

1982

Sharon M. Davis v. Charles Francis Davis : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE
STATE OF UTAH

SHARON M. DAVIS, :
Plaintiff - Respondent, :
vs. : Case No. D-79-2691
CHARLES FRANCIS DAVIS, :
Defendant - Appellant. :

BRIEF OF APPELLANT

APPEAL FROM THE DECREE OF DIVORCE AND ORDER ON
DEFENDANT'S OBJECTIONS OF THE THIRD DISTRICT COURT
FOR SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE G. HAL TAYLOR, JUDGE

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Defendant - Appellant. :

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

Respondent sued Appellant for a Divorce, alimony, and division of the property of the parties.

DISPOSITION IN THE LOWER COURT

This matter was tried before the Honorable G. Hal Taylor, without a Jury on May 15, 1981. The Court granted a Decree of Divorce to the Respondent, awarded her \$420.00 per month alimony, and distributed the property between the parties. The Appellant objected to the proposed Findings of Fact, Conclusions of Law and Decree of Divorce. On September 1, 1981, the Court heard argument and modified the Decree of Divorce. The Decree, Order of Appellant's Objections, Conclusions of Law, Findings of Fact, and Order were signed September 29, 1981.

RELIEF SOUGHT ON APPEAL

Appellant seeks an Order remanding the matter for

further testimony, or modification of the Decree of Divorce upon the grounds that the Trial Court abused its discretion by awarding alimony, inequitably dividing the real property of the parties, and requiring the Appellant to wait an unreasonable length of time for his share of the equity in the residence, and compelling Appellant to sell his New Mexico land and give Respondent one-third of the proceeds, and ordering Appellant to pay \$1,000.00 of Respondent's attorney's fees.

STATEMENT OF FACTS

The Plaintiff and Defendant were married on March 4th, 1974 in Evantson, Wyoming. No children were born of the marriage. However, three minor children of the Plaintiff born of a previous marriage lived with the parties. The Defendant provided the principal support for the Plaintiff and her minor children until May 15th, 1980, the date of separation. (Tr 44, lines 25-30)

Prior to the marriage, Defendant purchased four, one-half acre lots in New Mexico under a Real Estate Contract dated June, 1967, for \$6,200.00. (Tr 53, lines 6-27) A substantial portion of the balance was paid prior to the marriage in 1974. After the marriage, the Defendant continued making all of the remaining payments from his income. Between the years 1974 and 1978, during which time the contract was paid in full, the Plaintiff had no gainful employment. (Tr 53, lines 22-30) Therefore, the Plaintiff in no way contributed toward the acquisition of the New Mexico property.

Prior to the marriage, the Plaintiff had acquired an interest in the residence in which the Plaintiff and Defendant resided. The original purchase price of that property under a Uniform Real Estate Contract executed by the Plaintiff and her prior husband was \$18,900.00. At the time of the marriage in 1974, the first mortgage against the residence was \$18,210.00. (Tr 10, lines 3-6) The Plaintiff, therefore, had an equity of approximately \$3,000.00 in the residence which was valued at \$21,000.00. This particular \$3,000.00 equity was confirmed by the fact that shortly after the Plaintiff and Defendant were married, Plaintiff suggested that the Defendant pay off her prior husband's lien against the property of \$1,300.00 (Tr 5, lines 19-29) The Defendant did, in fact, pay off the former husband's equity with a cash payment of \$1,300.00. (Tr 33, lines 5-15) At that time, a deed was executed placing the property in the name of the Plaintiff and Defendant as joint tenants with full rights of survivorship. Shortly after the marriage, the Defendant commenced to substantially improve the residence by remodelling the house and purchasing new furnishings. In six and one-half years of marriage, the Defendant expended approximately \$40,000.00 as follows:

1. Second mortgage with Commercial Security Bank (\$15,000.00 principal, \$5,708.00 interest) (Tr 25, lines 16-30)
2. Personal injury settlement in 1973 for \$8,500.00 (Tr 84, lines 8-16)
3. Inheritance from mother's estate was \$5,000.00 (Tr

84, lines 23-25)

4. Personal injury settlement in 1978 for \$7,000.00
(Tr 84, lines 17-22)

At the time of the separation in May of 1980, the residence was appraised by Defendant's appraiser at \$78,000.00 and by the Plaintiff's appraiser at \$61,500.00. (Tr 7, line 9)

The house was inadequate and bare when Defendant moved in. (Tr page 86, lines 25-30)

The Court ordered the Defendant to sell the New Mexico property and give Plaintiff one-third of the proceeds. The Defendant was awarded only \$11,500.00 of the equity in the residence at the time of the divorce, together with one-half of any future appreciation until Plaintiff remarries, cohabits, sells, or her youngest child attains the age of majority. It is evident that the Appellant is receiving substantially less than one-half of the equity in the house. The original value of the home was \$18,900.00 and by using the Plaintiff's appraisal of \$61,500.00 at the time of the Divorce, the equity would be \$42,600.00. Therefore, Appellant should have been awarded a minimum of \$21,300.00 plus any appreciation.

The Plaintiff was awarded most of the personal property, including the furnishings. The Defendant was ordered to pay \$420.00 per month alimony (\$345.00 on the second mortgage payments and \$75.00 additional alimony) until the second mortgage of approximately \$16,000.00 is paid in full. The monthly payments of the second mortgage are \$345.00. Defendant is not to

participate in any equity created by the payment of alimony which is earmarked for payment on the second mortgage.

The Plaintiff was ordered to pay approximately \$1,200.00 in indebtedness and the Defendant was ordered to pay approximately \$9,000.00 in indebtedness, together with \$1,000.00 towards the Plaintiff's attorney's fees.

ARGUMENT

POINT I

THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING ALIMONY AS PART OF MORTGAGE PAYMENTS IN WHICH APPELLANT WILL NOT PARTICIPATE WHEN THE PROPERTY IS SOLD.

At the time the parties were married, the Respondent still had three minor children residing with her. The Appellant supported them as well as the Respondent. The parties lived together for approximately six (6) years during which time the Respondent was not employed. The substantial support of the family was derived from the Appellants income.

During the course of the marriage, the Appellant not only paid off the Respondent's former husband's equity in the house, he purchased new furnishings and fixtures. The parties jointly borrowed \$20,000.00 to remodel the residence. This loan was secured by a second mortgage against the residence payable at \$345.00 per month. To assist the remodelling and refurnishing, the Defendant further expended \$5,000.00 received from his mother's estate and \$15,500.00 insurance proceeds realized from Defendant's personal injuries.

The additions to the residence greatly enhanced the comfort of the residence and increased its value. The second mortgage was being paid by the Appellant prior to their separation.

As part of the Decree of Divorce, the Court ordered the Appellant to pay alimony in the sum of \$420.00 per month until the second mortgage was paid in full. The \$420.00 was broken down as follows: \$75.00 cash and \$345.00 payment on the second mortgage.

This alimony payment in and of itself may not appear to be onerous, and it certainly provides financial assistance to the Respondent who may be in need of economic help for a short time. However, the Court, by not providing for the Appellant to recover at least to the extent of 50% of the principal payments toward the second mortgage, was an abuse of discretion. The Respondent not only benefits from the immediate financial assistance, she also gets all of the equity derived from the mortgage payments made by the Appellant when the residence is sold. Surely, the \$75.00 per month is more than ample alimony to be paid by the Appellant in light of the short number of years they were married and the financial benefits Respondent and her children received during the marriage period.

The Court held in Jespersion vs. Jespersen, (1980) 610 P2d 326 at page 328 as follows:

"We have previously held that a trial court must consider many factors in making a property settlement in a divorce proceeding, but that the purpose of the settle-

ment should not impose punishment on either party . . .
. . . ."

"In making a property division, a Court may properly consider such things as the length of the marriage and parties respective contributions to the marriage. This marriage lasted less than six (6) years and no children issued therefrom."

In Read vs. Read, (1979) 594 2d 871, the Court said at page 872:

"If it appears that the Decree is so discordant with an equitable allocation that 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."

It is obvious that resentment develops when alimony is granted to one of the parties when the marriage has been of short duration and no issue was born of the marriage. It is therefore, understandable that the Appellant would be extremely unhappy at the prospects of not only paying substantial alimony in the form of mortgage payments when he is not even allowed to recover one red cent when the property is sold many years later. It has the effect of really paying the other spouse twice - once by relieving the spouse of making the mortgage payment, and then allowing the same spouse to get the "built up equity" when the house is sold.

POINT II

THE TRIAL COURT ABUSED ITS DISCRETION BY GIVING THE RESPONDENT AN EXCESSIVE AMOUNT OF THE EQUITY IN THE RESIDENCE AND COMPELLING THE APPELLANT TO SELL HIS NEW MEXICO PROPERTY IN WHICH HE MADE ALL THE PAYMENTS.

Both of the parties had prior marriages. The Appellant

was older and was supporting three minor children of his prior marriage as well as the Respondent's minor children. At the time of the marriage, he had been paying on some vacant lots in New Mexico for approximately six (6) years. After the marriage, from his earnings he made the remaining payments on the real estate contract.

The Respondent brought into the marriage three minor children and a residence. From the prior divorce, the equity in their property was determined to be approximately Three Thousand Dollars (\$3,000.00). The former husband was awarded a \$1,300.00 lien on their residence. The Respondent asked the Appellant to pay off her former husband's equity, which he did. Thereafter, the Respondent executed a new Deed making each of the parties joint tenants. It appears that the intent was to thereafter recognize each other as equal owners.

The Respondent did not have any gainful employment. The result was that the first and second mortgage payments as well as the family food, clothing, and other necessities were provided by the Appellant. At the time of the marriage, the first mortgage was approximately (\$18,210.00). At the time of the Divorce, the value of the residence was between \$61,500.00 and \$78,000.00 depending on which appraisal is used. The first (\$14,421.90) and second (\$15,876.26) mortgages would total approximately \$30,298.16. Therefore, the equity would be between \$31,000.00 and \$48,000.00, all of which equity has been acquired during the marriage. Appellant paid for the entire equity by way of mortgage payments and the purchase of the former husband's

interest. In addition, the Appellant must pay off the entire second mortgage by which time the Respondent's youngest child will be approaching eighteen years of age, at which time the equity will have been increased \$15,876.26. Under the circumstances why is it not reasonable for the Appellant to expect one-half of the entire equity which he has substantially created rather than the minimal \$11,500.00 plus one-half of the increase due from inflation? In all fairness, it would appear that the Appellant should be entitled to \$11,500.00 plus the return of the second mortgage payments and one-half of the equity realized by inflation. The Respondent at most should receive one-half of the total equity, none of which was acquired by any financial contribution on her part. As an additional benefit, she will have realized the use and possession of the residence until the residence is sold pursuant to the Decree of Divorce.

The Appellant has not only received an unfair distributive share of the residence, the Court has ordered him to sell the New Mexico land which he purchased six (6) years prior to the marriage and made every payment subsequent to the marriage. Why should the Respondent receive any interest in the out of state property when she has made no contribution for its acquisition? Certainly the \$75.00 per month alimony should fully compensate her for any loss she may have suffered as a result of the marriage and divorce.

This particular type of inequitable distribution was met by the Court in the case of Read vs. Read (1979) 594 P2d 871 at

page 872, the Court said:

" It is well established that the Trial Court has considerable discretion in the allocation of the property and financial resources of the parties. Nevertheless, this discretion is not entirely without limit. . . ."

" When a marriage has failed, a Court's duty is to consider the various factors relating to the situation and to arrange the best allocation of the property and the economic resources of the parties so that the parties and their children can pursue their lives in as happy and useful manner as possible. In view of these principles, it is our view that the property award in this case is too desparate and that the Decree must be modified. In light of this conclusion, and because the case is equitable in nature, this Court may either exercise its own prerogative of making a modification in the Decree or remand for entry of a modified Decree by the Trial Court."

The Court also considered the consequences of the sale of real property when it could be a severe disadvantage to the other property. In Berry vs. Berry (1981) N. 17165 Filed July 30, 1981, the Court states at page 36 of the State of Utah Bulletin Number 81-14, August 15, 1981:

" Because of his financial condition, we find that this was an abuse of discretion. The Order requiring the Defendant to purchase her interest is unfairly weighted in her favor and creates a burden upon him which he should not be expected to bear at this time under the present circumstances."

In the instant case, the Appellant is ordered to sell the lots purchased by the Appellant and give Respondent one-third of the net proceeds. Why should the Appellant be ordered to sell this property in a distressed market in order to satisfy this one-third unearned interest? The Court itself admitted, after hearing oral argument on September 1, 1981, that he had no way of

knowing its value. The Trial Court said,

"With regard to the ranch property, I struggled with that for quite a while and can find no other way to find out the true market value of that property than to sell it and divide the proceeds." (Tr 19, lines 15-18)

The inequity of the property distribution becomes more obvious when considering that the Respondent received virtually all of the furniture and furnishings acquired by the parties, the Respondent was ordered to pay some \$1,200.00 in debts, the Appellant was ordered to pay \$9,000.00 in debts and \$1,000.00 toward Respondent's attorneys fees.

It may be argued that Appellant did get to keep his Retirement account, but under the circumstances, it would appear that the Respondent has done nothing to deserve any share in it.

CONCLUSION


Appellant has not received an equitable share in the distribution of the property of the parties. The Trial Court abused its discretion in not providing that the Appellant recover at least one-half of the monies which he has and will invest in the property prior to its sale together with one-half of the appreciation. The Trial Court further abused its discretion in awarding the Respondent a one-third interest in the New Mexico property when it was purchased by the Appellant prior to the marriage, and she made no payments subsequent to the marriage. This unfairness is multiplied by the Decree ordering that the property be sold in order to determine its market value.

Appellant respectfully requests this Court to modify the

Decree of Divorce in accord with fairness or in the alternative,
remand the case for further hearing.

RESPECTIVELY SUBMITTED this 4 day of January, 1982.

BEASLIN, NYGAARD, COKE & VINCENTI

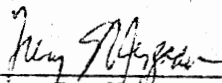


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CERTIFICATE OF MAILING

I hereby certify that two true and correct copies of the foregoing Brief of Appellant were mailed, postage prepaid, this 4 day of January, 1982 addressed to the following:

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