

1957

Mary Gilchrist Curry v. H. Donald Curry and Shell Oil Co. : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Romney, Boyer & Ronnow; Attorneys for defendant and appellant;

Recommended Citation

Brief of Appellant, *Curry v. Curry*, No. 8562 (Utah Supreme Court, 1957).
https://digitalcommons.law.byu.edu/uofu_sc1/2665

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

NOV 8 1957

LAW LIBRARY

In the
Supreme Court of the State of Utah

MARY GILCHRIST CURRY,
Plaintiff and Respondent,

vs.

H. DONALD CURRY,
Defendant and Appellant,

and

SHELL OIL COMPANY,

Defendant.

Case No.
8562

FILED

JUN 28 1957

BRIEF OF APPEALANT

Clk. Supreme Court, Utah

Appeal from the District Court of the 2nd Judicial District,
Davis County, State of Utah,

Honorable John M. Wahlquist, Judge.

ROMNEY, BOYER & RONNOW,
*Attorneys for Defendant and
Appellant, H. Donald Curry.*

1409 Walker Bank Building,
Salt Lake City, Utah.

TABLE OF CONTENTS

	Page
STATEMENT OF FACTS	2
(A) Statement of Facts as to the Pleadings and Procedure	2
(B) Statement of Facts as to Material Events ..	3
STATEMENT OF POINTS	5
ARGUMENT	
POINT I. THE COURT ERRED IN GRANTING THE DIVORCE HEREIN SINCE THE TOTAL EFFECT THEREOF IS TANTAMOUNT TO A DECREE IN FAVOR OF RESPONDENT, AND SHE DID NOT POSSESS GROUNDS TO SUPPORT SUCH A DECREE	6
POINT II. THE COURT ERRED IN GRANT- ING A DIVORCE WHEREIN CUSTODY OF THE CHILDREN IS IN RESPONDENT IN THAT THE RESULT THEREOF IS GROSSLY INEQUITABLE TO APPELLANT AND THE CHILDREN	9
CONCLUSION	13

INDEX OF CASES AND AUTHORITIES

UTAH STATUTES CITED:

30-3-1 (7), U. C. A. 1953	6
30-3-10, U. C. A. 1953	11

CASES CITED:

Doe v. Doe, 48 Utah 200, 158 P. 78	8
Holman v. Holman, 94 Utah 300, 77 P. 2d 329 ...	7
Hyrup v. Hyrup, 66 Utah 580, 245 P. 335	7
White v. White, ... Utah ..., 281 P. 2d 745	7
Wilson v. Wilson, 5 Utah 2nd 79, 296 P. 2d 977	3, 7, 10

EXPLANATORY NOTE REGARDING SYMBOLS

The original transcript filed herein was deemed by the parties and found by the trial court not to be a verbatim transcript. The parties have by stipulation formulated a transcript of the testimony of the witnesses which is on file herein. The record of the hearing before the District Court subsequent to the trial, at which hearing the original transcript was discussed, was filed herein on June 9, 1957 and will be referred to as "supplemental record." The symbols used in this brief are as follows:

R—Record

S/R—Supplemental Record

OT—Original Transcript

T—Stipulated Transcript

In the
Supreme Court of the State of Utah

MARY GILCHRIST CURRY,
Plaintiff and Respondent,

vs.

H. DONALD CURRY,
Defendant and Appellant,

and

SHELL OIL COMPANY,
Defendant.

Case No.
8562

BRIEF OF APPELLANT

Appeal from the District Court of the 2nd Judicial District,
Davis County, State of Utah,

Honorable John M. Wahlquist, Judge.

This brief will outline the inequity resulting from the Trial Court having granted a decree of divorce to Appellant against his will. It will show that he did not at any point desire the divorce, particularly if he were thereby deprived of the custody of his children. Moreover, since the total

effect of the decree is tantamount to an award of divorce to Respondent, the argument will be directed chiefly to that practicality, rather than to the technical state of the record.

STATEMENT OF FACTS

(A) *Statement of Facts as to Pleadings and Procedure.*

This was a divorce action brought by Plaintiff, Mary G. Curry, Respondent herein, against her husband H. Donald Curry, Defendant and Appellant, and Shell Oil Company, Defendant. There is no controversy as to Shell Oil Company.

To Respondent's complaint praying for a divorce on the grounds of mental cruelty Appellant filed an answer and counter-claim, in both asserting that Respondent had no grounds for a divorce, that it was to the best interests of the family as a whole and particularly of the children that the marriage continue, and that Appellant did affirmatively desire that the marriage be not broken (R. page 9, par. 7). Appellant alleged that if grounds did exist upon which to base a decree of divorce they ran in his favor; that if upon a trial of the cause the Court deemed that a divorce was necessary, the decree should be in his favor and he should be given custody of the children (R. page 10, par. 4; and page 11).

The cause was tried to the Court sitting without a Jury on June 26, 1956, at Farmington, Utah.

When the evidence had been presented and both parties had rested, Appellant urged the Court not to grant the

divorce and argued in support thereof that no substantial amount of evidence had been adduced to establish the statutory ground of mental cruelty relied upon by the Respondent. The Court advised counsel from the bench that while the evidence on the point of mental cruelty might not be strongly persuasive, he nonetheless thought that the Respondent no longer loved Appellant and that the Respondent at least was actively unhappy with the marriage relationship. The Court further stated that he believed the Supreme Court's ruling in *Wilson vs. Wilson*, 5 Utah 2nd 79, 296 P. 2nd 977, required him to grant a divorce when he found a marriage relationship that was "intolerable" to the parties.

The Court decreed a divorce in favor of Appellant but granted custody of the four minor children of the parties to Respondent (R. page 27).

The parties were given 10 days to agree upon a property settlement and support and alimony payment agreement, which was done and the Court approved the terms thereof. The Court in his Findings of Fact found "that the stipulations and agreements of Defendant (Appellant) have been most generous to the Plaintiff and children and that should he hereafter request a modification of the terms of the stipulation, consideration should be given to such request without regard to any change in his financial status or circumstances" (R. page 22, par. VI).

(B) *Statement of Facts as to Material Events.*

Appellant and Respondent were married on December 15, 1945 in Calgary, Alberta, Canada. Appellant was then

and is now a United States citizen and a geologist for Shell Oil Company. Respondent was and is a citizen of Canada. The couple moved to the United States where they lived consecutively in California, Wyoming, and Utah. Four children were born to them: Jane in November of 1948 in California; Gil, March 1950, Clay, October 1951, and Deborah, April 1953; in Casper, Wyoming. The couple moved to Salt Lake City in the summer of 1953 and have since resided there and in Bountiful, Utah.

In Casper, Wyoming, in 1953 Appellant underwent a vasectomy (surgical sterilization) operation upon the request and approval of his wife, Respondent herein. Appellant agreed to the surgery, and both parties seem in accord that the reason for the operation was to prevent further pregnancies and improve the health and well being of the wife (T. p. 5 lines 9-16).

In January of 1954 Appellant was hospitalized in Salt Lake City by Dr. J. Floyd Cannon for hemorrhaging in connection with a gastric ulcer attack. In June of that year he was again hospitalized and underwent surgery for correction of the stomach condition. During both periods of hospitalization his wife was in almost constant attendance at his bedside and exhibited marked devotion (T. page 7, lines 20-23 and p. 13, lines 6-9).

In June 1954, immediately after Appellant's hospitalization, Respondent went to her parents' home in Canada for a vacation with the children. Appellant remained in Utah to convalesce from his illness for a time. Respondent extended her vacation in Canada an additional four weeks

time (T. page 5, lines 4-6). Appellant went up to Canada to bring Respondent and the children back to Utah. A Mr. "X" lived in Canada near her parents and she saw him during that vacation (T. page 5, lines 6-8). Upon her return from Canada to Salt Lake City in the late summer of 1954, her affections for her husband were less than they had been theretofore (T. page 4, line 30). In the autumn of 1954 after her return from Canada, Respondent's brother and "X" came to the home of the parties in Bountiful, Utah and stayed there for about one week. During this visit Respondent showed affection for "X" in the presence of Appellant. When her brother and "X" left, Respondent exhibited marked disappointment. At this time the parties had something of a "show-down" and she admitted to Appellant that she had great affection for "X" (T. p. 4, lines 25-30). In the autumn of 1955 Respondent was to go to Canada to attend her brother's wedding. Appellant was opposed to this because of her feelings toward "X" who lived in Canada and he was fearful that the relationship would progress further.

STATEMENT OF POINTS

POINT I

THE COURT ERRED IN GRANTING THE DIVORCE HEREIN SINCE THE TOTAL EFFECT THEREOF IS TANTAMOUNT TO A DECREE IN FAVOR OF RESPONDENT, AND SHE DID NOT POSSESS GROUNDS TO SUPPORT SUCH A DECREE.

POINT II

THE COURT ERRED IN GRANTING A DIVORCE WHEREIN CUSTODY OF THE CHILDREN IS IN RESPONDENT IN THAT THE RESULT THEREOF IS GROSSLY INEQUITABLE TO APPELLANT AND THE CHILDREN.

ARGUMENT—POINT I

THE COURT ERRED IN GRANTING THE DIVORCE HEREIN SINCE THE TOTAL EFFECT THEREOF IS TANTAMOUNT TO A DECREE IN FAVOR OF RESPONDENT, AND SHE DID NOT POSSESS GROUNDS TO SUPPORT SUCH A DECREE.

Here is a case where some of the usual frictions that exist in the normal home occurred. These normal frictions over a period of ten years of married life had been resolved by the parties from time to time. It was not until the late summer of 1954 when respondent became enamored of a man in Canada that the situation in the home of the parties reached a state which the trial judge characterized as being "intolerable to the plaintiff" (Respondent) (R. page 21, par. IV).

There was no showing of any overt acts on the part of the appellant husband which would give rise to the type of mental cruelty contemplated in our statute. Respondent relies on Title 30-3-1 (7) Utah Code Annotated 1953 in

seeking a divorce. At that citation and as grounds for a divorce the wording appears:

“Cruel treatment of the plaintiff by the defendant to the extent of causing bodily injury or great mental distress to the plaintiff.”

It is respectfully submitted that neither the Code Citation nor the cases interpreting the same countenance a divorce where mere unhappiness of one of the parties exists. Our Supreme Court has held in *Hyrup v. Hyrup*, 66 Utah 580, 245 P. 335 that

“Courts can grant divorces only for the particular causes prescribed by law and then only when grounds or cause for divorce is proved by substantial evidence.”

In *White v. White*, . . . Utah . . . , 281 P. 2d 745 it was held where both parties in a divorce action appear to be in equal wrong or where evidence fails in the statutory grounds for divorce, the Court in exercise of sound discretion may deny prayer for divorce. Our Supreme Court in *Holman v. Holman*, at 94 Utah 300, 77 P. 2d 329 has held that

“Mere drifting apart because of failure to synchronize interests or ambitions is no grounds for divorce although it may be that the parties cannot or should not live together.”

As given in the statement of facts the trial judge in the instant case declared he felt himself bound by our Supreme Court's decision in *Wilson v. Wilson*, supra, where at page 979 the Court is heard to say:

“Where it appeared that the purposes of matrimony had been destroyed to the extent that further living together was intolerable, it was in accordance with the Court’s duties and prerogative to grant Plaintiff a divorce.”

It is clear that in equity cases such as this the Supreme Court may review both the law and the evidence. The plaintiff in the instant case testified that Mr. Curry’s cruelty to her arose through the effect it was having on the children and felt that she could “get along with him without growing children, but now I cannot” (T. page 1, lines 29-30). Here we have a statement from respondent herself that she could get along with him if it were not for the effect on the children. All the evidence, however, was to the effect that she believed Mr. Curry was adversely affecting the children through his religious attitude. The Court has indicated at page 3 of a transcript of proceedings on file herein held subsequent to the divorce that he found nothing objectionable to appellant’s religious beliefs. At said page the Court said:

“If you want a finding of fact that the Court sees nothing objectionable about his (appellant’s) religious beliefs, I’ll make such a finding for you. I think they are not objectionable. I think they are highly commendable. I can do that on the religious issue if it would be helpful” (S/R, page 3).

Her contention that he was hurting the children fails. There is nothing further in the transcript of evidence of cruelty other than some nebulous references to sexual incompatibility. No overt acts of cruelty are complained of by respondent. Chief Justice Straup in *Doe v. Doe*, cited

at 48 Utah 200 and 158 Pacific 78, declared that Courts, on the grounds of cruelty, grant the wife a decree on much less evidence than they do the husband, and that before a decree is granted to the husband on such ground, it ought to be a somewhat aggravated case.

In the instant case since the decree ran to appellant the trial court is rather bound to be heard to say that the situation was an aggravated one and the equities favored appellant.

It is respectfully submitted that the trial judge was in effect acting in a role of psychological commentator or philosopher rather than as a judge in interpreting his responsibility in the light of *Wilson v. Wilson*, supra, in finding that excessive unhappiness existed and therefore he should grant a divorce. Since there were no overt acts on the part of appellant constituting grounds for a divorce under the mental cruelty section of our Code, and since the grounds actually were in appellant's favor, the trial judge clearly extended his prerogative in granting the divorce as he did, when the result thereof is tantamount to granting the divorce to respondent, and when it sets up the inequities it does as to appellant.

ARGUMENT—POINT II

THE COURT ERRED IN GRANTING A DIVORCE WHEREIN CUSTODY OF THE CHILDREN IS IN RESPONDENT IN THAT THE RESULT THEREOF IS GROSSLY INEQUITABLE TO APPELLANT AND THE CHILDREN.

It is clear that respondent's unhappiness arose from her own actions in actively seeking outside the family relationship a romantic association, or in allowing herself to become so involved with another. Granting that the situation did mature into an active unhappiness, on her part, it resulted from her own acts and not from acts or failures of the appellant.

In *Wilson v. Wilson*, supra, the opinion states at paragraph (2)

“* * * when people are well adjusted and happy in marriage, one of them does not just out of a clear blue sky fall in love with someone else; and when this occurs it usually is an indication that the marriage has disintegrated from other causes.”

This comment is, of course, consonant with normal human experience. Its strict application, however, to the facts of the instant case might well be improper and unjust. The evidence shows a devoted wife at the bedside of her sick husband for several hours a day almost daily on two occasions of hospitalization in January and June of 1954. Their maid likewise would be heard to say that they were affectionate, that there were no difficulties between them as far as she could tell from 1952 until July of 1954. (T. page 16 STIPULATION RE TESTIMONY of LYDIA SMITHERS.) Then comes that fatal trip of respondent to her childhood home in Canada in July 1954, where she stayed four weeks longer than she originally intended, and where her husband apparently had to come up and get her. In the girlhood scene, away from a convalescing husband, thrown into close association with another man, and amid

scenes and activity of which she was fond, who may say that all this did not overweigh the usual rule that one does not "fall in love" "out of a clear blue sky." This wife did fall in love in Canada in the summer of 1954, and her "falling" struck a blow to her marriage and to appellant's and the children's substantial rights and interests therein.

Under our statutory provision at Title 30-3-10, Utah Code Annotated 1953, providing for custody of the children in the wife, an inequitable situation arises in the instant case. Here we have a wife who has created her own unhappiness. The statute provides for the wife to have custody of the children, other things being equal. We have her unequivocal statement (T. page 4, line 5, et seq.) that she, if the divorce is granted, will take the children with her to Canada. There is no evidence that the children desire to go to Canada. There is evidence that the point in Canada to which Respondent intends to take them is backward and lacking in the educational and cultural advantages the children have in Utah (T. page 14, line 15, et seq.). Respondent had, four years earlier, actively sought an agreement on the part of Appellant to have him sterilized as a safeguard against pregnancy and with a feeling that the four children constituted an adequate family.

The Appellant is foreclosed from having any more children of his own. His work keeps him in Salt Lake City. It is very remunerative work and it is economically prudent that he remain here. When Respondent exercises her rights under the present decree and carries out her expressed intention to take the children to a point in Canada, some 900 miles from Bountiful, Utah, we have the Appellant virtually

permanently deprived of any association with those children. The inequity of this is so apparent as to require little amplification. Moreover, the interests and welfare of the children are probably better served by keeping them here.

We do not believe the Supreme Court is saying in *Wilson v. Wilson*, supra, that divorces are to be granted categorically where active unhappiness or mere incompatibility are found. To so hold would be to nullify the requirements of the statute which make the existence of specific grounds for divorce a condition precedent to a decree. "Unhappiness" is not a ground for divorce in this State. We believe each case must be judged on its merits, and upon the circumstances attending it. If the present decree is to run its logical course, we will find four children of American citizenship taken to Canada by a mother whose failure to make a marriage work has caused the divorce in the first place. It will leave a husband in Salt Lake City, virtually required to stay here because of economic reasons, forever foreclosed from having other children of his own. A husband who at all stages of the proceedings herein has opposed the divorce and the breaking up of the family on the basis of a completely valid desire to keep the family together and to have some influence over and association with his children.

Appellant is well able to care for the children himself (T. page 13, line 28, et seq.).

CONCLUSION

On the basis of the record herein appellant respectfully prays this Honorable Court for relief in the alternative as follows:

I. For an order reversing the holding of the trial court that a divorce should be granted, and ordering that the decree herein be set aside. Or, failing this

II. For an order modifying the terms of the decree to the extent that if the decree shall stand in other particulars, the custody of the minor children of the parties be given to Appellant. Or failing this,

III. For an order preventing the respondent from taking the said children out of this jurisdiction and away from Appellant's ability to visit with them frequently. This restriction should remain in effect at least for the time Appellant remains in this jurisdiction or for a period of six (6) years' time, whichever is least. Or for such relief to Appellant as to the Justices of this Honorable Court seems meet and equitable.

Respectfully submitted,

ROMNEY, BOYER & RONNOW,
*Attorneys for Defendant and
Appellant, H. Donald Curry.*