

1971

George Ghost v. Thelma Ghost : Petition For Rehearing

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IN THE SUPREME COURT
OF THE STATE OF UTAH

GEORGE GHOST,

Plaintiff-Respondent,

vs.

HELMMA GHOST,

Defendant-Appellant.

Application for Review
The Supreme Court
and Appellant's
Application

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TABLE OF CONTENTS

	Page
APPELLANT'S APPLICATION FOR REHEARING.....	1
APPELLANT'S BRIEF IN SUPPORT OF APPLICATION FOR REHEARING.....	3
STATEMENT OF KIND OF CASE.....	3
DISPOSITION ON APPEAL.....	3
RELIEF SOUGHT ON REHEARING.....	5
STATEMENT OF FACTS.....	6
ARGUMENTS.....	10
POINT I. THE APPELLATE COURT IS REQUIRED TO PASS UPON THE WEIGHT OF THE EVIDENCE.....	10
POINT II. A SUPERFICIAL REVIEW OF THE RECORD COMPELS A QUITE DIFFERENT CONCLUSION AS TO THE INCOME OF THE DEFENDANT THAN THAT REACHED BY THIS COURT ON APPEAL.....	11
POINT III. GRANTING PLAINTIFF A DIVORCE AND DENYING DEFENDANT ALIMONY IS MANIFESTLY UNJUST.....	14
POINT IV. IT WAS IMPROPER FOR TRIAL COURT TO REQUIRE COUNSEL FOR DEFENDANT TO CHOOSE BETWEEN GIVING TESTIMONY IN SUPPORT OF THE REASONABLE VALUE OF LEGAL SERVICES RENDERED, OR IN CONTINUING PARTICIPATION IN TRIAL AS COUNSEL FOR DEFENDANT.....	17
CONCLUSION.....	18

CASES CITED

	Page
Cline v. Hulum, 435 P.2d 152, 154(Okla., 1967)....	11
Croft v. Jensen, 86 Utah 13, 40 P.2d 198, 203(Utah, 1935).....	11
Graziano v. Graziano, 7 U.2d 187, 93, P.2d 931, 933 (Utah, 1958).....	11, 15
Hamilton v. Hamilton, 89 Utah 554, 58 P.2d 11(Utah, 1936).....	11
Hendricks v. Hendricks, 91 Utah 553, 63 P.2d 277, 279(Utah, 1936).....	11, 16
Hendricks v. Hendricks, 91 Utah 564, 65 P.2d 642(Utah, 1937).....	16
In re Margaret Michaelsen. Deceased, 3rd Dist. Ct. S.L. Co., Case No. 56,143.....	6, 7, 8, 14, 19
In re Margaret Michaelsen, Incompetent, 3rd Dist. Ct., S.L.Co., Case No. 52800	7, 14, 19

STATUTE CITED

Section 30-3-5, U.C.A. 1953.....	10
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IN THE SUPREME COURT
OF THE STATE OF UTAH

GEORGE GHOST,

Plaintiff-Respondent,

vs.

Case No. 12252

THELMA GHOST,

Defendant-Appellant.

APPELLANT'S APPLICATION FOR REHEARING

The Defendant-Appellant respectfully petitions this Court for a new hearing on her appeal.

This petition is made pursuant to Rule 76(c)(1), Utah Rules of Civil Procedure, and is based upon the following alleged points of error:

1. The record does not support the conclusion that Defendant-Appellant has \$245.00 per month income from apartments which she will inherit.

2. Affirmation of the lower court's decree of divorce by this Court effectively deprives the Defendant-Appellant of any and all rights she

reasonably has or should have acquired by virtue of her marriage of 34 years.

3. Appellate Court did not answer question of whether trial court properly required Defendant's counsel to choose between giving testimony concerning the reasonable value of services rendered the Defendant or in continuing his participation in the trial as the counsel and advocate for the Defendant.

Respectfully submitted,



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IN THE SUPREME COURT
OF THE STATE OF UTAH

GEORGE GHOST,

Plaintiff-Respondent,

vs.

Case No. 12252

THELMA GHOST,

Defendant-Appellant.

APPELLANT'S BRIEF IN SUPPORT OF
APPLICATION FOR REHEARING

STATEMENT OF KIND OF CASE

Defendant appealed from a judgment of the lower court which granted Plaintiff a decree of divorce and denied Defendant an award of alimony.

DISPOSITION ON APPEAL

This Court affirmed the trial Court. Notwithstanding a marriage of some 34 years, this Court concluded that the trial court had not abused its discretion in granting the Plaintiff a divorce because

the parties had not cohabited for many years while they lived together, because the Defendant had called the Plaintiff vile names and had cursed him on numerous occasions, and because the Defendant threw the Plaintiff's belongings out on the porch and asked him to leave. Moreover, it was concluded that the Defendant was awarded all of the property acquired during the marriage, which consisted of a balance of a checking account in the amount of \$454.89, a modest amount of furniture, and Defendant's own expectancy of her inheritance of a furnished, five-unit apartment house. It was further concluded that the trial court did not abuse its discretion in denying an award of alimony to the Defendant, based upon the conclusion that the Defendant had \$245.00 per month rental income, \$21.71 per month social security, and \$80.55 per month railroad retirement benefits, which she loses by virtue of the Court granting a divorce. The award of \$125.00 attorney's fees to counsel for the Defendant was held to be reasonable, but this Court failed to meet the issue of whether or not counsel

could properly testify as to the reasonable value of services rendered, without disqualifying himself from further participation in the trial.

RELIEF SOUGHT ON REHEARING

Defendant respectfully requests a full consideration by this Court of the evidence contained in the record, and a full consideration of all inferences reasonably to be drawn therefrom. In addition, Defendant further requests this Court to fully consider the economic plight in which she is left by the decision of the lower court, and the affirmation thereof by this Court. Considering same and the shocking inequities thereof, Defendant seeks an order of this Court remanding the case to the lower court to fully review the probate proceedings on file with said District Court concerning the apartment house which Defendant will inherit, and any accounting or accountings contained therein. Also, after review of the probate proceedings, that the trial court be directed to modify its Findings and Conclusions to comport with

The full evidence which it should consider to fully and fairly dispose of the issues before the Court.

STATEMENT OF FACTS

The facts recited in the opinion of this Court filed November 3, 1971, state with reasonable accuracy the facts of the record before the Court, with one notable exception. This Court, as did the trial court, concluded that the Defendant receives \$245.00 per month rental income from an apartment house which is subject to a probate In the Matter of the Estate of Margaret Michaelson, Deceased, which is pending in the Third District Court for Salt Lake County, Case No. 56,143. In addition, the Court recognized the Defendant would have \$21.70 per month social security benefits. One can only conclude therefrom as fact that Defendant, after a divorce, will have spendable income of \$266.70 per month. Both courts recognized that Plaintiff had income of \$250.05 per month.

This Court's opinion did not concern itself with the fact that from the monthly gross rentals of \$245.00 per month, annual taxes of \$255.00 must be paid. In addition, bills for insurance, electricity, gas, water, repairs and maintenance, and advertising, must be paid therefrom. Moreover, a \$245.00 per month gross income assumes 100% occupancy of the apartments in question. (R. 92, 98, 99, 100 and 101.)

During the trial in the lower court, the judge was informed that prior to the Michaelsen probate, there had been a guardianship In the Matter of the Estate of Margaret Michaelsen, Incompetent, Third District Court for Salt Lake County, Case No. 52,800. The Final Accounting in said case covers operations of the apartment house in question from July of 1957 through and including May of 1969. Even a cursory review thereof discloses that rental income of \$4,837.50 was received, and that operating expenses were \$4,071.47. Net rental income of \$766.03, spread over the 23 months involved, yielded an average net monthly rental income of

slightly over \$33.00 per month. Both this Court and the lower court found that a large portion of the family savings had been expended in repair work on the apartment house, which was in bad shape when the Defendant assumed the responsibility thereof. (Tr. 38.) Therefore, one might reasonably conclude the net rental income of approximately \$33.00 per month is unusually low.

Both this Court and the trial court found that there was a pending probate concerning the apartment house, supra. As soon as the appropriate tax clearances can be obtained, this author anticipates completing the Final Accounting and Settlement of said probate. The Final Accounting, when complete, will disclose that through November, 1971, gross rental income on the apartment house was \$6,952.50, and that there were operating expenses for the same period in the amount of \$3,921.64. Accordingly, the gross monthly rental income has averaged approximately \$232.00 since June

of 1969. The net rental income of \$3,030.86 has yielded a net monthly income of just over \$100.00.

In addition to the inaccurate conclusion about Defendant's income, this Court's opinion did not give any consideration to the requirements of the Defendant, or her circumstances. There is uncontroverted evidence that Defendant needs approximately \$175.00 to \$180.00 per month for living expenses. Moreover, the opinion fails to consider Defendant's age of 68 years, that she has rheumatoid arthritis, a bad back with two fused discs, total blindness in one eye, and loss of vision in the other eye, and the fact that the Defendant requires assistance because of her vision problems. (R. 74, 75 and 79.) It should be pointed out that Defendant has suffered a heart attack and has been hospitalized since the briefs on appeal were submitted to this Court. This Court concluded Plaintiff's income and resources are very limited, that he is in poor health, and that a considerable portion of his income goes to pay medical expenses.

This conclusion is made, notwithstanding the fact that Plaintiff has medical benefits, both through social security and railroad retirement. It is almost too plain for statement that Defendant's income is more limited than that of the Plaintiff, and that the medical requirements of the Defendant are certainly as great, if not greater, than those of the Plaintiff. Plaintiff will continue to have medical benefits through railroad retirement, whereas the Defendant will be deprived of any medical benefits under railroad retirement when the divorce in this case becomes final.

ARGUMENTS

POINT I

THE APPELLATE COURT IS REQUIRED TO PASS UPON
THE WEIGHT OF THE EVIDENCE.

Section 30-3-5, Utah Code Annotated, 1953, provides that "the court may make such orders in relation to . . . the maintenance of the parties . . . as may be equitable." Having before it the predecessor statute containing the same language as that quoted, the Utah

Supreme Court observed in the case of Hamilton v. Hamilton, 89 Utah 554, 58 P.2d 11(Utah, 1936), at page 14, that the quoted section relaxed in divorce proceedings rules of law calculated to maintain the stability of judgments. Where cases are cognizable in equity, rather than in law, the Appellate Court is required to consider the entire record and pass upon the weight of evidence. Croft v. Jensen, 86 Utah 13, 40 P.2d 198, 203(Utah, 1935); Cline v. Hullum, 435 P.2d 152, 154(Okla., 1967); Graziano v. Graziano, 7 U.2d 187, 93, P.2d 931, 933 (Utah, 1958); Hendricks v. Hendricks, 91 Utah 553, 63 P.2d 277, 279(Utah, 1936). In the last cited case at page 279, the Utah Court indicated that it is

well settled in this state that where the appeal is on the question of the propriety of the judgment for alimony, this court is required to review the evidence in the nature of a trial de novo on the record, and the appellant is entitled to the judgment of this court, as well as the trial court, on this question. (Emphasis added.)

POINT II

A SUPERFICIAL REVIEW OF THE RECORD COMPELS A QUITE DIFFERENT CONCLUSION AS TO THE INCOME OF THE DEFENDANT THAN THAT REACHED BY THIS COURT ON APPEAL.

At the outset, it should be observed that the Plaintiff was 78 years of age when this action was originally filed in December of 1969 and he is now 80 years of age. It is apparent from the first few pages of the transcript of the trial that Plaintiff was very hard of hearing. Defendant was 68 years of age when the action was commenced and is now 70 years of age. There is no dispute with the fact that both parties are suffering from poor health. Considering the foregoing, and particularly the hearing difficulty of Plaintiff, it is understandable why the record may be unclear and deficient in certain respects. Counsel for Defendant tolerated numerous leading questions, simply because of communication problems interjected into the proceedings by Plaintiff's hearing difficulties. Notwithstanding such indulgence, Plaintiff's testimony is replete with contradiction and confusion. Accordingly, it is respectfully submitted this Court should review such a record with great care, and be hesitant about making hasty conclusions, without the benefit of careful scrutiny of all that is contained in the record and

the reasonable inferences to be drawn therefrom.

The central issue in this case, it seems to this author, is concerning the income and finances of the parties, and particularly the income of the Defendant and her ability to care for her own needs after a divorce. The result achieved by the trial court and this Court on appeal strips Defendant of her human dignity and ability to cope with the financial necessities facing her now and in the future.

The record before this Court on appeal disclosed that Defendant expected to inherit a five-unit apartment house, which property was the subject of a pending probate before the district court from which the appeal was taken. Moreover, the uncontroverted evidence was that the apartment house is old and in bad repair. Evidence further established that annual taxes thereon were \$255.00, and it is apparent that other bills must be paid from the gross rentals, such as insurance, electricity, gas, water, repairs and maintenance and advertising. For the trial court and this Court to assume the apartments would be fully occupied 100% of the time and without any expenses whatsoever is simply incredible.

There is absolutely no other explanation for the Court's conclusion that Defendant receives \$245.00 per month rental income from the apartments in question.

Before making Defendant a ward of the State, it would seem desirable for this Court to carefully review the record before it, and the reasonable inferences to be drawn therefrom, and to remand the case to the trial court to review carefully the guardianship and probate files concerning the Michaelsen Estate.

POINT III

GRANTING PLAINTIFF A DIVORCE AND DENYING
DEFENDANT ALIMONY IS MANIFESTLY UNJUST.

As a result of her 34-year marriage, the trial court awarded the Defendant all of the property acquired during the marriage, which consisted of the balance of a checking account of \$454.89, and a small amount of old furniture. In addition, the court awarded the Defendant the apartment house which she expects and is entitled to receive through inheritance. How the court had authority to award probate property in these proceedings, and as property supposedly acquired in the marriage, is most puzzling to this author. Section 30-2-1, Utah Code

Annotated, 1953, provides that the

real and personal estate of every female acquired before marriage, and all property to which she may afterwards become entitled by . . . inheritance . . . shall be and remain the estate and property of such female, and shall not be liable for the debts, obligations or engagements of her husband . . .

If said statute is controlling and applicable in this case, then it must be concluded that Defendant was awarded \$454.89, plus a couple of rooms of old furniture. Even by the most archaic measures of value, one must surely conclude that this is a niggardly and paltry sum for the services Defendant rendered Plaintiff for more than thirty of the most productive years of her life.

In the Graziano case, supra, at page 933, this Court acknowledges

the broad powers of review in equity with which this court is endowed, [and] when a divorce decree is under attack, it has always been regarded as an attack upon the whole decree, and when it appears that there is an abuse of discretion so that an inequity or injustice is wrought, the court has proceeded to make such adjustments as it deemed necessary to do justice between the parties and to give effect to the purpose just mentioned above.

In the earlier Hendricks case, supra, at page 279, the Utah Supreme Court concluded

that it is not necessary for this court to find a gross abuse of discretion on the part of the trial court before modifying the judgment as to alimony and that no general rule as to the amount of alimony can be laid down to follow in all cases, . . . and that if, upon examination of the records, this court is convinced that the award in the trial court is inequitable and unjust, it should direct such decree as it finds to be just and equitable.

A petition for rehearing was filed with the Utah Supreme Court in the case of Hendricks v. Hendricks, 91 Utah 564, 65 P.2d 642 (Utah, 1937), concerning the allowance of costs and attorney's fees. When the case was presented on its merits, through oversight nothing was mentioned about attorney's fees. A written motion for fees was on file with the trial court, but it appears that said matter was not raised at time of hearing on the merits. In addition, it appears from the per curiam decision that the issue of fees was overlooked on appeal. Notwithstanding these oversights, the Court prevented an injustice by reopening, and permitting the award of costs and fees.

It is respectfully submitted that these causes support the conclusion that this Court does have the prerogatives and means at its disposal to correct gross and manifest injustice. For this Court to turn the debilitated 70-year-old Defendant from the bar of justice with effective monthly income of approximately \$125.00 per month and living expenses of approximately \$180.00 per month, without alimony or separate maintenance, and with the consolation that she has been awarded \$454.89 and some old furniture for the service she rendered Plaintiff for over 30 years, would be a most callous and shocking result.

POINT IV

IT WAS IMPROPER FOR TRIAL COURT TO REQUIRE COUNSEL FOR DEFENDANT TO CHOOSE BETWEEN GIVING TESTIMONY IN SUPPORT OF THE REASONABLE VALUE OF LEGAL SERVICES RENDERED, OR IN CONTINUING PARTICIPATION IN TRIAL AS COUNSEL FOR DEFENDANT.

Point V of Appellant's brief concedes the trial court had likely not committed error in awarding an attorney's fee of \$125.00 under the circumstances. The only serious issue raised about the amount of attorney's fees was that Defendant should be permitted

additional attorney's fees because of her appeal.

The issue raised on appeal which went totally unanswered was whether or not counsel could be disqualified from further participation in trial by electing to be sworn and give testimony in support of the reasonable value of legal services rendered in the case before the trial court.

Although the ruling of the trial court in this case did not result in earthshaking consequences, the issue raised is nonetheless one of general interest to the whole Utah State Bar. Point IV of Appellant's brief adequately canvasses the issue, and nothing more can be added that will be of any benefit.

CONCLUSION

Equity and good conscience dicatate that this Court grant Defendant's Application for Rehearing. The broad powers vested in this Court in matters of equity should be invoked to prevent a monumental miscarriage of justice.

Defendant respectfully requests this Court to remand this case to the trial court to review the

Michaelson guardianship and probate files, with directions for the trial court to reconsider the case in light thereof and to modify its Findings, Conclusions and Decree consistent therewith. To do otherwise, will effectively turn the Defendant away, with no one to look to for the necessary support and maintenance she so badly needs.

Respectfully submitted,

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