

1983

Susan Race v. Robert Wayne Race : Brief of Appellant's Former Attorney

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors. Kellie F. Williams and Lynn P. Heward; Attorneys for Appellant

Recommended Citation

Brief of Appellant, *Race v. Race*, No. 19146 (1983).
https://digitalcommons.law.byu.edu/uofu_sc2/4716

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT
OF THE STATE OF UTAH

SUSAN QUENTINE RACE,)	
)	
Plaintiff and Appellant,)	
)	
vs.)	No. 19146
)	
ROBERT WAYNE RACE,)	
)	
Defendant and Respondent.)	

BRIEF OF APPELLANT'S FORMER ATTORNEY

Appeal from the Judgment of the
Third District Court
For Salt Lake County
Honorable Bryant H. Croft, Judge

Kellie F. Williams
142 East 200 South
Suite 300
Salt Lake City, Utah 84111
Attorney for
Appellant

Lynn P. Heward
1174 East 2700 South
Salt Lake City, Utah 84106
Former Attorney for
Appellant

Jimi Mitsunaga
731 East South Temple
Salt Lake City, Utah 84021
Attorney for
Respondent

FILED

NOV 10 1983

TABLE OF CONTENTS

STATEMENT OF THE KIND OF CASE	1
DISPOSITION IN LOWER COURT.	1
RELIEF SOUGHT ON APPEAL	1
STATEMENT OF FACTS.	2
ARGUMENT.	6
Point 1. The state court should allocate the homestead exemption regardless of the theory of the case.	6
Point 2. If the trial court did not have juris- diction to award the home to defendant, it should determine the homestead exemption available to plaintiff (Theory A).	8
Point 3. If the trial court validly awarded plaintiff's interest to defendant to hold in trust for her, there should be a determination as to the homestead exemption available to her (Theory B)	10
Point 4. If the trial court validly decreed the proceeds of the home be paid to creditors, it should have provided for the homestead exemption (Theory C).	13
Point 5. It is equitable that the entire homestead exemption be allocated to plaintiff	15

AUTHORITIES CITES

<u>In re Bachman</u> , 21 B.R. 849 (W.D. Pa. 1982).	9
<u>Brown v. Brown</u> , 189 S.W. 921 (Ky. 1916)	9
<u>Cleverly v. District Court of Second Judicial Dist.</u> 85 Utah 440, 39 P.2d 748 (1935)	14
<u>Closson v. Closson</u> , 30 Wyo. 1, 215 P. 485, 29 A.L.R. 1371 (1923)	14
<u>In re Cunningham</u> , 9 B.R. 70 (D.N.M. 1981)	10

Daly v. Daly, 533 P.2d 884 (Utah 1975) 14

In re Eisenberg, 7 B.R. 683 (E.D.N.Y. 1980). 8

Hansen v. Mauss, 40 Utah 361, 121 P.2d 605 (1912). 11

Kimball v. Salisbury, 17 Utah 381, 53 P. 1037 (1898) 15

Mangus v. Miller, 317 U.S. 178, 63 S.Ct. 182, 87 L. Ed.
169 (1942) 9

Master Lubricants v. Cook, 159 F.2d 679 (9th Cir. 1947). 12, 13

Panagopoulos v. Manning, 93 Utah 198, 69 P.2d 614 (1937). 14

Rogers v. Rogers, No. 17570, Utah, September 21, 1983. 8

In re Scott, 12 B.R. 613 (W.D. Ok. 1981) 13

In re Treiling, 21 B.R. 940 (E.D.N.Y. 1982). 8, 11

Utah Builders Supply Co. v. Gardner, 86 Utah 250,
39 P.2d 327, 103 A.L.R. 928 (1934) 11

24 Am Jur 2d Divorce and Separation § 931. 14

STATUTES CITED

11 U.S.C. § 363(h). 9

11 U.S.C. § 522(b). 12

Section 78-23-3 Utah Code Annotated. 14

Section 78-23-4 Utah Code Annotated. 9

STATEMENT OF THE KIND OF CASE

The case in the lower court was in the nature of a divorce action which among other things adjudicated the property rights of the parties.

DISPOSITION IN LOWER COURT

The lower court disposed of the issues before it as indicated in Appellant's Brief. However, that court refused to address the issue of the homestead allowance since the defendant and respondent had individually filed for bankruptcy.

RELIEF SOUGHT ON APPEAL

The Appellant's Brief addresses most, if not all, of the relief sought on appeal. This brief will only address part of the relief sought, namely, that the homestead exemption should be awarded to the plaintiff and appellant. In the alternative, the homestead exemption should be declared to exist, and the matter remanded for a determination as to the proper allocation of that exemption.

STATEMENT OF FACTS

Plaintiff filed a Verified Complaint for divorce on or about August 3, 1980, which started this action.

After some preliminary hearings in this matter, defendant filed for bankruptcy under Chapter 13 on May 20, 1981.

The parties agreed that their home should be sold, but were unable to agree on how best to effectuate the sale.

On August 10, 1981, a hearing was held and the court ordered that child support payments cease. They were not ordered resumed until at least eighteen months later.

A trial was held on October 1, 1981. In the resulting Amended Decree of Divorce dated December 14, 1981, the trial court awarded the parties' home to defendant in order to facilitate its sale.

The trial court placed certain limitations on how defendant could sell the home. The court also dictated terms for the disposition of the proceeds.

During the interlocutory period, which by the terms of the Decree ended March 14, 1983, defendant's bankruptcy was converted to Chapter 7. Plaintiff then filed for record her Declaration of Homestead on February 8, 1982. A copy of that Declaration is attached hereto as Exhibit A.

On or about January 8, 1983, plaintiff filed a Motion to Reconsider. This Motion asked for increased limitations on

defendant's power to sell the home, and for different provisions for distribution of the proceeds.

On February 26, 1982, the court stated during a hearing that before any sale of the home was finalized, it would have to be submitted to the court for approval. This ruling was embodied in an Order dated March 31, 1982.

On March 19, 1982, the trial court gave approval for a specific sale provided that the entire proceeds of the sale were distributed in accordance with a subsequent order of the court, or deposited with the court pending such an order.

In the hearing held on February 26, 1982, plaintiff asked the court about a determination as to the proper allocation of the homestead exemption, since plaintiff had filed her declaration. The court refused to consider it at that time.

(Page 98 of transcript, page 558 of record.)

In preparation for the time when the trial court would consider the homestead exemption, plaintiff filed a Statement of Points and Authorities Relevant to the Homestead Exemption, dated April 16, 1982. This statement pointed out that the homestead exemption would apply to proceeds of the sale of the property.

On or about May 17, 1982, the trial court executed a Court Approval of Sale referring to a specific Earnest Money and Offer to Purchase. The court made provision for the payment of part of the proceeds as necessary to effect the sale, and ordered that the "remaining amounts shall be paid to the Clerk

of the Court for disbursements according to a future specific Order of the Court."

On May 25, 1983, the bankruptcy court also approved the sale of the home, and by June 3, 1982, the home had been sold. The trustee in defendant's bankruptcy began collecting the said "remaining amounts."

In a hearing held on August 12, 1982, there was a review of the history of the case.

Plaintiff indicated that the issue of the homestead exemption had been raised but not disposed of. (Page 2 of transcript, page 564 of record.)

The Judge agreed that he had never intended to award all of the equity in the home to defendant for his own use. (Page 7 of transcript, page 569 of record.)

Nevertheless, the issue of the homestead exemption was not addressed by the court despite being raised again and argued in that hearing by plaintiff. (Page 10 of transcript, page 572 of record.)

Finally, on February 4, 1983, plaintiff again raised the issue of the homestead exemption. The Judge stated he did not think it was something he was in a position to control, and thus declined to decide the issue. (Pages 3 and 4 of transcript, pages 650 and 651 of record.) He later emphasized that his rulings were to be final. (Page 36 of transcript, page 683 of record.) These statements were reflected in the Supplemental Order and Judgment to Decree of Divorce dated March 18, 1983,

from which Order and Judgment this appeal has been taken.

On July 11, 1983, the trustee in defendant's bankruptcy, Anna Drake, executed an affidavit confirming her position that she would not distribute the remaining proceeds of the sale of the home of the parties until this matter had been decided on appeal. A copy of that Affidavit of Trustee, Anna Drake, is attached hereto as Exhibit B.

ARGUMENT

Point 1. The state court should allocate the homestead exemption regardless of the theory of the case.

There are several logical theories which can explain or justify what the state and federal courts have done in this matter. Each of these theories leads to the conclusion that the state court should allocate the homestead exemption. These logical sequences are as follows:

Theory A: (1) The divorce court did not have jurisdiction to allocate the property of the parties since defendant had filed for bankruptcy.

(2) Plaintiff still had title to an undivided one-half interest in the home of the property at the time the home was sold.

(3) The bankruptcy court had no right to sell plaintiff's interest, and the sale may be rescinded, OR the bankruptcy court's action was justified by the power it has to sell the property of a co-owner.

(4) One-half of the proceeds held by the bankruptcy trustee should be paid to plaintiff.

(5) Plaintiff's share would be exempt from process by creditors to the extent of the homestead exemption.

(6) The state court should decide to what extent plaintiff is entitled to the homestead exemption applicable to her individual property.

Theory B: (1) The divorce court had jurisdiction to allocate the property of the parties.

(2) The divorce court awarded plaintiff's one-half interest to defendant to hold in trust for plaintiff's benefit.

(3) The bankrupt estate only had bare legal title with respect to plaintiff's interest in the home.

(4) The proceeds of plaintiff's one-half interest held by the bankruptcy trustee are not part of the bankrupt estate.

(5) The homestead exemption applies to the equitable interest held by the plaintiff.

(6) The state court should decide to what extent plaintiff is entitled to the homestead exemption before payment to creditors.

Theory C: (1) The divorce court had jurisdiction to allocate the property of the parties.

(2) The divorce court awarded the home to defendant to take care of creditors.

(3) The bankruptcy court would recognize a homestead exemption applicable to such an award.

(4) The parties were entitled to a homestead exemption.

(5) The state court should decide to what extent plaintiff is entitled to the homestead exemption before payment to creditors.

Point 2. If the trial court did not have jurisdiction to award the home to defendant, it should determine the homestead exemption available to plaintiff (Theory A).

(1) Theory A is based on the divorce court not having jurisdiction to allocate the property of the parties.

This basis is consistent with a recent case decided by this Court, Rogers v. Rogers, No. 17570, filed September 21, 1983.

On page 4 of that decision, the Court explained that the estate of the bankrupt spouse could conceivably include some interest, legal or equitable, in all property of both of the married parties. The result which followed on page 6 of the decision was that the automatic stay applied to any purported division of any of the property of either spouse.

Any actions taken by the lower court in violation of that stay would be void. In re Eisenberg 7 B.R. 683, 686 (E.D.N.Y. 1980).

(2) If the divorce court's action actually had no effect on plaintiff's property, then the bankrupt estate consisted of no more than that which defendant had prior to the orders of purporting to award him certain real and personal property. In re Treiling, 21 B.R. 940, 942-3 (E.D.N.Y. 1982).

(3) What defendant actually possessed was an undivided one-half interest in the home of the parties. Absent any adjudication increasing defendant's interest in the home, all the trustee in bankruptcy could sell was a one-half interest in the home.

However, the trustee sold both spouses' interest in the home.

If the trustee had no right to sell plaintiff's interest, then clear title was not conveyed, and perhaps rescission would be the most appropriate remedy.

However, the bankruptcy court does have the power to sell the property of a co-owner. 11 U.S.C. §363(h). In re Bachman, 21 B.R. 849, 851 (W.D.Pa. 1982). And the fact that the sale of the home was approved by the bankruptcy court might indicate it had exercised that power.

(4) If the bankruptcy court was selling the property of a co-owner, namely the interest of the plaintiff, then one-half of the proceeds held by the trustee would be the property of the plaintiff. Brown v. Brown, 189 S.W. 921, 923 (Ky. 1916); Mangus v. Miller, 317 U.S. 178, 185, 63 S.Ct. 182, 185, 87 L. Ed. 169 (1942).

(5) Since that one-half has not been adjudicated to be included in the bankrupt estate, then it is property of the plaintiff consisting of proceeds of the sale of a home against which a declaration of homestead had been properly filed. Section 78-23-4 Utah Code Annotated.

(6) Either plaintiff is entitled to a homestead exemption in the full amount declared, or she is entitled to a homestead exemption to the extent allowed by the state court.

Point 3. If the trial court validly awarded plaintiff's interest to defendant to hold in trust for her, there should be a determination as to the homestead exemption available to her (Theory B).

(1) The divorce court and bankruptcy court were each aware of the other's involvement. Yet each continued to make decisions based on the supposed efficacy of the other's jurisdiction.

Based on the divorce court's award of the home to the defendant, the bankruptcy court approved a sale of the home.

Based on the integral involvement of the divorce court, the trustee has affirmed that she will not disburse the remaining proceeds from the sale of the home until this appeal is decided.

Therefore this Court could well act on the basis that the divorce court had jurisdiction to do what it did. In re Cunningham, 9 B.R. 70 (D.N.M. 1981).

(2) As indicated in the Statement of Facts above, the trial court did not mean to award all of the equity in the home to the defendant. Rather, title was awarded to the defendant essentially to facilitate the sale of the home. (Page 7 of transcript, page 569 of record.)

(3) Thus what defendant gained by the decree was merely legal title, encumbered by the declaration of homestead which had been filed before the decree became final. This is,

in turn, what would be in the bankrupt estate. In re Treiling, 21 B.R. 940, 942-3 (E.D.N.Y. 1982).

(4) Although the initial decree specified that the proceeds would be paid to the creditors before it would be paid to the parties, it had not addressed the homestead exemption. Therefore, the issue was not res judicata and could be decided later. Utah Builders' Supply Co. v. Gardner, 86 Utah 250, 39 P.2d 327, 103 A.L.R. 928 (1934); Hansen v. Mauss, 40 Utah 361, 121 P.2d 605 (1912).

In addition, another order was entered within ten days of the time the decree became final, effectively modifying the decree by reserving the issue of the final distribution of the proceeds of the home. This same reservation was contained in the May 17, 1982 order approving the sale of the home.

Assuming that the bankruptcy court has jurisdiction to determine what will be done with all of the funds in the bankruptcy estate, that jurisdiction will not enable that court to determine what will be done with plaintiff's half of the proceeds, since that half represents her equitable interest, which interest is not part of the estate.

(5) In view of the fact that plaintiff declared a homestead exemption affecting property to which she had legal title, which legal title was converted to an equitable interest, which was in turn converted to money in the possession of the bankruptcy trustee, that trustee holds those proceeds subject

to plaintiff's homestead exemption

(6) Since the decree which provided that legal title would be vested in defendant also provided that the creditors be paid first, the bankruptcy court will probably rely on that absent a ruling by the state court that there is an applicable homestead exemption. Master Lubricants v. Cook, 159 F.2d 679 (9th Cir. 1947). Although this case predates the Bankruptcy Reform Act of 1978, Section 6 of the old Bankruptcy Act apparently treated homestead exemptions the same way as the present Act, at least as to Utah residents. 11 U.S.C. §522(b).

Point 4. If the trial court validly decreed the proceeds of the home be paid to creditors, it should have provided for the homestead exemption (Theory C).

(1) As reviewed under Point 3(1), there is rationale that would justify the conclusion that the trial court had jurisdiction to allocate the property of the parties.

(2) The decrees of the trial court might be read to have awarded an equitable interest in the home of the parties to certain creditors of the defendant. Thus, when legal title was vested in defendant, he would have held that title in trust not only in part for the benefit of plaintiff, but also in part for his creditors.

Since defendant was in bankruptcy, property awarded to him became part of the bankrupt estate. The estate was essentially property held for the benefit of his creditors. Thus property awarded to him for the benefit of creditors would be treated the same as property just awarded to him.

(3) When a party to a divorce is awarded the home of the parties, and files for bankruptcy, the bankruptcy court will determine the existence of a homestead exemption based upon the provisions of the divorce decree. Master Lubricants Co. v. Cook, 159 F.2d 679 (9th Cir. 1947); In re Scott, 12 B.R. 613, 616 (W.D. Ok. 1981).

(4) When the plaintiff filed her Declaration of Homestead, she owned the home in the sense necessary to file that declaration, since the decree awarding title to the property

to the defendant had not become final. Daly v. Daly, 533 P.2d. 884 (Utah 1975).

Even if the decree had been final, plaintiff's one-half equitable interest in the property would be subject to her claim of a homestead exemption. Panagopulos v. Manning, 93 Utah 198, 69 P.2d 614 (1937).

Therefore, there could not be any type of a forced sale which would result in plaintiff, or at least the parties, receiving less than the amount of the exemption declared. Section 78-23-3 Utah Code Annotated; Cleverly v. District Court of Second Judicial Dist., 85 Utah 440, 39 P.2d 748 (1935).

(5) It is now necessary for the state court to allocate this exemption using the same power exercised in transferring title from plaintiff. 24 Am Jur 2d Divorce and Separation §931 at 1062. Closson v. Closson, 30 Wyo 1, 215 P. 485, 29 A.L.R. 1371, 1377 (1923).

Point 5. It is equitable that the entire homestead exemption be allocated to plaintiff.

In plaintiff's Statement of Points and Authorities Relevant to the Homestead Exemption dated April 16, 1982, plaintiff set forth certain "Equitable Considerations" supporting the proposition that the homestead exemption should be allocated to the plaintiff. These included the following:

(1) Despite being ordered to do so on March 9, 1981, defendant never made any monthly payment of principal, interest, tax, and insurance on the residence (about \$500.00 per month).

(2) Plaintiff supported the two younger children of the parties with no hope for any help from the plaintiff after August 11, 1981. This is particularly pertinent since the homestead exemption is intended to be a means of support for the family. Kimball v. Salisbury, 17 Utah 381, 395, 53 P. 1037, 1041 (1898).

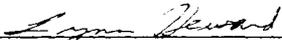
(3) Plaintiff brought the sum of \$7,000 to the marriage which was used for the downpayment on the home.

(4) Most of the debts were incurred solely for defendant's benefit and without plaintiff's knowledge.

(5) The defendant received a disproportionately large share of the personal property of the parties.

For any or all of these reasons, this Court should use the equitable powers to now allocate the entire homestead exemption to the plaintiff.

Respectfully submitted this 2nd day of
November, 1983.

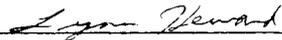

LYNN P. HEWARD
Former Attorney for Plaintiff

DELIVERY CERTIFICATE

I hereby certify that true and accurate copies (2)
of the foregoing Brief of Appellant's Former Attorney were
delivered to the following on the 10th day of November, 1983.

Kellie F. Williams
142 East 200 South
Suite 300
Salt Lake City, Utah 84111

Jimi Mitsunaga
731 East South Temple
Salt Lake City, Utah 84021



3646563

DECLARATION OF HOMESTEAD

The undersigned, Susan Race, hereby claims a homestead in the property situate in the County of Salt Lake at 9653 South 2720 East, Sandy, Utah and more particularly described as follows:

Susan Race

Beginning at a point which is North 0°05'34" East 884.88 feet and South 89°59'32" East 165.86 feet from the West quarter corner of Section 11, Township 3 South, Range 1 East, Salt Lake Base and Meridian, (said point also being the Northwest corner of Lot 301, Oakridge Heights No. 3), and running thence South 89°55'00" East, along the North line of said Lot 301, 100.00 feet; thence North 0°05'29" East 97.10 feet, more or less, to the Southeast corner of property deeded to William D. Green, etux, by Warranty Deed recorded as Entry No. 2693849 in Book 3814 at Page 247 of the Official Records; thence North 89°59'32" West along the South line of said property, 100.00 feet, more or less, to the East line of 2720 East Street; thence South 0°05'34" West, along the East line of said Street 97.10 feet, more or less, to the point of beginning.

The estimated cash value of said property is \$40,000.
(Present market value less contract balance.)

The above-named claimant is residing at 1311 McKettrick Street in Wenatchee, Washington 98801, and is entitled to this homestead exemption as a head of family since she is married and to her best knowledge, information, and belief, her spouse has not filed a declaration of homestead.

The amount of the homestead claimed is \$11,500, including \$8,000 for the claimant as head of family, \$2,000 for her spouse, Robert W. Race, age 31, 9653 South 2720 East, Sandy, Utah 84092, and \$1,500 for her three dependant children, one of which, Tamara Race, age 16, lives at 2026 Woodglen Street, Simi Valley, California 93063, and the other two of which, Jeffrey Race, age 11, and Sharon Race, age 5, live with claimant at her address given above.

DATED this 5 day of February, 1982.

Susan Race

SUSAN RACE

EXHIBIT B

KELLIE F. WILLIAMS
Attorney for Petitioner
SUSAN RACE HUNTER
CORPORON & WILLIAMS
142 East 200 South, Ste 300
Salt Lake City, Utah 84111
(801) 328-1162

IN THE UNITED STATES BANKRUPTCY COURT, FOR THE
DISTRICT OF UTAH, CENTRAL DIVISION.

IN THE MATTER OF
ROBERT WAYNE RACE.

AFFIDAVIT OF TRUSTEE,
ANNA DRAKE.

NO. 81-01923

STATE OF UTAH)
 : ss.
COUNTY OF SALT LARE)

COMES NOW, ANNA DRAKE, as Trustee in Bankruptcy, and deposes and states as follows:

1. That she has been and is the Trustee in Bankruptcy in the above-entitled matter.
2. That she will not disburse any funds in this case until the Bankrupt's divorce appeal, Case No.19146, has been determined by the Supreme Court of Utah.

DATED this 11th day of July, 1983.

Anna W. Drake
ANNA DRAKE

SUBSCRIBED AND SWORN to before me this 11 day of July, 1983.

Valerie M. Kules

NOTARY PUBLIC, Residing in
Salt Lake County, Utah.

My Commission Expires:

6-9-86