2001

Leah M. Daly v. George F. Daly : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

LEAH M. DALY, Executrix for the Estate of Eva Dean Daly, deceased,
Plaintiff and Respondent,

vs.

GEORGE F. DALY,
Defendant and Appellant.

Case No. 13517

BRIEF OF RESPONDENT

Appeal from the Interlocutory Decree and Orders of the Third Judicial District Court in and for Salt Lake County, State of Utah, Honorable James S. Sawaya, Judge, presiding.

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ADDITIONAL STATEMENTS OF FACT

The home in question is located at 1806 Bryan Avenue, Salt Lake City, Utah. It was purchased in 1952, for the sum of $18,500, T5. Mrs. Daly worked for a period of 45 years throughout her marriage and retired after the divorce action had been commenced, T6. The daughter, Leah Daly,, put all of the money she made as an employee of the Mountain States Telephone Company into the marriage beginning in 1951,

and continuing through the year 1962, during which years she contributed to her mother $40,720, T37.

Leah had a partnership during this period of time under the name of Alta Junior Ski School. Leah lived exclusively on the funds she received from this partnership. All of her wages from the telephone company were paid into the account maintained by her mother and father. Leah also has done all the lawn work and house painting and cleaning for a period of 21 years, T39.

Appellant was born April 19, 1897, and was 76 years old, not 67 years old as alleged in appellant's brief, at the time of the trial, T54. Appellant has never done any of the lawn work, T39. Appellant never did pay any of the bills, T40. In addition to the contributions by Leah of her wages during the period mentioned, she bought with her own funds the wishwasher, a washing machine, dryer, garbage disposal, all the furniture in the living room, the pictures on the walls, carpet in living room, dining room and hall, the carpet in both bedrooms, a double bed and two single beds for the basement, a color television, all at a cost of $4,200, T40. She paid with her own money all of these amounts, T41. Leah also purchased about $40 worth of groceries each month which she was able to purchase at a wholesale price including most of the meat consumed in the home which she paid for from her own funds, T41. In addition when they would go to the store for groceries, she would pay for the groceries from her own funds, T42. Leah and Respondent in

addition to the items paid for exclusively by Leah purchased $1,000 worth of drapes which they paid for jointly.

Appellant, whose name was on the joint bank account with his wife, wrote checks in an amount of between $100 and $150 per month for his own use from said joint account, T27.

The decree of the Court awarded the Respondent the title to the real property, subject to an equitable lien in favor of the Appellant in the sum of $8,000, which was payable $100 per month without interest commencing the first day of August, 1973. Appellant received $77 per month retirement from the State of Utah and at the time of the trial received $227 per month from Social Security, T54, and $5.00 per month cost of living increase, T82, plus the $100 per month which has been paid each month on the equitable lien on the property making a total of $409.00, per month. Appellant has medicare and medicard plus he has insurance in the Horace Mann Insurance Company that pays all the costs of medicines after payment of the first $75.00 each year and the amount of hospital bills medicare does not pay, T12, T70.

Respondent upon her retirement on March 31, 1973, received the sum of $212.90 per month from Social Security and $120.00 pension per month from Salt Lake City, total $332.90, T13, from which she was ordered to pay $100 per month to the Appellant to retire the equitable lien of $8,000 on the property.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN FAILING TO GRANT DEFENDANT'S MOTIONS TO DISMISS AND/OR MODIFY THE INTERLOCUTORY DECREE OF DIVORCE IN LIGHT OF CHANGED CIRCUMSTANCES.

The Defendant's motion to dismiss P38 is based entirely on the fact that the plaintiff died on September 23, 1973, before the interlocutory decree became final.

The Utah Supreme Court in the early case of *Parsons -vs- Parsons,* 40 Utah 602, 122 P907, @909 held "The cases are applicable upon the points that the so called interlocutory decree is an adjudication on merits of all controversies arising upon the issues and like any other judgment on merits is subject only to be vacated or modified on appeal . . . or on other proceedings known to the Code for reexamination on review of a cause on the merits".

The Court in the case of *Rasmussen -vs- Call,* District Judge 55 Utah 597, 188 P 275 @276 after quoting with approval from the case of Parsons -vs- Parsons supra held that the decree of August 29, 1919, dissolving the marriage, gave to the plaintiff a real, substantial right, cannot well be questioned. . . . The effect of the interlocutory decree being to vest in plaintiff certain personal and property rights, it necessarily fol-

lows that the existence of those rights denies to any court, the authority or right to take the same from her except upon legal proceedings in which plaintiff had an opportunity to be heard in disproof of any attack upon such rights. . . . Sufficient cause means legal cause.

In the case of in re Harpers Estate, Anderson -vs- Harper, 1 Utah 2nd 296, 265 P 2nd, 1005, @1006.

The appeal was taken from a decree of the trial court determining title to certain real property to be vested in respondent as the survivor of a joint tenancy. The question presented was concerned with the effect of death of one of the parties.

"When the death of one of the parties occurs after the entry of a divorce decree and before the decree is final, the decree becomes ineffective to dissolve the marriage, death having terminated that personal relationship. *However, the occurrence of death does not abate the action itself and to the extent that property rights are terminated by the decree, it remains effective and becomes final in the same manner, and at the same time as one between living persons.* (Emphasis added)

The reasoning of the Rasmussen case (Rasmussen -vs- Call District Judge supra) is applicable to the instant case. All the property rights granted Fred W. Harper by the divorce decree vested upon his death, in his heirs and devisees subject to the statutory limitations of the decree itself and applicable probate proceeding."

It is clear that the mere fact of death of the plaintiff, Eva Dean Daly, did not abate the action relating to the property rights that had been determined by the Court as part of the interlocutory decree.

The defendant's motion to modify the interlocutory decree by awarding to the appellant the home of the parties located at 1806 Bryan Avenue, Salt Lake City, Utah, and the life insurance described in the decree P 40. The ground for such modification is described as "the changed conditions of the parties, growing out of the plaintiff's death".

The applicable facts are that both the plaintiff and defendant worked for approximately 45 years and were at the time of the trial both retired. Their joint earnings were kept in a joint bank account from which the appellant withdrew between $100 and $150 per month for his own use, T27. Leah Daly, the daughter of the parties, lived with her father and mother. During the eleven years from 1951 to 1962, T37, she was employed by Mountain Bell Telephone Company and in her spare time operated the Alta Junior Ski School as a partnership. During those years she lived on her earnings from the Alta Ski School and donated the salary she received from Mountain Bell Telephone Company amounting to the sum of $42,720, T37, to the joint account of her mother and father, T37.

At the time of the trial appellant was receiving $227 per month from Social Security, $77 per month retirement from State of Utah, T54, and $5.00 per

month cost of living increase, T82, making a total of $309.00 per month. Appellant also had medicare and medicade and a policy with Horace Mann Insurance Company that pays for all medicine after the first $75 worth in each year and pay the hospital bills medicare does not pay, T12, T70.

The Respondent after her retirement on March 31, 1973, received $212.90 from Social Security, $120 per month pension from Salt Lake City. She had medicare and medicade and a policy with Horace Mann Insurance Co. for payment of medicines and hospital fees like her husband's policy. After paying $100 per month to appellant on the equitable lien of $8,000, she had a net monthly income of $232.90.

The Court gave the savings account in First Security Bank to the appellant amounting to approximately $300 and the family automobile. Mrs. Daly received the home, subject to an $8,000 equitable lien in favor of the appellant and the household furniture, furnishings and appliances.

After the death of the Respondent, Leah Daly executrix of the Estate of Eva Dean Daly was substituted as party plaintiff and respondent in said action.

The Respondent submits that there has been no change of circumstances upon which the court should make any revisions of the interlocutory decree. The appellant still receives his Social Security in the sum of $227.00 per month plus an increase of 11% during

the year of 1974. He still receives the pension in the sum of $77 per month from the State of Utah and $5.00 per month cost of living increase and $100 per month from the Respondent on the equitable lien on the home and will continue to receive the same until $8,000 has been paid which will be in approximately 7½ years.

The trial court considered the question as to which party should be awarded the real property and decided that the appellant, a man of 76 years of age, who had done no yard or lawn work for the past 25 years and who was in poor health would be better off with an equitable lien of $8,000 on the home, payable at the rate of $100 per month, than to give him an undivided interest in the real property with respondent.

The Utah Supreme Court in many cases has enunciated its opinion of the advanced position of the trial judge in being able to judge the credibility of the witnesses.

In Anderson vs. Anderson, 18 Utah 2nd 286, 422 Pac 2nd 193, the Utah Court said:

"Recent pronouncements of this court, and the policy to which we adhere are to the effect that the trial judge has considerable latitude of discretion in such matters and that his judgment should not be changed lightly and in fact not at all, unless it works such a manifest injustice or inequity as to indicate a clear abuse of discretion."

In Stone vs. Stone, 19 Utah 2nd 378, 431 Pac 2nd 802, the Court said:

"The Findings and Order are endowed with a presumption of validity and the burden is upon the appellant to show they are in error . . . accordingly we recognize that it is the prerogative of the judge to judge the credibility of the witnesses, and in case of conflict we assume that the trial court believed the evidence which support the finding. We review the whole evidence in the light most favorable to them; *and we will not disturb them merely because this court might have viewed the matter differently, but only if the evidence clearly preponderates against the findings*". (Emphasis added)

In Jensen vs. Nielsen, 26 Utah 2nd 96 485 Pac. 2nd 673 note one at page 675.

"Even though as plaintiff's contend this Court may review the evidence in a case of equity, due to the prerogatives and advance position of the trial court we look with favor upon the findings and judgment and do not disturb unless the evidence clearly preponderates against them", citing

Stone vs. Stone supra

Wiese vs. Wiese, 24 Utah 2nd 236, 469 Pac. 2nd 504.

The interlocutory decree determined the property rights of the parties, even though the respondent died before the decree became final. Harper's Estate supra.

"The decree remained effective and becomes final in the same manner and at the same time as one between living persons".

CONCLUSION

We submit that the law and the evidence abundantly justifies the order of the trial court in denying the motion to dismiss the action. That the Utah law is clear that the death of the Respondent did not abate the action as far as the awarding of property rights to the Respondent is concerned. That the property rights vested in the heirs of the Respondent at her death. We further submit that there has been no change of circumstances sufficient to justify the amendment of said decree. The appellant will be adequately taken care of for the rest of his life under the terms of said decree.

Respectfully submitted,

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CERTIFICATE OF MAILING

Two copies of the above and foregoing Brief of Respondent were posted in the U.S. mail postage paid and addressed to the Attorney for the Appellant, David J. Knowlton of Vlahos & Gale, at 312 Eccles Bldg., Ogden, Utah, and Horace J. Knowlton, at 214 Tenth Avenue, Salt Lake City, Utah, and copies thereof were delivered to the Clerk of the Supreme Court, State Capital Building, Salt Lake City, on this 4th day of October, 1974.