

1964

# Maxfield C. Whitehead v. Anna Shaw Whitehead : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

FILED

AUG 24 1964

MAXFIELD C. WHITEHEAD,

*Plaintiff-Appellant,*

v.

ANNA SHAW WHITEHEAD,

*Defendant-Respondent.*

Clerk, Supreme Court, Utah

Case No.

10064

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RESPONDENT'S BRIEF

Appeal from the Judgment of the Third District  
Court for Salt Lake County, Utah.  
Honorable Merrill C. Faux, Judge.

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RESPONDENT'S BRIEF

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STATEMENT OF FACT

It is necessary for defendant to set forth an additional statement of facts as the plaintiff's statement does not set forth the facts as the trial court found them and upon which the trial court based its decision.

The plaintiff introduced in evidence Exhibit P-1 contending that it was a financial statement of his assets and liabilities as of December 31, 1957. The plaintiff thereafter introduced in evidence Exhibit 2-P, which he contended shows the assets and liabilities of the plaintiff as of December 31, 1961. From reading the record and from the findings of fact and conclusions of law as found by the trial

court, Exhibit P-2 introduced by the plaintiff was totally unreliable and found not to reflect the plaintiff's true net worth (see R-56, 57, 58) and further did not contain a complete statement of the plaintiff's assets. R-57. In this regard it was defendant's contention at the trial, and the trial court found that the plaintiff was purposely attempting to conceal his assets in order to create the impression that during the marriage of the parties the plaintiff's net asset position had decreased, whereas in truth and fact he had actually increased his net worth during the marriage. See R-56, 57, 58. This is particularly borne out by the testimony of the plaintiff on cross examination, wherein he was forced to admit that he had, prior to the trial, violated the order of the court, and had disposed of property which the court had restrained him from selling. See R-121, 122, 123. Further, the plaintiff refused to disclose at the time of trial, by evasive answers, the amount of King Oil Company stock he possessed. It was only after the trial court admonished the plaintiff that the plaintiff, subsequent to the trial, furnished the court with a record of the King Oil Company stock purchased during the marriage. Said stock, plaintiff contended, was held in the name of his children. See R-125, also letter of plaintiff's counsel dated February 5, 1963, R-119, 120.

The parties were married on the 27th of December, 1957, and separated on or about the latter part of April, 1962.

The defendant introduced in evidence Exhibit 4-D, which is a financial statement of the plaintiff prepared by the plaintiff and his attorney showing the assets and liabilities as of October 1, 1960, and which shows the plaintiff as having a net worth of \$125,950 exclusive of the 30,000 shares of King Oil Company stock. Further, the testimony and evidence shows that during the period of the marriage from 1957 to and including 1961 the defendant wife was working as a school teacher and contributed to the marriage her earnings in the sum of \$23,082.78. During this same period of time, the plaintiff husband showed earnings and losses as follows: 1957—loss from business \$3,136.31; earnings from rental property \$506.57. 1958—earnings \$63.20 from Utah Power & Light Co.; \$43.75 from Don M. and Garn G. Christensen; \$160.00 from Maxco, Inc.; \$638.00 from his contracting business; and a loss of \$746.68 from other sales of stocks and property. 1959—earnings from business \$1,748.43; loss from stock manipulations and other sales \$557.24. 1960—income from Utah Power & Light Co. \$3,868.92; miscellaneous earnings \$685.85. 1961—earnings from Utah Power & Light Co. \$3,756.09; additional business income \$593.82; a loss of \$1,398.28, or a net income of \$2,951.64 for the year 1961. See R-57 and Exhibits 10, 11, 3-D and 6-D.

During this same period of time the court found from the testimony of the plaintiff that he

paid a total of \$5,645.65 as support money to his former wife for the support and maintenance of his three minor children by a prior marriage. R-57.

During the period of the marriage the defendant bought the groceries and paid the utilities. R-89. Further, the defendant made payments on the 1955 Mercury automobile of some \$680.00 (R-90) and also paid for some of the repairs on the 1955 Mercury. R-91. Further, the defendant planted the shrubs and took care of the landscaping of the home. R-93. Further, the furniture which was purchased by the plaintiff prior to the marriage and which was being paid for during the marriage was left in plaintiff's possession even though payments to the extent of \$450.00 were made by defendant. See R-117.

During the period of the marriage the plaintiff was buying and selling property, both real and personal, and was delving in the stock market, and was substantially free from any financial obligations of the marriage, and was able to handle his property in about any manner he saw fit. R-81 to 85, R-119, 121, 122, 125. As was generally testified to by the defendant during the time that plaintiff was free to engage in these activities she was paying the utilities, buying the groceries, taking care of any cleaning expenses, care of the plaintiff's dog, purchasing medicine, paying for the shrubs and landscaping, the plaintiff's personal expenses, the car insurance, some gas and car main-

tenance, general household expenses, repair of washer, television, purchase of newspaper, and even carrying the plaintiff on the defendant's hospital and surgical insurance. See R-145, 149, 162, 54-58.

The only thing the defendant took from the marriage was approximately \$800.00 in savings (R-146) and the miscellaneous items of personal property which she brought into the marriage, or which were given to her as gifts, all as more particularly set forth on Exhibit 7-D, said Exhibit being an itemization of the items which defendant was permitted to take from the home at the time she left. During the defendant's testimony, a dollar value was placed upon those items which were accumulated during the marriage and which the defendant took with her, and the said dollar value is set opposite the items in pencil figures on said Exhibit 7-D and which items total \$104.10. The balance of the items were her personal property prior to the marriage or given to her by her parents or friends.

## ARGUMENT

### POINT I AND II.

THE TRIAL COURT DID NOT ERR IN ENTERING ITS SUPPLEMENTAL FINDINGS OF FACT AND IN DENYING PLAINTIFF'S MOTION FOR A NEW TRIAL; AND FURTHER THE TRIAL COURT DID NOT ERR IN AWARDING DEFENDANT AS ALIMONY AND PROPERTY SETTLEMENT THE SUM OF \$10,000.00.

Point I and Point II of plaintiff's brief will be



argued together as they pertain to the same subject matter.

It was and is the defendant's contention that the plaintiff's Exhibit P-2, alleging the assets and liabilities of the plaintiff as of December 31, 1961, was wholly false and did not reflect a true statement of the plaintiff's net worth. The court found that this was the case, and in paragraph 5 of the findings of fact and conclusions of law the court so stated that said financial statement did not reflect a true statement of the plaintiff's net worth, and further did not reflect the purchase of 30,000 shares of King Oil Company stock purchased during the marriage and which was an asset of the plaintiff. R-57.

With reference to plaintiff's financial statement, Exhibit P-2, plaintiff has attempted by said Exhibit to show that his assets are considerably below that which he possessed at the time of his marriage to the defendant, to-wit, December 31, 1957. The court should compare this with the financial statement, Exhibit 4-D, which the plaintiff and his attorney prepared, and which shows the plaintiff's financial condition as of October 1, 1960. According to the financial statement of October 1, 1960, Exhibit 4-D, the plaintiff shows a net worth of \$125,950.00 as compared with \$111,759.37 which he claimed as of December 31, 1957. Actually during this period of time the plaintiff was increasing his assets while being supported by his wife, the de-

fendant. Between October 1, 1960, and December 31, 1961, plaintiff attempts to show a loss in total net worth in excess of \$79,967.03. A slight perusal of the plaintiff's income tax returns for 1960 and 1961 shows that these were two years in which he made more money than he did in 1957, 1958 and 1959. See Exhibits 4-D, 10, 11, 9, 3-D.

It is obvious that the plaintiff by his balance sheet and financial statement of December 31, 1961, has attempted to place values upon his property which would be consistent with the purpose for which he has submitted his financial statement, to-wit, to attempt to show that the defendant has bankrupt him. However, it is very obvious that he has purposely on his 1961 financial statement set the values as low as he thought he could reasonably justify in order to accomplish the purpose he intended. Compare the values of the real estate on plaintiff's 1961 financial statement with the values of the real estate on plaintiff's 1960 financial statement, Exhibit 4-D. For example, the house and lot at 578 East 3610 South, plaintiff has listed the home at a value of \$15,800. The defendant testified that the reasonable fair market value of said home was \$16,000 with a balance on a first mortgage of \$8,200, which would leave approximately \$8,000 equity. Whereas, the plaintiff lists an equity of \$5,494.26. Compare again item 4 on Exhibit 4-D, Schedule "B", wherein the plaintiff lists six building lots at a value of \$1,600 each and com-

pare the same with Schedule A-1 on the plaintiff's Exhibit 2-P, where he lists five building lots in Maxfield Subdivision at a value of \$5,500 or \$1,100 each. Somehow or other said lots suddenly lost \$500 in value per lot. Compare again item 5 on Schedule B of Exhibit 4-D, the Schedule A-1 of Exhibit 2-P, the two building lots on LaDoor Drive. On the 1960 schedule plaintiff lists them at a value of \$2,400 each. On plaintiff's 1961 schedule he lists them at a value of \$800.00 each. The plaintiff's purpose is obvious in this particular.

During the period of the marriage the plaintiff paid to his former wife for the support and maintenance of his former wife and minor children by his former marriage the sum of \$5,645.65. R. 104. It is obvious and the trial court so found that the plaintiff, Mr. Whitehead, was supported and maintained by his wife, the defendant, during the period of his marriage, leaving the plaintiff free to buy and sell real and personal property, stocks, etc., as he saw fit; all this at the expense of being supported by his wife. A glance at the income tax returns of plaintiff and defendant, as shown by the Federal tax returns, shows that Mr. Whitehead had total net earnings during this period of \$8,855.87 while Mrs. Whitehead, the defendant, had total net earnings during said period of \$23,082.78. After deducting the \$5,645.65 that Mr. Whitehead paid for support money to his former family, it is obvious that if Mrs. Whitehead had not been sup-

porting him and buying groceries and taking care of their obligations, that said support money would not have been paid.

On cross examination of the plaintiff, the defendant attempted to make the plaintiff answer with respect to the King Oil Company stock. After the court admonished the plaintiff, his attorney agreed to produce a statement of the number of shares of King Oil Company stock purchased by the plaintiff during the marriage; and on February 5, 1963, nearly two weeks after the trial, a list of said stock was submitted to the court and to counsel for defendant. See the plaintiff's letter dated February 5, 1963, and the schedule attached thereto showing 28,000 shares of King Oil Company stock. Compare this with the 2,000 shares of King Oil Company stock which the plaintiff lists on his financial statement, Exhibit 2-P.

The defendant submits that the plaintiff has not come into this court in an honest attempt to set forth the property of the parties, but rather to attempt to mislead and confuse the court as to the assets which he possesses. The defendant at R-137, 138, 139, sets forth a list of the property which the defendant claims was accumulated during the marriage and in which she claims an interest. A quick comparison of values on the various balance sheets, Exhibits 2-P, 1-P and 4-D, shows a value in excess of \$70,000. The \$10,000 awarded by the court to the defendant is minor in comparison.

Certainly in view of the fact that the plaintiff has not come forward with clean hands and presented an honest financial statement, the testimony of the defendant should be accepted by the court as undisputed evidence of the accumulated marital property. The plaintiff's attitude with respect to the orders of the court was amply displayed when he admitted without compunction that he sold 200 shares of Investment Resources contrary to the order of the court restraining him from doing so prior to the trial. See R-121, 122, 123. However, until the plaintiff was confronted with the evidence showing said sale, to-wit, Exhibit 5-D, the plaintiff could not seem to remember what had happened to said stock.

The plaintiff in a magnanimous gesture indicated that the defendant could have the 1955 Mercury automobile, which had a fair market value of \$150.00 and was not in useable condition because the transmission was out of order.

Even though these parties were only married in December 1957, the plaintiff cannot walk out of this marriage with all of the benefits and accumulations without making some equitable adjustment to the defendant, who has maintained and supported him and the household during the period of their marriage. The statutory provision which is pertinent to this situation is Section 30-3-5, Utah Code Annotated, 1953, as amended, which reads as follows:

“When a decree of divorce is made, the court may make such orders in relation to the children, property and parties and the maintenance of the parties and children as may be equitable; \* \* \*”

This Court has in a number of cases passed on the question of division of property between the parties. See *Foreman v. Foreman*, 111 Utah 72, 176 P 2d 144; *Pinion v. Pinion*, 92 Utah 255, 67 P 2d 265; *Lundgreen v. Lundgreen*, 112 Utah 31, 184 P 2d 670; *Willy v. Willy*, 113 Utah 391, 195 P 2d 743; *Griffin v. Griffin*, 18 Utah 98, 55 P. 84; *Porter v. Porter*, 109 Utah 444, 166 P 2d 513.

The gist of all of these decisions is to the effect that the trial court should consider all of the circumstances of the parties, the amount of property owned by each of them; whether said property was accumulated before the marriage or after the marriage; the ability and opportunity of each to earn money; the financial condition and necessity of each party; the health of the parties; the standard of living of the parties; the duration of the marriage; what the wife gave up by way of the marriage, and what age they were when they were married.

All of these factors taken into consideration resolve themselves to the point that the court in effect should make a fair and equitable distribution considering what the wife has put into as well as what the husband has brought into the marriage.

In the case at bar where the defendant has in the four years of the marriage worked and earned a substantial income, all of which has been contributed to the benefit of both parties; and whereas the plaintiff has used his own property for purposes of investment and reinvestment, and to gain a material benefit from those investments, it would only appear proper and fair that the defendant wife should be entitled to a fair share of those assets and particularly in a case such as this one where the plaintiff has attempted to misrepresent his assets to the court.

The plaintiff has attempted in his testimony to state that the defendant did entirely as she pleased with her own income and made no accounting whatsoever to him or contributed anything to the marriage by reason of her income, and in this regard note should be taken of the plaintiff's testimony with respect to the long vacation periods which the plaintiff contends the defendant engaged in as compared to the testimony of the defendant, wherein she stated her visitation consisted of four or five days a year at the most in visiting her parents or her grandfather, and on one occasion as much perhaps as twelve or thirteen days. See R-148. It is obvious the trial court did not believe the plaintiff's testimony in this regard. See R-57, par. 6.

The decision of the trial judge in this case should be upheld unless the plaintiff can show a clear abuse of discretion. In the case of *Wilson v.*

*Wilson*, 5 Utah 2d 79, page 84, 296 P 2d 977, the court stated:

“It is true as defendant contends that a divorce proceeding is equitable and that it is within the prerogative of this court to review the evidence and to substitute its judgment for that of the trial court under proper circumstances. More recent pronouncements of this court and a policy to which we adhere are to the effect that the trial judge has considerable latitude and discrimination in such matters, and that his judgment should not be changed lightly, and in fact, not at all, unless it were such a manifest injustice or inequity as to indicate a clear abuse of discretion.”

See also *McDonald v. McDonald*, 120 Utah 573, 263 P 2d 1066; *Lawlor v. Lawlor*, 240 P 2d 271, 121 Utah 201.

In Point I of the plaintiff's argument, the plaintiff states the court was confused with respect to the purchase of the King Oil Company stock. The plaintiff in his letter of February 5th states that the 28,000 shares of King Oil Company stock was purchased in January, February, March and April. Since the parties separated sometime in April, 1962, the stock would be included as a part of the marital assets, even though it was purchased by funds from the sale of other properties. Note, however, the plaintiff's testimony at page 77 of the record wherein he states:

“Q. And how many shares do you have in King Oil Company?



A. Approximately 8,000 that was listed on the deposition that was taken, whatever that is, and then there is some more in the safe deposit box.

Q. Now this in the safe deposit box, in whose name is that stock?

A. It is in my name.

Q. Has it been endorsed?

A. It is sealed up in an envelope addressed to my children.

Q. And when did you —

A. Stamped envelope.

Q. And when did you purchase that stock?

A. About the same time, the first part of this year, and the last part of last year, and the first part of this year.

\* \* \* \*

Q. That purchased in the early part of '62 or the latter part of '61 is that correct?

A. That is correct." (R-77-78)

The plaintiff's complaint about the trial court's finding with respect to the 28,000 shares of the King Oil Company stock as not being included in the financial report of the plaintiff dated December 31, 1961, is wholly unjustified. Reference to the above testimony of the plaintiff should be noted in this respect in which the plaintiff by his own testimony sets forth the stock as being purchased in 1961 and 1962. The fact that the plaintiff misrepresented

the facts and his refusal to disclose the facts certainly would justify the trial court finding against the plaintiff in every particular possible wherein the plaintiff has not made a complete disclosure to the court. It should be noted that the letter of February 5, 1963, was not submitted to the court until sometime after the actual trial. Certainly the plaintiff cannot complain if there were any error with respect to the actual purchase date and whether or not they were included in a particular financial statement of the plaintiff.

It is respectfully submitted that the decision of the trial court should be affirmed.

Respectfully submitted,

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