

1981

Shirlene Rae Turner v. Thomas De Lan Turner : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors. Donald J. Eyre, Jr.; Attorney for Respondent Milton T. Harmon; Attorney for Appellant

Recommended Citation

Brief of Respondent, *Turner v. Turner*, No. 17257 (Utah Supreme Court, 1981).
https://digitalcommons.law.byu.edu/uofu_sc2/2451

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT FOR THE STATE OF UTAH

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

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

DONALD J. EYRE JR.
125 North Main Street
Nephi, Utah 84648
Telephone: 623-1141
Attorney for Defendant
and Respondent.

MILTON T. HARMON
36 South Main Street
Nephi, Utah 84648
Telephone: 623-1802
Attorney for Plaintiff
and Appellant.

FILED

MAR - 6 1981

IN THE SUPREME COURT FOR THE STATE OF UTAH

SHIRLENE RAE TURNER,

Plaintiff and Appellant,

vs.

THOMAS DE LAN TURNER,

Defendant and Respondent.

Case No. 17257

BRIEF OF RESPONDENT

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

DONALD J. EYRE JR.
125 North Main Street
Nephi, Utah 84648
Telephone: 623-1141
Attorney for Defendant
and Respondent.

MILTON T. HARMON
36 South Main Street
Nephi, Utah 84648
Telephone: 623-1802
Attorney for Plaintiff
and Appellant.

TABLE OF CONTENTS

	Page
NATURE OF THE CASE	1
DISPOSITION IN THE LOWER COURT	1
RELIEF SOUGHT ON APPEAL	2
STATEMENT ON THE FACTS	2
ARGUMENT	6
<p>POINT I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DIVIDING THE MARITAL PROPERTY.</p>	
<p>POINT II. THE AWARD OF ALIMONY AND ATTORNEYS' FEES BY THE TRIAL COURT WAS FAIR AND EQUITABLE AND NOT AN ABUSE OF DISCRETION.</p>	
CONCLUSION	12

CASES CITED:

English v. English, Utah, 565, P.2d 409 (1977)	9
Gramme v. Gramme, Utah, 587 P.2d 144 (1978)	7 and 9
Hamilton v. Hamilton, Utah, 562 P.2d 235 (1977)	7
Hansen v. Hansen, Utah, 537 P.2d 491 (1975)	7
McDonald v. McDonald, 120 Utah 573, 236 P.2d 1066 (1951)	7
Openshaw v. Openshaw, 80 U. 9, 12 P.2d 364 (1932)	11
Pearson v. Pearson, Utah, 561 P.2d 1080 (1977)	7
Pope v. Pope, Utah, 589 P.2d 752 (1978)	7
Read v. Read, Utah, 594 P.2d 871 (1979)	8
Weiss v. Weiss, 111 U. 353, 179 P. 2d 1005 (1947)	11

IN THE SUPREME COURT FOR THE STATE OF UTAH

SHIRLENE RAE TURNER,

Plaintiff and Appellant, :

vs. :

THOMAS DE LAN TURNER,

Defendant and Respondent. :

BRIEF OF RESPONDENT

Case No. 17257

NATURE OF THE CASE

This case is an appeal by the Plaintiff-Appellant from a Ruling of the Fourth Judicial District Court, in and for Juab County, State of Utah, the Honorable J. Robert Bullock presiding, denying Plaintiff-Appellant's Motion for New Trial and for Amendment of Findings of Fact and Conclusions of Law and Decree of Divorce.

DISPOSITION IN THE LOWER COURT

Plaintiff-Appellant commenced this action in the lower Court to obtain a Decree of Divorce. Trial on the issues was held on the 21st day of May, 1980, and based thereon the Court entered its Findings of Fact and Conclusions of Law and Decree of Divorce. The Decree granted a divorce to the plaintiff, provided for the division of the parties' property and debts, and for payment of alimony and attorney fees. The plaintiff

filed a Motion for a New Trial and for Amendment of Findings of Fact and Conclusions of Law and Decree of Divorce. After submission of Memorandum and Argument the lower Court denied said Motion, prompting this appeal.

RELIEF SOUGHT ON APPEAL

Defendant-Respondent seeks to have this Honorable Supreme Court affirm the Ruling of the lower Court denying Appellant's Motion for New Trial and for Amendment of Findings of Fact and Conclusions of Law and Decree of Divorce, and thereby affirming the Findings of Fact and Conclusions of Law and Decree of Divorce entered by the Lower Court.

STATEMENT OF FACTS

The Defendant-Respondent will follow the pattern of the Plaintiff-Appellant's Brief and the titles "Plaintiff" and "Defendant" will be used herein. The Defendant makes the following additions and corrections to the Plaintiff's Statement of Facts.

The Plaintiff and the Defendant were inter-married at San Leandro, California on June 26, 1971. The defendant brought assets into the marriage having a value in excess of \$29,000.00, R-55, which assets include equity in a house in San Leandro, California, which the

Defendant had purchased prior to the parties' marriage. The Plaintiff had a negative net worth at the time of marriage and brought no substantial assets into the marriage, T-36,37.

Both parties had previously been married and the Plaintiff had a minor child which she brought into the marriage. The Defendant was the main support of the Plaintiff's minor child during the period of their marriage, T-40. The parties had no children as issue of their marriage.

At the time of their marriage the Defendant was employed as a police officer by the Oakland City Police Department, and had worked sufficient years to retire, but he worked an additional year to vest pension rights in the Plaintiff, T-55. The Plaintiff was employed at the Bank of America at the time of their marriage, and continued to be employed there during the period of time the parties resided in California.

It had been the Defendant's life long goal to move to Utah and own and operate a small farm, T-15,54. In furtherance of that goal the parties entered into contracts of sale to purchase certain farm ground near Levan, Utah, beginning in 1974. In order that the parties could make the payments on the farm property and acquire the necessary farm machinery, the Defendant returned to his former trade of iron worker. During 1975 and 1976, he worked as an iron worker for Kaiser Steel, at times working seven days a week,

twelve hours a day, T-56,57. The Defendant during 1976 and 1977 came to Utah by himself and worked on an iron work job at Kennecott Copper and lived in his truck camper in order to earn additional money for farm machinery, and on the weekends would come to Levan, Utah, to work on the farm, Dep. of Thomas Turner -72.

In 1977, the Defendant sold his house in California and moved with the Plaintiff to Levan, Utah. The parties purchased what has been described as the Malmgren home in Levan, Utah, using the proceeds of the sale of the Defendant's house in California to purchase the house, R-54. The parties subsequently purchased what has been described as the Horton home in Levan, Utah, during 1978, and used the Malmgren home as a rental unit, R-53.

After moving to Utah the Defendant began to operate the two farms the parties had previously purchased, with minimal help from the Plaintiff, T-77-25. The two farms are generally described as the Christensen farm and the Bendixen farm, which farms total 48 acres with associated water stock. The farms at the time of divorce hearing had a total value by the defendant's testimony of \$84,000.00 or \$1,750.00 an acre, R-51.

At the time of the divorce the Defendant was 60 years old and had various health problems which prevented him from further employment as an iron worker, T-69. The Plaintiff

was 41 at the time of the divorce, in good health, and employed as a receptionist at a medical clinic.

The Court found that the Plaintiff was entitled to a divorce from the Defendant on grounds of mental cruelty. The Defendant also presented testimony to establish grounds for his claim of mental cruelty as set forth in his Counterclaim, T-64,65,66. The Court made no finding that the Defendant had transferred his affections from the Plaintiff to another woman, and the Defendant had no involvement with another woman until after the Plaintiff had filed for divorce.

The Plaintiff testified at trial that her monthly budget was \$763.00, which amount included the \$180.00 mortgage payment on the Horton home, and her projected increase after May, 1981, was as a result of a projected church mission or college expense by her son from a previous marriage, R-38.

Both parties employed attorneys and incurred attorneys' fees, which they were obligated to pay, T- 87,88.

After a full trial on the merits the Court awarded the Plaintiff the Horton home, a substantial portion of the parties household furniture and appliances, the parties car, and various other miscellaneous items. The Defendant was awarded the Malmgren home, the farms, the farm machinery, and various other miscellaneous items. The Defendant was

further ordered to make the monthly payments on the Horton home and pay the Plaintiff a \$10,000.00 cash settlement.

Using the values placed upon the property by the Defendant, and deleting the values of those items of property which the parties brought into the marriage and subtracting from the Defendant's total the \$10,000.00 he was ordered to pay the Plaintiff and the \$20,000.00 mortgage on the Horton home which he is obligated to pay, the Plaintiff received a net distribution of \$69,800.00 and the Defendant received a net distribution of \$95,688.00, or 42% to the Plaintiff and 58% to the Defendant, R-58.

Subsequent to the entry of the Decree of Divorce in this matter the Defendant executed and delivered to the Plaintiff a check for \$10,000.00 with the endorsement on the back "Received as full payment of the \$10,000.00 due and owing Shirlene Turner as part of the property settlement in the Decree of Divorce between Shirlene Turner and Thomas D. Turner." The Plaintiff has accepted said check and cashed it.

ARGUMENT

POINT I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DIVIDING THE MARITAL PROPERTY.

This Court has stated on numerous occasions that there is no fixed formula upon which to determine a division of property, it is a prerogative of the trial court to make whatever disposition of property as it deems fair, equitable

able, and necessary for the protection and welfare of the parties. See Pearson v. Pearson, Utah, 561 P^{2d} 1080 (1977) Hamilton v. Hamilton, Utah, 562 P^{2d} 235 (1977); Gramme v. Gramme, Utah, 587 P^{2d} 144 (1978).

Further this Court has also stated on numerous occasions that the trial Court in a divorce action has considerable latitude of discretion in adjusting financial and property interests, and for the Plaintiff-Appellant to prevail, she would have to prove that there was a misunderstanding or misapplication of law resulting in substantial and prejudicial error, or that the evidence clearly preponderated against the Courts findings, or that such a serious inequity resulted as to manifest a clear abuse of discretion. See Pope v. Pope, Utah, 589 P^{2d} 752 (1978) Hansen v. Hansen, Utah, 537 P^{2d} 491 (1975). The Plaintiff has not sustained her burden of establishing one of the above mentioned factors that would warrant this Court in reversing the decision of the trial court as to property division.

Using some of the factors set forth in McDonald v. McDonald, 120 Utah 573, 236 P^{2d} 1066 (1951) and stated in the Plaintiff's Brief, we obtain the following comparison between the Plaintiff and the Defendant.

1. The defendant brought assets into the marriage having a value in excess of \$29,000.00; the plaintiff had a negative net worth at the time of the marriage.
2. The marriage between the parties had a duration

of nine years, and no children were born as issue of the marriage.

3. The defendant supported the plaintiff's minor son from a previous marriage during the period of their marriage.

4. Both parties worked during periods of the marriage, with the defendant's income being substantially more than the plaintiffs.

5. The defendant put forth extra effort to acquire the Utah farm property and machinery, working long hours and living under difficult conditions.

6. At the time of the divorce the defendant was 60 years old with health problems which prevented his normal employment; the plaintiff was 41 in good health, and employed as a receptionist at a medical clinic.

7. The plaintiff's standard of living after the divorce will be basically the same as before the divorce; she is living in the same house with the same furnishings, and sufficient income to cover her monthly budget, and in addition she received \$10,000.00 as part of the property settlement.

When reference is given to the above mentioned factors it becomes clear that the division of the property made by the lower Court herein permits the parties to pursue their lives in as happy and useful a manner as possible.

Further the division of property by the lower Court will not likely lead to additional economic difficulties and distress, and therefore this Court should affirm the division of the property made by the lower Court. See Read v. Read, Utah, 594 P^{2d} 871. (1979)

The defendant received the farm and farm machinery, which had special significance to him because of his life long dream to operate a small farm in Utah and because of the extra sacrifice he had made to acquire those assets.

The plaintiff received the better of the two houses, free and clear of any obligation to pay the mortgage, and essentially all of the furnishings and appliances which the parties owned at the time of divorce. In addition she was awarded a \$10,000.00 cash settlement from the defendant. After nine years of marriage, the plaintiff went from a financial position of having a negative net worth, to a position where she was awarded nearly \$70,000.00 in assets. Clearly the lower Court did not abuse its discretion in distributing the parties assets in the manner that it did.

POINT II. THE AWARD OF ALIMONY AND ATTORNEYS' FEES
BY THE TRIAL COURT WAS FAIR AND EQUITABLE
AND NOT AN ABUSE OF DISCRETION

This Court in recent cases has held that the purpose of alimony is to provide post-marital support, and it is not to be considered as a penalty to be imposed upon the husband, or as a reward granted to the wife. See Gramme v. Gramme, Utah, 587 P^{2d} 144, (1978).

The criteria that should be used in determining a reasonable award of alimony include financial conditions and needs of wife, ability of wife to produce a sufficient income for herself, and the ability of the husband to provide support, See English v. English, Utah, 565 P^{2d} 409, (1977).

The plaintiff testified at trial that her monthly budget was \$763.00, which amount included the \$180.00 monthly mortgage payment on the Horton home. She

further testified that she would need \$225.00 a month alimony until she could adjust her affairs otherwise, based upon her then take-home pay of \$540.00 per month, T-28. The trial Court ordered the defendant to pay the Plaintiff alimony of \$50.00 a month for 24 months, and ordered him in addition to pay the \$180.00 a month mortgage payment on the Horton home. The total monthly support payment ordered by the lower Court was \$230.00, which exceeds the \$225.00 requested by the Plaintiff. Clearly there was not an abuse of discretion in the award of alimony if it exceeded the actual request by the Plaintiff.

Mention is made in the Plaintiff-Appellant's Brief that her monthly budget will increase in the future, because of the possible increased needs of her teenage son from a former marriage. The possibility of increased future needs is not a proper consideration in the determination of present support payments. The Plaintiff because of her present ability to work and earn an income, and because of her age and the condition of her health is in a much better position to provide for the future support of herself and her son, than is the defendant.

As to the awarding of attorneys' fees, the Plaintiff alleges that the trial Court erred in awarding the Plaintiff only \$500.00 attorney's fees rather than the

\$1,540.00 that was requested. This Court has again held that the reasonableness of the award of attorney's fees is largely a matter within the discretion of the trial Court. See Openshaw v. Openshaw, 80 U. 9, 12 P^{2d} 364 (1932) , Weiss v. Weiss, 111 U. 353, 179 P^{2d} 1005 (1947).

Many of the same factors used to determine if there was an abuse of discretion as to property division and as to award of alimony should be applicable, also, as to the award of attorney's fees.

In assessing the need of the Plaintiff for the award of attorney's fees the Court should consider the fact that the Plaintiff made no request for temporary attorney's fees prior to trial; and was employed at the time of trial and the defendant was unemployed with his only source of income being the \$930.00 a month pension check. The plaintiff was also awarded a \$10,000.00 cash settlement which would provide a source for payment of attorney's fees. The defendant also had to employ an attorney to represent his interests, to whom he had to make payment.

The Plaintiff implies in her Brief that the trial Court made a finding that \$1,500.00 was a reasonable attorney's fee and the Court made an oversight in awarding only \$500.00 on attorney's fees. In fact the Court only made a finding that the Plaintiff's

attorney expended 30 hours in prosecution of the suit and a reasonable fee per hour was \$50.00 per hour. The award of \$500.00 attorney's fees was not an oversight as the Court made a direct ruling on that amount when the Court denied the Plaintiff's Motion to Amend the Findings of Fact and Conclusions of Law.

Based upon the foregoing argument the lower Court did not abuse its discretion in the award of alimony and attorney's fees.

CONCLUSION

The trial Court at the close of the trial herein made the comment that in its view parties in a divorce action usually can make a better decision for themselves than the Court can, but when they force the Court to make those decisions, it can only base its decisions upon the facts as it sees them and the laws. Commenting further the Court stated that it obviously couldn't do what both parties wanted, but it would have to do what the evidence and the law indicates, T-88, 89

The trial Court, because of its nature, is in the best position to evaluate the evidence and consider each of the parties' position and then render a sound decision. That is why this Court has consistently held in divorce cases that the trial Court has considerable latitude of

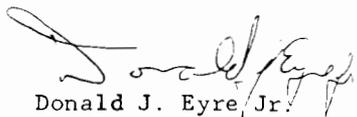
discretion in adjusting the financial and property interests of the parties, and this Court will not reverse the decision of the trial Court unless there has been a substantial error or a serious inequity would result therefrom.

The Plaintiff-Appellant has not met the burden of showing a substantial error or a serious inequity with respect to the division of property, or to the award of alimony and attorney's fees. The Plaintiff's standard of living will remain the same after the divorce as before; she will be living in the same house with the same furnishings, and will have sufficient income to cover her monthly expenses. In addition she was awarded a \$10,000.00 cash settlement which she accepted as satisfaction of the property division between the parties.

The award of the farm property to the Defendant is not an abuse of discretion, given the special significance of that property to the Defendant and the significant extra work and effort he put forth to obtain it.

Based upon the facts herein and the argument set forth, clearly the division of property and the award of alimony and attorney's fees was within the latitude of discretion of the trial Court and its judgment should be affirmed by this Court.

Respectfully submitted,



Donald J. Eyre, Jr.
125 North Main
Nephi, Utah 84648
Attorney for Defendant-
Respondent