

1981

# Edith Ellen Dogu v. Turhan S. Dogu : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

EDITH ELLEN DOGU, )

Plaintiff and )  
Appellant, )

v. )

TURHAN S. DOGU, )

Defendant and )  
Respondent. )

CASE NO. 17800

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BRIEF OF APPELLANT

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Appeal from the Judgment of the  
Second Judicial District Court  
Weber County, State of Utah  
THE HONORABLE RONALD C. SMITH  
DISTRICT COURT JUDGE

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PETE N. VLAARS,  
VLAARS, PETERSON &  
Legal Firm  
2447 Lincoln Blvd.  
Ogden, Utah

Attorney for

C. GERALD PARKER, ESQ.  
PARKER, THORNLEY & CRITCHLOW  
2610 Washington Boulevard  
P.O. Box 107  
Ogden, Utah 84402

Attorney for Respondent

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

EDITH ELLEN DOGU, )  
)  
Plaintiff and )  
Appellant, )  
) CASE NO. 17603  
v. )  
)  
TURHAN S. DOGU, )  
)  
Defendant and )  
Respondent. )  
----- )

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BRIEF OF APPELLANT  
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STATEMENT OF THE KIND OF CASE

This is an action for divorce brought by the Appellant, Edith Ellen Dogu, against the Defendant and Respondent, Turhan S. Dogu.

DISPOSITION IN LOWER COURT

Upon an evidentiary trial held before the Honorable Ronald O. Hyde, one of the Judges of the Second Judicial District Court, the Court found sufficient fault to award a Decree of Divorce to the Appellant. The Appellant, will be referred to hereinafter as the "Wife", and the Respondent will be referred to hereinafter as the "Husband".

The Court awarded the care and custody of the minor children to the Wife, and the property as listed on the Wife's Exhibit "1", together with alimony of \$1,500.00 per month, until the Husband retires, then the alimony to be reduced to \$750.00 per month. The Husband was awarded the property as listed on defendant's Exhibit, and his retirement, and the family home to be sold, the Florida property to be sold, and to divide the proceeds after costs of sale and other costs are taken out. The parties shall pay their own attorney fees, and the Husband to pay the debts of the marriage, and upon the sale of the property in Turkey, then the proceeds to be divided. (R 38)

#### RELIEF SOUGHT ON APPEAL

The Wife (Appellant) seeks modification of the Decree of distribution of assets as granted in the Lower Court, wherein the Court a distribution of the marital assets and property by reason of the abuse of discretion by the Lower Court.

#### STATEMENT OF FACTS

The parties were intermarried in Indiana, on August 10, 1957. (T 88) That three (3) children were born as issue of the marriage, with two of the children emancipated and a daughter living with the Wife. (T 89)

The Husband is a physician, specializing in anesthesiology, and is on the staff of the McKay-Dee Hospital. (T 116) The Wife is not employed, and has been a housewife for the twenty-three (23) years of the marriage. (T 81) The Wife assisted the Husband in learning English, typing and handling correspondence for the Husband, and has assisted the Husband generally throughout his practice. (T 134, T 135)

The Wife owned a home in Pennsylvania, which was sold during the marriage (T 90), with the \$60,000.00 profit from the home being divided, the Wife receiving \$30,000.00, of which the Wife put \$10,000.00 in the present home in Ogden, Utah, and \$20,000.00 in savings certificates. (T 92)

Based upon the appraised value of the home, there will be approximately \$31,000.00 profit, of which the Husband would receive \$15,500.00, and the Wife would receive \$15,500.00. (T 129)

The Wife has no retirement, nor has she been employed or earned Social Security benefits. (T 128) The Wife is sixty (60) years of age. (T 174)

The Husband has formed a Professional, Utah Corporation, of which he is the sole member thereof, and receives a salary from his Professional Corporation. (T 117)

The Husband's income for 1977, was \$37,000.00; in 1978, \$60,000.00; and in 1979, the Husband's Professional Corporation paid him \$108,000.00 in wages. (T 122)

The corporate filing of the Professional Corporation shows that it had in 1979, gross income of \$144,054.00, and that it evidences in the federal tax return, that the Husband was paid \$110,925.00 as salary. (R 58)

The Professional Corporation pays twenty-five percent (25%) of the money drawn by the Husband for salary, and bonuses into a retirement fund from the corporate income, and does not pay it from the money drawn by the Husband. (T 157)

The Husband testified that his salary from the Professional Corporation is a monthly draw of \$4,200.00 net, after withholding and taxes (T 127), plus salary and bonuses as he needs it. (T 128)

The Corporation has \$45,000.00 in Timeway Certificates, drawing interest (T 117); has added another \$25,000.00 to the corporate savings from March to August 6, 1980. (T 119)

The Husband has \$10,000.00 in a Keogh account with McKay-Dee Hospital, as of August 6, 1980; and also has a TMA savings account of \$5,372.24; a bank balance in the Corporation of \$6,084.41; a checking account at Weber Valley Bank in the amount of \$12,048.70. (T 120)

The Husband also has \$9,350.14 in TIAA benefits, and \$17,709.87 in CREP benefits, which benefits are being increased yearly by interest and investment, and were funds earned by the Husband and invested in retirement funds during his marriage (T 121), which were set aside while he was employed as professor at University of Pennsylvania.



The Husband further has \$10,075.00 in annuity invested with Prudential Insurance Company. (T 121) The Corporation has \$25,000.00 in accounts receivable, which should be at least ninety percent (90%) collectable, due from patients. (T 122)

The condominium in Turkey has no indebtedness, and in accordance with the testimony of the Husband, it would be worth one million lira today, with a lira valued at seventy-five (75) lira to the dollar currently. (T 123)

The Husband has valued one-half of the Palm Coast property at \$5,850.00, alleging a total value of \$11,700.00, for the Florida property as an estimate of the equity to be divided in the unimproved property. (Def's Ex. 2, R 48)

The Wife has valued the condominium purchased in Turkey in 1962, to be valued in the sum of at least \$50,000.00. (T 96)

## ARGUMENT

### POINT 1.

THE DIVISION OF ASSETS BY THE COURT CONSTITUTED AN ABUSE OF DISCRETION BY THE COURT.

This Court held in Wilson v. Wilson, 5 Utah2d 79, 296 P.2d 977 (1956), that the Court's function and responsibility is:

To endeavor to provide a just and equitable adjustment of their economic resources, so that the parties can recon-

struct their lives on a happy and useful basis. In doing so, it is necessary for the Court to consider, in addition to their relative guilt or innocence of the parties, an appraisal of all of the attending facts and circumstances; the money and property they possess, and how it was acquired; their capabilities and training, and their present and potential income.

In considering the Court's findings in the Wilson case, supra, it is immediately obvious that the Wife, having been a housewife for twenty-three (23) years (T 89), being sixty (60) years of age (T 174), without any trade, skills or profession, and suffering from arthritis, high-blood pressure, and being compelled to wear a hearing aide (T 90) has a bleak future as to any substantial earnings, if any, while the Husband is a doctor of medicine, and by his own admission has had substantial increase in earnings each year to 1979, when he was paid \$108,000.00. (T 122)

The award to the Wife of one-half of the equity in the condominium, subject to the ability of either of the parties to sell the condominium in Turkey, is a really "Catch 22" situation, in that the Husband has testified that a non-Turkish citizen cannot own property in Turkey. (T 110) That the Husband's family is living in the condominium, and has resided in it for all of the years, and that they pay no rent, and have resided there for free during all of the

period of time. (T 124) That as a matter of practical application of the Court's order, which states:

If the parties sell the property in Turkey, then the proceeds to be divided.  
(R 39)

It is not practicably feasible for the Wife to effect a sale of the property, and that the only practical manner of giving the Wife one-half the equity of the property in Turkey was to award to the Husband all of the equity of the property in Turkey, and adjust the Utah assets of the Husband to reflect and award to the Wife one-half of the equity in the Turkey condominium. It would logically appear that the Husband will make no effort to oust his family from the Turkish condominium, and will allow them to continue to live there rent-free, leaving the Wife with no practical way to obtain any equity at all from the property in Turkey.

The total disregard by the Court as to the actual substance and nature of a Utah Professional Corporation, by treating the assets and income of the Corporation as some non-affiliated entity of the Husband, is totally in conflict with the equitable nature of a divorce action, when consideration is given to the fact that the Corporation was formed by the Husband, and he is the sole owner thereof, and that the total income of the professional corporation is from the services of the Husband, and from the earnings retained by the Corporation from the services of the Husband

in his practice of medicine, and that the cash reserves of the Corporation of tens of thousands of dollars is not that of the Husband, but that of some entity other than the Husband. This matter of evading division of assets between a professional spouse and the spouse not an incorporator or member of a professional corporation is a method that would be most readily adopted by all professional persons in the State of Utah, if upheld, in that it will shield from distribution by the Court all assets of a professional corporation other than those which the individual incorporator himself desires to pay to himself as and for salary and wages, and this issue must be dealt with if a divorce action is truly an action in equity.

This Court stated in Tsoufakis v. Tsoufakis, 14 Utah2d 273, 382 P.2d 412 (1963), that a divorce case is equitable in nature, and that the appeal court may review the evidence and substitute its Judgment for that of the trial court where it finds that in the division of property or the awards of alimony and child support, that the division and award of the lower court was unjust and inequitable, and was an abuse of discretion. This Court further stated that the facts and circumstances in each particular case will govern such decisions.

This Court further held in Martinett v. Martinett, 8 Utah2d 292, 331 P.2d 820 (1958):

If there is such a serious inequity as to manifest a clear abuse of discretion, this court will make the modification necessary to bring about a just result.

It is submitted to this Court that the failure to consider the assets of the Corporation, as the true assets and the real assets of the Husband, and the failure of the Court to make an actual distribution of the value of the Turkish condominium to the Wife, when there is no practical recourse for the Wife to in any manner seek the sale of the condominium in Turkey, and particularly when the family of the Husband have been residing for years without paying any rent or return whatsoever on the investment of the Husband and Wife in the condominium, and in considering the fact that the condominium is in a foreign country where a non-Turkish citizen has no standing whatsoever, constituted in fact a non-award whatsoever to the Wife as to the condominium, which by the Husband's own estimate is worth at least \$30,000.00 and on today's market considering inflation in Turkey, probably a great deal more as the Husband has been directly quoted hereinabove as to the value of the home, and the Wife has estimated the value of the condominium to be at least \$50,000.00. That there is a basis for an award of the equity in that condominium to the Wife without placing it in a "Catch 22" situation that means a denial of any equitable participation whatsoever in the asset.

CONCLUSION

It is submitted to this Honorable Court that based upon the factual situations stated above, upon the current and continuing earnings of the Husband of more than \$100,000.00 per year, and considering the lack of any job training in the Wife, and her age and health, that she is entitled to the very minimum of an equitable distribution of all of the assets of the Husband, and that the Professional Corporation should not be a shield for the assets of a professional person where the Husband is the sole owner of the Corporation, and may pay himself whatever he desires, and any consideration of an equitable distribution of assets must consist of the total assets, including those of the corporate Professional Corporation's assets withheld by the Husband from distribution to himself, and that equity requires that the Court modify the Decree of Divorce by making a distribution by this Court or returning the matter for further consideration by the Lower Court in accordance with the findings of this Court.

RESPECTFULLY SUBMITTED this 29 day of June, 1981.

VLAHOS, PERKINS & SHARP

BY 

PETE N. VLAHOS, Of the Firm  
Attorneys for Appellant  
Legal Forum Building  
2447 Kiesel Avenue  
Ogden, Utah 84401

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 29 day of June, 1981,  
I mailed a true and correct copy of the above and foregoing  
Brief of Appellant, by placing same in the United States  
Mail, postage prepaid and addressed to the following:

C. GERALD PARKER, ESQ.  
PARKER, THORNLEY & CRITCHLOW  
2610 Washington Boulevard  
P.O. Box 107  
Ogden, Utah 84402  
(Attorney for Respondent)

  
-----  
SECRETARY