1955

La Mar Anderson v. Honorable Clarence E. Baker and George Beckstead : Brief of Plaintiff

Utah Supreme Court

Fred L. Finlinson; Attorney for Plaintiff;

IN THE SUPREME COURT
of the
STATE OF UTAH

LA MAR ANDERSON,
Plaintiff,

— vs. —

HONORABLE CLARENCE E. BAKER, Judge of the Third Judicial District Court, in and for Salt Lake County, and GEORGE BECKSTEAD, Sheriff,
Defendants.

Case No. 8420

BRIEF OF PLAINTIFF

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STATEMENT OF FACTS

Lamar Anderson, hereinafter referred to as the husband, and Florence J. Anderson Pluckard, former wife of Lamar Anderson, hereinafter referred to as the wife, were married, one to the other, at Seattle, State of Washington, on July 16, 1936. From this union there were begotten two sons, Craig and Brent, and two daughters, Diane and Michele. The youngest child is now of the approximate age of 10 years, and the eldest child of the approximate age of 17 years. Unhappy differences having arisen between the husband and wife, their marriage contract was dissolved by decree of

divorce issuing on the 26th day of September, 1949, from the Third Judicial District Court of the State of Utah. (Tr. 15)

On the 10th day of September, 1949, in contemplation of the divorce proceedings, the husband and wife entered into a stipulation and agreement (Tr. 4) dividing between them their joint properties accumulated as a result of their joint efforts as husband and wife. (Tr. 4) The portion of that distribution with which we are here in this action concerned reads as follows:

> "It is further agreed that the one-half of the net sales price of this property hereby and herewith given to the defendant, LaMar Anderson, shall be placed in trust with a trust company located in Phoenix, Arizona, the name of which to be mutually agreed upon and selected by the parties hereto, and that said one-half (½) of net sales price, less the costs of disbursements and handling of the same to be paid by said trust company, is to be paid directly to the said Florence Anderson at the rate of Two Hundred Fifty Dollars ($250.00) per month for the purpose of providing support money for the minor children of the parties. That said payments of Two Hundred Fifty Dollars ($250.00) shall be made until the said one-half of said net sales price has been paid to the plaintiff herein. *When said one-half of said net sales price of said property has been fully paid to the plaintiff as herein provided, the defendant, LaMar Anderson, shall then commence to pay to the plaintiff, Florence Anderson, the sum of Two Hundred Dollars* ($200.00) *per month for the care, support and maintenance of the minor children herein.*" (Tr. 8) (Emphasis added)

The real property above referred to was situated in

Phoenix, Arizona, and consisted of motel rental units; at all times hereinafter mentioned and during all of the proceedings in the court below, said property remained unsold and the wife had possession thereof and received the income, if any there was, therefrom.

The stipulation and agreement of the parties hereinabove referred to was incorporated into and became a part of the decreement of divorce, wherein it was ordered:

> "And it is further ordered that the provisions of said stipulation and each and every one of them, be and the same hereby are incorporated into this decree by this reference and made a part hereof and that each of said parties receive the respective shares agreed upon therein and that each perform the respective obligations imposed upon each therein and that the support of the minor children of the parties *be paid as provided therein.*" (Tr. 16) (Emphasis added)

On or about the 11th day of August, 1952, the then counsel for the wife filed in the Third Judicial District Court *a petition for order to show cause* (Tr. 17) in which the wife alleged:

> "That pursuant to said decree plaintiff was awarded $200.00 per month for the care, support and maintenance of the minor children of the parties. That since the entering of said decree, and up to and including the 10th day of August, 1952, there was due and owing to plaintiff, under the said decree, for the support, care and maintenance of the minor children of the parties, the sum of $7,000.00." (Tr. 17)

Order to show cause issued. (Tr. 19) The husband cross-petitioned (Tr. 21) and alleged:

"Defendant alleges that under the Decree payments for support are not due to the plaintiff at this time since the Decree provides that a certain property was to be sold by either of the parties and one half of the net proceeds of the sale applied to the support of the children at the rate of $250.00 per month, and that such property has not been sold." (Tr. 21)

The cause was argued before the court on the 22nd day of August, 1952 (Tr. 23), and on the 26th day of August, 1952, the court entered its Findings in part as follows:

"That under the terms of the divorce decree heretofore entered in the above entitled action the defendant was ordered to pay to plaintiff for the support and maintenance of the four minor children of the parties the sum of $200.00 *per month, i.e.,* $50.00 *for each minor child;* that there has accrued as such support money up to and including August 10, 1952, the sum of $7,000.00, of which amount the defendant has paid $2,515.59; that there is now due and owing to plaintiff by defendant back support money in the sum of $4,484.41." (Tr. 24) (Emphasis added)

On the date last above mentioned the court then made its order and decreed as follows:

"1. That plaintiff be and she is hereby awarded judgment against defendant for back support money in the sum of $4,484.41, for $125.00 attorneys fees and costs.

"2. That the property described in Paragraph 3, subsection (c) of the Stipulation and Agreement *specifically incorporated in the divorce decree be sold as soon as possible.* (Emphasis added)

"3. That defendant is hereby found in contempt of court and sentenced to serve 30 days in the County Jail for his wilfull failure to comply with the decree of the court; that said sentence is hereby suspended upon defendant's compliance with the following conditions: That defendant pay to plaintiff the sum of $300.00 per month commencing on the 1st day of September, 1952, and payable on the 1st day of each and every month thereafter until the further order of the court; said payments to be made at the office of the Clerk of Salt Lake County and to be allocated as follows: $200.00 per month as current support money and $100.00 per month to apply on the back support money." (Tr. 26 and 27)

Thereafter, upon affidavit of the wife, the court, Honorable Clarence E. Baker presiding, did on the 10th day of February, 1953, order the arrest of the husband for the wilful failure to comply with the order of the court, dated the 26th day of August, 1952. (Tr. 30)

On May 1, 1953, the husband petitioned the Third Judicial District Court to vacate its order (Tr. 31) The matter was heard by the court on the 12th day of September, 1953, and the matter was argued to the court and submitted on the said 12th day of September, 1953, and the court on the 5th day of February, 1954, ordered the petition dismissed. (Tr. 37, 84, 86) Counsel for the husband filed notice of appeal (Tr. 87) and designation of record on appeal (Tr. 88) in said cause, *Florence J. Anderson, Plaintiff-Respondent, vs. Lamar Anderson,* Defendant-Appellant, 3 Utah 2d 277, 282 P. 2d, 845.

In that action this Honorable Court dismissed the husband's appeal on the ground and for the reason that

the appeal was not taken in time and that failure to do so was jurisdictional and noticeable by the court sua sponte.

The husband seeks here a writ of prohibition arresting the execution of the order of the Third District Court.

STATEMENT OF POINTS

POINT I.

PROHIBITION IS THE ONLY LEGAL RECOURSE REMAINING TO PLAINTIFF TO ASSURE HIM SUBSTANTIAL JUSTICE IN THE COURTS OF UTAH TO PREVENT A PALPABLE AND IRREMEDIABLE INJUSTICE.

POINT II.

THE COURT BELOW ERRED IN FINDING THE PLAINTIFF IN ARREARS IN PAYMENT UNDER THE TERMS OF THE DECREE OF DIVORCE AND FURTHER ERRED IN SENTENCING THE PLAINTIFF TO AN IMPRISONMENT FOR CONTEMPT OF COURT.

ARGUMENT

POINT I.

PROHIBITION IS THE ONLY LEGAL RECOURSE REMAINING TO PLAINTIFF TO ASSURE HIM SUBSTANTIAL JUSTICE IN THE COURTS OF UTAH TO PREVENT A PALPABLE AND IRREMEDIABLE INJUSTICE.

Plaintiff is confronted with incarceration in the gaol for contempt of court, and, we think, for a contempt based upon a wrongful and arbitrary exercise of its jurisdiction by the defendant Court. It has been recently held that:

> "Adjudication of 'contempt of court' may be predicated only on contumacious disregard of some writ, precept, decree, order or command

emanating from court in proper exercise of its jurisdiction."

In re Roberts, 30 A. 2d 900, 902, 133 N. J. Eq. 122.

Such a rule is so sound that it needs no further support.

By its order the court has placed plaintiff in a position where he will be irreparably injured, and it is now clear that he has no adequate remedy to prevent such injury and has had none since the decision from this court in *Anderson v. Anderson,* supra. In such case this court has said that it may use the writ in the exercise of its sound discretion to prevent irreparable injury. *Mayers v. Bronson,* 100 Utah 279, 114 P. 2d 213, 136 A.L.R. 698; *Atwood v. Cox,* 88 Utah 437, 55 P. 2d 377; *Olsen v. District Court,* 106 Utah 220, 147 P. 2d 471.

In *Mayers v. Bronson,* supra, the writ issued because the plaintiff, in order to pursue his remedy by appeal, would either have had to forego a claim for immunity or refuse and risk a sentence for contempt. In the case at bar your plaintiff has no further remedy by appeal and has already been sentenced for the contempt. Therefore he is more deserving of this extraordinary writ than was the petitioner, Mayers. The original purpose of the writ was to secure the sovereign rights and preserve the public quiet; * * * it has been said, to prevent some great outrage upon the settled principles of law and procedure, in cases where wrong, damage, and injustice are likely to follow from such action. See 42 Am. Jur., Prohibition, page 141, and cases there cited.

In the case of *People ex rel Childs, v. Extraordinary*

Trial Term of Supreme Court, 228 N.Y. 463, 468, 127 N.E. 486-7, the court said:

> "The writ of prohibition is an extraordinary remedy for unusual cases, resorted to, not to correct errors, but in aid of substantial justice. * * * "

For plaintiff we would contend that incarceration in the gaol for the failure to perform what he had not by the original decree of divorce been ordered to perform would most certainly do unto him a substantial injustice.

POINT II.

THE COURT BELOW ERRED IN FINDING THE PLAINTIFF IN ARREARS IN PAYMENT UNDER THE TERMS OF THE DECREE OF DIVORCE AND FURTHER ERRED IN SENTENCING THE PLAINTIFF TO AN IMPRISONMENT FOR CONTEMPT OF COURT.

The action commenced in the court below was *an order to show cause,* based upon a divorce decree, in which plaintiff incorrectly alleged that the said decree provided for the payment of $200.00 per month support monies *commencing with the entry of said decree.* Had the action in the court below been a petition to modify the decree, then the court, without altering the terms of the original decree which was based upon the facts existent at the time said decree was made, would have been in a position to adjudicate the equities and to give to the wife in that cause any proper relief for which she could show entitlement. It was error for the court below to alter the terms of the original decree by proceeding under an order to show cause. *Cody v. Cody,* 47 Utah 456, 154 P. 952. So long as an original decree stands, the

parties are bound by the terms thereof; this court so held a husband, (*Osmus v. Osmus,* 114 Utah 216, 198 P. 2d 233) and a wife must also be so held — at least until she pleads and proves a change in circumstances such as to require, in fairness and equity, a change in the terms of the decree. *Osmus v. Osmus,* supra, and cases there cited.

We do not here contend that a decree of divorce in which a property settlement agreement has been incorporated cannot be modified. Our law provides for *subsequent* changes and new orders, 30-3-5, UCA 1953; but subsequent changes cannot be made without limitation and a court cannot change or modify a judgment at will.

In the instant case, the decree of divorce provides, in part:

> "4. That the plaintiff, Florence J. Anderson, be not awarded any alimony and that henceforth she not be entitled to any; the said plaintiff, having in her stipulation with the defendant, elected to receive a cash award as alimony and as and for complete settlement of the same as provided in said stipulation. * * *
>
> "6. And it is further ordered that the provisions of said stipulation and each and every one of them, be and the same hereby are incorporated into this decree by this reference and made a part hereof and that each of said parties receive the respective shares agreed upon therein and that *each perform the respective obligations imposed upon each therein and that the support of the minor children of the parties be paid as provided therein.*" (Emphasis added)

The stipulation and agreement, the terms of which

the court ordered the parties to comply with, provides:

"5. It is further agreed between the parties, subject to the approval of the Court, that the property described in subparagraph (c) of paragraph 3 of this stipulation shall be sold, and that either of the parties may list the same for sale after October 1, 1949, and that the plaintiff, Florence Anderson, may have the income from said property until the same has been sold.

"It is agreed between the parties hereto that the one-half (½) of the net sales price of this property shall be the sole and separate property and money of the plaintiff, and that she receive the same in full payment and satisfaction of any and all present or future claim of alimony from the defendant, LaMar Anderson, and that she waives any and further claim to any right to alimony.

"It is further agreed that the one-half of the net sales price of this property hereby and herewith given to the defendant, LaMar Anderson, shall be placed in trust with a trust company located in Phoenix, Arizona, the name of which to be mutually agreed upon and selected by the parties hereto, and that said one-half (½) of net sales price, less the costs of disbursements and handling of the same to be paid by said trust company, is to be paid directly to the said Florence Anderson at the rate of Two Hundred Fifty Dollars ($250.00) per month for the purpose of providing support money for the minor children of the parties. That said payments of Two Hundred Dollars ($250.00) shall be made until the said one-half of said net sales prices has been paid to the plaintiff herein. When said one-half of said net sales price of said property has been

fully paid to the plaintiff as herein provided, the defendant, LaMar Anderson, shall then *commence* to pay to the plaintiff, Florence Anderson, the sum of Two Hundred Dollars ($200.00) per month for the care, support and maintenance of the minor children herein."

Notwithstanding the provisions of the decree and of the stipulation and agreement as above set out, the court below found said LaMar Anderson delinquent in the payment of support monies in the amount of "$200.00 per month i.e. $50.00 for each minor child" *from the date of entry of the divorce decree* for an accrued total sum of $7,000.00. Set off was allowed in the amount of $2,515.59, which represented funds donated by plaintiff in addition to what the decree and agreement provided for. Judgment was entered in the sum of $4,484.41 and plaintiff was held to be in contempt of court, and sentenced to gaol.

Separation agreements are not contrary to public policy and they are generally enforced by the courts of this country and of England (see 17 Am. Jur., Divorce and Separation, Sec. 722, et seq.); they have been sustained by this court. *Johnson v. Johnson,* 107 Utah 147, 152 P. 2d 426; *Barraclough v. Barraclough,* 100 Utah 196, 111 P. 2d 792; *Jones v. Jones,* 104 Utah 275, 139 P. 2d 222. Our court said, in the case of *Hall v. Hall,* 111 Utah 263, 177 P. 2d 731, at 733:

> "It is true that we have held that a stipulation for an alimony settlement is only a recommendation to the court—Jones v. Jones, 104 Utah 275, 139 P. 2d 222 — but we did not mean by that

that it was to be given no weight at all. Absent any proof to the contrary the lower court should assume that the parties best know their own financial standing and capabilities, and accept their stipulations for its face value, unless the record before the court obviously indicates that to accept the stipulation would not accomplish equity. To ignore the wishes of the parties without grounds for doing so clearly is an arbitrary and capricious act."

The agreement between the parties should be enforced and if there is to be subsequent change or a new order made, it must be upon proper procedure and only after a showing by the moving party of a change in conditions since the entry of the decree. *Gardner v. Gardner,* 111 Utah 286, 177 P. 2d 743. In the case of *Openshaw v. Openshaw,* 105 Utah 574, 144 P. 2d 528, this court held that the right of a trial court to modify an alimony or support money award did not extend to installments that had accrued; it follows, does it not, that where, as here, under the terms of the decree, nothing had become due or had accrued, it would not be within the province of the court to enter judgment for a sum not owing thereunder.

In the cause at bar, we do not come before this court on the issue of the responsibility of a father to support his children. Our cause would have little merit if such were our contention. We readily concede that the obligation does exist and that it is the prerogative, and in fact the obligation, of the courts of this state to enforce such an obligation when they are properly called

upon so to do. If conditions have so changed in the lives of the parties to the separation agreement since their voluntary entry therein, appropriate adjudication should be had to make adjustment therefor. Mrs. Pluckard has a remedy in the courts, and that remedy is to seek a modification of the terms of the divorce decree by proper proceedings through which she may obtain her just entitlement. The plaintiff here, her former husband, stands in jeopardy of imprisonment, and we submit he there stands without a showing against him of contempt such as would amount to a contumacious disregard of the divorce decree, or in fact, any disregard to the terms thereof whatever.

May we take the liberty of further pointing out to the Court that under terms of the Stipulation and Agreement between the parties hereto and the decree of divorce, all Mrs. Pluckard need have done to commence her entitlement to payments of support money in the sum of $200.00 per month by this plaintiff was to sell the property in Phoenix, Arizona and to have exhausted one-half of the net proceeds therefrom at the rate of $250.00 per month. Mrs. Pluckard's entitlement to payments in the amount of $200.00 from Mr. Anderson would have immediately accrued upon the exhaustion of the funds received from the sale, regardless of what amount of moneys the property might have been sold for.

CONCLUSION

The writ should be made permanent; the plaintiff here, LaMar Anderson, should not be incarcerated in the County Gaol upon a finding of a contempt of which he was clearly innocent and which we respectfully contend came from a wrongful and arbitrary exercise of jurisdiction.

Respectfully submitted,

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