

1998

Margaret Lucille Lent v. Norman Floyd Lent : Brief of Appellee

Utah Court of Appeals

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Recommended Citation

Brief of Appellee, *Lent v. Lent*, No. 981568 (Utah Court of Appeals, 1998).

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COURT OF APPEALS

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JURISDICTION OF THE UTAH COURT OF APPEALS

The Utah Court of Appeals has jurisdiction in this matter pursuant to §78-2a-3(h), Utah Code Annotated 1953, as amended.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Appellee takes issue with the issues presented by the Appellant. Specifically, Appellee disagrees that Issue No. 1 presented by the Appellant is an appropriate issue for the Court, as said Issue was not raised at the time of the Notice of Appeal nor in the Docketing Statement as required by Rule 9 of the Utah Rules of Appellate Procedure. Thus, the Appellee believes that the only issue on appeal is Issue No. 2 as presented in the Appellant's Statement of Issues Presented for Review.

STANDARD OF REVIEW

Appellate Courts review jurisdictional issues under the “clearly erroneous” standard. Kamdar & Company v. Laray Company 815 P2d 245 (Ut. App. 1991).

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND RULES

Utah Code Ann. §78-27-24(6) (1998)

Any person, notwithstanding Section 16-10a-1501, whether or not a citizen or resident of this state, who in person or through an agent does any of the following enumerated acts, submits himself, and if an individual, his personal representative, to the jurisdiction of the courts of this state as to any claim arising out of or related to . . .

- (6) With respect to actions of divorce, separate maintenance, or child support, having resided, in the marital relationship, within this state notwithstanding subsequent departure from the state; or the commission in this state of the act giving rise to the

claim, so long as that act is not a mere omission, failure to act, or occurrence over which the defendant had no control.

STATEMENT OF THE CASE

1. NATURE OF THE CASE

Appellee generally agrees with the nature of the case as set forth in Appellant's brief.

2. STATEMENT OF FACTS

In addition to the Statement of Facts set forth by the Appellant, the Appellee sets forth the following additional facts:

- a. The parties had irreconcilable differences when they separated in January of 1989, and although they attempted to reconcile those differences when they visited each other, they were not able to do so. See Verified Complaint for Divorce, paragraph 4, (R. at 2 and 3). Also see Findings of Fact and Conclusions of Law in RE: Bifurcated Decree of Divorce; paragraph 5, (R. at 89).
- b. Mr. Lent did sign an affidavit indicating that he has not engaged in any extra-marital relationship within the state of Utah (R. at 57 and 58).
- c. Mr. Lent never resided with Mrs. Lent in a marital relationship except in the state of Idaho, although work/vacation-type trips did occur in the state of Utah. (R. at 15).

SUMMARY OF ARGUMENT

The irreconcilable differences of the parties existed at the time that Mrs. Lent separated from her husband in 1989 and moved herself to the state of Utah. Thus, such differences did not arise within the state of Utah. Additionally, Mrs. Lent's argument that Mr. Lent's alcohol consumption

was an irreconcilable difference that occurred within the state of Utah was objected to at the time of the final hearing, as that was the first time it had ever been raised in any of the pleadings or proceedings.

The issue of whether the parties resided in the state of Utah in the marital relationship should not be heard by this Court as it was not preserved by Mrs. Lent in her notice of appeal nor in her docketing statement which required her to set forth the issues before this Court. However, the parties did not reside together in the marital relationship as contemplated by the statute. Their residence was the state of Idaho. Intermittent work and/or vacations into a neighboring state do not constitute “residing together” as the statute requires for the state of Utah to assume jurisdiction over an entire marital estate.

ARGUMENT

Point 1. There is only one issue raised in this appeal.

Mrs. Lent filed a Docketing Statement dated September 22, 1998. In the Docketing Statement, Mrs. Lent raised one issue for review in this appeal. That issue was “Did the trial court err by ruling that Utah does not have jurisdiction over defendant where acts that created the irreconcilable differences that existed between the parties and which were relied on in granting the Decree of Divorce occurred in the state of Utah?” The Docketing Statement was filed pursuant to the Utah Rules of Appellate Procedure, and specifically Rule 9. Rule 9 of those rules requires that all issues presented by the appeal must be set forth with particularity and that general conclusions are not allowed. Mrs. Lent’s issue in her Docketing Statement is a particular issue and is the issue on this appeal.

However, in Mrs. Lent’s brief she has now raised a second issue which relates to the parties residing in the marital estate together for

purposes of conferring jurisdiction on the Utah court over Mr. Lent, an Idaho resident. This issue should not be heard as it was not raised in the Notice of Appeal or in the Docketing Statement, and was raised for the first time in Mrs. Lent's brief. This procedural deficiency should operate against Mrs. Lent and should not be considered by this Court. However, Mr. Lent will address that issue later in this brief, not as a waiver of the procedural deficiency, but to address the issue in the event this Court does waive that procedural deficiency.

Point 2. Jurisdictional standards for asserting long-arm jurisdiction.

Utah Courts have adopted a two-part inquiry in determining whether they can exercise personal jurisdiction over non-residents. See Kamdar & Company v. Laray Company 815 P2d 245 (Ut. App. 1991) and cases cited therein. First, claims against a non-resident must arise from the activities enumerated in Utah's long-arm statute, and second, the defendant's contacts must be sufficient to allow jurisdiction to be exercised without violation of the due process clause of the Fourteenth Amendment of the United States Constitution.

In related situations (not domestic) under the long-arm statute, courts have frequently stated that under the due process inquiry, a defendant's contacts with our state must be purposeful; that one avail himself of the privilege of conducting activities within our state; that he reasonably anticipated being hailed into court here; and that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. See Burt Drilling, Inc. v. Portadrill 608 P2d 244 (Utah 1980); Anderson v. American Society of Plastic & Reconstructive Surgeons 807 P2d 825 (Utah

1990), Parry v. Ernst Home Center Corporation 779 P2d 659 (Utah 1989); Kamdar & Company v. Laray Company 815 P2d 245 (Ut. App. 1991).

These directives, when applied to the Lent's domestic situation, indicate that Utah lacks jurisdiction over Mr. Lent. However, to further justify such holding, a comment from Parry v. Ernst Home Center Corporation 779 P2d 659 (Utah 1989), is helpful.

The United States Supreme Court stated that additional factors for inquiry include the burden on the defendant, the interests of the forum state, and the plaintiff's interest in obtaining relief. It must also "weigh in it's determination "the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several states in furthering fundamental substantive social policies" Id. 729 P2d at 661.

The Lent's married and lived in Idaho, their assets are there, their differences or inability to get along arose there. Then, Mrs. Lent moved out and came to Utah. While they tried a little bit to reconcile, it never worked. Therefore, these parties are divorced. Logic, common sense, and the law all support the action being done in Idaho, not Utah. The Utah District Court was correct when it dismissed the complaint and concluded that as to Mr. Lent, there was not a sufficient basis to maintain personal jurisdiction over him in Utah.

The Utah Court held an evidentiary hearing regarding the issue of jurisdiction over Mr. Lent. Mrs. Lent had the burden of proving jurisdiction by a preponderance of the evidence. Kamdar & Company v. Laray Company 815 P2d 245 (Ut. App. 1991). Her facts do not reach that level of proof. The lower Court's conclusion that it did not have jurisdiction is not clearly erroneous, and should be upheld.

Point 3. Irreconcilable differences existed at the time of the parties' separation in Idaho in 1989.

Mrs. Lent argues that the irreconcilable differences existing between the parties occurred within the state of Utah. This argument is actually defeated by her own verified complaint and the final pleadings on the divorce which was granted. In her verified complaint, and particularly paragraph 4, she indicates that the parties did develop irreconcilable differences during their marriage. She admits that she separated in January of 1989 and moved from Idaho to Utah and that she and Mr. Lent did not live together as husband and wife thereafter. She indicated in her verified complaint that they made efforts to reconcile their differences by visiting each other after their separation in 1989, even though they maintained separate residences after their separation. Finally, she states that despite their efforts to reconcile, those irreconcilable differences remained. The final Findings of Fact are similar in content to the facts she alleged in her verified complaint. She now would ask this Court to hold that the irreconcilable differences were committed in this state, and thus confers upon Utah courts complete jurisdiction to handle the divorce matters.

Under Utah law, irreconcilable differences are not fault-based. See Haumont v. Haumont 793 P2d 421 (Ut. App. 1990). This raises an issue as to what acts and whose acts created the irreconcilable differences, as it relates to Utah's long-arm statute in U.C.A. §78-27-24(6). It is apparent from Mrs. Lent's pleadings that she had irreconcilable differences with her husband prior to her separation in January of 1989. At the final hearing when the Decree of Divorce was granted, she then, for the first time, testified that Mr. Lent had consumed alcohol within the state of Utah since their separation and that that was one of the issues that she had for

irreconcilable differences. Her testimony was objected to on the basis that it was the first time in the history of the case that she had raised alcohol as an issue for the divorce. The issue of alcohol consumption was raised for the first time at the hearing when Mr. Lent was not present and could not defend himself. Furthermore, per her own Verified Complaint, she already had irreconcilable differences before she ever resided in the state of Utah. Thus, Mr. Lent's alcohol consumption in the state of Utah, after separation, while it may have kept the parties from reconciling, was not a cause of their irreconcilable differences, which already existed prior thereto. Mrs. Lent's testimony concerning the alcoholism and counsel's objection to the same is found in the transcript pages 13-17.

It is noted that in these proceedings, Mr. Lent actually filed two motions to dismiss which were heard by the Court. At the first hearing, the Court denied the motion to dismiss on the basic presumption that Mrs. Lent had raised the issue of infidelity within the state of Utah as a grounds for the divorce. Alcoholism was not raised in the first motion to dismiss, nor even in the pleadings filed in the second motion to dismiss.

Mrs. Lent did raise an issue of infidelity within the state of Utah. Mr. Lent specifically refuted her allegations and stated that he did not engage in any extra-marital affair within the state of Utah ever. Mrs. Lent finally admitted that she could not prove any infidelity in the state of Utah. She makes hearsay statements concerning a birth certificate, which she acknowledges she could not find. Based upon Mrs. Lent's own admission that she could not prove any infidelity in the state of Utah, there is no basis to conclude or determine that an act of infidelity occurred within the state of Utah giving her grounds for divorce within this state. It is also noted with the infidelity issue that if indeed it had occurred outside of Utah, and was

used by Mrs. Lent as a grounds for her irreconcilable differences that it, too, existed at the time the parties separated in 1989, and cannot be used to confer jurisdiction over Mr. Lent, in the Utah Court.

It is also interesting to note that Mrs. Lent's allegation of infidelity occurred approximately 35 years ago when the parties were both admittedly living in the state of Idaho. See record at page 72. It is incongruous with the principles of personal jurisdiction to allege an act occurring 35 years ago as the basis for conferring jurisdiction in this state, when after that act, the parties lived together in the state of Idaho for at least an additional 25 years. It should not be the place of Utah Courts to allow a party to sit upon an alleged act for 25 years, move to a neighboring state, and then attempt to use that act as giving rise to personal jurisdiction in the neighboring state, being Utah.

Point 4. The parties did not reside together in Utah.

The parties did not reside in the state of Utah in the marital relationship. This issue was not preserved in this appeal and should not be heard by this Court. However, the argument is very simple to establish. The provisions of Utah's long-arm statute as it relates to divorce and found in Utah Code Annotated §78-27-24(6) were designed to confer jurisdiction on this Court for parties who actually live in or have lived in this state together.

If we were to accept Mrs. Lent's argument, then any couple who has ever been to the state of Utah could later come back, establish their three month residency, and invoke the jurisdiction of the Court for a divorce. A couple's contacts with the state could be in the nature of work, temporary work, as Mr. Lent has done, for vacations as many people travel, conventions which our state or it's entities host, or any other number of

draws that the state of Utah has for people traveling together. Under Mrs. Lent's theory, as soon as a man and wife cross the Utah border, they are residing in our state in the marital relationship. That term should not be construed so broadly. It should more naturally be construed in its logical sense, and that is in conjunction with an actual residency. It should mean an intent upon those parties' parts to live and make Utah their home together and signify something more than the temporary transient situations which temporary work, conventions, and vacations portray. This is especially true in the Lent's situation where they openly admit that their residence was in Bannock County, state of Idaho, and has been for not just a few years, but for, in essence, their entire marital relationship which lasted some 44 years.

It is urged that this Court accept the term of "resided within the marital relationship" as provided in the long-arm statute to have a similar meaning, at least as to the time element, as that found in the jurisdictional requirements of Utah Code Annotated §30-3-1(2). For purposes of jurisdiction, the parties should have at least resided in Utah together with an intent to make this their home for the requisite period of time. Thereafter, if they choose to move and establish a different home base and then later separate, and one or the other move back to Utah, then it would be appropriate for Utah courts to then assert personal jurisdiction over both of the parties. To define residence as meaning less than this simply opens the door to an abuse of the jurisdictional requirements of the Utah court system and to an abuse of legal due process.

While the term residence can and has taken different meanings in different situations, it is urged that this Court take the provisions of Title 30 and actual bona fide residence for jurisdictional purposes, combine that with

the long-arm statute and the provisions of residing within this state, and harmonize them to require not just transitory situations in Utah, but some type of permanent intent upon the parties to stay here and make this state both their homes before asserting jurisdiction in a divorce situation.

It is only logical that Idaho handle the divorce issues between these parties where they resided for over 35 years together before Mrs. Lent decided to separate from Mr. Lent, and then unilaterally moved to the state of Utah and made this her permanent home. Mrs. Lent's reliance upon the Ohio case added in their brief, I believe, is distinguishable simply because it is a Uresa action for support, and not an initial divorce action with the very basic provisions of the divorce itself.

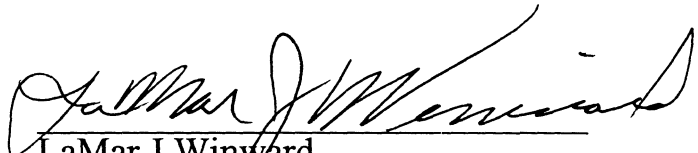
CONCLUSION

The District Court was correct in dismissing the plaintiff's complaint for lack of jurisdiction. The alleged acts giving rise to irreconcilable differences already existed prior to Mrs. Lent's move to Utah and/or she could not prove that they even arose within the state of Utah. Thus, the Utah court does not have jurisdiction over Mr. Lent for acts arising without the state of Utah leading to irreconcilable differences. Mr. Lent did not reside in the marital relationship within the state of Utah. These parties were Idaho residents, and indeed, long-time Idaho residents. His temporary work in Utah, and Mrs. Lent's visiting him here in a vacation situation does not rise to the level of residing within the state of Utah for the purposes of conferring jurisdiction on our Court system.

The District Court was correct in dismissing Mrs. Lent's complaint

for lack of personal jurisdiction over Mr. Lent. That decision was not clearly erroneous, and it should be affirmed on this appeal.

DATED this 30 day of April, 1999.


LaMar J Winward
Attorney for Defendant/Appellee

I, LaMar J Winward, certify that on April 30, 1999, I served two copies of the attached Brief of Appellee upon G. Michael Westfall, the counsel for the Appellant in this matter, by mailing it to him by first class mail with sufficient postage prepaid to the following address:

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