1976

Vera Arlene Ferguson v. Lowell Gene Ferguson : Brief of Respondent

Utah Supreme Court

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

VERA ARLENE FERGUSON,

Plaintiff and Appellant,

vs.

Case No. 14639

LOWELL GENE FERGUSON,

Defendant and Respondent.

RESPONDENT'S BRIEF

Appeal from Judgment of the Third Judicial District Court, Salt Lake County, State of Utah
The Honorable Stewart Hanson, Jr., Judge

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NATURE OF CASE

This action was initiated by Plaintiff-Appellant, after the annulment of her second marriage, seeking reinstatement of alimony payments from her first husband, Defendant-Respondent herein, judgment for back alimony not paid by Defendant-Respondent during the Plaintiff's second marriage, and increased child support.

DISPOSITION IN LOWER COURT

The Honorable Stewart Hanson, Jr. ordered that child support payable by Defendant to Plaintiff be increased from $70.00 per month to $160.00 per month for each of the parties' three minor children. The Court

ruled that Defendant's obligation to pay alimony ceased upon her remarriage, and that Plaintiff did not show any evidence of an exceptional circumstance for which alimony could be reinstated.

RELIEF SOUGHT ON APPEAL

Defendant-Respondent respectfully requests that the Court affirm the decision of the Lower Court terminating Plaintiff's right to alimony from the Defendant and reverse the Lower Court's award of child support and attorney's fees in excess of that which Plaintiff-Appellant prayed for in her Order to Show Cause and pleadings.

STATEMENT OF FACTS

Defendant-Respondent adopts Plaintiff-Appellant's statement of facts with the following factual and procedural additions:

Factual

Testimony and evidence received at the hearing of the within matter demonstrated that Plaintiff, Arlene Ferguson, did not request alimony from the husband of her remarriage solely on the basis of her feeling that he would not pay such alimony, if awarded. No showing was made to the annulling court of her financial need (T. 126) or of her husband's ability to pay, yet evidence was received in this matter that Mr. Hunsaker

had the financial ability to support his former wife both during and after their marriage. Mrs. Ferguson testified that during her marriage to Mr. Hunsaker both owned and made payments upon their homes and Mr. Hunsaker made monthly payments to Mrs. Ferguson in the approximate amount of $250.00 (T. 74). Real property was acquired by Mrs. Hunsaker in anticipation of the marriage (T. 76), and Mr. Hunsaker, with Mrs. Hunsaker's consent, applied for a home construction loan within two and one-half months after the marriage. Mrs. Ferguson further testified that she was not aware of Mr. Hunsaker's financial condition (T. 79), nor did she ask him, and at no time did she ever seek alimony from Mr. Hunsaker (T. 126).

Procedural

Defendant received notice that Plaintiff's second marriage was annulled on October 18, 1974. After several letters from Plaintiff and her counsel requesting reinstatement and payment of back alimony, and after the filing of the within Order to Show Cause, Defendant attempted to collaterally attack the Hunsaker annulment on several grounds, including collusion upon the District Court and lack of jurisdiction in that the grounds upon which annulment was based were not sufficient to grant jurisdiction to the annulling court.

The District Court, prior to making its Findings in the Hunsaker annulment, entered Mr. Hunsaker's default, apparently upon a stipulation between those parties. The Court then entered Findings and Decree based upon financial misrepresentations.

Plaintiff's Order to Show Cause requested: (a) increased child support from $70.00 per child per month to $140.00 per child per month; (b) increased alimony from $150.00 per month to $300.00 per month; (c) back alimony for the months during which the Plaintiff was married to Mr. Hunsaker; (d) $500.00 attorney's fees; and (e) contempt of court for failure to pay alimony during the subject Hunsaker marriage.

Thereafter, because of Defendant's alleged refusal to answer interrogatories respecting his financial condition until Plaintiff proved her right to reinstatement of alimony, the Law and Motion Judge entered an Order of Sanction which deemed Defendant to be financially able to provide whatever amount the Plaintiff could demonstrate was needed for child support and alimony, if awarded (T. 187). Accordingly, Defendant was not allowed

to present any evidence as to his financial status.[1/]

ARGUMENT

POINT I.

THE LOWER COURT CORRECTLY REFUSED TO AWARD PLAINTIFF-APPELLANT BACK AND FUTURE ALIMONY PAYMENTS

Plaintiff-Appellant's entire argument rests upon two Utah Supreme Court decisions, both of which are distinguishable on the facts and both of which have been made inapplicable to this matter by legislative amendment.

(A) Enactment of §30-1-17.2, Utah Code Annotated.

As correctly noted and quoted by Plaintiff-Appellant, Cecil v. Cecil, 11 U.2d 155, 356 P.2d 279 (1960), held that a husband is obligated to pay alimony to his former wife after the annulment of her remarriage since the policy of the state was not served where the wife could not look to any other person for such support. Since annulment proceedings did not grant the Court jurisdiction to award

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1/ At no time did the Plaintiff-Appellant move to amend the prayer of relief to conform with Judge Hanson's finding of child support in the amount of $180.00, which was $20.00 over that which was requested by the Plaintiff-Appellant, or $800.00 for attorney's fees, $300.00 over that which was requested. The Court, on its own motion, amended the petition to "conform" with its own findings, however, Defendant contends that it had no jurisdiction to do so. (See Court's bench ruling at T. 191 and Defendant's arguments at T. 187).

alimony or support, the only other source would be the wife's former husband:

> "There being no valid marriage, the purported wife would not be entitled to support from the purported husband, in the absence of a statute allowing alimony in case of annulment." (Emphasis added) 356 P.2d at 281.

Since the Court's holding in Cecil and in Kent v. Kent, 28 U.2d 34, 497 P.2d 652 (1972), the Utah Legislature passed Chapter 65, Laws of Utah, Section 3(a), which provides, in pertinent part, as follows:

> "30-1-17.2 If the parties have accumulated any property or acquired any obligations subsequent to the marriage, or there is a genuine need arising from economic change of circumstances due to the marriage, or if there are children born, or expected, the Court may make temporary and final orders, and subsequently modify the orders, relating to the parties, their property and obligations, the children and their custody and visitation, and the support and maintenance of the parties and children, as may be equitable..."

Thus, the legislature insured that a wife could, under the circumstances cited, look to the husband of an annulled marriage for support. Having released her first husband by remarriage, she is now authorized to look to her second husband for support and maintenance. The Utah Legislature apparently adopted the arguments of Professor Homer H. Clark, Jr. in his treaties on the Law of Domestic Relations:

"Most of these exceptional cases arise when the wife's second marriage is annulled. The conventional analysis formally was that the annulment amounts to a declaration that no valid marriage ever existed. The purported marriage, therefore, cannot effect existing legal rights. Modern cases are beginning to reject this view, and to treat the effect of an annulment (at least for this purpose) as analagous to the effect of divorce. On that analysis, the annulment of the wife's second marriage would not revive her rights under the alimony decree. This result is certainly correct as a matter of policy. Once the wife remarries, her first husband should be entitled to assume that his duty to pay her alimony is at an end, and to adjust his financial affairs accordingly. If her second marriage is later annulled, her first husband is not responsible and should not have to face a revival of a liability which, in many cases, will cause him unforseeable hardship. He ought not to be made the underwriter of his former wife's marital disasters. The solution for the wife's difficulties is not to make her first husband resume the burden, but to pass a statute like that in New York authorizing alimony in annulment suits."
H. Clark, Law of Domestic Relations, 458 (1968).

Plaintiff's argument that Utah Code Annotated, §30-1-17.2 does not apply to her case since there was no finding of a genuine need arising from economic change of circumstances due to the marriage, fails of logic where it is shown that not only was such a finding never made, it was never requested by Plaintiff in her default annulment proceedings. Plaintiff, by her

marriage to Hunsaker, gave up her right to support ($150.00 per month) from the Defendant-Respondent, and by her annulment gave up an additional $250.00 per month which she was receiving from her second husband. Such change of financial circumstance is a fact which would have allowed her the right to request alimony or support from Hunsaker, which request was never made.

Plaintiff's contention that the annulment Decree did not find a genuine need arising from economic change of circumstances due to the marriage can only imply that in spite of her loss of alimony and support from Defendant-Respondent herein, and in spite of her anticipated loss of support from her second husband, no genuine financial need existed. For the very same reason, the Lower Court, in the instant matter, found that Plaintiff had failed to demonstrate not only a genuine need arising from change of circumstances, but also any exceptional circumstance which would allow an unconscionable or inequitable result if the wife's right to alimony was terminated. Austead v. Austead, 2 U.2d 49, 269 P.2d 284 (1954). In Austead, the Utah Supreme Court held that remarriage of an ex-wife terminated her right to receive alimony from her first husband. The Court, however, noted an exception to the general rule if "an excep-

tional circumstance" existed where it would be either unconscionable or inequitable to terminate the wife's right to alimony.

In Cecil and Kent, the Supreme Court found exceptional circumstance where the wife's subsequent marriage was annulled. In both Cecil and Kent, the Court relied upon the fact that the wife had no right to support arising from a marriage which was subsequently annulled, the Courts being greatly influenced by a public policy of insuring to a wife a legal right to support. At the same time, the Court recognized "...it would be inequitable for her to obtain the right to support from two sources." Cecil, 11 U.2d at 158, 356 P.2d at 280.

Further, Plaintiff-Appellant's reliance upon the dictum in Cecil that the wife's attempted marriage did not adversely alter or change her former husband's circumstances so that it would be inequitable to require him to continue his alimony payments, is misplaced since (a) no evidence was allowed to be presented that the Defendant-Respondent had in fact recommitted his assets and would have suffered adversely by an award of alimony against him and in favor of Plaintiff-Appellant, and (b) Plaintiff showed no evidence of the Defendant's circumstances. No "equitable

considerations" are cited which would favor an order that Defendant pay back alimony. Indeed, the entire record is devoid of any such equitable considerations.

(B) Cecil and Kent are Distinguishable.

Both Cecil and Kent dealt with void marriages, and the District Court in each case had the jurisdiction and power to declare the marriages annulled and void ab initio. It is questionable that Plaintiff was entitled to an annulment upon the grounds indicated in the annulling court's Findings of Fact and Conclusions of Law. While Defendant-Respondent does not allege fraud upon the Court, it is obvious that the Hunsaker parties entered into a stipulation which could well be regarded as collusive action directly and adversely effecting the rights of the Defendant-Respondent who was not allowed, in the Lower Court, to collaterally attack the Hunsaker proceedings. As the Lower Court correctly noted in its memorandum decision (T. 151): "...In the instant case the annulment was based upon fraudulent misrepresentations as to financial status, at best a ground which at common law made the marriage voidable." (T. 152).

Further, equitable considerations were cited in both Cecil and Kent, thus complying with the standards set forth in Austead v. Austead. In both cases, the

marriages were extremely short lived; in both cases the wife could look to no other individual for her support and maintenance by law; and, in both cases there is the implication or the stated fact that the wife was dependent upon charity for her maintenance. In the instant matter, Plaintiff-Appellant advanced no "exceptional circumstances" which would allow the District Court to reinstate alimony against her first husband. The Lower Court is generally afforded wide latitude in determining both change of circumstance and the existence of exceptional circumstance, and, unless found to be capricious or arbitrary, that finding has constantly been supported in the appellate process.

POINT II.

PLAINTIFF-APPELLANT FAILED TO DEMONSTRATE HER NEED FOR REINSTATEMENT OF ALIMONY

In its Memorandum Decision dated the 4th day of November, 1975 (T. 151), the District Court, in relying on Austead v. Austead, maintained that in spite of §30-1-17.2 the Court retained jurisdiction to determine whether "exceptional circumstances" exist which would allow a wife to retain alimony upon remarriage. In making such a determination, the Court may consider why no award of alimony was made in the Decree of Annulment,

a fact which the Court found to be relevant to the question of the needs of Plaintiff as they relate to the reinstatement of alimony. The Court further found that, since the rights of the Defendant with respect to his duty to pay alimony were effected by the determination of the annulling Court (or its lack of determination), Defendant may collaterally attack the Decree of Annulment to the extent that such a determination reflected the needs of his former wife. Accordingly, it was determined that Plaintiff had the burden to establish a prima facia case against Defendant-Respondent.

The Court found that the Plaintiff had not shown any exceptional circumstances for which alimony should be reinstated. Indeed, Plaintiff testified that not only was alimony not awarded by the annulling court, but she did not request such alimony. To the extent that Defendant-Respondent was able to collaterally attack the annulment proceedings, the Court heard and found evidence of Mr. Hunsaker's financial condition and abilities and it appears therefrom that, had the Plaintiff sought such support from Hunsaker, he would have indeed been able to provide such financial support. (T. 159-172). The Court found that there was indeed an economic change

of circumstance due to the marriage of the Plaintiff and Mr. Hunsaker, however, no genuine need arose therefrom. It is illogical for Plaintiff to assert that, while no genuine need arose from her change of circumstance as a result of her marriage to Mr. Hunsaker or as a result of the annulment of the Hunsaker marriage, there was a genuine need or change of circumstance which would give rise to a reinstatement of alimony from the Defendant herein, especially in the absence of other facts which would evidence any other genuine need of the Plaintiff.

POINT III.

THIS COURT SHOULD AFFIRM THE LOWER COURT'S DECISION IN REFUSING TO AWARD BACK OR FUTURE ALIMONY TO PLAINTIFF-APPELLANT

The Lower Court, in its Memorandum Decision, correctly recognized that "in any event, alimony is not automatically reinstated without a determination by the Court of those respective needs and abilities (referring to the parties) and if reinstated, runs from the date of reinstatement, not from the date of a voided marriage." (T. 153).

Plaintiff's reliance that the annulment was void ab initio and therefore should relate back to the date of the marriage is simply a legal fiction designed to do justice between the parties to the

annulled marriage and should be pierced to protect the rights of a third party. Sefton v. Sefton, 291 P.2d 439, 45 Cal.2d 872 (1955).

> "However, in cases involving the rights of third parties, courts have been especially wary less the logical appeal of the fiction should obscure fundamental problems and lead to unjust or ill advised results respecting a third party's rights. Thus, the exceptions to the theory of 'relation back' should have their typical application to situations effecting an innocent third party. See, 55 C.J.S., Marriage, §68." 291 P.2d at 441.

The Utah Legislature recognized the inherent unfairness of the "relation back" legal fiction as it effects the rights of third parties by enacting Section 30-1-17, Utah Code Annotated at the same time that it amended the annulment provisions authorizing the award of alimony in an annulment proceeding. The legislature stated: "The judgment in the action shall either declare the marriage valid or annulled and shall be conclusive upon all persons concerned with the marriage." §30-1-17, Utah Code Annotated (1953 as amended). It is submitted that the language "all persons concerned with the marriage" concerns only those parties directly concerned with the marriage and not those third persons whose rights would be effected without any notice or right to participate in the annulment proceeding.

Finally, Plaintiff is contending that she was, during the period of her remarriage, entitled to two sources of support, i.e., from her former husband and her then husband.

POINT IV.

THE LOWER COURT ERRED IN AWARDING CHILD SUPPORT AND AN AWARD OF ATTORNEYS FEES IN EXCESS OF THAT PRAYED BY PLAINTIFF IN HER ORDER TO SHOW CAUSE

The Court found a change of circumstance with respect to the minor children of the Plaintiff and Defendant herein and awarded an increase of child support to the sum of $160.00 per child per month, in spite of Plaintiff's requested prayer for an increase to $140.00 per month. While Defendant agrees that the District Court always retains jurisdiction over minor children residing within the jurisdiction of the State, the Defendant asserts that under these circumstances the Lower Court lacked jurisdiction to enter such an award, and because this is an equity matter, the Court may and should reverse Judge Hanson's ruling to the extent of the excess child support or attorneys fees awarded.

By reason of the Order dated January 8, 1976 imposing sanction upon Defendant, Defendant was unable to assert his defenses to Plaintiff's Order to Show

Cause on grounds of recommitment of his assets after Plaintiff's remarriage to her second husband or on his financial inability to provide any such amount as may be awarded. Thus, the Lower Court refused, in spite of Defendant's Motion to Continue the hearing pending further objections to the Order of Sanctions or appeal, to allow Defendant to maintain any defenses respecting his financial abilities to provide the requested child support or alimony. Assuming its ruling was proper, to the extent the Court made an award within the boundaries of Plaintiff's prayer for relief, the Court exercised its discretion properly. However, to the extent the Court awarded any amount in excess of that which was prayed for by Plaintiff without allowing Defendant to maintain any defenses with respect to his financial abilities to provide this greater amount, the Court not only lacked jurisdiction, but acted in an arbitrary and capricious manner. This same position holds true for any amounts awarded for attorneys fees in Plaintiff's favor in excess of that requested.

It should be noted that at no time during these proceedings either before or after the Order of Sanction was imposed, did Plaintiff move to amend her Petition for Order to Show Cause or prayer of relief. The Order of Sanction in the manner imposed is similar to a default

certificate based upon a party's complaint or petition. Surely a party who received such a default certificate in his favor would not thereafter amend his default judgment in an amount in excess of that which the default certificate was based upon.

Rule 8 of the Utah Rules of Civil Procedure states, in pertinent part:

> "(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim or third party claim, shall contain...(2) a demand for judgment for the relief to which he deems himself entitled."

The rule was drafted and fashioned after Rule 8(a) of the Federal Rules of Civil Procedure and is liberally construed. Thus, the Court has held that in equity proceedings, the relief granted may be somewhat broader than the specific relief prayed for. The relief demanded in any petition or complaint is gauged by the prayer which gives the Defendant or Respondent such precise information as to the judgment demanded that he may be able to decide whether or not to defend such an action. Thus, the prayer should be specific enough to conform to the allegations of the Plaintiff's pleadings and to inform the Defendant of the degree to which he will choose to defend the matter.

Had the Order of Sanctions not been imposed against

the Defendant, it is submitted that the Court would have had full power on its own motion to amend the Plaintiff's prayer for relief and award whatever amount it deemed necessary to provide for the minor childrens' support and maintenance within the confines of the Defendant's abilities to pay. However, the Order of Sanction imposed against the Defendant on January 8, 1976, together with the trial judge's refusal to allow Defendant to present any evidence respecting his financial condition imposes upon the trial court a duty not to grant relief greater than that which was prayed for since, arguendo, the Defendant was entitled at such point to determine whether or not to appeal or request other relief from the Order of Sanction. The District Court denied Defendant equal protection of the laws in refusing to allow him to present testimony respecting his financial condition as it applies to the award granted in excess of that requested, and further denied Defendant the equal protection of the laws granted to an individual to make a choice to defend or not defend an action.

Clearly, this Court would hold that a District Court did not have jurisdiction to enter a default judgment in excess of that which was originally prayed for without amendment by the praying party prior to the entry of the default certificate.

CONCLUSION

By amending §30-1-17.2 of the Utah Code Annotated, the Utah Legislature has chosen, without regard to whether a marriage is void or voidable, to attach to annulled marriages sufficient validity and significance to support an award of alimony so that, just as the case of any other valid marriage, there is a continuing duty to support the wife after the marriage is terminated, whether by divorce or annulment. The legislature, in so doing, destroyed the very foundation of the Cecil and Kent decisions. The Plaintiff's actions herein, whether to remarry or not, or whether to annul such marriage or terminate the remarriage by divorce, should not, in the absence of exceptional circumstances, effect the obligation of Defendant herein once having relied on the Plaintiff's act of remarriage. Plaintiff has shown no exceptional circumstance for which this Court, or any other Court, could consider a reinstatement of Defendant-Respondent's obligation to pay alimony to the Plaintiff.

Finally, the District Court acted beyond its jurisdiction in awarding child support and attorneys fees to Plaintiff in excess of that which was requested and, accordingly, such excess award should be, in the

interest of equity, reversed.

Respectfully submitted this 29th day of October, 1976.

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CERTIFICATE OF SERVICE

I hereby certify that I have served two copies of the foregoing Respondent's Brief by hand delivering the same to Harold G. Christensen and/or Ellen Maycock, Attorneys for Plaintiff and Appellant, at 700 Continental Bank Building, Salt Lake City, Utah 84101, this _____ day of October, 1976.

SANDACK & SANDACK

_____

ROGER D. SANDACK