1966

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

IN THE SUPREME COURT
of the
STATE OF UTAH

MELVA S. ANDERSON,
Plaintiff-Appellant,
vs.
BIARD E. ANDERSON,
Defendant-Respondent.

Case No. 10715

BRIEF OF RESPONDENT

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

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RESPONDENT'S STATEMENT OF THE NATURE OF THE CASE

As stated by the Plaintiff-Appellant, this is an action for divorce, including the division of property.

DISPOSITION IN THE LOWER COURT

The trial court entered a Decree of Divorce on the 15th day of July, 1966, granting the Plaintiff a divorce, and in essence directing that the property accumulated by the parties during their marriage be liquidated to pay the debts insofar as possible, and ordering that the net assets, both real and personal, accumulated during the marriage and owned by the parties on November 26, 1965 be distributed, one-third to the Plaintiff-Appellant and two-thirds to the Defendant-Respondent, the value of said assets to be figured as of the date of division. In addition, the Plaintiff-Appellant was awarded the sum of $200.00 per month as alimony and $900.00 attorney's fees. From this decree the Plaintiff has appealed.

RELIEF SOUGHT ON APPEAL

The Plaintiff-Appellant is seeking to have the Decree of Divorce modified on the question of the division of the real and personal property after the debts and obligations have been paid.

IDENTIFICATION OF THE PARTIES AND EXPLANATION OF ABBREVIATIONS

Melva S. Anderson is the Plaintiff and Appellant. Biard E. Anderson is the Defendant and Respondent. For practical purposes Melva S. Anderson is sometimes referred to by her own name or as the Plaintiff and Biard E. Anderson is sometimes referred to by his own name or as the Defendant. The foregoing is consistent with the Appellant's identification of the parties.

"R ...." refers to a page reference in the record of the case.

RESPONDENT'S STATEMENT OF FACTS

By way of supplementing and in some instances correcting the Plaintiff's STATEMENT OF FACTS, the following statement is submitted:

The Plaintiff has never made any financial contribution to the marriage until she started conducting bus tours approximately two years ago (R. 62, 179). She works for an engineer (R. 54) and is capable in her work (R. 59). She generally works forty hours per week and earns $1.85 per hour (R. 61), resulting in an average monthly income of $320.00 per month. She holds up well in her work (R. 63) and is very capable in doing her particular work (R. 56, 57).

The take-home pay of the Defendant is $739.45 per month (R. 182). Commencing with about 1951 or 1952, the Defendant involved himself in various business ventures, losing on some and making on others, with a profit over the last nine years amounting to roughly $1,000.00 a year (R. 111). His various business ventures have not involved his pay check (R. 112), which at least since 1960, he has customarily delivered to the Plaintiff (R. 81).

By the time of the trial, the only equity the parties really had was their home (R. 187). Exhibit 14 shows that the total liabilities of the parties amounted to $71,407.00 with a net worth of $10,167.00, based on the sale of the home at $65,000.00. If the home is not sold, bankruptcy is inevitable (R. 126, 128). Plaintiff's observation on page 8 of her brief may well be true: "If we take Exhibit 14 as bearing out the true facts, it is apparent that there may be no property to divide."

The Defendant had filed a counterclaim (R. 9). At the outset of the trial a Stipulation was entered into, with a recognition that both parties had grounds for divorce:

> "THE COURT: I have read the pleadings. There isn't much there. I do not know the parties.
> "You may make what opening statements you think are necessary.

"MR. McCULLOUGH: Let me make a brief one.

"If the Court please, with respect to this matter, in view of expediting the question of the divorce, particularly with reference to the grounds, Plaintiff would be willing to stipulate, and does stipulate that both parties in this action have grounds for divorce, if they were permitted to testify and state the facts upon which based.

"THE COURT: Is this stipulation satisfactory as far as your client is concerned?

"MR McMURRAY: That stipulation would be agreeable, and in keeping with the feelings of the Defendant, and in view of that stipulation on the part of the Plaintiff, through her counsel, that the Defendant would have grounds if were testifying in court, the Defendant is willing to withdraw his counterclaim, and permit the Plaintiff to proceed, as far as the question of grounds is concerned.

"If the Court finds that she has sufficient grounds for divorce, to grant it in her favor, in view of what she has said through her counsel.

"THE COURT: Without prejudice as to what the decision of the property or alimony would be.

"MR. McMURRAY: It should be this stipulation is made with the understanding that the Court thereupon would consider the property matter, and that no prejudice whatsoever would result against the Defendant, but would consider the property matter without in any way involving this grounds problem.

"MR. McCULLOUGH: That is agreeable if the Court is agreeable to it.

"THE COURT: The Court feels this is a wholesome method of handling it.

"The counterclaim is withdrawn, and you may proceed, Mr. McCullough." (R. 53-54)

Counsel for the Plaintiff on pages 5 and 6 of his brief seems to infer that the Court was unable to or did not follow the stipulation of the parties and out of context quotes the trial court. This is most unfair to the court and a reading of the record will show (see for example R. 186-188) that Plaintiff's counsel at the trial of the case repeatedly injected matters into the testimony that went to grounds for divorce after sufficient testimony had been introduced to support her claim for divorce, the only purpose of which could have been to prejudice the Court. Nevertheless, it is clear that the trial court was capable of ~~objecting~~ objectively considering the problem in harmony with the stipulation of the parties and did in fact do so. In this regard the Court's attention is respectfully invited to Pages 188-191 of the Record.

SCOPE OF REVIEW

In the case of *Allen v. Allen*, 109 Utah 99, 165 P. 2d 872 (1946) this Court reviewed and set forth the scope of review in divorce proceedings:

"There are numerous decisions of this court holding that the Supreme Court will not substitute its judgment in a divorce proceeding relative to alimony and division of property for that of the trial court unless the record clearly discloses that the trial court's decree in such matters is plainly arbitrary.

* * *

"We believe that the great weight of authority supports the rule that a decree of the trial court in divorce proceedings, relative to alimony and division of property, will not be modified except when the trial court has abused its discretion. Otherwise, the appellate court by its own actions would alter the purpose for which it was created. An appellate court cannot remain a court of appeals and invite a review of every case decided by a lower tribunal where its judgment fails to satisfy one or both parties to the litigation."

See also *Anderson v. Anderson,* 104 Utah 104, 138 P.2d 252, 254; *Stewart v. Stewart,* 66 Utah 366, 242 P. 947; *Adamson v. Adamson,* 55 Utah 544, 188 P. 635; *Pinney v. Pinney,* 66 Utah 612, 245 P. 329; *Bullen v. Bullen,* 71 Utah 63, 262 P. 292; *Blair v. Blair,* 40 Utah 306, 121 P. 19, Ann. Cas. 1914 D 989, 38 L.R.A., N.S. 269; *Friedli v. Friedli,* 65 Utah 605, 238 P. 647; *Pinion v. Pinion,* 92 Utah 255, 67 P.2d 265, 267.

ARGUMENT

POINT I

THE LOWER COURT DID NOT ABUSE ITS DISCRETION AND DID NOT MAKE AN INADEQUATE AWARD OF PROPERTY TO THE PLAINTIFF AND DID PROPERLY CONSIDER THE STIPULATION OF THE PARTIES IN REGARD TO DIVISION OF PROPERTY.

The Plaintiff contends that the trial court did not follow the stipulation of the parties in ~~disturbing~~ distributing the property. See Point I of Plaintiff's brief.

This contention is not fair to the trial court nor is it supported by the record which clearly shows that notwithstanding the efforts of Plaintiff's counsel to constantly bring up matters going to "blame" and "grounds" that the court was able to and did in fact consider the problem of the distribution of property objectively and in the light of the Stipulation of the parties (R. 53-54) and in accordance with well established rules, guide lines and precedents (R. 188-191).

Counsel cites *Wooley v. Wooley*, 113 Utah 391, 195 P.2d 743 (1948) as a basis for his contention that the Plaintiff should receive something more than one-third of the property. It should be noted however, that in the

Wooley case, though a stronger case was presented for the husband, both of the parties had grounds for divorce. It should also be noted that in the Wooley case no alimony was awarded to the wife while in the instant case the Plaintiff was awarded $200.00 per month. Furthermore, this court pointed out in the Wooley case that a one-third division of property to the wife "is a relative amount which must, of necessity, vary with the facts of the particular case."

The general factors recognized as guide lines in arriving at an equitable result have been referred to in a number of previously decided cases. See ***Foreman v.*** *Foreman,* 111 Utah 72, 176 P. 2d 144, 152 following *Pinion v. Pinion,* supra.

In disposing of the property and providing for the support of divorced persons this court in other cases has been guided by the "one-third rule" but has consistently recognized that this is only a guide line to be varied with the peculiar circumstances of each case. For example in *Griffin v. Griffin,* 18 Utah 98, 55 P. 84 (1898) it was held that the dissolution of a marriage by divorce being analogous to its dissolution by death, a general rule for the allowance of alimony is the customary one-third of

the husband's property, or one-third of his income. But, in *Blair v. Blair*, supra where the husband's property was worth $40,000.00, an award of $4,500.00 to the wife who was granted the divorce for her husband's willful neglect to support her, was held, under the circumstances, not to be so inadequate and inequitable as to justify a reversal on the grounds of abuse of discretion. In the case of *Porter v. Porter,* 109 Utah 144, 166 P.2d 516 (1946) the court modified the decree entered by the trial court with the result that the wife who got the divorce, received less than one-third property of the husband.

Many other cases could be cited and are collected by the annotator under Section 30-3-5 Utah Code Annotated, 1953, which cases all support the concept that a one-third distribution of property to a wife in a divorce proceeding might be used as a guide line to be varied under the particular facts and circumstances involved in the case. See for example, *Bullen v. Bullen,* supra and *Wooley v. Wooley,* supra.

In the instant case, the Plaintiff has made practically no financial contribution to the marriage (R. 62, 179) It is true, of course, that over the years she has performed her roll as a wife and mother in a marriage that has now

deteriorated resulting in divorce. She is employed with average earnings of $320.00 per month (R. 61) and is in good health (R. 63). *It was stipulated that both parties had grounds for divorce and that the court should make a distribution without prejudice to the Defendant* (R. 53-54). The Plaintiff was awarded $200.00 per month as alimony and one-third of the net assets of the estate.

This court might well note that the Plaintiff is apparently very satisfied with the $200.00 per month alimony award as no appeal is being taken from that portion of the decree. Though this court is not being called upon in this appeal to consider the propriety of the $200.00 per month alimony award, certainly it should be considered in determining the sufficiency of the property distribution to the Plaintiff.

In the light of all of these circumstances there is no basis for a contention that the Plaintiff has been treated unfairly or that the trial court has violated any prior guide lines established by this court. The decree entered by the trial court evidences no abuse of discretion whatsoever. Even if this court might have made some other disposition of the property of the parties had it been sitting in place of Judge Jeppson at the trial, there is certainly nothing in the record that would remotely suggest that the decree entered was "plainly arbitrary." As a

matter of fact in the light of the alimony award, the property award to the Plaintiff of one-third of the net estate, whatever that might turn out to be, was most generous.

POINT II

THE OBLIGATIONS ARISING FROM BUSINESS VENTURES SHOULD NOT BE PAID BY THE DEFENDANT AS CONTENDED BY THE PLAINTIFF.

The contention of the Plaintiff in Point 2 of her brief is so obviously unfair as to deserve little comment. The Plaintiff is here contending that all of the debts generated by the business activities of the Defendant should be paid by him and that the balance of the estate should be divided 50-50.

The Plaintiff, of course, over all the years that the parties have been married has enjoyed the economic benefits made possible through the Defendant's efforts. She has had the benefit of his monthly paycheck (R. 81) as well as some gain on his business ventures (R. 111). She married him, we may presume, for "better or worse." Now at the end of the trail together her concept of fairness seems to be: the "better" for her, the "worse" for him.

If this court were to order that a division of the property be made in accordance with the argument of the

Plaintiff, the effect would be to plunge the Defendant into bankruptcy. See Exhibit 14. An examination of Exhibit 14 clearly demonstrates that this would be the inevitable result. This, of course, does not seem to concern the Plaintiff, nor is she concerned with the fact that creditors who are entitled to be paid will not be paid if she is granted her request. We can only be grateful that courts are more objective and considerate of all interests concerned than are emotional and impassioned litigants who become blind to duties and obligations. The trial court never lost sight of the fact that creditors were entitled to be considered in this proceeding and thus ordered that the assets be liquidated and the obligations discharged and thereupon the estate be divided. Under the decree as entered the creditors have an even chance of being paid, both the Plaintiff and Defendant may receive a few dollars from the estate acquired and the Defendant will not be bankrupt.

SUMMARY

In conclusion we respectfully submit that the decree of the trial court is already more than generous in favor

of the Plaintiff. She has her $200.00 per month alimony and one-third of the net assets of the parties. The decree of the trial court should be affirmed.

Respectfully submitted,

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