1972

Mildred D. Dubois v. F. Ray Dubois, Jr. : Brief of Respondent

Utah Supreme Court

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 RESPONDENT

Appeal from the Judgment of the Third Judicial District Court for Salt Lake County, Utah,
The Honorable Marcellus K. Snow, Judge

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NATURE OF THE CASE

This is an action to dissolve a marriage that was consummated December 13, 1942, and for a determination and an equitable allocation of the marital estate with alimony and incidental relief by way of attorney's fees and costs of suit.

DISPOSITION IN LOWER COURT

After three days of trial the lower court by its Memorandum Decision (R. 16-18) directed a decree of divorce in favor of respondent with alimony in the monthly amount of $375.00, attorney's fees of $10,000.00 and a partition of the marital estate of the then fair current value of approximately $570,000.00 on the basis of 40 per cent to appellant and 60 per cent to respondent.

The marital estate consisted of real and personal property, some in joint tenancy, some in co-tenancy and other portions in the individual names of the parties. The Memorandum Decision dated August 4, 1971, while delineating certain guidelines, admonished counsel for both parties and solicited their sound discretion and stipulation so that federal and state income tax and other considerations and consequences might be worked out to the maximum possible benefit of both appellant and respondent.

Functioning within the perimeter of the Memorandum Decision Richard H. Stahle, Esq., of counsel for appellant and Gregory W. Aggeler, C.P.A., of Touche Ross & Co. for respondent, both being recognized by the parties as being knowledgeable in the field of income tax law, consulted each with the other and arrived at a division of specific items all as reflected in the findings of fact and conclusions of law (R. 34-42) which findings were adopted by the trial court on January 10, 1972, and carried forward into the decree of divorce entered the same day (R. 43-49). The adjustments as made showed a total gross dollar estate of $578,407.00 as of May 31, 1971, with items of a given dollar amount of $347,044.00 allocated to respondent and items of a given dollar amount of $231,-363.00 allocated to appellant (R. 29-33).

The matter of the settlement of findings based upon the allocation as set forth above was by motion (R. 26) which motion came on before the court for hearing on January 10, 1972, at which time, in the absence of specific objections with regard to the various items as the same

were allocated between the parties (R. 71-77), the findings were settled and the decree was entered from which appellant now appeals.

STATEMENT OF FACTS

Appellant's statement of facts does not do justice to the record and in some respects is at variance with the same. The item of $581,911.00 that is mentioned several times in appellant's brief and particularly on page 3 is opposed to the item of $570,000.00, which latter figure was used by the trial court in its Memorandum Decision of August 4, 1971, as being the approximate fair current market value of the estate. The $581,000.00 plus figure is an accounting problem and appellant is in no position to assert the same, which figure he states as being taken from pages 5-6 of the findings of fact (R. 38-39). There are no totals shown on those pages but there is an explanation by way of "notes" (R. 30) which is a part of the analysis and evaluation as presented to counsel in connection with the motion fixing time to settle the findings of fact and conclusions of law and for the entry of the decree, which proposed findings are likewise attached to the motion (R. 26-49).

Paragraph 4 of the motion (R. 27) states that the various documents, which included the proposed findings, conclusions and decree, and the analysis and evaluation, the latter being the result of communications between Gregory W. Aggeler for respondent and Richard H. Stahle, Esq., for appellant, were supplied to counsel for appellant

in lieu of a proposed stipulation contemplated by the Memorandum Decision (R. 16-18) so as to give the appellant an opportunity to make such objections at the time fixed to settle the findings, if any he may have, to the documents as so prepared (R. 27). At the hearing on January 10, 1972, there were no objections to the segregation of assets and the valuations given to the same (R. 71-77). The many repeated statements of this court are to the effect that matters not raised in the lower court cannot be raised for the first time on appeal.

Appellant's statement of the facts gives the court no information with regard to the events leading up to the divorce proceedings and undue emphasis is placed upon the death of respondent's uncle, Dr. Charles E. Hirth, who in his lifetime was a most generous benefactor by way of gifts to the parties jointly and individually. Emphasis, by way of a factual statement, is placed upon the speculative and conjectural benefit to respondent as a potential recipient of an estate from her aged mother who is now living in a nursing home. The trial court excluded the inheritance from Dr. Hirth as a part of the marital estate. No reference was made in the findings to the expectancy following the death, as and when it occurs, of respondent's mother.

Appellant who was 50 years of age at the time of trial and respondent who was 51 at said time were, as appellant points out, married on December 13, 1942, in San Antonio, Texas. There are two adult children as the issue of the marriage, one a son and one a daughter, both of

whom are married, and there are grandchildren. But there is more by way of factual statement that appellant omits and that we are impelled to add.

On January 25, 1970, respondent was made aware of the fact that her husband was in love with another woman (R. 54). To that time the marriage was a definite exception to the expression that there is never any wholly guilty or wholly innocent party to a divorce action. Appellant had the unquestioned affection and confidence of respondent, respondent's mother and other members of respondent's family. Respondent's mother thought that "there was no man in the world as great as Ray Dubois" and respondent expressed herself "I didn't think there was anyone like him either". Dr. Hirth "absolutely adored him" (R. 130-131). There is nothing in the record to indicate any disloyalty on respondent's part and their relationship until the revelation made by appellant, was one of the utmost trust and confidence on respondent's side (R. 129-130).

While in San Francisco with her husband on January 25, 1970, respondent overheard a telephone conversation between her husband and Marjorie Parry, his first cousin. At the end of the telephone conversation appellant used terms of endearment toward his cousin and then when he became aware that his wife had overheard his side of the conversation, he said "I am in love with another woman" and when asked how long the affair had been going on "he said for months" (R. 131-134). Between the incident in January and the filing of the complaint on the 23rd

day of June, 1970, (R. 1) there were efforts to get the matter "reconciled" (R. 134).

The parties were members of two country clubs, Willow Creek in Salt Lake and Pauma Valley in California, both being avid golf players. In the last 20 years of their marriage they have taken many trips, stayed at the finest hotels, enjoyed all of the comforts of what might be described as leisure living, played golf at the most select country clubs wherever they happened to be, were socially prominent in Salt Lake and charter members of Willow Creek since its beginning. They lived in the Mt. Olympus area in a home reasonably valued at $50,000.00 (R. 136-137). Appellant was president of the Utah Golf Association and respondent described their social activities as being "country club people" having spent the last 10 years in the golfing world and a great deal of time and money in the country club both in Salt Lake and in Pauma Valley (R. 138).

Appellant voluntarily terminated his employment with Lees Carpets as of September 30, 1970, and immediately left Salt Lake to live in San Diego (R. 144) where Mrs. Parry was residing (R. 9). Appellant's salary at the time of his termination was $22,000.00 a year and at the time of trial, the latter part of July, 1971, he was unemployed as a matter of his own choosing. His lack of employment was in no way, expressly or by implication, attributed by him as a reason for his not paying alimony to the respondent. Appellant conceded that there was no physical or mental condition inhibiting him from the work that he was accustomed to doing and that he was think-

ing about getting a broker's license in California and perhaps developing the Pauma Valley property (R. 215).

With respect to the Pauma Valley property respondent was asked the question and made the answer as follows:

> "Q. Haven't you stated to Mrs. Parry's boys in effect that the Pauma Valley area was most attractive to you, and that both you and their mother were going to build their home there?" (Dep. page 76, lines 14-16).
>
> "9. *Answer*: I recall having stated to Mrs. Parry's boys that the Pauma Valley area was most attractive to me. I do not recall having stated to Mrs. Parry's boys that I or their mother had plans to build any home there, although such a possibility is an attractive one for me and has been for a number of years" (R. 11).

During the interim between the termination of the employment with Lees Carpets and the trial of the case in July of 1971 appellant expended capital assets in order to meet obligations that had accrued since leaving his employment with no compensating job employment from that point on (R. 230). The expenditure of capital is one of the variables in connection with accounting matters.

Appellant by his answer (R. 4) admitted that substantial gifts from respondent's side of the family had been made to the parties over the years. Exhibits 2-P and 3-P account for the various gross dollars attributable to gifts, the investment and reinvestment of the same and the imbalance created by appellant in his favor in the in-

vestment of various securities. As of May 31, 1971, a summary of the total estate as shown by the exhibits is indicated at $588,581.00 with assets in the name of respondent valued at $119,764.00, assets in the name of appellant valued in the amount of $203,982.00 and in the joint names of the parties, assets valued at $264,835.00 (R. 107-108). There was a single item of $14,225.00 that appellant received in 1957 from respondent's mother concerning which he had no present memory (R. 220) but which at the time of his deposition he "vaguely" recollected (R. 229). The transmittal of a letter to respondent's mother by appellant mentioning the sum of $14,225.00 was corroborated by the witness Stansfield as having been seen in appellant's file sometime during the month of August, 1970, (R. 234). The frugality of both parties to conserve and accumulate an estate is an admitted fact (R. 222) and Exhibit 1-P kept in the hand of appellant is replete with factual information with regard to gifts as well as the plan of early retierment (age 55) by 1975 with a total gross estate of $750,000.00. This item is found in Exhibit 1-P on a page titled Total Assets of "Mil & Ray," nine pages forward from the last page of Exhibit 1-P.

Appellant at the end of his statement of facts calls attention to the fact that during the period of the marriage he contributed "in excess of $500,000.00 in earned income to the marital estate." Whether this amount is before or after tax is not indicated, but in any event, it averages out at $17,241.00 per year for a marriage of 29

years. We submit that it would be impossible for appellant on that salary to rear his family, live on the social and economic level of the parties and end up with an estate of in excess of $570,000.00 but for the contributions by way of gifts admittedly from plaintiff's side of the family.

The following, by way of argument, is in the same order and is intended to controvert the points raised by appellant.

ARGUMENT

POINT I.

THE EXCLUSION OF RESPONDENT'S INTEREST IN THE ESTATE OF HER UNCLE AND HER EXPECTANCY, IF ANY, OF AN INHERITANCE FROM HER MOTHER WHO IS STILL LIVING WAS NOT AN ARBITRARY AND CAPRICIOUS ACTION ON THE PART OF THE TRIAL COURT.

The trial court was aware of the death of Dr. Hirth during the month of May, 1970, following the disclosure of appellant's relationship with Mrs. Parry and approximately a month prior to the filing of the complaint. It is not clear from appellant's brief whether he claims some allocation of that interest or whether the contention is that there should be a disclosure and an affirmative showing that the trial court acted with the discretion afforded it in such matters. As to the latter, the court expressly by

its findings of fact awarded to respondent the interest devised and bequeated to her by her uncle.

MacDonald v. *MacDonald*, 120 Utah 573, 236 P. 2d 1066 (1951), cited by appellant, is a case that has been commented on many times by this court. There is nothing in the case that supports appellant's contention and in fact it is authority in support of the conclusion arrived at in the instant action by the trial court both as to the estate of Dr. Hirth and the expectancy, if any, from respondent's mother.

Section 30-3-5, Utah Code Annotated, 1953, provides for such orders in relation to the property "as may be equitable." There is no question but what Dr. Hirth made substantial gifts both in the way of property and cash to respondent and appellant during his lifetime. The Illinois farm lands, the property near Vernal and many substantial cash contributions came from him and were utilized by the parties in building up the large estate that the trial court had under consideration (R. 126-131). The equities of the situation including the conduct of appellant justify the discretion exercised by the trial court. *MacDonald* v. *MacDonald*, supra, has been repeatedly cited by this court in connection with the proposition that a divorce judgment will not be disturbed unless the evidence clearly preponderates against the finding of the trial court, or there has been a plain abuse of discretion, or where a manifest injustice or inequity is wrought. We submit that the judgment in the instant matter cannot

be equated with any circumstance that the holding in *MacDonald* v. *MacDonald* would condemn.

The facts in the *MacDonald* case are of a sordid nature and as have many times been stated each case must rest on its own factual premise, there being no "rule of thumb" in the application of the equitable principles involved. Mrs. MacDonald was the defendant and filed a cross complaint for divorce. The trial court entered a judgment for the husband and the wife appealed. This court held that the evidence supported the finding that the wife had been guilty of habitual drunkenness for a period of at least four years and affirmed the judgment of the lower court. Regardless of the defendant's condition which the court observed as being in most instances a manifestation of some mental or nervous illness or maladjustment to the problems of life where excessive drinking is often sought as an escape from the realities of existence, all of the physical assets of the property with the exception of the 1949 Hudson automobile were awarded to the defendant and the plaintiff was ordered to pay alimony in the sum of $10.00 per year. The trial court was quoted as stating:

> "Such assets are sufficient to care for defendant * * * and should keep her in such fashion that she will not become a charge upon public authorities. Should defendant's financial condition become so that she is in danger of becoming a public charge, the duty of support should fall upon the plaintiff and not upon the public authorities * * *."

Among the assets awarded to the defendant wife in

the *MacDonald* case was a bank account of a little more than $6,900.00 in defendant's name which was the balance of an inheritance of $8,000.00 which she had received in 1950. It was also stated that defendant had an expectancy in the estate of her mother who was 82 years of age at the time of the trial. The case contains the oft repeated statement as follows:

> "The problem of attempting to do justice to parties in a divorce action as to the division of property and the awarding of alimony is undoubtedly one of the most perplexing situations ever to confront a court. The longer the period of marriage, the greater the difficulties. It would be a wise judge indeed who could accurately apportion the weight of all the factors and arrive at the one correct solution, if there be such. The problem is of such a nature as not to be susceptible of solution by any exact formula; indeed the authorities frequently say that for that reason each case must be determined upon its own facts."

The opinion then cites from *Pinion* v. *Pinion*, 92 Utah 255, 67 P. 2d 265 (1937), from which was expressed a general formula in the attempt to get the factors in perspective all of which may not be present or important in every case, but which was applied to the evidence in the case then before it. The factors thus stated are: (1) the social position and standard of living of each before marriage, (2) the respective age of the parties, (3) what each may have given up for the marriage, (4) what money or property each brought into the marriage, (5) the physical and mental health of the parties, (6) the relative ability, training and education of the parties.

> "The following points (7 to 15 inclusive) relate to conditions to be appraised at the time of the divorce, giving some attention to comparison with points 1 to 6 inclusive:"

(7) the time of duration of the marriage, (8) the present income of the parties and the property acquired during the marriage and owned either jointly or by each now, (9) how it was acquired and the efforts of each in doing so, (10) children reared, their present ages, and obligations to them or help which may in some instances be expected, (11) the present mental and physical health of the parties, (12) the present age and life expectancy of the parties, (13) the happiness and pleasure, or lack of it, experienced during marriage, (14) any extraordinary sacrifice, devotion or care which may have been given to the spouse or others, such as mother, father, etc., and obligations to other dependents having a secondary right to support, (15) the present standards of living and needs of each including the cost of living.

There is nothing in the foregoing that supports appellant's contention that the vested inheritance in the estate of Dr. Hirth be included in the "marital estate" if by that it is meant that appellant should participate directly or indirectly in the inheritance. Unlike the *MacDonald* case the inheritance came after the breakup of the marriage, but there is a similarity in that the bank account of something in excess of $6,000.00 in Mrs. MacDonald's name, identified as the balance of an inheritance, was allocated to her intact. All of the material assets including the home and the household furniture with the exception of

the 1949 Hudson automobile were awarded to the defendant wife.

The expression that Mrs. MacDonald "has an expectancy in the estate of her mother who was 82 years of age at the time of the trial" was not equated with either a property allocation or alimony, but the court expressly stated that Mrs. MacDonald "should not be required to look to her mother for support, but the definite expectancy in her 82 year old mother's estate is something which may well be kept in mind as a future contingency."

Nothing else was said about the expectancy, in fact the connotation with respect to the award of the nominal sum of $10.00 per year as alimony ignores the possibility, the court stating:

> "In making the decree awarding defendant only the nominal sum of $10 per year alimony, which was based on the then circumstances, Judge Van Cott expressly recited that it was for the purpose of preserving her right to alimony and directed that if danger of dependence appeared, the burden of her support *would fall upon plaintiff and not upon others.*" (Emphasis added.)

Appellant cites *Michelsen* v. *Michelsen*, 14 U. 2d 328, 383 P. 2d 932 (1963), as being in accord. In the *Michelsen* case it was stated that the plaintiff wife had an interest in the estate of her deceased father which was valued at approximately $19,600.00 and the assertion was made that the trial judge failed to take into consideration the inheritance, it being a conceded fact that no mention was made of the item in the findings. This court held, how-

ever, that it was apparent that the trial judge did consider it "for it is discussed in his second Memorandum Decision". Alimony in the amount of $275.00 a month was awarded to the wife and she was awarded the equity in the home situated on a 3½ acre tract of land in the Holladay area upon which the trial court placed a valuation of $30,000.00 which was apparently offset by awarding to the husband certain shares of stock which the court found to have a value of $20,000.00. The court in affirming the decree of the trial court concluded:

> "The plaintiff is 57 years of age and was, at the time of the hearing, unemployed. True, she will receive considerable benefit and help from her inheritance. However, we cannot say that the lower court's determination was manifestly unjust, inequitable, or an abuse of discretion warranting this court to substitute its judgment therefor."

Appellant cites *Woolley* v. *Woolley*, 113 Utah 391, 195 P. 2d 743 (1948). We fail to find any reference to an inheritance vested or otherwise in this case. The court remanded the case to the lower court with directions to modify the decree for the reason that part of the funds jointly accumulated had been reinvested in speculative interests which may at some later date greatly increase the worth of the defendant husband. The court stated:

> "If the money vested in the mining ventures has been earned by the efforts of defendant in his profession, the efforts of the wife and mother in taking care of the home and children have assisted defendant in its accumulation. Accordingly, she should not be denied her share of any increase in value that may result in the future."

> "The effect of the decree as granted by the court below appears to have been to award the plaintiff a cash settlement in lieu of all alimony. It is doubtful that the court intended to retain jurisdiction of the matter for further proceedings in the event defendant realized on his mining investment. This should be done. * * * The specific awards as ordered by the court will be permitted to stand except that the sums paid shall not be in lieu of all alimony."

The *Woolley* case contains the often repeated statement to the effect that the decree of the trial court in divorce proceedings relating to alimony and division of property will not be modified except when the trial court has abused its discretion and cites *Allen* v. *Allen*, 109 Utah 99, 165 P. 2d 872 (1946), to that effect.

In the instant action the trial court was fully aware of the death of Dr. Hirth, of the extensive gifts made by him to the parties during his lifetime, his affection and confidence in the solidity of the marriage relationship and then by considered judgment excluded appellant from participation, directly or indirectly, in the inheritance of some $75,000.00 which vested after the breakup of the marriage. We submit that under all of the authorities this was not an abuse of discretion and appellant cannot properly complain on that score. Appellant by his brief leaves the reader in considerable doubt as to how the inheritance could be considered "by the court in adjusting the rights of the parties in that estate".

As to the contention that under the law of this state contingent future interests *must* be considered by the trial

court in adjusting the parties' rights in the marital estate as directed to respondent's expectancy in her mother's estate is of startling consequence. We challenge the statement as made and submit that this court in *MacDonald* v. *MacDonald*, supra, has declared just the opposite. If an expectancy in the estate of a living relative *must* be considered by the trial court, the door of discovery is opened onto a vista of endless consequences.

Section 30-3-11.1, Utah Code Annotated, 1953, is a legislative declaration of public policy of preserving marriages and promoting the public welfare by preserving and protecting the institution of matrimony. Just plain greed could thwart the whole business if the expectancy of inheritance from relatives now living could be exploited. The consequence of a discovery deposition directed to the monied father-in-law, mother-in-law, spinster aunt, uncle, or even a more distant relative, could balloon the whole discord of the marital relationship out of any semblance of perspective.

At this point it should be noted that Exhibit 15-D projecting appellant's assets including an item of $95,000.00 attributable to the estate of his father and mother, Exhibit 16-B projecting respondent's assets including an estimate of Dr. Hirth's estate and the expectancy of her mother's estate (Mrs. Derry) and Exhibits 17-D entitled Final Analysis, but projecting inheritances and expectancies from the immedate family of both of the parties were not received into evidence and presumably not before the court for consideration.

POINT II.

THE TRIAL COURT EXPRESSLY REJECTED THE SO-CALLED "TRUST" THEORY AS THE BASIS OF ITS DIVISION OF THE MARITAL ESTATE.

Appellant mistakenly argues under his Point II that the trial court divided the marital estate on the theory that appellant was a trustee and that gifts from respondent's family constituted the corpus of what might be termed a trust estate held by appellant for the benefit of the respondent. The trial court expressly rejected this theory in the presence of all trial counsel after argument and before the Memorandum Decision. This will not be denied.

There was a complete disclosure of the property held by the parties, how the same was acquired, the efforts of each in doing so and basically the other factors as set forth and enumerated in *MacDonald* v. *MacDonald*, supra, and *Pinion* v. *Pinion*, supra. The equities of the situation are clearly evident and include the fact that respondent committed all property as received by her to her husband for investment and reinvestment to afford their standard of living (R. 129-130), and their mutual enjoyment and exclusive country clubs with golf and travel as their pastime (R. 136-138) and the endpoint of early retirement (age 55) on a principal accumulation of more than $750,000.00.

Even a ¼ interest in a portion of the Illinois farm property that respondent inherited before marriage was

later put in joint tenancy with her husband (R. 212-213). All cash that came to respondent from her family was delivered to appellant without question (R. 191, 217). Appellant stated the he never wanted respondent to suffer, to be without or to have to work again in her life (R. 202).

Exhibit 1-P, the record book kept by appellant in his own handwriting, at the page heretofore referred to, states the goal to be accomplished in the following words:

Goal 1966 $500,000.00

Goal 1970 $600,000.00

Goal 1975 Net Worth Goal 1975 $750,000.00

Born 1920 — Retire Age 55

The affair with Marjorie Parry existed for a considerable length of time unbeknown to respondent. Appellant maintained a joint safety deposit box with Mrs. Parry in San Diego which he declined to reveal until he was furnished with evidence of a writing that such a joint safety deposit box existed (R. 198-200). The witness was shown Exhibit 5-P and recognized his handwriting on the document addressed to Mrs. Parry stating "pay (the attorney) if you have to. We have plenty in our safety deposit box in San Diego." Mrs. Parry's divorce was in July, 1970, (R. 184). He maintained a joint safety deposit box with Mrs. Parry in the Continental Bank in Salt Lake City (R. 187).

Furthermore, appellant no longer wished to remain married to respondent but "I have always wanted, and

still do want, the plaintiff to be happy and to have all of her wishes and needs reasonably satisfied" (R. 11). There is ample evidence in the record to justify the findings of the trial court that in light of the direct gifts and inheritances from plaintiff's side of the family, the accumulation of the parties during the marriage, including the investments and reinvestments of the gifts and inheritances and other assets "it is fair and equitable that the accumulations of the parties be divided, so far as can reasonably be done, on a basis of 60 per cent to the plaintiff and 40 per cent to the defendant" (R. 37).

The allocation of the property was not on the theory that the gifts be isolated from the so-called marital estate but to the contrary, the same were treated as a part of the marital estate which estate the court divided on a basis deemed to be fair and equitable.

Anderson v. *Anderson*, 18 U. 2d 286, 422 P. 2d 192 (1967), is cited by the appellant as being a case that considered the so-called "trust" theory and "flatly rejected it". The *Anderson* case again emphasized that no firm rule can be uniformly applied in all divorce cases, that each must be determined upon the basis of the immediate fact situation and that the trial judge has considerable latitude of discretion in such matters "and that his judgment should not be changed lightly, and in fact, not at all, unless it works such a manifest injustice or inequity as to indicate a clear abuse of discretion." The court mentioned the wide swing of the pendulum by commenting on *Wilson* v. *Wilson*, 5 U. 2d 79, 296 P. 2d 977 (1956),

where the court awarded substantially all of the property possessed by the parties which was in excess of $20,000.00 to the wife and approximately $500.00 to the husband.

In the *Anderson* case last mentioned there was a debt load in excess of $71,000.00 and a net worth of approximately $10,000.00. Bankruptcy was apparently inevitable unless the home was sold and the debts paid. The "novel" doctrine was that at the trial it was urged that the wife have ½ of the net assets clear of the debts. The decree, on the contrary, ordered the accumulated property sold to pay the debts and the net assets remaining, if any, to be distributed 1/3 to the plaintiff and 2/3 to the defendant. In addition, the plaintiff was awarded $200.00 per month as alimony and $900.00 attorneys' fees. Not only the property but also the debts were attributable largely to the defendant husband and the factual premise was entirely distinct and different from the instant case. One difference was the fact that both parties had grounds for a divorce. In *Anderson* the court, however, reiterated its previous holdings so far as the responsibility of the court is concerned.

> "This court has stated that '[t]he 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. In doing so 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.' "

POINT III.

THE AWARD OF ALIMONY WAS A PROPER EXERCISE OF DISCRETION BY THE TRIAL COURT.

Appellant argues in part that the expectancy in respondent's mother's estate, the inheritance that she will receive from Dr. Hirth, all coupled with the award of the marital estate, should offset her need of $750.00 per month by way of alimony and this in anticipation of income from other sources after the divorce (R. 146). Respondent's testimony in that regard was not challenged although in the brief appellant characterizes the testimony as "her own self-serving statement". It will be recalled that appellant voluntarily terminated his employment and that by not working he did not want it understood that respondent was not entitled to alimony on that account. It will also be recalled that he did not want his wife to ever work or to suffer financially in any respect.

Alimony is a matter of discretion based upon variable circumstances. In the instant case there was no determination of income as distinguished from capital sufficient to permit respondent to enjoy the same standard of living to which she was accustomed while married to appellant. There are, however, certain assets that are income pro-

ducing such as the Illinois farm property, paying a little over $4,000.00 per year and certain of the securities in publicly owned corporations, the dividend income from which is not disclosed. *Openshaw* v. *Openshaw*, 80 Utah 9, 12 P. 2d 364 (1932), and *Allen* v. *Allen*, supra, are cited by counsel and are consistent with the discretion exercised by the trial court, the court having obviously taken into consideration the income that respondent can reasonably anticipate from other sources when the award was in the amount of $375.00 rather than $750.00 per month as requested by respondent. *MacDonald* v. *MacDonald*, supra, expressly refers to the fact that it is the husband's obligation to support the wife even though in that case the wife was at fault, the court stating that she should not be required to look to others in that regard, making specific reference to an expectancy from her aged mother's estate as and when she died.

In *Sorensen* v. *Sorensen*, 14 U. 2d 24, 376 P. 2d 547 (1963), there was substantial property awarded to the wife and likewise $1,250.00 per month as alimony. The court stated:

> "It is apparent from the court's distribution of the property that the husband was left with the wherewithall to continue producing a substantial sum of money and also substantial interests in real and personal property were allowed to be retained by him, so that it does not appear he will be greatly hindered in the mode of living to which he has accustomed himself. The wife has been given some income producing property, as well as alimony, so that she can continue living in the style to which

she has become accustomed during the marriage. Under such circumstances, this court cannot say that there has been a plain abuse of discretion or that the awards are unjust and inequitable. Unless there is manifest injustice and inequity or a clear abuse of discretion, this court will not substitute its judgment for that of the trial court."

POINT IV.

THE AWARD OF ATTORNEYS' FEES IS CONSISTENT WITH CASES OF THIS KIND.

Appellant does not question the amount of the requested attorneys' fee which was the subject of proof (R. 236-237) and which is outlined in Exhibit 12-P. The Utah cases cited by appellant, namely, *Alldredge* v. *Alldredge*, 119 Utah 504, 229 P. 2d 681 (1951) and *Weiss* v. *Weiss*, 111 Utah 353, 179 P. 2d 1005 (1947), are not in point and do not support the contention that attorneys' fees to a wife must be based upon need and a showing that she has no separate estate from which to pay the same.

In the *Alldredge* case the husband brought the action and was awarded the divorce. The wife was the one at fault and her counterclaim was dismissed. The trial court denied the wife alimony and attorneys' fees and this court while affirming the decree of divorce remanded the case for the purpose of awarding the defendant counsel fees and determining the amount of alimony, regardless of the fact that she had been found guilty of misconduct resulting in a divorce against her.

In the *Weiss* case the husband's action for divorce was dismissed on jurisdictional grounds. As to attorneys' fees, the court stated:

> "The statute does not contemplate that awards for expenses of suit or for temporary alimony should be made only in those cases where the 'adverse party' (usually the wife) is destitute or practically so. It contemplates such awards when in the sound discretion of the court the circumstances of the parties are such that in fairness to the wife she should be given financial assistance by her husband in her prosecution or defense of the divorce action, and for her support during its pendency."

In *Stuber* v. *Stuber*, 121 Utah 632, 244 P. 2d 650 (1952), the court sets forth the above quoted portion from the *Weiss* case and then concludes:

> "The rights of the wife to attorneys' fees when she is forced to go to court to enforce a divorce decree should not be different from those of one who seeks temporary alimony. The court did not err in granting attorneys' fees to respondent."

In *Gardner* v. *Gardner*, 118 Utah 496, 222 P. 2d 1055 (1950), attorneys' fees were awarded the wife with the statement that "Evidence as to what would constitute a reasonable attorneys' fee was not a prerequisite to an award thereof when the case was contested and the court awarded only a modest fee." *Butler* v. *Butler*, 23 U. 2d 259, 461 P. 2d 727 (1969), could be said to be an exception to the statement just made to the extent that there must be evidence to sustain a finding in support of an

order awarding attorneys' fees to the plaintiff wife.

In *Sorensen* v. *Sorensen*, supra, this court sustained a substantial attorneys' fee although the plaintiff wife was awarded property and alimony of consequence. In the instant action appellant would have this court announce a rule that is contrary to precedent and to the everyday practice of trial courts throughout the state in the award of attorneys' fees to the wife irrespective of her financial necessity and of her own ability to pay such fees.

POINT V.

THE DECREE WAS NOT PREMISED UPON A VINDICTIVE OR PUNITIVE PREMISE.

No one ever "wins" in a divorce action. The background history of the parties to the instant action spells a tragedy and yet, human nature being what it is, the falling out of love is not a rarity. Seldom, however, do people go "first class" when the parting of the ways occurs at the ages and after the accumulations as found in the instant case and with retirement at the age of 55 with material assets of ¾ of a million dollars the mutual goal of the parties. It is undoubtedly the respondent who feels that she has come out on the short end, the fortune having been acquired through gifts from her side of the family, the husband not only having betrayed the wife but also the donors. Be that as it may, *Wilson* v. *Wilson*, supra, cited by appellant under this point, states that as a practical matter the court invariably does consider the relative loyalty or disloyalty of the parties to their mar-

riage vows and the relative guilt or innocence in causing the breakup of the marriage.

The trial court was sensitive to the expression used in *Wilson* v. *Wilson*, supra, to the effect that there was no authority in our law for administering punitive measures when after hearing the testimony with regard to the telephone conversation on January 25, 1970, between appellant and Mrs. Parry and the final separation of the parties, he interrupted by asking respondent if the matters to which she had testified caused her extreme mental anguish to which she answered affirmatively, then said the "grounds are complete" (R. 134).

Appellant's voluntary retirement from Lees Carpets on September 30, 1970, his association with Mrs. Parry, his offer to contribute to the expense of her divorce, the fact of the joint safety deposit box with Mrs. Parry both in Salt Lake and in San Diego, his rapport with Mrs. Parry's sons both by way of trips outside of the United States and with regard to projected plans for Pauma Valley, coupled with his expenditure of capital assets rather than to secure a job after a demonstrated earning capacity of some $22,000.00 a year were matters that went to credibility, including the accounting of the marital estate.

In the *Wilson* case which was tried before Judge Wahlquist in Davis County, the husband asked plaintiff to secure a divorce for the reason that he was in love with another woman and wanted to marry her. Notwithstanding the fact that the divorce was indispensable to his plans

he desired to be released from the bonds of matrimony at the least possible economic disadvantage to himself. The trial court awarded the wife all of the property possessed by the parties except for $500.00 as indicated and then required the defendant by way of an award of property, to pay the cash sum of $5,000.00 payable $50.00 a month. The only change that this court made was to reduce the $5,000.00 payment to $2,400.00 payable $50.00 per month or until the plaintiff's remarriage, whichever event occurred first in point of time. In so doing the court, nevertheless, made the following observation:

> "The more recent pronouncements of this court, and the policy to which we adhere, are to the effect that the trial judge has considerable latitude of discretion in such matters and that his judgment should not be changed lightly, and in fact, not at all, unless it works such a manifest injustice or inequity as to indicate a clear abuse of discretion."

CONCLUSION

Appellant was represented by extremely competent counsel. The case was contested at every level to the extent of even denying the grounds of divorce. The record discloses a patient, tolerant and understanding attitude on the part of the trial court toward both parties. There was no semblance of a punitive nature. But as in *Wilson* v. *Wilson*, appellant obviously desired to be relieved from the bonds of matrimony at the least possible economic disadvantage to himself. Why he did not engage in some compensable work activity is only known to himself, but

he disclaimed his retirement from work at the age of 50 as not meaning to deprive respondent of alimony and he expressed the desire that she continue to live in the manner to which she had been accustomed and that she never be required to work.

As the court has expressed, these cases take almost the wisdom of a Solomon in their equitable solution and this applies equally to the task of counsel, who on both sides, over a long period of time, must constantly be alert to the sensitivities of their respective clients and to the ultimate outcome which can be rationalized on a fair and equitable basis.

In the instant matter the rationalization of a fair and equitable financial consequence in favor of the respondent is ignored by appellant and he unfairly charges the trial court with being biased and prejudiced. As in the *Wilson* case the falling in love with another woman with the pressure of dissolving the bonds of matrimony has its own devastating effect. Here we have grandparents who outwardly lived an extremely happy and constructive life, but now the attack is on the trial court. This is an irrational act of one suffering from an extreme guilt complex, unable in the ordinary course of things to accept the full consequence of his own voluntary whim and act. He apparently cannot adjust himself to the fact that he has indulged in one of the most expensive and devastating "luxuries" of life.

The decree of the trial court should be sustained with such affirmative relief by way of costs and attorneys' fees on appeal as to this court may seem proper.

Respectfully submitted,

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