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Maxfield C. Whitehead v. Anna Shaw Whitehead : Appellant's Petition for Rehearing and Brief on Petition for Rehearing

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

MAXFIELD C. WHITEHEAD,
Plaintiff-Appellant,
vs.
ANNA SHAW WHITEHEAD,
Defendant-Respondent.

Case No.
10064

APPELLANT'S PETITION FOR REHEARING AND BRIEF ON PETITION FOR REHEARING

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

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PETITION FOR REHEARING

Appellant respectfully petitions this court for an order granting rehearing in the above case.

This petition is based upon the following points whereby it asserts the court has erred. Each point is hereinafter argued in the brief annexed hereto and made a part of this petition:

POINT I

THE COURT MISTAKENLY ASSUMED THAT THE EARNINGS OF THE DEFENDANT EXCEEDED THOSE OF THE PLAINTIFF AND THAT DEFENDANT THEREFORE SUPPORTED THE PLAINTIFF AND HIS FORMER FAMILY.

POINT II

THE FACTS SHOWN BY THE EVIDENCE WORK A MANIFEST INEQUITY.

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BRIEF ON PETITION FOR REHEARING

POINT I

THE COURT MISTAKENLY ASSUMED THAT THE EARNINGS OF THE DEFENDANT EXCEEDED THOSE OF THE PLAINTIFF AND THAT DEFENDANT THEREFORE SUPPORTED THE PLAINTIFF AND HIS FORMER FAMILY.

In its opinion this court stated as follows:

> "According to their income tax returns, during the period of the marriage, the Plaintiff had total earnings of around $9,000.00 and contributed a total of about $5,500.00 to the support of his family, whereas, the Defendant had net income of about $23,000.00, all of which she spent on family living expenses, so that she was, in effect, helping to support the Plaintiff and his former family."

The above language seems to indicate that the court thought that the Defendant's income was so much greater than the Plaintiffs that her claims and contentions as to spending all of her income to support Plaintiff were correct. This is not so. According to the income tax returns of the parties (Exhibit D-3) the Defendant had a total gross

income for the four years of marriage (1958, 1959, 1960 and 1961) of $20,002.78. After deducting the amounts withheld for state and federal income tax and for F.I.C.A. the Defendant had a net income of $17,205.33 during the period of the marriage. Plaintiff's net income for the same period after business expenses but before deductions for capital gains, depreciation and deductions for tax loss carry over was $36,488.67. It is thus apparent that the Plaintiff's income far exceeded the Defendants and belief of the Defendants contention that she supported the Plaintiff is wholly erroneous.

Defendant further claimed that she had spent her money on the living expenses of the parties. However, her checks entered in evidence to substantiate this claim (Exhibit D-8) totalled $4,008.40 and included her own insurance premium payments, together with payments made directly to the Plaintiff, which, defendant admitted, were repaid to her by the Plaintiff. (R. 79, 91, 92, 93). Defendant has never explained the manner in which she spent the balance of $13,196.93 either during or after the marriage and the Plaintiff neither requested nor did he require her to account for her money during the marriage. Each of the parties had their separate income and their separate bank accounts as set forth in Appellant's Brief, with an agreement and

understanding from the day of the marriage as to which household expenses each of the parties would pay.

POINT II

THE FACTS SHOWN BY THE EVIDENCE WORK A MANIFEST INEQUITY.

In its opinion the Court stated that the decision of the trial court should not change unless evidence indicated a manifest injustice. The facts here show that the award of the trial court was made without consideration of the actual income of the parties, their ability and opportunity to earn money, how the property of the Plaintiff was acquired, and the relative positions of the parties at the time of their separation. From these facts as shown by the evidence, it would appear that an award of $10,000.00 as alimony is an extreme award, not based upon either fact or equity, and is, as was stated by Chief Justice Henroid in his dissenting opinion, "an award out of proportion to the letter and spirit and our statute governing the situation". See Title 30-3-3, Utah Code Annotated, 1953.

Under the facts herein, as distinguished from the facts in the case of *Lawlor vs. Lawlor*, 121, Ut. 201, 240 P2d 271 cited in the main opinion of this court, it would appear that the award of the trial court was not fairly sustained by the evidence.

CONCLUSION

We respectfully request that the petition for rehearing be granted and that upon the hearing thereof that this court reverse the judgment of the District Court below.

Respectfully submitted,

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