1957

Edith H. Westerfield v. Wilmer T. Coop : Brief of Appellant

Utah Supreme Court

George B. Handy; Attorney for Defendant and Appellant;

Case No. 8616

IN THE

SUPREME COURT

OF THE

State of Utah

EDYTH H. WESTERFIELD,
Plaintiff and Respondent,

—vs.—

WILMER T. COOP,
Defendant and Appellant.

APPELLANT'S BRIEF

GEORGE B. HANDY
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PRELIMINARY STATEMENT

Defendant appeals from the judgment entered in the above action wherein the plaintiff was awarded judgment against the defendant for $2750.00 for delinquent support money, $150.00 for fees for her attorney and court costs in the amount of $13.20. In this brief, we refer to the parties as they appeared in the court below.

The record on appeal is in two volumes, one of which consists of the pleadings, minute entries, and similar papers. All references to this volume are designated

by the letter "R." The other volume which is separately numbered is a transcript of the testimony and proceedings at the trial. References to this volume are designated by the letter "T."

STATEMENT OF FACTS

On September 24, 1942, plaintiff obtained a final decree of divorce from the defendant in Sacramento County, California. Both parties at the time being residents of the state of California (R. 1).

By the terms of the California decree, defendant was ordered to pay the sum of $65.00 per month to plaintiff for the support and maintenance of herself and the three minor children of the parties. This sum was not apportioned as to what amount would be for plaintiff as alimony and what amount as support money for the children.

On February 21, 1944, plaintiff obtained an order modifying the divorce decree whereby the previous award of support money for herself and the three minor children is increased from $65.00 per month to $100.00 per month and here also, there is no attempt to apportion a part of this sum as alimony and a part as support money, nor to indicate how much was to be paid for the support of each child (R. 1). This order to pay was limited by the phrase "until the further order of the court" (R. 1).

Plaintiff re-married in April of 1944 and made no attempt to establish what amount defendant should pay from that time on as support money (T. 13). Nor did plaintiff seek a modification of the decree as each child attained majority (T. 13).

In April, 1955, plaintiff commenced an action in the District court of Weber County, State of Utah for delinquent alimony and support money due under the California decree in the amount of $8400.00.

The court held that the statute of limitations had run against all amounts due prior to April 19, 1947, (eight years prior to plaintiff's action in Utah) (R. 13) and the court further found that *although the California court's decree of divorce does not specifically so state, it was said court's intent in said divorce decree* (italics ours) that the support payments required to be made by the defendant to the plaintiff for the plaintiff and the minor children's support be divided equally among the plaintiff and the children, one-fourth (¼) to each, and that further, when the plaintiff re-married in April of 1944, the defendant's duty to pay support payments for plaintiff terminated and the support payments should have been reduced to Seventy-Five and 00/100 Dollars ($75.00) per month under the modified decree of divorce, and that when Richard Coop, the eldest child of the parties, left the family and took up his own independent life in October, 1944 by marrying, the defendant's duty to pay support payments for him terminated and the support payment should have been further reduced to the

sum of Fifty and no/100 Dollars ($50.00) per month, and that when Wilmer Coop attained the age of majority on October 17, 1950, the defendant's duty to pay support for him terminated and the support payments should have been reduced to Twenty-Five and 00/100 Dollars ($25.00) per month, and that when George Coop attained his majority on December 2, 1952, the defendant's duty to pay future support payments terminated. The court therefore finds that the defendant has failed, refused and neglected to pay to the plaintiff as ordered by the Superior Court of the State of California in the parties divorce decree for support money, which has not been barred by the Statute of Limitations, is as follows: Three (3) years, six (6) months), at Fifty and 00/100 Dollars ($50.00) per month as and for the support for the minor children of the parties, Wilmer and George Coop, being the period of time from April 19, 1947 to October 17, 1950, and for two (2) years and two (2) months at Twenty-Five and 00/100 Dollars ($25.00) per month for the support of the minor child of the parties, George Coop, being the period of time from April 19, 1947 to December 2, 1952, the total amount being Two Thousand Seven Hundred Fifty and 00/100 Dollars ($2,750.00) no part of which has been paid. Plaintiff was also awarded $150.00 as attorneys fees and $13.20 as court costs (R. 13, 19).

STATEMENT OF POINT TO BE ARGUED

POINT I.

THE COURT ERRED IN FAILING TO DISMISS THE COMPLAINT FOR THE REASON THAT SAID COMPLAINT

FAILED TO STATE A CAUSE OF ACTION UPON WHICH RELIEF COULD BE GRANTED.

ARGUMENT

The facts, as related above, show a judgment of divorce awarded in California, which as modified provided that defendant pay plaintiff for the support of herself and the three minor boys of the parties, the sum of $100.00 per month. *That said sum was never apportioned as to what amount of the total was for alimony and what amount for support money for each of the children, neither in the decree, the modification nor by any subsequent change of circumstances.* (Italics ours.)

No action had been taken in the state of California to reduce the decree as modified to a final judgment so that the amount due was a fixed, sum certain and it is the contention of defendant that the judgment not being a final one, was not entitled to the protection of the full faith and credit clause of the Federal Constitution and an action could not be filed in the State of Utah until such action had been taken.

The *Restatement of the Conflict of Laws,* Section 434, page 517, provides that in order for a valid foreign judgment to be enforced by an action in another state, it must be, among other things, (a) final and (b) certain in amount.

In support of defendant contention that the California decree was not final so as to entitle it to full faith and credit in Utah, defendant refers the court to the only Utah case on this point, *Hunt vs. Monroe,* 91 P. 269.

In that case a decree of divorce was awarded in the state of Colorado; custody of the two minor children was awarded to the mother and the father was ordered to pay a total of $20.00 per month for the support of the two minors. A total sum of $60.00 was paid in compliance with the said decree during a four and a half year period. Suit was filed in the Utah court for the delinquent support money due under the Colorado decree.

On the issue as to whether a decree and judgment of a sister state for accumulated alimony or maintenance money was a final judgment which was entitled to full faith and credit in an action in Utah, our Supreme Court held:

> "The question as we understand it, in view of the decision in the Lynde case, (Lynde vs. Lynde, 181 U.S. 183) may be stated thus: that an action upon a judgment or decree for alimony or maintenance, rendered by a court of competent jurisdiction of one state, may be maintained in another court of competent jurisdiction of another state, *where the amount due or payable is fixed, having a definite sum presently due and enforceable in the state where rendered; but that alimony or maintenance becoming due in the future, payable in installments is not a final judgment upon which an action can be brought, unless and until the court which rendered it passes upon and fixes the specific amount due and payable in some proper proceedings in the original action,* if such can be maintained in the state where the original order or judgment was entered. The mere fact, however, that a specific sum, presently due, is also subject to modification, does not defeat the

action in any other state; *but the fact that a sum is not specifically fixed as due in the future and payable in installments or otherwise, does defeat the right of action, unless the amount due is ascertained and fixed by some appropriate proceedings before the action on the judgment or order or decree is commenced as above stated.* In view, therefore, that the judgment or decree in this case falls clearly within that class which in the Lynde case is held not to be a final judgment and hence not within the full faith and credit clause of the Federal Constitution, we have no alternative than to hold that the action cannot be maintained on the judgment as it now stands." (Italics ours.)

Prior to instituting the action in the Utah court, the plaintiff in the instant case, made no effort to have the judgment for alimony and support reduced to a fixed, sum certain and therefore, in accordance with the holding in *Hunt v. Monroe,* supra, the judgment sued on was not a final judgment and was not entitled to full faith and credit under the Federal Constitution.

In the case of *Kahn vs. Kahn,* 268 P2 151, (Cal.), the plaintiff sued the defendant in the California courts on a judgment for alimony and support obtained in a divorce proceeding in Ohio. The decree in the Ohio court provided for alimony and support money in a combined sum as follows: "It is ordered that the plaintiff is hereby allowed as reasonable alimony for herself and the support of her three minor children, and the defendant is ordered to pay to the plaintiff the sum of $300.00 per month, each and every month *until the further order of the court."* (Italics ours.)

The California court held as follows:

> "Also since the Ohio court reserved continuing jurisdiction over the subject of alimony and child support, appellant does not possess the absolute right to recover in a collateral proceeding in another court. *Before she can make any headway toward realizing on her judgment, she must request the court that dissolved her marriage to modify the decree by entering a judgment for the accrued sums.* (Italics ours.) (Citing cases.) In each of the cited cases the order to pay was limited, as in the instant judgment, by the phrase 'until the further order of this court.' *By reason of the fact that in the judgment here involved, the Ohio court expressly reserved a continuing jurisdiction over the subject matter, appellant can state no cause of action until she has requested the Ohio court to modify its decree by adjudging a definite lump sum to be due. Having failed to do so, her complaint states no valid cause of action.* (Italics ours.)

Thus it is seen that the California Courts have agreed with the Utah Court. In the case at bar, the court of the State of California had also retained continuing jurisdiction over the matter by the phrase "until the further order of this court" and thus prevented the judgment from being final and certain and in the absence of the plaintiff applying to the California court for a judgment for accrued sums, her complaint does not state a cause of action.

Plaintiff could not have recovered the arrearages in an action brought in California because *Section 336 of*

the California Code of Civil Procedure bars an action of any state if brought more than five years after its entry.

In *Kahn v. Kahn,* supra, the court stated:

> "Because no installment payable within such last preceding five years, and because all had matured more than five years before the instant suit was filed, not one of the three children can successfully assert a right under the Ohio decree, even if the entire judgment had run in their favor only."

In support of this proposition, the court cited California authorities, *Biewend vs. Biewend,* 109 P2 701, *Castle vs. Castle,* 162 P2 656.

Therefore, in the present case where plaintiff remarried in 1944, the son Richard married in 1944, and son Wilmer became 21 years of age in 1950, and son George became 21 years of age in 1952, no action could be maintained for plaintiff, and sons Richard and Wilmer in the State of California, because of the 5 year statute of limitations, even if the decree had been modified and the sums due them had been made certain. This leaves only son George to be considered and it is not for the Utah court to say what is due to him from the non-apportioned award of alimony and support money. To determine that would be to indulge in speculation and guess.

If this judgment is void and unenforceable as to plaintiff and two of the three children in California because of the California Statute of Limitation, can the judgment be a valid one in Utah? A judgment that is void and unenforceable in California cannot be entitled to full faith and credit in Utah. *Restatement of Conflict of Laws,* Sec. 441, page 523.

> "A valid foreign judgment for the payment of money will be enforced only for the amount for which it is enforceable in the state in which it was rendered."

Another reason why the complaint does not state a cause of action is that the decree of the California court is not entitled to full faith and credit because of the uncertainty in the amount due on the judgment.

To emphasize the uncertainty, plaintiff in her complaint prayed for $8400.00; at the trial, plaintiff amended to ask judgment for $12,500.00 and the trial court below awarded the sum of $2,750.00.

It is to be remembered that the California decree provided for an award that was non-apportioned as to alimony and support money.

The trial court below under these facts has attempted to do something in regard to a California decree that no California court would do. That is to retro-actively modify the decree when changes occurred such as remarriage of the plaintiff and the coming of age and marriage of the minors.

In the Findings of Fact in the instant case (R. 13) and paragraph 9 thereof, the court below stated "The court further finds that although the California courts' decree does not specifically so state, it was said court's intent in said divorce decree that the support payments required to be made by the defendant to the plaintiff for the plaintiff and the minor children's support be divided equally among the plaintiff and the children, one-fourth (¼) to each, etc." What right does the Utah court have to say under these circumstances what the intent of the California court was?

It is the indisputable law in California that where a blanket award has been made for alimony and support money, without an attempt to apportion between them, and the wife remarries or a minor comes of age that the judgment is unenforceable in the absence of a modification of the decree to make the amount due certain. *Danz vs. Danz,* 216 P2 162, *Kahn v. Kahn,* 268 P2 151, *Parker v. Parker,* 266 P. 283.

In *Parker v. Parker,* (Cal.) 266 P. 283, an order such as was made in the instant case reducing a blanket award for alimony and support money without a petition to modify the decree being made and granted was reversed, because "*** it was in effect a retro-active modification of the judgment."

The California court in the Parker case did not feel that it was within the province of either the Supreme Court or the trial court to determine retro-actively what

portion of the entire amount was alimony and what portion was support money and to do so was to indulge in speculation and guess.

In *Danz v. Danz* ,(Cal.) 216 P2 162, where the wife had been given a combined or blanket award for alimony and support money, had subsequently remarried and had never obtained a modification of the decree, the trial court refused to order defendant to pay alimony or support money after the marriage of the plaintiff in the absence of a modification of the decree. The Supreme Court of California upheld this action stating that the trial court could not at the time if acted, modify the blanket order.

In *Kahn v. Kahn,* (Cal.) 268 P2 151 wherein an action was filed in California on an Ohio decree awarding a non-apportioned sum as alimony and support money, the California court held that inasmuch as it was impossible to determine what amount was meant for alimony and what amount was meant as support money, that the judgment was therefore too uncertain to be enforceable and the pleadings consequently did not state a cause of action, and were not entitled to full faith and credit.

Further quoting from *Kahn vs. Kahn,* supra,

> "From a review of the pertinent decisions it is clearly the established law that if a wife seeks to recover the unpaid installments on her decree from another court and the amount of her award is the combined sum of alimony and support and

her children have attained their majorities and the court is unable to determine the portion intended for alimony as distinguished from the part allowed for child support, then the entire award of such decree is illegal and non-enforceable. Hale vs. Hale (Cal.) 45 P2 266."

See also: *Danz v. Danz,* (Cal.) 216 P2 162; *Harris v. Harris,* (Cal.) 52 P2 985; *McVey v. McVey,* (Ariz.) 137 P2 971, 972; *Levy v. Dockendorff,* (N.Y.) 163 N.Y.S. 435, 439; *Parker v. Parker,* (Cal.) 266 P. 283; *Schluter v. Schluter,* (Cal.) 20 P2 723; *McKannay v. McKannay,* (Cal.) 230 P2 214; *Herman v. Brennan,* 211 N.W. 52 (Mich.); *Boehler v. Boehler,* 125 Wisc. 627, 104 N.W. 840, 841; *Rife v. Rife,* 272 Ill. App. 404, 411; *Evans v. Evans,* 116 Wash. 460, 199 P. 764.

It is quite clear, therefore, that where plaintiff had remarried and the minors have attained their majorities, the California Court would not have entertained plaintiff's action on the decree for a combined sum as alimony and support money, until and unless the decree had been modified after the re-marriage of plaintiff and the coming of age of the boys and there had been a judicial determination that a fixed, sum certain was due.

Applying the California law to the California decree, plaintiff was not entitled to recover without a modification of the decree and an adjudication that a sum certain was due and the Utah court was required to follow the California law in this matter.

If the sum due was not certain so that a complaint, if filed in California would not state a cause of action, the judgment would not be sufficiently certain to be entitled to full faith and credit in the state of Utah.

Restatement of Conflict of Law, Sec. 436, page 519:

> "A valid foreign judgment for the payment of money *will not be enforced* uness the amount to be paid is fixed in the judgment, *or has since become fixed under the law of the state which rendered it.* (Italics ours.)

CONCLUSION

The complaint of the plaintiff filed in the District Court of Weber County, Utah on a California divorce decree did not state a cause of action because any claim plaintiff had against the defendant was void and unenforceable because of the California Statute of Limitations and because the foreign judgment sued on was not entitled to full faith and credit in Utah because the judgment was not final and was not certain.

Respectfully submitted,

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