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Utah Supreme Court

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In The Supreme Court of the State of Utah

MILDRED D. DUBOIS,
Plaintiff-Respondent,
vs.
F. RAY DUBOIS, JR.,
Defendant-Appellant.

Case No. 12820

BRIEF OF APPELLANT

STATEMENT OF THE KIND OF CASE

This is an action for a divorce in which the plaintiff sought a division of the marital estate, almony and attorney fees.

DISPOSITION IN LOWER COURT

The Court awarded the plaintiff a divorce on grounds of mental cruelty and then, having ultimately valued the marital estate at $581,911.00, awarded respondent 60% of that estate, permanent alimony in the amount of $375.00 per month and attorney fees in the sum of $10,000.00. Appellant appeals from all portion of the Decree of Divorce excepting the awarding of the divorce.

RELIEF SOUGHT ON APPEAL

Appellant seeks to have the value of respondent's interest in the estate of Dr. Charles E. Hirth included in the marital estate; the property awarded to respondent out of the marital estate, as expanded by the above, fixed at $307,000.00; and to have the alimony and attorney fees awarded to respondent eliminated entirely.

STATEMENT OF FACTS

Appellant and respondent were married on December 13, 1942, in San Antonio, Texas. Two children were born to the parties, both of whom are now over the age of 21. (T.T. 47-48)* On or about June 23, 1970, respondent filed a Complaint in the District Court of Salt Lake County seeking a decree of divorce on grounds of mental cruelty and praying for an award of an equitable portion of the marital estate, seeking alimony, and praying for an award of attorney fees.

The case came on for trial before the Honorable Marcellus K. Snow, District Judge of the District Court of Salt Lake County on July 28, 29 and 30, 1971. On August 4, 1971, the Court issued a memorandum opinion awarding the respondent an Interlocutory Decree of Divorce; valuing the marital estate at approximately $570,000.00; awarding the plaintiff 60% of the marital estate as thus valued, establishing certain guide lines for the division of the estate among the parties,

* (Note: T.T. refers to the Trial Transcript)

and awarding the respondent alimony and $10,000.00 attorney fees. On January 10, 1972, the Court entered its Findings of Fact and Conclusions of Law and its Decree of Divorce, which confirmed the awards set forth in its memorandum opinion of August 4, 1971, with the exception that $581,911.00 was accepted as the value of the estate rather than $570,000.00. (F.F. 5-6) The court, however, failed to offer any explanation for this increase in the estate's valuation.

The Court in its Findings of Fact and Conclusions of Law expressly excluded from the marital estate any property which the respondent might succeed to by way of an inheritance from the estate of Dr. Charles E. Hirth. (F.F. 4)* Dr. Hirth died in May, 1970, (T.T. 144) approximately one month before the respondent commenced her action for a divorce. The respondent's interest in this estate has been valued at approximately $100,000.00 by respondent, less certain minor expenses associated with the upkeep of Dr. Hirth's burial site, a bequest of $2,000.00 to a church and the expenses of administering the estate. (T.T. 83-84) The minimum net value of this inheritance to respondent was estimated as being between $75,000 and $100,000.00 (T.T. 198). In addition, the Court in its Findings of Fact failed to mention or include within the marital estate the expectancy which the respondent has in her mother's estate. Uncontradicted evidence indicates, in reference to this,

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* (Note: F.F. refers to the trial court's Findings of Fact and Conclusions of Law)

that respondent will be the sole beneficiary of her mother's estate, that this estate is valued at a minimum of $150,000.00, (T.T. 199) and that her mother is aged, feeble and living in a nursing home. (T.T. 47-48, 85-86, 93 and 140-41)

The Court also expressly found in its Findings of Fact and Conclusions of Law that the greater bulk of the assets of the marital estate was derived from gifts and inheritances received from respondent's side of the family. (F.F. 2) The underlying and uncontradicted evidence indicates, however, that respondent received only a total of $117,509.00 in gifts and inheritance from her side of the family during the course of the parties' marriage (T.T. 22), and that appellant received a total of $66,137.00 in gifts and inheritances from respondent's side of the family during that same period of time. (T.T. 24) During that same time period, however, appellant contributed in excess of $500,000.00 in earned income to the marital estate. (T.T. 152).

ARGUMENT

POINT I

THE COURT COMMITTED REVERSIBLE ERROR BY EXCLUDING FROM ITS VALUATION OF THE MARITAL ESTATE THE VALUE OF RESPONDENT'S INHERITANCE IN THE ESTATE OF DR. CHARLES E. HIRTH AND BY FAILING TO PROP-

ERLY CONSIDER THIS INHERITANCE AND THE RESPONDENT'S EXPECTANCY IN HER MOTHER'S ESTATE WHEN IT DIVIDED THE MARITAL ESTATE.

A. Utah law requires that property interests which vest in either husband or wife prior to the dissolution of the marriage be included within the marital estate and be considered by the court in adjusting the rights of the parties in that estate.

The trial court in its Findings of Fact and Conclusions of Law expressly excluded from the marital estate respondent's vested inheritance in the estate of her uncle Dr. Charles E. Hirth. (F.F. 4) The minimum value of this inheritance was established by the evidence as being between $75,000.00 and $100,000.00. (T.T. 198)

In *McDonald v. McDonald,* 120 Utah 573, 576-83, 236 P.2d 1066 (1951), this Court held that the trial court had properly taken into consideration, in adjusting the financial affairs of the parties, an inheritance which the wife had received approximately one year before the initiation of the divorce proceedings in question but subsequent to the commencement of the marital difficulties between them. *Accord, Michelsen v. Michelsen,* 14 Utah 2d 328, 329-30, 383 P.2d 932 (1963); *cf., Woolley v. Woolley,* 195 P.2d 743 (Utah 1948). It

should be noted that these cases are in accord with the decisions of courts in other jurisdictions which have held that property interests vested in a party at the time of the divorce, although not presently reduced to that party's possession, are to be considered in adjusting the financial and property affairs of the parties. *Schreiber v. Schreiber,* 224 So. 2d 407 (Fla. 1969); *Clarke v. Clarke,* 188 N.E. 2d 619 (Ohio, 1963); *Smyth v. Smyth,* 179 P.2d 920 (Okla. 1947)

B. Under Utah law contingent future interests must be considered by the trial court in adjusting the parties' rights in the marital estate.

In view of the court's award of sixty percent of the marital estate to the respondent from which it excluded respondent's vested inheritance in the estate of Dr. Charles E. Hirth, the approximate net value of which was established by the evidence as being between $75,000.00 and $100,000.00, (T.T. 198) it is clear that the court completely failed to give any consideration to the respondent's expectancy in her mother's estate, which was valued by uncontradicted testimony at a minimum of $150,000.00. (T.T. 199), and which the trial court completely failed to mention in its Findings of Fact and Conclusions of Law or in its Memorandum Opinion, when it divided the marital estate. In *MacDonald v. MacDonald, supra,* this court held that the wife's expectancy in the estate of her aged mother was rightly considered by the trial court in adjusting the fi-

nancial affairs of the parties. 120 Utah at pp. 578 and 582; *cf., James v. James,* 248 S.W.2d 706, 708 (Ky. 1952), where the court affirmed a lump sum alimony award, which is akin to a property settlement award, which was based in part upon the husband's expectancy in his mother's estate, he being the only heir.

POINT II

THE COURT COMMITTED REVERSIBLE ERROR BY ADMITTING EVIDENCE THAT WAS BASED UPON THE THEORY THAT THE MARITAL ESTATE OF THE PARTIES WAS A TRUST CORPUS AND THE APPELLANT ITS TRUSTEE AND BY ADOPTING THAT THEORY AS THE BASIS OF ITS DIVISION OF THE MARITAL ESTATE.

A. The Utah Courts have never interpreted or applied either U.C.A. Section 30-2-1, or Section 2 of Article XXII of the Utah Constitution relating to the emancipation of married women, to the division and distribution of the marital estate in a divorce proceeding, but rather, have always treated the powers granted them under U.C.A. Section 30-3-5 as pervasive, allowing them to reach all of the property of both the husband and the wife.

Respondent's attorney argued that since the relation of husband and wife is one of trust and confidence, any contribution to the marital estate by the wife or her family constituted a trust corpus, which, if managed by the husband along with his contributions to the family estate, constituted him a trustee. (T.T. 242-248) Moreover, according to this theory, when discord subsequently erupts between the parties, this trust relationship dictates that all of the trust assets, as originally contributed by the wife or her family, be traced, their productivity noted and a comparison made between their current value and a capitalized value utilizing an arbitrarily selected figure of seven percent. (T.T. 26-35) Then, if the current value of these assets is less than their hypothetically calculated capitalized value, the husband's contributions to the marital estate are to be surcharged for the difference. Then, the actual or capitalized value of these assets, whichever is greater, is awarded to the wife as her separate property. (T.T. 22-34 and see plaintiff's Exhibits P-2 and P-3).

Moreover, in calculating these values, you assume that all of the living expenses of the parties were paid out of the husband's contributions (T.T. 43), and you ignore any gifts or inheritances which the parties may have received from the husband's side of the family (T.T. 41). You also ignore the investment philosophy, goals, or practices of the husband (T.T. 44) and you neglect to deduct, in calculating the capitalized value of the trust assets, any gifts which the parties may have

made to their children during the course of their married lives (T.T. 45).

Respondent's attorney recognized when he proffered this theory to the court that there was no precedent for it under Utah law (T.T. 242). However, not only is there no precedent under Utah law for the acceptance or use of such a theory, but this court has itself previously considered such a theory and flatly rejected it. *Anderson v. Anderson,* 18 Utah 2d 286, 422 P.2d 192, 193-35 (1967). In that case the plaintiff's wife appealed from a judgment of the trial court wherein she had been awarded one-third of the parties total net assets plus $200.00 per month as alimony and $900.00 for attorney fees. The defendant husband had, during the course of the parties' marriage, engaged in a variety of business ventures unrelated to his regular job. Unfortunately, these ventures suffered a number of severe reverses and, at the time of divorce, the marital estate had liabilities in excess of $71,000.00, with a net worth of approximately $10,000.00. The plaintiff argued on appeal that their business debts should "be paid by the defendant out of his earnings and that she should be awarded one-half of all property remaining after these obligations . . . [have been] paid in full." 422 P.2d at pp. 193-94. The court in response to this argument held that:

> "It is novel doctrine that would leave the husband with the accumulated liabilities of 30 years of married life and award to the wife

> one-half of the net assets free and clear of these debts. Any business venture is accompanied by some risk of failure and to say that because the husband managed these investments it is his loss but that she will nevertheless share in the profitable portion of his financial endeavors, is an untenable suggestion. She married him "for better or worse." This does not mean the "better" for her and the "worse" for him. 422 P.2d at p. 194.

This result is completely in accord with the general rule that all of the property of the parties, including their separate property is subject to the control, direction and disposition of the divorce court when the statute involved directs the court to make such dispositions of the parties' property as it deems equitable. 24 Am. Jur. 2d *Divorce and Separation* § 926. The statute which is controlling here, U.C.A. § 30-3-5, utilizes this language and this court has always interpreted the power granted it thereunder broadly. See, for example the *MacDonald* and *Michelsen,* cases discussed, *supra,* under Point I.

Not only was evidence based upon respondent's "Trust" theory erroneously admitted over appellant's objections, (T.T. 22, 34-35 & 46) but it is obvious from the court's Findings of Fact and Conclusions of Law that it was influenced thereby in making its property award to the respondent. One example of this influence is the court's findings that the appellant abused the re-

spondent's trust in him by creating an imbalance of investments in his own favor. (F.F. 2-3)

Moreover, it is only on the basis of such a theory that it would be possible for the court to find that the bulk of the assets in the marital estate had been produced from gifts and inheritances from respondent's side of the family. This is so because respondent's own testimony and evidence establishes that her side of the family during the course of the parties' marriage, contributed only $117,509.00 by way of gifts or inheritance to her, and that they gave only an additional $66,137.00 to the appellant. (T.T. 24) These figures ignore, of course, the value of the vested inheritance which respondent will receive from Dr. Hirth. In contrast to the total contributions of approximately $183,000.00 by the respondent's family, $66,137.00 of which was given to appellant and not to respondent, the appellant contributed over $500,000.00 in earned income. (T.T. 152) This uncontradicated evidence, coupled with the court's other findings, compels the conclusion that the trial court committed reversible error by admitting evidence's based on respondent's "Trust" theory and by adopting that theory as the means of allocating the property contained in the marital estate.

POINT III

THE COURT COMMITTED REVERSIBLE ERROR BY AWARDING RESPONDENT ALIMONY.

A. Under Utah law, an award of alimony must be based upon the reasonable needs of the wife and in connection therewith, the court must consider those needs in relation to all of her present and prospective assets.

It appears to be generally accepted by most courts, including this Court, that the decision of whether or not to award a party alimony cannot be divorced from the property which the court awarded each party or from the total assets and resources of each party, including contingent future interests.

In Utah, the general rule is that an award of alimony must be based upon the reasonable needs of the party concerned. *Openshaw v. Openshaw,* 12 P.2d 364, 368 (Utah 1932); and *Allen v. Allen,* 165 P.2d 872 (Utah 1946). Having determined what these needs are, however, the court must then determine the amount of alimony that will be necessary to satisfy these needs in relation to all of the assets of the wife, including the assets awarded to her in the divorce proceeding and those which she will likely succeed to in the future. *MacDonald v. MacDonald,* 120 Utah 573, 236 P.2d 1066 (1951); *Cf. Stuckey v. Stuckey,* 41 Cal. Rptr. 792 (1964); *Henning v. Henning,* 362 P.2d 124 (Ariz. 1961); *Baugher v. Baugher,* 408 P.2d 443 (Colo. 1965); *Dworkis v. Dworkis,* 111 So. 2d 70 (Fla. 1959); *Richards v. Richards,* 355 P.2d 188 (Haii. 1960).

In the instant case the trial court awarded re-

spondent approximately $347,044.00 of an estate valued ultimately by the court at $581,911.00. The court, as noted above, expressly excluded from the estate respondent's vested inheritance from Dr. Hirth. Moreover, there is no indication in the record or in the court's Findings of Fact and Conclusions of Law that it took either respondent's inheritance from Dr. Hirth or her expectancy in her mother's estate into account when it awarded her permanent alimony in the amount of $375.00 per month. Moreover, the record is also barren of any evidence, other than generalized statements by respondent that she enjoyed a high standard of living during the course of her marriage to appellant, (T.T. 56-69) and her own self-serving statement that she would need $750.00 per month in alimony to make ends meet, (T.T. 69) of what her needs are. In this regard, it is interesting to note that even without taking respondent's expectancy in her mother's estate into account, respondent's total assets should produce approximately $29,543.00 per year in income using seven percent as an average rate of return and assuming that respondent's total assets would equal $422,044.00, which figure is the sum of the $347,044.00 awarded respondent in this action and the minimum of $75,000.00 in inheritance which she will receive or has already received from the estate of Dr. Hirth. It is difficult to see how, in view of these facts, an award of $375.00 per month in alimony to respondent can be considered equitable or in any other fashion justified.

POINT IV

THE COURT COMMITTED REVERSIBLE ERROR BY AWARDING RESPONDENT ATTORNEY FEES.

A. Under Utah law an award of attorney fees to a wife in a divorce action is based upon her need and in connection therewith, the court must consider all of the present and prospective assets of the wife.

In *Allredge v. Allredge*, 229 P.2d 681, 687 (Utah 1951), this court held that the rationale for allowing a wife suit money and attorney fees is that she "normally has no separate estate from which to pay for bringing or defending the action." And in *Weiss v. Weiss,* 111 Utah 353, 364, 179 P.2d 1005 (1947), this court also held that awards for attorney's fees and suit money may be made in the divorce decree "provided the necessity for such awards is found to exist." *Accord, Richards v. Richards,* 355 P.2d 188 (Haii. 1960); and *Henning v. Henning,* 362 P.2d 121 (Ariz. 1961).

In the instant case, the respondent had, according to her own testimony, approximately $9,000.00 in savings in her name at the time the parties separated, (T.T. 78) and she received thereafter, at appellant's request, (T.T. 148) the annual rent check from the Illinois farms in the amount of approximately $4,500.00 (T.T. 69 and 77). Moreover, appellant paid all of the accrued

household bills before he left Utah in October, 1970 (T.T. 149). Additionally, appellant, from the time that he separated from respondent in June, 1970, until he left the state in October, 1970, made voluntary support payments to respondent (T.T. 68). Even more important, respondent was awarded $347,044.00 of the marital estate by the court which is over $110,000.00 more than the court awarded appellant. Additionally, respondent has a vested interest in Dr. Hirth's estate valued at a minimum of $75,000.00 (T.T. 198), and an expectancy in her mother's estate valued at a minimum of $150,000.00 (T.T. 199). In view of the facts that respondent's assets greatly exceed appellant's and that she had sufficient income and liquid assets available to her throughout the course of this action to satisfy her needs and pay her bills, burdening appellant with the payment of respondent's attorney fees is unnecessary, inequitable and unconscionable.

POINT V

THE COURT'S AWARD TO RESPONDENT WHEN VIEWED AS A WHOLE MANIFESTS AN INTENTION ON THE COURT'S PART TO UNLAWFULLY PUNISH APPELLANT.

A. Punitive measures have no place in Utah Divorce Law.

In *Wilson v. Wilson,* 5 Utah 2d 79, 296 P.2d 977, 979 (1956), this court expressly stated that,

> "We recognize that there is no authority in our law for administering punitive measures in a divorce judgment, and that to do so would be improper, except that the court may, and as a practical matter invariably does, consider the relative loyalty or disloyalty of the parties to their marriage vows, and their relative guilt or innocence in causing the breakup of the marriage."

The court also noted that rarely is there ever a "wholly guilty or a wholly innocent party to a divorce action." 296 P.2d at p. 979. The court then stated that the proper approach is for the court "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." 296 P.2d at p. 979. *Accord, Anderson v. Anderson,* 18 Utah 2d 286, 422 P.2d 192 (1967).

In the instant action there is uncontradicted testimony that appellant worked extremely hard (14-16 hours per day) throughout the course of this marriage and, as a consequence, generated earnings in excess of $500,000.00. (T.T. 152) The appellant did this in order to provide respondent with a very comfortable living and to amass the assets which are at issue on this appeal. On the other hand, respondent's only financial contri-

bution to the marital estate, as valued by the trial court, was the gifts and inheritances which she received from her family, (T.T. 89) which only totaled $117,509.00.

Notwithstanding these facts and the fact that respondent is not suffering from any disability, the trial court did the following things: excluded certain assets, contrary to Utah law, from the marital estate; adopted a theory in regards to a husband's management of the marital estate that is unique to Utah law and that has in fact been expressly rejected previously by this court; found against the weight of the evidence on the basis of that theory, that the marital estate, as valued by the court, had been produced primarily from assets contributed by respondent's family; ordered the estate divided on a 60-40 basis, an award which is unprecedented, for an estate as large as the instant one, under Utah law; awarded respondent alimony in the amount of $375.00 per month despite the fact that there is no need for such an award in view of the assets available to and awarded to respondent by the court; and finally, awarded respondent attorney's fees in the amount of $10,000.00, although again there is no showing of need on respondent's part and although in fact respondent, by the court's actions, has been made a far wealthier person than appellant.

All of these actions on the court's part when taken together clearly manifest an unlawful intent to punish appellant. These actions most certainly are not calculated to "minimize animosities" and aid the parties to

"reconstruct their lives on a happy and useful basis." *Wilson v. Wilson,* 5 Utah 2d 79, 83, 296 P.2d 977 (1956).

CONCLUSION

For the foregoing reasons it is respectfully requested that the Court set aside the property, alimony and attorney's fees, awards of the trial court and exercise the authority which it has in a divorce action to review the record *de novo, Wilson v. Wilson,* 5 Utah 2d 79, 84, 296 P.2d 977 (1956); and *Wiese v. Wiese,* 24 Utah 2d 236, 238, 469 P.2d 504 (1970), by decreeing its own judgment denying respondent alimony and attorney fees, ordering the inclusion of respondent's inheritance from Dr. Hirth in the marital estate, awarding appellant $349,911.00 of that estate which would then be value at $656,911.00 (utilizing $75,000.00 as the value of respondent's inheritance from Dr. Hirth) and awarding respondent the remainder, which would come to $307,000.00. In the alternative, appellant requests that the judgment of the district court be reversed in all particulars other than its award of a divorce to respondent and that the cause be remanded with directions to eliminate the awards of alimony and attorney fees, to recalculate the value of the marital estate and to distribute it in accordance with the directions of this Court.

Dated this 23rd day of June, 1972

Respectfully submitted,

VAN COTT, BAGLEY,
CORNWALL & McCARTHY

Attorneys for Defendant-Appellant

Clifford L. Ashton

Ray G. Martineau

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of Appellant was served upon Harley W. Gustin, attorney for respondent, by delivering a copy thereof to him at 1610 Walker Bank Building, Salt Lake City Utah on this 23rd day of June, 1972.

____
Ray G. Martineau