

1987

Jerry Ann Nunley v. Kenneth R. Nunley : Brief of Appellant

Utah Court of Appeals

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BRIEF

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DOCKET NO. 870285-CA

IN THE UTAH COURT OF APPEALS

JERRY ANN NUNLEY,

)

Plaintiff and Respondent)

vs.)

Case No. 870285-CA

KENNETH R. NUNLEY,

)

Defendant and Appellant)

14h

BRIEF OF THE APPELLANT

Appeal From a Final Order of The
Sixth Judicial District Court, Sanpete County
Honorable Don V. Tibbs, Presiding

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FILED

OCT 23 1987

Timothy M. Shea
Clerk of the Court
Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

JERRY ANN NUNLEY,)

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STATEMENT OF COURT OF APPEALS JURISDICTION:

This is appeal from a final order of the Sixth District Court.

STATEMENT OF NATURE OF THE PROCEEDINGS:

This is an action for divorce with a subsequent Petition to Modify filed by Appellant.

ISSUES PRESENTED:

1. Whether the lower Court had jurisdiction over the Appellant to modify the Stipulation and Property Settlement Agreement without Appellant's consent or appearance.

2. Whether the lower Court abused its discretion in the following particulars:

a. by rejecting the parties' agreement concerning alimony and the marital residence.

b. by awarding a Judgment against the Appellant for alimony arrearages.

DETERMINATIVE CONSTITUTIONAL PROVISIONS AND RULES:

1. Constitution of The United States, Amend XIV, Sec. 1.

2. Constitution of the State of Utah, Art. I, Sec.7, and Art. VIII, Sec. 9.

3. Rule 2.9 of the Rules of Practice in the District Courts of the State of Utah.

4. Rule 5(a) of the Rules of Practice in the District Courts of the State of Utah.

STATEMENT OF THE CASE:

This is a divorce action which was combined by the Court with Appellant's Petition to Modify the Decree.

STATEMENT OF THE CASE: Course of the Proceedings.

Plaintiff, Jerry Ann Nunley filed an action for divorce against her husband, Kenneth R. Nunley in Sixth District Court, Sanpete County, Utah, on September 11, 1985. There was no request for temporary support or alimony filed.

Simultaneously with the filing, the parties entered into a settlement agreement which provided, inter alia, that the marital residence would revert to her ex-husband upon the parties' youngest child attaining the age of 18. There was no obligation created in the agreement to pay alimony to the Plaintiff.

On the 19th day of February, 1986, Plaintiff appeared with her attorney at Sixth District Court for the purpose of obtaining a default divorce from Defendant pursuant to the

Stipulation. At this proceeding the Court rejected the Stipulation, (See Transcript, Divorce Proceedings, P. 7, L.16-19), and continued the hearing to March 19, 1986 with instructions that defendant be given notice. (TR. Divorce Proceedings, P.10, L.24-25).

The attorney for Plaintiff also offered to give notice to the Defendant (See transcript, Divorce Proceeding, P.10, L.1-5). At the outset it should be noted that this initial attempt to obtain the default divorce on the 19th day of February, 1986, was the first of four hearings on the issue of defendant's obligation to pay alimony and disposition of the marital home. For purposes of reference to the four separate transcripts involved in this appeal, the record shall be enumerated as TR. 1, 2, 3, or 4, as they occurred in chronological order.

On March 19, 1986, the continuance of the initial hearing, Plaintiff appeared personally with counsel, while defendant did not appear either personally or by counsel.

The Court acknowledged and recognized it was without jurisdiction over Mr. Nunley due to lack of service upon the defendant and, additionally, because of the Court's prior rejection of the Stipulation. (TR. 2, P. 4, L. 1-8).

Counsel for Plaintiff informed the Court that the parties had discussed the Court's proposed changes, (TR. 2, P.4, L. 10-17), but it was subsequently discovered that

defendant never was given notice of the March 19, 1986 hearing. (TR. 3, P.5, L.13-16).

The Court, recognizing the risk, indicated it would go forward in granting the divorce as modified and indicated to Plaintiff's counsel to serve defendant with the final documents and in order to give defendant an opportunity to be heard on the issue of the modifications. (TR. 2, L. 23,24).

The Court ordered defendant to pay \$250.00 per month per child for the two of four children in Plaintiff's custody who were still minors. (TR.2, P.7, L. 20,21). With regard to alimony, defendant was ordered to pay \$400.00 per month after the Court entered an ex parte finding of defendant's income. but the Court again repeated its order to Plaintiff's counsel to serve defendant with the final Decree and Findings, as amended, and recognized defendant's right to disagree with the ruling. (TR. 2, P.9, L.5-7).

The Decree of Divorce was subsequently entered in March of 1986, and, in paragraph 9 of the Decree, it was ordered that defendant be personally served with the Findings of Fact, Conclusions of Law and Decree of Divorce and would have 30 days thereafter to petition the Court for modification of the pleadings.

Eventually, on the 10th of December, 1986, defendant made his initial appearance in the proceedings by way of bringing a Motion to Conform Decree to Stipulation. Defendant, being unaware of the fact that the Court had

modified the parties' original agreement, asked the Court to honor the Stipulation as agreed to by the parties.

At the outset counsel for Plaintiff objected to the Motion due to a lack of timeliness in filing within the 30 day limitation as ordered by the Decree. In his objection to the Motion to Conform, counsel for Plaintiff recited that defendant was mailed a copy of the Decree in August, 1986, and used this date as reasons why the Court should not entertain the December, 1986 hearing. (Emphasis Added).

The Court allowed counsel for defendant to argue the Motion, but, thereafter denied the same. Nevertheless, the Court allowed for a subsequent filing of a Petition for Modification as contemplated by the Decree, (TR. 3, P. 9, L. 18-25), because of the lack of personal service of the final divorce documents upon the defendant.

On the 20th day of May, 1987, the fourth hearing in this matter came on for hearing before the Court pursuant to defendant's Petition to Modify Decree. After having heard the testimony of both parties and argument of counsel, the Court affirmed its prior ruling of \$400.00 per month alimony and its disposition of the marital home, namely that the home be sold and the proceeds divided equally after the youngest child attained the age of majority. However, because of a Stipulation between counsel, the Court also heard the matter of defendant's alleged alimony arrears and subsequently entered a judgment against defendant for \$3,758.00, a sum

that was calculated, with some offsets, from March of 1986, the date the Decree of Divorce was granted at the second divorce hearing. (TR. 4, P. 64, L. 8-19).

This appeal resulted.

RELEVANT FACTS (with citations to the record).

1. At the first default divorce proceeding of February 19, 1986, hereafter referred to as TR.1, the Plaintiff acknowledges the home she and the children were living in was originally defendant's father's home. (TR. 1, P.6, L. 25 and Pg. 7, L. 1). Furthermore, Plaintiff indicated to the Court on three separate occasions that she did not want the home and property (TR.1 , P.6, L. 22 and 23, P. 7, L. 14, and P. 8, L. 11-13,) where Plaintiff also rejects alimony.

2. At the continued divorce proceeding of March 19, 1986, hereafter TR. 2, the Court and counsel for Plaintiff acknowledge there was no service or notice of the hearing served upon defendant (TR. 2, P. 4, L. 1-8). Defendant, of course, was not present to be heard. (TR. 2, P. 3, L. 16-20).

The Court also admonished counsel for Plaintiff as to the risk involved in going forward without service. (TR 2, P. 4, L. 18-19). The Court apparently attempted to cure the matter of lack of service by ordering plaintiff's counsel to personally serve defendant with the Court's modifications

contained in the Decree of Divorce. (TR. 2, P. 4, L. 19-22 and P. 9, L. 9-10). The Decree now requires defendant to pay \$400.00 per month alimony and awards each party an equal interest in the Sanpete County residence.

3. At hearing number 3, (hereinafter TR. 3), defendant's Motion to Conform the Decree to the Stipulation, the fact of lack of service of the March 19th, 1986 hearing was again acknowledged when the Court, upon counsel's request, examined the file for proof of service upon defendant. There was no notice or proof of service found by the Court. (TR. 3, P. 5, L. 13-16) and (TR. 3, P. 6, L. 2 and 3). Furthermore, the fact that defendant was not personally served with the Decree and Findings within the 30 day limit imposed by the Decree is also acknowledged by Plaintiff's counsel. (TR. 3, P. 7, L. 15-21).

The assertion that only the Decree and not the Findings or Conclusions were received by defendant is further bolstered by examining plaintiff's Objection to the Motion. In paragraph 4, it is stated defendant was mailed a copy of the Decree in August of 1986. Plaintiff fails to refute the assertion of defendant's counsel, that no Findings or Conclusions were ever mailed to defendant (TR. 3, P. 6, L. 4-8; P. 8, L. 12-17). Also, plaintiff's counsel acknowledges he had no proof of delivery of the Findings to the defendant (TR. 3, P. 9, L. 2-4).

4. At the fourth and final hearing of this matter, the Petition to Modify the Decree, (hereafter TR. 4), that was heard May 20, 1987, the Court finally heard the issues contemplated by the Petition to Modify as awarded in the Decree. Further, the Court ruled that no change of circumstances need be shown. (TR. 4, P. 5, L. 4-5 and L. 7-13).

From this hearing evolved several relevant facts:

1. That two of the parties' four children would be living with defendant as of June, 1987. (TR. 4, P. 12, L. 25, P. 13, L. 1-2; P. 13, L. 18).

2. That Defendant acquired the marital residence from his father. (TR. 4, P. 16, L. 23-24). That the acquisition was through inheritance in 1972. (TR. 4, L. 1-12). That the home was fully paid for 16 years before plaintiff and defendant lived in it (TR. 4, L.13-18).

3. That from September, 1985, defendant paid to plaintiff \$600.00 per month on a voluntary basis and continued to do so throughout the proceedings. (TR. 4, P. 20, L. 11-25; P. 21, L. 1-10). (It should be noted that the Stipulation and Decree only required \$500.00 per month as child support payments). That defendant considered this \$600.00 per month payment by him as all child support. (TR. 4, P. 35, L. 19).

4. With regard to the residence, even as recently as May of 1987, she continued to renounce any claim to the

marital home because she had no use for it. (TR. 4, P. 37, L. 22-25; P. 38, L. 1-13).

5. That plaintiff admitted she told defendant she did not want alimony from him. (TR. 4, P. 39, L. 3-9).

6. That plaintiff would be called back to work in mid-June of 1987 and would earn between \$300.00 and \$400.00 every two weeks.

7. That despite the fact plaintiff ^Awas not working at the time she filed for divorce, she did not request alimony. (TR. 4, P. 58, L. 6-11).

SUMMARY OF THE ARGUMENT

The lower Court should not have modified the parties' original Stipulation, because of the lack of service of any of the changes upon the defendant.

The Court should not have modified the Stipulation of the parties' in the face of plaintiff's repeated assertions that she did not want nor did she feel she had any claim to the marital home and because there is no evidence that the home was acquired thorough joint marital efforts.

By awarding alimony to the plaintiff without her having requested the same, the Court abused its disretion.

Even assuming, arguendo, that the Court subsequently acquired jurisdiction over the defendant because of his later appearances in Court, the alimony requirement should not have commenced until the last Court ruling, when defendant

appeared for his Petition to Modify, or from June, 1987. Therefore, no judgment representing alimony arrears from March of 1986 should have been entered.

ARGUMENT

POINT I

THE COURT WAS WITHOUT JURISDICTION TO RENDER MODIFICATIONS OF THE PARTIES' ORIGINAL STIPULATION.

The only mention or assertion of service in this matter is that acknowledgement by the defendant in the original Stipulation between the parties that he had received a copy of the plaintiff's Complaint.

It is uncontroverted that defendant was never personally served with all the final documents that normally concluded a divorce proceeding, namely, the Findings of Fact, Conclusions of Law, and Decree. (TR 4, P. 5, L. 4-5 and L. 7-13), nor was defendant ever served with notice of the March 19, 1986 hearing where the Court modified the Stipulation and ordered alimony and divided the marital home. Rule 2.9 and Rule 5(a) of the Rules of Practice in the District Courts of the State of Utah require service upon a party in this situation.

Defendant, in effect, was denied due process of law when the Court's changes were made effective from the March 19,

1986 hearing. Constitution of The United States, Amend XIV, Sec. 1; Constitution of The United States, Art I, Sec. 7.

It has been held previously that the trial Court could not have jurisdiction to enter a Decree of Divorce where there was no effective service of process. Garcia vs. Garcia, 712 P.2d. 288 (Utah 1986). Therefore, it would follow that any other substantive orders commonly occurring in Divorce Decrees could not have any validity.

ARGUMENT

POINT 2

THE COURT, BECAUSE OF DEFECTIVE SERVICE, COULD NOT HAVE ACQUIRED JURISDICTION OVER THE DEFENDANT UNTIL DEFENDANT APPEARED IN THE ACTION BY HIS FILING THE PETITION TO MODIFY.

Defendant does not contend the Court could not have awarded plaintiff the Decree of Divorce. However, orders concerning alimony and allocation of property should only have been effective after defendant appeared in the action through his Petition to Modify. Robinson and Wells, P.C. vs. Warren, 669 P.2d 844 (Utah 1983).

Also, a party never served with process is not subject to the Court's jurisdiction until the party appears in the action. Wagoner vs. Sounier, 627 P.2d 428 (Okla., 1981). It would follow, therefore, that the lower Court erred by entering a judgment against defendant for unpaid alimony

arrears that accrued from March 19, 1986. No alimony order should have been effective against defendant until the Order resulting from defendant's Petition to Modify was signed and entered. See also, Larsen vs. Larsen, 561 P.2d 1077 (Utah, 1977).

ARGUMENT

POINT 3

THE COURT ABUSED ITS DISCRETION BY AWARDING PLAINTIFF ALIMONY AND AN INTEREST IN THE HOME CONTRARY TO THE AGREEMENT OF THE PARTIES'.

A reading of the record in the first proceeding, (TR. 1) indicates the plaintiff declined alimony even after questioning by the Court. (TR. 1, P.7, L.6 and L.14-15 and P.8, L.11-13). Even at the second hearing, plaintiff never affirmatively requested alimony.

The same argument of judicial abuse applies similarly to the Court allocating to plaintiff an interest in the residence of the parties'.

It cannot be sufficiently emphasized that the parties, in arms length negotiations, contracted and thereafter embodied their agreement in the Stipulation subsequently rejected by the Court. Further, plaintiff had advice of counsel while defendant proceeded pro se.

While defendant recognizes the wide discretion the trial Court possesses in divorce actions, the Appellate Court can alter and amend the findings of the lower Court. Constitution of Utah, Art. VIII, Sec. 9.

Defendant's position is that the lower Court overstepped bounds of judicial propriety and neutrality when it literally imposed an alimony and housing award contrary to the stated desires of both parties.

ARGUMENT

POINT 4

THE LOWER COURT IMPROPERLY APPLIED THE LAW WHEN IT AWARDED PLAINTIFF AN INTEREST IN THE RESIDENCE.

Without conceding the abuse of discretion position previously presented, defendant respectfully submits that the Court should not have awarded plaintiff an interest in the home inherited from his father. (TR 2, P.7, L.20).

The record is absolutely void of any testimony or other evidence that the residence was acquired or thereafter improved or increased in value because of joint marital efforts. It appears settled in Utah that inherited property is not considered a part of the marital estate that should be allocated unless the same was acquired or improved as a result of the joint marital effort of the parties. Preston

vs. Preston, 646 P.2d 705 (Utah, 1982); Burke vs. Burke, 51 Utah Adv. Rep. 10 (1987).

The record of the 4th hearing, the Petition to Modify, shows that plaintiff not only did not know the age of the home, but was unclear as to whether any improvements have been made of the home. (TR 4, P.53, L.6-10), nor was she clear as to its value (TR. 4, P.53, L.13-17). In fact instead of testifying what, if any, improvements had been made, plaintiff instead informed the Court of the home's need of repair. (TR. 4, P.53, L.19-23).

Therefore, without evidence of plaintiff's contributions and efforts, the Court erred in awarding her a portion of the home.

Finally, a last examination of the record in the Petition to Modify at, P.38, L.21-23, indicates plaintiff accepted the interest in the home simply because the awards went hand-in-hand with the award of the divorce, and the quote the plaintiff, ".....that's the only way I could get it....." (TR. 4, P.38, L.22-23).

CONCLUSION

The trial Court was without power to enter Orders against defendant without proper service upon him until the defendant made a general appearance in the action by filing his Petition to Modify. Having entered judgment against

defendant, the Court violated defendant's right to due process.

Even after the Court acquired jurisdiction, it should not have entered a judgment against defendant for alimony arrears simply because the alimony award was not valid until June of 1987. Not only was the award of the judgment an abuse of discretion, but the alimony and real property award to the plaintiff was contrary to the parties' intentions and to settled Utah legal principles.

The Court of Appeals should reverse the judgment of the lower Court, set aside the judgment for alimony arrears, and restore the parties to their original position they found themselves in after they executed the Stipulation by eliminating plaintiff's alimony and real property interest award.

KENT T. YANO
Attorney for Defendant/Appellant

ADDENDUM

1. Constitution of The United States, Amend. XIV, Sec. 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Constitution of The State of Utah, Art. I, Sec. 7, and Art. VIII, Sec. 9.

(Art. 1, Sec. 7:) No person shall be deprived of life, liberty or property, without due process.

(Art. VII, Sec. 9). From all final judgments of the district courts, there shall be a right of appeal to the Supreme Court. The appeal shall be upon the record made in the court below and under such regulations as may be provided by law. In equity cases the appeal may be on questions of both law and fact; in cases at law the appeal shall be on questions of law alone. Appeals shall also lie from the final orders and decrees of the Court in the administration of decedent estates, and in cases of guardianship, as shall be provided by law. Appeals shall also lie from the final judgment of justices of the peace in civil and criminal cases

to the District Courts on both questions of law and fact, with such limitations and restrictions as shall be provided by law; and the decision of the District Courts on such appeals shall be final in cases involving the validity or constitutionality of a statute.

3. Rule 2.9 of The Rules of Practice, in the District Courts of the State of Utah:

(a) In all rulings by a Court, counsel for the party or parties obtaining the ruling shall within fifteen (15) days, or within shorter time as the Court may direct, file with the Court a proposed Order, Judgment or Decree in conformity with the ruling.

(b) Copies of the proposed Findings, Judgments, and/or Orders shall be served on opposing counsel before being presented to the Court for signature unless the Court otherwise orders. Notice of objections thereto shall be submitted to the Court and counsel within (5) days after service.

(c) Stipulated settlements and dismissals shall be reduced to writing and presented to the Court for signature within fifteen (15) days of the settlement and dismissal.

4. Rule 5(a) of The Rules of Practice in the District Courts of the State of Utah:

(a) Service: When required. Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original Complaint unless the Court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written notice other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, notice of signing or entry of judgment under Rule 58(d), and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except as provided in Rule 55(a) (2) (default proceedings) or pleadings asserting new or additional claims for relief against them which shall be served upon them in the manner provided for service of summons in Rule 4.

MAILING CERTIFICATE

Mailed a true and correct copy of the Brief of Appellant to Plaintiff/Respondent's counsel, Paul R. Frischknecht, 50 North Main Street, Manti, Utah 84642, postage prepaid this _____ day of October, 1987.

KENT T. YANO