

1981

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

Utah Supreme Court

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

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EDITH ELLEN DOGU, )  
 )  
Plaintiff-Appellant, )  
 )  
vs. )  
 )  
TURHAN S. DOGU, )  
 )  
Defendant-Respondent. )

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Case No. 17603

BRIEF OF RESPONDENT

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

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**FILED**

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Cl<sup>erk</sup>, Supreme Court, Utah

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

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EDITH ELLEN DOGU,	)	
Plaintiff-Appellant,	)	
vs.	)	Case No. 17603
TURHAN S. DOGU,	)	
Defendant-Respondent.	)	

---

BRIEF OF RESPONDENT

---

STATEMENT OF THE KIND OF CASE

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

DISPOSITION IN LOWER COURT

The District Court of Weber County, the Honorable Ronald O. Hyde presiding sitting without a jury, granted a Decree of Divorce to Plaintiff-Appellant, hereinafter referred to as the "Wife", on the basis of "minimal grounds" as agreed to between the parties (T. 88). Defendant-Respondent, hereinafter referred to as the "Husband", presented no grounds for divorce, although representing that the case was "two-sided" (T. 88).

Custody of the 17-year old daughter of the parties was awarded to the Wife and the Husband was ordered to pay \$200 per month child support. The Wife was awarded \$1,500 per month alimony and upon Husband's retirement, said alimony was to be automatically reduced to \$750 per month.

The family home in Ogden was to be sold and the net proceeds were to be divided equally between the parties after the payment of the first mortgage and swimming pool debt. Real property in Palm Coast, Florida was to be sold and the proceeds divided equally between the parties. Each party was awarded one-half of any interest the parties might have in a condominium in Turkey.

Wife was awarded savings certificates, bank accounts, and corporate stock, with a total value of \$23,450. She was also awarded a 1976 Chevrolet Monza.

Husband was awarded savings accounts of \$2,205, bank accounts in his professional corporation of \$26,308, a 1977 Cadillac, and his retirement benefits.

Husband was to pay the debts of the marriage and each party was ordered to pay his own attorney's fees.

#### RELIEF SOUGHT ON APPEAL

Husband (Respondent) seeks an affirmation of the trial court's judgment.

### STATEMENT OF FACTS

Appellant's Statement of Facts does not fully set forth the facts established at the trial, states incorrectly certain facts, and leaves out vital testimony having a bearing upon the issues on appeal.

The parties were married to each other on August 10, 1957 in Indiana (T. 88). The Husband was a medical doctor at the time of this marriage. Three children were born of the marriage, two of whom are emancipated, and a 17-year old daughter, Kismet, who resides with the Wife (T.89). Kismet is employed by her father, and she is paid \$225 per month for her work there (T. 130 & 136). The 20-year old son of the parties is studying to become a commercial pilot and the Husband pays more than \$500 per month for the son's education and support which will continue for three and one-half years (T. 136). The Husband plans to support Kismet while she is in college (T. 137).

Earlier in the marriage, the parties together owned a home in Latrobe, Pennsylvania. Contrary to the Wife's Brief, this home was owned by both of the parties, rather than just the Wife (T. 90). In 1977, they sold this home, together with a summer cottage in Pennsylvania, for which they received in excess of \$60,000, which they divided equally between them (T. 90 & R. 27). Each of the parties

put \$10,000 of this money into the acquisition of the family home in Ogden and the Wife put \$20,000 into savings certificates which she still owns (T. 92). The substantial part of the Husband's remaining \$20,000 went to move the family from Pennsylvania to Utah and for living expenses for the family until he was able to establish his practice in Utah (T. 140).

In 1962, while living in Turkey, the parties purchased a condominium there at a cost of approximately \$5,000 American money (T. 96 & 123). The Wife testified that she has no idea of the value of the condo but guesses that it might be worth somewhere around \$50,000 (T. 96). The Husband testified that the condo may be worth \$200,500 Turkish lira to as high as a million Turkish lira. One dollar is worth about 70 Turkish lira, so that his estimate would be between \$2,864 and \$14,285 American money (T. 123). He testified elsewhere that it may have a value of around \$30,000 (T. 124). Both of the parties are now citizens of the United States (T. 91) and as such, they cannot own real property in Turkey (T. 155). The condo was transferred to the Husband's sisters who have lived in it for many years without any contributions to its upkeep having been made by the parties (T. 124). The Wife does not desire to deprive the Husband's family of the use of the condo (T. 96).

The assets of the parties at the time of the trial consisted of the following:

(a) The family home in Ogden which was appraised for \$121,000 (R. 43) and has since been sold for \$122,000. The court ordered that the net proceeds be divided equally between the parties (T. 164 & R. 79). After the payment of the debt against the home of approximately \$78,000 (T. 129), the parties will each receive \$22,000 from which they must each pay one-half of the costs of sale.

(b) A lot at Palm Coast, Florida which cost \$14,200 in 1964 and on which there is a balance owing of \$3,500, with the Husband making payments of \$175 per month (T. 138 & 139). The court ordered that this property be sold and the proceeds divided equally between the parties (T. 164 & R. 79).

(c) Bank accounts, savings certificates, and E. F. Hutton stock in possession of Wife having a total value of \$23,450 (T. 93, T. 104, & R. 40). These assets, together with the 1976 Monza, were awarded to the Wife (T. 163 & R. 80).

(d) Husband's accounts at McKay-Dee Hospital Credit Union totaling \$2,205 (T. 140). These were awarded to the Husband (T. 164 & R. 80).

(e) Bank accounts and savings certificates owned by Husband's professional corporation totaling \$26,308 (T. 141). There will be a substantial tax liability against these accounts when withdrawn from the professional corporation (T. 142). These were awarded to the Husband (T. 164 & R. 80).

(f) The Husband has acquired certain retirement benefits over the years. These consist of a TIAA and a CREF account created while the Husband was a medical school professor in Pennsylvania. There is now approximately \$27,000 in these two accounts (T. 142). These accounts were contributed one-half by the university and one-half by the Husband, and he cannot withdraw the accounts until he turns 65 years of age (T. 142). The Husband has a Keogh retirement program through Prudential Life Insurance Company of \$10,075 which cannot be withdrawn until retirement (T. 143).

There is also a pension and profit sharing trust set up through the Husband's professional corporation in which there is a total of \$49,655 deposited in certificate and savings accounts. This cannot be withdrawn until retirement (T. 143). The Husband did not set up the pension and profit

sharing trust until three years ago and because of his advanced age, he made sizable contributions to the trust during those years (T. 144). The Husband was awarded his retirement benefits (T. 163 & R. 80).

The Statement of Facts in the Wife's Brief overstates the Husband's savings and retirement benefits by a substantial amount (See page 4 of Wife's Brief). Her statement that there was \$45,000 in timeway certificates and that another \$25,000 was added to that account is incorrect. There were initially two \$10,000 savings certificates to which another \$25,000 was added, making a total of \$45,000 (T. 119). By the time of the trial, that was increased to a total of \$49,655, which is the total amount in the pension and profit sharing trust (T. 143). The Wife's statement that there is \$10,000 in a Keogh account and \$10,075 in a Prudential Insurance Company annuity is incorrect. These are one and the same investment (T. 143).

The Husband's taxable income in 1977 was \$36,973 and in 1978 it was \$60,854 (T. 147). At the present time, he is employed by his professional corporation and draws a salary of \$4,200 per month and, in addition, takes bonuses as needed and available (T. 127 & 128). In 1979, he withdrew from the corporation as salary and bonus a total of \$108,675 (T. 148) but in order to do so, he drew \$9,700 more than

the corporation had available and the professional corporation, therefore, suffered a loss of \$9,700 (T. 151). In 1979, the parties paid \$35,897 of federal income tax and \$4,448 of state income tax, using income averaging (T. 149). Because of the change in deductions and income averaging, the Husband's taxes will be substantially higher in the future (T. 150).

The Husband was a 56-year old anesthesiologist at the time of the trial (T. 90). In 1978, he suffered a stroke known as a transient isometric attack and was also hospitalized for double vision (T. 151).

The Husband is working between 60 to 110 hours per week (T. 152) and with his health condition, he cannot continue that pace (T. 153). It is anticipated that another anesthesiologist will be hired which will further cut back the Husband's working hours (T. 152).

The Wife intends to work (T. 90) and is attending business college (T. 102), and expects to be employed in about a year from the trial date of August 27, 1980 (T. 103).

## ARGUMENT

### POINT I

THE DIVISION OF ASSETS BY THE COURT WAS FAIR AND EQUITABLE AND  
DID NOT CONSTITUTE AN ABUSE OF DISCRETION BY THE COURT

In the case of Stone v. Stone, 19 Utah 2d 378, 431 P.2d 802 (1967) this court stated:

"In reviewing the trial court's order in divorce proceedings there are certain well established principles to be borne in mind. The findings and order are endowed with a presumption of validity, and the burden is upon the appellant to show they are in error. Even though our constitutional provision, Section 9 of Article VIII, states that in equity cases this court may review the facts, we nevertheless take into account the advantaged position of the trial judge. Accordingly, we recognize that it is his prerogative to judge the credibility of the witnesses, and in case of conflict, we assume that the trial court believed the evidence which supports the findings. We review the whole evidence in the light most favorable to them; and we will not disturb them merely because this court might have viewed the matter differently, but only if the evidence clearly preponderates against the findings."

The Wife has not borne the burden of overcoming the presumption of validity of the court's finding and order. The court divided the equities in all of the real property equally between the parties. The Wife does not appear to object to each of the parties receiving one-half of the proceeds of the Ogden home and a like division of the Florida property, but she complains of the court's order regarding the condominium in Turkey. The court, however, wisely recognized that the Turkey condo is somewhat of an unknown quantity. The parties paid a total of \$5,000 to acquire it but neither of them own it at the present time because of prohibitions against non-Turkish citizens owning real estate there. It's present

value is speculative, with the Husband testifying that it's value in American money may be as low as \$2,864 and as high as \$30,000, and the Wife making a wild guess that it may be worth as much as \$50,000. The court correctly ordered that if either party was able to exercise ownership over the Turkey condo, then each party was to be awarded a one-half interest therein (R. 79). This is consistent with the Wife's request set out in her Exhibit 1 (R. 40) that the Turkey condo be sold and the proceeds divided equally. If, and when, the parties can exercise ownership control over the condo, that very thing will be done. There was no evidence presented in the trial that this property is in any way an asset of the parties at the present time.

The remaining assets, exclusive of the Husband's retirement benefits, consisted primarily of bank accounts, savings certificates, and stock. The Wife was awarded such accounts totaling \$23,600. The Husband received credit union accounts in his own name of \$2,205 and accounts and certificates in his professional corporation totaling \$26,308. When such funds are withdrawn from the corporation, they will be subject to substantial income taxes which will reduce them to the point that the savings of the Wife and those of the Husband will be substantially comparable.

Each of the parties was awarded an automobile, his

Cadillac having somewhat more value than her Chevrolet, but this having been offset by her having received the substantial part of the household furniture and furnishings.

## POINT II

THE COURT DID NOT ABUSE IT'S DISCRETION  
IN AWARDING THE RETIREMENT BENEFITS TO HUSBAND  
AND REQUIRING HIM TO PAY ALIMONY AFTER HIS RETIREMENT

The court correctly considered the ages, health conditions, earning capacities, and child support needs of the parties, and awarded the Wife \$18,000 per year alimony and \$2,400 per year child support. In addition, the Husband pays over \$6,000 per year for the support and education of his aviation-student son. This amounts to over \$26,000 per year in support responsibilities. In addition, the Husband was ordered to pay the mortgage payment on the house of \$469 per month and payment of \$175 per month on the Florida lot, until those properties are sold (R. 80).

This court, in the case of Wilson v. Wilson, 5 Utah 2d 79, 296 P.2d 977 (1956) stated that:

"The court's responsibility is to endeavor to provide a just and equitable adjustment of their economic resources so that the parties can reconstruct their lives on a happy and useful basis."

The Wife in this case is beginning anew with \$23,600

of savings and stock, well over \$20,000 from the proceeds of the Ogden home and the Florida property, household furniture and furnishings, \$18,000 per year alimony, and any income she might earn upon completion of her business school training. This should be more than sufficient to enable her to reconstruct her life "on a happy and useful basis".

The Wife's implication that the \$25,000 of accounts receivable from the Husband's medical practice is a marital asset is not valid. This is part of the Husband's future income, on which he must pay income taxes and from which he must pay the Wife's alimony.

The trial court correctly ruled that the Husband should be awarded his retirement benefits, consisting of \$27,061 in TIAA and CREF, \$10,075 in his Keogh plan with Prudential Life Insurance, and \$49,665 in his pension and profit sharing trust. The evidence was that none of these funds can be withdrawn until the Husband retires, and pursuant to this court's decision in the case of Bennett v. Bennett, Utah, 607 P.2d 839 (1980), the husband's retirement benefits should not be considered as one of the assets of the parties. This court suggested in the Bennett case that where the husband could withdraw the amount of contributions he had made to his retirement fund at any time prior to 31 days before he was eligible to retire, that fund might appropriately be considered a marital asset. The court specifically ruled,

however, that where the fund cannot be withdrawn until retirement, no present value can be assigned thereto, and it should not be considered one of the assets of the parties.

The United States Supreme Court, in the recent case of McCarty v. McCarty, 69 L.Ed.2d 589, decided June 26, 1981, held that military retirement benefits which accrued during the parties' marriage and which could not be withdrawn until the husband's retirement, were not subject to division between the parties and should be awarded solely to the husband.

If this court should hold, notwithstanding the previously cited cases, that the Husband's retirement benefits are assets having a present value, the trial court still made a fair and equitable decision in awarding those benefits to the Husband. This court, in the case of Englert v. Englert, Utah, 576 P.2d 1274, in referring to a husband's pension fund or insurance, stated:

"These should be given due consideration along with all other assets, income and the earnings and the potential earning capacity of the parties, in determining what is the most practical, just and equitable way to serve the best interests and welfare of the parties and their children."

In the present case, the court took the retirement benefits into consideration and wisely ruled that rather than

physically divide those benefits between the parties, he would require the Husband, after his retirement, to continue to pay the Wife alimony of \$750 per month, or \$9,000 per year. The source from which the alimony will have to be paid at that time will be the Husband's retirement benefits. The trial judge in stating, "I think the idea that removing those [retirement benefits] from assets and continuing alimony makes good sense" (R. 163), did not abuse his discretion, but rather made sound provision for the maintenance of the Wife after the Husband's retirement.

#### CONCLUSION

The trial court made a fair and equitable award of the property of the parties by ordering that the real estate be sold and the net proceeds be divided equally between the parties. The remaining assets, consisting of bank accounts, stock, automobiles, and household furniture, including the bank accounts in the Husband's professional corporation, were also divided fairly and equitably between the parties on a substantially 50-50 basis.

The court made the only feasible order possible regarding the condominium in Turkey by granting a one-half interest to each of the parties in whatever ownership rights the parties have in that property.

It was not an abuse of discretion by the trial court to award the Husband his retirement benefits and require that he use them as a source of paying the Wife substantial alimony after his retirement.

The judgment and decree of the trial court should therefore be affirmed.

Respectfully submitted,

/s/ C. Gerald Parker

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Attorneys for Defendant-Respondent

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 28th day of September, 1981, I mailed two true and correct copies of the above and foregoing Brief of Defendant-Respondent, by placing the same in the United States Mail, postage prepaid and addressed to the following:

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~~BY~~  
SECRETARY