

1980

Johanna G. Nielsen v. Hilton Phillip Nielsen : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
OF THE
STATE OF UTAH

JOHANNA G. NIELSEN, :

Plaintiff-Respondent :

-vs- :

CASE NO. 17260

HILTON PHILLIP NIELSEN, :

Defendant-Appellant :

APPELLANT'S BRIEF

APPEAL FROM A JUDGMENT OF
THE THIRD DISTRICT COURT
SALT LAKE COUNTY
HON. KENNETH RIGTRUP

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IN THE SUPREME COURT
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POINT:

The TRIAL COURT IN ORDERING A DISTRIBUTION OF THE PROPERTY OF THE PARTIES TO THIS ACTION HAS ABUSED ITS DISCRETION AND THE ORDER WORKS A MANIFEST INJUSTICE AND IS INEQUITABLE.

STATUTES

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CASES CITED

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APPELLANT'S BRIEF

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NATURE OF CASE

- - - - -

This is an action in divorce, both parties having filed Complaints, Numbers D-79-160 and D-79-1021, the matters having been consolidated at the time of trial on June 3, 1980.

DISPOSITION BELOW

The Honorable Kenneth Rigtrup, District Judge, entered an Order July 21, 1980, granting a Decree of divorce to the Plaintiff-Respondent in this matter. There were no children as a result of this marriage, and no support or alimony was awarded. The Court ordered a complete distribution of the property contributed and acquired during the marriage, and each party was required to pay their own fees and costs.

RELIEF SOUGHT

on the grounds that the Trial Judge abused his discretion in granting this award and failed to equitably distribute the parties' economic resources.

STATEMENT OF FACTS

Plaintiff and Defendant were married on November 11, 1974 and separated in November of 1978. A reconciliation was attempted in February of 1979; however, by March of 1980 it was determined that the viable ends of the marriage were over and the divorce action was pursued. The divorce trial occurred on June 3, 1980 and the Court entered its Findings of Fact and Conclusions of Law and the Decree of Divorce on July 21, 1980.

At the time of the marriage the testimony would reflect that Defendant-Appellant brought into the relationship the following assets:

1. A residential property located in Midvale, Utah (no value established).
2. A horse raising and training business with ownership of animals with a value of \$40,000-\$50,000.
3. A school bus driving route which produced a gross yearly income of \$6,000-\$6,500.
4. A sawdust delivery business which produced an income of approximately \$100.00 per week, or \$4,800 gross.
5. A pick-up truck, horse trailer, tack and equipment and miscellaneous personal effects.

The Plaintiff-Respondent came into the marriage with

value established).

2. Her interest as a sole proprietor in a restaurant business known as Johanna's Kitchen. (The business was located on property which was being rented on a month-to-month basis and according to her tax records, showed a gross income the year prior to the marriage, 1973, of approximately \$15,000.00.

3. Her automobile and personal effects.

4. A savings account which contained \$14,000, more or less.

The record indicates that during the course of the marriage, all assets were pooled and one major account, known as the "Johanna's Kitchen account", was established. The parties made payments for all their living expenses and paid their incomes into that account. During the four years of this marriage, Plaintiff and Defendant were involved in the purchase of the property upon which the business, known as Johanna's Kitchen was located. He worked in the restaurant, assisted in a complete remodeling, which changed the business from a ten booth business to a facility capable of seating 100 people. He also performed the other jobs in which he was involved prior to, and at the time of the marriage.

Plaintiff in this action continued to exercise primary control over the restaurant, but also became involved with Defendant in his horse ownership, raising and training

During the course of the marriage, the parties held all assets in common and all income and losses generated from their business activities were shared and considered joint obligations.

Testimony indicates that in addition to the purchase of the property and remodeling of the restaurant facility, that a piece of recreational property located near the Wansley Reservoir was purchased. During the marriage, Plaintiff acquired another automobile and Defendant acquired a different pick-up truck and horse trailer. During the marriage horses were sold and the income earned went to the Kitchen account. Defendant's other income went into the Kitchen account and monies were borrowed which went into the Kitchen account. All expenses of the marital unit were paid from the restaurant account.

At the time of the divorce the Trial Judge granted Plaintiff a Decree of Divorce and made the following disposition of property. The equity or monetary values testified to and accepted at the time of trial are included for consideration:

TO THE PLAINTIFF:

1. Her home located in Sandy, Utah with all furnishings and personal effects acquired prior to marriage. (No value established)
2. A horse, known as Wild Lightning, with a value of \$5,000.00.
3. An automobile.
4. All equity in the business known as Johanna's

Kitchen including the real property upon which the business was located. Appraisal shows a value in the

land and business of \$104,000.00, or after subtracting the mortgage amount and other payables of \$57,000.00, a net equity of approximately \$47,000.00. It should be noted that the business in 1979 reported a gross revenue of \$216,000.00 for Federal Income Tax purposes.

TO THE DEFENDANT:

1. The residential real property he owned prior to the marriage located in Midvale, Utah. (No value established, except that property had recently been sold on contract for the price of \$35,900.00)
2. The recreational property located at Wanship - equity value of approximately \$1,500.00 in the property.
3. All of the remaining horses and equipment associated with his horse training and raising business (estimated value of remaining stock was approximately \$5,000.00)
4. His pick-up truck, horse trailer and personal effects including certain items of jewelry which had been removed from his vehicle and not previously returned.

RELIEF SOUGHT

At this time, the Court award has resulted in the following circumstances. Defendant, who is age 64, is currently working part-time for approximately \$15.00 per week and on Social Security, shows a net loss after the divorce in income of approximately \$2,500.00 per year. (A comparison of part-time income and Social Security against his school bus driving

position and sawdust delivery route.)

A loss in interest and equity in his horse business of \$35,000.00 to \$40,000.00 determined by value at divorce -vs- value of marriage.

Net appreciation in the value of real property, without considering the property he brought into the marriage of approximately \$1,500.00.

Defendant, considering the award, is in substantially worse financial condition now than he was at the time the marriage was contracted.

On the other hand, the Plaintiff in his matter has received an award that grants her all of the appreciation in the value of the business, even though the testimony at the trial would indicate Defendant substantially contributed to that value. Additionally, she has been awarded assets in the form of a horse which indicates that she received part of the assets which might have been considered uniquely the Defendant's business.

Without considering the residential real property which each brought into the marriage, the vehicles, personal property or personal effects or establishing a value for gifts of jewelry and otherwise which were exchanged and lost or still the fact remains that the Defendant received an equity position in real property and business assets of approximately \$6,500.00. (\$5,000.00 worth of horses and \$1,500.00 worth of property.) The Plaintiff, without considering the value of residential real property owned prior to the marriage, vehicles

personal property or gifts of jewelry obtained during the marriage has an equity position of at least \$52,000.00 (\$47,000 of equity in the business property and \$5,000 value of horse awarded.)

Additionally, Plaintiff, at age 45, has a business which has shown an increased revenue production from 1973 at \$15,000.00 to a 1979 figure of \$216,000.00.

From a position where two people enter a marriage on nearly equal footings, work together for a period of four years to substantially improve one business at the expense of others, and then to distribute the appreciation 13% to the Defendant and 87% to the Plaintiff appears to be an abuse of the Trial Judge's discretion.

In the case of Read -vs- Read, 594 P.2d 871, the Supreme Court in 1979 held that:

"In a divorce proceeding, Court's duty is to consider various factors relating to situation and to arrange best possible allocation of property and economic resources of the parties, so that the parties....can pursue their lives in as happy and useful a manner as possible; if it appears that decree is so discordant with an equitable allocation, it will more likely lead to further difficulties and distress than to serve the desired objective, then a reappraisal of the decree must be undertaken."

Further in the Read case the Court held that:

"A property settlement contained in a divorce decree which awarded a wife approximately 90 per cent of assets accumulated by parties during theirmarriage was inequitable."

In the case at hand, it appears that the wife has been awarded almost 90% of the assets accumulated during the course of the marriage. The Plaintiff wife herein has been

awarded 100% of all income producing assets and this would under the reasoning of the Court, in the case of Pope -vs- Pope, 586 P.2d 752, a 1978 Utah case, be inequitable. In that decision the Court held that:

"The Trial Court's division of marital property resulting in 65% of benefits to wife and 35% to husband did not constitute abuse of discretion, since husband was awarded income-producing assets of family, husband had two college degrees and several years experience in operating his business, and wife had no college education and was unemployed at time of trial."

In the case of Gramme -vs- Gramme, 587 F.2d 144, the Utah Supreme Court in construing the requirements of UCA 1953 30-3-5 provides:

"In the distribution of marital estate, there is no fixed rule or formula, thus the Trial Court's responsibility is to endeavor to provide a just and equitable adjustment of parties economic resources so that parties might reconstruct their life on a happy and useful basis.

In this case the property award has provided the wife all income producing assets and although her ownership of the basic business pre-dated the marriage, the mutual efforts of both parties, in addition to their mutual assets were used to add to and increase its value. It would be just and equitable:

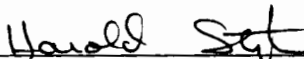
1. For the Supreme Court to readjust the property distribution, and award the Appellant a portion of the accumulated equity in the business.
or in the alternative
2. Remand for additional action by the Trial Court to determine what distribution would be just and equitable in the circumstances.

SEE ALSO the following Utah cases:

Humphreys -vs- Humphreys 520 P.2d 193

Martinett -vs- Martinett 8 Ut.2d 202

Respectfully submitted,



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