1983

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

IN THE SUPREME COURT OF THE STATE OF UTAH

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RAYMOND E. FOGG, :

Plaintiff-Appellant, : Case No. 19004

vs. :

LONDA F. FOGG, :

Defendant-Respondent. :

- -

BRIEF OF RESPONDENT

- -

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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TABLE OF CONTENTS

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STATEMENT OF THE NATURE OF THE CASE

This is an appeal from the property division portion of a divorce case.

DISPOSITION IN THE LOWER COURT

The appellant was awarded the home of the parties subject to a judgment in favor of the respondent in the sum of $10,543.90, with terms for payment of that amount. The personal property was divided between the parties.

RELIEF SOUGHT ON APPEAL

Respondent seeks an affirmation of the decision of the trial court.

STATEMENT OF FACTS

Londa Fogg (hereinafter referred to as respondent) does not entirely agree with the statement of facts in the appellant's brief.

The "postmarital equity" in the home at the time of divorce was not $11,455.00. The appellant calculates that amount by the following formula:

$44,890.00	Value at the time of the divorce
-22,205.00	Value at the time of the marriage
$22,685.00	
-11,230.00	Mortgage balance at time of the divorce
$11,455.00	

Determining the equity under that formula is totally erroneous. It treats the facts as if there was no mortgage before the marriage. Such is not true. In other words it charges all the mortgage obligation to postmarital equity when in fact there was a mortgage prior to the marriage. The equity in the home at the time of the divorce is as follows:

$44,890.00	Value at the time of the divorce (Defendant's Exhibit 1; Tr. 140, 167)
-11,230.00	Mortgage balance at the time of the divorce (Tr. 144)
$33,660.00	

The premarital equity is as follows:

$22,205.00	Value at the time of the marriage (Defendant's Exhibit 1; Tr. 142-143)
-14,500.00	Mortgage balance at the time of the marriage (Tr. 143)
$ 7,705.00	

So of the $33,660.00 of total equity, $25,955.00 of it was accumulated after the marriage. This is figured as follows:

$33,660.00	Total equity
- 7,705.00	Premarital equity
$25,955.00	Postmarital equity

The other misleading thing about the facts is in connection with the vacation plan. During the marriage the parties purchased a vacation plan for $2,800.00. (Tr. 162-163) The claim that the vacation plan is worth $5,200.00 is based on inadmissible evidence. At the trial the appellant introduced a letter from American International Vacation, Inc. to the appellant stating that the current value of the vacation plan was $5,200.00. (Plaintiff's Exhibit 2) It was never received into evidence (Tr. 19) nor could it have been received into evidence because it is inadmissable hearsay. (Rule 63 of the Rules of Evidence) At the trial the appellant admitted that the vacation plan could not

it sold for more than $2,800.00. (Tr. 164) So the statement that the vacation trailer is worth $5,200.00 is not only hearsay but obviously sales talk.

ARGUMENT

POINT I

ANY REPRESENTATIONS TO THE COURT WERE ACCURATE AND ARE SUPPORTED BY THE RECORD

Appellant complains because of a letter sent by respondent's counsel to appellant's counsel and the court stating that the postmarital equity in the home was $25,441.79. Not only is that fact true, (actually it is short by $513.21) but it is supported by the record. (Tr. 140-144)

The appellant is the party that is misleading the court with inaccurate information concerning equity. The error in appellant's thinking is set forth in respondents Statement of Facts above.

Appellant also complains that after the letter there was no further hearing as requested. The so called request for a hearing simply said as follows:

> "However, I think it would be beneficial to the court and counsel if we could meet some time convenient to the court and review these matters for ten or fifteen minutes." (Tr. 84)

There was at least one hearing after that letter in connection with the appellant's Motion to amend the Findings of Fact. (Tr. 104)

POINT II

THE DECREE IS FAIR TO BOTH PARTIES

When the true facts concerning the postmarital equity are made known, it is apparent that a judgment in favor of the respondent in the amount of $10,543.90 is more than fair to the appellant. At the time of the marriage the appellant contributed the home with an equity of $7,705.00 and the respondent

contributed $8,000.00 in cash. (Tr. 140) The $8,000.00 in cash was used for remodelling the home. (Tr. 157,166) So both parties made about the same contribution to the home at the time of the marriage. So perhaps the respondent should have received one half of the total equity rather than what has been called postmarital equity.

The reason why the respondent only got the postmarital equity was because the appellant supposedly made a $5,000.00 to $6,000.00 contribution from his navy retirement into the house at the time of the remodeling. However, that was not a lump sum cash contribution like the respondent made and it was just the appellant's monthly retirement checks which went into the joint savings account. Many things were paid from the joint account, so the money cannot really be earmarked. Furthermore, since those checks were only $500.00 or $600.00 a month, it would have taken about ten months to have accumulated $5,000.00 to $6,000.00. The remodeling took place over two months, so it cannot be certain that the appellant actually made a $5,000.00 to $6,000.00 contribution. (Tr. 154,165,167-168)

Even if the navy retirement contribution is considered to offset the $8,000.00 cash contribution of the respondent, there is still a postmarital equity of $25,955.00. An award to the respondent of $10,543.90 is not unfair to the appellant. See Lundgreen vs. Lundgreen, 184 P.2d 670 (Utah 1947)

POINT III

THE AMOUNT OF THE JUDGMENT IS THE AMOUNT REQUESTED BY THE APPELLANT IN THE PRAYER OF HIS COMPLAINT

The appellant filed his complaint for a divorce in the court below on September 15, 1981. Paragraph 2 of the prayer of the complaint says as follows:

> "That plaintiff be granted the home of the parties with him to pay defendant the sum of $10,000.00 for her equity in said home."

The appellant should not be heard to complain of the divorce decree when it is essentially what he prayed for in his complaint.

POINT IV

THE COURT HAS WIDE DISCRETION IN THE TERMS OF THE DIVORCE DECREE

Section 30-3-5, Utah Code Annotated 1953, as amended, provides 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 maintainance of the parties and children as may be equitable."

The division of property is a matter that rests largely within the sound discretion of the trial court. Pinney v. Pinney, 245 P.329 (Utah 1926) A large discretion is vested in the trial court in making distribution of property. Stewart v. Stewart, 242 P.947 (Utah 1926) The matter of disposing of the property and providing for the support of the divorced persons and their children rest in the sound legal discretion of the trial court, reviewable only for abuse of discretion. Bullen v.Bullen, 262 P.292 (Utah 1928)

POINT V

THE AWARDING OF INTEREST IS WITHIN THE DISCRETION OF THE COURT

The Workman case cited by the appellant is not authority for concluding that the trial court abused its discretion in awarding the respondent interest on the judgment. That case is distinguishable. In that case the trial court divided the equity in the home equally between the parties and the husband was ordered to either pay the wife that one half amount if he elected to sell the home, regardless of its sale price, or to purchase the

wife's interest within six months at the appraised price. The husband was also ordered to pay the wife 8% of her equity amount. On appeal the Supreme Court of Utah said that where the decree made an equal division of the value of the property, there was no reason to compel the husband to pay the wife one half of the appraised value if he sold the property to a third party. The court said that if the property is sold to a third party, the wife should receive one half of the actual price, without interest.

In the Workman case, if the husband elected to buy out his wife's share, then the interest obligation was still applicable. In the case at bar the only option the appellant has is to buy the respondent's share. Therefore, like the Workman case, interest could be charged. If respondent's share of the equity is paid out today it is of more value to her than if she gets the money later. For that reason it is a sound exercise of the trial court's discretion to add interest to the obligation.

It should be pointed out that interest does not begin until July 5, 1983. That gives the appellant a reasonable time within which to sell the home, borrow the money or do whatever was necessary to pay her her share.

POINT VI

THE DECREE OF DIVORCE DOES NOT INFRINGE ON THE APPELLANT'S NAVY PENSION

Even if the law does not allow the respondent any interest in the appellant's navy retirement, the respondent made no claim to the retirement and the divorce does not touch it.

When the true facts concerning the equity in the home are revealed, it is apparent that the divorce decree is an equitable division of the property without taking into consideration or even affecting the appellant's navy retirement.

CONCLUSION

The decree of the trial court should be affirmed for the reasons set forth above.

Respectfully Submitted,

BACKMAN, CLARK & MARSH

David B. Boyce

David B. Boyce

CERTIFICATE OF MAILING

This is to certify that a true and correct copy of the foregoing BRIEF OF THE RESPONDENT was mailed postage prepaid this 28th day of June, 1983 to the following: William J. Cayias, 1558 South 1100 East, Salt Lake City, Utah 84105.

Tina Schreyer