1983

Monte Ray Higley v. Geraldine Wright Higley : Brief of Respondent

IN THE SUPREME COURT OF THE

STATE OF UTAH

MONTE RAY HIGLEY, Plaintiff-Respondent, vs. GERALDINE WRIGHT HIGLEY, Defendant-Appellant.	)	Case No. 18970

BRIEF OF RESPONDENT

Appeal from the Judgment of the
Second Judicial District Court of
Weber County, State of Utah
THE HONORABLE JOHN F. WAHLQUIST
DISTRICT COURT JUDGE

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BRIEF OF RESPONDENT

STATEMENT OF THE KIND OF CASE

This is an action for divorce brought by Plaintiff-Respondent, Monte Ray Higley, against Defendant-Appellant, Geraldine Wright Higley.

DISPOSITION IN LOWER COURT

The District Court of Weber County, the Honorable John F. Wahlquist presiding sitting without a jury, granted a Decree of Divorce to each party against the other, and provided that the Decree of Divorce should not become final until the expiration of three months from and after the date of entry thereof.

Wife (Defendant-Appellant) was granted the use and

occupancy of the family home in Hooper, Utah for a period three months until the divorce becomes final, during which time husband (Plaintiff-Respondent) is to make the mortgage payment thereon, together with the utility payments on the gas lights, and water and during the same period, he is to make available to wife his health and medical insurance. During the same three-month period, husband is also to pay to wife the sum of $150.00 per month as temporary alimony pursuant to a temporary order signed by the Honorable Ronald O. Hyde on June 13, 1982 (R. 14). Although this temporary alimony award was inadvertently omitted from the Decree of Divorce, it was set forth in the trial judge's bench ruling (R. 212).

When the Decree becomes final at the end of the three-month waiting period, husband is ordered to continue to make the house payments for an additional three years, which payments shall be considered temporary alimony to wife. At the end of the said three years, wife is to receive $100.00 per month permanent alimony and the home in Hooper is to be sold at that time. The costs of sale are first to be paid and from the remaining proceeds, wife is to receive the first $6,000.00 and the remainder is to be divided equally between the parties.

Husband is also awarded all of the tools; the welding equipment, supplies, and contents of the welding shop; the scrap and other metal; axles; and other material and supplies

related to the welding business. He is also awarded one of the sewing machines, the 1968 Ford pickup truck and camper, the leather tools and equipment, the movie camera, projector, screen, one-half of the movies, and his personal things.

Wife is awarded all of the household furniture and effects, except for four items of husband's choice. Wife also receives the 1967 Ford, the 1971 Dodge Colt, the 1946 GMC pickup truck, and her personal effects.

Defendant's civil service retirement accrued during the marriage is to be divided equally between the parties at the time it is received, pursuant to the formula set forth in the Utah Supreme Court case of Woodward v. Woodward cited at 656 P.2d 431.

Husband is to pay the marital debts of approximately $2,000.00, together with $500.00 toward wife's attorney's fees to be paid at a minimum of $25.00 per month.

RELIEF SOUGHT ON APPEAL

Husband (Respondent) seeks an affirmation of the trial court's judgment.

STATEMENT OF FACTS

Appellant's Statement of Facts contains numerous errors and makes no citations to the pages of the record supporting the alleged statements as required by Rule 75(b)(2)(d) of the Utah Rules of Civil Procedure.

Husband alleges that the facts are as follows: The parties were married to each other on June 12, 1953 at Salt Lake City, Utah (T. 12) Husband is 49 and wife is 47 (T. 11 & 14). He did not complete high school and she is a high school graduate (T. 11 & 14). Five children have been born of the marriage, all of whom are adults (T. 12). The two younger children are ages 21 and 19 and still live with their mother, but contrary to wife's brief, both of these children are employed full time, are self-supporting, and are not attending college (T. 13, 54, 100).

Husband has been employed as a welder at Hill Air Force Base since May, 1966 (T. 48). His net take-home pay is $1,159.68 in a four-week month (T. 49 & 50 and R. 24). His annual gross income at Hill Air Force Base is $24,356.80 (T. 6 Over the years, husband has operated a small welding business after hours and has earned additional money to help his childr through college (T. 62). Husband testified that he will probably not maintain two jobs in the future (T. 62) and wife testified that he told her recently that he was unhappy, tired overworked, and just needed a rest (T. 107).

The statement which appears several places in wife's brief that husband earns approximately $35,000.00 per year is not true. He has done no welding on the side since April, 1982 (T. 62) and there is no testimony in the record that he earns $10,000.00 a year on his second job. The only testimo

given was that in the last two or three years he has earned around $9,000.00 from his second job (T. 116). This amounts to between $3,000.00 to $4,500.00 per year, but will not continue in the future.

Wife has considerable work experience, including being a sales clerk at J. C. Penney's, working at a phone answering service, operating scales for a sugar beet company, driving truck for local farmers, and being an Avon Sales Representative for approximately 10 years (T. 14 & 15). She has also taken in sewing, ironing, and done baby-sitting (T. 117). She also types and has done this for the business (T. 117) and she has also kept books for the business (T. 134).

Wife underwent stomach surgery in 1972 (T. 118) and again in 1975 (T. 119), and had a hysterectomy somewhere between 1972 and 1975 (T. 120). She has not been hospitalized since that time except that she was in the hospital overnight as the result of a minor automobile accident a year ago (T. 17).

Wife claims she was advised in 1979 that she would need another stomach operation (T. 159). She has never had the recommended surgery (T. 159). In response to her counsel's leading question, wife testified that she is on a liquid diet (T. 121) but then testified that she eats potatoes, gravy, soup, and sometimes beef (T. 121 & 152). She also stated that she needs one deep freeze for her meat and one for her vegetables (T. 151). She stated she has no health problems

other than her stomach condition (T. 124). Since her surgery she has been physically active and has played baseball, softball, rides bicycles and horses, and raises a large garden each summer (T. 18). The trial judge found that she is an employable person and that most people with her health problems work (R. 214).

The assets of the parties at the time of the trial consisted of the following:

(a) A home in Hooper, Utah, situated on less than one acre of land (T. 24) on which there is also an old, small uninhabitable house and a building which husband has used as a welding shop (T. 25 & 26). Husband's estimate of the value of said real estate is $69,500.00, which is based on an appraisal made of the property (T. 27 and R. 27). There is a mortgage on said property of $7,300.00 (T. 29), leaving an equity based on husband's valuation of $62,200.00, with mortgage payments of $205.00 per month. Wife originally listed the real property on her schedule of assets at a value of $69,500.00 (R. 29) but thereafter testified that she felt it was worth less than that, probably $50,000.00 to $55,000.00 (T. 128). She did

not have the property appraised.

(b) Household furniture and furnishings, including major appliances consisting of three refrigerators, three deep freezes, four television sets, a microwave oven, a washer, dryer, and four sewing machines (T. 153, 30, & 31). Husband estimates the value of the furnishings at approximately $5,000.00 (T. 31) and wife estimates their value at $600.00 (T. 153).

(c) A 1967 Ford, a 1971 Dodge Colt, and a 1946 GMC pickup truck. Husband estimates the value of the Ford to be $400.00, the Colt $500.00 and the GMC pickup truck $100.00 (T. 31 & 32). Wife estimates the value of the 1967 Ford at $200.00 (T. 150) and the Colt at $100.00 (R. 29).

(d) A 1968 Ford pickup truck which husband estimates to be worth $800.00 (T. 32) and wife claims its value is $2,500 (R. 29).

(e) A 1971 Camper which both parties value at $500.00 (T. 38 and 133).

(f) Welding equipment and tools which husband acquired with money he earned working evenings after getting off his job at Hill Field

(T. 33). He had an appraisal of the welding equipment from Whitmore Oxygen Company of $3,155.00 (R. 19 & 20 and T. 6) and he has additional miscellaneous welding items which were not appraised which he values at about $500.00 (T. 33). He also has hand and power tools which he values at $200.00 (T. 35). Wife estimates the value of the welding equipment and tools at $39,216.00 (T. 134 & R. 29). Wife has not had the welding equipment or tools appraised and states that her estimate is based upon what she thinks it would cost to replace the equipment (T. 156).

(g) Lawn and garden tools, including rototiller and riding lawn mower which husband values at $775.00 (T. 35 & 36 and R. 21).

(h) Husband has firearms which he values at $400.00 (T. 37 and R. 21).

(i) Scrap metal which husband values at $500.00 (T. 38 and R. 21).

(j) Horseshoeing equipment which husband values at $100.00 (T. 38).

(k) Wife claims husband is building a fifth-wheel utility trailer with a value of $3,500.00 (T. 133). Husband testified

this was built for his brother (T. 73) and the trial court made no disposition of it in the divorce decree.

(l) Husband has accrued civil service retirement benefits at Hill Air Force Base in the sum of approximately $16,000.00 (T. 40 and Plaintiff's Exhibit 4).

(m) At the time of their separation, the parties had a 1972 Suzuki motorcycle but it was stolen during the pendency of the divorce (T. 173).

Husband claimed mental cruelty as grounds for divorce (T. 19), testifying that wife discriminated between his family and her's (T. 19); that she discouraged their children from being involved with his family and attempted to turn them against husband (T. 19 & 21); that she was domineering, bossy, and had to have everything her way; that her maiden name was Wright and she told her husband she was Wright, and was born Wright, and would always be Wright (right), meaning she was never wrong (T. 20); that she frequently refused to have a sexual relationship with her husband, sometimes claiming that she was sick, although she was well enough to do other things, including getting her hair done, or going to town, or taking a trip (T. 22); that she physically abused him by hitting him and tearing the shirt off his back, although he did not strike her (T. 23 & 24). After losing his affection

for his wife, he developed an interest in another woman (T. 23) with whom he openly associated, even in the presence of his children (T. 98). Wife spent much of the trial testifying of husband's association with "the other woman".

Wife told husband she did not intend to work and that he would have to support her the rest of his life (T. 19 & 158), but thereafter testified that she recognized that it would be necessary for her to be employed (T. 158).

ARGUMENT

POINT I

EACH PARTY TREATED THE OTHER CRUELLY AND THE COURT DID NOT ABUSE ITS DISCRETION IN GRANTING A DECREE OF DIVORCE TO EACH.

Husband does not dispute the court's decision that wife is entitled to a decree of divorce because of his romantic activities with another woman. There is, however, ample evidence in the record to establish that the wife is not faultless in this marriage and that she has been guilty of cruel treatment, giving husband grounds for divorce. In addition to her misconduct testified to by husband and set forth above in the facts, the court correctly found that the wife's entire life centered around the children and that when decisions had to be made, wife always sided with the children and against husband (R. 210). Her preference for the children over her husband was made very clear at the trial when she testified that many of the husband's personal

things should go to the children, rather than to him. This included his tools (T. 136), his guns (T. 137), the camper (T. 155), his movie equipment (T. 162), his leather working tools (T. 163), and his welding equipment (T. 164).

Although the court stated that the cause of the divorce was the wife's reaction to the discovery of husband's clandestine activity, the court did not find that this was the grounds for the divorce (R. 211). The court in a lengthy and well reasoned bench ruling explained his viewpoint and observation of the marital problems and concluded that the wife could probably have saved the marriage had she reacted differently to the discovery of her husband's romantic activities, and had there been early marriage counseling (See Bench Ruling R. 209-212).

Respondent husband submits that the evidence establishes that wife is at least equally, if not more, at fault in this marriage. Should the court decide, however, that the cruelty of husband has been greater than that of wife, this does not preclude the granting of a decree of divorce to each party. Appellant's argument that the case of Mullins v. Mullins, 26 U 2d 82, 485 P2d 663, requires that the court must find each party equally at fault in order to grant a decree of divorce to each is not true. In that case the court stated:

> "There seems to be nothing in our statute or in logic that would prevent a dissolution of the marriage by granting a divorce to both, where the facts fault each equally as respect to grounds therefor, -- if such procedure would make anybody happy."

This language is merely permissive and indicates that the court may grant a decree to each party if their fault is equal, but does not require that the fault be equal in order to grant a decree to each. The court goes on to state:

> "Whether one or the other or both should be given a divorce should be left to the sound discretion of the trial court based on the evidence adduced."

In most cases, there is misconduct on the part of both parties, but in very few, if any, is the misconduct of each party exactly equal. To require such a finding would preclude the granting of a divorce decree to each party in substantially every case. The recognition of this concept is set forth in the Utah case of Hendricks v. Hendricks, 123 U 178, 257 P2d 366, wherein the court stated:

> "To affirm that a guilty spouse is never entitled to a divorce is a position difficult to to apply to the facts of life. It is seldom, perhaps never, that any wholly innocent party seeks a divorce against one who is wholly guilty. Awareness of this fact and the giving of attention to the social implications of divorce has given rise to various exceptions and limitations on the doctrine of recrimination."

The language of the Hendricks case quoted by Appellant to the effect that "the trial court would best

perform its function in the administration of justice by determining which party was least at fault, granting a divorce, and adjusting their rights" is not mandatory and still clearly leaves the discretion to the trial court.

The appropriate concept is recognized by the Supreme Court of Oklahoma in the case of Mackey v. Mackey, 420 P2d 516, wherein the Court stated:

> "1. Our statute, 12 O.S.1961, Sec. 1275, providing that where the parties appear to be in equal wrong, a divorce shall be granted to both parties, is no proscription against granting a divorce to both parties where both ask for a divorce and the evidence shows both are at fault, although one was more in the wrong than the other."

See also Izatt v. Izatt, Utah 627 P2d 49 (1981).

In the Utah case of McKean v. McKean, 544 P2d 1238 (1975), the court granted a decree of divorce to each of the parties, and on appeal, the wife claimed that the divorce should have been awarded to her alone. The trial court made no findings that the parties were equally at fault and the Supreme Court stated:

> "We have carefully reviewed the record in this case and conclude that the record supports the court's finding that each of the parties were entitled to a divorce."

POINT II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DIVIDING THE ASSETS OF THE PARTIES OR IN ITS AWARD OF ALIMONY TO APPELLANT.

Respondent has a difficult time determing what is

meant by Appellant's QUESTION OF LAW #2. Appellant quotes a paragraph from the case of Gramme v. Gramme, Utah, 587 P2d 1 (1979) regarding the criteria in determining a reasonable award for support and maintenance, but does not indicate where in she feels the trial court was in error. It is not known whether she objects to the division of assets ordered by the court, or merely to the alimony award.

In the case of Stone v. Stone, 19 Utah 2d 378, 431 P2d 802 (1967) this court stated:

> "In reviewing the trial court's order in divorce proceedings there are certain well established principles to be borne in mind. The findings and order are endowed with a presumption of validity, and the burden is upon the appellant to show they are in error. Even though our constitutional provision, Section 9 of Article VIII, states that in equity cases this court may review the facts, we nevertheless take into account the advantaged positition of the trial judge. Accordingly, we recognize that it is his prerogative to judge the credibility of the witnesses, and in case of conflict, we assume that the trial court believed the evidence which supports the findings. We review the whole evidence in the light most favorable to them; and we will not disturb them merely because this court might have viewed the matter differently, but only if the evidence clearly preponderates against the findings."

The wife has not borne the burden of overcoming the presumption of validity of the court's finding and order. On the basis of values established by husband's testimony, the wife was awarded property worth approximately $40,100.00, consisting of the home $34,100.00, furniture $5,000.00, 1967 Ford $400.00, 1971 Dodge Colt $500.00, 1946 GMC pickup truck $100.

husband was awarded property worth approximately $34,150.00, consisting of equity in the home $28,100.00, 1968 Ford pickup truck $800.00, welding equipment $3,550.00, hand and power tools $200.00, firearms $400.00, camper $500.00, miscellaneous scrap metal $500.00, and horseshoe equipment $100.00.

The significant differences in estimated values of assets consist of the tools and equipment, the 1968 Ford pickup truck, and the household furniture. The husband's estimate of the value of the welding equipment and tools is based primarily upon an appraisal made by an experienced and competent welding equipment appraiser and dealer. The wife's inflated estimate of $39,216.00 was based on her personal opinion of the replacement cost of the equipment, notwithstanding that she has had no experience as a welder.

Her estimate that the value of the 1968 Ford pickup truck is $2,500.00 is also grossly inflated when it is recognized that this truck is 15 years old and she estimated its value to be more than 12 times greater than the value she placed on their one year older 1967 Ford automobile.

Her estimate of the value of the household furniture at $600.00 is unrealistically low when it is recognized that the appliances alone include three refrigerators, three deep freezes, four television sets, a microwave oven, a washer, dryer, and four sewing machines.

The fact that the family home is to be sold in three

years and the wife to receive $6,000.00 more of the proceeds than does the husband, is not inequitable to the wife. It should be remembered that the children of the parties are all raised and this is by far the most substantial asset of the parties. The only fair way the parties can share in the assets is for the home to be sold and the court treated the wife more than fair in delaying the sale for three years. In most divorce cases, the husband is entitled to his equity in the home at the time the youngest child reaches majority.

The court dealt equitably with the wife regarding the civil service retirement benefits, holding in substance that she should receive one-half of those benefits which accrued during the marriage pursuant to the formula set forth in the recent case of Woodward v. Woodward.

The award of alimony to wife is fair and equitable. For three months after the trial date, she is to receive approximately $695.00 per month, consisting of $150.00 per month temporary alimony, $205.00 per month house payment, and utility payments which she testified total $340.00 per month (R. 7). For the next three years, she is to receive alimony in the form of her house payment of $205.00 per month, and thereafter she receives $100.00 per month permanently. This is more than fair to the wife in view of the husband's net monthly income of $1,159.68 (R. 24) and his own monthly

living expenses of $933.00 per month, including $273.00 per month payments on debts totalling $2,000.00 (R. 24 & 25).

The trial court took into consideration the need the wife claims to additional stomach surgery when he ordered that the decree of divorce should not become final for three months to enable the wife to take advantage of husband's group medical insurance coverage through his employment, and the granting of $695.00 per month financial assistance to her for those three months. Although the wife claims she was diagnosed as needing this surgery four years ago, she has apparently never been sufficiently ill to require that she obtain the surgery. To the date of this brief, she has still not had the surgery. Notwithstanding her testimony that she is on a liquid diet, she stated that she eats potatoes, gravy, soup, and sometimes meat, and that she has need for at least two deep freezes in which to store her meat and vegetables (T. 151). Her physical activities of playing softball, baseball, bicycling, riding horses, coaching, unloading blocks, and gardening, all raise question as to the validity of her alleged health problems. The trial court was correct in finding that she is an employable person and that most people with this kind of health condition are able to work. Wife recognizes this and testified that she has been seeking employment (T. 158).

With wife's past work experience, she should be able to obtain employment and upon sale of the family home in three years, she will have a substantial sum with which to remake her life.

The trial court met well its responsibility set forth in Wilson v. Wilson, 5 U 2d 79, 296 P2d 977 (1956), wherein it is stated:

> "The court's responsibility is to endeavor to provide a just and equitable adjustment of their ecomonic resources so that the parties can re-construct their lives on a happy and useful basis."

CONCLUSION

The trial court was justified in granting a decree of divorce to each party against the other, and made a fair and equitable award of the property of the parties, together with reasonable provision for the maintenance of the wife under the existing circumstances.

The judgment and decree of the trial court should therefore be affirmed.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that on this 20th day of May, 1983, I mailed two true and correct copies of the above and foregoing Brief of Respondent, by placing the same in the United States Mail, postage prepaid, and addressed to the following:

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