1966

Melva S. Anderson v. Biard E. Anderson : Brief of Plaintiff

IN THE SUPREME COURT
of the
STATE OF UTAH

MELVA S. ANDERSON,
Plaintiff,

—vs.—

BIARD E. ANDERSON,
Defendant.

Case No. 10715

BRIEF OF PLAINTIFF

Appeal from the Judgment of the
Third District Court for Salt Lake County
Hon. Joseph G. Jeppson

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CASES CITED

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STATEMENT OF NATURE OF CASE

This is an action for divorce including the division of property of the parties.

DISPOSITION IN LOWER COURT

The decree of divorce, entered on the 15th day of July 1966, granted plaintiff a divorce, dividing the assets both real and personal one-third to plaintiff and two-thirds to defendant, the value of said assets to be figured as of the date of division, and also awarding to plaintiff the sum of $200.00 per month as alimony, and further providing that the assets accumulated during the marriage be liquidated to pay the debts incurred insofar as possible.

RELIEF SOUGHT ON APPEAL

To modify the decree of divorce on the question of the division of the real and personal property after the debts and obligations have been paid.

STATEMENT OF FACTS

Plaintiff and defendant were married on June 3, 1935 (R-14). Three children were the issue of said marriage, all of whom are over twenty-one years of age (R-63-4).

The defendant is a mechanical engineer, having graduated from the University of Utah in 1935 and having worked for American Smelting & Refining Company since 1934, and at the present time is working in the capacity of a project design engineer, which position he has held since 1958, and he receives $1,000.00 per month as a gross salary (R-110). In addition to his salary, he receives a bonus each year of around two percent (2%) of his annual salary; sometimes he receives stock (R-138).

Plaintiff is fifty-five years old (R-71). She has recently been working for their son and at the present time earns $1.85 per hour and works forty hours per week. The work is of a special nature and may not last very long (R-56). Her take-home pay averages $300.00 per month (R-60).

The home presently owned by the parties at 2894 Crestview Drive, Salt Lake City, Utah, was built in 1960 (R-66) at the approximate cost of $55,000.00, and the

present value placed on said home as a minimum market value for quick sale is $65,000.00 and it should sell for about $75,000.00 (R-119). The financing of the home consisted of $30,000.00 borrowed from Doxey-Layton, $1,000.00 of which was used in fees and various costs, $9,375.00 from the equity of their former home on Laird Drive, $3,000.00 from Federal Savings and Loan, and the rest of it out of the sale of some stocks and money borrowed from Anderson Egg Farm (R-119-120).

Mr. Anderson testified that with $500.00 received from his father's estate he invested in uranium stocks during the uranium boom and that over a period of nine years he had a profit of roughly $10,000.00, or approximately $1,000.00 per year (R-111). He also invested in Wyoming oil wells operated as Bimont which was a joint venture of himself and one Lamont Stevens. This business is now closed and he suffered a loss as he still owes money to plaintiff's mother and to his son-in-law (R-114).

Mr. Anderson invested in what was known as Anderson Chicken Farm which was transferred to a corporation named Cackling Acres (R-115) and the Anderson Egg Farm or Ranch which cost approximately $45,000.00 (R-141). The Cackling Acres cost approximately $155,000.00 (R-145).

Exhibit D-14 sets forth the obligations that Mr. Anderson owes as of May 1, 1966 which are as follows and which total $71,407.00:

LIABILITIES

First Fed. S & L 35 @ 56.38	$ 1,973
Walker Bk. (BSMT) 23 @ 24.17	450
Murray 1st T & L 7 @ 333.47=2,334.29+6,810.31	9,100
Cackling Acres Loan	8,497
Mortgage — 2894 Crstvw. Dr. (payments include taxes $226)	26,442
Cont. Bk. (Steve) 30 @ 67.90	2,037
Equit. Life Loan on Ins.	1,193
Cont. Bk. (Furn.) 20 @ 52.88	1,058
Dr. Lignell — Melva Dentist	164
Utah Production Credit (50 mo.)	650
Int. Farm Assoc. (300 mo.)	4,843
Zion Bk. 20 @ 33.98 (23rd E.)	678
Sears 14 @ 11.00	154
Robinson Note @ $50—6%	4,400
Acct's Payable:	
Ross Anderson	3,500
Howard McIntosh	1,050
Mrs. L. B. Smith	1,050
Virgil Ostler	3,400
Doxey-Layton	268
Household Bills	500
TOTAL	$71,407

The $3,400 borrowed from one Virgil Ostler was used to pay on his income tax about $1,000 and provided operating capital for the Anderson Egg Farm (R-162). The Anderson Egg Farm showed a loss last year of $5,000 and might show another loss of $5,000 (R-164). The Cackling Acres venture has shown a loss for the last two years, the total price of which was $155,000 (R-145), and Mr. Anderson has testified that there is possibly $110,000 to $120,000 still owing for it; that the payments were around $900 per month. He owns fifty percent (50%) of the

stock (R-146). The $10,500 he got to put in Cackling Acres was received $2,000 from the sale of stocks he owned and the $7,500 he borrowed from the Murray First Thrift and Loan (R-147). The loan for $14,480.12 was a consolidation of two prior loans (R-149). The loan he made on October 8, 1963 from Murray First Thrift for $3,819.97 was used to buy laying hens for the Anderson Egg Farm and the loan made on January 20, 1964 from Murray First Thrift for $3,882.80 was for the same purpose (R-148). Part of these two loans have been paid back; the $14,480.12 was used partly to pay what was left on the two loans just mentioned and give him the $7,500 in cash for the payment of Cackling Acres (R-154-155). The loan from Zion's Bank was originally for $1,000 to make a changeover at the Anderson Egg Farm from laying hens to broilers and the balance owing on it was $678 (R-159).

The parties stipulated that the Court would consider the division of the property without in any way involving the question of grounds of divorce or who was responsible, to which the Court stated that it thought that this was a wholesome method of handling the matter (R-54). The defendant testified that he was willing to divide equally with the plaintiff any equity that was derived from the sale of the home after the payment of any obligations (R-130).

The Court, in commenting on the division of property stated:

> "if he is to blame for failure to continue marriage, you start with the rule of thumb of one-third and

two-thirds on future interest, but where they are both to blame, one-third and two-thirds would not be the right figure." (R-188)

The Court further stated that it could not get out of its mind that the defendant was to blame for certain investments or was not to blame and that plaintiff is to blame for not going along and hoping that they would succeed and so on (R-189). The Court further commented that it had spent a couple of hours going over the testimony and that it tried to determine whether she was to blame or he was to blame (R-191).

The Court found that the plaintiff was entitled to a divorce on the grounds of cruelty causing great mental distress and ordered that she be awarded $200.00 alimony; that the parties liquidate the property and that the parties are entitled to a division of the net assets of their accumulation of one-third to plaintiff and two-thirds to the defendant (R-203-204).

ARGUMENT

POINT I

THE LOWER COURT ABUSED ITS DISCRETION BY MAKING AN INADEQUATE ALLOWANCE OF PROPERTY AWARD TO PLAINTIFF AND ERRED IN CONSIDERING WHO WAS AT FAULT IN CONNECTION WITH THE DIVORCE.

If all of the property and assets of the parties are to be taken into consideration in connection with the payment of the obligations, then in fairness to plaintiff under the circumstances and conditions in this case, plaintiff should be entitled to one-half of anything remaining after

the debts have been paid. As the record shows, the parties stipulated, that as to who was at fault should not be considered by the Court; and, under the ruling of *Pinion v. Pinion*, 92 Utah 255, 67 P.2d 265 (1937) the Court should not have considered the same. In the Pinion case the Court held:

> "In this case the question of fault or cruelty cannot be taken into consideration in the property settlement because the parties stipulated and the court stated it would not be considered. The plaintiff was not given an opportunity to answer by evidence the testimony of defendant. The alimony or property distribution was to be made without considering the matter of fault on the part of either spouse. Fault was to be considered only in the matter of determining whether she or either was entitled to a divorce. So mistreatment, if any, cannot be an element in this case."

There is no question that the Court did take into consideration as to whom was at fault. The Court stated that it could not get out of its mind who was to blame and that the Court had spent a couple of hours going over the testimony to try to determine whether the plaintiff or defendant was to blame.

In the case of *Woolley v. Woolley*, 113 Utah 391, 195 P.2d 743, (1948), this Court laid down the following rule concerning the distribution of property:

> "In determining generally what a wife is entitled to when a divorce decree has been granted to the husband, we have considered one-third as being a fair proportion. This is a relative amount which must, of necessity, vary with the facts of the par-

> ticular case. While recognizing that the award in each case is influenced by the facts presented, we have set out some general factors as guides in arriving at an equitable result. It is not necessary that they be repeated here as they have been referred to in a number of previously decided cases. See Pinion v. Pinion, 92 Utah 255, 67 P. 2d 265. The factors set forth are primarily for the purpose of guiding the trial court in arriving at its decision and are not intended to be all inclusive or invariable. However, they adequately encompass the controlling elements in this case."

As stated in the Woolley case where the husband was granted the divorce, one-third was considered a fair proportion for the wife; but where the wife is granted the divorce or where the subject of who is at fault is not to be considered, then the division should be different. The facts of this case warrant that the property be divided at least fifty-fifty. The couple were married in 1935 and have lived together as man and wife for over thirty years. Mrs. Anderson is fifty-five years of age and is not trained to hold down any particular type of employment. It is true that at the time of the separation she was working for her son on a special type of work which the son testified would not be permanent.

If we take Exhibit 14 as bearing out the true facts it is apparent that there may be no property to divide. Certainly where the obligations incurred were for business speculations in the chicken business, the husband is making a gross income in excess of a $1,000.00 a month and plaintiff is only awarded $200.00 alimony, plaintiff should be entitled to one-half of any property remaining

after the obligations have been paid. In fact, defendant agreed that plaintiff should have one-half of any equity derived from the sale of the home after the obligations had been paid. We feel certain that had the Court not considered who was at fault in the matter, it would have divided the property equally between the parties.

POINT 2

THE OBLIGATIONS ARISING FROM BUSINESS VENTURES SHOULD BE PAID BY THE DEFENDANT.

The financial difficulties of defendant were caused to a considerable extent by his business ventures in connection with the purchase of the Anderson Egg Farm and the Cackling Acres, one costing $45,000.00 and the other $155,000.00 and requiring payments in excess of $900.00 per month; and from the examination of Exhibit D-14, you will find that several of the obligations owing in substantial amounts were borrowed for the operation of these two properties. In fairness and justice to the plaintiff, the business obligations should be paid by the defendant and particularly when consideration is taken to the amount he earns each month and the amount she is to be paid each month for alimony.

CONCLUSION

In conclusion, we respectfully submit that the Court should be required to modify its decree requiring the business obligations to be paid by defendant out of his earnings and award to plaintiff one-half of all the prop-

erty and assets remaining after all the other obligations have been paid in full.

Respectfully submitted,

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