1957

Peter Mart Jorgensen v. Ranghild V. Jorgensen : Brief of Respondent

Utah Supreme Court

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Case No. 8618

IN THE SUPREME COURT
of the
STATE OF UTAH

PETER MART JORGENSEN,
Plaintiff and Respondent,

—vs.—

RANGHILD V. JORGENSEN,
Defendant and Appellant.

RESPONDENT'S BRIEF

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RESPONDENT'S BRIEF

STATEMENT OF FACTS

This is an action for divorce commenced by the plaintiff-respondent. The trial court awarded the divorce to the defendant-appellant on her counterclaim, making a distribution of certain properties to the parties and providing that the floral business be continued and managed by the respondent husband. The defendant has appealed from the portion of the judgment awarding property. Appellant in her brief refers to the parties as they were designated in the trial court and respondent will do likewise.

The defendant's statement of facts is limited to that necessary to show the facts upon which she was awarded

the divorce. To adequately state plaintiff's position a few additional facts are required.

The marriage between the plaintiff and defendant commenced to deteriorate in the years 1938 and 1939. At that time a person by the name of Mrs. Tronier was working part time for the parties in the floral business (R. 57). The defendant, Mrs. Jorgensen, took exception to the woman, apparently believing plaintiff was showing her too much attention. Plaintiff denied any improper attentions or interest in Mrs. Tronier. The defendant apparently did not take the matter seriously because she testified that, except for a minor quarrel, her married life was very happy until 1953 (R. 98). The plaintiff testified that this early disturbance was caused by defendant's constant nagging and accusations against him of improper conduct (R. 30, 57). However, he admitted more or less peaceful years until 1953. During these years the parties went on a trip to Denmark to visit family and friends and on that occasion met the Mrs. Nielsen referred to in defendant's brief (R. 60-61). In 1953 the defendant made a trip to Denmark to visit her aging parents and on her return events occurred which ultimately led to the divorce (R. 58, 98).

During the time defendant was in Denmark plaintiff had occasion to see Mrs. Nielsen. Plaintiff regarded her as a mutual friend of him and his wife, socially and personally, because of common interest and background. On defendant's return from Denmark she testified that plaintiff was to meet her in New York to visit friends,

but that he cancelled out on her. Plaintiff states that he was ready and willing to go, but received word from her that she wanted to come straight home (R. 64). On defendant's return to Salt Lake she was told by her children of the matters relating to plaintiff and Mrs. Nielsen and, as a result, she asked plaintiff about *his new girl friend* (R. 102). Plaintiff regarded defendant's statement about his new girl friend as a renewal of the nagging and accusations of improper conduct which had occurred in the past.

Nothing of importance appears in the record until August 1955 when the defendant testified she overheard a telephone conversation between plaintiff and Mrs. Nielsen (R. 103). The testimony as to this conversation as between the plaintiff and Mrs. Nielsen is in conflict (R. 76, 103, 146).

The trial court, in its memorandum decision, described the breakdown of the marriage in expressive terms, charging them with mutual loss of interest, each becoming self-centered, irritable and suspicious. The memorandum decision did not indicate fault or the party entitled to the divorce (Mem. Dec. page 1).

All of the property of the parties was accumulated during the marriage and consists of insurance policies, the floral business and property, a home on Walker Lane and about fifteen acres of undeveloped residential property. The plaintiff commenced the floral business in 1932 and during most of their married life defendant assisted in the business. Her activities were limited to

waiting on the retail customers and other tasks normally expected of a saleswoman (R. 95, 132). While plaintiff and defendant at times discussed the business, she took no part in the management, purchasing or the wholesale part of the business (R. 96, 131-132). Prior to the marriage defendant worked for the National Biscuit Company.

STATEMENT OF POINTS

1. THE DISTRIBUTION OF THE PROPERTY WAS A PROPER EXERCISE OF THE COURT'S DISCRETION.
2. THE DISTRIBUTION OF THE PROPERTY WAS FAIR AND EQUITABLE.

ARGUMENT

1. THE DISTRIBUTION OF THE PROPERTY WAS A PROPER EXERCISE OF THE COURT'S DISCRETION.

Defendant complains that the court has not acted within its statutory authority, and that the decree is so incomplete and indefinite that it has no finality. The argument advanced is that a partnership is being maintained notwithstanding the expulsion of one of the partners and that one joint tenant is being deprived of the right to destroy the tenancy. The difficulty with defendant's argument is that no consideration is given to the nature of the action and is an attempt to solve the problem by hard and fast rules relating to property rights.

The principal asset of the parties is the floral business which has been conducted as a partnership. The

business is operated on premises leased for a specified term of years, with an option of renewal. The Hyland Floral, as it is called, is the result of the business commenced by plaintiff in 1932. While it has the label of partnership and has been treated as such in its records and accounts, it is entirely incident to the marriage. The defendant did not become a partner by reason of a cash contribution, because she had a special knowledge or skill relating to the floral business or for any reason other than as the wife of the plaintiff. The defendant admitted that her husband exercised the same proprietory attitude as is usual of men in their own business affairs, and as might be expected of a man having the paternal, thrifty, hardheaded business approach of Danish people. This is the premise to which the statutory provisions should apply.

Section 30-3-5, *Utah Code Annotated* 1953, provides that where a divorce is granted the court may make such order in relation to the property as may be equitable. It does not say or require the court to bring about the dissolution and finally and irrevocably settle every property right between the parties. A situation analogous to the instant case has been before the court in a prior case. In that case the parties had accumulated farming property during the marriage and this Court was asked by the wife therein to distribute to her one-half of the property, necessitating the sale of the property which had provided a livelihood during the long period of the marriage. This Court refused to divide the property, recognizing that it was difficult of division in a manner to pro-

tect the rights of both parties and the continuation of the property under the defendant husband's control would properly protect and be to the best advantage of both. *Dahlberg* v. *Dahlberg,* 77 Utah 157, 292 P. 214. In the instant case the business is conducted on leased premises and its substantial value is not in the tangible business property, but in its value as a going concern.

Section 30-3-5, *Utah Code Annotated* 1953, further provides that the court may make subsequent changes or new orders with respect to property as may be reasonable and proper. By virtue of this provision the Court has the right to retain jurisdiction over property which, in the best interests of the parties, should not be distributed, and affords a practical means of protecting the wife from improvident acts, the consequences of serious illness and other unforeseeable events which might make or tend to make her a public charge. We believe that *Dahlberg* v. *Dahlberg,* supra, rejects any proposition that all property must be distributed without regard to the best interests of the parties or in face of the proposition that a liquidation would destroy the value of the property and seriously harm earning capacity.

The only evidence relating to the value of the Hyland Floral is the amount of income which the business was able to produce. The sale value of the tangible property was not even suggested. It is the only means of livelihood of the plaintiff and the only future security available to the defendant. The interest of the State of Utah in the divorce action dictates against its destruction.

The only question involved, therefore, is whether or not the order made relating to the property constitutes an abuse of discretion.

2. THE DISTRIBUTION OF THE PROPERTY WAS FAIR AND EQUITABLE.

Defendant's statement of the facts is directed to the establishment of the plaintiff as the guilty party. It is argued that this label of guilt entitles the defendant to an award of property according to her personal standards of equity. Equity has many aspects. The plaintiff continued to build an estate which he knew would benefit defendant over a period of seventeen years of marital trouble. Equity does not require that his means of livelihood be destroyed because he did not secrete property or devise methods of limiting or defeating defendant's rights. The parties have no serious physical or mental health problem, their children have been reared and are of age and it is not shown that there has been any happiness in the marriage for several years, and neither party is suffering any extraordinary sacrifice or loss of devotion or care. The decree as entered provides the best method available to maintain the standards of living and needs of both parties. In considering the general factors relating to a property division, the parties are equal. *Pinion* v. *Pinion,* 92 Utah 255, 67 P.2d 265; *MacDonald* v. *MacDonald,* 120 Utah 573, 236 P.2d 1066.

The defendant's notion of equity is simply that she does not see why she should not be permitted to pick and choose as to amount and kind of property. As pointed out

in the statement of facts, the marriage began to come apart in 1938. It required approximately seventeen years to complete the process of disintegration. The nature of the guilt is reflected in the words of the trial court finally ending the marriage:

> "So, here, we see no outlet except to terminate the marital status by dissolving and terminating the marriage contract." (Mem. Dec. page 2).

The court did not delineate guilt, the situation was hopeless and termination was all that was left. The order relating to the property resulted in an equal division between the parties. The circumstances which surround the litigation are found behind the decree awarding the divorce and, in the last analysis, show equal guilt in the destruction of the marriage relation.

Defendant's argument relating to the inequitable distribution of the property should have been directed to the judicial rather than a personal discretion. It has been said by a respected court that discretion is not a judge's sense of moral right, neither is it his sense of what is just, and he is not clothed with a dispensing power or privilege to exercise his individual notions of abstract justice, but principles of law are to be ascertained and followed, and justice is administered on settled and fixed principles. *Rugg* v. *State,* 104 N.Y.S. 2d 633, 278 App. Div. 216.

This Court has stated that discretion does not mean happy or fortuitous choice, but a discretion guided by circumstances surrounding the litigation. *Broadbent et*

al. v. Gibson et al., 105 Utah 53, 140 P. 2d 939. That must mean principles of law.

In the exercise of its judicial discretion the trial court performed solemn acts. It entered its memorandum decision, the findings of fact, the conclusions of law and the decree. These acts were the result of an application of the legal principle that in a divorce matter an order relating to property should be consistent with the interests of the parties and in a way to properly protect their rights. Unless the trial court's judgment, under all of the circumstances, is so wrong that a manifest injustice and inequity results, the decree should be sustained. In *Lawlor* v. *Lawlor,* 121 Utah 201, 240 P.2d 271, this Court set forth its policy in reviewing judicial discretion:

> "This court is reluctant to modify a divorce decree because usually the evidence is contradictory and the trial court having seen and heard the witnesses is more able to determine their credibility than we are. Also, in the absence of an abuse of discretion, we do not disturb the property division."

This policy has been reaffirmed in many cases. *Callister* v. *Callister,* 1 Utah 2d 34, 261 P. 2d 944; *Blotter* v. *Blotter,* 1 Utah 2d 351, 266 P. 2d 1018; *Tremayne* v. *Tremayne,* 116 Utah 483, 211 P. 2d 452; *MacDonald* v. *MacDonald,* supra; *Anderson* v. *Anderson,* 104 Utah 104, 138 P. 2d 252; *Hendricks* v. *Hendricks,* 91 Utah 553, 63 P. 2d 277; *Allen* v. *Allen,* 109 Utah 99, 165 P. 2d 872; *Dahlberg* v. *Dahlberg,* supra; *Wilson* v. *Wilson,* 5 Utah 2d 79, 296 P.2d 977; *Nokes* v. *Continental Mining & Milling Company,* decided April 1, 1957 (unreported).

CONCLUSION

The trial court acted within its statutory authority relating to the property of the parties, and the decree with respect thereto is an exercise of the sound discretion of the court, being calculated to give the defendant an equal share of all the property of the marriage, while making provision to secure her against unfavorable circumstances not foreseeable and, at the same time, making its possible for plaintiff, as well as defendant, to reconstruct a new life.

The judgment should be affirmed.

Respectfully submitted,

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