1976

Robert O. Christensen v. Ethel T. Christensen : Respondent's Appeal Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

ROBERT O. CHRISTENSEN,
Plaintiff and Respondent,

vs.

ETHEL CHRISTENSEN,
Defendant and Appellant.

Case No. 11003

RESPONDENT'S APPEAL BRIEF

Appeal from Judgment of the
Second District Court for Davis County
Honorable Thornley K. Swan, Judge

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CASES CITED

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STATEMENT OF THE KIND OF CASE

This is a divorce action between the Respondent and the Appellant.

DISPOSITION IN THE LOWER COURT

Trial was first had in this matter on the 15th day of June, 1965, before the Honorable Thornley K. Swan in the Second Judicial District Court of the State of Utah in and for Davis County, at which time the Court awarded the respondent a divorce, granted custody of the three minor children to the appellant, with an award of child support of $100 per month for each of said children, and awarded a distribution of the property between the parties,

which gave the home and the household furnishings to the appellant in lieu of any periodic alimony; and further ordered that the respondent pay all of the outstanding family indebtedness existing at that time, which amounted to $933.56, and $125.00 owing on the automobile awarded to appellant; and that the respondent was to pay $200.00 of the appellant's attorney's fee.

Subsequent to this judgment the appellant made a motion for a new trial, which was granted; and on the 21st day of June, 1966, a second trial was held before the Honorable Thornley K. Swan in which evidence was put forth concerning the questions of alimony, support money, property settlement, and grounds for a divorce. And at the conclusion of said trial, the Court entered a judgment granting a divorce to the respondent, granting custody of the children to the appellant and $100 a month support money for each of said children; the home and furnishings therein were awarded to the appellant in lieu of any periodic alimony, and a lump sum amount of $2,400 alimony was awarded to the appellant with the respondent having the option of paying it in a lump sum or at the rate of $100 per month; appellant was awarded one automobile and the respondent was awarded the other automobile; and the respondent was ordered to pay the balance of the family indebtedness existing at the time of the first judgment, amounting to $933.56, and $100 for the appellant's attorney's fee.

RELIEF SOUGHT

Respondent seeks to have the judgment of the Court entered the 6th day of July, 1966, affirmed.

STATEMENT OF THE FACTS

In the following material, references to the first trial in 1965 will be (65 TR ....) and the second trial in 1966 as (66 TR ....).

The parties were married in Palo Alto, California, in 1940. Five children were born of that marriage, two of which were dependent upon and residing with the appellant at the time of the second trial in this matter (66 TR 4). The children presently residing with the appellant are Norma, 16 years of age, and Charles, 13 years of age. The parties have lived in a home at 3187 South Crestview Circle, in Bountiful, Utah, since 1950. The home is valued from $12,000 to $15,000, with a $4,000 indebtedness still owing, which is payable at $64 per month. The respondent has for some number of years been employed as an examiner for the Federal Home Loan Bank Board, which job requires him to travel extensively throughout the western United States, including Hawaii and Alaska. He has worked various jobs prior to this employment which usually requires an accounting education which he does not have (66 TR 16-17). While on the road, he is paid a per diem of $16 except in Alaska where it is higher. While he was on the road, he would stay in sub-standard type accommodations and eat inexpensive meals in order that he could send part of the per diem home to the

appellant (66 TR 11). At the time of the trial the respondent was a Grade 9 in the Civil Service rating system and had a take-home pay of approximately $218.65 (66 TR 18-19). He also received 10 cents a mile while operating his automobile in the Government business. The other examiners who work with him are Grade 11, and he has reached the point that he cannot rise to a higher grade. (66 TR 17).

During the marriage the appellant has worked full time on several jobs at various times; however, since 1960 she has not worked full time, but has worked part-time jobs and was at the time of trial working a part-time job as a public stenographer. (66 TR 39-40). She is trained as a secretary. During their marriage there has been continual arguments concerning finances and concerning the appellant's attitude as exhibited in public towards the respondent as a provider and as a husband and father (66 TR 5-6). After several years of such quarreling and disagreement, the respondent filed an action requesting a divorce from the appellant. The appellant answered and filed a counterclaim asking for the home and all of the furnishings, $600 per month alimony and support, and a divorce from the respondent.

On the 22nd day of March, 1965, an order awarding temporary alimony and support money was entered. On the 15th day of June, 1965, a trial was held by the Honorable Thornley K. Swan, at which time the appellant was represented by a Ver-

den E. Bettilyon. A the beginning of that trial, Mr. Bettilyon informed the Court that "Well, your Honor, my client does not want to proceed with entering the grounds for divorce, and we feel under these circumstances that we should allow the plaintiff to proceed to present grounds for divorce. We will then take the position of not contesting it, with the knowledge again that this will not influence the Court's decision as to property division and support money and alimony" (66 TR 2-3). Judgment was entered after the trial awarding a divorce to the respondent and granting the appellant custody of the children plus $100 per child support money, plus the home and all of the furnishings, and ordering the respondent to pay all of the then existing obligations other than the mortgage on the house and furniture, and a portion of the obligation on one of the cars (R 15-16). Several days after the judgment was entered, the appellant's attorney, Verden E. Bettilyon, withdrew from the case and Mr. J. Grant Iverson entered as an appearance for the appellant. The Motion for New Trial was filed complaining that the evidence did not support the Findings of Fact and Conclusions of Law. The Court granted a new trial, which was held on the 21st day of June, 1966. Meanwhile, the parties' 18-year-old son, who had been living with the appellant at the time of the first trial, became married and set up a household of his own separate and apart from the appellant, thus leaving only two minor children

in the custody of the appellant. The respondent, meanwhile, paid the debts which he had been ordered to pay by the Court, which amounted to approximately $933 (66 TR 58-59), thus eliminating all obligations except those on the house and its furnishings.

After the original action had been filed, the respondent requested more out-of-town assignments and did receive them, which amounted to him being away from Salt Lake City approximately 50% to 75% of the time (66 TR 22). Prior to the filing of the action, however, he was not out of town as much as he was after he made the above request. During the first six months of 1966, the appellant made $1,053.27 as a public stenographer (66 TR 39). She also received $200 per month in support money from the respondent (66 TR 44). She claims that her average expenses for the period were $519.40 per month (66 TR 44). At the time of the second trial, the Court allowed the parties to put on evidence concerning the question of alimony, support money and property settlement; and it was understood that the respondent could produce further testimony in connection with the grounds for the divorce. After the trial the Court entered judgment accordingly, granting to the respondent a divorce and ordering him to pay to the appellant $100 per month per child as support; and in lieu of periodic alimony, the Court awarded to the appellant the home and all the furnishings therein plus a lump sum alimony of $2,400,

which could be paid at the rate of $100 per month. The Court also awarded one car to each party and directed the respondent to pay a part of the appellant's attorney's fees and to pay the balance of any delinquent family indebtedness which were existing at the time of the institution of the divorce (R 26-27). Appeal was taken from the judgment.

ARGUMENT

POINT I.

THE TRIAL COURT HAD SUFFICIENT EVIDENCE UPON WHICH TO GRANT A DIVORCE TO THE RESPONDENT AGAINST THE APPELLANT.

The appellant in this case is in a somewhat peculiar situation inasmuch as at the beginning of the first trial the appellant, through her attorney, Verden E. Bettilyon, apparently conceded that there was grounds for a divorce, and that the divorce could be awarded to the respondent. The only issue to be contested was the distribution of the property and the determination of support and alimony payments, if any. Upon the judgment of the Court awarding no periodic alimony payments, the appellant apparently then decided to contest the grounds of the divorce, which objection was renewed against the second judgment.

There is little question as to the status of the law upon this point. In many cases in the past this Court has made it clear that when a marriage is obviously deteriorated to the point that it would be

folly to do otherwise than to dissolve it, the trial court should grant the divorce. Obviously, no definite standard can be set up as to what must be shown in order to establish grounds for a divorce. The respondent concedes that a divorce must be based on more than merely the desire of the parties to be separated inasmuch as the public has an interest in whether there exists sufficient ground for the dissolution of the marriage. However, the Court has made it clear that divorce cases are to be approached on a pragmatic basis with concern of the de-facto status of the marriage.

In the present case the respondent alleged that the appellant had treated him cruelly, causing him great mental distress. It is the position of the respondent that the evidence is clearly sufficient to establish that the appellant has in fact caused the respondent great mental distress by their constant arguing and her frequent deprecation of him (66 TR 8, 9, 10). The testimony also clearly shows that the marriage had disintegrated to the point that it was folly to think that it could be reconstituted. (66 TR 35). The uncontroverted evidence establishes that the parties quarreled continuously when the respondent was not on the road and was at home. (66 TR 12). There was some variation as to the cause of these arguments; however, it was agreed that many of them stemmed from disagreement over financial matters, in particular the propensities of the appellant to spend more money than

was needed, and her apparent lack of appreciation for the sacrifices of the respondent while on the road. He testified that they were constantly in debt and that his wife never seemed to get the bills paid, even though she would get his pay check plus part of the per diem with which to pay them. (66 TR 7). The appellant's answer was always that she was only spending that which was necessary; however, her concept of what was necessary obviously did not agree with that of the respondent. He testified that this constant fighting over finances and his ability as a breadwinner was a source of great emotional frustration to him and that when the matter was discussed with the appellant her attitude was merely that she couldn't get along on less. (66 TR 7). The respondent also testified that his wife was constantly inciting him to wrath by digging and cutting remarks directed towards him in public and in private (66 TR 8), which, accompanied by the berating he received from his colleagues while trying to live frugally on the road, was a source of great mental distress to him (66 TR 11). He also states that on one occasion his wife had gone through his luggage without his permission and had found some shorts which he had packed to wear at a physical examination in place of the LDS garments which he normally wore and that she had confronted him with these shorts and had inferred that he was involved in an illicit affair while on the road. (66 TR 9-10). He also testified that the appel-

lant besides possessing a domineering personality was a sloppy housekeeper, that she often was yelling and screaming at the children (66 TR 34), that she argued and berated the respondent in front of the children (66 TR 12), and that she would sleep a good part of the day and that it was common practice for him to get up in the morning and take care of the children and get them fed and off to school (66 TR 34). As a result of these arguments with the appellant and the berating which she heaped upon him, the respondent testified that he did not want to spend another minute with her (66 TR 10) and that he couldn't get away from the house fast enough (66 TR 35).

The appellant herself testified that there was serious and continuous quarreling between she and the respondent (66 TR 45). She stated that the arguments were serious in nature (66 TR 45) and that in her opinion the arguments were sufficient to cause a breakup of an average marriage. (66 TR 46). She also stated that if she had her way, she would have all of the respondent's pay check instead of just part of its as support. (66 TR 48).

It appears obvious that there is sufficient basis for the trial Court's finding that the respondent had suffered mental cruelty as a result of his wife's actions and that he accordingly was granted a divorce. It should be noted that in neither trial did the appellant attempt to establish that the divorce should be awarded to her and not to the respondent. It

would appear that the appellant is not in a position to argue that the divorce should be granted to her and that the only question therefore is whether the facts establish a basis for awarding the appellant a divorce. A similar situation was presented in the case of *Griffiths vs. Griffiths*, 3 Utah 2d 182, 278 Pac. 2d 983 (1955), where the wife was questioning the court's decree granting the husband the divorce. The evidence there showed that there was constant fighting between the parties and that the defendant was of a quarrelsome disposition, that she nagged him and falsely accused him of laying around, rather than getting up and getting a job immediately upon his discharge from the Army, that she was without cause unreasonably suspicious of his conduct, that she searched his pockets and when she discovered a telephone number in his pockets she would call and berate whoever answered the phone, that she embarrassed him by open criticism of his friends in their presence, and that she was generally disagreeable and quarrelsome and critical of him and he found it so intolerable that he wanted to escape therefrom by re-enlisting in the Army. The court there affirmed the divorce in behalf of the husband.

On point also is the case of *Curry vs. Curry*, 7 Utah 2d 198, 321 Pac. 2d 939 (1958), where the court laid down the following general test as to the grounds of mental cruelty:

"There, of course, must be some objective

> standards upon which to judge whether mental cruelty is made out. But it must also be realized that what constitutes cruelty to the extent of causing great mental distress has considerable subjective content because it depends somewhat upon the sensibilities of the person complaining and also in a measure upon the justification, or lack of it, for the conduct complained of." (Page 201)

In the present case the record shows that the appellant was guilty of those actions which are commonly the basis of a finding of mental cruelty in that she berated and belittled her husband in front of the children and in public, that she was suspicious of him and his actions when he was away from home and would search his belongings in that regard (66 TR 9-10), that she did not cooperate with him in financial matters which were a constant and continuous source of quarrel and argument between the parties, and that she left much to be desired in the manner in which she kept up the house and provided for her husband and children (66 TR 34). The record also clearly shows the existence of the subjective frustration and punishment that respondent incurred as a result of the appellant's actions and that in fact he suffered great mental pain and distress because of such actions (66 TR 7, 10, 34).

No doubt, this action is similar to all divorce actions in the sense that the respondent has some responsibility for the deterioration of the marriage; however, the question is whether or not the record

indicates sufficient basis for the Court to find a divorce in his favor. It appears clear that the decision of the Court was well within the wide latitude of discretion given to the Court in such matters and that its judgment after having observed the demeanor of the witnesses through two trials should not be changed or altered by this Court.

POINT II

THE TRIAL COURT WAS CORRECT IN NOT AWARDING THE APPELLANT ANY PERIODIC ALIMONY AND GRANTING IN LIEU THEREOF THE AMOUNT OF $2,400 PLUS THE HOUSE AND ALL OF THE FURNISHINGS THEREIN.

The appellant questions the actions of the trial court in not granting periodic alimony. The record shows, however, that the appellant was fairly compensated considering the facts surrounding this marriage and the parties' financial conditions. The Court reviews this issue as it does Point I under the rule that the findings of the District Court should not be overruled unless the judgment of the District Court works a manifest inequity or injustice. *Whitehead vs. Whitehead,* 16 Utah 2d 179, 397 Pac. 2d 987. And it is also noteworthy that the right to alimony is solely within the discretion of the Court and that it is payable to either the husband or the wife depending upon the circumstances. In the case of *Martinett vs. Martinett,* 8 Utah 2d 202, 331 Pac. 2d 821 (1958), the Court said in reference to Section 30-3-5, Utah Code Annotated, 1953, which

authorizes the awarding of alimony, support money, and distribution of property:

> "It is important to note that this statute makes no distinction between the spouses. It does not contemplate, nor should there be, any discrimination or inequality of such awards on the basis of sex. They may be made in favor of either spouse, and should be based upon the needs of the parties and the equities of the situation being dealt with." (Page 205)

The respondent in this case is not unaware of the needs of the appellant. However, the respondent agrees with the trial court that those needs were filled as reasonably and equitably as could be under the circumstances by the division ordered by the Court. It should first be noted that the court awarded the following items to the appellant: the house, which had up to $11,000 equity, all of the furnishings within the house, a car, which the respondent was to pay $125 towards, a lump sum alimony of $2,400, child support of $100 per child until they reach their majority, and in addition to this the respondent was ordered to pay all of the bills which were existing against the family at the time the action was filed, which amounted to approximately $1,000 and $300 attorney's fees. This is certainly not a case where the husband is absconding with the fruits of the marriage; in fact, it becomes obvious that he has been left with nothing but his own ability to continue in his job and make a living for himself. It is of interest to note that the appellant claims that

she requires approximately $520 a month in which to take care of herself and the two children and that the amount did not change when the third child left home. Common experience indicates that this is more than is necessary for the appellant and two children and that with proper management less money would be required for the average monthly expenses. Her inability to manage money contributed to the break up of the marriage and now is being asserted by appellant as reason for more money from the respondent. The intentions of the appellant are possibly revealed in her statement on page 49 of the 66 Transcript where in response to the question of whether or not she realized that the average family income was not $500 a month, she replied, "Well, Chris isn't making what an average man makes." Obviously, the truth is in this case that the appellant could get along on less money but that she wants as big a cut out of the respondent's pay check as possible.

The Court found that the income of the respondent was approximately $218.65 every two weeks, exclusive, of course, of the per diem and mileage and any overtime. The Court, however, properly excluded consideration of the per diem inasmuch as the purpose of the per diem as evidenced by the Government regulations put in evidence as plaintiff's Exhibit E was to provide for the dignified existence of the employee while away from home, and thus in the Government's view and properly

under the Court's view should not be considered as income to the recipient. Thus, under that finding the respondent would be receiving approximately a net of $436 a month, and that as long as he was paying the support payments his income would be approximately $236, which does not meet the $267 per month requirement which he testified he had to get along on per month (66 TR 13). The Court expressed the desire that under the circumstances of this case he did not want to saddle the respondent with periodic alimony payments (66 TR 58). The record also shows that the appellant is a qualified secretary, that she could get employment, and that she at the present time did have employment which was paying her on the average $163 a month for the six months prior to the second trial (66 TR 44). The trial court's attitude obviously was that the appellant was awarded sufficient property and support payments to take care of her minimum requirements and that she would have to go to work in order to maintain herself at a reasonable standard. It surely is not an abuse of discretion for the Court to expect the appellant to go to work where her past indicates a history of employment and where she is capable of performing such work. The Court was liberal in the property settlement and in the support award, and did, in fact, award alimony to the appellant. One would get the impression from her position on appeal that alimony was completely forgotten. It can hardly be said that the trial Court was unreasonable

in lieu of periodic alimony granted appellant the home and the amount of $2,400, which could be paid in a lump payment or at $100 per month which thus would provide $100 per month alimony for a period of two years. The appellant argues that the award must be such that there will be a guarantee that the appellant will not at some future time go onto the welfare rolls of the county. This is a facetious argument, for although it is a consideration that the Court must make, it cannot go so far into the future as to guarantee the financial security of the parties involved in a divorce. Under the award granted by the Court, there is no reason why the appellant should ever be on the welfare rolls. It is not the role of the Court to be a soothsayer, but rather to make an equitable settlement determining at the time of decision the present and predictable future needs of the parties tempered by the circumstances of the case and the finances available.

The respondent respectfully submits that the Court awarded approximately $20,000 to the appellant in property and lump sum alimony, and in addition to that, awarded support payments for the children which will last for at least five or six years to come until the youngest child has reached his majority. The respondent has cleared all of the family debts except those on the house and furnishings and has obviously left the appellant in as good a position as could be provided under the economic situation of these parties. A statement of the Court at

the conclusion of the trial was supported by the findings of fact and is therefore set out below in order to further inform the Court of the basis of the trial court's thinking and subsequent decision:

> "This defendant has demonstrated to this Court, from the evidence, that the plaintiff could not satisfy her financial needs, and I don't believe she'd be satisfied with anything this Court could provide for her, with plaintiff being the source of those needs. I think she spoke somewhat facetiously, but somewhat correctly, when nothing short of all could really satisfy her (66 TR 56)."

The Court then continued on to say:

> "The Court is impressed with Mr. Garrett's argument that there must be a cut off between these parties on this financial payment. The Court attempted to meet that by its former rulings; and found previously that the award of all the property, and the liberal support award was made to the plaintiff, or to the defendant, in lieu of any alimony. Furthermore, that the plaintiff was burdened with a large sum of obligations, of outstanding debts and obligations, incurred during the marriage which he has now paid. He has met this responsibility, and I don't think he should be penalized for it. Well, this Court is not going to saddle this plaintiff, under the facts of this case with a permanent award for alimony. Again I point out that the Court has been very liberal in the property settlement award, giving it all to the defendant, and has granted a very liberal support money award. It was foreseeable that defendant would have a period of time with her son Robert living at

home, that she would be receiving $100 a month for him to apply on the household expenses. In light of the testimony, and the needs of the defendant, the Court will award defendant a lump sum alimony in the sum of $2,400. That will be payable either in cash or at the rate of $100 a month, whichever best suits the defendant, or the plaintiff's ability to pay; there being no interest if it is a monthly payment, or no discount if it is a cash payment. (66 TR 58-59)."

CONCLUSION

This divorce action was instituted by the respondent after a period of separation. Appellant did not want the divorce. Even though at the pretrial of this case it was determined that she would put on evidence in support of her counterclaim, she refused to do so at the time of trial and offered no evidence as to grounds for divorce on the second trial of the action. She was content to have respondent's entire pay check and a substantial portion of the per diem permitted him as a Government employee. All she has ever wanted from respondent is money, and she was content that he be away from home a major portion of the time. The foundation of her appeal in this case is financial. She wants nominal alimony. This may appear to be innocuous, but her real motive is to continue her financial stranglehold on respondent. Were the Court to grant the relief she asks, it would only be a matter of a short time before the Court would be asked to in-

crease the award, and this would become an endlessly litigated matter.

Affirmatively, the record shows that the appellant received all of the property the parties had accumulated during their marriage; received a generous amount for child support and a lump sum of $2,400 in lieu of alimony. The Decree of Divorce in favor of respondent was supported by sufficient evidence, and clearly the trial court did not abuse discretion in the property settlement.

The Decree in the lower court must be affirmed.

Respectfully submitted,

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