1984

Betty M. Gardner v. William James Gardner III : Appellants Reply Brief

IN THE SUPREME COURT OF THE

STATE OF UTAH

BETTY M. GARDNER,	)	
	)	
Plaintiff-Appellant,	)	
	)	
vs.	)	Case No. 19246
	)	
WILLIAM JAMES GARDNER, III,	)	
	)	
Defendant-Respondent.	)	

APPELLANTS REPLY BRIEF

Appeal from the Judgment of the
District Court of Weber County, State of Utah
THE HONORABLE RONALD O. HYDE
DISTRICT COURT JUDGE

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APPELLANT'S REPLY BRIEF

For reply to the Brief of the Respondent, the Appellant informs the Court:

1. The Respondent contends in Respondent's Brief, page 4, although Husband did not present grounds for divorce, he represented that the case is "not one-sided". (T. 168)

Appellant responds:

The transcript at page 168 evidences the attorney for Respondent stating:

> "We do not intend to present grounds with respect to the divorce on his part, and we are willing to acquiesce and let her proceed. On that basis, we have no evidence. There is no purpose of getting into a hassle. We do want the Court to know it is a two-sided proposition. It is not all one-sided. That is our position."

Appellant responds that the acquiescense of the Respondent was an attempt to keep out of the record the basis of the Appellant for seeking the divorce, wherein the Appellant testified at TR 169:

> Q: "Is it correct that you agreed to summarize your side of the marital problem, and that the Defendant has become involved with another woman and he has advised you that he wanted out of the marriage; although you didn't want the divorce at the time, you proceeded to file; you realize that you can't remain in a marriage when your spouse no longer loves you?"
>
> Answer by Appellant: "That is Correct."

2. Respondent contends at page 5 of Respondent's Brief that "wife is in good health (T. 177), but states she does not want to go to work (T.177) and that she wants to direct her attention solely to philanthropic activity without producing any sort of income. (T. 219) She is, however, capable of employment, having developed good secretarial skills as secretary to a college President and as a very competent executive secretary to a hospital administrator."

Appellant responds:

That the Appellant was Wife of the Respondent for 31½ years, (Appellant's Brief, page 13) and the basis of the quotation of the Respondent was based upon the follow-

dialogue between Respondent's counsel and Appellant as witness:

> Q: "You have testified here you have been a very hard worker."
>
> A: "Yes."
>
> Q: "What you want to do is direct your attention solely to philanthropic work?"
>
> A: "Yes."
>
> Q: "Whatever matters, and are you now interested at all in directing your attention to producing any sort of income; is that right?"
>
> A: "That is right, right now."
>
> Q: "You just want to give your time to charity?"
>
> A: "I would like to be able to relax a little bit."
>
> Q: "You could earn a very good income if you were to do a work producing income; couldn't you?"
>
> A: "My Husband has never wanted me to do that." (Tr. 219)

3. The Respondent contends on page 16 of Respondent's Brief that based on the Wife's own evidence, she leaves the marriage with assets in excess of $150,000.00 in value and further states it was appropriate for the Court to order that the Wife be permitted to remain in the home until it is sold and make the mortgage payment of $229.00 per

month, together with taxes and insurance from the $1,200 per month alimony she receives, and then makes the gratuitous statement which can in no way be part of any record before the Court that "the real property was, in fact, sold within a few months after the granting of the divorce, so that Wife was responsible for those expenses for only a short time."

Appellant responds:

What the Respondent does not state, which was also not made a part of the record, but is a fact, is that the Respondent objected to the sale of the property except on a cash basis, and that additional papers (which were filed on Appeal on May 11, 1984, which was more than five months after the filing of the Brief of Appellant) evidences and was not available to Appellant at the time of the preparation and filing of the Brief of Appellant, objection and notice was shown of refusal of the Respondent to accept a valid offer of sale, which the lower Court upheld as an objection of the Respondent, and upon the actual sale of the property by the Appellant, the Respondent was given all of the cash proceeds received from the sale of the property and the Appellant was compelled to take a contract for payment of Appellant's equity in the property so that, in fact, the

Appellant was left more destitute than ever, in that out of her magnificent sum of $1,200.00 per month alimony, she was compelled to make the mortgage payments on the home, pay the insurance and the property taxes and to maintain the property, and did not receive any part of the cash selling price of the property, which was demanded and received by Respondent in order to allow the sale of the property. In addition thereto, the record filed on May 11, 1984 evidences an Order to Show Cause of Declaration in Re Contempt brought by the Appellant against the Respondent who denied, failed and refused to pay the minimual amount of $1,200.00 monthly alimony ordered to be paid by the Respondent for the 31½ years of service rendered by the Appellant as Wife to the Respondent and which he refused and failed to pay the support for August, September, October and November until the final order of the Court in December, 1983, ordering payment of same. (See additional papers on Appeal filed May 11, 1984)

4. The Respondent contends on page 16 of Appellant's Brief:

> "Wife brought no assets into the marriage, and with the exception of the medical assets and retirement benefits which will be discussed hereafter, she is leaving the marriage with over one-half of the marital assets."

Appellant responds:

That the Appellant had brought into the marriage, 31 years previous, the desire and ability to aid her spouse to become a doctor, and did for 8 years continuously work and support the Respondent and assist him in attaining his medical degree, including his internship and hospital residency, and therefore brought more assets into the marriage than the Respondent, in that she brought in cash and the ability to work. Going out of the marriage, the Respondent is able to retain his more than $100,000.00 worth of retirement; an established practice with income of $82,000.00 annually, his ownership in the clinic and all its entities while the Appellant is leaving with less than one-half of the marital assets, in that she is leaving behind 31½ years of her youth with the knowledge that the Respondent has gained himself a new, younger female companion and a fancy new condominium-love nest.

The Appellant further responds that the coercive effect of the Respondent by not paying $1,200.00 per month alimony while the Appellant was under the duty and obligation of paying the monthly mortgage payments, maintenance and cost of the premises without any source of income or savings was coercive upon the Appellant to sell the property at a pri

... from what the Appellant would have sold the property for without the duress and to also be compelled to turn over to the Respondent all of the Respondent's share in cash while retaining for the Appellant Promissory Notes and obligations for long term payment on the amount owed by the purchaser in order to escape the liability of the monthly mortgage payments, taxes and insurance ordered by the Court to be paid by the Appellant and not by the Respondent out of the $1,200.00 pittance required to be paid by the Respondent to the Appellant as her share of the superb medical income developed by the Respondent from his practice as a medical doctor.

5. The Respondent contends in Point II of its Brief, pages 16-23 that the Dogu vs. Dogu case, 652 P.2d, 1308 is the only applicable case to be considered by the Court in the alimony and disposition of medical assets and retirement funds by the trial Court, in that the later decision of this Court and holdings in Woodward vs. Woodward, 565 P.2d, 431 is not applicable, alleging that the Woodward case is not applicable in that the amount going into the retirement fund depends on factors including the success of the clinic and "the need to use income for other expenses".

The Respondent further contending under its Point II - effect, that the medical business is not a profit making business, and that the banding together of a large group of the most prominent medical doctors in a clinic whose assets were established by the clinic's own appraisers as a clinic building with a value at $2,300,000.00; vacant land with a value of $360,00.00 adjacent to the clinic; and an adjacent building and land valued at $630,000.00. (Appellant's Brief page 6) somehow makes it highly uncertain of the continued ability of the clinic to pay into the retirement of the Respondent and by some alchemy invalidates the Woodward holdings of this Court.

The Respondent further contends that the decision of the Court to reduce the alimony to $600.00 per month at the time of the retirement, based upon the allegation that the home would be sold, which the Respondent makes allegation outside the record stating ("which has already occurred") without stating that the fact is that the Respondent got all the cash and the Appellant has a long term note which may or may not be paid and may require further collection efforts, and the Respondent further makes claim that the Husband's income will materially decrease and that the Wife will also receive social security benefits.

The Appellant responds:

That she cannot maintain her style of life on a gross of $1,200.00 per month income; that there is no reason to believe that the Husband's income will not increase rather than decrease, and that he is presently President of the Ogden Clinic and that in fact the Wife does not have the qualifications for receiving her own social security benefits, in that she will be required to have additional quarters of work in order to attain same, and will not be eligible to participate in the social security funds of the Respondent by reason of the divorce and particularly more so if he should decide to marry the woman he is presently living with, with whom he was having an affair as set forth in the Appellant's Brief and without denial by the Respondent.

6. The Respondent contends in justification of the failure of the Court to award attorney fees at page 30 of Respondent's Brief; that the trial Court did not make an award of attorney fees as such, but did consider the matter and made a specific finding that the Wife could use her share of the E. F. Hutton money certificate and her share of the proceeds from the sale of the Ogden Clinic building to assist in paying her attorney fees.

The Appellant responds:

That even as of this date, the Respondent has refused to release the distribution of the Appellant's $2,000.00 share in the E. F. Hutton money certificate, and that in fact the only source for payment of attorney fees to the previous counsel of the Appellant had to be paid out of the $1,200.00 alimony of the Appellant, which when she does receive it, is the only current income that she has to continue her style of life as the ex-wife of the Respondent, a medical doctor, after 31½ years of marriage.

7. The Respondent contends that:

> "He (referring to the Court) no doubt recognize that she (referring to the Appellant) was receiving a very substantial property award in addition." Page 30 of Respondent's Brief.

The Appellant contends:

That there is nothing in the record to indicate that the trial Court had any such recognition or belief that the award being made to the Appellant was "very substantial" compared to the truly very substantial award made to the Respondent by the Court's refusal to recognize the Woodward case by awarding all of the retirement funds to the Respondent, together with all of the good will, accounts receivable, clientele and other assets congruent with an established $100,000.00 a year medical practice in the leading

medical clinic in Weber County and the most prestigious, and in the denial of any future participation by the Appellant in the future value of the practice of the Respondent and in failing to recognize the inherent value of the Respondent's other business entities which are used as a tax saving device, not as a deterrent to the earning ability and income of its medical partners.

CONCLUSION

Without burdening the Court, the Conclusion as stated in the Brief of the Appellant is a valid conclusion and there are no particular changes to be stated to the Court as such, and the Appellant apologizes to the Court for bringing in material extraneous to the record before the Court but finds it essential to offset the representations made in the Brief of the Respondent, wherein material not a matter of record have been submitted to this Court in drafting Respondent's Brief and in its presentation to the Court. The Appellant has made reference to documents which were made known to the Appellant for the first time when the record was picked up for purposes of filing a Reply Brief to the Brief of the Respondent, which consisted of two packets of materials which were not available at time of preparation of Appellant's Brief, but are a part of the record to be con-

sidered by this Court, even though the Appellee filed a five months subsequent to the filing of Appellant's Br. and references made to that record is made in good faith, that such record is an official part of the record in the it is part of the record which was obtained from the Cler of the Supreme Court.

Respectfully submitted this 1 day of June, 1984.

PETE N. VLAHOS,
Attorney for Plaintiff &
Appellant

CERTIFICATE OF MAILING

A copy of the above and foregoing Reply Brief of Appellant was posted in the U.S. mail, postage prepaid and addressed to the attorney for the Respondent, C. Gerald Parker, Esquire, 2610 Washington Boulevard, P.O. Box 107, Ogden, Utah 84402 on this 7 day of June, 1984.

Secretary