1991

Verla H. Carter v. Gerald W. Carter : Brief of Appellant

Utah Supreme Court

Dave Mcmullin; Attorney for Plaintiff.
Patrick H. Fenton; Attorney for Defendant.

IN THE SUPREME COURT OF THE STATE OF UTAH

VERLA H. CARTER,

Plaintiff and Respondent,

vs.) Case No. 14554

GERALD W. CARTER,)

Defendant and Appellant.)

APPELLANT'S BRIEF

ON APPEAL FROM THE DISTRICT COURT OF THE FIFTH
JUDICIAL DISTRICT OF THE STATE OF UTAH,
IN AND FOR JUAB COUNTY

HONORABLE J. HARLAN BURNS, Judge

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IN THE SUPREME COURT

OF THE STATE OF UTAH

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APPELLANT'S BRIEF

STATEMENT OF THE KIND OF CASE

This is a brief on the refusal of the Court to exercise its discretion and modify an existing Decree of Divorce.

DISPOSITION IN THE LOWER COURT

This item arose in Juab County, Utah. Prior to the divorce, the parties had accumulated considerable properties in Levan area of Juab County, Utah. In addition, the defendant and appellant was a construction worker and had tremendous income producing capacities. A Decree of Divorce was entered on or about the 12th of June, 1973,

which, among other things, awarded the plaintiff $200.00 per month alimony, the home of the parties in Levan, Utah, considerable farming property and other property in the Levan area. In the due course of events, a Petition to Modify the Decree of Divorce to reduce the alimony was filed before the above entitled court, the defendant and appellant alleging change of circumstances. Primarily the hearing on 14 January, 1976, is the controlling item in this matter, and as a result thereof, the trial Judge refused to modify the Decree of Divorce.

RELIEF SOUGHT ON APPEAL

The reversal of Judge Burns' Order refusing to modify the Interlocutory Decree of Divorce and the alimony provisions therein.

STATEMENT OF FACTS

At the time of the divorce, defendant was an able-bodied man, and in addition to the property accumulations that the trial Court disposed of at the time of the divorce, had a tremendous earning capacity of approximately $21,000.00. At the time of the hearing on the modification, defendant had

remarried, and his earning capacity was approximately one-half of the amount at the time of the divorce.

ARGUMENT

POINT I.

THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO MODIFY SAID DECREE OF DIVORCE.

There is no question this comes under the provisions of Utah Code Annotated, 1953, as amended, being provided for by Section 30-3-5 of same, allowing the trial Court to keep jurisdiction to make modifications wherever they might be proper.

While there were considerable arguments and a great deal of court hearings back and forth about properties, violations of each others property rights awarded by the Court at the time of the divorce and items of this nature, these hearings were based primarily upon putting into effect the Court's Decree and differences in opinion as to how this should be done and whether the parties had correctly interpreted the Decree and taken the property. At the time of the divorce the plaintiff and respondent was awarded the home in Juab County, Utah, and, in the opinion of the undersigned, a more than equitable share of the property that had

been accumulated there. At the time of the divorce in addition to the property items and items of this nature, the income of which was later denied to the appellant by giving the properties to the respondent, the appellant was also steadily employed in construction work and making $21,000.00 a year. (See transcript of 14 January, 1976, page 33, line 11) This is uncontested. In addition, at the time of the hearing for modification, the properties that had previously been awarded to the plaintiff were capable of producing in excess of $2,000.00 a month properly operated. (See transcript of 14 January, 1976, page 32, line 21.) This is over and above the home and various other things that had been provided for the plaintiff. At the time of the hearing for modification, to-wit, 14 January, 1976, the defendant and appellant was on unemployment, and the construction type work he had been doing was no longer available. He had been laid off by Utah International in Cedar City, Utah. However, he had made the mistake of remarrying a girl that in Cedar City, Utah was locally termed as an heiress. There had been hearings on other items pertaining to the estate from which the defendant's present wife was to inherit from that colored the Judge's thinking in this particular matter. The same Judge having

set in Iron County on the estate items and now setting in Juab County on the divorce and modification item. In addition to remarrying and taking on other obligations, the primary purpose for the modification was the reduction in income. Although drawing unemployment at the time of the hearing, the defendant at that time was employed by Utah International at the Cedar City Iron Mines, and his anticipation of employment was between ten and twelve thousand dollars per year when fully employed, without consideration of the layoffs. (See transcript of 14 January, 1976, page 33, line 27) It was the appellant's thinking that under these conditions his income had been reduced to better than half and he asked for modification of the Decree of Divorce and the alimony provisions therein by half. This was refused by the trial Court.

There is no question this was an abuse of discretion. The only reason that can possibly be attributed to the failure of this nature to consider, bearing in mind that the divorce decree itself had made a wealthy woman out of the plaintiff, provided her with considerable income property in addition to the home and items of this nature, and in addition to this the plaintiff was producing income from work in the Juab County area,

the only consideration that can be given is the trial Court erred in failing to consider these items. This is especially true when one considers that the trial Court admittedly considered items not presented in evidence. In this particular case, the defendant having testified at the time of the hearing on modification that he was under a doctor's supervision and that many types of construction equipment he could no longer ride. He was limited to welding and repair work and things of this nature. (See transcript 14 January, 1976, page 34, line 6 to page 35, line 24) Although the back injury was ancient, it had not been bothering him at the time of the divorce, but at the time of the hearing of the modification was active and work was limited pursuant to doctor's orders.

Under these conditions, there can be no question that the trial Court failed to give consideration to the testimony as it was presented, and there is no question that there was a substantial change in conditions. At any time any person has their income reduced from $21,000.00 a year to ten to twelve thousand dollars a year, takes on additional obligations, has health problems that limit the type of work they can do, there is a substantial change in conditions. Also, it is common knowledge that if anyone

rides construction equipment long enough, they are going to have back troubles that will impair them the later portion of their life and impair their incapacities.

POINT II.

THE TRIAL COURT CONSIDERED INFORMATION AVAILABLE TO THE TRIAL COURT IN ANOTHER HEARING AND NOT PRESENTED IN THIS HEARING.

It has always been the understanding of the undersigned in very limited and severely curtailed law practice in the State of Utah that juries and courts were limited to considering as evidence only the things presented. The undersigned has some faint memory of having heard the Honorable J. Harlan Burns, who was judge on this item, instruct juries to the effect that they consider nothing not presented in the courtroom. There had been considerable proceedings in Iron County, Utah, before the Honorable J. Harlan Burns prior to the hearing for modification of Decree of Divorce in the matter of the estate of George W. Hunter, deceased, pertaining to cattle operations and items of this nature, where the defendant, Gerald W. Carter, had testified as to possible operations for cattle, lease operations that he might be

interested in and items of this nature. The present Mrs. Carter, one of the heirs in that estate, had a local reputation of having received considerable property thereby. In the opinion of the undersigned, the present plaintiff, Verla H. Carter, together with her present attorney, Dave McMullin, considered bringing an alienation of affections suit against the present Mrs. Gerald W. Carter, and in one instance the undersigned was so advised by Dave McMullin. It stands to reason that there was considerable local gossip about the defendant in the instant case marrying an heiress, both in Iron County and Juab County.

There is no question that in refusing to modify the Decree of Divorce, the trial Court considered evidence from outside the courtroom, and very honestly immediately made a disclosure to both counsel of same. See transcript 14 January, 1976, page 50, line 9 to line 22, which is as follows:

> "THE COURT: Mr Fenton, Mr. McMullin, before you go further and since it is part of the Court's ruling in this matter and counsel for each of the parties are entitled to know the basis of the Court's ruling, in addition to the testimony heretofore heard in this matter and heard today in this matter the Court is not unmindful of the testimony of this defendant that he was capable physically and qualified to run cattle and lease property and operate a ranch operation in the

other matter the Court referred to pending in Iron County. Frankly, this Court, and I would assume any other court cannot divorce entirely testimony heard in other matters bearing directly upon the same type issues and you are entitled to that being in the record and the record so reflects."

CONCLUSION

This item should be remanded back to the trial Court with orders to grant the Petition for Modification and cut the alimony in two, pursuant to the original Petition for Modification.

Respectfully submitted,

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Attorney for Defendant
and Appellant