1971

Marie Child Hamilton v. Gordon Dean Hamilton : Brief of Respondent

In The Supreme Court of The State of Utah

MARIE CHILD HAMILTON,
Plaintiff and Respondent,

-vs-

GORDON DEAN HAMILTON,
Defendant and Appellant.

Case No. 12543

BRIEF OF RESPONDENT

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NATURE OF CASE

This was an action for divorce involving the questions of property settlement between the parties and the amount of alimony and child support to be paid by defendant to the plaintiff. At the trial the defendant did not challenge plaintiff's grounds for or right to a divorce, and there was no dispute as to custody of the minor children.

DISPOSITION IN LOWER COURT

The case was heard by the Honorable Allen B. Sorensen of the Fourth Judicial District Court in and for Utah County, sitting without a jury. Judge Sorensen awarded the plaintiff an interlocutory decree of divorce; the care, custody and control of the minor children, subject to reasonable visitation by defendant; made a property division between the parties, and made an award of alimony and support to be paid by appellant to the respondent.

RELIEF SOUGHT ON APPEAL

Respondent seeks an order of this court affirming in all respects the judgment of the lower court.

STATEMENT OF FACTS

The case was heard by the court on March 10, 1971. With the exception of witness, Ted Garfield, who testified only as to the value of the home, the respective parties were the only witnesses called. (Tr. 19, Ex. 4)

There was no problem over the custody of the children or over visitation privileges. (Tr. 18)

Defendant did not contest or challenge plaintiff's right to the divorce. (Transcript)

The parties were married in 1949. (Tr. 3) Their

first child was stillborn, but at the time of the divorce they had five living children varying in age from five (5) years to nineteen (19) years. (Tr. 4) The oldest son, Stewart, was married and did not live at home. (Tr. 4) Early in the marriage plaintiff worked, at one time for Christensens (store), and at Mountain Telephone Co. (Tr. 4) Plaintiff's father gave them a building lot upon which they built their first home. They later sold that property and used enough of their equity from that sale to buy the lot upon which their present home stands, and used the rest of that equity to start the partnership business in which defendant is presently engaged. (Tr. 5) During the last several years of their marriage the parties lived together but not as husband and wife. During those times defendant gave plaintiff $150.00 per week to run the home on. (Tr. 6) At the time of the divorce the plaintiff had a heart problem and trouble with one of her eyes. (Tr. 8, 9)

The amount of alimony and support needed by the plaintiff and her children came to $1,007.17 per month. (Ex. 1) Plaintiff had been employed about one year at the time of the divorce and earned $312.00 per month, (Tr. 8) leaving a balance needed of $695.17. During the time that the parties were separated before the divorce was instituted the

plaintiff had been receiving from defendant $150.00 per week to run the house on. (Tr. 11)

Defendant's income for 1969 was $20,586.89. (Ex. 5) At the trial he testified that his income for 1970 was $17,434.39. (Tr. 24; also Ex. 5) At the time of the divorce hearing defendant was living at the Sage Motel and taking most of his meals there. (Tr. 26) He testified that his needs were $390.00 per month for living expenses and $50.00 for debt retirement. He stated that he generally drew $1,000.00 per month from the partnership. (Tr. 26 and R. 20) During the first eleven months of calendar year 1970 he had withdrawn $16,139.89 from the partnership earnings. (Ex. 2) When he was on business the partnership paid for his meals, lodging, and gasoline. He was also furnished a car at company expense. (Tr. 33)

The assets accumulated by the parties at the time of the trial were as follows: Home $22,000.00, less mortgage owing of $7,036.00; furniture and fixtures $5,000.00; 1969 Pontiac $2,370.00, and equity in the partnership of $110,988.15. All of these values were furnished by defendant. (Ex. 4 for expert opinion on value of home and exhibits 2 and 3)

At the conclusion of the hearing the Honorable Allen B. Sorensen, trial judge, awarded the plaintiff the following:

Home, subject to the mortgage; household furniture and fixtures; 1969 Pontiac automobile; $27,000.-00 judgment, which was a lien on defendant's interest in the partnership but with no execution for an 18 month period; $100.00 per month per child for four minor children; $250.00 per month alimony until the month following satisfaction of judgment, then $150.00 until the further order of the court. (R. 33, 34)

By an amendment to the Decree dated May 21, 1971, the trial judge extended the time within which the $27,000.00 judgment should be paid to 54 months. (R. 56)

STATEMENT OF POINTS

POINT I

THE JUDGMENT OF THE TRIAL COURT WAS FAIR AND ENTIRELY EQUITABLE AND SHOULD BE SUSTAINED BY THE SUPREME COURT ON APPEAL.

ARGUMENT

The trial court's decree in this matter, establishing the alimony and support to be paid and making the property settlement, was based upon evidence taken at the trial practically all of which was furnished and made available by defendant. Defendant's

expert valued the home at $22,000.00 (Ex. 4). Defendant himself valued the furniture and fixtures, car, and amount owing on the mortgage (Ex. 3). Although Exhibit 2 is shown as "Plaintiff's Exhibit" it was furnished at time of trial by Defendant (Tr. 12, 13). The Defendant's earnings statements showing some $20,500.00 for the year 1969 and $17,423.00 for 1970 were prepared by and introduced by Defendant (Tr. 24).

Under our Rules (Rule 59—Utah Rules of Civil Procedure), the only basis for bringing in new or additional evidence is on grounds (3) accident or surprise and (4) newly discovered evidence. With respect to accident or surprise, our court has long said that such is not a ground for a new trial if by the exercise of ordinary diligence it could have been avoided. ***Stewart Mining Co. v. Coulter, 3 Utah 174, 5 P. 557.*** To bring in newly discovered evidence as a basis for a new trial it has long been held that it must be shown that the moving party used due diligence before the trial. ***Van Dyke v. Ogden Savings Bank, 48 Utah 606, 161 P. 50.*** The trial court found that appellant had failed in both respects.

To succeed in obtaining a new trial, the defendant would have to come within either Rule 59(6), insufficiency of the evidence, or Rule 59(7), error in

law. While the trial judge did extend time for payment of the judgment from 18 to 54 months, he was not otherwise impressed by defendant's contentions and denied his motion (R. 56).

The matter of disposing of the property and providing for the support of divorced persons and their minor children rests largely in the sound legal discretion of the trial courts, reversible only for abuse of discretion. ***Bullen v. Bullen, 71 Utah 63, 262 P. 292; Pinney v. Pinney, 66 Utah 612; 245 P. 329; Tremayne v. Tremayne, 106 Utah 483, 211 P(2) 452 and Carter v. Carter, 19 Utah (2) 183, 429 P(2) 35.*** In a divorce proceeding, the Supreme Court will not substitute its judgment relative to alimony and division of propery for that of the trial court unless the record clearly discloses that the trial court's decree in such matter is plainly arbitrary. ***Allen v. Allen, 109 Utah 99, 165 P. 2d 872.***

This case was tried by the court more than two months after the close of the taxable year 1970 (Tr. 1). The evidence showing defendant's earnings for 1970 and the value of his interest in the partnership was taken from an exhibit prepared by defendant's accountant as of November 30, 1970, and was provided by and introduced by defendant (Ex. 2). That exhibit shows that defendant's share of the

partnership net earnings for that eleven month period was $17,423.39 of which he had then actually withdrawn the sum of $16,139.89, leaving him an equity in the business of $110,988.15 as of that time (Ex. 2).

After the court had made its decision and had entered the decree, defendant apparently decided he should cut his income for 1970 and reduce the amount of his equity in the business. He increased depreciation reserve from $69,018.29 as shown on the November 30, 1970 statement (Ex. 2) to $80,462.82 on the December 31, 1970 statement attached to defendant's motion (R. 44), a difference of $11,444.52. In addition, the current assets were reduced from $270,199.15 to $238,770.87, a difference of $31,428.29. The accounts receivable were decreased by some $20,000.00 but accounts payable were only reduced from $135,615.41 on November 30 to $133,345.47 on December 31, a difference of some $3,300.00. It is noteworthy that an operating statement was not attached to the December 31 statement (R. 44) as it was to Ex. 2.

The amount withdrawn from the partnership by the partners during the month is not shown. The unexplained "Adjustments" resulted in a decrease of partners equity from $222,308.82 on November 30, to

$178,598.54, a difference of $43,710.28 on the December statement. (R. 44 and Ex. 2)

The November 30 statement (Ex. 2) does not give a breakdown of the depreciable assets, but lumps all equipment at a cost of $177,767.47 and buildings at $17,703.07 with a total depreciation reserve for all depreciable assets at $69,018.29. The December 31 statement, R. 44, shows the airplane at a cost of $97,435.05 with a depreciation reserve of $40,500.00 thus leaving an unrecovered cost of slightly less than $57,000.00. The very most difference the value of the airplane could make if it is now worth $39,500 would be $17,500.00.

The partnership must have justified the purchase of the airplane by the needs of its business. There appears to be no complaint as to the operation or effectiveness of that machine nor in the fact that it is used in the business. Since it is a business asset apparently fully capable of performing the function for which it was originally purchased, it seems to Respondent that it could make little difference whether its actual value is either more or less than that upon which it was carried on the books of the Company at the time of the trial.

The evidence before the court showed that there was in the business current assets of more than

$270,000 of which only $15,416.00 was represented by inventory. The balance was divided about equally between cash and accounts receivable. Thus the bulk of the business assets were not of the "quickly depreciating variety" as appellant claims in his brief.

In his Brief appellant argues that Respondent was not only awarded one-third of the property but also one-third of his income. Such is not the case. Of the $650 per month presently required to be paid by appellant, the sum of $400.00 was designated by the decree as child support of $100.00 each for the four minor children. The support of those minor children is the responsibility of the appellant whether or not there was a divorce. ***Griffin v. Griffin 18 Ut 98, 55 P. 85.*** The $250.00 awarded to Respondent for her support or alimony reduces to $150.00 as quickly as appellant pays the money due as part of the property settlement. By its decree the trial court gave appellant 4½ years to make that payment. Appellant can avoid the interest and save $1,200.00 per year alimony by satisfying the judgment.

The evidence here shows that Respondent reasonably required $1,007.17 per month to make ends meet for her and the four children (Ex. 1). She earns, presently, $312.00 per month (Tr. 8). That leaves $695.17 required for their bare necessities. Her debts

and obligations including the dental bill, but excluding the house payment, total $2,622.74, requiring monthly payments totaling $220.78 (Ex. 1). Appellant admits he draws $1,000.00 per month and claims that his monthly needs total $440.00 per month including $390.00 for his own rent and food. (R. 20, 21) That amounts to $5,220.00 annually. The further fact is that during the first 11 months of 1970 the appellant had actually drawn a total of $16,139.89 from the business (Ex. 2). In the calendar year 1969, he earned $20,586.89 (Ex. 5). Taking his annual earnings at the $16,139.89 figure and reducing the same by $7,800.00 per annum given to his wife and children it still leaves appellant more than $3,100.00 per year over and above his very huge estimated needs on a yearly basis. By merely applying his excess to payment of the judgment over a 4½ year period he could cut the judgment in half.

The court did not award Respondent any of the partnership property. It merely awarded her a lien on defendant's equity therein until the judgment is paid by the appellant. There is no judgment in favor of respondent against the partnership as such, but only against the appellant individually.

The evidence supports and justifies the decree of the trial judge. This is not a situation where it could be said that the evidence clearly preponderates

against the trial court's findings. See ***Graziano v. Graziano, 7 Utah (2) 187, 321 P (2) 931.*** There was no plain abuse of discretion nor is there manifest injustice or inequity. See ***Curry v. Curry, 7 Utah (2) 199, 321 P (2) 939.***

The Respondent has been required to employ counsel in connection with the appeal and she has incurred expenses for printing brief and the like. A reasonable fee for the use and benefit of Respondent's attorney and her other costs should be determined and allowed by the court.

CONCLUSION

The judgment of the trial court should be affirmed and respondent should be awarded her attorney fee and necessary costs.

Respectfully submitted,

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