1978

Nancy Jane Peart Roche v. Melvin Kent Roche : Brief of Appellant

Utah Supreme Court

Dale M. Dorius; Attorney for Respondent;
Pete N. Vlanos; Attorney for Appellant;

IN THE SUPREME COURT FOR THE

STATE OF UTAH

NANCY JANE PEART ROCHE, /

Plaintiff and Respondent, /

vs. Case No. 15806

MELVIN KENT ROCHE, /

Defendant and Appellant. /

BRIEF OF APPELLANT

Appeal from the Judgment of the
First Judicial District Court of
Box Elder County, State of Utah,
Honorable VeNoy Christoffersen,

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BRIEF OF APPELLANT

STATEMENT OF THE KIND OF CASE

This is a Petition for Modification of a Decree of Divorce brought by the Defendant and Appellant, Melvin Kent Roche, seeking modification of previous Divorce Decree granted by the Court and diposition in Lower Court upon a full evidentiary hearing held in the Lower Court by a Petition and hearing on a Writ of Corum Nobis. The Court made a finding, that the Appellant was not the father of the child alleged by the Respondent to be the issue of the Appellant. The Court, however, reaffirming its Decree, that the Appellant shall continue to pay support for the child as awarded in the previous Decree of Divorce as between the parties, Appellant and Respondent.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the Judgment of the Lower Court wherein after making a finding, that the Appellant was not the father of the Respondent's child, reaffirmed the Order of the Court, that the Appellant shall continue to be bound to pay support for said child in accordance with the original Decree of Divorce.

STATEMENT OF FACTS

The Appellant, who was the Defendant in the Lower Court, will be referred to in this Brief as the "husband" and the Respondent, who was the Plaintiff in the Lower Court, will be referred to in this Brief as "wife".

The Appellant and Respondent were intermarried on December 7 1969, in Brigham City, Box Elder County, State of Utah. (R-1) The Appellant was in the United States Army Forces with service in Viet Nam, serving overseas until July 29, 1969, (T-43), and was granted an emergency leave from July 29 to September 6, 1969 (Def.Ex. 6), arriving in Brigham City August 3 and returning the first part of September to his overseas duty post. Subsequent to which he was discharged in December.

It was testified that the child was a normal nine-month birth being within four days from the exact date that the predicted

date of delivery would be, and the child was born on May 12, 1970. (T-40)

The husband in his Answer and Counterclaim, in reliance upon the allegation of the wife, that the child was born as issue of said marriage, (R-1) admitted in his Answer to the Complaint the allegation of the wife as to the legitimacy of the child, and further alleged in his Counterclaim, that the wife was away from home at least once or twice each week during the night time and refused to advise the husband where she had been, except to state that she had been to beer parlors or private bars, (R-12) and after the filing of a divorce complaint by the wife and the husband's removal of his property from the home, found her in company of other men within their home, and also had found her in another city with another man; and upon this basis, made his Counterclaim. (R-12,-13)

A Decree of Divorce was granted by the Court, divided the assets of the marriage, awarded custody of the child to the wife, and required the husband to pay support and to maintain his present life insurance in an amount up to 50 percent of the outstanding policy with the minor child as the beneficiary. (R-29,-33)

A Petition to Vacate the Decree of Divorce as to the findings of the paternity and a Petition for a Writ of Corum Nobis was made by the husband following the remarriage of the

husband and after a year of marriage, upon discovering his inability to conceive and have issue and sought medical advice, and was thereupon advised that he was sterile and that the basis of the sterility was a hereditary problem. (R-66)

Based upon discovery as a result of medical advice and information, that the sterility was a congenital defect, and upon the medical findings by Dr. Bart R. Nelson, that the examinati and clinical tests revealed a zero sperm presence (Def.Ex. 1), and upon the finding by the physician, that the husband was unable to father children and that he "could not have been able to do this in the past based upon the strong family history of "Aspermia" (Def.Ex. 2), and upon the further findings by Dr. Otto F. Smith on February 20, 1977, that the sperm count was essentially zero (Def.Ex. 3), the husband filed the Petition to Vacate the Decree of Divorce and for a Writ of Corum Nobis.

The husband at all times relied upon the representation by the wife, that the issue was his child and that he was the father of the child (T-53). The husband had no knowledge that he was not the father until the medical opinions given hereinabove.

Upon Order of the Honorable VeNoy Christoffersen of August 2, 1977, HL-A testing of blood was ordered to be conducted at the University of Utah Medical Center in Salt Lake City for the purposes of determining the paternity of the husband. The wife, husband, and issue were ordered to take the blood

examinations. (R-84)

Upon examination at the University of Utah, taken simultaneously of the husband, the wife, and the alleged issue, it was determined by Dr. C. W. DeWitt, that an examination of the HL-A antigens excluded the husband as the father on the basis of HL-A typing. (Def.Ex. 5)

Upon a full evidentiary hearing held before the Honorable VeNoy Christoffersen, testimony was given by Dr. Charles DeWitt, a professor of the Department of Pathology and the Department of Surgery of the University of Utah Hospital, that the husband had to be excluded as the father of the child, allegedly his issue. (T-25,-29)

The Court in its Memorandum Decision, stated that inasmuch as it had found that the original Decree of the Court in the divorce made a finding that the child was the issue of the marriage and that even though "evidence was offered that would indicate fairly conclusively, that the Defendant was not the natural father of the child", the Court denied the setting aside of the order of payment of child support. (R-99)

ARGUMENT

POINT I

THE LOWER COURT ERRED FOR FAILURE TO MODIFY ITS JUDGMENT TO DENY CHILD SUPPORT.

The filing by the Appellant of a Motion to Vacate the

Decree of Divorce as to the paternity of the husband (R-67), simultaneously with the filing of an Affidavit for Writ of Corum Nobis (R-68), and together with the additional Affidavit of the husband as to the basis for the filing of the Writ of Corum Nobis (R-71), was a proper pleading to the Court wherein the Appellant seeks a review and correction or vacating a part of the Judgment in the same Court wherein the Judgment was entered because of an error of fact which was not extrinsic to or did not appear in the record at the time of the granting of the Judgment of the Decree of Divorce by the Court. (Cit. 18 Am.Jur.2d, Sec. 3, Corum Nobis.)

The Appellant relied upon the verified Complaint of the Respondent, wherein she made the allegation that the Appellant was the natural father of the issue (R-1), and the falsity of the allegation was unknown to the Appellant at the time of trial, and the matter was not an issue at the time of trial, and a Petition of Corum Nobis is the only remedy available to the Appellant and was filed immediately upon his obtaining knowledge of the fact of his hereditary sterility, together with the medical testimony before the Court, revealed that the issue could not possibly have been the issue of the Appellant.

Rule 60(b) of the Utah Rules of Civil Procedure specifically provides that upon Motion and upon such terms as are just, the Court may in the furtherance of justice relieve a

party from a final Judgment where even though more then three months have elapsed since the date of the final Judgment, the Court finds that (6) "***that it is no longer equitable that the Judgment should have prospective application," or under (7) "for any other reason justifying relief from the operation of the Judgment."

In Egan v. Egan, 560 P.2d 704, the Court in ruling upon this case referred to Rule 60(b) of the Utah Rules of Civil Procedure, the Court holding that the issue of paternity was raised by a separate suit in equity, the Court stated that:

> This writer believes that the Court could well have found fraud did exist based upon the nine elements as set forth in Pace v. Parrish. However, the writer also feels that mistake of fact may be grounds under an action in equity to grant relief as provided under Rule 60(b)(7), wherein it states: 'Any other reason justifying relief from the operation of a Judgment', **the Court, therefore, feels that under the provisions of Rule 60(b), particularly Rule 60(b)(7), that this is sufficiently broad to permit Trial Court to take the action he did in granting partial relief from the prior Judgment.

The Appellant having filed a Petition, together with an Affidavit and Motion in Support of a Writ of Corum Nobis, and the Court having by its own finding predetermined that the "evidence was offered that would indicate fairly conclusively that the Defendant was not the natural father of the child," (R-99) the Court should have found sufficient mistake

of fact to modify the Court's previous Judgment requiring the continued paying of child support.

The Court in its Memorandum Decision relied upon the case of McGavin v. McGavin, 27 Ut.2d 200, 494 P.2d 283, which Judgment was rendered February 24, 1972, prior to the decision in Egan v. Egan, which was rendered in 1977, supra.

The McGavin case was based upon an intermediate appeal from the Trial Court's Order granting a Motion to have a blood test taken to determine who the father of the child was after a divorce had been filed and based upon an out-of-Court assertion and held that the action did not comply with Rule 60(b).

The evidence before the Supreme Court and the record at that time revealed that the averment was known to both of the parties prior to the Divorce Decree and was an issue that could have been tried or was triable at the time of trial.

It is submitted to the Court, that the facts in the present matter before the Court was not known to the Appellant until a year after his remarriage, and upon the medical determination that not only was he congenitally sterile, but the further evidence that upon submission to tests by the Respondent, the Appellant, and the alleged issue, it was found that the Appellant could not possibly have been the father of the child.

The Court having erroneously based this Judgment and decision upon the ruling in McGavin v. McGavin, (R-99), it

was clearly an erroneous Judgment.

In the instant matter before the Court, the findings of the Lower Court as to the paternity of the Appellant is already a matter of record and the medical and scientific records as to the paternity are also a matter of record, and the only remedy being sought by the Appellant is the release from the burden of continued payment of child support for issue that is conclusively not that of the Appellant.

It is further submitted to the Court, that this is not an attempt under Section 30-3-5, Utah Code Annotated, as amended 1953, to seek a modification of findings of the Court and the Decree of Divorce from facts known at the time of trial, but is an equitable action seeking the modification of a Judgment and Decree of the Court based upon facts unknown at time of trial and not adjudicated by the Court, in that the Respondent alleged in her Complaint filed as a verified Complaint, that the issue was that of the Appellant and Respondent, and that as a result of the verified allegation, the Appellant admitted the issue; and the basis of the equitable action now before the Court is based not upon any pre-existing facts but upon indisputable evidence ascertained one year after the granting of the Decree of Divorce and was not part of any venal conduct of the Appellant as against the Respondent or the issue, but

was discovered on matters extraneous to the previous matters in issue as between the Appellant and the Respondent in their contest for a divorce.

Harding v. Harding, 26 Ut.2d 277, 488 P.2d 308, Supreme Court of Utah (Sept., 1971), an action was brought seeking a modification of a Decree of Divorce and this Court held:

> This proceeding seeking to modify the Divorce Decree is in equity; and it is the prerogative of this Court to review the evidence, to make its own findings, and to substitute its Judgment for that of the Trial Court when the ends of justice so require.

In the instant matter before the Court, there is no claim of error due to the previous original finding of the Court, in that the paternity of the issue was not before the Court and was not in controversy, and the then finding could not have preponderated either way nor could there have been a misunderstanding or misapplication of the law, nor whether was there an abuse of discretion that an inequity or injustice had resulted, but in the present matter before the Court, it is submitted that the Supreme Court having the prerogative to review the evidence and make its own findings cannot but conclude that the findings of the Court was in favor of the Appellant as to the paternity of the issue and the error before the Court is that of equity and law, in that the Lower Court has misinterpreted its obligation to be bound by the McGavin's case, supra, decision and the error is one of law, in that

this Court is not bound to continue an injustice as to a matter that was clearly not res judicata at the original trial and Decree of Divorce as between the parties, and that both the Lower Court and this Honorable Court have the right and the duty to the correcting of a Judgment based upon facts that were not in evidence at time of trial.

In the Baker v. Baker action, 175 P.2d 213 (Dec., 1946), this Court determined that there was a lack of full disclosure by one of the parties to the Decree of Divorce, and held that as a result of the lack of such full disclosure, one of the parties to the action was deprived of her Day in Court, and upon that grounds, reversed the decision of the Lower Court.

In Lopes v. Lopes, 518 P.2d 687 (Jan., 1974), this Court had analyzed and discussed the Lord Mansfield Rule, which extends only to the testimony as to the accessibility of the spouse in an action where one seeks to declare the illegitimacy of the issue. It was further stated:

> **That in the adoption of the Rules, it was realized that in some instances it might be found unjust in regards to such a generality as absolute and immutable as reflected in this statement of the committee's report and recommendations to the Court, which is published as a preference to the Rules: 'It would, of course, be presumptuous to suppose that this is a final word to be said upon the law of evidence. It is assumed that the Court may from time to time deem it advisable to make additions, changes, or modifications'.

It should, therefore, be noted that the evidence before the Lower Court was medical and scientific and did not deal in specifics with the accessibility of the spouse.

The Affidavit and Motion on the Writ of Corum Nobis was filed on April 4, 1977, (R-66 - 73), and the Evidentiary Hearing of the medical testimony, together with the examination of the parties for determination of HL-A testing was before the Court, and the holding by the Court, that it was bound by McGavin v. McGavin, supra, and Shaw v. Pilcher, 9 Ut.2d 222, 341 P.2d 949, in the Court's Memorandum Decision of January 18, 1978, is an erroneous application of the law of this State as has been previously set forth in this Brief.

CONCLUSION

It is submitted to the Court, that a Court of equity has the right and the duty under a Writ of Corum Nobis to hear evidentiary facts concerning matters not in issue at time of the original Judgment of the Court, and that where facts are presented which were unknown to the parties at time of trial and Judgment which the Court finds are in direct contradiction as to the paternity of the party seeking relief, and that the Lower Court was in error in believing it to be bound by previous rulings of the Supreme Court of Utah as a basis for the denial of equitable relief to the Appellant, and further, that the

Supreme Court has a right to review all of the evidence before it and to render a final verdict in a matter where the evidence is indisputable and preponderates in favor of the party seeking relief.

Respectfully submitted this 5 day of September, 1978.

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CERTIFICATE OF MAILING

A copy of the foregoing Brief of Appellant was posted in the U.S. mail postage prepaid and addressed to the Attorney for Respondent, Dale M. Dorius, P. O. Box U, 29 South Main Street, Brigham City, Utah 84302, on this 5 day of September, 1978.

Jeannine Stowell, Secretary