1978

Douglas A. Nelson v. Michelle Marion Davis : Brief of Appellant

Utah Supreme Court

Samuel King; Attorney for Appellant;
Wendell E. Bennett; Attorney for Respondent;

IN THE SUPREME COURT OF THE STATE OF

DOUGLAS A. NELSON,

Plaintiff and Respondent,

vs.

MICHELLE MARION DAVIS,

Defendant and Appellant.

Case

APPELLANT'S BRIEF

APPEAL FROM ORDER AND JUDG
OF HONORABLE JAMES S. SAWAYA,
THIRD DISTRICT COURT, SALT LA
COUNTY, UTAH

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STATEMENT OF THE KIND OF CASE

An action to set aside a termination of joint tenancy.

DISPOSITION IN LOWER COURT

When respondent filed for divorce, his wife, Betty Nelson, who was appellant's mother, terminated the joint tenancy on the home owned by her and respondent. On the death of Betty Nelson, before a decree of divorce had been entered, Mr. Nelson brought this action against appellant who is executrix of her mother's estate, to have the termination of joint tenancy set aside, and Judge Sawaya granted respondent such relief.

RELIEF SOUGHT ON APPEAL

Reversal of Judge Sawaya's order, reinstating as valid and effective Mrs. Nelson's termination of the joint tenancy.

STATEMENT OF THE FACTS

The parties married on March 11, 1976. Each had children by prior marriages, each having been widowed.

Mrs. Nelson had a child, Michelle Davis, born March 7, 1955, as issue of her marriage to her deceased husband. Subsequently, she remarried, having a child by her second marriage, Monique Skinner, born February 26, 1962. That marriage ended in divorce.

Mrs. Nelson and her children were Australian. Mrs. Nelson immigrated to the United States in late 1975. On arrival in Utah,

she bought a home occupied by herself and her daughters. She sold this home on her marriage to Mr. Nelson, and he made her a joint tenant on his home in Salt Lake City, Utah.

She was 50 years of age at the time of her marriage to Mr. Nelson.

Mr. Nelson's first wife died of a stroke in 1975.

Betty Nelson died of cancer on May 24, 1977.

References in this brief to the parties refer to appellant as Mrs. Nelson and and respondent as Mr. Nelson, as appellant's interest in the case is solely as executor of her mother's estate, and the matters in issue were between Douglas and Betty Nelson.

The parties resided together continuously from the date of their marriage until the end of September, 1976.

Mrs. Nelson had been in robust health, had taken a vacation with Mr. Nelson to California in June, but then rapidly became very ill. On being hospitalized in September, 1976, surgery was perform and a number of inoperable cancers were discovered in her abdomina area.

The entire domestic file was received in evidence as an exhibit. (T 106, L 5-8) The domestic file, case D-24033, Salt Lake County District Court, is included under separate cover in the record on appeal designated as Supplemental Index (SI). The medical report on her condition is included. (SI 189-190)

Mr. Nelson moved out of the home. By complaint dated September 28, 1976, and filed October 4, 1976, he sought annulment based

on fraud, or alternatively, divorce. During the number of hearings that followed in the domestic case, he did not pursue the matter of annulment nor profer proof on fraud.

Mrs. Nelson's cancer progressed so rapidly that, by the time the case was ready for trial, she was bedridden and so ill that the case couldn't be tried.

Her older daughter, Michelle, had a job in Salt Lake City, and resided out of the parties' home, but on Mr. Nelson moving out, Michelle moved into the home and remained there until her mother's death, caring for her mother. The then 14 year old child, Monique, resided with her mother and Mr. Nelson through their marriage.

Because the case was never tried, there is no adjudication as to the merits of the parties' domestic claims and financial positions. For that reason, this brief will incorporate the appropriate allegations from the complaint of Mr. Nelson and the counterclaim of Mrs. Nelson to set forth their positions.

COMPLAINT

> "4. That the defendant, in order to induce the plaintiff to marry her represented to him that she would maintain a normal relationship as a wife with the plaintiff, would treat him with love and affection, and would give him the respect that a husband would expect of a wife all of which was done for the purpose of inducing the plaintiff to marry the defendant. Said representations were false when made and were known by the defendant to be false when made, and were made to the plaintiff for the purpose of inducing the plaintiff into marrying the defendant. Based upon said misrepresentations the plaintiff entered into the marital relationship with the defendant, and based further upon said representations said marriage should be annuled, and each party placed back into the position they were in prior to the time of said marriage." R. 5 and 6.

"6. That prior to the marriage of the parties the plaintiff was the owner of a home located at 3061 Canyon View Circle, Salt Lake City, Utah, and had for many years prior thereto lived in said residence with his first wife, who, prior to the marriage of the plaintiff and defendant passed away after having suffered a stroke." (SI 166)

"8. That the defendant has funds of her own and is capable of supporting herself, and due to the short duration of the marriage between the parties, the plaintiff should not be required to pay the defendant anything by way of support with the exception of the sum of $100.00 per month for a period of three months commencing October 1, 1976, and ceasing with the last month of payment being required in December, 1976." (SI 166)

"10. That the plaintiff has purchased some items of household effect at the insistance of the defendant during the marriage, and said effects have been purchased with the funds of the plaintiff, and should be awarded to the plaintiff along with all of the property he owned prior to the marriage including, real, personal,or mixed property of whatever kind and nature and wherever located." (SI 167)

"WHEREFORE, plaintiff prays judgment against the defendant either annuling the marriage and declaring same void, or in the alternative that the Court does not find sufficient grounds for an annulment that the plaintiff be awarded a Decree of Divorce from the defendant divorcing the plaintiff from the defendant and disolving the bonds of matrimony, and awarding to the plaintiff his home located at 3061 Canyon View Circle, Salt Lake City, Utah, and any and all personal property, real property, or mixed property of whatever kind or wheresoever located that the plaintiff owned prior to his marriage of short duration to the defendant, or purchased by the plaintiff during his short marriage with the defendant, with the defendant to be awarded the property that she owned prior to the marriage and brought into the marriage with her, with each party to assume, pay, and hold the other party harmless from any and all obligations on the property awarded to the respective parties, and for an Order of the Court requiring the defendant to vacate the home of the plaintiff located at 3061 Canyon View Circle, Salt Lake City, Utah not later than the first day of December, 1976, and that each party be awarded their automobile that they owned prior to their marriage and brought into the marriage with them, and for such other and further relief as to the court seems just and equitable in the premises.

"DATED this 28th day of September, 1976." (SI 168)

"2. Plaintiff has treated defendant cruelly causing her great mental and physical suffering and distress by refusing to live with her, provide for her or care for her since discovery of, and treatment for an inoperable condition of cancer of her internal organs, and has treated her cruelly in other ways.

"3. In latesummer, defendant was hospitalized at the LDS Hospital, her cancer was then diagnosed for the first time and she was operated on, the operation being a colostomy. She is now receiving regular chemotherapy and is not physically capable of working for wages.

"4. Defendant resides with her two daughters, Michelle, age 21, and Monique, age 14. She and her daughters came to the United States 14 months ago from Australia, their native land. In connection with marrying plaintiff, defendant gave up a widow's pension of $247.00 from the Australian government. She has made inquiry to see if it can be reinstated, and has not yet received a reply.

"5. Defendant was purchasing home which she sold at a loss to her of approximately $3,000.00 and moved into plaintiff's home at the time of their marriage, all on plaintiff's insistence. She had $1,400.00 in savings all of which have been spent by her on joint bills of the marriage and a California vacation for plaintiff and defendant in June, 1976. She also sold her stove and bedroom furniture at plaintiff's insistence, giving him the proceeds. Defendant is presently without funds, or a place to live other than the home occupied by plaintiff at the time of their marriage, which he has conveyed into their joint names.

"6. Defendant had health insurance on herself and her daughters which she gave up at plaintiff's insistence on their marriage, thereafter and presently being covered by plaintiff's insurance he being an employee of an insurance company.

"WHEREFORE defendant prays judgment as follows:

"1. For a Decree of separate maintenance, or as a secondary alternative, for a Decree of Divorce at such time as is appropriate.

"2. For an immediate Order of court allocating obligations of the parties, allowing defendant temporary and permanent

support and alimony, allowing defendant use of the home at 3061 Canyon View Circle, Salt Lake City, Utah, with the plaintiff being restrained from entering onto such premises or its real property without express invitation, for her temporary and final costs and fees herein, requiring plaintiff to maintain fully all insurance on which defendant is beneficiary, or life insurance on which he is principal.

"3. For such other relief as the court may deem proper.

"DATED October 15, 1976." (SI 169-170)

Because Mrs. Nelson is deceased, it should be noted that she verified the content of her Answer and Counterclaim. (SI 170-171)

Before marrying Mr. Nelson, Betty Nelson had employment and health insurance. Mr. Nelson is an insurance executive and added her to his existing health insurance when they married. As a result of her marriage, Mrs. Nelson had neither employment nor health insurance other than that provided through Mr. Nelson when he filed for divorce.

The treatment of cancer can reasonably be expected to be expensive. As Mr. Nelson's complaint did not offer to continue health insurance for Mrs. Nelson to meet her future cancer related medical expense, offered only $100 a month for three months, sought to put her out of the home and terminate her interest in the home, and the income from the Australian government to Mrs. Nelson as mother of the 14 year old daughter, Monique, had terminated, Mrs. Nelson was in a position of financial distress.

Mrs. Nelson filed a Motion for an Order Pendente Lite which came on for hearing on October 22, 1976, before Judge Dean E. Conde. At that hearing, Mrs. Nelson's financial problems were set before

Judge Conder. Mr. Nelson, on his part, through his attorney Wendell Bennett, presented a strong argument that it was hard on him to lose half equity in his home because his wife became terminally ill after a short marriage.

Having considered the matter, Judge Conder entered his Order Pendente Lite allowing Mrs. Nelson to stay in the home, requiring Mr. Nelson to make payments on the home, and utilities, pay Mrs. Nelson a living allowance of $150 per month, and to keep her insured. (SI 179; Minute Order at SI 175)

This order was not signed by Judge Conder until November 4, 1976. Reason for this delay is explained in the letter dated November 1, 1976, from Mrs. Nelson's attorney, Samuel King, to Mr. Nelson's attorney, Wendell Bennett. Judge Conder made this letter a part of the court file. The letter stated:

"Dear Wendell:

"In view of the fact that you haven't responded to my letters inviting negotiation nor approved nor commented on the proposed Order for signature by Judge Conder, I have no choice in order to protect the financial security of Mrs. Nelson and her estate, than to terminate the joint tenancy and have her deed her interest in the property to her adult child, Michelle. This is now being done and will be recorded during the week.

"Sincerely," (SI 226)

On November 3, 1976, Mrs. Nelson signed the termination. It was recorded November 4, 1976. The termination provided:

"NOTICE OF TERMINATION OF JOINT TENANCY

"BETTY N. NELSON, hereby gives notice that she terminates the joint tenancy between herself and Douglas A. Nelson, such joint tenancy being reflected and established by Quit

Claim Deed dated May 13, 1976, and recorded May 14, 1976, in the Office of the Salt Lake County Recorder, entry #2814353, and relating to the real property in Salt Lake County, Utah, described as:

'Lot 7, Canyon View Circle, according to the official plat thereof.'

"DATED November 3rd, 1976.

/s/ Betty N. Nelson"

On receiving Mr. King's November 1, 1976, letter, Mr. Bennet contacted Mr. King and asked him to review the matter with Judge Conder when the written order covering the October 22, 1976, hearing was submitted. Mr. King did this with Mr. Bennett being contacted and advised from chambers.

Judge Conder,being fully aware of the parties' positions, signed the order and added beneath his signature:

"Defendant may convert the joint tenancy to tenancy in common. Property cannot be conveyed to any third party. D.C." (SI 179)

To clarify exactly the effect of this Order, counsel appeare without pleadings in Judge Conder's chambers on November 5, 1976. At that time, Judge Conder affirmed his order that "Defendant may convert the joint tenancy to tenancy in common," and stated:

"This order is entered to clarify the record. The basis on which the court entered its order of November 5, 1976 [sic, the actual date was November 4, 1976], was as follows:

"The parties are restrained from disposing of assets while the case is pending. Defendant, however, has the right to terminate the joint tenancy and create a tenancy in common, but is restrained from conveying her interest in the said property until further Order of the Court." (SI 182, 183)

Mrs. Nelson's document terminating the joint tenancy was recorded November 4, 1976, by her counsel after leaving Judge Conder's chambers. The Quit Claim Deed that she executed at the same time as the termination was held by counsel pursuant to the instruction of Judge Conder. It was recorded June 3, 1977, after Mrs. Nelson's death.

On January 27, 1977, Mrs. Nelson filed a Motion for Leave to Record Deed. The medical report indicated that she might die any day. (SI 189,190) The purpose of the motion was to allow conveyance of the property to the daughter, Michelle, so as to avoid the cost and time that might be involved in probate, with Michelle joining in the motion stating that she would not convey the property until after her mother's death, in the event that Mrs. Nelson should have a remission and be able to appear for hearing of the divorce. (SI 186-188)

Judge David K. Winder heard the motion and entered a Memorandum Decision (SI 207,208) and Order (SI 209). In his decision and order, Judge Winder denied leave to record the deed, recognized the legally binding effect of the Termination of Joint Tenancy stating:

> ". . . The court feels no further transfer of the property from the plaintiff or defendant should be made. . .. In denying the defendant's Motion, the court is certainly not unmindful of the defendant's legitimate interest in attempting to avoid probate and other problems by present transfer to her adult daughter of whatever interest she has in the 3061 Canyon View Circle property, and prior to her death, which appears imminent, but the court feels that until all matters are resolved, it would be premature to transfer [illegible]." (SI 237)

On Mrs. Nelson' death, Mr. Nelson filed the present action. The trial was extremely brief, the entire testimony covering only 22 pages (Transcript of Trial and Motion for New Trial, P 11-33). The trial was so brief because the court entirely incorporated the domestic file which covered all of the issues except the care of the home and yard given by Michelle while her mother was dying. Mr. Nelson sought damages as to that, which Judge Sawaya denied.

Judge Sawaya also found:

> "3. That following the creation of the joint tenancy by the plaintiff Douglas A. Nelson with Betty N. Nelson, a divorce action was filed, and the said Betty N. Nelson, thereafter filed what was purported to be a notice of termination of joint tenancy, and also executed a Quit Claim Deed attempting to convey said property to Michelle Marion Davis, however, at the time said Quit Claim Deed was executed the said Betty N. Nelson was under a Court Order not to convey said property." (T 76)

This finding was patently erroneous. Judge Conder entered no order restraining the parties in regard to property in the October 22, 1976, hearing. The termination document was executed November 3, 1976. On November 4, 1976, Judge Conder's hand-written addition to his written order specifically recognized that Mrs. Nelson had a right to make the termination. This was reaffirmed in his later order on the November 5, 1976, hearing (SI 182,183), and by Judge Winder in his order (SI 207-209).

There never was an order restraining Mrs. Nelson from terminating the joint tenancy.

STATEMENT OF THE LAW

ARGUMENT

POINT I.

BETTY NELSON HAD THE RIGHT TO TERMINATE THE JOINT TENANCY WITH OR WITHOUT LEAVE OF COURT UNLESS RESTRAINED BY COURT ORDER, AND THE ORDERS ALLOWING HER TO TERMINATE ARE SIMPLY JUDICIAL DETERMINATIONS THAT SHE HAD CAUSE TO TERMINATE.

Hamilton v. Hamilton, Utah, filed March 22, 1977, case number 14456, is in point.

There, the husband conveyed real property which was in his name alone, during the time interval between divorce trial, which awarded the wife a half interest in all of his real property and the time the decree embodying the verbal order was signed. There was no existing order of court restraining the parties from disposing of their assets but the award of half the property to the wife was evidence of a judical intent to that effect.

In finding that the parties were free to dispose of assets unless specifically restrained by court order while a domestic action was pending, the court reviewed 30-3-5, UCA 1953, and held that:

> "It neither authorizes nor prohibits a party to a divorce action from transferring assets during the pendency of the proceedings. The statute specifically sets forth the stage of the proceeding at which the court may exercise this discretion--and that is 'when a decree of divorce is made ... .' "

Appellant concedes that a restraining order prior to trial would be valid. The point of Hamilton is that the parties are

free to act until restrained by court order. This holding is conclusive on Mrs. Nelson's right to terminate the joint tenancy. She was never restrained from so doing at any time.

The question is whether she had cause to do so. Judge Conder found that she did (SI 179, 182-183). In reviewing that order, Judge Winder affirmed her right to terminate, and accepted as a fait accompli that she had done so. (SI 209)

The domestic trial judges, Conder and Winder, had before them the circumstances between the parties. The entire case was not adjudicated due to her death, but her having good cause to terminate was ruled on.

A joint tenancy, where the parties have a right of survivorship, is a close legal relationship with fiduciary characteristics. A party is entitled to terminate a joint tenancy either by consent of the other party, or by acts of the other party which are inimical to the close relationship. 14 AmJr 2d, Cotenancy and Joint Ownership, §15, P 108.

Judge Conder's finding that Mrs. Nelson had the "right" to terminate the joint tenancy is certainly supported by the circumstances of Mr. Nelson filing for divorce on finding that she had inoperable cancer, such filing including his attempt to evict her from her home, no provision for her support, and termination of her medical benefits.

Sympathy must be felt for a man who has his second wife terminal the year after his first wife's death. However, Mr.

Nelson acted so entirely in his own interest, that he forced Mrs. Nelson to act to protect her children. If, instead, he had stood by her, she would never have had grounds to terminate the joint tenancy and the home would now be his.

Mr. Nelson's acts of suing for annulment or divorce and offering the terms he offered, did not constitute the degree of concern for the other party's interest which characterizes a joint tenancy relationship.

POINT II.

THE ORDER OF NOVEMBER 4, 1976, AUTHORIZING MRS. NELSON TO TERMINATE THE JOINT TENANCY WAS A FINAL ORDER, NOT APPEALED, AND IS NOW RES JUDICATA.

Usually orders made during the pendency of litigation are not final orders. However, when those orders have a final effect irrespective of the ultimate outcome of the case, then they are final and appealable at that time.

Wheelwright v. Roman, 50 U 10, 165 P 513
Snow v. Snow, 13 U 15, 43 P 620
Winnovich v. Emery, 33 U 345, 93 P 988
State v. Booth, 21 U 88, 59 P 533
Rule 72(a),(b), URCP

Daly v. Daly, 533 P2d 884 (Utah, 1975), is a case which set aside a Decree of Divorce, when one party died after the decree was entered but before it was final. Daly restored the property awarded to the decedent by the decree back to the survivor. That case is clearly distinguishable. It dealt with a judicial convey-

ance of property which became a nullity on the death of a necessary party to the action before the order was final.

In the case at bar, the order allowing termination of joint tenancy was final. Also, it did not convey property, but allowed a change of relationship, for the express purpose of terminating rights of survivorship. It dealt with the legal rights of the parties, but not with conveyance.

A domestic order pendente lite which immediately and permanently effects property rights of the parties cannot be cured by appeal after a decree has been entered. For example, an order allowing a party to dispose of, or convert assets, is final in the sense that the acts will be done, positions changed, and the parties cannot be restored to their original position, by appeal of the decree after it is entered.

The party could preserve the issue by taking an interlocutory appeal. Whether the interlocutory appeal is heard while the case is pending, or, as is often the case, the Utah supreme Court reserves judgment until a final decree is entered, at least the issue is preserved and the other party given notice.

Mrs. Nelson had full right to rely on the final effect of Judge Conder's orders, as Mr. Nelson never preserved his right of appeal. Until her death, Mrs. Nelson acted on the basis that the joint tenancy was terminated, which protected her children.

POINT III.

JUDGE SAWAYA DID NOT HAVE THE POWER TO SET ASIDE ORDERS OF JUDGES OF THE SAME LEVEL.

Judge Sawaya frankly and candidly admitted during the hearing of appellant's motion (T 73-74) in which he made his order invalidating the termination of joint tenancy, that he made his order based not so much on law as on equities.

At that hearing, he was asked by counsel if "...you explained your decision in this case by saying it was just so grossly unfair to Mr. Nelson to take away his half equity in the home that he had put a lifetime into--," and Judge Sawaya agreed that was the reason for his ruling. (Trial transcript P 54 L 18 55 L 10)

Judge Sawaya had ruled, while the evidence was being presented, that he would not allow evidence from appellant as to the equities, the questions before him being purely legal. (Trial transcript, P 54, L 18-23)

No complaint is made of Judge Sawaya. On reflection, he followed equities rather than law. However, his change of rationale did prejudice appellant because her equities had not gone into evidence. Thus, Judge Sawaya did not have the facts before him, when he ruled, that Judge Conder had. He allowed an offer of proof at the hearing to have him modify his order, but by that time he had his mind made up.

It is always greatly appreciated by counsel when a trial judge candidly admits his basis for a ruling that he makes, even though such might make his ruling more easy to appeal, because

of its assistance to counsel and the appellate court in finding the basis of the ruling so as to better analyze it.

It was probably due to this equitable, rather than legal, basis, of Judge Sawaya's ruling, that to support it, he made the finding that Mrs. Nelson was under restraining order with prohibited her from termination of joint tenancy. (T 76, ¶3)

Such finding was appropriate and supported by the record only in regard to a conveyance from Mrs. Nelson to her daughters, but such finding being entirely unsupported, and contrary to the orders of Judge Conder, in regard to termination of the joint tenancy.

In effect, what Judge Sawaya did was to overrule the orders of Judge Conder allowing termination of the joint tenancy. (SI 179, 182-183)

Judges do not have power to overrule judges of the same cou and on the same level, except in clear and absolute cases of judicial error or to correct gross injustice.

Peterson v. Peterson, 530 P2d 821 (1974)
State v. Morgan, 527 P2d 225 (1974)

CONCLUSION

Appellant prays that Judge Sawaya's Order invalidating Mrs. Nelson's termination of joint tenancy be reversed, that such termination be recognized and the case remanded to the trial court for appropriate proceedings.

Respectfully submitted,

SAMUEL KING

MAILING CERTIFICATE

I certify I mailed two copies of the foregoing Appellant's Brief to Wendell E. Bennett, attorney for respondent, 370 East 500 South, Suite 100, Salt Lake City, Utah 84111, U. S. Mail, postage prepaid, June 22, 1978.

Hazel Sykes