1949

Edith N. Gardner v. Earl W. Gardner : Brief of Appellant

Utah Supreme Court

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In the Supreme Court of the State of Utah

EDITH N. GARDNER,
Plaintiff, Respondent

vs.

EARL W. GARDNER,
Defendant, Appellant

Case No. 7342

APPELLANT'S BRIEF

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INDEX OF CASES, STATUTES AND TEXTS

Points

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STATEMENT OF FACTS

In this case the plaintiff-respondent filed an action to dissolve the bonds of matrimony existing between the plaintiff and the defendant alleging mental cruelty and non-support in her complaint. Appellant-defendant denied the jurisdictional facts alleged in the complaint and also denied the allegations of mental cruelty and non-support. Defendant further alleged that plaintiff herself was guilty of misconduct and that she had condoned any misconduct on the defendant's part (R. 8, 9, 10, 11, 12 and 14). A decree of divorce was entered in favor of the plaintiff-respondent based on mental cruelty (R. 25). This is an appeal from the decree.

This appeal presents three basic questions (1) whether the lower court had jurisdiction to enter a decree, (2) whether on the evidence the decree of divorce was proper, and (3) whther the plaintiff was entitled to an allowance for attorney's fee.

The respondent and appellant were married at Pocatello, Idaho, on June 15, 1948 (R. 8), and the respondent filed an action for divorce approximately four months later on October 28, 1948 (R. 3). The appellant was a friend of the respondent's family (R. 73). The parties had known each other for twenty years, and during that time appellant and respondent had been in each other's company quite a bit. Before the marriage, the parties had discussed getting married at an earlier time, but the appellant preferred to wait until arrangements were made to take care of respondent's mother (R. 63, 64, 129 and 130). The respondent's mother was in poor health and she was with the appellant and respondent from the time of their marriage until the divorce action was filed. The appellant only had two days alone with his wife when relatives and friends were not present. (R. 141). In the brief period of the marriage a few quarrels resulted. The parties did not have a serious quarrel pertaining to themselves individually—every disagreement they had concerned a friend or relative (R. 140). However, the appellant was kind and considerate of his mother-in-law who lived with him during the marriage (see paragraph 11 of Findings

of Fact, R. 23, also R. 149).

Prior to the marriage the respondent lived wtih her mother in Logan, Utah, while the appellant lived on a farm which he owned at Santaquin, Utah (R. 127). At the time of the marriage, he was in the process of selling it (R. 65). The sale was completed on September 23, 1948, at which time the appellant moved his things away from the farm (R. 127 and 128). At the time of the marriage, the parties had planned on making a trip leaving Logan, going through Yellowstone Park, Montana, Washington and down the Pacific Coast until they found a place they liked for a permanent home (R. 128). This trip never materialized, the mother was ill and couldn't be left alone so the parties stayed at the home of the respondent's mother in Logan, Utah (R. 38, 63, 64, 65 and 66). The appellant never intended to make Logan his home (R. 129). Within a day or so after the sale of the farm was complete (September 23, 1948), the parties packed their belongings and left for California to make their home (R. 48, 130 and 131). They took the mother-in-law along with them (R. 131).

Before the marriage the parties had visited California (R. 129) and had definitely decided to make California their home after the marriage (R. 65 and 131). While in Utah, the parties had written to real estate men in California in an effort to line up a place to live (R.66). They packed their belongings, took part of them with them and left the remainder in a condition

to be shipped at a later time (R. 131 and 66). They left Utah intending to make California their home (R. 66 and 131, Defendant's Exhibit I). After they had arrived in California, they immediately began looking for a home to buy and finally found one that was suitable. They both signed the contract for the purchase of the home which was located at Windsor, California, and made payments on the purchase price (R. 49, 61 and 132). The appellant took the proceeds from the sale of his farm ($4000.00), and the respondent added $1400.00 of her own money and a joint bank account was established in a California bank (R. 50 and 132). While waiting for the home they had purchased to be vacated, the parties quarreled, and they made a trip back to Utah, arriving October 16, 1948 (R. 51 and 146). Only twelve days later the respondent filed a divorce action in the District Court of the First Judicial District of the State of Utah, in and for the County of Cache, alleging that she had been a bona fide resident of Cache County for more than three months prior to the filing of the action (R. 3). After the divorce action was commenced the appellant returned to California to do some remodeling work on the home that they had purchased (R. 59 and 136). He thought that the divorce action would be called off (R. 155). The appellant wrote respondent a letter from California, sent her $50.00 for a ticket and asked her to return to him (R. 139 and 70). The appellant considered himself still a resident of

California (R. 70, 140 and 190). He owns no property in Utah (R. 188).

STATEMENT OF ERROR

Appellant relies upon the following errors committed by the trial court for reversal of the judgment decree of this Court below:

1. The trial court erred in entering a decree in favor of the plaintiff since the lower court did not have jurisdiction to render a divorce decree.

2. The court erred in entering paragraph one of its Findings of Facts for the reason that the undisputed evidence shows that the plaintiff was not a bona fide resident of the State of Utah, in the County of Cache, for more than three months prior to the commencement of the action.

3. The court erred in awarding to the plaintiff judgment against the defendant for attorney's fees in the sum of $150.00 for the reason that the plaintiff neither alleged nor approved an attorney's fee.

4. The court erred in entering paragraph eight of the Findings of Facts for the reason that the plaintiff neither alleged nor approved any attorney's fee.

5. The court erred in entering a decree of divorce in favor of the plaintiff for the reason that the evidence does not support or justify a decree of divorce in favor of the plaintiff.

6. The court erred in entering paragraphs four, five and six of the Findings of Facts for the reason that said paragraphs are not supported by the evidence.

7. The court erred in entering paragraphs, one, two, three, four, five and six of the Conclusions of Law for the reason that the court did not have jurisdiction to enter a decree, and for the further reason that the evidence does not support nor justify a decree in favor of the plaintiff.

POINT NO. I—THE LOWER COURT DID NOT HAVE JURISDICTION TO ENTER A DECREE OF DIVORCE.

This point covers Assignment of Errors No. 1 and No. 2.

The evidence is undisputed that Mr. Gardner owned property and lived in Santaquinn, Utah, prior to the marriage, and that his ownership continued down unitl September 23, 1948, and that he had a place to live on his farm even though a part of the premises was occupied by a tenant. He considered himself domiciled in Santaquinn and while selling the farm at Santaquinn, he temporarily stayed in Logan with the plaintiff. Mrs. Gardner admitted that even before the marriage they were discussing California as their future home. There is absolutely nothing in the record to indicate that these parties intended to make their permanent home in Logan with Mrs. Yonk. It would seem clear that the stay in

Logan was merely temporary while the farm property in Santaquinn was being sold. It is submitted that the temporary arrangement in Logan was not sufficient to constitute Logan as the domicile of the parties during that period of time (see Kidman vs. Kidman, 164 P 2d 201, in which this Court stated, "We assume that the phrase means the maintenance therein of something more than a mere 'legal residence' ".).

In September, 1948, after the farm property was sold, the parties packed their belongings, took the full proceeds of the farm sale, together with $1400.00 of Mrs. Gardner's money, and moved to California, purchased a home and opened a bank account. Even Mrs. Gardner stated that it was their intention to live in California if they could make a go of it. Mr. Gardner is more emphatic that the parties definitely intended to make California their home. However, Mrs. Gardner's intention, even with its reservation, is sufficient to constitute California their home. Section 31 of Volume 17, American Jurisprudence, at Page 609 sets down the well established rule that if a person is actually moved from one place to another with intention of remaining in the latter place for an indefinite time, such latter place is deemed the domicile, notwithstanding he may entertain a floating intention to return to his previous domicile at some future time. Section 24 of the same volume at Page 605 restates this general rule and confirms the position of appellant that the parties

did make California their home and were domiciled there at the time this divorce action was commenced.

It is undisputed from the evidence that the parties deposited large sums of money in a joint bank account in California, purchased a home which they both selected, and were waiting in California for the home to become vacant so they could permanently move into it. Section 33 of the same volume of American Jurisprudence at Page 611 states the general rule that a person moving into a state with the intention of making his home, obtains his domicile in that State although he has not settled in a permanent home there (see also 5 A. L. R. 298, 16 A. L. R. 1298, White v. Tennant, 8 S. E. 596). The fact that Mr. Gardner regarded California his home is further borne out by the fact that after the California home became vacant he entered into it and made extensive repairs and he remodeled the place. He got it ready for his wife and requested that she come and live at their home. However, in the meantime, she had returned to Logan, and after being in Utah for the short period of twelve days, she commenced divorce proceedings.

Section 40-3-1, Utah Code Annotated, 1943, provides that the Court shall have jurisdiction to hear a divorce case if the plaintiff has been an actual and bona fide resident of the State and of the County in which action is brought for three months next prior to the commencement of the action. It is submitted that regardless of

the way the facts are interpreted, it is clear that this requirement was not met. Mrs. Gardner had only been in the State twelve days at the time she filed her Complaint. Prior to that time, she was a resident of California and prior to her residence in California, she was domiciled in Santaquinn, Utah, with her husband (Section 27, Restatement of the Law of Conflict of Laws). The case of Speak vs. Speak, 19 P 2d 386, states the rule that the husband's domicile is the wife's domicile, and that the husband has the right to change that domicile. Mr. Gardner considered himself domiciled in Santaquinn until he changed his domicile to California. He considered, and the facts certainly support him, that the stay in Logan, Utah, was merely temporary and did not constitute a residence within the meaning of Section 40-3-1, Utah Code Annotated, 1943 (Kidman vs. Kidman supra; Grant vs. Lawrence, 108 Pac. 931).

Even though it is argued that the domicile of both of the parties was in Logan, Utah, prior to the time they left for California, and that that they did not acquire a permanent domicile in California, nevertheless Mrs. Gardner was only in the State for twelve days immediately prior to the commencement of the action. It seems conclusive that the lower Court did not have jurisdiction to enter an interlocutory divorce decree (159 A. L. R. 497; Sneed vs. Sneed, 123 Pac. 312).

POINT NO. II—IT WAS AN ABUSE OF THE COURT'S DISCRETION TO ALLOW RESPONDENT AN ATTORNEY'S FEE.

This point covers Assignment of Errors No. 3 and No. 4. The respondent's original complaint and her amended complaint contained absolutely no allegations concerning an allowance of an attorney's fee to the respondent. Furthermore, there was no prayer in the original or amended complaint asking for an allowance for an attorney's fee. At the trial of the action, the respondent failed to introduce any evidence concerning an allowance of an attorney's fee, and the appellant specifically objected to any award to the plaintiff for an attorney's fee (R. 203). Although it may well be argued that the Court can set an attorney's fee in a divorce without taking testimony (see Anderson vs. Anderson, 181 Pac. 168, and Jenkins vs. Jenkins, 153 P 2d 262), still it is submitted that it is an abuse of the Court's descretion to award an attorney's fee in this case in the absence of allegations, a prayer, or any proof concerning such fees. There was no issue before the Court on the matter and no attorney's fee should be allowed.

POINT NO. III—THE EVIDENCE BEFORE THE COURT DOES NOT JUSTIFY THE FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECREE.

This point covers Assignment of Erros No. 5, 6 and 7. The Findings of Fact, upon which this decree is based, state in substance that the appellant was of a quarrelsome nature and jealous of the respondent's relatives and because of a few quarrels was guilty of mental cruelty. An examination of the record will show that these quarrels did not result solely because of any bad temper or jealousy upon the part of the appellant, but that if fault in these quarrels is to be placed, the respondent must bear a full share of any responsibility for these quarrels. They were not unprovoked or unjustified. The evidence shows that the respondent was a highly nervous, irritable woman, who had a quick temper, and that frequently the appellant was the recipient of the effects of this temper (R. 53 and 57). The appellant in his amended answer to the amended complaint alleges as affirmative defense that the respondent herself was guilty of misconduct. It is a fundamental rule that if both parties to the action are guilty of misconduct, then neither party can recover a divorce (Ahlbom vs. Ahlbom, 204 P 99; Hartwell vs. Hartwell, 69 Pac. 205.) Although it is not possible to quote the rather voluminous record to bear out the appellant's contention, it is felt that the record will amply support the proposition that the respondent's conduct toward the appellant was anything but exemplary, and certainly she does not come before the Court as the innocent victim of the appellant's jealous or bad disposition (R.

82, 92 and 101).

Furthermore, we feel that the alleged acts of mental cruelty are trivial and inconsequential. Approximately five quarrels form the basis of respondent's claim of mental cruelty (R. 38, 40, 47, 51 and 52). Each party had a different explanation of the reason for the quarrels and who was to blame. It is impossible to give citations to the record; the record as a whole must be read on this point. Thos quarrels involved matters which the parties should have adjusted and resolved between themselves. Certainly the divorce laws do not guarantee a woman that she will not have some quarrels with her husband. Admittedly, there were more quarrels here than one would like to see in a marriage relation, but it should be remembered that this husband and wife were living under very trying circumstances. We have pointed out where the parties had their mother-in-law with them throughout the entire marriage. The husband and wife were only alone for approximately forty-eight hours. There was the problem of the care of an elderly mother-in-law, who was ill. The parties for several months did not have a home of their own, and it wasn't until they moved to California did they acquire one. The parties were passing through a transition period in attempting to adjust themselves to their new lives. The respondent was hasty in filing the divorce action, but she felt that she couldn't turn back after the action had been filed (R. 140 and 155). To

base a divorce on the flimsy evidence of this case is to write in Section 40-3-1, Utah Code Annotated, 1943, as amended the grounds of temporary incompatability and rest it under the grounds of mental curelty (Cawley vs. Cawley, 202 Pac. 10). Before too much emphasis is placed on the trivial quarrels of the parties, it should be pointed out again that the appellant was an old friend of the family, had known the respondent for over twenty years, and that even before the marriage, the parties had quarreled and had disputes (R. 106).

Even though it is felt that these trivial quarrels constituted mental cruelty on the part of the husband, still it should be noted that the parties lived together as husband and wife as late as the first part of October, 1948, (the Complaint was filed toward the last part of October, 1948). The respondent expressed himself that that period had been the happiest of her life (R. 82). The appellant alleged as an affirmative defense condonation. This cohabition of the respondent with appellant in California and on the trip back to Utah condoned improper acts, if any, of the appellant which occurred before that time (R. 143 and 89). Certainly, a finding of mental cruelty cannot be based on the minor things that occurred when the parties returned to Utah (Barr vs. Barr, 10 S.W. (2d) 884; Hammond vs. Hammond, 132 N.E. 724; Heard vs. Heard, 272 S.W. 501).

CONCLUSION

In conclusion, it is submitted that the Court lacked

jurisdiction to enter an interlocutory degree of divorce, and furthermore that the Court had insufficient evidence upon which to base a decree of divorce or the award of an attorney's fee, and that the judgment of the lower Court should be reversed and the Complaint dismissed.

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