1981

Kathie Adell Munford v. Raymond G. Munford : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE

STATE OF UTAH

KATHIE ADELL MUNFORD,

Plaintiff and Appellant

vs.

RAYMOND G. MUNFORD,

Defendant and Respondent.

Case Number 18088

RESPONDENT'S BRIEF

Appeal from the Order of the

District Court of Morgan County

The Honorable J. Duffy Palmer

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NATURE OF CASE

This case is a divorce action commenced by Plaintiff in the District Court of Morgan County. About 6 weeks following the trial and the Courts decision in the case, APPELLANT filed a Motion under Section 30-3-5 Utah Code Annotated, 1953 as amended, seeking a reconsideration or modification of the Courts Judgement or Decree on the property question.

DISPOSITION IN THE LOWER COURT

After a hearing, with evidence presented and argument of counsel, the Lower Court denied APPELLANT'S Motion.

RELIEF SOUGHT ON APPEAL

Defendant requests that APPELLANT'S appeal be dismissed, and that the Judgement and ruling of the Lower Court be affirmed.

STATEMENT OF FACTS

On or about January 14, 1981, without the knowledge or permission of Defendant, Plaintiff left Defendant and his three children of a prior marriage, and took her two children (of a prior marriage, which two children had been adopted by Defendant), along with many items of personal property and food storage, etc. (R-12-14; TR-33-34).

The marriage between the parties had taken place about 4 years prior to this time, and Plaintiff had moved into the home of Defendant, which had been previously acquired by him.

The Parties had their problems and difficulties in trying to reconstitute 2 separate families during the 4 year period, but Defendant was unaware of Plaintiff's intentions to leave him (R-14; TR-33-34).

The Parties were having a very difficult time meeting all their obligations and expenses by reason of the recession, especially in the car business, which Defendant was engaged in, and Defendants monthly income about that time was less than his monthly outgo (about $1,300.00 Gross income and about $1,600.00 minimum expenses), (R-15-16).

About December 15, 1980, a month prior to Plaintiff leaving Defendant, said Defendant made application to borrow $23,000.00 from his credit union in order to help out on the bills and obligations and to consolidate some of their debts. The home of Defendant was encumbered by a 2nd Mortgage for the $23,000.00 and the loan was con-

summated on January 14, 1981. Defendant personally still owes and is paying on this loan, and Plaintiff has no obligation (TR-79,87).

Plaintiff filed her Complaint for Divorce against Defendant on January 19, 1981, and among other things she asked for an equitable interest in Defendant's home (R-1-5).

At the time of the loan application by Defendant with his credit union, about December 20, 1980, the credit union conducted an appraisal on the Defendant's home for the purpose of the loan, and Plaintiff was well aware of that appraisal and its purpose, and she and her attorney had a copy of the same which was introduced by them at the trial as Plaintiff's exhibit "P-H" (R-33,94). Plaintiff and her attorney in fact insisted on an additional appraisal done on the home for the trial, as the December 20, 1980 appraisal was done by the "Credit Union for a different purpose" (R-30-31).

From the time of filing Plaintiff's Complaint, January 19, 1981 until the time of trial in this case, May 12, 1981, Plaintiff's counsel did not serve any interrogatories on, nor take deposition of, Defendant in regard to the case, the assets, debts, etc. However, counsel for Plaintiff did express some surprise on the 2nd Mortgage for $23,000.00 at the time of trial, whereupon Judge Thornley K. Swan states, "It ought not to, its been on, he says, he took it out last December" - - - - "We have had all that time to find out about it, Mr. Vlahos" (TR-86).

It was Defendant's contention that the home, having been acquired by Defendant prior to his marriage to Plaintiff should remain the property of Defendant, including the equity therein, as very little had been paid off on the Mortgages during the marriage and Plaintiff

had put no money into it (R-13; TR-66,70). The Trial Court, however, after weighing all the evidence and hearing the arguments of counsel, and in its discretion, awarded $6,000.00 equity to Plaintiff in Defendant's home.

Plaintiff, by this appeal, is not satisfied with the Lower Courts ruling on this particular issue and says the Trial Court has abused it's discretion.

ARGUMENT

POINT I

THE APPELLANT FAILED TO FILE HER APPEAL IN THE TIME REQUIRED BY STATUTE, AND THE APPEAL SHOULD BE DISMISSED.

It is not quite clear to counsel for RESPONDENT whether APPELLANT is appealing the alleged abuse of discretion of the trial Judge, Thornley K. Swan, of May 12, 1981, or the alleged abuse of discretion of Judge J. Duffy Palmer, in the subsequent hearing on September 3, 1981.

APPELLANT'S POINT I seems to go to the question of Judge Palmer's abuse of discretion in denying the modification or reconsideration motion of September 3, 1981. Yet the cases cited and the argument by counsel appear to attack the decision of Judge Swan on May 12, 1981, wherein, "The loan of $23,000.00 was never taken into consideration, either at trial or in subsequent Findings of Fact and Conclusions of Law, or Decree, by the Court." (That would be Judge Swan) (APPELLANT'S BRIEF, Page 4).

In either event, Plaintiff's appeal is not proper or well taken and should be dismissed.

If Plaintiff's appeal is from Judge Swan's Findings and Decree in the Divorce action, which were entered in the [illegible]

1981, although signed by him on July 17, 1981, then Plaintiff has failed to file her appeal in the one month period of time permitted by Statute, as this appeal was not filed until September 17, 1981.

Counsel for APPELLANT argues that his filing a Motion for Modification or Reconsideration stays the time for filing the appeal until after that matter is ruled upon. However, counsel in his brief admits that his Motion for Modification or Reconsideration was under Section 30-3-5 Utah Code Annotated. (APPELLANT'S BRIEF, Page 4).

Rule 73(a) Utah Code Annotated 1953, as amended, provides that the running of the time for appeal is terminated only by a timely Motion made pursuant to Rule 50(b), Rule 52(b) or Rule 59 of the Utah Rules of Civil Procedure. Rule 50(b) involves a Motion for Judgement notwithstanding the verdict. Rule 52(b) involves a Motion to amend the Findings or to make additional Findings. Rule 59 involves a Motion for a new trial or making new Findings.

Plaintiff's Motion for Reconsideration or Modification was not filed under any of the above rules, but was filed for the purpose of asking the Court to make other Orders in relation to the property distribution, "as may be equitable", under Section 30-3-5 of the Utah Code.

It should be noted that the Motion for Reconsideration or Modification was filed by Plaintiff on July 2, 1981, (R-36) and yet counsel for Plaintiff did not even submit the Findings and Decree in the case to the trial Judge until July 17, 1981, and they were not filed in the Court until July 28, 1981 (R-38-43). Thus, Plaintiff cannot argue that her Motion was filed for the purpose of amending or making

additional Findings.

It appears, therefore, that Plaintiff's Motion did not stay the time for filing appeal, and inasmuch as more than one month expired from the entry of the Decree in the Register of Actions, (July 28, 1981) to the time of filing the appeal (September 17, 1981), this appeal should be dismissed.

In the event Plaintiff's appeal is strictly from Judge Palmer's Order denying Plaintiff's Motion under Section 30-3-5 of the Utah Code, said appeal is also not well taken for the following reasons:

(a) Plaintiffs Motion, Paragraphs 4 and 5, (R-36), stated in substance that Plaintiff had made further investigation in regard to the $23,000.00 loan and the Court should set a date and time for hearing further evidence and testimony that Plaintiff would present. Over the objections of Defendant and his counsel Judge Palmer on September 3, 1981 did in fact allow Plaintiff to put on further evidence, and then after full consideration, the Court felt there was no basis for reconsideration of the Trial Courts decision. (R-1-3 of the September 3, 1981 hearing).

(b) Under Section 30-3-5 of the Utah Code, it provides:

> - - - "The Court shall have continuing jurisdiction to make subsequent changes or new Orders with respect to the support and maintenance of the Parties, the custody of the children and their support and maintenance, or the distribution of the property as shall be reasonable and necessary."

Therefore, Plaintiff has her remedy under this statute if and when she can, by proper Motion, Affidavits, and evidence, show the reasonable and necessary change of circumstances.

The appeal to the Supreme Court is therefore unnecessary and not well taken.

POINT II

THE LOWER COURT DID NOT ABUSE IT'S DISCRETION, AND IT'S DECISION SHOULD BE AFFIRMED.

The Trial Court, Judge Thornley Swan, took into consideration all of the property interests of the Parties, including a full consideration of the $23,000.00 2nd Mortgage, the payment of bills and debts, etc. in making his discretionary Judgement and ruling in this case. The court also took into consideration the increase and appreciation in value of Defendant's home. Thus, the cases cited by counsel for APPELLANT in his Brief are either distinguishable or not applicable to our situation.

In the Wooley v. Wooley case, 195 P 2nd 743; 113 Utah 391, cited in APPELLANT'S Brief, the Parties had lived together more than 30 years and part of the funds both parties accumulated went into a speculative interest, and thus the Court held the wife was entitled to a share of any increase in value of such speculative interest.

In the instant case, the court did take into consideration the $23,000.00 loan and Mortgage as well as giving the Plaintiff a fair and equitable amount from the increase in value in Defendants home, even though the Parties had lived together only about 4 years.

Furthermore, the Supreme Court should not interfer in a Trial Court's discretion in such cases unless there is clear evidence of an arbitrary decision from the record. The Wooley case above cited is good authority for the Utah Law on this question. The court therein stated:

> "The Supreme Court will not substitute it's judgeemnt in divorce proceedings relative to alimony and division of property for that of the Trial Court unless the record clearly discloses that the Trial Courts Decree in such matters in plainly arbitrary."

(see also Allen v. Allen 165 P 2nd 872; 109 UT. 99, as one of the leading cases on this issue.)

The Smith v. Smith case, 291 P. 298; 74 UT. 60, and the Glover v. Glover case, 242 P 2nd 298; 121 UT. 362, cited in APPELLANTS argument are distinguishable from the present case in that one of the Parties in those cases had committed fraud or had failed to fully disclose to the court what their true condition was as to the property. In our case, Defendant fully disclosed to the court what the true condition was as to the property and the Mortgages owing, and Plaintiff certainly knew or should have known, and had plenty of time to determine all the facts as to the property, debts, etc. as was mentioned by the Trial Judge (R-86). Consequently, there is no evidence of fraud nor evidence in the record to show abuse of discretion by the Trial Court.

Counsel for APPELLANT also cites Fletcher v. Fletcher (1980) 615 P 2nd 1218, a Utah case, wherein the Trial Courts findings and discretion were in fact affirmed on appeal. The Trial Court had considered in that case, as was also done in the present case, the equity of both parties to the action in any interest the parties may have acquired in the home prior to the Divorce Decree. Judge Swan fully considered and awarded Plaintiff an equitable interest in Defendants home based upon it's appreciated value during the marriage. Where is the abuse of discretion?

The Utah Supreme Court in the Fletcher case also makes abundantly clear that on appeal the Court will not disturb the Trial Court's decision without clear evidence of abuse. The Court states:

> "on appeal of Divorce Proceedings, The Supreme Court will not disturb the action of the Trial Court unless evidence clearly preponderates to the contrary, or the Trial Court has abused it's discretion, or misapplied principles of law"

"In division of Marital property in Divorce Proceedings, the Trial Judge has wide discretion, and his findings will not be disturbed unless the record indicates abuse thereof"

Again, there has been no showing of abuse in the record by either Judge Swan or Judge Palmer in this case, and the Trial Court's decision and rulings should be affirmed.

CONCLUSION

In as much as APPELLANT'S entire argument appears to go to the abuse of discretion of the Trial Judge, Thornley K. Swan, and the Motion for Reconsideration or Modification comes under Section 30-3-5 of the Utah Code, Plaintiff's appeal should be dismissed, as not having been timely filed. In the alternative, the Trial Judge's findings, Decree, and rulings should be affirmed and their discretion in the property distribution in this case not be disturbed.

RESPECTFULLY SUBMITTED this 31st day of December, 1981.

Gaylen S. Young, Jr.

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CERTIFICATE OF MAILING

I hereby certify that on the 31st day of December, 1981, I mailed a true and correct copy of the foregoing Brief of Respondent to Pete N. Vlahos, Attorney for Appellant, at Legal Forum Building, 2447 Kiesel Avenue, Odgen, Utah, 84401, postage prepaid.

Gaylen S. Young, Jr.