1983

Raymond E. Fogg v. Londa F. Fogg : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

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RAYMOND E. FOGG, :

Plaintiff-Appellant, :

vs. : Case No. 19004

LONDA F. FOGG, :

Defendant-Respondent. :

- -

BRIEF OF APPELLANT

- -

Appeal From The Judgment of the District Court, Third Judicial District, Salt Lake County, the Honorable Raymond S. Uno, Judge Pro Tem

- -

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IN THE SUPREME COURT OF THE STATE OF UTAH

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RAYMOND E. FOGG,

Plaintiff-Appellant,

vs.

LONDA F. FOGG

Defendant-Respondent.

Case No. 19004

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BRIEF OF APPELLANT

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STATEMENT OF THE NATURE OF THE CASE

The appellant Raymond E. Fogg appeals from a decree of divorce and distribution of marital assets entered in the District Court for the Third Judicial District, Salt Lake County, State of Utah, the Honorable Raymond S. Uno, Judge Pro Tem.

DISPOSITION IN THE COURT BELOW

The appellant Raymond E. Fogg, plaintiff below, filed a complaint for divorce and distribution of marital assets in the District Court of Salt Lake County on December 5, 1981. (R. 2). Trial was held in the same Court on May 2, 1982, the Honorable Raymond S Uno, Circuit Judge, sitting as District Judge Pro Tem. The appellant was granted a decree of divorce

which neither the appellant nor respondent contests. The Court, on the 6th day of January, 1983, signed the decree of divorce which was entered on the 10th day of January, 1983. A motion to amend the findings of fact and conclusions of law was filed (R. 101) but abandoned by the appellant. Notice of Appeal was duly filed on the 9th day of February, 1983.

RELIEF SOUGHT ON APPEAL

The appellant Raymond E. Fogg does not contest the decree of divorce, which was granted to the appellant in the instant case, but appeals only from so much of the decree of divorce as divided the marital estate of the parties and seeks reversal of the decree and remand for rehearing in the District Court.

STATEMENT OF FACTS

The appellant was awarded a decree of divorce from the respondent, the Court finding mental cruelty as the justifiable grounds. (R. 91). The appellant and respondent were married on February 14, 1975, in Salt Lake City, Utah, and no children were born as a result of the marriage. (R. 90, 91). The parties brought into the marriage property they had acquired prior to the time they got married, both parties being in their middle years. (T. 19, 20, 39, 40). The trial court awarded the appellant a 1977 Ford pickup truck with shell, a 1977 trailer, aluminum boat, and ther personal items. The

respondent was awarded a 280Z Datsun automobile, a vacation trailer having an equity of $2,800.00 and valued at $5,200.00, savings bonds and other personal items. (R. 96-98). The principal issue in dispute was the equity in a three-bedroom home located at 1243 West 600 South in Salt Lake City, Utah. The value of the home was appraised at $44,890.00, which was apparently accepted by the Court and not controverted in the evidence. (T. 8) (Defendant's Exhibit 1). The mortgage at the time of trial against the home was $11,243.00. (T. 12). The appellant brought the home into the marriage and at the time of the marriage the home had a value of $22,205.00. (T. 11). Appellant paid between $5,000 and $6,000 for additions to the home from his Navy pension (R. 20) and the respondent paid $8,000 towards the home out of funds that she brought into the marriage. (T. 8, 26). The respondent purchased a $7,500.00 plus value Datsun automobile (T. 13) which she paid for out of her funds and value from other vehicles. (T. 39). The appellant had a 1977 Ford truck which he had paid for with an old camper, and an old truck. (T. 44). The income of the two parties who work is approximately the same. (T. 44). Appellant works as a mail carrier and respondent is also employed making the same as appellant. The trial court awarded a judgment in the decree in favor of the respondent in the sum of $10,543.90 and gave the home to the appellant. The court

ordered that the appellant satisfy the judgment by paying the sum of $666.66 on January 5, 1983, and each and every month thereafter until January 5, 1984, or the sum of $7,999.92. On January 5, 1984, the entire balance on the obligation was to become due and payable. (R. 97). Interest was ordered payable on the judgment beginning July 5, 1983, at 12 percent per annum. (R. 97).

The hearing on the divorce and distribution of property was held on May 21, 1982. The appellant testified that after mortgage payment and other expenses he had remaining funds of $158.10 per month over his postal pay. (T. 22). Appellant also had a Navy pension of between $500 and $600 per month to which the respondent made no legal claim. (T. 23, 33). The American International Vacation Plan which the Court awarded to the respondent had an equity of $2,800.00 but the plan sold for and had a value of $5,200.00. (T. 31-32). The value of the home, less the value at the time of the marriage, subtracting the outstanding mortgage, the equity in the home at the time of the divorce was $11,455.00. The judgment of the Court in favor of the respondent in the sum of $10,543.90 plus interest is virtually the equity in the home that had been developed during the marriage to the respondent. The original minute entry made by the Court after the hearing on May 21, 1982, awarded an equity in the home to the respondent to be

[illegible] determined by the Court. (R. 17). On November 23, 1982, [illegible] Court made a subsequent minute entry based on a motion of respondent's counsel and awarded a judgment in favor of the respondent in the sum of $7,997.40 at 12 percent interest. (R. 80). There were letters and communications ex parte between counsel and the court subsequent to the minute entry. (R. 81-85). Counsel for the appellant in one letter to the Court (R. 83) made the following statement.

> "I am concerned about the projections made by Mr. Boyce that are beyond the record and trial matters that were had before the Court. I would hope the Court could find time for Mr. Boyce and I to meet with you to review these matters to see if they can't be resolved."

The minute entry also indicated that the value of the vacation program was still open for question. (R. 80). Thereafter, the Court entered the decree with the judgment previously mentioned contained therein. No additional opportunity was afforded counsel to have evidence presented to the record or to test the valuation communicated to the Court subsequent to the hearing of May 21, 1982.

ARGUMENT

POINT I

THE JUDGMENT ENTERED BY THE TRIAL COURT IN FAVOR OF THE RESPONDENT FOR THE EQUITY IN THE HOME OF THE PARTIES WAS IMPROPERLY ENTERED BECAUSE: (A) VALUATIONS ON THE ASSETS OF THE MARRIAGE WERE MADE EX PARTE TO THE COURT WHICH AFFECTED THE COURT'S JUDGMENT AND WERE NOT A PART OF THE RECORD WHICH DENIED APPELLANT DUE PROCESS OF LAW; (B) THE JUDGMENT RESULTED IN A DISPARATE AWARD TO THE RESPONDENT.

A. Valuations on The Assets of the Marriage Were Made Ex Parte to the Court Which Affected The Court's Judgment and Were Not a Part of the Record Which Denied Appellant Due Process of Law.

The evidence of record showed that the home in question was owned by the appellant prior to the marriage of the parties and that at the time of the marriage of the parties was valued at $22,205.00. (T. 11). The value of the home at the time of the trial was $44,890.00. (T. 8). The outstanding mortgage against the property was $11,230.00, leaving an equity in the home attributable to the marriage of the parties of $11,455.00. Subsequent to the marriage of the parties the home was put in joint names (T. 20) and both parties contributed to the remodeling and improvement of the home. The respondent contributed $8,000.00 in cash to the marriage which was utilized in part on the home. (T. 8). The appellant also contributed in excess of $6,000.00 for additions to the home, as well as paying the mortgage. (T. 20). Consequently, the

respective positions of the parties as to the appreciation of the equity during the marriage was approximately equal. If the equity in the home were divided equally the appellant would receive $5,227.50 as would the respondent. The trial court apparently initially believed that the respondent should receive out of the equity the amount of cash she contributed to the marriage and the minute entry entered on November 23, 1982, set the judgment for the respondent at $7,997.40. (R. 80). Subsequently, in the decree of divorce the court awarded respondent judgment against the appellant in the sum of $10,543.90. (R. 97). The monthly payout was set at $666.66 which would have been appropriate for a monthly payout of the original amount of the judgment entered in the Court's minute entry. However, the judgment then called for a "balloon" payment to become due and payable on the 5th of January, 1984. (R. 87). The balloon payment would be approximately $2,500.00. This was not contained in the minute entry and apparently bears no relationship to what was the evidence of record in the testimony of the parties or the proffered exhibits. In a letter that was sent by respondent's counsel to appellant's counsel and also to the trial judge and which was included in the record on appeal (R. 81, 82), it is stated that the equity in the home after subtracting the pre-marital equity and mortgage balance was $25,441.79. In reality, the equity is

$11,455.00. $44,890.00 less mortgage, $11,230, less valuation at the time of marriage. Consequently, the Court had before it valuation figures that were not a matter of record and had not been subjected to cross-examination or anaysis during the trial. Other information was also contained in the letter of respondent's counsel and it was asserted that respondent would settle for some $10,000. This figure appears to be the approximate figure the trial judge seized on in awarding respondent judgment. Counsel for the appellant wrote the court directly and protested the projections made by respondent's counsel that were "beyond the record and trial matters that were held before the court." (R. 83). Counsel also asserted the problems with the payout formula and the impact that anything different than the Court's minute entry would have on appellant. Appellant's counsel expressly requested that there be a hearing with the Court to have the matter resolved. (R. 84). No such hearing was forthcoming and the Court apparently entered its judgment based on matters outside the record.

It is Hornbook law that the trial court cannot determine matters not in evidence. See, Barber v. Flynn, 628 P.2d 1151 (Okla. 1981). Appellant has never had the opportunity to cross-examine or challenge the evidence submitted ex parte by the respondent in respondent's

communication of November 24, 1982. (R. 80-82). In State v. Lance, 23 Utah 2d 407, 464 P.2d 395 (1970), this Court considered a proceeding that involved an effort to deprive a mother of the guardianship of her children and to deprive her of parental rights. In reversing the trial court's action, the Court held that it denied due process of law for the trial court to consider a social file in making its judgment which was not a part of the record. Citing supporting authorities, 23 Utah 2d 414, n. 8, the Court remanded for a new hearing observing:

> In the instant action, the use of the social file was a denial of due process of law, since appellant had no opportunity to know, cross-examine, explain or rebut this secret evidence.

The holding of the Lance case is applicable to the circumstances of this case. There was no stipulation that the Court could reopen the trial and accept otherwise incompetent evidence. Further, the circumstances show that the appellant was clearly prejudiced by the new communications with the Court. Most recently, in Girard v. Appleby, ___ P.2d ___ (Utah, No. 17662, March 11, 1983), this Court held in a different context that a similar process was improper. The Court said:

> It lies within the sound discretion of the trial court to grant a motion to reopen for the purpose of taking additional testimony after the case has been submitted but prior to entry of

> judgment. The court should consider such a motion in light of all the circumstances and grant or deny it in the interest of fairness and substantial justice. However, no such discretion is afforded the court to reopen the case sua sponte. Preservation of the integrity of the adversarial system of conducting trials precludes the court from infringing upon counsel's role of advocacy. Counsel is entitled to control the presentation of evidence, and should there be a failure to present evidence on a claim at issue, it is generally viewed as a waiver of the claim. (Footnotes omitted).

It is, therefore, submitted that the Court should remand the matter to the trial court for additional hearing to determine whether the parties should be allowed to reopen and present additional evidence, or, in the alternative, whether the Court's judgment should be changed to reflect the evidence at trial as expressed in the Court's minute entry of November 23, 1982. (R. 80).

B. The Judgment Resulted in a Disparate Award to the Respondent.

It is respectfully submitted that the actions of the trial court in its decree awarding a judgment to the respondent in the sum of $10,543.90 and awarding a payout in excess of $666.00 per month awarded to the respondent a disproportionate share of the equity of the home. As noted above, the actual equity in the home that was attributable to the marriage of the parties was $11,455.00. The Court awarded a specific judgment in favor of the respondent of $10,543.90 with 12 percent

interest to commence July 5, 1983. The interest payment between the July period and the time for the January balloon payment would be approximately $265.00 and if carried for a period until appellant could obtain a loan to make a payout would completely consume the equity in the home attributable of the parties. (R. 83-84). Thus, the effect of the Court's judgment was the award on the equity in the home to the respondent. The other property awarded to the parties approximately balances out. There is no apparent justification for the exceptionally heavy award of the equity to the respondent. Appellant was granted the decree of divorce and there was no special fault attributable to the appellant. Respondent is employed earning an income equivalent to the appellants. This Court has noted that there is no fixed rule for determining the allocation of property. Hamilton v. Hamilton, 562 P.2d 235 (Utah 1978); Gramme v. Gramme, 587 P.2d 144 (Utah 1978); Fletcher v. Fletcher, 615 P.2d 1218 (Utah 1980). Rather, the award should be based upon the equities of the case with a view towards assisting the parties in reconstructing their lives. DeRose v. DeRose, 19 Utah 2d 77, 426 P.2d 221 (1967); Searle v. Searle, 522 P.2d 697 (Utah 1974); Reed v. Reed, 594 P.2d 871 (Utah 1979); Hacking v. Hacking, 620 P.2d 71 (Utah 1980). In Searle v. Searle, supra, relying upon McDonald v. McDonald, 120 Utah 573, 236 P.2d 1066

(1951), this Court observed that in making an equitable property settlement the following factors were appropriate for consideration:

> (a) the amount and kind of property owned by the parties; (b) the property accumulated during their marriage; (c) the ability of each to earn money; (d) the financial conditions and necessities of the parties; (e) the standard of living of the parties; (f) the health of the parties; (g) the duration of the marriage; (h) what the wife gave up by way of marriage; and (i) the age of the parties." 522 P.2d at 698.

Looking to the factors referred to in the McDonald decision, there are no special equities favoring one party over another. Therefore, it is submitted that the trial court erred in awarding the judgment in favor of the respondent which effectively consumes the equity in the home of the parties and which substantially favors the respondent over the appellant. This Court should reverse and require a new hearing, or, in the alternative, order that judgment be afforded the respondent only in the sum of $5,727.50, which would be one-half the equity in the home.

POINT II

THE TRIAL COURT SHOULD NOT HAVE AWARDED INTEREST ON THE JUDGMENT AND SHOULD HAVE ALLOWED APPELLANT TO PAY OUT ANY JUDGMENT IN EVEN INCREMENTS.

The trial court awarded 12 percent interest on the judgment given the respondent with the interest to commence on July 5, 1983. There is no justification of record to sustain

award of interest which, in effect, further extends the amount of the equitable interest in the home of the parties which was awarded to the respondent. If appellant failed to satisfy the judgment in accordance with the Court's direction, then interest might be appropriate but in the absence of any default on the part of the appellant, the award of interest is punitive. See Workman v. Workman, 652 P.2d 931 (Utah 1982), where the trial court had awarded interest payable to one party on the equity in a home but on appeal this court held no interest should be paid.

It is further submitted that by requiring the full amount of the judgment to become due and payable in January, 1984, thus requiring the appellant to make a balloon payment, the trial court acted inequitably. There is absolutely no evidence of record that the appellant has any assets, liquid or otherwise, that are expeditiously available to satisfy the judgment. The testimony of record showed that the appellant had only $158.10 out of his salary after making appropriate payments and satisfying expenses. The $666.66 payment as ordered by the Court would require the appellant to significantly adjust his life style and to borrow money or take money from his Navy pension, which was not the subject of any claim by the respondent. By requiring a balloon payment, the court has imposed a punitive obligation far beyond the economic

wherewithal of the appellant to meet the obligation. There is no showing of any need for the judgment to be satisfied by a lump sum payout. No testimony was offered at trial to show any particular need that the respondent had that would require such a special payment. The only way that appellant could effectively meet the balloon payout would be to borrow money at a substantial rate of interest which would further jeopardize the already difficult economic situation of the appellant. Although the trial court has considerable latitude and discretion in the disposition of property and the judgment should not be changed lightly, where a manifest injustice or inequity indicates a clear abuse of discretion, this Court will reverse. Pearson v. Pearson, 561 P.2d 1082 (Utah 1977). This Court should modify the judgment, if the Court determines the judgment is otherwise appropriate, to provide for no interest on the judgment and for a reasonable incremental payout. It is submitted that this could better be determined by remanding the matter to the trial court for further consideration.

POINT III

THE EFFECT OF THE TRIAL COURT'S AWARD WAS TO SIGNIFICANTLY INFRINGE UPON APPELLANT'S NAVY PENSION WHICH WAS IMPROPER AS A MATTER OF LAW AND WAS BEYOND ANY CLAIM MADE BY THE RESPONDENT.

The appellant, prior to his marriage to the respondent had completed a lengthy tour of service with the United States

... and had retired. (T. 20). The appellant's Navy pension ... relatively modest, being between $500 and $600 per month. (T. 33). The respondent made no claim to any part of appellant's pension in the pleadings and expressly rejected any claim to the pension at trial. (T. 32). Appellant retired from the Navy July 3, 1969 (T. 32) and the marriage of the parties occurred February 14, 1975. (R. 2). It was, therefore, improper for the trial court to enter in its decree any award to the respondent to any part of the appellant's pension either directly or indirectly.

In McCarty v. McCarty, 453 U.S. 210 (1981), the United States Supreme Court held that upon dissolution of a service member's marriage, federal law precluded the courts from dividing a service member's retirement pay pursuant to state divorce laws. The Court concluded that Congress had established a comprehensive military personnel program providing for retirement pay. The application of state property laws conflicted with the military retirement scheme which is designed to reward the retiree for his military service. The Court determined that conflicts between competing state and federal policies would impair the objectives of the federal program as a state decree could intrude upon the congressional direction. It is apparently because of the McCarty case that respondent's counsel correctly made no claim

to the appellant's pension. On February 8, 1982, Congress modified the effect of the McCarty decision by enacting the Uniform Services Former Spouses Protection Act, P.L. 97-252, 97th Congress, 10 U.S.C. § 1408(c)(1), as amended by § 1002 of the referenced Act. That Act has no application to the instant case. For the Act to be applicable to a military pension, the spouse must have been married to the service member for ten or more years, during which time the service member must have performed ten or more credible years of military service. 10 U.S.C. § 1408(d)(2), as amended by § 1002 of the referenced Act. The purpose of the Act was to give the spouses of military personnel, who have shared in the family problems and military service of the uniformed member, an opportunity to share in the benefits upon the dissolution of marriage. Since the respondent does not fit within the Act the standards of the McCarty decision are applicable to the appellant's pension.

This Court's recent decision in Woodward v. Woodward, 656 P.2d 431 (Utah 1982), allowing the trial court to award a wife a portion of a husband's retirement benefits, is not to the contrary, since that decision involved a civilian employee of Hill AFB, whose pension would not be subject to the protections of the McCarty decision or the Uniform Services Former Spouses Protection Act. However, to the extent that the trial court would attempt to directly apply Utah law and the

equitable apportionment concept of the Woodward decision so as to allocate to the respondent a portion of appellant's pension, or to so structure the decree that the effect was indirectly the same, the trial court exceeded its authority as a matter of law. It is respectfully submitted that the action of the trial court in the instant case did intrude upon the appellant's pension. The uncontradicted testimony of the appellant was that after his expenses and exclusive of lunches he had $158.10 per month to live on. (T. 22). The effect of the Court's judgment in favor of the respondent requiring the appellant to pay $666.66 per month on the judgment of $10,543.90 and to make a balloon payment plus interest was essentially to take a portion of the appellant's retirement pay in violation of the McCarty decision and federal law. Therefore, the decree should be modified to allocate the liability to the parties without reference to appellant's pension. This Court should remand for further consideration by the trial court without reference to the appellant's Navy pension.

CONCLUSION

The facts of this case show that the trial court was unjustifiably generous in awarding the marital estate of the parties to the respondent. Further, the Court's judgment was based upon matters occurring after hearing, apparently communicated to the Court ex parte and under circumstances that

violated due process of law. The decree as actually entered by the Court further violates the standards of equitable apportionment of the marital estate of the parties as previously articulated by decisions from this Court and intrudes upon the appellant's Navy pension in violation of federal law. This Court should reverse and remand for further consideration with direction that the judgment previously awarded by the trial court be vacated and the equitable interest of the parties in the former home of the parties be divided equally with respondent to receive judgment for her portion to be paid out on a reasonable incremental basis that will not unduly burden the appellant or intrude into appellant's Navy pension.

Respectfully submitted,

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