

1969

Ernestine B. Harrison v. Jack M. Harrison : Appellant's Reply Brief

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IN THE SUPREME COURT OF THE STATE OF UTAH

ERNESTINE B. HARRISON,
Plaintiff and Respondent,

vs.

JACK M. HARRISON,
Defendant and Appellant.

Case No.
11370

APPELLANT'S REPLY BRIEF

Appeal from the Judgment of the District Court of
Salt Lake County, State of Utah
Hon. Joseph G. Jeppson

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STATEMENT OF THE CASE

Appellant submits herewith his Reply Brief for the reason that Respondent does not come to grips with the issues as stated by Appellant and it appears that a further written argument from Appellant will be helpful to the Court.

Respondent at page 3 criticizes the Statement of Facts of appellant charging him with omitting numerous facts and evidence. Then Respondent proceeds to

adduce only evidence favorable to the respondent, pointing out no evidence omitted by the appellant in his statement, and overlooking the fact that in this type of action the Court shall review all of the evidence.

Stone v. Stone, 19 U. 2d 378, 431 P. 2d 802;

Whitehead v. Whitehead, 16 U. 2d 179, 397 P. 2d 987;

Dearden v. Dearden, 15 U. 2d 105, 388 P. 2d 230;

Steiger v. Steiger, 4 U. 2d 273, 293 P. 2d 418.

Respondent makes many mis-statements of evidence and states only one fact not included in the brief of appellant, namely, the fact that appellant has kept company with Lorainne Woodland, who was an employee at the Data Processing Company. Appellant regards this as immaterial, there being no rule that when a marriage is destroyed the parties may not seek companionship elsewhere.

Respondent's tactic in her brief is the same as her tactic at her second trial, namely, to attack Harrison and attempt to make him look deceitful, crafty, and untrue to his wife. She obviously succeeded in trial court and it is appellant's hope that this Court will give a dispassionate review of the evidence and the case and not base its decision on whether or not the Court likes the Appellant.

Appellant admits that the marital situation is a bad one and that feelings are and always have been strong and explosive. The record of the first trial is not available but Judge Anderson found Appellant to

be "aggressive" (Finding 4, R 67). Judge Anderson also was aware of the fact that appellant was keeping company with Loraine Woodland (R 67) and with both aspects of the case before him gave the plaintiff and the children all they should have by way of divorce decree.

Respondent's brief is devoted primarily to the argument that defendant's partnership should be ignored, that the trial judge ignored it and that this court should look through the partnership and treat this case as though all Data Processing business were the defendant's personally and that the so called partners are pawns and have no rights and no standing. The trial court found there was a partnership. (Finding of Fact No. 6, R 68). There was no issue raised in the Motions to alter and amend the decree that the partnership was a fraud or non-existent. (R 98 and 104). There is no finding or conclusion that the partnership was a fraud or was not a real partnership. Judge Jeppson ruled that he could not ignore it (R 327 lines 23 to 31) and yet he did ignore it, in effect, by ordering payments which appellant cannot possibly pay without jeopardizing the financial welfare of the partnership, assuming that he could impair the partnership in an effort to pay the judgment,) and even made an award of one half of a non-existent account formerly owned by the partnership, loaned to Keith Hawkes, and used completely in constructing a building owned by the partnership. The Court made no finding as to the partnership and in her brief respondent ignored

this completely, without explaining how the partnership can be ignored.

There are issues of law involved herein, requiring analysis by the Court, and based upon certain fundamentals which appellant does not challenge:

1. The parties are hostile.
2. The defendant does not like to pay taxes if he can avoid them honestly.
3. One reason for the partnership is to share earnings with his brother, mother and father. Other reasons were not explored and were not in issue.
4. Defendant regards partnership matters as including a separate entity and that the divorce action is against him and not the partnership.

Before a second trial judge could modify the Decree the following issues must be faced:

1. Did the defendant conceal any assets of himself or the partnership?
2. Did the defendant testify falsely?
3. If either one or two is answered affirmatively, and we think they should not be, was there such conduct as amounted to extrinsic fraud as discussed by this Court in several decisions?
4. If no relief is available on the issues of fraud and concealment, an entirely different question is presented, namely, have there been changed circumstances,

and if so, what changes in the facts exist in June, 1968 as compared with December, 1966?

5. Is the decision of the second trial judge a result of passion and prejudice against the defendant?

We shall briefly relate the contents of the two briefs to these five issues, attempting to avoid repetition.

ARGUMENT

1. *Did the defendant conceal any assets of himself or the partnership?*

This is covered at pages 32 to 35 of Appellant's brief. The respondent makes a statement of fact on this point at pages 16 to 18 of her brief. Respondent argues these facts as though there were some dispute about them. The account of \$3,094.19 was in evidence at the first trial and the respondent testified that she had forgotten it. (R 313). There is no dispute in the evidence that the partnership had an account of money which it loaned to Keith Hawkes and recalled so that the building could be constructed. This plainly appears in the records of the partnership which were produced at the trial and there was not one word of testimony that at the time of the first trial there was any false statement in any of the records with reference to any of these amounts. And there is not one word of testimony that respondent's attorney, Kenneth Rigtrup, asked for any records which were not shown to him

or that he was shown any records which were inaccurate or tended to conceal any facts.

At Page 18 of her brief just before the argument Respondent states that the original findings of fact listed in detail all of the assets of the parties with family savings of \$1,600.00 and assumes from this that these were the partnership assets.

The first trial judge was not confused. He had before him the partnership savings account of \$3,094.19 (Exhibit P-4) and also the account of \$1,600.00 representing family savings as distinguished from partnership assets. (Exhibit P-3). It was one-half of this family savings which was awarded to the plaintiff, and other assets of the parties individually consisting of stocks and bonds and the home were divided one-half to the plaintiff and approximately one-half to the defendant. (Conclusions 7 and 9, R 71). To imply that the \$1,600.00 of family savings should be contrasted with the partnership accounts of \$3,094.00 and \$9,729.00 is an egregious affront to the intelligence of the first trial judge and the entire inquiry of the first trial which sought to distinguish between partnership property and the separate property of the plaintiff and the defendant.

2. Did the defendant testify falsely?

This is considered in Appellant's Brief, pp. 35-37. Respondent offers no support in her Brief for the finding of false testimony about income (Finding 4, R 115)

except for the unsupported and unsupportable accusation of "defendant's perjured testimony regarding his income". (Brief, p. 21, line 2).

Defendant gave an "estimate" of income in the form of Exhibit D-7 at the first trial. There is no evidence of false testimony. The subsequent tax returns and report to Valley Bank were claims of income by defendant for specific purposes but his income as a one-third partner was one-third of the partnership profit of \$23,688.29 for 1966. The actual cash of the partnership received by him in 1966 was not shown. (R 246-247)

3. If either 1 or 2 is answered affirmatively, and we think they should not be, is there such conduct as amounts to extrinsic fraud as discussed by this Court?

This matter is discussed in Appellant's brief at pages 34 and 35 and in Respondent's brief at pages 19 and 20.

Both parties rely on *Haner v. Haner*, 13 Utah 2d 299, 373 Pac. 2d 577, a portion of which is quoted by respondent. Respondent argues that the actions of defendant "were designed and had the effect of depriving plaintiff of the opportunity to litigate the issues in the divorce action, and a fair trial was effectively prevented." On the contrary, Mr. Rigtrup alleged in his Amended and Supplemental Complaint:

"Plaintiff is aware of certain assets which the Defendant has secreted, or diverted to his own

use, and based upon information and belief, alleges that Defendant has so conducted his financial circumstances in such a fashion that he should be required to make a complete accounting of all financial transactions which he has entertained during the marriage, and should be further required to provide all of his records pertaining to stocks, bonds, bank accounts, savings accounts, mutual funds, or any other records relating to his personal financial circumstances, and should be further required to provide all of the records pertaining to his business located at 57 East Oakland Avenue, or any other business venture interest which he has acquired or obtained during the coverture." (R 3)

It also appears that Mr. Rigtrup went to the partnership office and examined all of the records he asked for (R 242) and at that time which was June, 1966, the partnership savings account was still in the partnership name and was available to Mr. Rigtrup. Also available were gross receipts and all accounts of the partnership business. (R 245).

The question discussed in *Haner* is whether the alleged conduct "has the effect of depriving the other party of the opportunity to present his claim or defense. * * * To prevent them from contesting the issues * * * preventing the attendance of the parties or witnesses; or by destroying or secreting evidence * * * ". There is no suggestion in this record that plaintiff did not have a fair trial, did not contest the matter, and there is no evidence whatsoever that any issue was withheld or that there was any evidence destroyed or secreted.

Respondent in the second trial charged both fraud and concealment and change of circumstances. The evidence was therefore admissible on one issue or the other and it was not possible to submit this question on a ruling of evidence.

4. If no relief is available on the issues of fraud and concealment an entirely different question is presented, namely, have there been changed circumstances, and if so, what changes in the facts exist in June, 1968 as compared with December, 1966?

The only reference to this issue in the Findings of Fact is the last clause of Finding No. 4, which refers to deliberate misrepresentation of income:

“That in addition thereto Defendant’s income has increased substantially since the time of the entry of the decree.” R(115)

The Conclusions of Law and the “Judgment and Amended Decree” (R 111 - 118) are silent on the matter of changed circumstances. That is why the matter was not stressed in Appellant’s brief (See pages 30 to 40). No finding of fact was made to indicate what the Court believed the income to be and in her brief (Pages 10 and 11) Respondent is equally vague and concludes that the income from the partnership in 1967 of \$35,000.00 all belongs to the Appellant, ignoring the partnership. (Res. Brief p. 23)

In December, 1966 the estimated income of Appellant was at the rate of \$9,000.00 per year. A three way

split of partnership income for that year would entitle Appellant to one-third of \$23,198.29 (one-third of line 14 plus line 27 from page 1 of Exhibit P 23).

In 1967 this income increased to one-third of \$34,465.30. (Exhibit P-3)

In June, 1968 there are no accurate figures and only estimates. Gross sales for the first five months of 1967 were \$48,146.57 (Exhibit P-9) and gross deposits in the partnership account for the first five months of 1968 were \$49,034.93 (Page 15 of Respondent's Brief; R 258). Appellant testified that business was off and that profits would be down for 1968 (R 217).

Appellant submits that a more critical question is whether Appellant had any money available to pay to the respondent. In 1967, according to his calculation, he paid \$9,203.86 for taxes and to the Respondent, leaving him for other uses \$2,100.00 (R 237).

He testified that all of his personal spending was handled through the partnership account as No. 950 (R 194 and 200) and it appears from an examination of Exhibit P-5 that some of the payments on alimony were listed in account 209.

All disbursements of the partnership for 1967 are shown in Exhibit P 5 totaling \$135,642.31. This total was made up of the \$96,000.00 of gross sales, plus the proceeds of the loan at Valley Bank of \$24,000.00 (R 213) plus about \$14,000.00 in savings accounts and proceeds of other receivables (R 215).

An analysis of this exhibit shows that the total of account Nos. 950 and 209 were \$10,950.92. Payments to Ernestine Harrison and to American Savings and Loan on those two account numbers total \$4,851.23 and \$1,190.00 or \$6,041.23. Payment of taxes was \$1,977.21 charged to account 950 and payments of rent on account 950 were \$770.00; attorney's fees were \$225.00. It appears that Account 420 was the building and that payments into that account and to Van Ash Construction Company totaled \$33,055.79 and payments on the land went to Construction Realty in the amount of \$6,249.83.

These figures reconcile very well with Appellant's testimony and with his statement that there were some accounts on the building still unpaid (R 214)

Appellant testified that in June, 1968, outstanding partnership payables were \$8,939.83 (Exhibit D 19, R 234) and that his personal obligations unpaid were \$5,762.78 (Exhibit D 20, R 235).

The partnership has no cash surplus, the defendant has no available cash but is being drained of cash by payments to and for his wife and children under the original decree. Respondent had no money in June 1968. In December 1966 there were some cash assets to be divided.

At pages 12 to 14 of her brief Respondent argues that Appellant received some benefits from partnership expenses which were deductible for tax purposes. It

is true, for instance, that if the partnership paid part of the rent because defendant used his apartment as an office, his living quarters could be better than they otherwise could be, to an extent which cannot accurately be determined.

But these items do not constitute any change of circumstance; and if defendant receives some benefit from some items in June, 1968 they are the same as he received in December of 1966. Mr. Rigtrup argued all of these matters in his Memorandum to the Court, thus indicating that these accounts were analyzed by Mr. Rigtrup and presented to the Court in evidence (R 135).

In short, the partnership had a better year in 1967 than in 1966, and 1968 appeared to be about the same as 1967. If it were not for the burden of constructing the office building defendant undoubtedly would have some cash assets and an increase in alimony and support money might have appeared appropriate. But all things considered there were no changes in circumstance justifying substantial adjustments of alimony and support.

5. Is the decision of the second trial judge a result of passion and prejudice against the defendant?

No justification appears in the record for awarding the house entirely to the respondent rather than one-half to each, since there were no changed circumstances with reference to that. No justification appears in the record for the Court on its own motion ruling that Mr.

Rigtrup should be paid by the defendant for services rendered in the first trial, the reasonable value of which Judge Anderson fixed at \$650.00 so far as defendant's responsibility goes.

No justification appears for giving a garnishee judgment to the plaintiff of partnership funds on deposit at the Valley Bank and Trust Company and for awarding one-half of partnership savings as they existed in 1966 and were invested in the construction of an office building in 1967.

The increase of combined alimony and support money from \$375.00 per month to \$900.00 per month when the defendant has no money and owes his creditors and the plaintiff's living expenses are \$571.00 per month (R 279) plainly indicate that the second trial judge either was misled by pretended evidence or made a decision as a result of passion and prejudice against the defendant-appellant.

A new trial should have been granted, or else additional evidence required at that time for the purpose of obtaining accurate evidence on the theory of change of circumstances since there was not sufficient evidence to support concealment of assets or false testimony as to income, both of which were argued from conjecture, without presenting the evidence in the record and testimony of Mr. Rigtrup.

Respectfully submitted,

**RICHARDS & WATKINS
AND RICHARD L. BIRD, JR.**