

1956

# Viola Vogle Wilson v. Marcel Felix Wilson : Brief of Appellant

Utah Supreme Court

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McCullough Boyce & McCullough; Attorneys for Appellant;

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**IN THE SUPREME COURT**

OF THE

**STATE OF UTAH**

VIOLA VOGLE WILSON,  
*Plaintiff and Respondent,*

— v. —

MARCEL FELIX WILSON,  
*Defendant and Appellant,*

} Case No. 8434

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**BRIEF OF APPELLANT**

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**McCULLOUGH BOYCE & McCULLOUGH**  
*Attorneys for Appellant*

417 Kearns Building  
Salt Lake City 1, Utah

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*Defendant and Appellant,*

} Case No. 8434

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### BRIEF OF APPELLANT

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#### STATEMENT OF FACT

This case came on for trial on September 16, 1955, before the Honorable John F. Wahlquist, one of the judges of the Second Judicial District Court, sitting at Farmington, Utah.

The facts are as follows: Plaintiff and defendant were married March 5, 1940. At the time of marriage plaintiff

was approximately 30 years of age and defendant 24 years of age. They had been married approximately 15 years. Hence, at the time of the divorce hearing plaintiff was 45 years old and defendant 39 years old. (R. 2, 12, 20.)

Prior to the marriage plaintiff had been employed as a saleslady in a shoe store in Salt Lake City for approximately 10 years. (R. 12) Plaintiff was not, however, employed outside of her duties as a housewife during any period of her married life and as far as the record discloses did not contribute any money or property in the acquisition of any of the assets accumulated by the parties during the marriage. (R. 12)

Except for a few weeks when plaintiff and defendant were first married and lived with plaintiff's parents, defendant has supported and maintained plaintiff, and all of the assets accumulated during their marriage were purchased with money earned by defendant. (R. 12, 18, 21, 23, 24, 25, 26, 30, 35)

At the time of the separation of the parties and at the filing of the complaint for divorce, plaintiff and defendant had accumulated the following property:

1. Home in Bountiful purchased for \$15,950.00. The fair market value of said home at the time of divorce was between nineteen and twenty thousand dollars. Subsequent to the signing of the decree of divorce plaintiff sold said property for a figure in excess of nineteen thousand dollars. There was a mortgage on said home as of August, 1955, in the sum of \$9,352.74 (R. 13, 10, 50, Exh. g)

2. A home in Salt Lake purchased for \$2,700.00 and fully paid for at the time of the divorce hearing. The fair

market value of said home is between four and five thousand dollars. (R. 13, 50)

3. Furniture and furnishings in the Bountiful home of a value of four thousand dollars. (R. 13)

4. Furniture in the Salt Lake home. The record discloses no estimate as to its value. Plaintiff testified that said Salt Lake home was "partly furnished." (R. 3)

5. Uranium stock which was sold prior to the divorce hearing for \$545.90. (R. 10)

6. A joint bank account at Continental National Bank in the sum of \$827.39, which plaintiff upon the filing of the divorce complaint immediately withdrew from said joint account and placed in an account in her own name in Walker Bank & Trust Company. (See Exh. A, R. 16)

7. Tax refund check in the sum of \$161.10. (R. 3)

8. 1946 Oldsmobile of a value of \$95.00. (R. 50)

Defendant, although not permanently employed at the time of divorce, is capable of earning from his labor an average of \$250.00 to \$300.00 per month. (R. 55, 56. See also Findings of Fact R. 29)

Defendant does not contest the ruling of the court with respect to the granting of the divorce to plaintiff. The record discloses that defendant asked plaintiff to secure a divorce for the reason that he was in love with another woman and desired to marry her. Plaintiff established sufficient grounds for divorce.

Defendant at the time of the divorce hearing was receiving from the U. S. Government, as a result of a service con-

nected disability—loss of hearing—\$173.00 per month. (R. 52)

Plaintiff was unemployed at the time of the hearing and stated she was under the care of Dr. Earl Skidmore. She states that the last time she saw Dr. Skidmore was “last Monday.” (R. 11) Plaintiff did not state what her physical defect was, but did state that she was physically unable to work right then. (R. 11) She further stated that she had no further appointments to see Dr. Skidmore, but would probably go to him frequently. (R. 11, 12) As to the purpose of plaintiff’s visit “last Monday” to Dr. Skidmore, apparently said visit was to determine whether plaintiff could have children or not. Plaintiff stated at R. 33: “A. As of *last Monday* the doctor said he could see no reason why I haven’t been able to have children.” Apparently a great deal of the parties marital difficulties stem from the fact they had had no children, although both obviously had a desire for children. (R. 28, 33, 34) It is defendant’s understanding that plaintiff is gainfully employed at the present time.

The court awarded to plaintiff the following:

1. The Bountiful home.
2. The Salt Lake home.
3. The furniture, furnishings and appliances located in both homes.
4. The \$827.89 account in Walker Bank, which includes in addition to the \$827.89, the tax refund in the sum of \$161.10 which plaintiff, prior to the divorce hearing, deposited in the Walker account in her name, or a total of \$988.99.

5. In addition to the above, the lower court gave plaintiff judgment against defendant in the sum of \$5,000.00, payable at the rate of \$50.00 or more per month. The court stated in the Decree R. 33: "said sum is ordered paid by defendant in any and all events as in the case of alimony, except that said sum is intended as a portion of the allocation of property to plaintiff and shall not be subjected to future modification by reason of any change of circumstances of the parties, and shall be a charge upon the estate of the defendant as to any balance that should remain should he die prior to the full payment thereof."

In addition to the above mentioned property, the court states in the Findings of Fact, with reference to the property accumulated during the marriage: R. 29. "A 1946 Oldsmobile and personal effects belonging to the defendant, including fishing gear, carpenter tools and four pieces of beauty shop equipment (3 chairs and hair dryer)." Other than the 1946 Oldsmobile, said other property—"fishing gear, carpenter tools and four pieces of beauty shop equipment (3 chairs and hair dryer)" are not mentioned in the record as property accumulated by the parties. Further the court did not see fit to award the property to either party in the decree of divorce. Presumably the court felt the defendant was entitled to the same as it is still in defendant's possession. Since this property was incorporated in the Findings of Fact somewhat extraneously, the court should not be offended if defendant states that said property, including the 1946 Oldsmobile automobile, could be readily duplicated for less than \$250.00, even though such valuation appraisal does not appear in the record. It is certain that the personal effects of plaintiff, including her wedding and



engagement rings and miscellaneous jewelry, would be comparable in value to the above items.

The sum of money, \$545.90, received from the sale of the uranium stock was used to pay \$250.00 to plaintiff's attorney (he had already received \$100.00 previously from plaintiff), \$14.80 costs of court, and \$281.10 to defendant's attorney. See letter of defendant's attorney to court dated September 26, 1955—R. 27.

It is upon this record that defendant seeks the aid of this court. Defendant asks relief from the oppressive judgment which has been rendered against him, depriving him of all the assets acquired during 15 years of married life, and saddling him with a \$5,000.00 judgment payable as alimony at the rate of \$50.00 per month.

## STATEMENT OF POINTS

POINT I. DEFENDANT IS ENTITLED TO A TRIAL DE NOVO AND A JUDGMENT FROM THE SUPREME COURT BASED UPON THE RECORD PRODUCED IN THE LOWER COURT.

POINT II. THE LOWER COURT GROSSLY ABUSED ITS DISCRETION IN MAKING THE AWARD OF ALIMONY AND DIVISION OF MARITAL PROPERTY WHEREBY DEFENDANT WAS DEPRIVED OF ALL THE ASSETS ACCUMULATED DURING MARRIAGE AND, IN ADDITION, ORDERED TO PAY FIFTY DOLLARS PER MONTH FOR A TOTAL OF ONE HUNDRED MONTHS.

## ARGUMENT

POINT I. DEFENDANT IS ENTITLED TO A TRIAL DE NOVO AND A JUDGMENT FROM THE SUPREME COURT BASED UPON THE RECORD PRODUCED IN THE LOWER COURT.

It is well settled law, by this court, that where the propriety of an alimony or property distribution in a decree of divorce is raised on appeal, this court will review the evidence in the nature of a trial de novo and appellant is entitled to the judgment of the Supreme Court as well as the trial court on this question. See *Hendricks v. Hendricks*, 91 Utah 553, 63 P 2d 277, also *Foreman v. Foreman*, 111 Utah 72, 176 P 2d 144, and cases cited therein.

POINT II. THE LOWER COURT GROSSLY ABUSED ITS DISCRETION IN MAKING THE AWARD OF ALIMONY AND DIVISION OF MARITAL PROPERTY WHEREBY DEFENDANT WAS DEPRIVED OF ALL THE ASSETS ACCUMULATED DURING MARRIAGE AND, IN ADDITION, ORDERED TO PAY FIFTY DOLLARS PER MONTH FOR A TOTAL OF ONE HUNDRED MONTHS.

Counsel for defendant have searched the Utah cases without success to find something comparable to the case at bar which would justify the lower court in rendering the decision that it did. It is defendant's contention that the lower court grossly abused its discretion in making its decision.

This court has held on many occasions that the ruling of the lower court will not be upset unless it is shown there was an abuse of discretion. In the instant case the lower court arrived at an exceedingly unjust result.

The court at R. 57 of the transcript of the testimony stated:

"The Court: I've thought this matter over. I think it's pathetic that the thing hasn't been settled to a greater extent than it has been between counsel. Of course, there is an impasse there. There's no question at all but that the lady is entitled a divorce in this matter on the grounds of mental cruelty. The thing I'm faced with of course is the division of the property, deciding what to do about this property.

"I'm mindful of several things about it. The one thing I'm most mindful about is what I've termed Amos and Andy, that is: Big judgments are hard to collect. A bird in the hand is worth two in the bush in this alimony business. At the same time I think under the law she is entitled to a certain amount of alimony because of 15 years. If certain divisions are made, I have in mind offering this election to the plaintiff: At the same time, I might say I foresee that this man is about to go into another marriage which is going to mean bitterness, almost unbearable bitterness, about the payment of alimony and that kind of thing. It's going to be a real human problem. I'm sure both counsel appreciate immediately the problems that are going to grow up as the years go by over alimony payment. This is the election: I would like the plaintiff to make a choice. She may have all of the property except the check in evidence.

"Mr. Duncan: I didn't get that.

"The Court: She may have all the property except the check in evidence, and \$5,000.00 payable \$50.00 a month for one hundred payments for the next one hundred months, or she may choose between the two homes and have \$10,000.00 at a hundred dollars a month, payable in one hundred installments. Please make a choice."

The lower court, from the context of the statement given above, apparently was attempting to give to plaintiff suffi-

cient so as to be supported the rest of her life, regardless of the equities of the situation.

The decisions of this court have compared the dissolution of marriage by divorce as analogous to its dissolution by death and a general rule for allowance of alimony is one-third of husbands property or one-third of his income. *Griffin v. Griffin*, 18 Utah 98, 55 P 84. Also *Bullen v. Bullen*, 71 Utah 63, 262 P 292. But that said amount is relative and must vary with the facts. *Woolley v. Woolley*, 113 Utah 391, 195 P 2d 743. For instance where the wife's health has been affected by the husband's conduct then alimony may be granted. *Foreman v. Foreman* 111 Utah 72, 176 P 2d 144.

“Effort should be made to place the parties as nearly as possible in the position they were immediately prior to the time they established their joint accounts, and joint ownership in bonds, and if for any reason *either party* cannot be placed fully in that status, he or she should be given credit in the form of a judgment for the shortage. In consideration of this matter the court should allow Mrs. Foreman a reasonable sum of money per month for such length of time as the court believes will enable her to readjust her life to her former position of self-support.” *Foreman v. Foreman*, cited *supra*.

In the case of *Pinion v. Pinion*, 92 Utah 255, 67 P 2d 265, and followed specifically by this court in *Anderson v. Anderson*, 104 Utah 104, 138 P 252, Justice Wolfe lists nine factors or elements to be given consideration by the court in awarding alimony and in settling property rights. They are as follows:

1. What were the ages of the parties when married? Plaintiff was 30, defendant 24.

2. What is the duration of the marriage. In this case 15 years.

3. What did the parties surrender or give up by marriage? Plaintiff gave up a job as a saleslady in a shoe store. In return she has been supported and maintained during the 15 years of married life. True she did not live in luxury, but as stated by plaintiff: "A. No, Mr. Gustin, we were never in a position that we were worried about money." Indeed, the wages of defendant were such that by his earnings alone they accumulated marital assets with a net value in excess of twenty thousand dollars. From all indications she lived better than she did prior to the marriage.

4. What property, if any, the parties contributed by marriage? Neither party entered into the marriage with any previous acquired property or money. Plaintiff was not employed outside of the home during marriage. Everything that the parties had at the time of divorce was gained by the parties during their married life from the money earned by defendant.

5. What amount of property was held by the parties at the time of divorce? All of the property of the parties was held jointly except the 1946 Oldsmobile, which was in defendant's name alone. The joint bank account was originally in the parties joint name, but was withdrawn by plaintiff and put in her own name.

6. What is the ability and opportunity of each party to earn money? Defendant is 39 and has a trade as a hair dresser, which he can pursue. Defendant's earnings from said trade, as shown by the record, will yield him about \$250.00

or \$300.00 per month. There is also a good possibility that defendant can continue his trade for some years to come.

Plaintiff has not worked for 15 years. The last job she held as a saleslady lasted for ten years up to the time of marriage. Accordingly it will be more difficult for plaintiff to secure employment than defendant, but she is not entirely incapacitated from working. Plaintiff testified that she was under the care of Dr. Earl Skidmore and was physically unable to work. However, she does not disclose the nature of her physical disability. The last time she claims she saw the doctor prior to the hearing was for the purpose of determining whether or not she could have children. Further defendant understands plaintiff is working at the present time, which is good indication that plaintiff can, if she will, contribute to her own support.

7. What are the financial conditions and necessities of each party, including abilities to save and care for earnings? The parties from their testimony have always lived within their means, regardless of how much defendant earned. Defendant's first job as a cab driver paid him \$80.00 to \$100.00 per month. While defendant was in the army, the parties lived on defendant's allotment of \$90.00 per month, plus earnings they had saved from defendant's prior earnings. It is obvious that the parties can manage their funds well and have done so right up to the time of the divorce, as is shown by their ability to accumulate the amount of property they have. The record shows that during the five and one-half months between the time the divorce was filed and the trial (R 7) that plaintiff spent on an average of \$163.21 per month, which includes a payment of \$90.13 per month on the Bountiful house mortgage and a \$100.00 payment to

her attorney during that time. The cancelled checks and bank statements (See Plaintiff's Exhibit A) further show that during said period of time plaintiff was purchasing clothes, shoes, etc., apparently as her needs arose, and taking care of her house, utilities, groceries, etc.

Defendant's financial needs are not set forth in dollars and cents. He testified that he intended marrying, therefore, his expenses would be more than plaintiff's.

8. What is the health of the parties?

9. What is the standard or mode of living of the parties?

Both the factors 8 and 9 have been discussed above and further comment is not necessary.

It is impossible to conceive how the lower court could maintain it had arrived at a just decision, unless the court felt that defendant should be punished as the guilty party to the divorce. Of necessity, under our law and the decisions of this court, there must be a guilty party to every divorce, otherwise a decree could not be granted. However, this alone would not justify the court in exacting the proverbial "pound of flesh" in attempting to equalize the matter.

The court in the Foreman case cited supra, criticized the trial court for just that thing:

"It would seem from a reading of the above statement that what the court was attempting to do here was to compensate Mrs. Foreman for her suffering of the pangs of unrequited love—heart balm—and teach Mr. Foreman a lesson in marriage. Neither task is properly within the issues of a divorce case such as this."

Every item of marital property, except a 1946 Oldsmobile automobile of a value of \$95.00, the court awarded to plaintiff. Approximately \$20,000.00 in property was given to plaintiff and, in addition, a \$5,000.00 award of "non-modifiable" alimony is given to plaintiff to be paid in all events, even after death from his estate. Such cannot be the law of the State of Utah.

### CONCLUSION

Defendant respectfully requests that this court reconsider the evidence presented in this case and make an equitable distribution of the marital property.

Respectfully submitted,

McCULLOUGH, BOYCE & McCULLOUGH  
*Attorneys for Defendant and Appellant*