

1967

Wanda Carter v. Ercil v. Carter : Appellant's Brief

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors. Jackson B. Howard; Attorney for Appellant

Recommended Citation

Brief of Appellant, *Carter v. Carter*, No. 10751 (1967).
https://digitalcommons.law.byu.edu/uofu_sc2/3906

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

**In the Supreme Court of the
State of Utah**

WANDA CARTER,
Plaintiff and Respondent,

vs.

ERCIL V. CARTER,
Defendant and Appellant.

APPELLANT'S BILL

Appeal from Order of the Fourth Justice
Utah County, State of Utah
The Honorable Allen B. Swenson

JACKSON B. HOWARD
Delphi Building
120 East 300 South
Provo, Utah
Attorney for Appellant

DAVE McMULLIN
20 East Utah Avenue
Payson, Utah

Attorney for Plaintiff-
Respondent

FILED

DEC 21 1964

Clerk, Supreme Court

TABLE OF CONTENTS

	Page
Statement of the Kind of Case.....	1
Disposition in Lower Court.....	1
Relief Sought on Appeal.....	2
Statement of Facts.....	2

Argument:

POINT I

THE TRIAL COURT ERRED IN DENYING AND NOT GIVING MERIT TO THE DEFENDANT'S PETITION TO DIVIDE AND PARTITION THE IN- TEREST IN THE FAMILY HOME.....	4
---	---

POINT II

THE PETITION FILED BY THE DEFENDANT WAS REASONABLE AND IN ACCORD WITH THE LAW WITHIN THE STATE OF UTAH, THEREBY WARRANTING A FAVORABLE RULING BY THE COURT	8
--	---

CASES CITED

Anderson v. Anderson, 104 Utah 104, 138 P2d 252....	11
Anderson v. Cercone, 54 Utah 339, 180 Pac. 586.....	10
Griffin v. Griffin, 18 Utah 98, 55 Pac. 84.....	10, 13
Johnson v. Johnson, 107 Utah 147, 152 P2d 426.....	12
Lundgreen v. Lundgreen, 112 Utah 31, 184 P2d 670...	13
Openshaw v. Openshaw, 80 Utah 9, 12, P2d 364.....	10
Stewart v. Stewart, 66 Utah 366, 242 Pac. 947.....	11
Tremayne v. Tremayne, 210 P2d 452.....	12
Wooley v. Wooley, 113 Utah 391, 195 P2d 743.....	9

In the Supreme Court of the State of Utah

WANDA CARTER,
Plaintiff and Rspondent,

vs.

ERCIL V. CARTER,
Defendant and Appellant.

**CASE
NO. 10751**

APPELLANT'S BRIEF

STATEMENT OF THE KIND OF CASE

This is an action for a division and partition of the interest in the family home involved in divorce decree entered by the Court on March 14, 1949.

DISPOSITION IN LOWER COURT

Defendant made a Motion to the Court in November of 1965 to have the property in question sold and the proceeds to be awarded first to the defendant for the value of his separate labors and expenses put in the property since the Decree of Divorce was entered, and to order the remainder of the proceeds to be divided equally between the plain-

tiff and the defendant. The Court denied defendant's motion in a minute entry of the Court, dated December 27, 1965, but no order was issued by the Court denying such. In April of 1966, the defendant petitioned the Court to divide and partition the interest in the family home. The plaintiff at this time also petitioned the Court to award the family home of the parties to the plaintiff. The Court, on the 13th day of October, 1966, issued an order denying all motions and petitions filed by either of the parties.

RELIEF SOUGHT ON APPEAL

The appellant seeks a decision setting aside the order of the 13th day of October, 1966, and the minute entry of December 27, 1965, made by the trial court, and to have the case remanded to the lower court with instructions to divide and partition the interest in the family home .

STATEMENT OF FACTS

The plaintiff and the defendant were married in 1939, and on March 14, 1949, the Court entered an Interlocutory Decree of Divorce between the parties and in favor of the plaintiff. Within two weeks after this Decree of Divorce was entered by the Court, the parties resumed a marital relationship and continued this relationship for a period of over 14 years, and another child was born to the parties on April 16, 1951, as a result of this reconciliation.

The 1949 Decree provided that the plaintiff was entitled to the use and occupancy of the house and lot in which the plaintiff and defendant and their children had been residing, and that the plaintiff was not to sell said place without the consent of the Court and the agreement of the

plaintiff and defendant. This was done in order that the Court might make a fair and equitable distribution of the proceeds. The purpose of said decree and the agreement of the parties at that time was to grant the possession and use of the home for the rearing and upbringing of the minor children, but the plaintiff was not granted fee simple title to the property. The proceeds of the property were to be later divided between the parties after the use of the home was no longer necessary for the rearing of the children. On the 14th of March, 1949, the said home was an inadequate two-room home in a very poor condition. After the decree was entered, the defendant herein, Ercil V. Carter, spent a substantial amount of money and extensive time on his own after work and on weekends in reconstructing his house and making it a suitable residence, which more than doubled the value of the home. He completely remodeled the front two rooms of the house by putting in new flooring, replastering and rewiring the whole house, and added a sizeable twelve-foot by forty-foot extension to the rear as well as building a garage beside the home and installing a furnace. The value of these modifications are in excess of the sum of \$4,000.00. This reconstruction of the home was done at the expense of the defendant and by his own labor without any contribution of the plaintiff, and was done without legal obligation or direction from the Court and was not intended as a gratuity to the plaintiff.

The plaintiff, Wanda Carter Penrod, remarried and moved from the premises, and the home was rented. The family existing between the parties to this action have matured and no longer need the residence for a home. The property was appraised on the 31st of March, 1965, for the

sum of \$8,550.00, and the present fair market value of the property remains at about the same.

Based on the above, the defendant petitioned the Court to divide and partition the interest in the family home or to sell the home and award the proceeds first to the defendant for the value of his separate labors and expenses put in the property, and to order the remainder of the proceeds to be divided equally between the plaintiff and the defendant. The plaintiff petitioned the Court to award her the home in fee simple. At the Argument of these Motions, the parties stipulated the essential facts of the case which were the same as have been set out above. The Court made its ruling with full knowledge of such facts. In its ruling, the Court denied all motions and petitions, thereby leaving the parties in the status quo and not dividing the property, which was held jointly according to the 1949 decree.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DENYING AND NOT GIVING MERIT TO THE DEFENDANT'S PETITION TO DIVIDE AND PARTITION THE INTEREST IN THE FAMILY HOME.

The purpose of a petition to divide and partition an interest in real property is to determine who is entitled to what. The defendant's petition was filed with the Court for the purpose of determining his share or interest in the family home which the plaintiff had been awarded the use and occupancy of as a home for herself and the minor children, who were the issue of the marriage of the plaintiff and

defendant, under the divorce decree of 1949. Plaintiff, believing that she was entitled to the family home free and clear of any interest of the defendant, petitioned the Court to award the family home to her. By denying both of these petitions, the Court left the parties in the status quo, with neither having a clear title or knowing what his particular interest therein constituted. The defendant contends, on appeal, that his petition was meritorious in light of the affidavit which was attached to it when filed, the facts as stipulated to and the wording and intent of the 1949 Divorce Decree. It is stated in Paragraph 4 of the Decree issued in 1949, that

“The plaintiff is hereby awarded the house and lot in which she now resides and in which plaintiff and defendant and their children have been residing for the use and occupancy of said plaintiff and said minor children, said plaintiff not to sell said place without the consent of this Court and agreement of plaintiff and defendant. It is further ordered that the defendant maintain the payments due and to become due on the debt on said place, amounting to \$31.90 per month until said debt is paid in full Defendant is further ordered to pay all taxes due or which will hereafter become due on said place at the time said taxes become due and payable.”

Under Paragraph 7 of the Findings of Fact of the 1949 Decree, it is stated:

“That plaintiff and defendant own a house west of Provo City in Utah County, State of Utah, where there is a debt and obligation against said place in approximately the amount of \$600.00 and which is being discharged at the rate of \$31.94 per month. And it is

necessary for the plaintiff to have the occupancy and use of said lot and house and the furniture and furnishings therein as a home for herself and her minor children, issue of the marriage of the plaintiff and the defendant."

Under Paragraph 4 of the Conclusions of Law in said Decree, it is further stated:

"That plaintiff be awarded exclusive use and occupancy of the house and lot owned by the plaintiff and defendant as a home for herself and said minor children, together with all furniture and furnishings now in said house, and that defendant be required to pay all taxes assessed thereon or which hereafter will be assessed thereon and to pay the same when they shall become due and payable."

As can be seen from the above, the defendant retained an interest in the home according to the Decree, and the plaintiff was merely awarded the home for her use and occupancy as a home for herself and the minor children, which were the issue of the plaintiff and defendant. Further evidence of this was the fact that the defendant was required to pay the taxes that had accrued and that were to accrue in the future on said home, and that he was to make the monthly payments on the home which were still outstanding.

The fact that the Court retained jurisdiction over the property, and would not allow the plaintiff to sell it without the Court's consent clearly indicates that the house was not granted to the plaintiff in fee simple. In the Decree of Divorce it states that the plaintiff cannot sell the house without the consent of the Court and consent of the

plaintiff and defendant. This, in itself, indicates that the Court wanted to retain jurisdiction over the property in order that the proceeds of the property could later be divided between the parties after the use of the home was no longer necessary for the rearing of the children.

In the defendant's affidavit, submitted with his petition to divide and partition the interest in the family home, he states that the purpose of the Decree and the agreement of the parties at the time of the issuance of the Divorce Decree was to grant the possession and use of the home for the rearing and the upbringing of the minor children, but the plaintiff was not granted fee simple title to the property. The proceeds of the property were to be later divided between the parties after the use of the home was no longer necessary for the rearing of the children. It is further stated in said affidavit that the plaintiff, Wanda Carter Penrod, has remarried and moved from the premises, and the family existing between the parties to the action have matured and no longer need the residence for a home.

In light of the above stated facts, it seems that the defendant's petition to divide and partition the interest in the family home was meritorious, timely, and well-founded; and therefore, the trial court erred in denying such petition.

As further evidence of the court's error it also denied the plaintiff's petition to award the house to the plaintiff in fee simple, thereby leaving both parties in the status quo. Nothing was accomplished by either party in presenting their cause before the Court. Defendant contends on appeal that the court should have made a decision at that

time as to the particular ownership in the property in question and how such ownership should be divided.

POINT II

THE PETITION FILED BY THE DEFENDANT WAS REASONABLE AND IN ACCORDANCE WITH THE LAW IN THE STATE OF UTAH, THEREBY WARRANTING A FAVORABLE RULING BY THE COURT.

In his petition, the defendant asked (1) that the plaintiff, Wanda Carter, a.k.a. Wanda Carter Penrod, be adjudged to have an equity of $\frac{1}{3}$ of the fair market value of the property at the date of the Decree of Divorce from the defendant on March 14, 1949, said amount to be $\frac{1}{3}$ of \$4,500.00 or the sum of \$1,500.00; (2) that he (the defendant) receive an equity of $\frac{2}{3}$ of the fair market value of the property on the date of the divorce, or the sum of \$3,000.00, and that he be adjudged to have a further equity in the property for the reasonable value of his services and improvements to the property since the date of the Decree of Divorce in the sum of \$4,000.00; (3) that the plaintiff be required to account to the court for the rental moneys which she had received from the rent of the property since its use as a family home by herself was terminated, and that the said rental moneys be allocated to the parties in accordance with their equities and interest in the said property; and (4) that he be permitted by the court to purchase all of the equities and interest of the plaintiff in accord with their present fair market value as appraised; or, in the alternative, that the court order the sale of said property and division of proceeds in accordance with the interest of each.

In light of the Utah Law cited hereinafter, it seems that this petition filed by the defendant was not unreasonable and that the property rights of the plaintiff in this action should be terminated as of the date of the decree. After the 14th day of March, 1949, the plaintiff is not entitled to any increment in value of the property resulting from the expenses and labor of the defendant; and since the defendant has materially increased the value of this property, he is entitled to all of his contribution which was not provided under the marriage covenant. It would seem inequitable for the plaintiff to share a claim in the defendant's labors after the plaintiff claims that she has terminated her relationship with him.

In *Wooley v. Wooley*, 113 Utah 391, 195 P2d 743, the Court awarded the divorce to the defendant husband on the grounds of mental cruelty. Under the facts of this case, neither party had property when they married, but they worked harmoniously towards financial security and accumulated a substantial estate before the divorce. The Court ordered the distribution as follows: The plaintiff wife received \$19,000.00 from the sale of the family home where the remainder \$11,000.00 went to the defendant husband. The plaintiff also received \$10,000.00 war bonds, which the two had held. Defendant, in addition, received a \$41,600.00 from a contract which he held, paid up life insurance on his life, a \$10,000.00 retirement annuity, plus all of his mining interests, for a total of about \$53,000.00 in cash and \$10,000.00 in annuity contracts. The Court stated on page 745:

"In determining generally what a wife is entitled to when a divorce decree has been granted to the hus-

band, we have considered one-third as being a fair proportion. This is a relative amount which must come, of course, of necessity, vary with the facts of the particular case."

In applying this rule, the Supreme Court modified the decree to provide that the sums paid should not be in lieu of all alimony and that no alimony should be paid unless defendant should favorably improve his financial standing.

In the case of **Openshaw v. Openshaw**, 80 Utah 9, 12 P2d 364, in 1932, the Court gave the family home to the plaintiff wife stating that award of property valued at \$3,500.00 or \$4,000.00, even though it be one-half in value of all of the husband's property, it seems little enough to give in compensation for the loss which this wife has sustained by reason of the husband's wrongs.

In the case of **Griffin v. Griffin**, 18 Utah 98, 55 P 84, the Court allowed a division of the property granting one-third to the wife, stating that this is equivalent to dissolution of the marriage by death where the common law gave the widow one-third of the estate.

In the action of **Anderson v. Cercone**, 54 Utah 339, 180 Pac 586, 1919, the property in question was paid for by the husband's earnings while the wife contributed services in the looking after the house and children. The Court stated on page 349:

"Property purchased from the joint earnings from husband and wife as above described, belonged to the husband, subject only to such interest as the law gives her in the property of her husband. In other words, her rights in such property are neither more or less than they would be if the husband had bought the property with proceeds derived from his separate estate".

In the case of **Stewart v. Stewart**, 66 Utah 366, 242 Pac 947, 1926, the plaintiff husband sought and obtained a divorce from the defendant wife. During the marriage the plaintiff purchased the dwelling house out of his own wages while the defendant contributed the furniture from the house from a rooming house which she had rented. This furniture was of the value of less than \$850.00, while the house was worth possibly more than \$1,250.00. The Court stated that the defendant had probably contributed to the house payments by her own earnings which defrayed the expenses of the household, and while the plaintiff may have contributed some expense money for the household, he had taken full use and advantage of the defendant's property during the period of the marriage. Therefore, the court awarded the real property to each of them as tenants in common and awarded the used home furnishings to the defendant.

In **Anderson v. Anderson**, 104 Utah 104, 138 P2nd 252, 1943, the marriage between the older plaintiff, age 66, and the wife lasted five days and was terminated by the fault of the wife. In this case the court makes it clear that the basis for property settlement and alimony is not the property concept of dower at common law, but rather is based upon the following equitable situations as found in the quotation of the court:

"She is in no different position, neither better nor worse off, than before the marriage, unless she be wiser for the experience. . . . The basis and reason for allowing alimony to the wife is to repay her for the years spent in caring for the household, and helping the husband in building up his property, and to enable her to live, after the support of the husband is taken

away from her; or in certain cases to recompense her as far as material recompence will do so for injuries or abuse to her person or impairment of health brought on by conduct or cruelty of the husband during coverture."

In the case of **Johnson vs. Johnson**, 107 Utah 147, 152 P2nd 426, 1944, the defendant husband had diabetes and was unable to work. The parties had been supported on the relief rolls for much of their married life and it appeared that the plaintiff wife had paid at least part of the payments on the mortgaged home out of her own money. There was no award of alimony in the case for either the wife or the children and the court, in making a division of property decreed that the wife should take the family dwelling subject to the mortgage, while the husband would take 1/5 interest which he owned in a dry farm. Neither the value of the dwelling or its equity, nor the value of the 1/5 interest of the farm appeared in the record. In addition to the real property division, the wife was given one half of the interest in an insurance policy on the husband's life. The wife's portion being intended to provide the wife and children with some measure of security where they had no indication of any possible income.

In the case of **Tremayne vs. Tremayne**, 210 P2nd 452 (1949) the court found the wife had worked her entire married life and had supported the husband while he continued his education and increased his earning power substantially. The court found that the wife was in substantially no better earning position than at the start of the marriage. The court also found

"Without her working, the bulk of the property which

they have would not have been accumulated, and he probably could not have accumulated it had he been single and had he followed the same course which he did."

During the period of coverture the couple accumulated property in the value of \$2,057.00. Of this amount, the court awarded the wife \$1,651.00 or $\frac{4}{5}$ of the property, and awarded him \$406.00.

In the case of **Lundgreen vs. Lundgreen**, 112 Utah 31, 184 P2nd 670, 1947, the dispute revolves around the distribution of the home of the parties. The evidence indicated that the plaintiff husband paid the original purchase price on the home, but the wife used some of her funds for the remodelling of the house and did considerable work in improving it, although she also did the housekeeping for it for a period of four years. The Supreme Court, therefore, divided the property by determining the value of the real estate and allowing the plaintiff his original purchase price and $\frac{1}{2}$ the excess in value of the market price. The defendant was awarded one-half of the market value in excess of the original purchase price. As a final note, both of the parties were past 70 years of age and were living off their old age assistance.

In addition to the above cited authority, the plaintiff is now in a position of having another husband to care for her and has no need for the financial security of this property. She lives in Payson, and affirmatively states she intends to sell the property. Thus, there are no serious factors which would require other a division as provided for in **Griffin v. Griffin**, 18 Utah 98, 55 Pac. 84, where the court allowed a division of the property, granting $\frac{1}{3}$ to

the wife, stating that this is equivalent to dissolution of the marriage by death where the common law gave the widow 1/3 of the estate. There are no factors which would seem to take the rule out of this case and it would appear that this is still good law today.

CONCLUSION

The defendant-appellant respectfully urges the Court to set aside the trial court's order denying the defendant's petition to divide and partition the interest in the family home and to remand the case to the lower court with instructions to make a division and partition of the interest in the family home. The defendant-appellant respectfully contends: (1) That the Divorce Decree issued in 1949, both in word and intent, provides that the plaintiff shall have the occupancy and use only of the home in question and that the defendant shall retain an interest therein, and (2) that the petition of the defendant made to the Court for a division and partition of the interest in the family home was meritorious, reasonable, and in accord with the Law in the State of Utah, and warranted a favorable ruling by the Court.

Respectfully submitted,

HOWARD AND LEWIS
JACKSON B. HOWARD
Attorney for Appellant
120 East 300 North
Provo, Utah