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1978

# Paul P. Rost v. Janet L. Rost : Appellant's Petition for Rehearing

Utah Supreme Court

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Samuel King; Attorney for Appellant;

Pete N. Vlanos; Attorney for Respondent;

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IN THE SUPREME COURT OF THE STATE OF UTAH

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PAUL F. ROST, :  
Plaintiff/Respondent, :  
vs. :  
JANET L. ROST, : Case No. 15398  
Defendant/Appellant :

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APPELLANT'S PETITION FOR REHEARING

APPEAL FROM ORDERS OF HONORABLE JOHN F.  
WAHLQUIST AND FROM FINDINGS, CONCLUSIONS,  
AND DECREE OF HONORABLE RONALD O. HYDE,  
BOTH SECOND DISTRICT COURT, WEBER COUNTY,  
UTAH.

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### SAVING CLAUSE

Counsel has written and rewritten this petition six times.

The strong language is intended solely to get the attention of the court. It is counsel's gamble that he might offend the court, weighed against the necessity of stating the matter so as to get that attention.

Domestic law is in a state of evolution. Utah is not blind to this. The court's recent decision in Wilkins v. Stout was laudable. It opens the way to thoughtful consideration of outside assets, as the wife's inheritance, or the husband's vested retirement plan, that now stand as major and unresolved problems at the trial level.

Counsel has already used that opinion three times at the trial level, and it has been most helpful to the judges.

In the case at bar, the two issues raised are issues where counsel and courts sorely need guidance.

Most domestic cases, even on appeal, involve who gets the table and who gets the cloth.

This case, though, has not one, but two, issues whose thoughtful resolution can be of inestimable benefit. For that reason, counsel casts the dice and makes his gamble.

## APPELLANT'S PETITION FOR REHEARING

Appellant, through her attorney, Samuel King, respectfully requests the court to grant rehearing.

When an attorney takes the time to submit a thoughtful brief to the court, he should be reasonably able to expect that the court will render a thoughtful opinion.

The opinion in this case reads as if the opening page of the brief, Statement of Points, was considered, these points on their face held not worthy of further consideration, and the case cursorily scanned and dismissed.

In fact, the case contains two very important issues. The court has not touched on these. In other words, with all due respect to the court, it has missed the boat.

Probably the court is wearied of certain types of appeals, such as writs for habeas corpus from the Utah State Prison, or domestic appeals which are merely perpetuated bickering of the spouses.

Last year in Salt Lake County, over 4,000 domestic actions were filed. These cases involve an average of two children. Accordingly, in Salt Lake County alone, 16,000 persons were involved in the trauma and economic disaster of divorce in one year. That is an epidemic.

Because the judges in the state's populous areas are so swamped with work, they often render poor divorce decrees. This

is no reflection on the judge. It is that he doesn't have the

time to master the entire fact situation. Often, the judge's emotional and physical exhaustion enters as a human factor.

It was to this very epidemic nature of domestic litigation that the two important points in appellant's brief were addressed.

The first point was the issue of when abatement is appropriate.

This case is a good example of why domestic judicial discretion should follow the criteria applied by Utah in other civil cases, but never clarified in domestic cases, which holds that a case should proceed in the state which is "best suited" to hear the entire case. (See Brief P29; Annex 2, P6)

The result here, by denial of Mrs. Rost's motion for abatement, was that she was required to go to court to try CHILD CUSTODY ON THREE COURT DAYS' NOTICE FROM THE TIME THE ISSUE OF CUSTODY WAS RAISED, NOTWITHSTANDING THE FACT THAT NEITHER SHE NOR THE PARTIES' CHILDREN HAD EVER RESIDED IN THE STATE OF UTAH, THAT SHE WAS KNOWN TO BE ENTIRELY WITHOUT FUNDS WITH WHICH TO TRAVEL ACROSS COUNTRY TO APPEAR AND DEFEND, AND THAT ALL WITNESSES WHO KNEW HER AND THE CHILDREN, AND EVEN THOSE WHO KNEW THE HUSBAND IN HIS SETTING AS FAMILY MAN, RESIDED IN DIFFERENT STATES, NOT ONE RESIDING IN THE STATE OF UTAH. (Caps to draw attention)

These facts are spelled out in detail in Mrs. Rost's Brief on Appeal in the Statement of Facts at pages 6-9, in Point II at pages 28-32, and in Annex 2 (Her Interlocutory Appeal) at pages

Mrs. Rost prays the court review these portions of her Brief before proceeding with this petition.

In its opinion, the Utah Supreme Court stated simply that abatement was not a matter of right, the state of first filing having the power to proceed. Had it had one sentence in it concerning the facts, it is doubtful if the point would have been dismissed in such horn book fashion.

The fact of the Utah trial court's power to deny abatement was not in issue. Of course, it had the power.

The issue was, what criteria should the trial court use in ruling on such a motion? What discussion of this issue is there in the appellate opinion?

Following that, her prayer for relief was that she be free to proceed to enforce the decree, if such should be necessary, in New York. This prayer is overlooked in the appellate opinion. It was stated in the section on Relief Sought on Appeal (Brief page 1) and in her Summary (Brief page 32), factually explained at pages 9-10 of her brief and argued in Point II, pages 28-29.

Our society is transitory. This generality applies with great frequency in domestic cases. Following the break-up of a marriage, it is common for one spouse to leave the state of residence as part of the process of leaving the home, going home to mother, seeking greener pastures, or simply escaping.

Accordingly, the issue of sound criteria for abatement, or declining jurisdiction, is one that can be raised at trial hundreds of times each year. It is a proper issue. Most decis

will turn on what best serves the children.

The present Utah law and some other states is almost FIFO. First one to the courthouse wins.

This case is a classic example.

Had Major Rost honored his sworn Separation Agreement, Mrs. Rost would not have contested the divorce. It was his unilateral rescission, with no announced cause, that compelled her to file in New York to try to hold him to the agreement.

How the case came on for trial setting so rapidly is difficult to determine particularly when Major Rost had (1) filed no reply to Mrs. Rost's answer and counterclaim; (2) the plea in abatement had not been heard; and (3) he had not asked for custody in his original complaint.

When Judge Hyde heard the case, he commented that the prior judge had been attempting to "push the matter to early hearing."

There is conflict in the law as to which state has the primary decree, based on whether first filing is the criteria or first decree is the criteria.

It seems that Judge Wahlquist's purpose in "pushing" the case was to prevent Mrs. Rost from having time to obtain a "first" decree in New York.

This kind of race to be first has nothing to do with justice. To the contrary, it means that the courts will act so quickly and impulsively that they will rule without considering merits.

Judge Wahlquist is an experienced judge, but human. He had met the Major twice, and the Major is a fine looking, articulate man of military bearing. He had not met Mrs. Rost.

Clearly, the judge thought that he was not going to send that dedicated soldier cross country to fight a divorce on foreign turf. But by dealing with the known, the Major, in preference to the unknown, the wife and children, he forced them to that which he wouldn't make the Major do. This, though all witnesses relative to custody were also in New York.

To nail it down, the judge exceeded his authority. He terminated Mrs. Rost's support as of the trial date which he set the next week, three court days away. This forced Mrs. Rost to (1) trial in Utah or (2) starve. That relief had not been asked. He did it sua sponte.

What a help it would have been for her counsel if he could have argued, as Judge Wahlquist is a student of the law, "Your honor, the Utah Supreme Court has set criteria for abatement. Let's compare them to the situation here."

Doubtless the judge would have followed the law. It was the lack of such law that freed him to go unhindered by anything but his visceral reaction, i.e., discretion.

Mrs. Rost prays the court consider, and rule on, domestic criteria for abatement, and in process of that, free her to proceed in New York should it ever be necessary.



Turning now to the second major issue, which the Utah Supreme Court also overlooked, which is whether the Separation Agreement terms concerning property should not have been honored by the Utah court.

The opinion states, "There is no claim that the award of alimony and support for the minor children is inequitable or that the court abused its discretion in making the award. It is only asserted that the court should have followed the agreement made by the parties."

Pages 11 through 15 of Mrs. Rost's brief on appeal are a precise accounting in which Mrs. Rost showed that the Separation Agreement terms were equitable, and that Judge Hyde erred in not following them, so that his ruling was not equitable.

The essence of what happened is that Major Rost had reduced his total indebtedness (even though he had bought all new furniture on credit) from the time of the Separation Agreement to the time of trial, so he could actually live with the agreement.

What he did though was run up extreme "short term" debt, by using credit to pay his regular expenses, rather than using cash. His many credit charges were substantial.

Accordingly, he showed himself at the moment of trial, in a position of being cash short because he showed a substantial monthly cost of living, together with a great deal of short term indebtedness, both of which he had to meet each month.

Consider the ingeniousness of that. If I charge everything for a month or two or, without design, I habitually always spend my income before I receive it, relying on the time lapse before my credit charges reach me, I can duplicate my expenditures. That is, I have my monthly cost of living, then I also have my short term indebtedness. However, they both cover the same ground as the monthly cost of living.

Facts supporting this argument were further spelled out in the Statement of Facts within Mrs. Rost's Point I.

She did not claim on appeal that the court should have voided the Settlement Agreement with such words being in a vacuum. She said it, and proved it, because the Settlement Agreement terms were fair, so that revising them was unfair.

Judge Hyde made no findings of change of circumstance since the Separation Agreement had been made. He just found that Major Rost's then total monthly expenses were so high that he would have trouble meeting them and also paying the amount required by the Settlement Agreement. In doing that though, Judge Hyde (and it must be remembered that the case started in late afternoon and finished that evening on the day before Thanksgiving because of its rush to trial), didn't have the time to segregate and realize how and why Major Rost's total monthly expenses had been inflated, such inflating having nothing to do with his actual monthly need for money on a long term, regular basis. That is, if he had paid his short term debt on the schedule he listed,

he would speedily have retired it and then had that money as pocket cash.

Included within this factual issue was the larger issue of law and policy stated in detail at Point I of Mrs. Rost's Brief.

The appellate opinion conceives this issue to be whether New York law had to be applied in a Utah divorce trial. It naturally said "no."

Unfortunately, Mrs. Rost never claimed that. It was not an issue. If a pun may be allowed, such is not the case.

The issue was the weight to be given prelitigation settlement agreements.

In the ordinary commercial case, if the contract says the law of a particular state is to be used, such will be followed by the trial court. However, this rule is incompatible with the overriding duty of a domestic judge to do equity--he can't be blindly bound. It would seem such provision should be considered carefully and the foreign law reviewed, but followed only if consistent with equitable principles.

Mrs. Rost avoided that issue because of its complexity. Instead, she based her point on much stronger ground. This is the legal standing of a settlement agreement itself.

In most states of the union, prelitigation settlement agreements are strongly encouraged. They are the vehicles by which parties considering divorce can give the marriage one more try. While husband and wife are in that comparatively thoughtful stage of attempting to reconcile but realistically recognizing that

their problems may not be solveable, they can work out a settlement agreement, i.e., "Okay, while we're trying to be nice to each other, this is a good time to settle terms if we can't make it."

If they live the agreement out, and if either of the parties relies in good faith on that agreement, what weight should it be given in the courts? That was the issue presented on appeal.

At the present time in the Utah courts, from counsel's personal experience with several thousand cases, settlement agreements are worth the paper they are written on. The Utah Supreme Court has announced some criteria such as "great weight." It has made some comments about contractual obligation, but it always comes back to the unfettered discretion of the trial judge.

Compared to this, New York has announced specific criteria. Is there a finding of fraud or duress; is there specific evidence of gross overreaching at the time the settlement agreement was made; was either party ignorant as to the agreement's terms; have the parties lived with the agreement for a substantial time; will the party who relied be injured if the agreement is revoked? If not, the sworn contract is to be honored.

Applying specific criteria will save judge time because fewer cases will be tried, and with this save attorney fees which divorcing parties can rarely afford, and tremendous amounts of emotional trauma.

New York law is cited because it is in harmony with other states, and also the legal criteria the parties agreed to.

This does not tie the hands of the courts. If the specific criteria to set the agreement aside are not present at the time of trial, the courts can still, if there is a specific finding of changed circumstance, modify the terms of those agreements as under 30-3-5, UCA.

There was no adverse change here for Major Rost as his total indebtedness had decreased and his income increased. Mrs. Rost's position was unchanged except that travel and suit costs put her in debt.

The gap in the Utah law is that the trial judge has no distinction made by existing Utah law between later change of circumstance, and simply his feeling that in hindsight, the agreement should be changed.

It also has no distinction between settlements hammered out in the heat of litigation and those carefully drawn before litigation commences.

There are many truisms about 20-20 hindsight, all true. Worse, we are tempted to use it. The New York concept of judicial restraint has something to commend it.

It is because of this undefined judicial discretion that separation agreements are entirely unreliable in Utah.

Because they are unreliable here, Utah law encourages litigation to avoid them. This not only ties up the courts, it teaches people not to trust contracts, nor to trust the courts which interpret them. Are these results desirable?

Let us apply these theoretical arguments to actual situations.

A typical case might be a wife who by nagging and whining makes the husband entirely responsible for her happiness ("It's your fault I'm not happy, John."), yet no matter how valiant her efforts, she never lets him succeed. She is happy really because everything is her way, but he feels himself to be a miserable failure, a man who is not able to gain the love or respect of his wife.

As an alternate example, the husband tells the wife that he has provided her with children and a good home, so she is indebted to him. ("Most women would be grateful for what I give you, Marsha, so don't tell me what to do.") He then spends all of his free time and money with a golf club or girl friend in hand. The neglected wife is in despair.

In the marriage counselor's term, the "dynamics" of the relationships are out of balance, so that one party's needs are being fulfilled at the sacrifice of the others.

Both example marriages give the children a picture of what marriage is based upon what they see at home. This view of a flawed reality creates poor odds that these children in their marriages will have good marriages.

The unhappy spouse sees an attorney in a mood where they can't survive as an effective person or parent if things remain as they are, but desperately wishing to improve their marriage rather than destroy it.

At least half of counsel's divorce cases involve people forced to divorce, rather than wanting it.

As matters now stand, the attorney refers them to a reputable counselor or their clergyman and crosses his fingers. They usually return in due time to obtain the divorce. Sometimes they remain in the unhappy marriage with nothing improved, setting a tense, unhappy, atmosphere for the children to grow in.

Alternatively, suppose the attorney draws a settlement agreement, using as his tool to bring the dominant spouse in, that this is the only alternative to divorce.

The economics of a settlement agreement are pretty much self declarative. A sharing of assets and income timed to meet the needs of the children first and the parties second, and an allocation of debts based on ability to pay.

In this objective, professional setting, the parties see two things that they often don't see in the smoke of the conflict at home.

One thing is financial, and the other personal.

The financial aspect is that the divorce per se greatly increases the cost of living. Duplications will occur in housing, telephone, electricity, water and gas. Tax advantages of joint returns will be lost. The wife, no longer being an "insured" in health policy terms has to get a separate policy. Babysitters might be required if she has to work. Furnishings, linens, and all kitchen equipment must be duplicated. Car insurance goes

onto separate policies at higher rates than as a package, etc.

If the husband has a take-home of \$2,000.00 a month, \$1,500.00 of it meeting family needs, and \$500.00 being unbudgeted, he now sees that half of his income goes to the family and half to himself. However, out of his half he has to pay the duplicate expenses and the outstanding debt. He can make it, and for the welfare of his family will have to make it, but suddenly his financial freedom is gone.

The wife, on her part, has to run the house and raise the family on \$1,000.00 instead of \$1,500.00. With today's present home interest rates and food costs, the ordinary family with children needs that sum just for the basics of food, housing, and utilities. Where is the money to run the car, buy clothes or take the kids to Lagoon? She too will have to cut back severely.

The personal thing that they see, especially the spouse who has the upper hand, is that they will lose all the emotional advantages and status that their home and marriage offer. Once out of that relationship, where are the volunteers to serve their emotional demands as the other spouse has done?

The wife will be a "divorcee." The husband goes home to an empty apartment. They frequently remarry just to avoid these consequences. The study done by the recent Family Court Committee showed a shocking 75% of remarriages end in divorce in Utah. It is bad to worse for the spouses and kids.

Counseling is not too effective unless both parties have a powerful motivation for change. The alcoholic doesn't quit the



bottle until he is motivated.

Now the counselor can do his work.

The dominated spouses will have to look at the weakness of their pattern by which they slid from a healthy effort to make the other spouse happy to appeasing at a sacrifice of self. The dominating spouse will have to look at their contribution to a marriage that has become superficial and one-sided, rather than an intimate relation based on trust and sharing, which latter they make impossible by their self indulgent life styles.

This realistic appraisal of what a person's needs really are, and how they might be met within a marriage, is often rewarding. The "dynamics" can change. They frequently do.

Also, frequently the dynamics don't change. If so, the divorce is proper. In that event at least, the divorce can be easy because the terms are already set.

Professional counseling is used in the examples. Many people adjust for the better without it, provided the motivation is present of either changing their ways or divorcing. Clergymen are often effective. Also effective is a person just looking at the cold reality of his options, like the smoker who can never kick the habit until the doctor tells him he is a candidate for a stroke.

There is a lot of hypothetical in the above that the reader might question. There is also a lot of reality.

If the divorce is filed before the foregoing steps, by every act, damage is done, the parties polarize to protect their economic ends, and many marriages go into contested litigation.

What happens is that the "thinking" time is replaced by "litigation" time. The cart is before the horse, the parties suing first, and thinking second which is often an irreversible mistake.

Miracles can't be worked. There is no guaranteed solution for unhappy marriages.

The gravamen is odds. Assume 10% of divorces might be avoided by motivated parties. (Counsel's own experience puts it higher with at least one marriage out of three being improved to the point where both parties wish to stay married.) Assume another 10% can avoid domestic court contest by use of the settlement agreement (the variability of this figure depends on the weight given these agreements by the trial courts and, dependant on that, the frequency with which they are used as an alternative to filing for divorce).

Now, apply these percentages, or whatever percentages the reader chooses, to the 4,000 divorce cases in Salt Lake County in 1978, to determine what any beneficial percentages mean in terms of saving judge time, or in terms of saving marriages. Go ahead. Use your own figures and calculate the numbers, particularly if you go statewide for 10 years.

The benefits, it is submitted, justify a judicial policy favoring prelitigation settlement agreements. Such a policy

words only, will be futile because, as words only it already exists and is futile. Counsel says it is futile because he has tried a number of cases with ante-nuptial or prelitigation agreements and, as here, not one agreement has stood up.

The judicial policy must be implemented by strong, clear, criteria announced by our state's highest court. These criteria beneficially combine the concepts of the sanctity of marriage and the sanctity of contract. Such criteria must supercede the present unlimited judicial discretion, replacing it with criteria that are more reliable and precise, such as those which have proved successful in our sister states such as New York.

Appellant respectfully requests that the court reconsider her brief, its opinion, and direct oral argument if it feels it appropriate.

DATED February 12, 1979.

Respectfully submitted,

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SAMUEL KING

MAILING CERTIFICATE

Mailed two copies of the foregoing Appellant's Petition for Rehearing to Pete N. Vlahos, attorney for plaintiff/respondent, 2447 Kiesel Avenue, Ogden, Utah 84401, postage prepaid, United States mail, February 13, 1979.