1957

Sheila Wherritt Graziano v. Charles Benito Graziano : Brief of Respondent

Utah Supreme Court

Critchlow, Watson & Warnock; Attorney for Respondent;

Case No. 8640

IN THE SUPREME COURT

of the

STATE OF UTAH

SHEILA WHERRITT GRAZIANO
Plaintiff and Respondent,

vs.

CHARLES BENITO GRAZIANO,
Defendant and Appellant.

BRIEF OF RESPONDENT

CRITCHLOW, WATSON & WARNOCK
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STATEMENT OF FACTS

The appellant has gone into a great deal of detail outlining his interpretation of the facts as brought out at the trial. Respondent will not attempt to engage in a lengthy rebuttal of the facts as recited in Appellant's brief.

The Appellant, by his answer and his constant insistence as to the correct marriage date, has made it abundantly clear that this was a marriage of necessity because of a pregnancy consummated out of wedlock. We believe that in the brief of Appellant he also makes very clear

the total difference between the social, cultural and economic backgrounds of the parties. This unfortunate marriage could never have lasted.

The record will disclose that the plaintiff is a well educated woman who has traveled extensively and has gone to school in Europe and at the University of Utah. It will also disclose, and this is emphasized by the Appellant, that she had enjoyed all of her life a sense of complete economic security. The social and educational background of the defendant is much different. He had a high school education and was raised in a factory town in Connecticut. In pointing out these differences we do not wish it understood that we do it in the sense that we are belittling the appellant. It is done to emphasize the differences which arose between the parties.

A reading of the transcript will show that the defendant had about nine different jobs during the brief time the parties lived together. It will also disclose that in this short period they moved from Salt Lake City to Aspen, Colorado, and then to Bristol, Connecticut. In no case was the move made to improve their economic position but was to satisfy a whim of the defendant. The record will further disclose that in Connecticut the parties became in debt.

The plaintiff testified that she found life with her in-laws intollerable and constantly asked the defendant to provide a home for her and her child. The defendant in-

stead of trying to furnish a home bought a Porche automobile incurring a debt to do so. After he sold the Porche a note for $500.00 was signed by the parties. It was clear to plaintiff that her situation would not improve and so she came to Salt Lake City.

The plaintiff was forced to live in a household and in a manner which was entirely foreign to her when she was in Bristol. The persons with whom she had to associated had nothing in common with her, nor could they have, because of the differences in background. Defendant did nothing to attempt to provide the plaintiff with a pattern of life to which she was accustomed and plaintiff could not bring herself to accept his standards.

POINTS OF LAW

The plaintiff, will not, in this brief, answer the charges as to collusion. We believe that even a cursory reading of the transcript, will disclose that the court conducted the trial in a fair and impartial manner.

It is our position that there are two questions to be considered in this appeal.

1. IS THERE SUFFICIENT EVIDENCE TO SUSTAIN THE COURT'S FINDING GRANTING PLAINTIFF A DIVORCE.

2. THERE IS NO EVIDENCE SHOWING THE PLAINTIFF IS AN UNFIT MOTHER.

ARGUMENT

1. IS THERE SUFFICIENT EVIDENCE TO SUSTAIN THE COURT'S FINDING GRANTING PLAINTIFF A DIVORCE.

The court found that the defendant did not furnish the plaintiff with a proper home and that his refusal affected the health of the plaintiff. The court also found that defendant preferred to indulge in luxuries rather than provide a proper home for his wife and child. These findings are supported not only by the testimony of the plaintiff but by the testimony of the defendant.

This court has on numerous occasions held that the trial judge has the opportunity to observe the witnesses and that unless there is no evidence to support the findings or there is a clear abuse of discretion the findings of the trial court will not be disturbed. The latest case so holding is that of *Steiger* v. *Steiger,* 293 P. 2nd 418, 4 Utah 2nd 273. This case was decided February 16, 1956. The court therein stated, at page 419:

> "Under the principles enunciated in Hendricks v. Hendricks, Utah, 257 P. 2nd 366, the duty of the trial court, upon his determination that the marriage had been made intolerable by the acts of both parties, was to grant a divorce to the party least at fault. The scales were so evenly balanced in the present case that the trial court was required to make a very difficult decision. Nothing in the record convinced us that he abused his discretion in granting the divorce to the husband in this instance, and this court has often de-

> cleared itself unwilling to overturn the decision of the court which observed the demeanor of the witnesses. Lawlor v. Lawlor, Utah, 240 P. 2nd 271, MacDonald v. MacDonald, 120 Utah 573, 236 P. 2nd 1066, Stewart v. Stewart, 66 Utah 366, 242 P. 947."

We submit that the decree of the trial court granting the plaintiff a divorce should be affirmed.

2. THERE IS NO EVIDENCE SHOWING THE PLAINTIFF IS AN UNFIT MOTHER.

The defendant in his brief has argued at length that the plaintiff had before her marriage affairs with "numerous" men. There is evidence that the plaintiff may have had affairs with two men several years prior to her marriage with defendant. The only other affair was the one the defendant made very sure would be aired in the court, that was the one with him and resulted in pregnancy. The court properly admitted this testimony to the issue of cruelty and excluded it in consideration of the question of custody. This court in the case of *Baker* v. *Baker,* 224 P. 2nd 192 at page 197 has the following to say:

> "Plaintiff lastly contends that the trial judge erred in refusing to admit certain evidence offered by her. During the hearing plaintiff made a proffer of evidence on the unfitness of the defendant to visit and be alone with the children. This evidence concerned incidents which occurred prior to the hearing in the original divorce action and did not involve any improper conduct subsequent

> to the decree. The trial judge properly rejected the proferred testimony."

This leaves only two matters which could possibly be taken into consideration relative to the unfitness of the plaintiff to retain custody of the child. The fact that the plaintiff does not agree with the religious beliefs of the defendant and the fact that she at one time read a book which the defendant says was pornographic.

There is not one iota of evidence that since the separation of the parties that there has been any misconduct on the part of the plaintiff or neglect of the child nor that the child who is now about a year and one half old is living under any but the best of circumstances.

A reading of the cases of *Steiger* v. *Steiger,* supra, *Stuber* v. *Stuber,* 244 P. 2nd 650 and *Walton* v. *Coffman,* 169 P. 2nd 97 all decided by this court in recent years, relating to the custody of young children, illustrates just how tenuous the defendants position is. Certainly if under the facts in these cases there was any question of custody, there can be no question but that the award of the court in this case was mandatory.

The child is now living in a secure home among educated people. The defendant says that he will either take the child to his mother's home in Connecticut or bring his mother out here and establish a home and support the mother and child. The mother is 59 years old and has a limited education. To establish this home the defendant

says he will use his earning power and borrowing power to establish a home. He had to borrow money when he had his family living with his mother and at the time of the trial had not repaid it. He contributed nothing for the support of the child from the time his wife left him until the court ordered him to make payments on December 1, 1956.

Although, it is not in the record, because at the time of the trial the defendant was not in the Army, he is now in the Army of the United States. This certainly should be taken into consideration by this court in deciding a question of custody.

CONCLUSION

It is submitted that all of the findings and orders of the court are sustained by the evidence and the law.

The plaintiff renews her motion that the brief and the affidavits of the appellant be expunged from the record as being contemptuous and scandalous.

The plaintiff also asks the court to award her a reasonable attorney's fee on this appeal.

Respectfully submitted,

CRITCHLOW, WATSON & WARNOCK

Attorneys for Respondent