

1972

Mildred D. Dubois v. F. Ray Dubois, Jr. : Appellant's Reply Brief

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

APPELLANT'S REPLY

Appeal from the Judgment of the
District Court for Salt Lake County
the Honorable Marcellus H. [illegible]

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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

APPELLANT'S REPLY BRIEF

STATEMENT OF FACTS

Respondent's Statement of Facts is unacceptable in several particulars. First, respondent has insisted on belaboring the point that she had grounds for divorce something which was conceded at trial by appellant (R. 133)*, and which is not, in fact, at issue in anyway in this appeal. Respondent's obsession with the question of fault does, however, reinforce appellant's argument, in Point V of his brief, that the trial court's award, when viewed as a whole, manifests an intent on the court's part to unlawfully punish appellant.

*Note: R refers to the pagination of the Record.

Secondly, respondent's statement of facts deals at some length with her exhibits 2-P and 3-P, the introduction of which into evidence was objected to by appellant on the ground that they were based upon respondent's theory that the husband is the Trustee of the marital estate. (R. 99, 111-112, and 123). Moreover, respondent admitted at that time that these exhibits were based upon that theory and that that was the theory upon which she was proceeding. (R. 111-114). Appellant, however, in Point II of his brief clearly establishes that this theory is repugnant to Utah law and respondent does not appear to contest this fact in her brief. In view of this, respondent's continued reliance upon these exhibits is strange indeed.

Finally, respondent, in her statement of facts, admits that appellant contributed in excess of \$500,000.00 by way of *earned* income to the marital estate. She then proceeds to take this minimum figure as the absolute total of appellant's income, and, having divided it by the twenty-nine years of the parties' marriage, states that this amounts to *only* an average of \$17,241.00 per year. Respondent goes on to assert that it would have been impossible on such an income for appellant to build a marital estate with a value in excess of \$570,000.00 without the gifts to respondent from her family. What respondent neglects to mention is that her family's gifts to her over the twenty-nine years in question totalled only \$117,509.00, which amounts to only an average contribution per year of \$4,052.03. We submit that it

would have been patently impossible for the parties to have accumulated a marital estate with a vlaue in excess of \$570,000.00 but for appellant's contribution of earned income to the marital estate of over \$17,241.00 per year.

The following Argument is in the same order as the Argument in the briefs that have already been submitted in this matter.

ARGUMENT

POINT I

Contrary to respondent's assertions, this Court in *MacDonald v. MacDonald*, 120 Utah 573, 236 P.2d 1066 (1951) clearly held that it was proper for the trial court to take into consideration in adjusting the parties' property rights both the inheritance which the wife had received from her father subsequent to the development of the marital difficulties between the parties but prior to the initiation of the divorce proceedings, and the expectancy which she had in the estate of her sick, aged mother. 120 Utah at 578 and 582-83. The parties in the *MacDonald* case had been married for twenty-nine years at the time of the divorce. During the course of their marriage the wife had developed a significant drinking problem. Finally, the husband sued for divorce claiming as grounds therefore that his wife had been habitually drunk for the preceding four years. At trial, the court so found, and awarded the divorce to the husband. The court, however, awarded the wife almost all of the

property in the marital estate, plus attorney's fees and \$10.00 per year alimony. 120 Utah at 576-77. The wife appealed claiming that the Court had committed reversible error by not awarding her substantial alimony, 120 Utah at 578. In the Supreme Court's view, this was,

"one of those cases where the marriage had so far deteriorated that there was nothing . . . to do except to recognize the failure . . . 'pronounce a benediction on the wreck'; [and] proceed to make the best arrangement of the property and income of the parties so that they could readjust their lives to the new situation as well as possible." 120 Utah at 577.

The Court then noted that,

"The assets possessed by the parties were as follows: Their home, valued at \$13,000, less a \$6,000 mortgage, net value \$7,000; household furniture and equipment valued at \$2,000; 1949 Hudson automobile value at \$1,400, less a lien of \$121; a bank account of \$6,948.25 in defendant's name—which was the balance of an inheritance of \$8,000 which she had received in 1950. Defendant also has an expectancy in the estate of her mother who was 82 years of age at the time of the trial. The plaintiff has been employed by the Chicago, Milwaukee, St. Paul & Pacific Railroad Company at a good salary for many years; he is at present general

agent for the company at Salt Lake City at a gross salary of \$481.80 per month, or a net of \$387.56 after all deductions." 120 Utah at 578. (Emphasis added)

The Supreme Court affirmed the trial court's award of almost all of these rather modest assets to the wife. The Court's primary concern in this regard was the fact that the wife, although responsible for the divorce, was unable, due to her alcoholism, to secure and hold a paying job, a fact which was conceded to be true by all parties to the action. 120 Utah at 580.

The Court then considered the wife's claim that the rather modest assets awarded her by the trial court were insufficient to properly maintain her and that she was entitled, in addition, to a substantial alimony award. In the Court's view the proper method to follow in this connection was to evaluate the facts of the case before it in the light of the fifteen points set forth by Chief Justice Wolfe in *Pinion v. Pinion*, 92 Utah 255, 67 P.2d 265 (1937). Point nine of these fifteen points inquires into how the parties acquired the property contained in the marital estate. The Court answered this point by noting that all of the property had been acquired via the husband's efforts except for three hundred dollars (\$300.00) which she had put into the house and the six thousand nine hundred dollars (\$6,900.00) which she inherited from her father. 120 Utah at 581. The Court later summarized the importance of this factor in de-

temining whether the wife should receive alimony as follows:

“The court awarded her much the larger share of the family assets, and in view of the fact that she had \$6,900 in cash immediately available, saw no necessity to decree that she be paid substantial alimony immediately. *True, this cash is hers, but it was properly taken into account in appraising the entire financial situation of the parties and adjusting their property rights.*” (Emphasis added) 120 Utah at 582.

Point fourteen of the fifteen points set forth in the *Pinion* decision asks if there was, “[a]ny extraordinary sacrifice, devotion or care which may have been given to the spouse or others . . . and obligations to other dependents having a secondary right to support.” 120 Utah at 582. The Court answered this by stating that,

“This factor is not important here, but the converse of it is, She should not be required to look at 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.*” (Emphasis added) 120 Utah at 582.

The Court thus clearly and unequivocally held that an important factor that must be considered by the trial

court in order to accomplish a fair and equitable division of the property in the marital estate is the existence of contingent future interests that may redound to the benefit of one of the parties. In the instant case, the evidence indicates that respondent will be the sole beneficiary of her sick and aged mother's estate, the value of which was estimated at trial to be between One Hundred Fifty Thousand Dollars (\$150,000.00) and Two Hundred Thousand Dollars (\$200,000.00). The trial court did not, however, in either its memorandum opinion or its Findings of Fact and Conclusions of Law mention or even allude to respondent's expectancy in her mother's estate. Furthermore, as noted earlier, the trial court specifically awarded respondent the entire inheritance which she received from Dr. Hirth. In view of these facts and the size of the marital estate (approximately \$570,000.00) and the sources of the property contained therein (over \$500,000.00 in earned income from appellant versus approximately \$117,000.00 which respondent received in gifts from her family), it is crystal clear that the trial court committed reversible error and grossly abused its discretion by awarding respondent sixty percent of the marital estate.

Respondent has attempted to distinguish *Michelsen v. Michelsen*, 14 Utah 2d 328, 383 P.2d 893 (1963), which was cited in appellant's brief as being in accord with the Court's decision in *MacDonald*, by noting simply, as the Supreme Court did, in its opinion, that the trial court had "discussed" the inheritance which

the wife had received from her father in its second memorandum decision. The fact the Court dismissed the husband's assertions on that ground, clearly supports appellant's contention that inheritances that vest in a party prior to the divorce must be considered by the trial court when it adjusts the financial affairs of the parties. The fact that the Court did not disturb the trial court's award in that case does not in any way lend support to respondent's position for, unlike the instant case, the total assets contained in the marital estate, including the wife's inheritance, amounted to only \$70,000.00. Considering the wife's age, her lack of employment and the size of the marital estate it does not seem surprising that the Court affirmed the division of the assets and the \$275.00 per month in alimony decreed by the trial court.

Respondent has attempted to distinguish *Woolley v. Woolley*, 113 Utah 391, 195 P.2d 743 (1948), which held that the spouse in that case should be allowed to participate in any appreciation which might occur in some speculative mining properties which the trial court had awarded to the husband, by stating that the case did not involve an inheritance, vested or otherwise. That is true, but the case does stand for the proposition that future contingencies must be considered by the trial court in its adjustment of the financial affairs of the parties, the very point that is in issue in the instant case.

Finally, respondent claims that the *MacDonald* case cannot mean what it clearly says for if it does it

“would balloon the whole discord of the marital relationship out of any semblance of perspective.” (Respondent’s brief at page 17). Respondent’s adoption of this “horrible consequences” argument is interesting in three respects. First, it is a specious argument in that the holding in *MacDonald* is clearly limited by the facts of that case to situations where a significant sum of money will devolve upon a party in the not too distant future by the occurrence of an unavoidable event. Secondly, respondent argues that such a rule would force the parties to engage in interminable and exhaustive discovery. This hardly seems likely, however, since it must be remembered that the parties to a divorce action have been married for some period of time and are in all probability quite familiar with the financial affairs of their spouse’s family. Moreover, even if some slight increase in discovery is required, and the Utah cases as well as the cases from other jurisdictions (see appellant’s brief at pages 6-7) that employ this rule do not reflect any such increase, this seems a small price to pay for a more equitable resolution of the parties’ financial affairs. Finally, it must be noted that respondent’s adherence to this argument is particularly interesting in view of her apparent obsession both at trial and on appeal with the question of fault, something that was conceded at trial and which is not at issue on this appeal, for it clearly appears that respondent has attempted

to “balloon” this issue “out of any semblance of perspective.” As the Court in *MacDonald* noted:

“Great caution is necessary to prevent the contentions and strife which frequently exist in contested divorce cases from distorting the judgment by placing extraordinary emphasis on particular instances of blameworthy conduct or some unusual sacrifice or contribution in some one phase of the over-all picture.” 120 Utah at 580.

POINT II

Respondent has asserted in her brief that the trial court in chambers and off the record rejected her “trust” theory of the marital estate. The universally recognized rule is that the record which is certified to the appellate court controls that court’s determination of the issues presented in the appeal. 4 Am. Jur. 2d *Appeal and Error* § 486. The application of this rule to the instant case would appear to be particularly appropriate because it is manifestly clear from a review of the record before the Court (see particularly R. 35-36, 99, 111-113 and 123) and the trial court’s award, that the trial court based its division of the marital estate upon respondent’s trust theory.

Finally, respondent has attempted to distinguish

Anderson v. Anderson, 18 Utah 2d 286, 422 P.2d 192 (1967), from the facts of the case at bar. A comparison of the facts of that case with the facts in the instant case reveals, however, that the trust theory that respondent proffered at trial (see R. 111-114) is identical in all material respects with the theory that the Supreme Court of Utah unequivocally rejected in the *Anderson* case. Since, as indicated above, the record reveals that the trial court adopted the theory in question as the basis of its division of the marital estate, it is clear that the trial court committed reversible error.

POINT III

Respondent in her statement of facts states that appellant's annual salary at the time of his termination from Lee's was \$22,000.00 per year and that his average income over the course of the parties' marriage was only \$17,241.00 per year. As noted in appellant's brief, respondent's total assets of \$422,044.00, composed of the \$347,044.00 awarded her out of the marital estate and the \$75,000.00 she received from Dr. Hirth, which the court awarded her as her separate property, should produce approximately \$30,000.00 per year in income if invested at an average annual return of seven per cent. In view of these facts, it is difficult to see how respondent can in good faith and good conscience argue that in addition to this investment income of \$30,000.00 per year she is entitled to alimony of four thousand five hundred dollars (\$4500.00) per year. This would seem particularly true in view of the fact that respondent

apparently does not deny that an alimony award "measured by the wife's reasonable needs and requirements considering her condition and station in life . . . " *Openshaw v. Openshaw*, 80 Utah 9, 12 P.2d 364, 366 (1932). Consequently, it is clear from the absence of any evidence in the record as to what respondent's needs are, that the trial court's award of alimony to respondent was manifestly unjust, inequitable and unwarranted both by the facts and the equities of this case.

POINT IV

Contrary to respondent's assertions in her brief *Allredge v. Allredge*, 119 Utah 504, 229 P.2d 681, 687 (1951) and *Weiss v. Weiss*, 111 Utah 353, 361 362 and 364 179 P.2d 1005 (1945) clearly and plainly hold that "necessity" is the primary criterion by which the trial court must be guided in making an award of attorney fees. The four cases cited by respondent in support of her position do not hold otherwise and each of them is in fact irrelevant to the issue raised on this appeal. In *Gardner v. Gardner*, 118 Utah 496, 222 P.2d 1055 (1950), for example, the trial court awarded the wife \$150.00 in attorney's fees. The husband appealed claiming solely that the court was precluded from making such an award because his former wife had failed to specifically ask for such relief in her pleadings. The Supreme Court affirmed the trial court's award holding that the wife's prayer for general relief was sufficient, and that the facts which she alleged in her com-

plaint and later proved at trial entitled her to the fees awarded. 222 P. 2d at 1058.

In *Butler v. Butler*, 23 Utah 2d 259, 461 P. 2d 727 (1969), also cited by respondent, the trial court awarded the former wife \$600.00 in attorney fees in a post divorce action brought by her former husband to have her held in contempt for refusing to comply with the child custody provisions of the divorce decree. The husband appealed claiming that there was no evidence in the record to support the court's award. The Supreme Court agreed and reversed. 461 P. 2d at 728-29.

Stuber v. Stuber, 121 Utah 632, 244 P. 2d 650 (1950) is also completely in accord with the *Weiss* and *Alldredge* decisions. In the *Stuber* case the ex-wife brought suit against her ex-husband to force him to comply with trial court's decree which had awarded the custody of the parties' only child to her. The trial court affirmed its earlier award and ordered the defendant to deliver the child forthwith to the plaintiff. In addition, the court ordered him to pay his ex-wife an attorney's fee in the amount of \$100.00. The evidence in regards to the attorney's fees showed that the husband's net monthly income was almost three times as large as the wife's. Based on this evidence the Supreme Court affirmed the trial court's award, obviously concluding that a sufficient showing of need had been made by the wife. 244 P. 2d at 653. In the instant case, the respondent's assets and income as awarded by the trial court

are almost twice as large as appellant's, and consequently the *Stuber* case can hardly be said to be authority for the trial court's award in the instant action.

Finally, the respondent cites *Sorensen v. Sorensen*, 14 Utah 2d 24, 376 P. 2d 547 (1963), which is, however, completely irrelevant to the issue raised in this appeal. In the *Sorensen* case the wife was awarded attorney's fees in an amount not revealed in the Supreme Court's opinion. The husband unsuccessfully appealed this award claiming solely that the award was excessive. No issue as to the necessity of the award was raised by the husband and consequently that case has no precedential value in the instant situation.

POINT V

As appellant established in his brief, under this Point V, the trial court's actions when viewed as a whole manifest an unlawful intent on the court's part to punish appellant. Respondent has replied to this by arguing that it is legitimate for the court to consider the relative degrees of fault of the parties. This is a rather interesting position for respondent to adopt since it seems to impliedly admit that the court's actions were in fact punitive and inequitable. Moreover, respondent has not attempted to reveal how the court's actions could be considered to be fair and equitable, and this is not surprising since it is clear that they were not.

Respondent, has also argued the court's award in

the instant case is not punitive because the Supreme Court in *Wilson v. Wilson*, 5 Utah 2d 79, 296 P. 2d 977 (1956), affirmed the trial court's award of substantially all of the property in the marital estate to the wife. What respondent fails to reveal is that the total value of the marital estate in that case was only \$17,681.65. 296 P. 2d at 978-79. In view of the size of the estate and the fact that the wife established "that she . . . [was] in poor health; that she . . . [had] been under doctor's care; that she . . . [was] not presently capable of working and . . . [had] no special training or skill with which to maintain herself," 296 P. 2d at 980, it is not surprising that this Court affirmed the trial court's division of the marital estate. Moreover, it should be noted that this Court then went on to reduce the trial court's award of alimony by 50%, on the ground that it, when it was reviewed in the light of the court's property award, constituted a clear abuse of discretion and was manifestly unjust. 296 P. 2d at 980. It is submitted that the trial court's awards in the instant case likewise represent a clear abuse of discretion and are manifestly unjust to appellant.

CONCLUSION

For the foregoing reasons and the reasons set forth in appellant's brief, 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 valued 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 day of, 1972.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Appellant's Reply Brief 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 *8th* day of *November*, 1972.

Ray G. Martineau