

1980

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

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *Nielsen v. Nielsen*, No. 17260 (Utah Supreme Court, 1980).
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IN THE SUPREME COURT
OF THE STATE OF UTAH

JOHANNA G. NIELSEN,
Plaintiff-Respondent,
vs.
HILTON PHILLIP NIELSEN,
Defendant-Appellant.

Case No. 17260

RESPONDENT'S BRIEF

Appeal from a Judgment of
the Third District Court for
Salt Lake County
Hon. Kenneth Rigtrup

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FILED

DEC 22 1980

Clerk, Supreme Court, Utah

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Defendant-Appellant.

Case No. 17260

RESPONDENT'S BRIEF

STATEMENT OF THE KIND OF CASE

This is an appeal from a Divorce Decree, Findings of Fact and Conclusions of Law, entered by the Honorable Kenneth Rigtrup. Both parties were satisfied that the marriage could be dissolved. The only question is one of equitableness of division of property, some of which was acquired by the parties during their marriage.

DISPOSITION IN LOWER COURT

See Appellant's Brief.

RELIEF SOUGHT ON APPEAL

Defendant seeks to have the Court substitute its opinion as to an equitable and fair distribution of property, some of which was acquired during the marriage, for the trial court's judgment and decree.

STATEMENT OF FACTS

Plaintiff agrees with the Defendant's Statement of Facts.

ARGUMENT

POINT I

THERE IS SUBSTANTIAL PROBATIVE, COMPETENT EVIDENCE SUPPORTING THE FINDINGS OF THE TRIAL COURT, AND ITS DECREE IS AN EQUITABLE DIVISION OF PROPERTY IN WHICH THE PARTIES HAD AN INTEREST.

The marriage between Plaintiff and Defendant was of short duration, commencing on November 15, 1974 and terminating, for all practical purposes, in November of 1978, barely four years.

During the marriage the Plaintiff was gainfully employed in her business, Johanna's Kitchen, a business which she had established prior to the marriage and which, during the marriage, due to the Plaintiff's business ability and hard work, prospered. Defendant continued, during the marriage, to operate his horse training and racing business, which was financed substantially from earnings that the Plaintiff provided out of her restaurant business.

The only property which was acquired during the marriage was an equitable interest in a property near Wanship, where a downpayment and some additional payments had been made out of earnings primarily from Johanna's Kitchen. The history of the marriage is that the Plaintiff's business prospered, the Defendant's business failed.

The Defendant abandoned the marriage and sought the company of another woman in California and was no longer interested in

continuing his relationship with Plaintiff (See R., page 33).

Substantial evidence was received by the Court and examination of income tax returns for many years was made. The Court attempted to return to the Defendant all of the property which still existed and which was the result of his efforts and which he owned prior to the marriage. It returned to the Plaintiff her business which had prospered and which was in an improved condition compared to what it was at the beginning of the marriage.

Plaintiff testified that Defendant made little contribution to Johanna's Kitchen (R.35). Out of her business income, Plaintiff paid Defendant's alimony to a former wife (R. 37). She paid his obligations from the Kitchen income (R. 38-39-40). The gambling which Defendant did on his horses was paid out of the Plaintiff's business (R. 41). There was a steady loss in Defendant's horse business (R. 42). Even Defendant testified that the horse expenses exceeded the income from the horse operation (R. 92). Even the gambling, according to Defendant, only broke even (R. 97).

A careful examination of all the evidence reveals, it is respectfully submitted, that the trial court exercised even-handed and prudent discretion in fashioning a division of property. His decree permits both parties to reconstruct their lives on a happy and useful basis and returns to them all of the property in which they could honestly claim an interest.

The circumstances before the Court now resemble the case of Jespersion v. Jespersen, 610 P.2d 326, where this Court approved a 77% - 23% split of residual assets.

It is respectfully submitted that the Court followed the admonitions of this Court in its latest decision, Hacking v. Hacking, filed November 5, 1980, Case No. 16821, which cited the following cases as support for the proposition that this Court does not disturb the discretion of the trial court in fashioning a property division unless it discovers an abuse of discretion, and that fashioning a property division which permits the parties to reconstruct their lives on a happy and useful basis is the end that should be sought by all courts. See Fletcher v. Fletcher, Utah 615 P.2d 1218; Kerr v. Kerr, Utah, 610 P.2d 1380 (1980); Searle v. Searle, Utah, 522 P.2d 697 (1974); Read v. Read, Utah, 594 P.2d 871 (1979); Gramme v. Gramme, Utah, 587 P.2d 144 (1978); DeRose v. DeRose, 19 Utah 2d 77, 426 P.2d 221 (1967); English v. English, Utah, 565 P.2d 409 (1977); Naylor v. Naylor, Utah, 563 P.2d 184 (1977); Stone v. Stone, 19 Utah 2d 378, 431 P.2d 802 (1967); Mitchell v. Mitchell, Utah, 527 P.2d 1359 (1974).

CONCLUSION

The trial court made a careful, equitable, and fair distribution of the marital assets. His decrees should be affirmed.

Respectfully submitted this _____ day of _____, 1980.

KING and PETERSON

DAVID T. KING

Attorney for Respondent