

1996

Joos v. Joos : Brief of Appellee

Utah Court of Appeals

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E.H. Fankhauser; Attorney for Appellee.

Recommended Citation

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IN THE UTAH COURT OF APPEALS

PIPER C. JOOS,	*	
Plaintiff/Appellee,	*	Case No. 960720 CA
vs.	*	Priority No. 15
DAN RODNEY JOOS,	*	
Defendant/Appellant.	*	

BRIEF OF APPELLEE

APPEAL FROM A DECREE OF DIVORCE
THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH
HONORABLE SANDRA N. PEULER

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STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction of this matter pursuant to Section 78-2a-3(2)(h), Utah Code Annotated, as amended, pertaining to Appeals from District Courts involving domestic relations cases.

ISSUES PRESENTED FOR REVIEW

A. Was the denial of Defendant/Appellant's Petition for Conciliation, filed more than four (4) months after commencement of the divorce action, abuse of discretion, amounting to error?

B. Did the lower Court in exercise of its discretionary authority, error by granting Plaintiff a divorce upon the grounds of irreconcilable differences, a no-fault provision that does not need fault to be proven.

C. Whether the constitutionality of Section 30-3-1(h), Utah Code Annotated, as amended, not raised or argued by Appellant in the lower Court and raised for the first time on appeal, is properly before the Utah Court of Appeals.

STANDARD OF REVIEW

The Standard of Review on this Appeal is an abuse of discretion standard. The trial Court has broad discretion in

ruling on a Petition for Conciliation. Where the evidence in a divorce action, with respect to grounds, is conflicting, but there is sufficient evidence to support the lower Court's finding against the Defendant, the Appellate Court will approve the lower Court finding. Anderson v. Anderson, 104 Utah 104, 138 P.2d 252 (1943).

The Appellate Court should review the factual findings of the trial Judge under the "clearly erroneous standard." The trial Court's Findings of Fact should not be disturbed unless such findings are clearly erroneous. Findings of Fact will be regarded as clearly erroneous only if they are "so lacking in support as to be against the clear weight of the evidence." Hagen v. Hagen, 810 P.2d 478 (Ut. Ct. App. 1991); Jense v. Jense, 784 P.2d 1249, 1251 (Ut. Ct. App. 1989). The Appellant must first marshall the evidence which supports the finding and then demonstrate that, despite this evidence, it is clearly erroneous. Christensen v. Munns, 812 P.2d 69,73 (Ut. Ct. App. 1991).

The constitutionality of 30-3-1(h), Utah Code Annotated, as amended, is a presumption of validity standard. Lehi City v. Meiling, 87 Ut. 237, 48 P.2d 530 (1935). The legislative power is vested in the Legislature of the State of Utah by virtue of Article VI, Section 1 of the Utah Constitution. Marriage is a relationship that may be created and terminated only with consent of the State.

CONTROLLING STATUTES

A. Utah Code Annotated, Section 30-3-1(h), as amended, which provides as a grounds for divorce "irreconcilable differences."

B. Utah Code Annotated, Section 30-3-13.1, et. seq., as amended, enacted 1969 which provides that a Family Court Division of the District Court may be established with consent of the County Legislative body and determination by the District Court that social conditions in the County and the number of domestic relation cases in the Courts require the procedures provided for in this Act. (emphasis added)

C. Utah Constitution, Article VI, Section 1, which states the legislative power is vested in the Legislature (Senate and House of Representatives) of the State of Utah, embodies the power to regulate marriage, a relationship that may be created and terminated only with the consent of the State.

STATEMENT OF THE CASE

This an Appeal from a Decree of Divorce granted to the Plaintiff by the trial Court, the Honorable Sandra N. Peuler, upon the ground of irreconcilable differences, and denial of Defendant's Petition for Conciliation.

PROCEEDINGS IN LOWER COURT

The Plaintiff (wife) filed this divorce action on November 14, 1995 (R. 1-9), and Summons was first served on Defendant, December 3, 1995. (R. 34) The Summons and Order to Show Cause for Temporary Custody, Support and Other Relief, was served on Defendant a second time on December 29, 1995, (R. 38-44) after Defendant had filed a Motion to Quash the first service of process. (R. 25-29) Defendant filed his Answer to the Complaint on January 10, 1996 (R. 47-48).

Hearing on Plaintiff's Order to Show Cause was held on February 1, 1996, with an Order entered on the Order to Show Cause, March 4, 1996. (R. 71-77) The Guardian Ad Litem appointed by the Court to determine the allegations of abuse of the minor children, filed her report with the Court on May 20, 1996. (R. 80-86) It was her belief that the children were not being neglected or abused. However, she determined that the children did not have a good relationship with their father (Defendant).

Certification of Readiness for Trial was filed on March 25, 1996, (R. 99) after completion of discovery by Plaintiff. (R. 49; 68) Defendant, after Notice of the Pre-trial Settlement Conference, filed a Petition for Conciliation on April 17, 1996, (R. 101-103) although he had not yet attended the Divorce Education Course. Defendant's Petition for Conciliation was denied by Domestic Relations Commissioner, Lisa A. Jones, at the Pre-trial

Settlement Conference. (R. 104; 131) Defendant objected to the Commissioner's denial of his Petition for Conciliation. (R. 121-126) The case having been certified to Judge Sandra N. Peuler, for trial, an Order scheduling a Pre-trial/Settlement Conference for July 15, 1996 was sent by the Court. (R. 133-134) There being no settlement, a trial date of September 6, 1996 was set by the Court. (R. 135-136)

Defendant filed his Notice to Submit for Decision his Objection to denial of his Petition for Conciliation on July 30, 1996 (R. 151-152) The Court, the Honorable Sandra N. Peuler, denied Defendant's Objection by written and signed Minute Entry, August 22, 1996 (R. 150-153) and the Order thereon (R. 226-227).

The case came on for trial, as scheduled, September 6, 1996, and was tried. (R. 156-157) Defendant, on the morning of trial, filed an untimely handwritten letter with the Court. (R. 159-225; T. 284) Findings of Facts and Conclusions of Law, with the Decree of Divorce, was filed on October 22, 1996 and entered by the Court. (R. 241-269). Notice of Entry of Judgment was sent and filed with the Court, November 5, 1996. (R. 270-271) A Notice of Appeal was filed by Defendant on November 7, 1996. (R. 272-273)

DISPOSITION IN THE LOWER COURT

The Court, the Honorable Sandra N. Peuler, after evidentiary hearing, made findings and concluded that Plaintiff was entitled to

be granted a Decree of Divorce, upon the grounds of irreconcilable differences. (R. 242-243; T. 293-303; 504-505)

STATEMENT OF FACTS

1. The parties were married August 4, 1978 at Salt Lake City, Utah, and separated August 14, 1995. (T. 292)

2. Three (3) children were born issue of the marriage and Defendant agreed that Plaintiff should be the custodian and awarded custody of the children. (R. 2; 47; T. 304-305)

3. The parties had been experiencing problems and difficulties in the marriage for a little over three (3) years before Plaintiff filed her Complaint for divorce, that began after Defendant lost his job in the fall of 1991. Defendant acknowledged that there were problems and difficulties in the marriage, which he characterized as the "real problems" for which they sought counselling. (T. 376-377; 450-451)

4. The parties had been engaged in marriage counselling with Dr. Victor Cline prior to the time Defendant separated from Plaintiff and the minor children. (T. 295-296) Defendant left Plaintiff and the children without financial resources or support and stayed away for approximately 2 1/2 months. Plaintiff was not employed at the time and had not worked out of the home during the marriage. Defendant did not send money to support them, which was very hard on Plaintiff and the family, physically and emotionally.

(T. 298-300) Although the parties had engaged in counselling prior to Defendant separating from Plaintiff, they were unable to resolve the marital problems and difficulties that continued to the time of trial. (T. 353-355; 358-371)

5. Plaintiff testified to many of the problems she had experienced during the marriage to Defendant that could not be reconciled. She testified Defendant was controlling, critical of her and the children, very domineering, preaching to her which made her feel degraded and unworthy, all of which the Court found sufficient in terms of grounds for granting the divorce. (T. 294-303; 504-505) Defendant acknowledged that Plaintiff was unhappy in the marriage and had expressed to him that he was domineering, controlling and judgmental. (T. 403; 450-452)

6. Defendant has sought to place the source and blame of the parties unresolved problems and difficulties to unnamed others. (T. 398; 406; 423) Defendant did not attend the Divorce Education class and declined to continue marriage counselling after the separation (T. 353-354).

SUMMARY OF ARGUMENT

POINT I

DENIAL OF DEFENDANT'S PETITION FOR CONCILIATION BY THE TRIAL COURT WAS DISCRETIONARY AND NOT ERROR

Defendant/Appellant filed his Petition for Conciliation on

April 17, 1996, more than four (4) months after commencement of the action and after Notice of the Pre-trial Settlement Conference before Domestic Relations Commissioner, Lisa A. Jones. (R. 101-103; 105-106) The Third District Court had not established a Family Court Division, nor appointed a Domestic Relations Counselor. (See Section 30-3-15.1, U.C.A. Amended) Section 30-3-13.1, Utah Code Annotated, as Amended, provides:

A Family Court Division of the District Court may be established with the consent of the County Legislative body in a County in which the District Court determines that the social conditions in the County and number of Domestic Relations cases in the Courts require use of the procedures provided for in this Act, in order to give full and property consideration to such cases and to effectuate the purposes of this Act.

Utah Code Annotated, Section 30-3-15.2 of the Family Court Act relating to powers of Domestic Relation counselors, had been repealed, effective April 27, 1992. Absent the establishment of a family Court division by the Third District Court and the appointment of a Domestic Relations counselor, denial of Defendant's Petition for Conciliation by Domestic Relations Commissioner, Lisa A. Jones, and thereafter, Judge Sandra N. Peuler, denying Defendant's Objection to the Commissioner's Order, was proper, under the circumstances existing and within the discretionary authority provided by the Act. Section 30-3-16.7, U.C.A. of the Act, provides for a stay of a pending action, when a Petition for Conciliation is filed, for a period of sixty (60) days, unless the Court otherwise orders. (emphasis added)

Assuming the District Court had established a Family Court Division, and appointed a Domestic Relations counselor, Section 30-3-17, U.C.A. of the Act, "POWER AND JURISDICTION OF JUDGE" clearly provides discretionary authority to the Court with regard to filing a Petition for Conciliation and with respect to recommending the aid of a psychiatrist, psychologist or other specialist, or a religious representative by use of the word "MAY" adding, "the power and jurisdiction granted by this Act shall be in addition to that presently exercised by the District Court's and shall not be in limitation thereof." (emphasis added) The Court of Appeals, in rendering its decision in A.E. v. Crstan, 13 Ut. Adv. Rep. 3, at page 5, cited the Utah Supreme Court case of Kennecott Copper Corporation v. Salt Lake County, 575 P.2d 705 (Utah 1978) and acknowledged that the term "shall" may be either discretionary or mandatory. It is clear from reading of Section 30-3-16.7, U.C.A. of the Act, use of the word "shall" is discretionary where the District Court is given the authority and alternative to, "otherwise order." Use of the word "may" in Section 30-3-17, U.C.A. of the Act, is a clear indication of the discretionary authority given to the Court. Where, as here, the Third District Court had not established a Family Court Division, nor appointed a Domestic Relations counselor, denial of Defendant/Appellant's Petition for Conciliation by the District Court was proper, under the circumstances, and well within its discretionary authority.

POINT II

THE TRIAL COURT'S FINDING OF IRRECONCILABLE DIFFERENCES IS SUPPORTED BY THE SUBSTANTIAL WEIGHT OF THE EVIDENCE PRESENTED AT TRIAL

As a general rule, the trial Court is afforded broad discretion in domestic relation cases. When the Plaintiff presents sufficient, substantial evidence to support grounds for divorce, the Court should grant a divorce. Anderson v. Anderson (supra) All that is required is that the irreconcilable differences exist. Grosskopf v. Grosskopf, 672 P.2d 814 (Wy 1984)

Defendant's attack on the trial Court's ruling is a challenge to the Court's findings of fact. To successfully attack a finding of fact, Defendant, as Appellant, must first marshall all the evidence supporting the finding and then demonstrate that even if viewed in the light most favorable to the trial Court, the evidence is legally insufficient to support the finding. Christensen v. Munns (supra); Doelle v. Bradley, 784 P.2d 1176, 1178 (Ut. 1989)

Legal sufficiency of the evidence is determined under Rule 52(a) U.R.C.P., which provides:

"Findings of fact, whether based on oral or documentary evidence shall not be set aside unless "clearly erroneous" and due regard shall be given to the opportunity of the trial Court to judge the creditability of the witnesses."

Richens v. Delbert Chipman & Sons Co. 817 P.2d 382 (Ut. Ct. App. 1991); Doelle v. Bradley (supra). The finding of the trial Court and its conclusion that irreconcilable differences existed between the parties is supported by the trial transcript of Plaintiff's testimony and that of Defendant. During the marriage the Defendant was controlling, emotionally abusive, critical of her, being judgmental, preaching to her, causing her to feel unworthy. (T. 294-295) Defendant separated, voluntarily, from her and the family in August, 1995, while the parties were engaged in marriage counselling, staying away 2 1/2 months. (T. 296) At the time Defendant separated, there was \$5.00 in the checking account and Plaintiff was not employed, she not having worked outside of the home during the marriage. Defendant did not send money for support of the family. She supported the family by holding a yard sell and working two (2) jobs which was very hard physically and emotionally. (T. 298-299) Defendant disapproved of her working outside the home, stating by letter sent to her that she was "condemned." (T. 300) Plaintiff's desire to continue working and Defendant's disapproval of her working, continued and still existed at the time of trial. (T. 301; 469) There were financial differences that persisted throughout the marriage. (T. 301; 365; 376; 381) The trial Court, the Honorable Sandra N. Peuler, found from all of the testimony and evidence presented, Plaintiff had set forth sufficient basis for a divorce to be granted on the grounds

of irreconcilable differences. That the differences included her objection to Defendant's treatment of the children, his being critical of her, preaching to her, and disagreement over how finances were handled. That the parties have disagreed on how they should live their lives. Although the Defendant characterizes the differences that existed to be minor, and believes that the marriage can be reconciled, it takes two to make that commitment. The Court found that Plaintiff had concluded that their differences are so great that no reasonable effort would reconcile them. (T. 504-505).

Defendant/Appellant has not marshalled the evidence in support of the trial Court's findings or demonstrated that the evidence supporting the findings is legally insufficient. Although Defendant provided conflicting testimony, a trial Court's factual finding is deemed "clearly erroneous" only if it is against the clear weight of the evidence. Doelle v. Bradley, (supra). The challenged finding of irreconcilable differences is not "clearly erroneous" and therefore no abuse of discretion on the part of the trial Court and its finding and ruling of irreconcilable differences should not be disturbed.

POINT III

**DEFENDANT/APPELLANT'S CLAIM THAT SECTION 30-3-1(3)(h)
UTAH CODE ANNOTATED, AS AMENDED, IS UNCONSTITUTIONAL
IS WITHOUT MERIT**

The issue of the constitutionality of Section 30-3-1(3)(h), U.C.A. was not plead or raised by Defendant at trial. To preserve an issue for Appeal, a party must timely bring the issue to the attention of the trial Court, thus providing the Court an opportunity to rule on the issue's merits. Lebaron & Associates v. NEC Information Systems, 823 P.2d 479 (Ut. Ct. App. 1991) Turtle Management, Inc. v. Haggis Management, Inc., 645 P.2d 667, 672 (Ut. 1982). Issues not raised in the trial Court in timely fashion are deemed waived, precluding the Appellate Court from considering their merits on Appeal. Salt Lake County v. Carlston, 776 P.2d 653, 655 (Ut. Ct. App. 1989).

The authority and power to regulate marriage and divorce is with the State. The only grounds for divorce are those specified by statute. Statutes providing for dissolution of marriage on grounds of irreconcilable differences, have been held to be valid. Defendant/Appellant has not provided legal authority to support his position that Section 30-3-1(3)(h), U.C.A. is unconstitutional. In fact, the Addendum attached to Defendant/Appellant's Brief at R. 175 states:

The validity of marriage dissolution statutes of this nature (irreconcilable differences) has been attacked in several instances on such grounds as improper delegation of the legislative power, denial of due process of law, impairment of the obligation of contract and unconstitutional vagueness of statutory language, but no dissolution of marriage act of the type here under consideration has been held invalid as of this writing (emphasis added) Citing 21 ALR 2d 267 and 58 ALR 2d 1218

Defendant acknowledges this quote from his Addendum in his Brief at page 29. It appears from his Brief that he basis his claim of unconstitutionality in part on religious grounds. Defendant had his day in Court and was afforded the due process guaranteed by the Utah Constitution. The Court, hearing all of the testimony presented and in a position to judge the creditability of the witnesses, determined that sufficient, substantial evidence had been presented to support granting Plaintiff a Decree of Divorce on the grounds of irreconcilable differences. (T. 504-505) Defendant's Appeal on this issue should fail and be rejected by the Court of Appeals.


CONCLUSION

Defendant has failed to meet his burden of showing abuse of discretion by a clear preponderance under the clearly erroneous standard. The finding and ruling of the trial Court of irreconcilable differences is supported by substantial, legally sufficient evidence. The denial of the Defendant's Petition for Conciliation by the District Court was proper, under the circumstances, and within its discretionary authority. Absent abuse of discretion, there is no error. Defendant/Appellant, having failed to plead or raise the constitutionality of Section 30-3-1(3)(h), Utah Code Annotated, is deemed waived, precluding the Appellate Court from considering this issue on its merits. The

authority and power of the State to regulate marriage and divorce is not in dispute. The statutes providing for dissolution of marriage on the grounds of irreconcilable differences, have been held to be valid.

As a matter of law, Plaintiff having been awarded attorney's fees in the lower Court, should be awarded attorney's fees for this Appeal. Defendant's Appeal of the lower Court's ruling and decision should be denied in all particulars.

Respectfully submitted this 10 day of June, 1997.



EPHRAIM H. FANKHAUSER
Attorney for Plaintiff/Appellee

MAILING CERTIFICATE

I certify a true and correct copy of the foregoing was mailed to Dan Rodney Joos, Appellant, Pro Se, c/o Dr. Gene R. Fuller, 2446 East Sabal, Salt Lake City, Utah 84121 on this 10 day of June, 1997.

