1968

# Robert O. Christensen v. Ethel T. Christensen : Appellant's Petition For Rehearing

# In the Supreme Co
# of the State of U

OBERT O. CHRISTENSEN,

*Plaintiff and Respon*

vs.

THEL T. CHRISTENSEN,

*Defendant and*

PELLANT'S PETITI
ND BRIEF IN SUPPO



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## CASES CITED

# In the Supreme Court of the State of Utah

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ROBERT O. CHRISTENSEN,
*Plaintiff and Respondent,*

vs.

ETHEL T. CHRISTENSEN,
*Defendant and Appellant.*

Case No. 11003

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TO THE HONORABLE CHIEF JUSTICE AND TO THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF UTAH:

The Petitioner respectfully requests a rehearing in the above entitled cause and that the decision be modified as hereinafter suggested, for the reason and upon the ground following:

In affirming the trial court's denial of alimony to the Defendant, the decision of this Court failed to make such arrangements of property and economic resources of the parties that they will have the best opportunity to reconstruct their lives on a happy and useful basis.

WHEREFORE, Petitioner respectfully submits that a rehearing should be had and the decision revised, believing that a re-examination of the record will assist the Court better to understand the record certified, and will result in a revision and reversal of the decision herein.

Respectfully submitted,

MOFFAT, IVERSON & TAYLOR

By .....

J. Grant Iverson

Attorneys for Petitioner

# BRIEF IN SUPPORT OF PETITION FOR REHEARING

## ARGUMENT

### POINT I.

THE DECISION OF THIS COURT AFFIRMING THE TRIAL COURT'S DENIAL OF ALIMONY TO THE DEFENDANT FAILS TO MAKE SUCH ARRANGEMENT OF PROPERTY AND ECONOMIC RESOURCES OF THE PARTIES THAT THEY WILL HAVE THE BEST OPPORTUNITY TO RECONSTRUCT THEIR LIVES ON A HAPPY AND USEFUL BASIS.

The appellant (herein referred to as the defendant) respectfully submits that the division of property and economic resources of the parties in this case by the trial court and affirmed by this Court does not provide to the Defendant an opportunity to reconstruct her life on a happy and useful basis.

As stated in the decision of this Court:

> "The money and property to be dealt with is respectable but not extensive. They own a home in Bountiful valued at $12,000 to $14,000, with a balance of $4,000 to be paid in monthly installments of $56.00. Plaintiff has for many years worked for the U.S. government as an examiner of savings and loan associations. He has a present salary of about $8,500.00 per year, plus per diem and mileage, *and the Defendant is not employed.*"

Plaintiff testified that he receives $16.00 per diem for approximately three-fourths of the days of the year (R. 22). This would be 273 days a year. At $16.00 per

day, this would amount to $4,368.00. Thus, plaintiff's income is $8,500.00, plus $4,368.00, a total of $12,868.00 a year.

Again, as stated in the decision of this Court:

> "The trial court awarded the Defendant the custody of the two minor children, $100.00 each for their support, a lump sum of $2,400.00 alimony, payable at plaintiff's option in monthly installments of $100.00 until paid, the home and it furnishings, her automobile and that the plaintiff pay certain family debts and pay to the defendant $300.00 for her attorneys' fees."

Thus, there was awarded to the defendant a home with a net equity of from $8,000.00 to $10,000.00, plus $2,400.00 alimony. By now said alimony has all been paid. The award to the defendant at a maximum amounts to $10,000.00 for the home and $2,400.00 for alimony. This is $468.00 less than the plaintiff's annual income.

The trial court must have assumed, since it found that the defendant was unemployed, that she would be forced to sell the home and be obliged to rent another home. If we assume that the defendant would expend $250.00 per month for her living expenses, including rent, in four years all that has been given to her would be expended. She would then be without assets of any kind. During that four years, the Plaintiff's total salary and per diem would be $51,472.00.

The defendant's health is not good (R. 38, 39 and 54). If at any time she is unable to work, after the sale

price of the home has been expended, or if she is unable to obtain employment although physically capable, she will be on relief, while the plaintiff enjoys an income of more than $1,000.00 per month.

Can this be said to be fair and equitable?

A fair and equitable judgment should provide for some alimony to be payable to her, if only nominal, until the proceeds of the sale of the home are expended. If at that time it is established that she must be taken care of either by the plaintiff or by public relief, a trial court can fix a reasonable amount for her care. (See *McDonald v. McDonald,* 120 Utah 573, 236 P. 2d 1066). Is anything less than this fair and equitable to afford her "the best opportunity to reconstruct her life on a happy and useful basis"?

In the case of *DeRose vs. DeRose,* 19 Utah 2d 77, 426 P. 2d 221, decided by this court in April, 1967, the assets and income of the parties were very similar to the assets and income of the parties in this case. In that case, the plaintiff's wages were $340.00 per month, with take-home pay of approximately $300.00 per month, the defendant's income was approximately $1,000.00 per month, the parties had a home with a mortgage thereon of $8,788,000, which represented a major portion of the value of the home. The trial court awarded to the plaintiff all stock acquired during the marriage (no value shown), all household furniture, fixtures, tools, and equipment, a 1956 Chevrolet station wagon, one-half of their $4,250.00 bank account, and the family home, upon

the condition that she be required to assume a mortgage of $8,788.00 thereon and make the payments of $97.00 per month until the mortgage should be paid, and that at the time the youngest child should reach majority, was out of college, or plaintiff remarried, the home should be sold and the defendant receive one-half of the equity of the parties in the home as of September, 1965.

The defendant was awarded his equity in the home, one-half of the bank account of $4,250.00, and his 1963 Monza automobile.

The court ordered the defendant to pay $150.00 per month each as support money for the two children, and *$50.00 per month alimony.*

This court affirmed the action of the trial court, except that the equity of the husband in the home was awarded to the plaintiff instead of the defendant.

In the case at bar, the plaintiff, with an income of $2,868.00 a year more than that of the defendant in the DeRose case, is ordered only to pay $2,400.00 alimony, $100.00 per month child support, and loses his equity in the home. The $2,400.00 alimony has already been paid at $100.00 per month. If Mrs. DeRose was entitled to receive $50.00 per month alimony, why should the defendant in this case be denied all alimony?

It is indicated in the decision of this Court that the guilt of the defendant probably accounts for the failure of the trial court to reasonably provide for the defendant. It is stated thus:

> "This is also true of the relative guilt, or perhaps better stated, the greater responsibility one spouse may appear to have than the other for bringing about the failure of the marriage. This seems to have been quite definitely true in the instant case."

The appellant submits that the evidence of the plaintiff alone, without considering the evidence of the defendant, does not support a finding that she was guilty or had the greater responsibility for bringing about the failure of the marriage. Throughout the trial, she stated that she did not want a divorce, that she was willing to make an effort to make a happy home, and that she considered marriage sacred (R. 44-45). She stated: "I honestly tried to make things better." (R. 46) This accounts for her refusal to relate his shortcomings. He, on the other hand, evidenced his attitude when he stated:

> "I have no intention of ever spending a minute with that woman." (R. 10)

> "I haven't been in the house for two years." (R. 27)

As stated in the opinion of this court, the grounds for granting him a divorce were the following:

> "The defendant had caused him great mental distress in provoking quarrels, in quarreling with him and with the children, in continually belittling him in various ways and as a provider for the family, and in failing to properly discharge her duties in the home."

It is true that he made bald, general statements supporting the above quotation, but when considered

with all of his evidence, his testimony does not support the stated grounds.

In the first trial (R. 7), he stated:

> "We have both over a great many years worked up an antipathy toward each other — name-calling and just hard feelings, and constant fighting and bickering."

At the second hearing, he was asked who started the quarrels, to which he answered:

> "Well, I would say that she would. She would probably contend that I would start them." (R. 6)

He stated throughout the trial that their main difficulty concerned their finances. He stated:

> "I would say that she was an erratic spender, a compulsive spender. While *she didn't spend money on herself,* she was very free with the children and giftgiving, things for the house, and I didn't think she was a manager at all. We shifted the responsibility of the money back and forth. Never has been successful. Neither of us could manage the money very well according to the other." (R. 6)

He stated in answer to a question of how frequently they would quarrel:

> "It seems like it was a daily occurrence. Hardly a day went by but what there wasn't arguing and yelling, screaming back and forth and name-calling, *mostly on my part,* because I was incited to wrath, I would say." (R. 8)

Concerning the matter of belittling the plaintiff as a provider, when asked what he meant by belittling in public he stated:

> "I can't give you examples, specific examples. However, when we would go out to dinner there would always be snide little cutting remarks directed at me."

His attorney then stated to him:

> "You have got to be specific. You have got to tell me what they were and what she said, or the substance."
>
> "A. *I am unable to do that.* I am sorry. I can't. So many years have gone by since I have ever been in the house." (R. 12)
>
> "Q. Has Mrs. Christensen ever used abusive language toward you?
>
> "A. No, she has not, but *I have toward her.* I am sure of that." (R. 12)

The plaintiff was asked the following question and gave the following answer:

> "But as far as you can answer us, Mr. Christensen, the quarreling was over money, and you and she both started those matters, is that correct?
> "A. That is right." (R. 29-30)

The only specific evidence that he gave concerning her extravagances was the purchase of a jacket for the son, Robert. On cross-examination he stated that they had an argument over said jacket; that she wanted to pay more than was necessary. He was asked if he was aware that four years after that jacket was purchased,

it was still in use, and if he thought she paid too much for it, and he answered, "No." (R. 30, 31)

His testimony is wholly lacking in any particulars concerning the matter of "snide, little remarks" and extravagances and other matters of which he so bitterly complained.

The fact is, as established by his testimony, that he is the guilty party in this matter, not she. Her conduct has in all respects been much better than his.

As to her failing to properly discharge her duties in the home, he testified that many times during their married life she had been employed full time (R. 17), and that she had been a housewife and had worked at the same time (R. 17-18). He gave no evidence that he ever assisted her in keeping the home.

Can a woman who works all day long to help support the family, and after work attempts to maintain a home for five children, her husband and herself, be divorced if she does not keep an immaculate home?

In the opinion of this court, the following is contained:

> "Even though it is the established rule that divorce cases being in equity, it is the duty of this court to review and weigh the evidence, it is equally true that we have invariably recognized the advantaged position of the trial judge and given deference to his findings and judgment declaring that they should not be upset unless the evidence clearly preponderates against them, or

> unless the decree works such an injustice that equity and good conscience demand that it be revised."

Does the position of the trial judge give him an advantage when the testimony of one party alone is considered? That advantaged position aids him in determining who is telling the truth when conflicting testimony of two or more witnesses is being considered. If the evidence of only one party is being considered and evidence of the other party is not considered, the advantage of the trial judge disappears. The appellate court in such circumstances is in as good position to determine what is fair and equitable as the trial court.

Considering the plaintiff's testimony alone above delineated and judgment of the trial court affirmed by this court, can it be said that in equity and good conscience the decree works no injustice?

The following quotation from *Dahlberg vs. Dahlberg,* 77 Utah 157, 292 P. 214 at 217 is apropos:

> "The question thus is as to whether on the facts found the division and allowance were equitable and just. As to that, a divorce proceeding being

an action in equity, the parties, under the const tution are entitled to our judgment, as well a that of the trial court. Constitution of Utah, Ar 8, Sec. 9." Numerous other cases cited.

## CONCLUSION

The Defendant respectfully requests that her pet tion for a rehearing and reconsideration of this matte be granted.

Respectfully submitted,

MOFFAT, IVERSON & TAYLOR

By .....

J. Grant Iverson

*Attorneys for Petitioner*