1961

Albert A. Cecil v. LaVera C. Cecil, Eliza C. Butterfield, and Walker Bank and Trust Co. : Brief of Respondent on Petition for Rehearing

Utah Supreme Court

Romney, Boyer and Ronnow; Attorneys for Plaintiff and Respondent;

IN THE SUPREME COURT
of the
STATE OF UTAH

ALBERT A. CECIL,

Plaintiff and Respondent,

-v-

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.

Case No. 9229

RESPONDENT'S BRIEF ON PETITION FOR REHEARING

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COMES NOW, ALBERT A. CECIL, respondent herein, and respectfully moves the Court for a rehearing in the case upon the grounds set forth herein.

STATEMENTS OF FACTS

The facts in the case have been rather completely set forth in the original briefs of the parties and in the opinion of the Court filed October 27, 1960. Any new facts alluded to herein will be stated in connection with the argument.

STATEMENT OF POINT RELIED ON

POINT 1

THE MARRIAGE OF LaVERA C. CECIL TO DARWIN C. RICHARDSON IS A CHANGED CIRUMSTANCE REQUIRING MODIFICATION OF THE DECREE OF DIVORCE TO RELIEVE RESPONDENT FROM THE OBLIGATION TO PAY ALIMONY.

ARGUMENT

POINT I

THE MARRIAGE OF LaVERA C. CECIL TO DARWIN C. RICHARDSON IS A CHANGED CIRUMSTANCE REQUIRING MODIFICATION OF THE DECREE OF DIVORCE TO RELIEVE RESPONDENT FROM THE OBLIGATION TO PAY ALIMONY.

In its opinion rendered herein the Court has held there was not a sufficient showing of "changed circumstances" to justify the modification of the divorce decree. This point was not tried to the Court below nor did it appear in the briefs or arguments on appeal. But if

the point may be considered as being implicit in the case as it is now before the Court, we respectfully submit the Court's conclusion in regard to said "changed circumstances" is against the weight of judicial authority and does not rest on sound principle. We believe that changed circumstances clearly obtain in the case, as will be shown herein.

Apparently the compelling reason for the Court's decision is its desire to preserve a right of support for Mrs. Cecil, for on page 2 of the "green sheet" appears the following:

> "The courts appear to have been greatly influenced by a public policy of insuring to a wife a legal right to support."

Public policy does not demand, nor is it the obligation of this Court, to preserve for LaVera C. Cecil that which she voluntarily abandoned and renounced. She entered into a marriage with Richardson and thereby under the law set down by this Court in *Austad v. Austad*, 2 Ut. 2, 49, 269 P 2d 284, *legally renounced her right of support from Respondent,* and clearly *acquired a right of support from Richardson.* The record is clear that Mrs. Cecil, prior to the marriage, reviewed the financial status of Richardson, his work record and his pension (R. 51, 52). It must be remembered that the Trial Court in this case made a finding of fact that LaVera C. Cecil was mentally competent to enter into the marriage with Richardson (R. 100), and in this

finding we are persuaded this Court concurs. Thus, by marrying Richardson, she made an intelligent and affirmative election to look to him rather than to Respondent for support, both as a matter of fact and as a legal result. This is not a case where the wife acquired no right to support from the second husband because the marriage was void or was "no valid marriage" as the opinion recites. This marriage was at worst only voidable, not void, as shown at pages 10 and 11 in our original brief on appeal. And as indicated in the Court's opinion on page one of the "green sheet" and as testified to by her counsel, Mr. Richards (R. 82) she could have obtained a divorce from Richardson.

Clearly, the right to obtain a divorce includes a claim for support; and implicit in a divorce situation is the concept that the marriage was not a void one, merely voidable.

Under facts as here the Courts in well considered cases have refused to revive an obligation of alimony or support against the former husband under the concept that it is the voluntary act of the wife, affirmatively choosing the new husband as her source of support and entering into the marriage ceremony with him, and not whether the marriage so chosen turns out to be good, bad or indifferent as to economics or actual validity.

This is particularly true where, as here, the alimony award was based upon a property settlement or separation agreement.

Thus in *Sefton v. Sefton,* 279 P 2d 576, a California case:

> "It is the fact of the ceremonial remarriage that is in the minds of the parties and causes the payments to cease under the property settlement agreement. An annulment of the remarriage by thewife can not give new life to the husband's obligation which has terminated by the remarriage. In some cases it is months or even years before an annulment of the remarriage is sought by the wife, ~~can not give new life to the husband's~~ husband's obligation of support under such an agreement can be reinstated at the whim of the wife and at a time to be set by her?"

it reasonable say that the

and in the case of *Gaines v. Jacobsen,* 308 N.Y. 218, 124 NE 2d 290, the court said:

> "It was certainly unlikely that the parties intended the result to turn upon whether an unsuccessful remarriage was deemed in law void, as the present one, or voidable and valid until dissolved by a decree of divorce, but that the understanding must have been that, upon the wife's remarriage, the husband could regard himself as free of the duty to support her. The fact that the wife, because of the death of her second husband, was no longer in a position to obtain alimony from him was held immaterial, since the wife could not retain both husbands as sources of support, and, havnig made her choice, was bound by it."
>
> "Having remarried, *she chose to abandon her right to support from defendant in favor of Harragan.* Plaintiff could not retain both husbands

> as sources of support; *having made her choice she is bound by it;* although subsequent events proved it to have been an improvident one." (emphasis ours)

These two cases involve agreements of the parties adopted by the Court in the divorce decree, as in the instant case. The agreements in the two cases contained wording that alimony would cease upon remarriage of the wife which the agreement of the instant case does not contain, but the effect is the same: 48 A.L.R. 2 p. 322 Sec. 6(a):

> "While there is but little direct authority in point, the cases as a whole support the view that, unless a contrary intention is expressed in the agreement, the wife's remarriage terminates the husband's obligation to support her, under a separation agreement which *is silent on the question of the wife's re-marriage.*" (emphasis ours)

and the point is emphasized in the case of *Spatz v Spatz,* 171 N.Y.S. 2nd 157, 1958, in a situation where the provision regarding remarriage was omitted; the Court said:

> "It is true that the word "remarriage" is omitted physically from the provisions of paragraph "3.(a)" of the separation agreement made November 25, 1949 by the parties hereto. Admittedly, the aforesaid agreement could have been more precise in its terminology. Nevertheless, in the Court's opinion, not only the provisions of law but the public policy of the State are inherent parts of and are read into any agreement

made in this forum. It is a fact that, upon proof of a wife's remarriage, the Court must modify the judgment by deleting the provisions for the wife's support."

Two very recent cases on the general point contended for herein by Respondent are *Spatz v. Spatz,* supra, and *Gevis v. Gevis,* 147 N. Y. S. 2d 489, 1955. *Spatz* in holding that the annulment of a subsequent marriage by the wife did not revive former husband's obligation to pay alimony under a settlement agreement, said:

"The law does not countenance support for a spouse from two persons, each of whom, so far as the economic status is concerned may be deemed in the category of "husbands".

"Plaintiff-wife having remarried, must be held to have looked exclusively to her new husband Lerman for whatever support and maintenance she was entitled to. She could not, by that fact, "lay the financial and economic provisions of the separation at repose," for the "duration of the new marriage"; and if the remarriage were unsuccessful for any reason whatsoever or were otherwise abrogated, to then bring out of the mothballs and revive the agreement to support a former wife."

"It must not be overlooked that in the instant case the parties' marital status was abrogated by a decree of divorce, and no one could validly claim that the instant agreement *would be revived if the plaintiff's* remarriage had ended *in a divorce* rather than *in an annulment.*" (emphasis ours)

In the *Gevis* case cited above, the wife's second marriage was annulled on grounds of her misrepresentation, and she sought to revive former husband's alimony payments. The court said:

> "The question presented is whether, in the circumstances here, plaintiff may rely to any extent upon the principle that the declaration of invalidity of a voidable marriage serves to revive the obligation of the defendant under the decree of divorce as though the second marriage never existed."

The Court, in holding that she could not revive the obligation of the former husband, said:

> "Not alone is defendant a stranger to the controversy resulting in the annulment, but plaintiff by her own act contributed to the decree which destroyed her second marriage. It was by her own fault that the marriage, which relieved defendant of his obligation, was effaced. Defendant was still a stranger to the controversy when he remarried, and it is likewise by her own fault that plaintiff seeks now to cast upon defendant a burden larger than fixed by the decree of divorce. Injustice would arise if the rescission were now used to change the quality of defendant's act of remarriage done in reliance upon the decree of divorce and plaintiff's remarriage."

The Court quoted from *Gaines v. Jacobsen,* supra:

> "It makes neither sense nor reason nor is it good policy that the husband should stand ever ready to support the wife, insuring her mainten-

> ance should she, with full knowledge of the facts, but confused or misled by the vagaries of matrimonial law, discard or be discarded by a second husband because of legal infirmities in the remarriage."

and said finally:

> "It would seem to follow, therefore, that plaintiff's remarriage was voidable by her own act and knowledge and she ought not to be granted the benefit of rescission after defendant, a stranger to all the intervening acts, remarried in reliance thereon."

Counsel for Appellants will point out that New York (the forum of *Gevis* and *Spatz*) has a statute allowing for an alimony or support award in annulment cases. While this is true the *Gevis* case clearly was not decided on that point because immediately following the last statement of the Court in *Gevis* in the next above indented paragraph, the Court says:

> "There is another ground for refusal of support under the divorce decree."

and then adverts to the statute.

A fortiori, in the case at bar where a divorce could have been had, such divorce would have supplied to LaVera Cecil precisely what the New York statute provides were she in that jurisdiction.

The Court in its opinion says "it did not appear from the records that he (Richardson) ever supported

her." We simply cannot in the absence of record let our imaginations supply the fact that Richardson did not, or could not, support her. It is clear from the record that Mrs. Cecil reviewed the financial condition of Mr. Richardson prior to marrying him, and we must assume that she found it favorable, and she is deemed to know the effect of her act, which would be that in marrying Richardson she was forsaking and losing the support of Cecil.

CONCLUSION

The changed circumstances required for an affirmation of the judgment reside in LaVera Cecil's affirmative, deliberate and considered act in forsaking Cecil's support for that of Richardson, by marrying Richardson. Thus, as a matter of fact she changed both her and Respondent's circumstances and as the law gives her a right to support from Richardson, she may not with impunity leave Richardson now and turn again to Cecil. Her marriage was not void. It has only been annulled upon her misrepresentation to the Court that she was incompetent, and at most was voidable.

The Court should render its opinion that the judgment of the Trial Court is affirmed for the reasons set forth herein, or, in the alternative, should remand the case to the Trial Court for additional findings with

respect to changed circumstances based upon the record or upon further evidence to be taken.

Respectfully submitted,

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