

1960

Nick M. Vrontikis v. Dorothy Mae Jenson Vrontikis : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED

NICK M. VRONTIKIS,

Plaintiff and Respondent, Supreme Court, Utah

vs.

DOROTHY MAE JENSON
VRONTIKIS,

Defendant and Appellant.

Case
No. 9252

BRIEF OF RESPONDENT

COTRO-MANES & COTRO-MANES
Attorneys for Plaintiff and Respondent

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of the
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NICK M. VRONTIKIS,

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BRIEF OF RESPONDENT

The plaintiff respondent does not agree with defendant appellant's statement of facts because it contains arguments, conclusions, innuendos and matters not in issue.

With the court's indulgence, plaintiff respondent states the facts to be as follows:

STATEMENT OF FACTS

This is an action for a divorce commenced by the plaintiff. The parties were married October 30, 1952. There were no children born as an issue (R. 4).

The case was tried on the issues as presented by the plaintiff's amended complaint (R. 20), and defendant's answer and counter claim (R. 34), the court having on motion of the defendant set aside the antenuptial agreement which formed a part of plaintiff's amended complaint.

The court heard the matter, which lasted two days and made its findings of fact and conclusions of law (R. 86), and based on the findings made its decree awarding the plaintiff respondent a divorce and dismissed defendant's counter-claim (R. 94-125).

The court found that the plaintiff earned a salary in the sum of \$450.00 per month before deductions, and that the parties to the proceedings acquired an equity in a home amounting to \$9,500.00, some furniture and furnishings and appliances (R. 86-8; R. 90).

That the plaintiff was the owner of 10,000 shares of stock in the Vrontikis Brothers, Inc., valued at \$1,000.00; and a promissory note issued by Vrontikis Brothers, Inc., in 1954 in the amount of \$10,000.00, which was pledged to First Security Bank by the corporation in order to enable the corporation to sustain credit by borrowing; and several issues of uranium stocks of no value (R. 121).

The court awarded the defendant appellant \$3,000.00 property settlement, \$150.00 support and alimony for one year, household furniture and appliances and \$1,000.00 attorneys fees and costs (R. 125). The court further ordered the plaintiff to pay and discharge all medical expenses such as doctor fees and hospital expenses incurred to date by the

defendant; that all the rest and remainder of the property belonging to the parties was awarded to the plaintiff (R. 125-6).

Plaintiff appellant sold the equity which the parties had to the property described in the decree for the sum of \$10,000.00 (R. 177). That plaintiff, after the sale of the equity, deposited with the Clerk of Court the sum of \$4,006.80; \$3,006.80 payment to defendant appellant as by order of court and \$1,000.00 for the use and benefit of her attorneys (R. 155).

STATEMENT OF POINTS

POINT I.

THE TRIAL COURT DID NOT ERR IN EXCLUDING CERTAIN TESTIMONY OF THE PLAINTIFF ON THE GROUNDS THAT DEFENDANT FAILED TO LAY ANY FOUNDATION FOR THE INTRODUCTION OF THE TESTIMONY.

POINT II.

THE TRIAL COURT DID NOT ERR IN REFUSING TO GRANT A NEW TRIAL AS NO SUBSTANTIAL RIGHTS OF THE DEFENDANT HAD BEEN EFFECTED BY ANY RULING OF THE COURT.

POINT III.

THE EVIDENCE SUPPORTS A FINDING THAT THE PLAINTIFF WAS A RESIDENT OF SALT LAKE COUNTY

FOR MORE THAN THREE MONTHS PRIOR TO THE COMMENCEMENT OF THE ACTION.

POINT IV.

THERE WAS NO EVIDENCE THAT THE PLAINTIFF WAS THE OWNER OF STOCK OF GUNSITE BUTTE URANIUM CORPORATION.

POINT V.

DEFENDANT'S CONTENTION THAT BONUS PAYMENTS TO PLAINTIFF BY VRONTIKIS BROTHERS CORPORATION WERE DIVIDENDS IS NOT BASED UPON FACT, LAW, OR REASON.

POINT VI.

THE TRIAL COURT'S DECISION WILL NOT BE DISTURBED ON APPEAL UNLESS A CLEAR ABUSE OF DISCRETION IS SHOWN.

ARGUMENT

POINT I.

THE TRIAL COURT DID NOT ERR IN EXCLUDING CERTAIN TESTIMONY OF THE PLAINTIFF ON THE GROUNDS THAT DEFENDANT FAILED TO LAY ANY FOUNDATION FOR THE INTRODUCTION OF THE TESTIMONY.

In Point One of defendant's brief, she sets forth certain excerpts from the transcript relative to certain alleged conduct of the plaintiff. Defendant has seen fit to omit from her brief other testimony relating to this same issue. The following is the record:

Q. (By Mr. Gee) "When were you out of the country this last year?

A. (Mr. Vrontikis) February.

Q. February 1959?

A. Yes.

* * * *

Q. Who accompanied you to Mexico?

MR. N. J. COTRO-MANES: I object to all this cross examination as improper, not proper cross examination and on the further ground that there is nothing in the pleadings to substantiate this.

THE COURT: Well, this is an equitable proceedings. I suppose counsel seeks to show by cross examination that the plaintiff is not in a blameless position, and that plaintiff is not one that should receive equity at the hands of the court.

MR. N. J. COTRO-MANES: Where would the equity come in if he took a trip?

MR. PAUL COTRO-MANES: Further, this February is after filing of the complaint for divorce.

THE COURT: Is that right?

MR. GEE: That is right, Your Honor.

THE COURT: I don't think it is material then.

MR. GEE: It would be material if we could show the course of action preceding it.

THE COURT: If you could show something preceding it?

MR. GEE: Yes.

THE COURT: You should begin by showing prior events, and it might be that the circumstances after would have a bearing with respect to credibility.

MR. GEE: It might also go to credibility, it would develop a problem.

THE COURT: The rules with regard to the test of credibility, it seems to the court in this instance, don't justify its receipt, and the objection is sustained" (R. 210-11).

The defendant took the stand and testified to certain acts of the plaintiff which caused her mental distress in support of her counter-claim ground for divorce of Mental Cruelty. It is important to note that this is the only ground upon which she predicated her claim for an award of the divorce to herself. She did not amend her pleadings to come in any of the other grounds as allowed by the Utah Statutes. In reading over her testimony, it is to be noted that she did not once mention any conduct of the plaintiff which caused her any mental or physical suffering after October, 1958. How then, is anything that occurred after October, 1958 grounds for divorce?

The examination of the plaintiff by counsel for the defendant was for the purpose of proving the grounds for divorce as set forth by the defendant herself. As she based her claim

upon mental cruelty, conduct which had no effect upon her mental or physical being were not grounds for divorce as pleaded in her counter-claim.

If the defendant wanted to go into matters which were not pleaded in her counter-claim, she had the affirmative duty to amend her pleadings. This was not done. To allow the defendant to go outside of her pleadings in an attempt to prove grounds for divorce other than those pleaded would be to place the plaintiff in the position of having no notice upon which he could predicate a defense.

The court recently observed:

“Notwithstanding all of our efforts to eliminate technicalities and liberalize procedure, we must not lose sight of the cardinal principle that under our system of justice, if an issue is to be tried and a party’s rights concluded with respect thereto, he must have notice thereof and an opportunity to meet it.”

Buehner Block Co. v. Gelzos, 6 U.2d 226, 310 P.2d 517 quoting the case of National Farmers Union v. Thompson, 4 U.2d 7, 286 P.2d 249.

Rule 8 (a), Utah Rules of Civil Procedure, provides that the complaint or counter-claim shall contain a statement of the claim upon which the party seeks recovery. -

This Court, in the case of Blackham v. Snelgrove, 3 U.2d 157, 280 P.2d 453, holds that the complaint is required to give the opposing party fair notice of the nature and basis or grounds of the claim.

Rule 15 (b), Utah Rules of Civil Procedure, “Amendments to conform to the Evidence,” provides:

“When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.”

It is apparent from the strong objections made by plaintiff when the defendant sought to examine plaintiff as to a trip to Mexico, and defendant’s counsel having stated that he sought to show “infidelity” and that “plaintiff was stepping out on defendant,” that there was no consent by plaintiff, either express or implied, to the trial of this issue.

The record discloses that the defendant did not at any time move the court for leave to amend her pleadings to raise the issue of adultery, although Rule 15 of the Utah Rules of Civil Procedure allows liberal amendments. *Wells v. Wells*, 2 U.2d 241, 272 P.2d 167.

The Supreme Court of Utah, in the case of *Mitchell v. Palmer*, 121 U. 245, 240 P.2d 970, held that an objection on the grounds of immateriality and irrelevancy to the introduction of grounds not pleaded in the complaint was proper, and that if the other side did not move for leave to amend as provided by Rule 15 (b), he could not properly pursue those grounds.

The court sustained the objection to the introduction of the plaintiff’s activities after the filing of the complaint on the grounds of immateriality (R. 210) and the following day in referring back to its previous ruling again refused to allow any evidence of events not complained about by the defendant or which occurred after the filing of the plaintiff’s complaint. The Court, in discussing the defendant’s objections to the Findings of Fact and Conclusions of Law, asked defendant’s

counsel to show the court any instance where the defendant, herself, had complained of the conduct of the plaintiff during the months of January or February, 1959. Counsel could not do this as there was nothing in the record to show that the defendant had suffered by reason of the conduct of the plaintiff during this period.

POINT II.

THE TRIAL COURT DID NOT ERR IN REFUSING TO GRANT A NEW TRIAL AS NO SUBSTANTIAL RIGHTS OF THE DEFENDANT HAD BEEN EFFECTED BY ANY RULING OF THE COURT.

The defendant had her day in court. She now seeks another day. Rule 61, Utah Rules of Civil Procedure, states:

“No error in either the admission or the exclusion of evidence, and no error or defect in any ruling or order in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or otherwise disturbing the judgment order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceedings must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.”

As pointed out previously the grounds for divorce as plead by the defendant was based upon “mental cruelty.” Not adultery or any other grounds as specified by 30-3-1, Utah Code Annotated 1943 as amended. She made no complaint about any conduct of the defendant after October, 1958.

How then, can she complain about a substantial right being affected by the exclusion of evidence, even if proper, which would not be and could not be the basis of granting a divorce in her favor?

The burden is upon the defendant to show that the refusal of the court to admit the introduction of the evidence was prejudicial. *Burton v. ZCMI*, 122 U. 360, 249 P.2d 514.

To what extent was the defendant prejudiced by having the record shortened by limiting the examination on this subject? The record shows that the plaintiff under cross-examination denied any and all associations with other women for a period of two years immediately prior to the filing of the complaint by the plaintiff (R. 209-210). What further benefit could the defendant have derived from further denials by the plaintiff? The defendant did not offer to put on any other witness, other than the plaintiff himself, to show misconduct on his part, and then the defendant did not complain of any actions of his during the time that counsel for defendant sought to go into.

Defendant, in an attempt to get her "other day in court" now seeks to use the trial court's refusal to go into events, not complained about by the defendant, as a means of obtaining a new trial, by charging error.

The Supreme Court of Utah has set forth the basis upon which a trial court may grant a new trial.

In the case of *Startin v. Madsen*, 120 U. 631, 237 P.2d 834, the Court said:

"We must keep uppermost in mind the provision of our statute. See 104-14-7, UCA, 1943. The Court

must * * * disregard any error * * * which does not affect the substantial rights of the parties and no judgment shall be reversed or affected by reason of such error or defect. See Rule 61, U.R.C.P., to the same effect. Before the appellant is entitled to prevail, he must show both error and prejudice; that is, that his *substantial rights* are affected, and that there is at least a fair likelihood that the result would have been different. (Citing cases). Even if incompetent evidence is admitted, unless it is harmful to defendant, it is not grounds for reversal." (Citing cases).

The much cited case of *Crellin v. Thomas*, 122 U. 122, 247 P.2d 264, in discussing the granting of a new trial on the grounds of newly discovered evidence, held:

" * * * the exercise of judicial discretion in such instance must be based on a showing of substantial material evidence, from which it appears there is at least a *reasonable likelihood that it would affect the result of a new trial*." (Emphasis ours).

See also *Uptown Appliance v. Flint*, 123 U. 153, 249 P.2d 826, to the same effect.

Even if there has been error in excluding the evidence, the court should not grant a new trial as to the facts, if the court was satisfied with the facts, but merely allow the issue of the law to be retried. *Tebbs & Tebbs v. Oliveto*, 123 U. 153, 256 P.2d 699. In the case now before the court, the trial court was satisfied with the facts of the case and therefore the only question would be one of law, and there was no question of law involved, as the defendant had failed and refused to amend her pleadings to allege any ground for divorce which, in light of the evidence adduced, would have been basis for awarding the defendant the divorce.

The appellant cites many cases with regard to the introduction of evidence of grounds for divorce which occurred after the filing of plaintiff's complaint and before the filing of defendant's counter-claim. It is submitted that this is proper, and the trial court should permit the introduction which would go to prove the allegations of the defendant's counter-claim, however the evidence sought to be introduced must go to the proof of those allegations. The Supreme Court of Tennessee, (*Schwalb v. Schwalb*, 282 SW, 2d 661, 1955), held that matters may be considered by the court which occurred after the filing of the divorce action, if incorporated into the action by amendment or supplemental bill.

The Supreme Court of Vermont in the case of *Raymond v. Raymond* (1957), 132 A.2d 427, held that the events occurring after the filing of the complaint must be incorporated into the action by amendment of pleadings. The court stated further that it is a prerequisite that the other party be appraised of the grounds upon which the party asserting the later events is relying, and that if the other party is not appraised, by amendment or its equivalent, the introduction of evidence of such later events is objectionable.

The defendant sought to show infidelity, but did not plead this as a grounds for divorce, nor did she testify as to any infidelity of the plaintiff, nor did she testify as to any suffering because of the actions of the plaintiff after October, 1958. What then, is the prejudice to the plaintiff? As pointed out before, plaintiff denied any infidelity on cross-examination by defendant's counsel (R. 209-210).

Defendant attempts in her brief to make something out

of the form of the objection made by plaintiff's counsel. Defendant ignores the court's ruling made the previous day on the same issue (R. 211) and ignores the fact that the court referred back to its previous ruling. The objection made on one ground was that the matter was not within the pleadings (R. 210).

Rule 15 (b) provides:

“ * * * If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits.”

Again it is pointed out that defendant did not seek to enlarge the grounds upon which she sought a divorce. As to credibility, the record shows the statements of the plaintiff. Defendant offered no proof, either through her own statements or through the testimony of other witnesses to question the credibility of the plaintiff. How then could this line of questioning attack the credibility of the plaintiff?

Defendant's counsel was specifically asked by the court the basis for his questioning the plaintiff about his whereabouts in February, 1959, and counsel admitted that it was to show infidelity, thereupon the court made the same ruling as it had on the previous day, and sustained plaintiff's objections to the line of questioning.

The law is clear that in a divorce action, the court may grant a divorce only upon the grounds as alleged in the com-

plaint or counter-claim. As stated in the Alabama case of Rudicell v. Rudicell (1955) 77 So.2d 339:

“While evidence tending to show acts of illicit sexual intercourse between defendant and others subsequent to the filing of the bill was admissible *when offered in connection with or subsequent to the introduction of evidence tending to show adulterous intercourse between the parties during the time covered by the averments of the bill, the right to relief must rest upon proof of the adulterous intercourse charged in the bill.*” (Emphasis ours).

See also Renner v. Renner (1940) Maryland, 12 A.2d 195, 127 A.L.R. 674; Thayer v. Thayer, 101 Mass. 100 Am Dec 110; Hendricks v. Hendricks, 123 U. 178, 257 P.2d 366; Gilmore v. Gilmore, Cal., 287 P.2d 769.

This Court has ruled that recrimination in a divorce action has been discarded. Hendricks v. Hendricks, 123 U. 178, 257 P.2d 366; Curry v. Curry, 7 U.2d 198, 321 P.2d 939; Griffiths v. Griffiths, 3 U.2d 82, 278 P.2d 983. The New Mexico Supreme Court has gone into the historical background and has ruled that it had no basis in modern divorce law. Pavletich v. Payletich, NM, 174 P.2d 826. In that case the trial court announced:

“At this time I may as well state that I do not intend to make a finding of adultery, because I do not believe that adultery existing after a separation and state of incompatibility, with the parties living separate and apart, is material to the decision of the court in granting a divorce * * * .”

This was affirmed by the Supreme Court, which ruled

“The trial Court, therefore, correctly ruled that the question of adultery of appellant (Plaintiff, husband) was immaterial.”

POINT III.

THE EVIDENCE SUPPORTS A FINDING THAT THE PLAINTIFF WAS A RESIDENT OF SALT LAKE COUNTY FOR MORE THAN THREE MONTHS PRIOR TO THE COMMENCEMENT OF THE ACTION.

The defendant's contention under Point III of her brief may be likened to that of a drowning man reaching for a straw to support himself upon.

It is interesting to note that defendant admitted in her answer dated February 10, 1959, that the plaintiff was a resident of Salt Lake County and had been for more than three months prior to filing the action. (See Answer and Amended Answer).

It is also interesting to note that the defendant did not request the court to amend its Findings of Fact with regard to this fact.

The record abounds with evidence and testimony of both plaintiff (R. 145) and defendant as to the fact that the plaintiff was engaged in business in Salt Lake City and had been since 1952, that the plaintiff and defendant lived on State Street from 1952 until 1957, when they moved to Country Club Drive where they lived until the time of the filing of the divorce in 1959. The residency of the plaintiff in Salt Lake County since 1952 was established beyond any doubt

and the trial court so found. Where there are facts upon which the trial court could base its findings the appellate court will not disturb those findings. The law and cases have established this beyond the necessity of citing authority.

POINT IV.

THERE WAS NO EVIDENCE THAT THE PLAINTIFF WAS THE OWNER OF STOCK OF GUNSITE BUTTE URANIUM CORPORATION.

Defendant, in her brief, for the first time, raises a point that the plaintiff was the owner of 36,000 shares of stock of Gunsite Butte Uranium Corporation, valued at \$1,080.00.

Defendant did not request the trial court to make a finding that the plaintiff was the owner of this stock, but raises this issue for the first time upon appeal.

Plaintiff's Exhibits No. 1 and No. 2 show that the stock was purchased by check by Vrontikis Brothers Company, and Mr. Vrontikis testified that the only reason that the stock was issued in his name was that, upon advice of Mr. Kane of Hogle's, it would be easier to have it in the name of an individual instead of in the name of a corporation (R. 184). The owner of the stock was Vrontikis Brothers, Incorporated (R. 184). This evidence was not disputed.

POINT V.

DEFENDANT'S CONTENTION THAT BONUS PAYMENTS TO PLAINTIFF BY VRONTIKIS BROTHERS

CORPORATION WERE DIVIDENDS IS NOT BASED UPON FACT, LAW, OR REASON.

Defendant in Point IV of her brief alleges that the payment of bonuses to the plaintiff were dividend payments by the corporation. Defendant did not submit any evidence to substantiate this, such as corporate records or books, but merely makes statements not founded on facts, law or common usage of words.

The plaintiff testified that,

“In our work for over seven years we worked seven days a week, eight hours work is routine for most people. I put in more hours than most people do. I have a lot of work to do. I might be unloading, I might be loading, I might be making out contracts, I might be selling, making advertising, I might be doing one of a dozen functions and for that and for those services if the corporation thinks it is worth their while they will give me a bonus.” (R. 289).

A bonus is not a dividend. A bonus paid by a corporation is not a gift or gratuity, but a sum paid for services or on a consideration or in addition to that which ordinarily be given. *Diamond v. Davis*, 38 NYS.2d 103, 113; *Adams v. Mid-West Chevrolet Corp.*, 198 Okla. 461, 179 P.2d 147; *Lakos v. Saliaris*, CCA Md. 116 F.2d 440, 442; *Payne v. United States*, 269 F. 871.

The term “dividend,” as applied to corporations in a legal sense and as generally understood in common usage, means earnings or profits which are distributed in proportion to the shares of stock in the corporation owned by the several stockholders. *In Re Romney’s Estate*, 60 U. 173, 207 P. 139.

The record does not disclose that all stockholders of the corporation received bonuses, and even if they had, the record does not disclose what work they did to receive them.

Defendant complains that the court refused to order the plaintiff to answer certain interrogatories and thereby she was prejudiced. Had she proceeded, by use of Rule 26, 31 and 34, Utah Rules of Civil Procedure, she could have obtained this information from the Corporation.

Defendant could have, through diligence, ascertained all that she now seeks to claim prejudice for not having ascertained. She charges the court with error in finding the value of the Vrontikis Brothers, Incorporated, stock to be 10c per share, but she did not put on any evidence to rebut the testimony and evidence of plaintiff whatsoever.

Defendant asserts that par value of the stock of the corporation fixes the value of the stock.

“ * * * a statement of par value, in shares, has little or no real significance.”

11 Fletcher, Cyclopaedia Corporations,
Perm Ed 185, Sect 5125.

“A Court judicially knows that the par value of stock is very often in excess of its actual cash or market value.”

I. O. Painter Fertilizer Co. v. Foss
107 Fla, 464, 145 So 253

Mr. Justice Stone of the Supreme Court of the United States summarized this argument by stating:

“Par value and actual value of issued stock are not

synonymous, and there is often a wide disparity between them."

People v. Latrobe
279 U.S. 421, 73 L.Ed 776, 49 S. Ct. 377
65 ALR 1341, 1346

The value of the stock is

"constantly in a state of fluctuation as the business prospers or declines."

13 Am Jur 302, Corporations, Sec 177.

Therefore the court must rely upon the evidence of the value of the stock. That value, which was uncontroverted by defendant, was 10c per share, or a total to plaintiff, provided a buyer could be obtained, of \$1,000.00.

All of defendants cited atuthority admits that where there is evidence of the value of the stock, the par value has no significance. There was evidence as to the value and this evidence was not challenged. Had defendant wished to challenge the evidence she had the means, through proper usage of the Utah Rules of Civil Procedure, to do so.

POINT VI.

THE TRIAL COURT'S DECISION WILL NOT BE DISTURBED ON APPEAL UNLESS A CLEAR ABUSE OF DISCRETION IS SHOWN.

The law is clear and well settled that the trial court has discretion to award such alimony as it sees fit and its decision will not be disturbed in the absence of a clear showing of abuse. Blair v. Blair, 40 U. 306, 121 P. 19; Bullen v. Bullen,

71 U. 63, 262 P. 292; Friedli v. Friedli, 65 U. 605, 238 P. 647; Lawlor v. Lawlor, 121 U. 201, 240 P.2d 271; Pfaff v. Pfaff, 121 U. 277, 241 P.2d 156.

SUMMARY

We submit that the judgment of the court below awarding plaintiff respondent a divorce and the settlement of property and alimony to the defendant appellant is just and proper under the evidence and that the findings of the court and its decree which is based upon substantial evidence was correct and as a matter of law the judgment should be affirmed.

Respectfully submitted,

COTRO-MANES & COTRO-MANES
Attorneys for Plaintiff and Respondent