

1951

Albert Pfaff v. Ethel Miller Pfaff : Brief of Appellant

Utah Supreme Court

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7754

FILED

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CASE NO. 7754

Clerk, Supreme Court, Utah

**In the Supreme Court
of the State of Utah**

ALBERT PFAFF,

Plaintiff and Respondent

vs.

ETHEL MILLER PFAFF,

Defendant and Appellant

Appellant's Brief

JOSEPH E. EVANS,

Attorney for Appellant

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In the Supreme Court of the State of Utah

ALBERT PFAFF,

Plaintiff and Respondent

vs.

ETHEL MILLER PFAFF,

Defendant and Appellant

STATEMENT OF FACTS

Albert Pfaff, plaintiff and respondent, brought this action to obtain a divorce on the ground of the defendant's alleged cruelty, causing him great mental distress.

Ethel Miller Pfaff, his wife, by her answer denied plaintiff's allegations of cruel treatment and of any ownership by him in a dwelling and three lots in Moultrie, Georgia, standing of record in her name, and claimed equal ownership with the plaintiff of the Oldsmobile sedan automobile mentioned in the pleadings.

In her counterclaim she sought a divorce on the grounds of cruelty, wilful desertion and wilful neglect of the plaintiff to provide for her the common necessities of life.

The trial court found that the plaintiff was not entitled to a divorce and granted a divorce to the defend-

ant on the ground of the plaintiff's wilful desertion of the defendant for more than one year; restored her former name of Miller; awarded her alimony for a period of six months at \$127.50 per month; awarded her the dwelling and three lots in Georgia, and required the plaintiff to pay her attorney's fee and costs; and awarded the Oldsmobile automobile to the plaintiff.

This appeal is from the decree granting the divorce and requiring the plaintiff to pay her \$765.00 only, in six monthly payments of \$127.50.

ARGUMENT

POINT I

THE REAL ESTATE IN MOULTRIE, GEORGIA, ALTHOUGH ACQUIRED BY THE DEFENDANT DURING COVERTURE, WAS OWNED BY HER ALONE, FREE OF ANY INTEREST OR CLAIM OF THE PLAINTIFF.

There can be no controversy as to the exclusive ownership of the home and lots in Georgia by the defendant. By her own sweat and tears she paid the price for that property and naturally took title in her own name. The money paid was her own earnings and an inheritance, and the balance due was paid by her assumption of a mortgage on the premises held by the Federal Land Bank. (Tr. 15) The money sent to the defendant by the plaintiff was the living allowance which he as a member of the Armed Forces was obligated to make for his wife. She testified (Tr. 22) that the allotment was \$100.00 per month. From "running a cafe", together with an inheritance which she drew in the sum of \$500.00

from her mother's estate, she accumulated approximately \$1,600.00, which she used as a down payment on the Moultrie property. At the time of the trial she testified that she still owed \$800.00 on the property (Tr. 24), on which balance she is paying monthly instalments.

For two years she waited for him to come home; "I was alone looking for him every day, waiting for him to come home . . . I wanted the fryers for him." (Tr 36)

The appellant's position is that the Court was in error in finding as a fact (Finding No. 7) that the parties (both) were owners of a home and three lots in Moultrie, Georgia, and this the appellant asserts as an abuse of the court's discretion and not based on facts established by competent or any evidence. If this be so, then the only relief granted to the defendant was the requirement that the plaintiff should pay her \$127.50 per month for a period of six months only.

POINT II

THE AWARD OF ALIMONY IS INADEQUATE, INEQUITABLE AND UNJUST.

The equities and peculiar circumstances of the case warrant the appellate court in exercising its own judgment in regard to the trial court's complete termination of all support to the defendant at the end of six months, irrespective of the trial court's findings. The allowance of \$127.50 for six months only was grossly inadequate and is unjust, and equity and justice require that this court interfere.

The rule is stated in the following language quoted

from the case of *Dahlberg v. Dahlberg*, 77 Utah 157, at page 162:

“We think the rule contended for by the plaintiff is the correct rule, and is in line with the later cases from this jurisdiction.”

The rule referred to is —

“ . . . that the kind of division or the amount of an allowance to be made is dependent upon the facts, circumstances, and conditions of each particular case, and, if upon a consideration of them the division or allowance as made by the court below is inadequate or unjust, this court is justified, and it is its duty to interfere, and that, to do so, it is not essential to show an abuse of discretion in the court below, that it is enough, if upon the record presented, the court below erred in making the division or allowance and that equity and justice require an interference and a modification thereof . . . Of course, the rights and equities of both parties are to be considered, but, whatever doubt there may be concerning the matter, it ought to be resolved against the guilty party whose fault and wrongs and breaches of the marital relation destroyed the home and forced or brought about the separation.”

Further, at page 164:

“The question thus is as to whether on the facts found the division and allowance were equitable and just. As to that, a divorce proceeding being an action in equity, the parties, under our Con-

stitution, are entitled to our judgment, as well as that of the trial court.”

In the case of *Hendricks v Hendricks*, 91 Utah 533, at page 558, this court said:

“It is likewise well settled in this state that where the appeal is on the question of the propriety of the judgment for alimony, this court is required to review the evidence in the nature of a trial de novo on the record, and the appellant is entitled to the judgment of this court, as well as the trial court, on this question.

“It has further been determined by this court, as shown in the above cases, and cases therein cited, that it is not necessary for this court to find a gross abuse of discretion on the part of the trial court before modifying the judgment as to alimony and that no general rule as to the amount of alimony can be laid down to follow in all cases, but the decree in each case must be determined upon the facts, the conditions, and the circumstances of the parties in each particular case, and that if, upon examination of the record, this court is convinced that the award in the trial court is inequitable and unjust, it should direct such decree as it finds to be just and equitable. The amount of alimony is measured by the wife’s needs and requirements, considering her station in life, and upon the husband’s ability to pay.”

In the case of *Openshaw v Openshaw*, 80 Utah 9, at pages 18 and 19, this court said:

“. . . It is an ancient doctrine of the common law that it is the duty of a husband to support his wife. Such is still the law of this state, despite the many changes which have been made in modern times in the law respecting the civil and political status of married women. This duty of support does not end when the marriage is dissolved by a decree of divorce rendered at the suit of the wife for the husband's matrimonial wrongs; *but it continues so long as they both shall live, the wife remains unmarried and needs such support, and the husband is able to provide the same.* (Italics supplied) It is measured by the wife's reasonable needs and requirements, considering her condition and station in life, and the husband's ability to pay.”

In the case of *Hampton v Hampton*, 86 Utah 570, at page 572, this court reaffirms the rule that it is not necessary for this court to find a gross abuse of discretion on the part of the trial court before modifying the judgment as to alimony, and

“that no general rule as to the amount of alimony can be laid down to follow in all cases, but the decree in each case must be determined upon the facts, the conditions, and circumstances of the parties in each particular case, and that if, upon examination of the record, this court is convinced that the award in the trial court is inequitable and unjust, then this court should direct such decree as it finds to be just and equitable. *The amount of alimony is measured by the wife's needs and*

requirements considering her station in life and upon the husband's ability to pay." (Italics supplied)

CONCLUSION

Certainly, when the wife is forced by the misconduct of the husband to seek separation, she ought to receive sufficient support for her maintenance, regardless of her ability to work and contribute to her own support, as stated in the Dahlberg case, supra.

The review is in effect a trial de novo on the record.

Appellant asks for additional counsel fees for the prosecution of this appeal, and her costs on appeal.

It is respectfully submitted that the judgment of the trial court should be reversed and the case remanded for further trial and disposition, as this court may determine.

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