

1976

Vera Arlene Ferguson v. Lowell Gene Ferguson : Reply Brief

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.)	

REPLY 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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REPLY BRIEF

ARGUMENT

POINT ONE

THE TRIAL COURT ERRED IN FAILING TO FOLLOW THE LEGAL PRECEDENTS FROM THIS COURT HOLDING THAT A SUBSEQUENTLY ANNULLED REMARRIAGE DOES NOT TERMINATE THE OBLIGATION TO PAY ALIMONY ARISING FROM A FORMER MARRIAGE.

Defendant bases much of his argument in support of the trial court's decision not to award alimony on Utah

Code Ann. §30-1-17.2, in which the legislature provided that under certain circumstances alimony could be awarded after an annulment. However, §30-1-17.2 does not preclude an award of alimony in the present case for two reasons: First, §30-1-17.2 is silent on the effect on prior alimony of an annulled remarriage and second, by its terms, §30-1-17.2 does not apply to the present case.

Defendant argues that by enacting §30-1-17.2, the legislature sought to overrule the holdings of the Utah Supreme Court in Cecil v. Cecil, 11 U.2d 155, 356 P.2d 279 (1960) and Kent v. Kent, 228 U.2d 34, 497 P.2d 652 (1972). However, if the legislature wanted to preclude the reinstatement of the prior alimony, it could have done so. Instead, in §30-1-17.2, the legislature merely provided that in some cases alimony could be awarded in an annulment proceeding. Thus, the legislature has not acted with respect to a reinstatement of prior alimony.

Furthermore, §30-1-17.2 provides for an award of alimony only under certain circumstances. §30-1-17.2 provides:

If the parties have accumulated any property or acquired any obligations subsequent to the marriage, where 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 the children, as may be equitable. The children born to the parties after the date of the marriage, shall be deemed the legitimate children of both parties for all purposes.

None of these circumstances exist in the present case. The parties neither accumulated properties nor acquired obligations. The economic circumstances of the parties did not change. Nor were children born or expected. Under §30-1-17.2, then, an award of alimony after Mrs. Ferguson's second marriage would not have been proper.

Defendant argues both that there was a change of economic circumstances due to Mrs. Ferguson's remarriage (Respondent's Brief, pages 7 and 8) and that there was not such a change (Respondent's Brief, pages 8 and 9). In fact, the only change of circumstances that occurred during the second marriage was the cessation of alimony payments. As Mrs. Ferguson was entitled to have those payments rein-

stated upon her annulment, there was no change of economic circumstances.

The change in economic circumstances upon which Mrs. Ferguson based her request for increased alimony and child support were the additional living expenses since the divorce from Mr. Ferguson and Mr. Ferguson's ability to pay additional sums.

Defendant also argues that the Cecil and Kent cases cited in appellant's brief are factually distinguishable in some particulars. But in both cases the issue whether alimony from a prior marriage should continue after an annulment was squarely presented and in both cases, this Court held that alimony should continue. In the absence of any contrary precedent, the lower court should have ordered payment of alimony.

Defendant also continues to attempt a collateral attack on the annulment (Respondent's Brief, page 10). As appellant's original brief points out, this court held in Cecil that the annulment may not be collaterally attacked.

Defendant cites Austead v. Austead, 2 U.2d 49, 69 P.2d 284 (1954) as authority for the proposition that

Mrs. Ferguson must show exceptional circumstances to entitle her to alimony after a remarriage. However, Austead did not involve an annulled remarriage and thus is not controlling on the issue decided in Cecil and Kent. In any event, it may be argued that an annulment is what the Utah Supreme Court has regarded as an exceptional circumstance to entitle Mrs. Ferguson to a reinstatement of alimony.

Although defendant argues that plaintiff has not demonstrated a need for alimony, Mrs. Ferguson did demonstrate need to the lower court as shown by the fact that the court increased the amount of child support to be paid. Whether Mrs. Ferguson sought alimony from her second husband or whether her second husband had the ability to pay alimony is irrelevant to the question of Mrs. Ferguson's present need for support. This is another attempt by defendant to attack the annulment proceeding collaterally.

Defendant complains of the rulings in the court below regarding discovery. Plaintiff served interrogatories and a request for production of documents on defendant on

June 12, 1975. Defendant failed to respond. On December 3, 1975, plaintiff moved to compel answers and a response. On December 16, 1975, the court ordered defendant to respond. Defendant still failed to respond. As a result of that failure, on January 8, 1976, the court entered an order of sanctions, precluding defendant from offering evidence as to his financial status because his financial status was the subject of the interrogatories and request for production.

Defendant now attempts to base an argument on that preclusion. The order of sanctions was a valid exercise of the court's power to impose sanctions for failure to prevent discovery on defendant and defendant should not be now permitted to base an argument on that preclusion.

Defendant also argues that the order of sanctions amounted to a default judgment. (Respondent's Brief, page 18). There is no basis for such an argument. The difference between precluding defendant from offering proof on a certain issue, as to which he refused discovery, and the entry of a default are so obvious as not to require comment.

The argument that the lower court could not award child support and attorney fees in excess of the amount sought in the original order to show cause is equally without merit. As the court pointed out in Midwest Supply, Inc., v. Waters, 81 Nev. 210, 510 P.2d 876 (1973), a fraud action, the prayer for relief does not limit recovery, except in a default action. As pointed out above, this action cannot be characterized as a default action in view of defendant's vigorous contest. Further, as defendant pointed out this is an action in equity and "equity has the power to render full and appropriate relief to all parties regardless of the specific prayers." Federici v. Lehman, 230 Ore. 70, 368 P.2d 611 (1962) at 612-13.

CONCLUSION

Defendant has failed to explain adequately why the result in this action should not be governed by the courts decisions in Cecil and Kent. In light of that failure, this case should be remanded to the trial court

for an award of back alimony and an increase in future alimony.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served two copies of the foregoing Reply Brief, by hand delivering the same, to Roger D. Sandack, Attorney for Defendant-Respondent, at 370 East Fifth South, Salt Lake City, Utah 84111, this 12th day of November, 1976.


Stanley D. Rasmussen

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