1968

Helen T. Johnson v. Donald J. Johnson : Appellant's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

HELEN T. JOHNSON,
Plaintiff and Respondent,

vs.

DONALD J. JOHNSON,
Defendant and Appellant.

No. 11110

APPELLANT'S BRIEF

Appeal from Divorce Decree rendered by Third Judicial District Court in and for Salt Lake County, Utah.
Honorable D. F. Wilkins, Judge

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STATEMENT OF THE KIND OF CASE

The Appeal in this case pertains to a Decree of Divorce made and entered by the District Court of Salt Lake County.

DISPOSITION IN LOWER COURT

On September 21, 1967, in a default divorce hearing at which the defendant was not present but which

was held pursuant to stipulation, the District Court granted plaintiff a divorce. It also awarded her the alimony, child support, and personal property which the parties had agreed upon in a formalized "Stipulation and Property Settlement Agreement" between them. (R 44-54) At a "continuation" hearing on October 6, 1967, initiated by plaintiff, the District Court, over the objection of defendant, awarded plaintiff a 25% interest in some real property which was not included in the formalized "Stipulation and Property Settlement Agreement" but which had been conveyed to defendant by his parents subsequent thereto and just eight days prior to the original default hearing on the divorce (R 55-72).

Subsequently, on November 28, 1967, the District Court signed the Decree of Divorce and denied defendant's Motion in the alternative to:

(1) Base its "Findings", "Conclusions" and "Decree" solely on the "Stipulation and Property Settlement Agreement"; or

(2) Grant a new hearing and trial so that all matters concerning both the "properties" and "obligations" of defendant may be considered and that all facts concerning the need for child support and alimony and the ability of defendant to pay said child support and alimony may be considered.

RELIEF SOUGHT ON APPEAL

The relief sought in this Appeal is either a modification of the Divorce Decree so as to eliminate therefrom the real property which the District Court awarded plaintiff which had been conveyed to defendant by his parents just eight days before the default hearing on the divorce, or, a new trial in which all the facts and circumstances bearing on a fair, just and equitable award of alimony and child support as well as a division of property between the parties can be heard and determined.

STATEMENT OF FACTS

Plaintiff filed her Complaint for a divorce from defendant on February 1, 1967, (R 1) to which defendant filed an answer on February 9, 1967, (R 5) and a subsequent Answer on March 6, 1967.

Recognizing that their marital differences were irreconcilable the parties thereafter stipulated to a default hearing on the divorce and also agreed upon what alimony, child support, and property might be awarded plaintiff. This agreement was reduced to writing in a formalized "Stipulation and Property Settlement Agreement". (R 20-21)

Pursuant to the stipulation between them the divorce was heard by the Honorable D. F. Wilkins, District Judge, as a default divorce on September 21, 1967. (R 44-54) At that hearing Judge Wilkins

granted plaintiff a divorce. He also awarded her the alimony, child support, and personal property which the parties had agreed might be awarded her in the formalized "Stipulation and Property Settlement Agreement" between them.

After the original hearing on the divorce, plaintiff initiated and secured a "continuation" hearing which was held on October 6, 1967. Her sole purpose for this so-called "continuation" hearing was to have the Court award her, besides the alimony, child support and personal property which it had already awarded her pursuant to the "Stipulation and Property Settlement Agreement", an interest in the real property which defendant's parents had conveyed to him just eight days before the original default divorce hearing. (R 54-72)

Plaintiff was successful in her endeavors. In spite of defendant's objections, the District Court on November 28, 1967, signed the "Findings of Fact and Conclusions of Law" and the "Decree". By this Divorce Decree the District Court awarded plaintiff alimony, child support and personal property based solely on the "Stipulation and Property Settlement Agreement", and, in addition thereto, a 25% interest in real property which defendant's parents had conveyed to him. Other than what the parties stipulated to, there was never any hearing relative to plaintiff's needs for alimony and child support and what would be a fair and equitable division of the property between them, or hearing relative to defendant's ability to pay alimony and child support.

ARGUMENT

POINT I. THE COURT ABUSED ITS DISCRETION BY MAKING AN AWARD OF ALIMONY, CHILD SUPPORT, AND A DIVISION OF PROPERTY CONTRARY TO THE STIPULATION OF THE PARTIES WITHOUT HEARING AND CONSIDERING ALL THE APPLICABLE FACTS AND CIRCUMSTANCES.

In a divorce proceeding the District Court may make such orders as are equitable with reference to alimony, child support, and a division of property between the parties. This inherent authority is expressly conferred upon the Court by the provisions of 30-3-5 Utah Code Annotated, 1953, which provides in part as follows:

> "When a decree of divorce is made the Court may make such orders in relation to the children, property and parties, and the maintenance of the parties and children, as may be equitable; . . . "

In exercising such authority it is unquestioned that the court is not bound by the stipulation of the parties. See in this connection Madsen vs. Madsen, 2 U. (2d) 423, 276 P (2d) 917, Callister vs. Callister, 1 U (2d) 34, 261 P (2d) 944. The stipulation of the parties serves only as a recommendation. It is respectfully submitted, however, that if the court does not see fit to go along with the recommendation of the parties as set forth in their stipulation, the court should

hear and consider all applicable facts and circumstances. This was not done in the subject case.

The divorce started out as a contested case. Later, the parties stipulated it could be heard as a default case. They also stipulated as to alimony, child support, and a property division. (R 21-22) It was in fact heard as a default divorce on September 21, 1967. At that hearing the court granted plaintiff a divorce. It also accepted the recommendation of the parties and awarded plaintiff the alimony, child support and property agreed upon and as was set forth in the formalized "Stipulation and Property Settlement Agreement". (R 44 54).

Before the Findings, Conclusions and Decree were signed, however, in an unorthodox maneuver not provided for by the Statutes or Rules of Civil Procedure, plaintiff's attorney got the Court to have what he designated as a "continuation" hearing on October 6, 1967. The language of plaintiff's counsel as set forth in the record at Page 56 is immuminating:

> MR. HAYNIE: May the record show that this is a continuation called at the request of plaintiff of a hearing heretofore held prior to determination of this matter for the purpose of introducing certain evidence and for the purpose of ex-mining findings by the Court prior to filing of the findings which have not yet been filed.

When the Court queried counsel further as to the exact nature of this so-called "continuation" hearing he replied: (R 58)

MR. HAYNIE: All right. The amendment which we would like to have made is to permit the stipulation to be set aside and to be amend- so as to make provision for the disposition of real estate which was in the hands of the defendant and undisclosed to the plaintiff at the time of that stipulation.

Plaintiff's counsel deviously tried to create the impression that defendant had misled everyone, including the Court, as to the property which he owned at the time of the stipulation. He stated to the Court: (R 60)

MR. HAYNIE: If the Court, please, we took the deposition of the defendant. He said he had no real property. We had a prior hearing before Judge Anderson and he said there was no property. She testified she entered into this stipulation that there was no property. We want the evidence introduced and the Court to determine whether or not she has an interest.

All of the aforesaid facts are true. Defendant did not own any real property at the time his deposition was taken. He did not own any real property at the prior hearing before Judge Anderson. He did not own any real property when he and plaintiff entered into the stipulation between them. The stipulation was actually entered into prior to September 13, 1967. True, it was not signed until later, but, the parties had entered into the st ipulation before the 13th of September. Defendant did not own any real property until after the stipulation was entered into, namely, until September 13, 1967. It was then that defendant's parents con-

veyed their interest in their home to him subject to a life estate which they reserved unto themselves.

Admittedly, the Court has wide latitude and discretion in determining the proper disposition of property in a divorce proceeding. See in this connection Wilson vs. Wilson, 296 P (2d) 977, 5 U (2d) 79, Blackham vs. Blackham, 230 P (2d) 566, 119 U 593, Tresnayne vs Tresnayne, 211 P (2d) 452, 116 U 483, Anderson vs. Anderson, 138 P (2d) 252, 104 U 104, Bullen vs. Bullen, 262 P 292, 71 U 63 and Pinney vs. Pinney, 245 P 329, 66 U 612. However, as enunciated in the above cases, all of the facts and circumstances should be considered.

In this case defendant did not own any real property when the stipulation was entered into. He acquired some real property from his parents after he and his wife had entered into a property settlement agreement. Plaintiff and defendant had not been living together for more than five years. (R 48) Defendant's parents were 81 and 76 respectively. (R 66). It was not until after plaintiff and defendant had entered into their property settlement agreement that they conveyed the real property in question to defendant.

To make an award of alimony, child support and property based partly on a stipulation and partly on testimony concerning only one isolated property transaction without considering all the facts and circumstances and without giving defendant an opportunity

to be heard on all these matters is a denial of due process and an abuse of discretion.

POINT II. SINCE THE COURT REJECTED THE PARTIES' STIPULATION WITH REFERENCE TO THE DISPOSITION OF THEIR PROPERTY IT SHOULD NOT HAVE AWARDED PLAINTIFF ALIMONY BASED THEREON.

The divorce was a default divorce and accordingly the Court did not hear and consider any evidence concerning the need of plaintiff for alimony or the ability of defendant to pay alimony. It based its award of alimony to plaintiff solely on the stipulation of the parties while at the same time it rejected the stipulation of the parties with reference to the disposition of their property.

Defendant is and has been a real estate salesman. For the past two years his total gross earnings were only approximately $425.00 per month. Plaintiff was and is gainfully employed and her admitted gross earnings approximate $300.00 per month. Merely because defendant stipulated that plaintiff might be awarded $80.00 per month alimony does not mean that the facts justify such an award or that she needs that amount or that defendant can pay that amount.

The Court should either have accepted the stipulation of the parties concerning alimony, child support, and the disposition of the property of the parties or

it should have rejected the entire stipulation and received and considered evidence concerning all such matters, and entered its Decree based on such evidence. To reject defendant's attempt to submit such evidence for consideration was an abuse of its discretion.

CONCLUSION

For the reasons set forth herein, and, based on the evidence in the record and the law applicable thereto, Defendant-Appellant should be granted a new trial or the Divorce Decree modified so as to exclude therefrom the real property interest which the District Court awarded Plaintiff-Respondent.

Respectfully submitted,

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Attorney for Defendant-Appellant

Received copies of the foregoing this ..... day of February, 1968.

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Attorney for Plaintiff-Respondent