third/two-thirds measure has, unless it is merely to serve as a starting point from which to make variations in light of all the circumstances in the case. In 1927 the Court emphasized in discussing this standard that "no general rule can govern all cases, but . . . the property disposition must be varied with the peculiar circumstances of the case." Bullen v. Bullen, 71 Utah 63, 262 P. 292 (1927), modified (1928). The Court illustrated this point by referring to various cases in which the property distribution was far from being in accordance with the one-third/two-thirds standard and yet was upheld on appeal. In 1975 the Supreme Court approved a judgment that apparently had been based on this standard, but its approval was not of the standard itself but of the fact that in that case its application was not an abuse of discretion under the circumstances. Cox v. Cox, 532 P.2d 994(1975). And in 1977 the Court stated that a wife in a divorce case seeking one-third of her spouse's estate has a claim based only on custom, not law; that there is no formula fixing an award of one-third of the estate; and that the real focus is on the statutory requirement that orders in relation to property distribution be equitable. Clearly, there is nothing in this analysis to encourage a court to adhere strictly to the one-third/two-thirds measure.

It is difficult in analyzing Utah Supreme Court opinions in divorce cases to discover any pattern of approval or disapproval concerning property distribution made by trial courts. Indeed, the Court itself was motivated at one time to declare that "since each case goes off on its own facts, not much profit is gained by discussing them." Pinion v. Pinion, 92 Utah 255, 67 P.2d 265 (1937) On the other hand, the Court in Watts v. Watts, 21 Utah 2d 137, 442 P.2d 30 (1968) said that even though the facts of that case were not identical to those in Slaughter v. Slaughter, 18 Utah 2d 274, 421 P.2d 503 (1966), the situation was generally similar and the same principles and authorities noted in that case were equally applicable to Watts. Therefore, because the analysis of past case law may prove to be persuasive here by analogy or distinction, several cases are briefly analyzed below in chronological order. Focus is on the property distribution only.

--Stewart v. Stewart, 66 Utah 366, 242 P. 947 (1926)

H sued W for an assault. H was awarded the house and real estate, jointly owned. W was awarded the household goods and \$250 cash. This distribution was found inequitable and unfair and was modified, W to receive the household goods and one-half of the interest in the real estate with the house (no \$250 cash). Analogous: (1) Second marriage for both parties. (2) No children. (3) Married ten years.



(4) Ownership of property as tenants in common. (5) W contributed to property accumulation. Distinguishable: (1) W brought property into the marriage. (2) H contributed little, but made house payments from his small salary because convenient. (3) H ten years older than W, but W had rheumatism (affecting earning capacity of both).

--Weaver v. Weaver, 21 Utah 2d 166, 442 P.2d 928 (1968)

W sued H. W was awarded about half of \$750,000 estate. No abuse of discretion found. Analogous: (1) W assisted in supporting family during early years of marriage; worked five years as nurse; quit when first child was born and then assisted somewhat in H's medical practice. Distinguishable: (1) Married thirty-three years. (2) In addition to the \$250,000 H accumulated by medical practice, \$500,000 was accumulated by growth in value of stocks, a considerable portion of which were purchased from or received as a gift from H's father and sister. (3) Both had serious ailments; W totally disabled. (4) Had three children, now all adults.

--Humphreys v. Humphreys, 520 P.2d 193 (Utah 1974)

W sued H. W was awarded an equal division of proceeds on the sale of their home, after liens and other judgments against the parties were satisfied. Abuse of discretion implied in Supreme Court's decision to modify the judgment to reimburse W for the \$3,400 down payment she had made on the house, her claim being preferred over the other liens and judgments. Analogous: (1) Second marriage for both. (2) Married

nearly nine years. (3) W worked most of those years. Distinguishable.

(1) Had one five-year old child.

--Naylor v. Naylor, 563 P.2d 184 (1977)

W sued H. Each awarded a one-half interest in real estate they owned. No background discussion, but no abuse of discretion found in dividing the proceeds equally.

Given the above law and case rulings, it can be reasonably argued in the present case that the trial court abused its discretion and the presently ordered property distribution is inequitable and violates the intent of statutory and case law.

The property acquired by the parties was all acquired during the marriage, title was taken in their joint names, consideration was paid from funds acquired during the marriage from the equal effort and time of the parties, the property was acquired as a mutually determined goal and dream. And the joint effort required to acquire and manage the property, plus the mutual dislocation of the parties from prior jobs, home, and society, generally led to the disintegration of the marriage.

The parties essentially entered the marriage on equal footing, put forth equal effort into the marriage and property accumulation, and consequently, should leave the marriage with an approximate equal distribution of property.

The present court order divides the property anywhere from only

27% to 33% for the plaintiff, and from 67% to 73% to the defendant.

This is clearly inequitable and requires adjustment.

POINT II. ALIMONY SHOULD BE BASED UPON THE NEED OF THE RECIPIENT AND THE ABILITY OF THE PARTIES TO EARN INCOME; AND FURTHER, BASED UPON THE STANDARD OF LIVING TO WHICH THEY HAVE BECOME ACCUSTOMED.

Again we are faced with the determination of what is reasonable alimony. In making this determination the following facts are important:

1. The standard of living had by the parties during their marriage was based upon disposable income, over and above that used to acquire their property, of approximately \$20,000 per year.
  2. The plaintiff is an able bodied woman, employed as a receptionist with take-home pay of \$540 per month, and has no other sources of income.
  3. The plaintiff's monthly budget requires expenditure of \$763 to the fall of 1981 when it will increase to \$1000 per month.
  4. The plaintiff is the sole provider for a teenage son.
  5. The plaintiff terminated all earned pension benefits in order to acquire the property of the parties and move to Utah.
  6. The defendant is able bodied sufficient to do farm work full time, and has job skills as a law enforcement officer and as an iron worker.
  7. The defendant has income from pension benefits of \$930 net each month, with such sum increasing by cost of living adjustments.
- Historically, the defendant has been employed and has had substantial

earnings from his employment, averaging over \$12,000 per year during the marriage of the parties. And in addition has been awarded substantial income-producing farm property.

8. There was no testimony given regarding defendant's monthly budget, however, we do have facts which show the home he lives in, his farms, and machinery have been fully paid for.

9. The defendant has no dependants.

10. An award of temporary alimony of \$300 per month was made by the court. And the defendant, consistently, without hardship, paid in excess of \$200 per month on such order.

Considering all of the above, it can be fairly concluded that the plaintiff has a need of alimony of no less than \$200 per month, and the defendant has reasonable and adequate ability to pay the same. Consequently such an award would fall within the reasonable guide line of the applicable statute, U.C.A. 1953 Section 30-3-5(1) And is also supported by case law, see English v. English, 565 P.2d 409 (Utah 1977).

Consequently, the trial court's award of alimony in the sum of \$50 per month for 24 months is inadequate, placing the plaintiff in necessitous circumstances, while leaving the defendant with substantially more income than is required to maintain his accustomed living standard. This is not equitable and must now be remedied by ruling of this court.

POINT III. AWARD OF ATTORNEY FEES SHOULD BE BASED UPON REASONABLE EFFORT EXPENDED AND A REASONABLE HOURLY CHARGE.

The awarding of attorney fees in divorce actions is statutorily founded in Section 30-3-3, U.C.A. 1953. And has been implimented and adopted by the courts, which set as guidelines:

1. Necessity of party requesting.
2. Granting and amount is within trial court's sound discretion.

See Weiss v. Weiss, 111 Utah 353, 179 P.2d 1005 (1947).

The plaintiff had need for attorney fees. Her income of \$540 per month plus the court ordered alimony of \$50 per month, do not cover her undisputed expenses which are in excess of \$760 per month.

The defendant has ability to pay. With pension income in excess of \$900 per month, plus earnings from the farm and other employment to which he can devote substantial time.

There was no dispute and the court found that considering the time reasonably devoted to his client's cause and a reasonable hourly charge, plaintiff had incurred attorney fees in the sum of \$1540.00.

The effort of counsel greatly assisted the court, and the Court so commented:

"You did a good job, incidentally. I appreciate that very much. And as a matter of fact, without those Schedules and without your submission on the farm property and whatever, I would not have been able to have understood what the testimony was all about." T. 93.