

1982

Lynn R. Preece v. Mark V. Preece : Brief of Appellant

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *Preece v. Preece*, No. 18295 (Utah Supreme Court, 1982).
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IN THE SUPREME COURT OF THE

STATE OF UTAH

LYNN R. PREECE,

Plaintiff and
Appellant,

vs.

MARK V. PREECE,

Defendant and
Respondent,

CASE NO. 18295

BRIEF OF APPELLANT

Appeal from the Judgment of the
District Court of Cache County, Utah
THE HONORABLE VENNOY CHRISTOFFERSON
DISTRICT COURT JUDGE

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FILED

MAY 13 1982

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IN THE SUPREME COURT OF THE
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LYNN R. PREECE,

Plaintiff and
Appellant,

vs.

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Defendant and
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CASE NO. 18295

BRIEF OF APPELLANT

STATEMENT OF KIND OF CASE

This is an action of divorce brought by Lynn R. Preece, Plaintiff and Appellant, against Mark V. Preece, Defendant and Respondent.

DISPOSITION IN LOWER COURT

On a hearing held in the Lower Court on October 27, 1981, the Court made an oral decree granting divorce to the Appellant. That prior to signing of the final Judgment and Decree, and the Findings of Fact and Conclusions of Law in the matter, there was an intervening death of the Defendant and Respondent, and the Court subsequently allowed a filing

of a Nunc Pro Tunc Decree of Divorce by the attorney for the Respondent, making distribution of the Estate of the Intestate Defendant to be distributed by means of the Nunc Pro Tunc Decree of Divorce, rather than by probate.

RELIEF SOUGHT ON APPEAL

Appellant seeks the nullification of the Findings of Fact and Conclusions of Law, and Decree and Judgment of Divorce, by reason of the intervening death of the Defendant prior to the finalization of Findings of Fact and a signing of a final Decree of Divorce and acceptance by the Court of an agreed upon Findings of Fact and Conclusions of Law.

STATEMENT OF FACTS

The Appellant, who was the Plaintiff in the Lower Court, will be referred to in this Brief as the "Wife" and the Respondent who was the Defendant in the Lower Court, will be referred to in this Brief as "Husband" or "Decedent."

The matter was tried before the Court on October 27, 1981, following which the Court made an oral decision granting a decree of divorce to the Plaintiff, with the decree of divorce to become final upon signing of the Decree

and Judgment and the filing of the Findings of Fact and Conclusions of Law. (R-26)

On November 12, 1981, the counsel for Appellant submitted to the counsel for Respondent, the Findings of Fact, Conclusions of Law, and final form of Judgment and Decree of Divorce. (R-34)

On December 3, 1981, counsel for the Respondent rejected the Findings of Fact and Conclusions of Law made on behalf of the Appellant and advised the Appellant that unless the Findings were changed, that:

Unless I receive an objection from you within the next few days, I will file the papers with the Court and ask the Judge to strike Paragraph 9 before signing it, but I will leave it up to the Court as to whether it is left in or not.

My client has instructed me to file an appeal on the case***. (R 42)

On December 3, 1981, which is the same day as the mailing of the communication from counsel for Respondent to counsel for Appellant, set forth on R 42, the Respondent became demised. (R 24)

Subsequent to the intervening death of the Respondent, counsel for Respondent filed a Motion for a Nunc Pro Tunc Entry of Judgment on the oral verdict of the Court (R 23), which the Court granted by entering an order directing a Nunc Pro Tunc Decree Entry of Judgment on March 1, 1982, and

subscribing to said order on said date, notwithstanding the demise of the Respondent on December 3, 1981. (R 66)

ARGUMENT

POINT I.

DEATH OF PARTY IN DIVORCE ACTION PRIOR TO ACCEPTANCE OF FACTS AND AGREEMENT AS TO TERMS OF STATEMENT OF FACTS, CONCLUSIONS OF LAW AND DECREE OF DIVORCE NULLIFIES THE ISSUANCE OF SIGNED DECREE OF DIVORCE BY MEANS OF A NUNC PRO TUNC PETITION FOR JUDGMENT OF DIVORCE.

A hearing in the matter of the divorce action between the parties was held on October 27, 1981, and the Court made an oral decision stating:

The Plaintiff will be granted a Judgment and a Decree of Divorce from the Defendant; the interlocutory period will be waived, the Decree to become final upon signing. (R 26)

Counsel for Wife submitted a Findings of Fact and Conclusions of Law, together with a Decree of Divorce for approval by counsel for the Respondent, all prior to the demise of the Respondent, whose death occurred on December 3, 1981. (R 48)

The Findings of Fact and Conclusions of Law and Decree of Divorce was rejected by the counsel for the Respondent, and the counsel for the Respondent further stated that if the Court accepted the Findings of Fact and Conclusions of

Law and Decree of Divorce that the Respondent would file an appeal from same. (R 42)

The Court having stated that the oral decision would become final upon the signing of the Decree by the Court, (R 26), and there being no acceptance of the submitted Findings of Fact and Conclusions of Law and Decree of Divorce by the parties to this action, the intervening death of the Husband became dispositive of any attempt to terminate the marriage between the parties in that there was no agreed decree of divorce acceptable to the parties, particularly in view of the fact that the Respondent made known that an appeal would be taken from the judgment and verdict of the Court, if there was not a concession from the Appellant to agree to the terms of the decree demanded by the Respondent.

In State ex rel Tufton vs. Superior Court 46 Washington 395, 90 P 258, (1907), the trial judge announced that a divorce would be granted at the conclusion of the evidence and argument of counsel. However, no formal entry was made because the parties became reconciled and two (2) years later, the Plaintiff began another action for divorce against her husband which was prosecuted to a finality. Although the decree issued rested upon the causes of the same nature as recited in the earlier findings, a different

disposition was made of the property, and the Court was asked to sign the Findings of Fact and Conclusions of Law and Decree of Divorce prepared for signature in the first action. The reviewing court held that the trial judge was justified in denying an application for the entry nunc pro tunc of the divorce decree in the first action on the ground, among others, that the cause in the first action was never concluded and that no decree of divorce was ever pronounced. The Court asserted that it is the almost uniform practice to regard an oral pronouncement from the bench as merely a guide to the preparation of written findings, which, when prepared and signed, are regarded as the real findings on which the decree is based, and that the cause is still deemed pending until the formal findings of fact and decree are so prepared and signed.

In Wilson vs. Wilson, 73 Michigan 620, 41 Northwest 817, the complainant died before the divorce case was decided, but after the case was submitted for decision. The reviewing court reversed, as unlawfully rendered, a divorce decree made by the trial court relating back to a period before the plaintiff's death. The Court asserted that there can be no divorce decree after death has separated the parties and that the doctrine of relation back does not apply in such a case.

In Sahler vs. Sahler, 154 Florida 206, 17 Southern 2d 105, the Court stated that as a general rule supported by the weight of authority, a nunc pro tunc decree of divorce cannot be entered where one of the parties to the divorce action dies before the rendition of a decree, and the Court held that since no decree had been signed by the Chancellor, or finalized for record, or recorded, and not even a definite pronouncement has been made to all of the things that the final decree would contain if and when it was signed and recorded, that a nunc pro tunc decree of divorce would not be granted.

In Heil vs. Rogers 329 SW 2d 388, the Missouri Appellate Court held that a trial court, which had a divorce case under advisement at the time of the death of one of the parties, could not thereafter enter a judgment nunc pro tunc as of the date of the original submission. This is for the reason, said the court, that the cause of action in the divorce case does not survive the death of one of the parties.

In Mabry vs. Baird 203 Oklahoma 2112, 219 P 2d 234 (1950), the Court recognized the rule that a divorce action abates on the death of the party prior to rendition of a final judgment, thereby precluding the entry of a judgment nunc pro tunc thereafter.

In Berry vs. Berry 140 CAL APPELLATE 2d 50, 294 P 2d 757 (1956), the Court held that, in the absence of any claim or evidence, if the final decree was not signed, filed and entered because of "mistake, negligence, or inadvertence," as provided for by the applicable state statute that there would be no basis for the granting of a nunc pro tunc decree not based upon the stated grounds.

In the instant matter before the Court, there was no mistake, negligence, or inadvertence, but an actual and bona fide dispute as to the terms of the Findings of Fact, Conclusions of Law, and Judgment of Decree of Divorce, as submitted by the Appellant to the Respondent and seeking approval as to the form and contents of the final documents, and in fact, a specific statement by Respondent's counsel was made that an appeal would be taken if approved by the court and subscribed to as submitted by the Appellant to the Respondent.

This Court held in Daly vs. Daly 533 P 2d 884 (Supreme Court of Utah, March 1975), where a divorce action had been instituted and the divorce was not to be final until the interlocutory period of three (3) months had passed, that the demise of the spouse prior to the finalization of the decree of divorce renders ineffective any decree of the court as to divorce.

The language of the court specifically states:

At the same time we affirm the award, we hereby reverse prospectively that part of the decision in *In Re Harper's Estate*, having to do with determination of property rights, and hereby order and adjudge that when the death of one or both of the parties occurs after the entry of a divorce decree and before the decree is final, the decree becomes ineffective and is deemed and held to be of no further force or effect.

In Glad vs. Glad 567 P 2d 160 (Supreme Court of Utah, July 8, 1977), this Court held that, "timely motion setting forth objection suspends all proceedings until the court disposes of the same and that since the motion was merely stricken from the calendar and not heard on its merits, such was not a final disposition and consequently the first divorce did not, and has not as yet, become absolute."

In the instant matter before the Court, we have a disagreement and a refusal to approve the Findings of Fact, Conclusions of Law and Decree of Divorce presented by the Appellant to the Respondent and therefore, the intervening demise of the Respondent, prior to the presentation to the Court of the agreed Findings of Fact and Conclusions of Law, and prior to signing of any verdict of the Court as to Decree of Divorce, could not properly be the subject matter of a nunc pro tunc decree.

In Nelson vs. Davis 592 P 2d 594, (Supreme Court of Utah, February 1979), this Court again restated the principles announced by the Court in the case of Daly vs. Daly as being applicable, stating:

That when the death of one or both parties to a divorce action occurs during the pendency of the action, the action itself abates and their status, including their property rights, reverts to what it had been before the action was filed.

In the instant matter before the Court, it is not just a ministerial act in entering a verdict involved in the sought for nunc pro tunc decree here, in that there was obviously substantial dispute as to the terms of the Findings of Fact and Conclusions of Law and as to the Judgment and Decree of Divorce, as evidenced by the letter of counsel for Respondent and which was dated December 3, 1981, at R 42, following which was the intervening death of the Respondent. (R 24)

CONCLUSION

It is submitted to the Court that the intervening death of the spouse following the oral decision of the Court, and to be made final only upon submission of Findings of Fact, Conclusions of Law and a Decree of Divorce, could not be the proper subject of a nunc pro tunc decree following the demise of the spouse and particularly where

there was a substantial dispute as to the contents and form of the Findings of Fact, Conclusions of Law and Decree of Divorce, and there is no overwhelming equity that compels the distribution of the estate by decree of divorce rather than through the laws of intestacy relating to the estates of decedents.

RESPECTFULLY SUBMITTED this 11 day of May, 1982.

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BY 

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 11th day of May, 1982, I mailed a true and correct copy of the above and foregoing Appellant's Brief by placing same in the United States Mail postage prepaid and addressed to the following:

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