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Albert A. Cecil v. LaVera C. Cecil, Eliza C. Butterfield, and Walker Bank and Trust Co. : Reply Brief of Appellants

Utah Supreme Court

Gustin, Richards & Mattsson; Attorneys for Defendants and Appellants;

Case No. 9229

IN THE SUPREME COURT
of the
STATE OF UTAH

ALBERT A. CECIL,

Plaintiff and Respondent,

vs.

LaVERA C. CECIL, ELIZA C. BUTTERFIELD, as Guardian of the person of LaVera C. Cecil, and WALKER BANK & TRUST COMPANY, a corporation, as Guardian of the Estate of LaVera C. Cecil, an Incompetent,

Defendants and Appellants.

REPLY BRIEF OF APPELLANTS

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REPLY BRIEF OF APPELLANTS

Respondent in his brief raises new matter which is not supported by the evidence and law and to which appellants must reply.

Respondent in his argument under Point I questions the validity of the annulment proceedings claiming the same to have been obtained through fraud and collusion, and in any event, to be void on its face by reason of the

fact that the action was brought by the personal guardian rather than by one of the parties to the marriage.

POINT AND ARGUMENT

THERE IS A VALID JUDGMENT DECLARING THE MARRIAGE BETWEEN LaVERA C. CECIL AND DARWIN C. RICHARDSON TO BE NULL AND VOID.

On Page 7 of Respondent's Brief he attacks the judgment of annulment claiming that it was procured by fraud and collusion. There does not appear in the record one single element of fraud or collusion and the circumstances upon which respondent attempts to justify his conclusions support rather than discredit the action taken by the guardian of LaVera C. Cecil, Incompetent.

The attorney for the guardian of the estate of LaVera C. Cecil, after careful consideration of the circumstances, came to the conclusion from a factual and legal standpoint that it was in the best interest of his client that an annulment should be secured (R. 87-88). Mrs. Cecil, through her guardian, brought the action for annulment upon proceedings duly and regularly had, securing from Darwin C. Richardson a consent and waiver which is customary in such cases. At the time of the hearing on the annulment LaVera C. Cecil, an Incompetent, Eliza C. Butterfield, her guardian, and their attorney, appeared in Court, Civil Case No. 121299.

As Conservator of LaVera C. Cecil's estate it became the duty of Eliza C. Butterfield, as guardian, to bring an action to determine the validity of the marriage.

Such action was the only proper mode of procedure. *Fourth National Bank v. Diver,* (Kansas) 289 P. 446.

Respondent next claims that the annulment proceeding is void on its face in that the action was brought by the personal guardian rather than by one of the parties to the marriage. The annulment proceeding is entitled "LaVera C. Cecil, also known as LaVera C. Richardson, an Incompetent, by her Guardian, Eliza C. Butterfield, plaintiff, vs. Darwin C. Richardson, defendant."

Rule 17 (b) Utah Rules of Civil Procedure provides as follows:

> "INFANTS OR INCOMPETENT PERSONS. When an infant or an insane or incompetent person is a party, he must appear either by his general guardian, or by a guardian ad litem appointed in the particular case by the court in which the action is pending. A guardian ad litem may be appointed in any case when it is deemed by the court in which the action or proceeding is prosecuted, expedient to represent the infant, insane or incompetent person in the action or proceeding, notwithstanding he may have a general guardian and may have appeared by him. In an action in rem it shall not be necessary to appoint a guardian ad litem for any unknown party who might be an infant or an incompetent person."

The authorities cited by respondent are inconsistent with the above rule and set forth the minority rule. It is held in the majority of cases that a guardian of an incompetent may bring an action to annul the marriage. 70 *A.L.R.* 965, *Fourth National Bank v. Diver,* supra.

In the *Diver* case the language "when *either of the parties* to a marriage shall be incapable" was relied upon by respondent to support his theory that the guardian had no authority to institute an action to annul a marriage. This language is substantially the same as that language relied upon by the respondent herein. In discussing the right of a guardian to bring an action to annul a marriage, the Court states in the *Diver* case as follows:

> "The appellant contends that the guardian had no authority to institute this action because the Legislature has given no specific authority for a guardian to bring such an action, and further contends that the action cannot be revived in the name of the executor or trustee. Appellant urges that an action to annul a marriage must be brought by one of the parties to the marital contract. In support of this he cites R.S. 60—1515, which provides: '*When either of the parties to a marriage shall be incapable, from want of age or* understanding, of contracting such marriage, the same may be declared void by the district court, in an action brought by the incapable party; but the children of such a marriage, begotten before the same is annulled, shall be legitimate. Cohabitation after such incapacity ceases shall be sufficient defense to any such action.'
>
> The appellant urges that only the incapable party could bring the action—that inasmuch as Diver did not take any affirmative step to annul the marriage during his lifetime, and he has since died, the marriage cannot be impeached or attacked and is made valid from the beginning.
>
> It is impossible to conceive how an incapable party could elect to bring an action to declare a

> marriage invalid. In Birdzell v. Birdzell, 33 Kan. 433, 6 P. 561, 52 Am. Rep. 539, Justice Valentine very aptly said: 'Marriage is a personal status. * * * It cannot be dissolved or abrogated except with the voluntary consent of such insane person, and such insane person is incapable of giving any consent to such a dissolution or abrogation. How could a guardian conduct the mind of his insane ward through the ceremony that would make him or her a husband or wife, or how could he conduct such mind through a litigation that would undo the marriage relation? * * * The injured party may be willing to condone the wrong, or, for reasons satisfactory to himself or herself, may desire to continue the marriage relation, notwithstanding the wrong. * * * Whether a party who is entitled to a divorce shall commence proceedings to procure the same or not is a personal matter resting solely with the injured party, and it requires an intelligent election on the part of such party to commence the proceedings, and such an election cannot be had from an insane person.' Pages 435, 436, of 33 Kan., 6 P. 561." (Emphasis added)

CONCLUSION

We respectfully submit that the judgment of the lower court should be reversed and remanded as previously requested.

Respectfully submitted,

GUSTIN, RICHARDS & MATTSSON

Attorneys for Defendants and Appellants