

1957

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

Utah Supreme Court

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UNIVERSITY UTAH

Case No. 8562

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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED

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Clerk, Supreme Court, Utah

MARY GILCHRIST CURRY,
Plaintiff and Respondent,

vs.

H. DONALD CURRY,
Defendant and Appellant,

and

SHELL OIL COMPANY,
Defendant.

LEE W. HOBBS,
*Attorney for Plaintiff and
Respondent, Mary Gilchrist
Curry*

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RECORD CITATION SYMBOLS

On the verso side of his table of contents page, the Appellant has indicated the symbols he used in citing the various parts of the record on appeal. The Respondent will conform to the same citation system in her brief, which is 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

EXPLANATORY COMMENT AND PROCEDURAL STATEMENT

Over a year ago the Respondent in this action filed a Complaint, as plaintiff, alleging grounds for and praying for a divorce from her husband, defendant below and Appellant here. Respondent alleged cruelty as the ground for the divorce (R. 1). The Appellant filed an Answer and a Counterclaim (R. 9). In his Answer Appellant denied Respondent's allegations of cruelty, but in his Counterclaim he alleged that the Respondent had treated him cruelly and that if a divorce were granted he had grounds therefore and prayed that it be granted in his favor (R. 11). The Respondent filed a Reply (R. 12).

The action was tried to the Court, both parties eliciting evidence in support of their allegations of cruelty. At the conclusion of the evidence the Appellant moved that the court grant him the divorce and custody of the children (T. 57). The Court made findings of fact and conclusions of law (R. 20-26) and entered its decree (R. 27). The Court determined that each party had been cruel to the other, but determined that the Appellant was entitled to the divorce (R. 21, 24).

The Court awarded custody of the children to the Respondent subject to specified rights of visitation (R. 27). The Court made a settlement of property interests and awarded alimony and support money (R. 28) pursuant to a stipulation thereon by the parties. The Court specifically retained continuing jurisdiction regardless of Respondent's residence (R. 30).

The Appellant filed his Notice of Appeal. The transcript of the evidence and proceedings was prepared but the Court and the attorneys concerned determined that it was not satisfactory in that it was so inaccurate that it completely failed to reflect the testimony of the witnesses. It was agreed between the Court and the parties that a statement of the evidence would be prepared in lieu of the reporter's transcript of the evidence (S/R. 4, 5).

The attorneys for the parties prepared and agreed upon a narrative statement of the evidence and stipulated that it be used on this appeal in all particulars as the

testimony of the witnesses in lieu of the reporter's transcript of the witnesses' testimony previously filed herein. (See Stipulation Regarding Transcript, and the statement attached thereto.)

STATEMENT OF FACTS

Unfortunately the Respondent cannot adopt the Appellant's Statement of Facts as being correct. Appellant's Statement of Facts is highly argumentive, and much of the material contained therein is not supported by the record before this court. The Appellant's Statement of Facts is misleading in the following particulars: The entire paragraph which begins at the bottom of page 2 of Appellant's Brief and continues well onto page 3 is without foundation in the Record and further it is immaterial and improperly offered. Appellant's assertion of fact on the same page that the vasectomy was performed upon "the request" and approval of his wife exceeds the bounds of the record. Appellant's statement of fact that during periods of hospitalization Respondent "exhibited marked devotion" is also a gross exaggeration as the Stipulated Testimony at the citation given by Appellant shows (T. 7, 13). Appellant's assertion of fact, at page 5 of Appellant's Brief, that he went up to Canada to bring back Respondent and their children is unsupported by the record before this Court.

In lieu of Appellant's Statement of Fact, the Respondent offers the Explanatory Comment and Pro-

cedural Statement in this Brief, *supra*, which covers the procedural aspects of this case, and the following concise resume of material facts deemed important to an understanding of the issues raised by this appeal:

Appellant and Respondent were married on December 15, 1945, in Calgary, Alberta, Canada. Appellant was a United States citizen; Respondent resided in Canada (T. 1). Appellant is a geologist and his work has taken him to various parts of the United States, Canada and Europe. The couple have resided in California, Wyoming, and Utah. They have four minor children who at the time of the commencement of this action in January, 1956, ranged from two and one-half to seven years of age. Evidence introduced at the trial to the effect that the Plaintiff treated Respondent cruelly revolved in part around his religious attitude, his philosophy of life, and sexual demands. Evidence was introduced that the Respondent treated Appellant cruelly in that she had transferred her affections to another. In general evidence was adduced tending to show that the difficulties had been of long standing origin, arising from the sexual demands of Appellant and troubles caused thereby which had plagued their marriage long prior to the asserted transferral of affections, although the Appellant tended to place the turning point at a certain date and to tie it in with the Mr. "X" mentioned in Appellant's Brief. However, Appellant makes no claim and there is no evidence of any infidelity on the part of respondent. The parties had sincerely but without success engaged the aid of a marriage counselor.

Appellant underwent a vasectomy operation in 1953 to try to remove one cause of discord (T. 5).

The Respondent submits to this Honorable Court that the stipulated narrative statement of the evidence contains all of the witnesses' testimony before the court in this case, that the statement is relatively short and that in place of a further extended discussion of the facts that the Court be requested to refer to the stipulated statement, if it desires further expansion of the evidence. However, the Respondent submits that this case can be summarily disposed of on a question of law and that further resort to the facts may well be unnecessary.

STATEMENT OF POINTS

POINT I.

THE APPELLANT IS WITHOUT STANDING TO ATTACK THE DECREE OF DIVORCE BECAUSE HE COUNTERCLAIMED ALLEGING GROUNDS THEREFORE, ELICITED EVIDENCE IN SUPPORT THEREOF, AND AT THE CLOSE OF THE TRIAL MOVED THE COURT TO GRANT HIM THE DIVORCE.

POINT II.

EVEN IF THE COURT SHOULD ACCEPT APPELLANT'S POINT I, THE EVIDENCE SUPPORTS THE FINDING THAT A DIVORCE SHOULD BE GRANTED, AND IF THE COURT SEES FIT TO SET ASIDE THE DECREE AWARDED TO APPELLANT AT HIS REQUEST IT IS PROPER TO GRANT A DIVORCE IN RESPONDENT'S FAVOR.

POINT III.

THE COURT DID NOT ERR IN GRANTING THE CUSTODY OF THE MINOR CHILDREN TO THE RESPONDENT.

ARGUMENT

POINT I.

THE APPELLANT IS WITHOUT STANDING TO ATTACK THE DECREE OF DIVORCE BECAUSE HE COUNTERCLAIMED ALLEGING GROUNDS THEREFORE, ELICITED EVIDENCE IN SUPPORT THEREOF, AND AT THE CLOSE OF THE TRIAL MOVED THE COURT TO GRANT HIM THE DIVORCE.

Difficult as it is to determine the Appellant's rationale, it seems that his argument is that the evidence does not support the court's findings in his favor which he requested in his pleadings, by testimony elicited by his counsel, which he invited by his theory of the case at trial and by his reliance upon his counterclaim, and he further argues that there is insufficient evidence to support the award made at his instance in his favor, and that there is not enough evidence to support a divorce for Respondent and thus the decree should be vacated. He thus asks this Court to allow him to do a complete "about-face" on appeal.

In his counterclaim the Appellant alleged as grounds for a divorce that his wife had treated him cruelly. At the trial he brought forth by questions asked by his own counsel the testimony needed to support his allegation (T. 4, 5). The questioning of Respondent by

Appellant's counsel with reference to Mr. Alex McDougald was for this purpose—it could have had no other purpose (T. 4). It is a bit late now for the Appellant to say that he did not desire the relief he prayed for and which was granted him.

The Appellant has introduced by way of his brief matters not properly in the record which the Respondent believes to be improper and immaterial. However, since the Appellant has done this, Respondent feels constrained to mention that at the time that the Court was discussing the disposition of the case subsequent to the hearing of the evidence (mentioned by Appellant at page 3 of his Brief) and at which time Appellant notes a discussion with reference to *Wilson vs. Wilson*, 5 Utah 2d 79, 296 P. 2d 977, that the Court specifically asked the Appellant if he wished to withdraw his Counterclaim. Counsel for the Appellant answered that he did not wish to withdraw the Counterclaim. The record before this court shows that the Counterclaim alleging grounds for divorce in favor of Appellant and praying for a divorce in his favor if a divorce were granted furnished the foundation for Appellant's theory of his case below. It is significant to note in this regard that after counsel's summation and upon hearing that the Court felt that a divorce was merited that Counsel for Appellant moved the Court for a divorce in his favor and for custody of the children. This motion will be found at page 57 of the original transcript and is part of the record before this court for the reason that the stipulated narrative statement of testimony covers, ac-

according to the stipulation of counsel, only the testimony of witnesses. Thus, with or without the matter not properly in the record, it is manifest that the Appellant is now asking this Court to undo what he intentionally did up.

It is a rule of long standing and of obvious merit that a party cannot successfully complain of acts or of error which he induced the court to commit or for rulings which he invited the trial court to make.

3 *Am. Jur. Sec.* 876.

This rule of estoppel applies equally to pleadings, evidence, instructions, findings, judgments, and rulings on motions.

3 *Am. Jur. Sec.* 878, 879, 880, 882.

In *Essex Packers vs. Kisecker*. 373 Pa. 351, 95 A. 2d 544 the court held that one who had been granted a new trial upon his own motion would not be heard to complain that it was granted.

This court has held that where a person brought up an issue he would not be heard to complain that the court decided it.

Brown vs. Skeen, 89 Utah 568, 58 P. 2d 24.

On the matter of self-invited error this court has ruled, as is the unanimous rule, that one will not be heard to complain of instructions given at his request.

Nelson vs. Lott, 81 Utah 265, 17 P. 2d 272.

Pettingill vs. Perkins, 2 Utah 2d 266, 272 P. 2d 185.

Authorities supporting the proposition that one cannot change his theory of the case on appeal, complain that he got that which he asked for, or in any material manner take advantage of “self-invited error” are legion. The necessity for this rule is obvious.

The appellant need not have alleged that grounds existed in his favor, he need not have minutely examined witnesses with reference to these specific grounds, he need not have moved for a decree in his favor, he need not have refused to withdraw his counterclaim when given the opportunity by the trial court—but he did. The appellant could have asked for an amendment of the court’s findings, could have asked the court which heard the case to grant him relief—he did not. Instead he has waited until filing his brief on appeal, nearly two years after the trial, to say “my pleadings were in error, my elicited testimony is insufficient, my theory of the case was wrong, I now desire to change my mind.” To allow this would absolutely nulify the rules of law calculated to maintain the sanctity and stability of judicial determination. That such is not to be done is elementary hornbook law. This court properly said in *Pettingill vs. Perkins*, 2 Utah 2d 266, 272 P. 2d 185 (1954) that where a case is tried on one theory (and that theory prevails) that that theory is the law of the case and that the proponent of that theory will not be allowed to shift his position and theory on appeal.

Even assuming the assertions of the Appellant correct with reference to his reasons, i.e. that there is insufficient evidence to support the findings in his favor, he would not be heard to complain for even in cases of actual error, he who induced such error cannot thereafter assert such error on appeal. This court said in *Nelson vs. Lott*, 81 Utah 265, 17 P. 2d 272 (1932):

“Appellant complains of instruction No. 14, for the reason that the same assumes that the last chance doctrine is applicable. We are inclined to agree with counsel, but as the instruction is identical with defendant’s request No. 5, with the exception of the words “exercising due care and caution,” appellant has no cause for complaint.

Respondent respectfully submits that the Court did not err in the manner suggested by Appellant, and, a fortiori, there is more compelling reason for not permitting the Appellant to withdraw his pleadings, nor to denounce the evidence he elicited in support of his pleadings, nor to attack the findings of fact and conclusions of law entered thereon, nor to change his mind and withdraw his motion made at the close of the trial that a divorce be granted in his favor, and at this stage of the matter, nearly two years subsequent to the inception of this action and nearly eighteen months subsequent to the granting of the interlocutory decree in his favor and on his motion and without having in any manner attempted to use, let alone exhaust, his remedies before the trial court, to make the proposal that the trial court erred because it found in his favor and at his specific

request and in accord with a theory of the case presented by him and followed by him at the trial.

Innumerable authorities from all jurisdictions, without exception, support the rule here relied upon by Respondent. There is no foundation in either law, logic or experience to support the request the Appellant makes in his Point I. Cases concerning this type of issue occupy page after page in the American Digest System, digested under Appeal and Error, key numbers 882 (and its numerous subdivisions) and 883.

A few of the cases representing the law in this matter are:

In re Claussenius' Estate, 96 C.A. 2d 600, 216 P. 2d 485.

Staley vs. Fazel Bros., 247 Iowa 644, 75 N.W. 2d 253 (Appellant could not complain of testimony elicited by his own cross-examination).

Schlecht vs. Schiel, 76 Ariz. 214, 262 P. 2d 252.

Smith vs. City and County of San Francisco, 117 C.A. 2d 749, 256 P. 2d 999.

POINT II.

EVEN IF THE COURT SHOULD ACCEPT APPELLANT'S POINT I, THE EVIDENCE SUPPORTS THE FINDING THAT A DIVORCE SHOULD BE GRANTED, AND IF THE COURT SEES FIT TO SET ASIDE THE DECREE AWARDED TO APPELLANT AT HIS REQUEST IT IS PROPER TO GRANT A DIVORCE IN RESPONDENT'S FAVOR.

Appellant takes the position that the evidence elicited fails to support the decree awarded him, stating that it was incumbent upon him to show a more aggravated case than were he the wife, and that he did not, and further that there is not sufficient evidence to support a decree in favor of Respondent.

Although it may appear somewhat inconsistent for the Respondent to attempt to support the decree of divorce granted Appellant, it is submitted by the Respondent that the more recent cases from this court modify the earlier Utah cases cited by Appellant, and that where it is apparent that the marriage is not salvageable that a divorce should be granted. It is clear from the evidence that this marriage is now beyond hope of reclamation. The enlightened policy of the law in this respect is well founded on Utah decisions.

Wilson vs. Wilson, 5 Utah 2d 79, 296 P. 2d 977.

Hendricks vs. Hendricks, Utah, 257 P. 2d 366.

The case of *Hyrup vs. Hyrup*, 66 Utah 580, 245 P. 335, cited as authority for the proposition that a divorce is not merited in the instant controversy, by the Appellant, is clearly not applicable. This court pointed out in *Johnson vs. Johnson*, 107 Utah 147, 152 P. 2d 426 at 427, that the evidence in the *Hyrup* case revealed two quarrels over a period of several years. This is clearly not the same as the instant case wherein the record properly before this Court shows a long history of friction, cruel treatment, excessive sexual demands, incon-

sideration, and other deterioration of the marriage over an extended period of time which even the sincere attempts of the parties and their marriage counselor were unable to surmount. The trial court was correct in his finding that grounds for divorce existed, and he was correct in his conclusion of law that the marriage should be terminated.

Two years have nearly elapsed since the institution of these proceedings. During this time the parties have lived apart. The evidence before the trial court convinced him that their marriage was destroyed and that to force them to continue living as husband and wife would be intolerable. He thus awarded the decree to the party who in his opinion was least at fault.

Although *Wilson vs. Wilson*, 5 Utah 2d 79, 296 P. 2d 977 concerns itself with a property distribution incident to a divorce, the Court restated the correct rule of law which is applicable to the instant case. The Court said that when the purposes of matrimony had been destroyed to the extent that further living together was intolerable it was the court's duty and prerogative to grant a divorce.

Hendricks vs. Hendricks, Utah, 257 P. 2d 366, is directly in point. The opinion in that case, though short, is to the point and lucidly expresses the law to be applied where both parties are at fault. Although there may be some instances where the court of equity might be justified in refusing relief if both parties are found at fault, it is explained that such a doctrine has no place where the charges are cruelty.

Our statute does not limit the granting of a divorce to a party not at fault. No good purpose could conceivably be served by refusing to terminate the marriage which has in fact been terminated by the Appellant's own request by an interlocutory decree of divorce for a period approaching two years.

It is assumed that the citation by Appellant at page 7 of his brief to *White vs. White*, 281 P. 2d 745, as a Utah case and implying that it is declaratory of Utah law is an inadvertant error. *White vs. White* is an Oklahoma case specifically concerned with an Oklahoma statutory provision not found in our statutory law, a provision in Oklahoma which allows the court, in its discretion, to refuse to grant a divorce where the parties appear to be in equal wrong. This is not the law of Utah.

Hendricks vs. Hendricks, Utah, 257 P. 2d 366.

Steiger vs. Steiger, 4 Utah 2d 273, 293 P. 2d 418.

However, if the Court feels that it should grant the Appellant's request to be relieved of the decree he requested, it is but proper to award a decree of divorce to the Respondent. The evidence supports it, the findings of the trial court support it. Equity and fair play would demand it.

POINT III.

THE COURT DID NOT ERR IN GRANTING THE CUSTODY OF THE MINOR CHILDREN TO THE RESPONDENT.

The Appellant's second point is as poorly taken as is his first. Again he resorts to statements not found in the record by referring to Appellant's having gone to Canada to bring the Respondent and the child back to Utah in July of 1954 (Appellant's Brief, page 10). The Respondent submits that there is no mention of such a trip by the Appellant in the stipulated statement of testimony. The statement on page 11 of Appellant's Brief concerning the vasectomy is again not supported by the record before this court. Appellant's statement of fact that his work keeps him in Salt Lake City is also without foundation. The fact is that his employment has caused him to travel considerably.

Appellant refers to Respondent's expressions of intent to return to Canada as being the real nub of the reason why Appellant should be granted custody of the children. In reply it must be noted that there is no showing that the Respondent is not a proper person to have custody of the children. The trial court specifically found the Respondent to be a fit and proper person to have custody of the children, *and the Appellant has not seen fit to attack this finding* (R. 21). Appellant's fears, even if they were to be well grounded are insufficient grounds for this court to act upon, for the lower court retained continuing jurisdiction in this matter and his remedy would be available there if one is to be given him.

The Respondent is subject to the continuing jurisdiction of the trial court, regardless of her place of resi-

dence (R. 30). Since the trial court has retained continuing jurisdiction in this respect, it is there that the Appellant must first seek relief, if he merits it.

The Appellant insists that the trial court erred in granting custody primarily to the Respondent. In this assertion the Appellant is not supported by the facts nor by the applicable law. The welfare of the children is the primary, paramount and controlling consideration in determining the question of custody of minor children. Although they will be considered, of course, by the court in arriving at its decision, the wishes and personal desires of the parents must yield to the welfare of the children.

2 Nelson on Divorce 167.

Smith vs. Smith, 1 Utah 2d 75, 262 P. 2d 383.

Sampsell vs. Holt, 115 Utah 73, 202 P. 2d 550.

In the recent case of *Steiger vs. Steiger*, 4 Utah 2d 273, 293 P. 2d 418, this court again stated the underlying principles applicable to a situation such as the instant one. This Court affirmed the granting of a divorce to the counterclaiming husband but awarded the custody of the child to the mother subject to subsequent review, the Court stating that the paramount consideration was the welfare of the child.

The Appellant does not assert, nor can he, that the Respondent is unfit to have the children. Though he makes lukewarm suggestions that in his opinion the children might be better off with him, it is clear that his

request for custody is primarily motivated by an understandable, but not legally controlling nor material personal desire which does not have as its primary basis a consideration of the welfare of his children, but of his own personal preference.

It is of some interest to note that at pages 10 and 11 of his brief the Appellant expressly declares the very facts which he denies having sufficiently proved under his Point I.

Again it may be noted that the trial court did not find the Appellant completely faultless in this affair (R. 21).

In concluding argument on this point, Respondent desires to point out that the Appellant contends that he is virtually required to stay in Salt Lake City for economic reasons. This is untrue for he is an experienced trained geologist admittedly capable of earning \$10,000 per year. Appellant asserts that at all stages of the proceedings he has opposed the divorce. His filing of a Counterclaim, eliciting of evidence in support thereof, his motion for a divorce in his favor, his failure to complain, when he had the opportunity to so do, to the trial court, his refusal to withdraw his Counterclaim when offered the chance, his long delay in asserting this argument for the first time on appeal certainly contradicts his assertion that he has at all stages opposed the divorce.

This marriage has been completely severed for only slightly less than two years at this time. The Appellant

speaks of equitable treatment. The Respondent respectfully submits that granting the prayer requested by Appellant would not only be manifestly contrary to the law, but would also be of a grossly inequitable nature far exceeding any "inequity" asserted by Appellant. The decree of the trial court was most fair in allowing the Appellant rights of visitation and of temporary custody of the children. The law and the decree both allow his petition for a change, if and when there are conditions to merit it. The dissolution of his marriage is indeed to be lamented, particularly where small children are involved, but to continue the marriage, or to award custody to the Appellant would be to re-infect and aggravate and not to cure and alleviate.

CONCLUSION

On the basis of the record before this Court and the law applicable thereto, the Respondent respectfully prays that this Honorable Court deny the requests made by the Appellant, and that this court affirm the decree of the lower court, or failing so to do that the divorce decree be modified only to the extent of granting the divorce to the Respondent.

Respectfully submitted,

LEE W. HOBBS,

*Attorney for Plaintiff and
Respondent, Mary Gilchrist
Curry*