

1958

## Nita Martinett v. Cecil J. Martinett : Brief of Appellant

Utah Supreme Court

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L. G. Bingham; Attorney for Defendant and Appellant;

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JUN 23 1958

Supreme Court

IN THE SUPREME COURT  
of the  
STATE OF UTAH

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UNIVERSITY UTAH  
DEC 19 1958  
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NITA MARTINETT,

*Plaintiff and Respondent,*

vs.

No. 8820

CECIL J. MARTINETT,

*Defendant and Appellant.*

Appellant's Brief

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and Appellant*

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# IN THE SUPREME COURT

## of the

### STATE OF UTAH

NITA MARTINETT,  
*Plaintiff and Respondent,*

vs.

CECIL J. MARTINETT,  
*Defendant and Appellant.*

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#### PRELIMINARY STATEMENT

Defendant appeals from the decree of the trial court wherein the court awarded to the plaintiff a decree of divorce and also awarded to the said plaintiff substantially all of the property of the parties.

The record on appeal is in two volumes one of which consists of the pleadings, minute entries and similar papers. All references to this volume are designated by the letter "R". The other volume which is separately numbered is a transcript of the testimony and proceedings at the trial. References to this volume are designated by the letter "T".

#### STATEMENT OF FACTS

This appeal arose from a divorce action. The parties to said action having been married in 1924 and

having resided together since that time. There were no children born as issue of this marriage, however, the parties took into their home and raised to maturity a boy and a girl. These children being the plaintiff's niece and nephew by her deceased sister.

The parties acquired a home in South Ogden, Weber County, Utah, and also a farm in South Weber, Davis County, Utah. The wife was 52 years of age at the time the divorce action was initiated, and the husband was 67 years of age.

The parties appeared to have been reasonably happy in their marriage until the defendant sustained an accident while employed by the U. S. Government that resulted in the fingers of his left hand being cut off in a power saw. This resulted in his being unable to work for some time. Since this accident occurred in 1945 the health of the defendant has deteriorated markedly. He has been a patient at the Veteran's Hospital in Salt Lake City, Utah, for treatment of an ulcer, has suffered from a respiratory ailment caused by paint used in his work, and is being treated for a heart condition. Two days prior to the divorce papers being served upon the defendant his wife sought to have him admitted to the Veteran's Administration Hospital. (T. 69). He refused to enter the hospital at that time. Mr. Martinett has not been gainfully employed in any capacity since 1953, and the indications are that he will never be able to work again.

The Court in disposing of the property of the parties, upon granting to the plaintiff a divorce on the grounds of mental cruelty, awarded to the plaintiff substantially all of the parties property. The plaintiff

was awarded all of the farm of an approximate value of \$18,000, and one-half of the home in Ogden, of a value of approximately \$5,000. The plaintiff receiving approximately \$20,500 in property, and the defendant approximately \$2,500.

The plaintiff is at present regularly employed on a permanent status at Hill Air Force Base, Ogden, Utah, at a salary of approximately \$105.00 per two week pay period as take home pay. She has been regularly employed since 1950. She is eligible for retirement at the age of 60 years.

Mr. Martinett is not employed but is receiving a World War I Veterans Disability pension in the sum of \$78.75 per month, and a Civil Service retirement payment in the sum of \$74.00 per month.

## QUESTION PRESENTED

The question presented is whether the Court in disposing of the real property of the parties, in awarding to the plaintiff the entire farm, and one-half of the value of the home of the parties in Ogden, Utah, exceeded the discretion of the court, and whether said award was inequitable and unjust.

## POINT I

### ARGUMENT

THAT THE DECREE OF THE COURT IN AWARDING TO THE PLAINTIFF SUBSTANTIALLY ALL OF THE PROPERTY ACCUMULATED BY THE PARTIES WAS INEQUITABLE AND UNJUST AND AN ABUSE OF THE COURT'S DISCRETION.

Under Section 30-3-5, U.C.A., 1953, it is provided that when a decree of divorce is made the court may make such order in relation to the children, property and parties, and the maintenance of the parties and the children, as may be equitable.

A divorce proceeding being equitable it is within the prerogative of the Supreme Court to review the evidence and to substitute its judgment for the trial court under the proper circumstances. *Hendricks v. Hendricks*, 91 Utah 553, 63 P. 2d 277; *Wilson v. Wilson*, Utah, 296 P. 2d 977.

It is well settled in this State that inasmuch as the Court's order in relation to the distribution of the property of parties in a divorce action is within the discretion of said court, it will not be disturbed unless the court abuses its discretion. The facts in each divorce case are different and each must be determined under the facts of each case. *Tremayne v. Tremayne*, Utah, 211 P. 2d 452; *Lundgreen v. Lundgreen*, Utah, 184 P. 2d 670; *Woolley v. Woolley*, Utah, 195 P. 2d 743; *Allen v. Allen*, 104 Utah 104, 138 P. 2d 252.

Our Court has enumerated some of the factors that the trial court should consider in arriving at the goal to be sought in the distribution of the property of the parties. That goal being to provide a just and equitable adjustment of the parties economic resources so that the parties can reconstruct their lives on a happy and useful basis. In doing so it was stated in *Wilson v. Wilson*, Utah, 296 P. 2d 977, as follows:

“ . . . . it is necessary for the court to consider, in addition to the relative guilt or innocence of

the parties, an appraisal of all of the attendant facts and circumstances: the duration of the marriage; the ages of the parties; their social positions and standards of living; their health; considerations relative to children; the money and property they possess and how it was acquired; their capabilities and training and their present and potential incomes.” ✓

In connection with the first element, the guilt or innocence of the parties, the court in rendering its decision stated it felt that the defendant had been a good man. (T. 91) That the situation was one that was intolerable to the plaintiff. (T. 89). While it is true that in recent years, since defendant's failing health and resulting inability to work, he remained at home and perhaps drank a can of beer or two. Yet there are here none of the allegations usually displayed in a divorce court. If there be guilt on this defendant's part that the trial court felt it should utilize in determining what would be an equitable division of the property of the parties it would have to be his failing health, the natural afflictions of a man of 67 years who had spent his life in hard manual labor, and perhaps the frustrations of not being wanted.

There can be no doubt but that the defendant became to his wife a problem and from the tenor of her testimony a burden. A man of 67 years, ill and forced into inactivity that he has neither the training nor the aptitude to utilize is bound to become a problem to his family. Yet in our consideration of the parties loyalty to their marriage vows, should the phrase “in Sickness and in Health” be considered of no worth? The parties 33 years of marriage should have earned for him the



indulgence of his wife, and of the court in judging his behavior since his health and vigor departed. Viewed in the light of his misfortunes and ill health, his personal habits and manner of living, while not commendable, are not condemnable to the degree that his property rights should be prejudiced thereby.

This was a marriage that came into being in 1924. The parties being some 15 years apart in age. The defendant being the older. The marriage had endured for some 33 years during which time all of the property which is in dispute was acquired, and paid for.

As to the parties standards of living the record appears to disclose a couple who, until the last few years, were hardworking, and saving so that they were able to buy, build, and pay for a home in Ogden, Utah, and a farm in South Weber, Davis County, Utah, through their combined efforts. They have both evidenced a desire to own their home and enjoy the security and comfort such possession would give to them in their declining years. At which point in life the defendant has arrived.

In regard to the health of the parties it would appear that the difficulty with the couple began when the defendant became unable to work. The defendant has twice been a patient at the Veterans administration Hospital in Salt Lake City. He was the victim of an accident in 1945 that resulted in his fingers being cut off by a power saw. He also is incapacitated by a lung condition caused by paint spraying work he was engaged in for many years. Mr. Martinett also suffers from a heart ailment which prevents his attempting any useful

labor whatsoever. He is 67 years of age as well.

Mrs. Martinett is 52 years of age, regularly employed at Hill Air Force Base, Ogden, Utah, and the record discloses she has had difficulty in connection with a hernia.

There were no children born to the parties. The parties did, however, raise two children of the plaintiff's sister. These children were never adopted and are now of age.

A great deal of the trial record is devoted to the testimony of the plaintiff to the point that she contributed almost exclusively to the purchase of the home in Ogden and the farm in Davis County. At the time of the marriage of the parties neither owned any property or other assets of importance. The defendant used portions of his World War I bonus to assist in the purchase of the home in Ogden, and also made substantial contributions to the purchase of the farm. It is likewise true that the plaintiff worked at various times and that portions of her earnings were utilized in buying the properties. Much of the present value of the farm property was acquired through the construction by the parties of a house and other buildings upon the farm, and in the improvement of the land in general. It is admitted that the defendant contributed to these enterprises as long as his health would enable him to do so.

As to the capabilities of the parties and their training, the health of the defendant is such that he is unable to pursue a painting, or other trade he has engaged in heretofore. There would appear to be little doubt but that his productive years are over. The plaintiff has a

regular job at Hill Air Force Base. She has worked there continuously since 1950 and there are no indications other than that she will continue to be so employed indefinitely.

At the present time the plaintiff receives approximately \$105.00 take home pay every two weeks from her employment. The Defendant is receiving a Veteran's disability payment in the sum of \$78.75 per month, and a retirement payment of \$74.00 per month.

## CONCLUSION

It is respectfully submitted that the distribution of the parties assets as provided by the trial court should be modified to allow the defendant some degree of security and reward for his life work. The defendant has worked, and with his wife, come to possess two homes. Whether his days are few, as the court indicates they would be, (T. 90-91) or if he lives to the age of 94 years as did his father, he should not be cut off from all of his wordly goods.

On page 84 of the transcript the defendant sums up his situation when he says:

“my heart is gone, my wind is gone, my legs is gone, all I'm waiting for is to die.”

Can it be equity and justice that will also deprive him of a home of his own when through his labor he has earned the means for having one? He may only be

waiting to die, but surely the test as to which party the property should be awarded to in a divorce action is not whether the death of a party is imminent or remote. The defendant's health is gone and with it his ability to work and earn a living is gone, as well as is his wife. True, he is receiving retirement payments that will probably continue as long as he lives. It is submitted, however that he is entitled in equity and in justice to more than the approximately one-tenth equity in the property as awarded by the trial court.

Respectfully submitted

L. G. BINGHAM

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and Appellant*