2000

Jeannie V. Hamilton v. Robert Earl Hamilton : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

JEANNIE V. HAMILTON,
Plaintiff,
Appellant,

-vs-

ROBERT EARL HAMILTON, GEORGE POULSEN and MRS. GEORGE POULSEN

Defendants,
Respondents.

CASE NO, 14456

BRIEF OF RESPONDENTS,

AN APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT IN AND FOR MILLARD COUNTY, STATE OF UTAH

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ROBERT EARL HAMILTON,
GEORGE POULSEN and MRS.
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BRIEF OF RESPONDENTS,

NATURE OF THE CASE

Appellant brought this action seeking a decree quieting title in appellant to either, (1) a ½ undivided interest in the subject real property, or (2) an undivided ⅓ interest in the subject real property. Respondents Poulsen defended as a bona fide purchaser for value without notice of appellant's claims.

DISPOSITION IN LOWER COURT

This matter was submitted to the Court by both parties on Motions for Summary Judgment with depositions and transcripts of trial submitted as affidavits. The District Court for the Fifth Judicial District in Millard County, the Honorable J. Harland Burns presiding, entered its judgment decreeing respondent George Poulsen to be the owner of the subject real property and quieting title in his name and against appellant.

RELIEF SOUGHT ON APPEAL

Appellant seeks an order of this Court vacating the judgment rendered by the trial court and remanding the case for further proceedings, and Respondents seek affirmation of the judgment of the lower court.

STATEMENT OF FACTS

The property involved is northwest of Delta, Utah and was acquired on November 22, 1967 in the name of Robert Earl Hamilton, appellant's former husband (N-33). Title never was in her name, no homestead filing was ever made and no lis pendens relating to the divorce proceedings was ever filed by appellant. The purchase price of the property had been paid by Mr. Hamilton's father.

The appellant was married to the defendant Robert Earl Hamilton in November of 1964 in Las Vegas, Nevada. (T [1975] 3:18) (D 3:16). From approximately October, 1965 through April, 1968, the Hamiltons resided in California (D 3:17-20). In the Spring of 1968 the Hamilton family moved from California to Millard County, Utah (T [1973] 4:11-15) where they resided on the subject real property for approximately 13 months until the appellant returned to California in May of 1969. (T [1973] 4:16-20).

In Civil No. 5843 in Millard County (T [1969]) the appellant pursued a divorce action against the defendant Robert Earl Hamilton. The complaint in said action was filed on May 28, 1969 (T ']1975] 3:18-19) and the hearing on the case was held before the Honorable James P. McCune on December 8, 1969, (T [1975] 3:2;-21). The court found that the appellant was entitled to an interlocutory decree of divorce and orally granted such decree of divorce to her (T [1969] 32:9-16). The Court stated further that the decree would be final in all respects except as to the real property, including the water stock and equipment that goes with the farm itself (T [1975] 4:9-12 and T [1969] 38:25-30). The actual interlocutory decree of divorce was not signed and filed by Judge McCune until April 16, 1970 (T [1975] 5:11-14), which decree purported to require that the real property here involved and including other real property owned by the parties and 50 shares of water "should remain in

joint ownership as tenants in common until the Court, by further order, directs distribution or division of said property." (T [1975] 5:19-29).

On March 13, 1970 (D 317-19) during the time the final division of the real property was pending, the defendant Robert Earl Hamilton, representing himself to be "a single man" (D 6:18-19, 10: 17-21) conveyed by Warranty Deed to George J. Poulsen the real property involved in this litigation (T [1975] 4:22-25). The Warranty Deed was duly acknowledged by Robert E. Hamilton as a single man before Rodney Adams, a Notary Public, at Fillmore, Utah, and was recorded in the office of the Millard County Recorder's Office on March 31, 1970 in Book 77 at page 519 (T [1975] 5:15-16). Since that time the respondent George Poulsen has held title to and has claimed possession of said property.

The Findings of Fact and Conclusions of Law of the trial court, Judge Burns (T 45 to T 49) determined that respondent George Poulsen had no prior notice of the claimed interest of appellant, paid approximately $12,000.00 for it, no award had been made in the divorce proceedings prior to the sale, and that appellant is not the widow of the vendor, Robert E. Hamilton. Appellant is divorced from Robert E. Hamilton and has no right, title or interest in the property. Judgment was so entered December 30, 1975.

ARGUMENT

POINT I

APPELLANT IS NOT THE WIDOW OF FORMER HUSBAND-OWNER (VENDOR) AND HENCE HAS NO INTEREST IN REALTY OF DIVORCED HUSBAND SOLD TO RESPONDENT POULSEN.

Appellant asserts a one-third "dower" or statutory interest in the realty. This is claimed as a result of the language of Section 74-4-3 Utah Code Annotated 1953.

There are a number of problems that confront the appellant in order to be successful in this type proceeding. The first is that as identified, it is not a "dower" right, but a statutory interest, which does not come into existence until after the husband's demise. The language of Section 74-4-3, U.C.A. 1953, is "one-third in value of all of the legal or equitable estates in real property possessed by the husband at any time during the marriage, to which the wife has made no relinquishment of her rights, shall be set apart as her property in fee simple, *if*

she survives him;'' (underscoring ours). At no place is it asserted that Mr. Hamilton is deceased, and hence she is not entitled to a share in the realty. The interest which she asserts is under a section of the statutes, the title being ''Successions'', and relates to the potential right of a widow in the probate proceedings of the estate of the deceased husband. Absent the condition precedent to the whole theory of her case, namely that her husband is deceased, she has no interest which can be asserted. No proof was adduced that Robert E. Hamilton is dead.

State of Utah v. Davis, et al, 17 Utah 2d 38, 395 P.2d 277, involved the position asserted by transferees of a married woman claiming an interest in the property in the condemnation proceedings. The court held that such was not a valid basis, and stated:

> The contention that appellants had a dower interest in the property by virtue of a transfer by a married woman, whose inchoate dower interest had not vested, is without merit.

This seems to lay at rest any possible contention the plaintiff might have in this case she has an interest in the property when the potential interest was inchoate only at the time of the divorce. She is now a divorced woman and could not possibly recover the one-third interest if Mr. Hamilton were to die at this time, as she would not be his widow and would not have any of his statutory or common law dower rights to the property.

This issue generally has been considered by your Court and clearly decided that the wife's statutory one-third interest is conditioned upon her surviving the husband. *Gee v. Baum,* 58 Utah 445, 199 Pac. 680. At p. 603 the decision reads:

> While it is true that under our statute dower by the name is abolished and the wife takes one-third of her husband's real estate in fee if she survives him, yet, unless she does survive him, she has no interest in his real estate. The interest of the wife, although in fee, is nevertheless, a mere inchoate interest, and depends entirely upon the condition that she survive her husband.

Appellant cites two cases to overcome the obvious problem, namely, that appellant was not and is not the widow or her former husband, who was the fee title holder of the real property. These both involve estate issues *after* the death of the husband-owner. The quote from *In re Madsen's Estate,* 123 Utah 327, 259 P. 2d 595 (603) truly reflects the law relating to Mr. Madsen's *widow.* Had she not joined in a conveyance made during coverture, the

legal title might be "encumbered by dower" unless she has joined in the conveyance or estopped herself from asserting such statutory interest. The right considered by the Court was the interest of the *widow,* and even that could be lost by estoppel or conveyance. The *Hilton v. Sloan* case cited, 37 Utah 359, 108 Pac. 689, is very similar. The widow had estopped herself from asserting title to the one-third interest.

In our present case, appellant is not the widow of respondent Poulsen's grantor. Rather, she elected to seek and ultimately procured a divorce from Robert E. Hamilton. Section 73-4-3 of the Probate Code does not embrace "grass widows" in its benefits. In consequence, appellant is not entitled to claim a one-third interest in her former husband's realty. During the term of the marriage, appellant did not file or claim a homestead right in and to the realty in Utah.

The trial court properly held that on the basis of the statute and the facts in this case, appellant had not proven any right, title or interest in the realty purchased in good faith and for valuable consideration by respondent George Poulsen, believeing that at the time of the sale Mr. Hamilton was a "single man." Appellant did not become his widow during the period of the marriage, nor prior to the finalityof the divorce. The one-third "dower" was merely *inchoate* and now has uterly disappeared by reason of the divorce.

POINT II

DIVORCE DECREE SUBSEQUENT TO HUSBAND'S SALE OF REALTY AND WITHOUT LIS PENDENS CANNOT AFFECT TITLE TO BONA FIDE, INNOCENT PURCHASER FOR VALUE FROM HUSBAND.

To evaluate this phase of appellant's case, it may be helpful to schedule the events which are relevant:

Hamiltons were married in Nevada - 1964

Hamiltons resided in California, October, 1965 to April, 1968

Nov. 22, 1967 - Utah realty in question (plus other land and water) was purchased by Mr. Hamilton's father and title taken in the name of Robert E. Hamilton

Spring, 1968 - Hamiltons moved to property in Millard County.

May, 1969 - divorce action filed by appellant in Civil No. 5845 - no lis pendens, and she returned to California.

December 8, 1969 - trial in divorce and divorce granted to appellant - court said that such would be final as to custody of children, names, support, etc., but as to the property the trial court first said that it was not "in a position to decide the matter of peroprty rights until we have definite evidence . . . documentary evidence and something definite and certain submitted to the court . . ." (X-111) Later the court acquiesced in counsel for the parties seeking a compromise property settlement.

March 11, 1970, Warranty Deed by Robert E. Hamilton, "a single man" to George J. Poulsen, recorded March 31, 1970.

April 14, 1970 - Decree of Divorce.

The delay in the preparation of the actual Findings and Divorce Decree (hearing December 8, 1969 and Degree signed April 14, 1970) may have resulted from extended negotiations between appellant and her husband or between counsel. In the meantime, appellant had packed up and gone back to California. The court's expressions in December were that substantial evidence should be produced to guide him in fixing or approving a property settlement between the parties.

More than three months passed after the court had declared that a final divorce was being granted to appellant. Then, appellant's husband, apparently believing that the divorce had been granted and that the decree was final, approached respondent, George Poulsen, and offered to sell the land to him. In response to Mr. Poulsen's inquiry, Mr. Hamilton representated that he was divorced and now a single man. In the warranty deed on March 13, 1970, he represented himself to be a single man and so declared himself in the acknowledgment before the notary public. At that time appellant was in California and had been since May 1969 and Mr. Hamilton was residing alone on the property.

Mr. Poulsen purchased the property for a truck and cash, having a total value of $12,000.00, received and recorded the warranty deed and took possession. There was nothing to alert him to a duty of injury about any claimed interests of appellant. She had long since gone to California and no lis pendens was of record and no decree of divorce relating to the realty or at all had been entered of record.

Appellant says that the court in the divorce proceedings had retained jurisdiction of realty. Language may be found in the transcript of the divorce proceedings in the words, "The Court reserves for future decision the decision as to property settlement of the parties either by stipulation or by a further hearing." (X-119). Nothing was of record to

alert an innocent purchaser for value. The "villain" in this piece appears to be the husband, who was the sole record owner of the realty and who sold such representing himself to be a single man.

However, he probaably did so innocently, believing that after more than three months following the oral granting of a divorce to appellant, the divorce would be final. No one has placed in the record any excuse or justification for the four and one-half month lag in the preparation of the Findings and Decree for signing by Judge McCune. No agreement for division of the realty between appellant and her erstwhile husband has ever been filed or recorded.

When the Decree was finally entered on April 14, 1973, it purported to award the property (standing in Mr. Hamilton's sole name) to the parties in some sort of unintelligible phrase, as the property had never been in joint tenancy nor co-tenancy,

> "6. That the following described real property should remain in joint ownership as tenants in common until the Court, by further Order, directs distribution or division of said property."

However, at that time there was other real property in the name of the husband upon which the divorce decree could act. She had no interest in the presently involved property and he had fully divested himself of all right, title and interest by his warranty deed to George Poulsen.

If this appears to appellant to be an unjust situation, think of how it would appear to respondents, the Poulsens, if they were to be divested of all or half of the property now. Appellant was represented by legal counsel and could have protected herself from this result by any of the following methods:

(a) Filing a lis pendens at the inception of or during the course of the divorce proceedings. (Section 78-40-2 U.C.A. 1953);

(b) Recording a homestead declaration, asserting an interest for herself and the children; (Section 28-1-10 U.C.A. 1953);

(c) Staying in possession of the realty (such would be notice of her interest requiring a prospective purchaser to inquire and buy subject to rights of those in possession); or

(d) Filing a Notice of interest under the Marketable Title Statute (Sections 57-9-4 and 57-9-5 U.C.A. 1953).

Obviously, appellant and her then counsel could have insulated her against the problem now confronting her, had any one of the four courses been followed. These, by statute or by judicial decision, are each separately adequate to obviate any third party from becoming an innocent, bona fide purchaser for value and without notice of her interest. Appellant chose to do nothing to give notice to the world or to the Poulsens that she expected to procure a share in her husband's realty.

Respondent George Poulsen bought part of the realty owned by Mr. Hamilton in good faith and for valuable consideration, fully believing Mr. Hamilton's representations that he was a single man. Respondent still has recourse against Mr. Hamilton and against the water stock and residue of the land. But, as against respondents Poulsen, she has no legal or equitable recourse.

The trial court (Judge Burns) properly found against the appellant in this case. The consciousness of this finding and regrets in being impelled to make the same are evidenced by the court's expressions at the time of argument on the Motions for Summary Judgment. Then in the conclusions the court provided:

> D. This Court still has continuing jurisdiction for the administration of the other properties which were owned by the parties to the divorce action, consisting of 50 acres of property and 50 shares of water stock, and of the defendant Robert Earl Hamilton in said divorce proceedings, to make such orders as may be just and equitable as between the plaintiff and said defendant and as to said remaining property.

POINT III

THERE IS NO PUBLIC POLICY FAVORING APPELLANT AS OPPOSED TO INNOCENT PURCHASER RESPONDENT.

At page 5 of the appellant's brief we find, "it may be conceded that as a general rule a divorce terminates the wife's statutory interest." Certainly we agree with this. The "public policy" issues raised by appellant are in fact spurious. Divorce proceedings have

traditionally resulted in some award to the wife of some share of the realty. As this court has recently said, that is no fixed formula and the claim of one-third has no basis in law, but merely in custom. It was referred to as a "sort of dowered theory of one-third to woman and two-thirds to the man syndrom." *Leftwich v. Leftwich,* Utah case April 23, 1976 (not yet reported).

The basic rule as to division of properties as stated in Utah is found in *Martinett v. Martinett,* 8 Utah 2d 202, 331 P. 2d 821, is that the court should make such orders in relation to property ". . .as may be equitable." In *Holder v. Holder* Utah case, (May 6, 1976 - not yet reported) the principle of continuing jurisdiction "of the parties" in a divorce proceeding to make changes and new orders as to "support and maintenance, or the distribution of the property as shall be reasonable and necessary" was reaffirmed.

In this very case, Judge Burns has sought to achieve this result. As quoted above, in paragraph "D" of the Conclusions of Law, supra, the Court announced its continuing jurisdiction "for the administration of other properties which were owned by the parties to the divorce action, consisting of 50 acres of property and 50 shares of water stock." The trial court may well award to appellant the entire ownership in the 50 acres and 50 shares of water stock. The realty bought by respondent Poulsen did not include any water stock. The court also has retained jurisdiction of appellant's husband, Robert E. Hamilton, for making further awards.

Public policy favors an innocent purchaser of realty for value. The Utah legislature provided for the recording of deeds, encumbrances, etc. (Sect. 57-1-6 U.C.A. 1953) and said that recording is necessary to impart notice. this court has carved out the exceptions as to persons in possession and actual knowledge, *Meagher v. Dean*, 97 Utah 173, 91 P. 2d 454. Many Utah decisions are cited under this statute. Most recently this principle of notice by recording was pronounced by *Wilson v. Schneider's Riverside Golf Course,* _____ Utah 2d _____, 523 P 2d 1226.

The general principles of protection of respondents, Poulsen, as bona fide purchasers for value and without notice of appellant's claims, are stated at 77 Am. Jur 2d 754, ¶633.

> It has been declared that the soundest reasons of justice and policy demand that every reasonable intendment should be made to support the titles of bona fide purchasers of real property, and that no equity can be any stronger than that of a purchaser who has put himself in peril by purchasing a title for a valuable consideration without notice of any defect in it. . . .
> . . . .The protection accorded bona fide purchasers of real estate is ordinarily extended to purchasers acquiring a legal title. This principle falls within the maxim that "where equities are equal the law will prevail."

Somehow the appellant would want the court to feel sorry for her as the divorced appellant and right the apparent indignities imposed by her ex-husband, by taking away half of respondent Poulsen's land. This theory is supplemented by a suggestion that the valuable consideration paid by respondent to Mr. Hamilton is "inadequate". Page 10 of the appellant's brief asserts that the purchase price was only one-third of the true value of the land. The court should know that such is not a fair or correct statement.

The appraisal by Mr. Esplin was presented ex parte to the trial court and without cross-examination. His appraisal is found in the record (Q39-42). On the face of it we observe that the first item of appraisal was 50 share of Abraham Water, $6,250.00. This water was *not* sold to Mr. Poulsen. The next item on the appraisal is 86 acres of irrigated land at $200.00 per acre. Fifty acres of that land was *not* sold to Mr. Poulsen. Thus we must deduct $10,000.00 of land and $6,250.00 of water (available yet for award to appellant, according to Judge Burns' decision). This would leave values of $22,000.00 in land (but without any water) acquired by respondent Poulsen. However, the actual values are probably substantially less as affects the appellant, as may be seen from the following:

> (a) The entire property, including the water stock, *all* of the realty and some farming implements were purchased in November, 1967 (2-½ years before) for $11,500.00 by Mr. Hamilton's father and given by him to Mr. Hamilton.
>
> (b) Mrs. Hamilton (appellant) said in her deposition That she and her husband were supposed to pay her father-in-law for the entire property $15,000.00 (p. 13) and that she and her husband had only paid $2,500.00 in the two years they had been in possession, leaving $12,500.00 yet to be paid by her.

So, as between the appellant and the respondent there was not such a disparity of price. The $12,000.00 paid by respondents was the price fixed by Mr. Hamilton, who initiated the negotiations for sale and purchase of the land. Appellant could have protected herself by taking any of the four steps outlined above. She did not file a lis pendens, did not

remain in possession, did not record a homestead declaration nor a declaration of interest. If equities are to be balanced, the appellant herself does not come before the court with clean hands. She must be estopped from asserting her claims against an innocent, bona fide purchaser for value. So long as a substantial consideration has been paid, the court is not concerned with the actual number of dollars.

Lastly, the appellant identifies Section 76-20-10 U.C.A. 1953 as amended. This is in the Criminal Code and makes it a felony for a married man to falsely represent himself as unmarried. Certainly the thrust of this statute is to impose criminal sanctions against Mr. Hamilton, the appellant's ex-husband. The legislature well knew that by deceptive activities, a husband could deprive the wife of her hoped-for inchoate share in family realty by conveying as a "single man" realty standing solely in his name to a bona fide purchaser for value such as respondent Poulsen. To dissuade married men from such activities, the felony statute was adopted.

The long arm of the criminal law can reach out and punish Mr. Hamilton for this, we suppose. We know of no efforts on the part of Mrs. Hamilton (appellant) to file a criminal action against him. Surely the affirmation by this court of the Findings, Conclusions and Judgment as entered by Judge Burns will not "encourage violation of the criminal code" as contended by appellant.

Never have we understood that the Supreme Court of Utah was subjecting itself to that type of unjust accusation by merely doing its duty in affirming a proper order of the lower court. It appers to be most unfair for appellant to charge this Court with encouraging violation of the criminal code of Utah.

CONCLUSION

We must strenuously urge this court to affirm the judgment of the lower court. Stability of legal titles on realty are of importance to the economy and social structure in Utah. Were this title to the land to be overturned at the behest of an ex-wife who has failed to take the reasonable and necessary steps to protect her possible interests, then many titles

to realty will be suspect and all which pass through a "single man" grantor will be challenged.

Appellant still has recourse as to the water stock and other land and against her former husband. The gross investment which she and her husband had in the property was $2,500.00. Title never was in her name. She is not the widow of the title holder. The realty was sold to respondent Poulsen, while still vested in Mr. Hamilton, and Poulsen was an innocent bona fide purchaser for value. The divorce decree, when entered a month later, could not and did not act on the title to realty already conveyed. Appellant has failed to show any valid basis for reversal of Judge Burns' decision.

Respectfully submitted

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