

1967

Wanda Carter v. Ercil v. Carter : Respondent's Brief

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**In the Supreme Court of the
State of Utah**

WANDA CARTER,
Plaintiff and Respondent,

vs.

ERCIL V. CARTER,
Defendant and Appellant.

RESPONDENT'S

Appeal from Order of the Fourth Justice of the Peace,
Utah County, State of Utah,
The Honorable Allen B. Spencer, Judge.

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Ch. J.

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In the Supreme Court of the State of Utah

WANDA CARTER,
Plaintiff and Respondent,

vs.

ERCIL V. CARTER,
Defendant and Appellant.

**CASE
NO. 10751**

RESPONDENT'S BRIEF

STATEMENT OF KIND OF CASE

This is an action by the plaintiff, praying for an Order authorizing sale of the home belonging to the plaintiff, or in the alternative that the Order Modifying the Decree be modified to the effect that the home be awarded to the plaintiff free and clear so that the plaintiff may sell her home at her own discretion.

DISPOSITION IN LOWER COURT

Plaintiff made a motion to the Court on June 14, 1965, petitioning the Court to authorize the sale of the home and the property in question and in the alternative to have

the Order Modifying the Decree further to be modified to provide that the home be awarded to the plaintiff free and clear, so that the plaintiff may sell her home at her own discretion. The Court on the 13th day of October, 1966, denied plaintiff's motion.

RELIEF SOUGHT ON APPEAL

The appellant seeks a decision setting aside minute entry of December the 27th, 1966, and the order denying all motions dated the 13th day of October, 1966, and to have the Supreme Court of the State of Utah interpret the Findings of Fact and Conclusions of Law, and Decree entered the 14th day of March, 1949, and the Findings of Fact and Conclusions of Law, and the Order Modifying Decree entered the 24th day of May, 1964, to the effect that the property in question was awarded to the plaintiff as her sole and separate property and that this Court remands to the Lower Court this case with instructions to quiet the title to the home in question in the plaintiff.

STATEMENT OF FACTS

The District Court of Utah County awarded the plaintiff an Interlocutory Decree of Divorce on March the 14th, 1949. The Conclusions of Law set out the following:

"That the plaintiff be awarded the exclusive and occupancy of the home and lot owned by the plaintiff, and defendant, as the home for herself and said minor children, together with all furniture and furnishings now in said home, and that the defendant be required to pay all taxes assessed thereon and pay the same, when the same shall become due and payable."

It is stated in Paragraph 4 of the Decree issued in 1949, that

"The plaintiff is hereby awarded the house and lot in which she now resides and in which plaintiff and defendant and their children have been residing for the use and occupancy of said plaintiff, and said minor children; said plaintiff not to sell said place without the consent of this Court and agreement of plaintiff and defendant. It is further ordered that the defendant maintain the payments due and to become due on the debt on said place amounting to \$31.90, per month, until said debt is paid in full. The defendant is further ordered to furnish the plaintiff a suitable washing machine, or to continue the payments on washing machine now being purchased by the parties hereto. The defendant is further ordered to pay all taxes due or which may hereinafter due on said place at the time said taxes become due and payable."

The parties shortly after the decree issued in 1949, resumed living together and a child was born by the name of Cory on April the 16th, 1951.

The parties separated again in January, 1964, as a result of excessive drinking and physical beatings by the defendant. The parties on the 8th day of May, 1964, appeared before the District Court of Utah County, and stipulated in Open Court, that the Interlocutory Decree of March 14th, 1949, be modified. That the Findings of Fact, and Conclusions of Law, and Order Modifying Decree was signed and filed on May 29th, 1964. Said modification covered the property rights, alimony, support money of the parties and that part concerning the home are as follows:

In the Findings of Fact

3. "That the defendant has in fact molested the plaintiff and disturbs her in the use and enjoyment of her present home."
4. "That the defendant has been and is living in the home of the parties which has been previously awarded to the plaintiff herein."

In the Conclusions of Law, it is stated: that

1. (c) "That the defendant should vacate the home of the parties which is located approximately at 1891 West 600 South, street, in Provo, Utah. Which has been previously awarded to the plaintiff as her sole and separate property and in which the defendant has been residing in."

- (d) "The plaintiff should have the household furnishings, supplies, except for the tools and personal affects of the defendant herein, for her own use and enjoyment together with the house of the parties herein as previously awarded to her under the existing decree of divorce."

In the Order Modifying Decree it is stated:

1. "That the defendant, Ercil V. Carter, is hereby restrained and enjoined from molesting and interfering with the plaintiff, or her person at anytime together with her reasonable use and enjoyment of the home in which she lives, including the residence of the parties which has heretofore been awarded to the plaintiff located at 1891 West 600 South, Provo, Utah."

2. "That the defendant is hereby ordered to vacate the residence and property of the parties which was heretofore awarded to the plaintiff and located 1891

West 600 South Street, Provo, Utah, and that the plaintiff herein shall have a peaceful use and possession of said residence together with the household furnishings and supplies located in said house, except for the personal tools and effects of the defendant herein."

In both the Findings of Fact, and Conclusions of Law and the Order Modifying Decree it states:

"Plaintiff appearing in person and represented by Thomas S. Taylor, of the Firm of Christensen, Poulsen and Taylor. Defendant appearing in person and was represented by Jackson B. Howard of the firm of Howard and Lewis. The parties appeared in Open Court and stipulated that the decree of divorce heretofore entered should be modified."

The parties reconciled shortly after the divorce on March the 14th, 1949, but the defendant refused to remarry stating that "He did not want to get involved with attorneys' and legal action ever again." Plaintiffs' affidavit paragraph (1).)

Plaintiff in her affidavit set forth that she put her own money into the repair and improvement of the home and worked from the year 1956 until June of 1965, and put her money into the home while the defendant drank excessively and partied spending his money. (Paragraph (3) plaintiffs' affidavit.) That after the year 1956, a room and porch on the back of the home was added and the gas furnace was installed. (Paragraph (4) plaintiffs' affidavit.) Plaintiff advanced the sum of \$360.00, dollars, plus interest for the sewer line connection, advanced the sum of \$375.00, dollars, plus interest, to have the sewer line run into the home, and paid taxes on the home for the year 1964 and

1965, in the sum of \$275.00, dollars. She further installed door hooks and locks which the defendant had removed from the home. The defendant made statements that it was the plaintiffs' obligation to pay said taxes, make such improvements inasmuch as it was her home. (Paragraph 6, Plaintiffs' affidavit.)

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN FAILURE TO GRANT PLAINTIFF'S MOTION AUTHORIZING SALE OF SAID HOME OR IN THE ALTERNATIVE THAT THE ORDER MODIFYING THE DECREE BE MODIFIED TO PROVIDE THAT THE HOME BE AWARDED TO THE PLAINTIFF FREE AND CLEAR IN ORDER THAT THE PLAINTIFF MAY SELL THE HOME AT HER OWN DISCRETION.

This appeal comes to this Court not upon any record but only upon the pleadings. There has been no transcript prepared by the Court Reporter.

It appears to the respondent that the question before this Court is interpretation of the original Findings of Fact and Conclusions of Law, and Decree entered on the 14th day of March 1949, and the Findings of Fact and Conclusions of Law, and the Order Modifying Decree entered on the 29th day of May, 1964. Only from the interpretation of these findings and decrees can this Court decide which party the home belongs to.

It is stated in paragraph 4 of the decree issued in 1949 that:

"THE plaintiff is hereby awarded the house and lot in which she now resides, in which plaintiff and children have been residing, for the use and occupancy of said plaintiff and said minor children, said plaintiff not to sell said place without the consent of this Court and agreement of plaintiff and defendant. It is further ordered that the defendant maintain the payments due and to become due on the debt on said place, amounting to \$31.94 per month until said debt is paid in full. Defendant is further ordered to pay all taxes due or which will hereafter become due on said place at the time said taxes become due and payable."

The Court uses the words "The plaintiff is hereby awarded the house and lot in which she now resides." The Court would not allow her to sell said place without the consent of this Court and consent of the agreement of the plaintiff and the defendant. The purpose of this clause was that the Court did not want her to sell the home so that there was a prohibition against the plaintiff in selling the home and dissipating the proceeds from the sale of the home.

The words "that without the consent of the defendant," has no meaning because the Court has the power to allow the sale of the home by the plaintiff, without the consent of the defendant.

In the Conclusions of Law paragraph (c) filed May 29th, 1964, it states the following:

"That the defendant should vacate the home of the parties which is located at approximately 1891 West 600 South Street in Provo, Utah, which has been previously awarded to the plaintiff as her sole and separate property, and in which the defendant has been residing in."

Here again the Court uses the words "which has been previously awarded to the plaintiff as her sole and separate property."

In paragraph 1 and 2 of May 29, 1964 Order Modifying Decree the Court has the following:

"That the defendant, Ercil V. Carter, is hereby restrained and enjoined from molesting and interfering with the plaintiff or her person at any time together with her reasonable use and enjoyment of the home in which she lives including the residence of the parties which has heretofore been awarded to the plaintiff located at 1891 West 600 South, Provo, Utah."

"That the defendant is hereby ordered to vacate the residence and property of the parties which was heretofore awarded to the plaintiff."

One may search the Findings and Decrees and nowhere does it state that the defendant has any interest whatsoever in the real property in question and it constantly states that the home has been awarded to the plaintiff herein.

Blacks' Law, third edition, has this to say concerning the definition of the award:

"To grant, concede or adjudge. To give or sign by sentence or judicial determination."

Volume 4, Words and Phrases, page 897-8 has this to say concerning the definition of award:

"An award is a judgment formed and pronounced." Hoff vs: Taylor 2 South 829.

"An award is a final judgment both at law and in equity, and cannot be classed with contracts, sealed or unsealed." Olston vs: Oregon Power and Railroad Co. 97 p 538.

What was the intent of the parties?

In paragraph 2 of the plaintiff's affidavit, the plaintiff states that the intent of the parties was that the home was awarded to her.

The intent of the parties appears to be clear that the home belongs to the plaintiff because of the fact that the parties stipulated on the 8th day of May 1964, that the property had heretofore been awarded to the plaintiff as her sole and separate property. This is shown both by the Findings of Fact and Conclusions of Law and the Order Modifying the Decree.

It is further shown by the actions of the defendant herein whereby he has refused to pay the taxes for the years 1964 and 1965 and which he was ordered to do, under the original Decree of Divorce on the 14th day of March, 1949. Defendant has since the parties separated the last time, refused to pay for any improvements upon home such as improvements for the sewer, for the hook-up charge and the installations coming to the sum of \$735.00, dollars.

The stipulation by the parties on the 8th day of May 1964, which was later approved has not been objected to and no objection had been filed. Under rule 60 B Utah Rules of Civil Procedure,

"A motion to set aside any final judgmental order must be made within three (3) months after the judgment, order or proceedings was entered or taken."

The defendant has waited nineteen (19) months before bringing this matter to the Court claiming an interest in the real property.

The defendant to this day has not contended that his stipulation was a mistake on May 8th, 1964, and as such is bound by his stipulation. 50 Am. Jurisprudence page 610 states the following:

"Subject to the conditions and limitations respecting the subject matter and compliance with statutory requisites or rules of Court, and to the rights in respect to withdrawal or relief, stipulations made by parties to Judicial proceedings or by their attorneys within the scope of their authority are binding upon those who make them and those whom they lawfully represent and also upon the trial and Appellant Court, and in the absence of any valid ground or reason for refusing enforcement. They cannot be contradicted by evidence trying to show the facts to be otherwise. On appeal neither party will be heard to suggest the facts were other than stipulated, or that any material facts were omitted. A stipulation is not effective however, beyond the subject which it covers."

The plaintiff has worked and by her affidavit states that the money she earned went into the improvement of the home rather than the money of the defendant. The plaintiff claims that the defendant stayed in the home from at least 1950 until 1964, a period of fifteen (15) years and that he refused to get remarried and any money that he did contribute was nothing but rent for the fifteen years he lived in the home.

The parties in their stipulation to the modification of the original Decree of Divorce, settled their property differences, alimony and support money for the last child. The defendant herein wants to enjoy the benefits of the

Order Modifying the Decree but does not want to be bound by those parts that are not to his advantage.

The defendant in his brief, page 7, argues that the plaintiff was awarded the home and use of the home for the rearing and upbringing of the minor children. That the proceeds of the property would later be divided between the parties when the home was no longer necessary for the rearing of the children. The plaintiff has remarried but the child Corey is still of the age of 15 years and still a minor and is in the need of a home whether it be the one in question or other one. Appellant's argument is without merit.

CONCLUSION

That a proper interpretation of the various Conclusions of Law, and decrees entered into in this matter shows that the property was awarded to the plaintiff and nowhere does it show in any of the findings and decrees that the defendant had any interest whatsoever in the said property.

The plaintiff-respondent respectfully urges the Court to grant to the plaintiff the right to sell the home, and in the alternative that the Order Modifying the Decree be modified to provide that the home be awarded to the plaintiff free and clear, in order that the plaintiff may sell the same at her own discretion. That the case be remanded to the lower court quieting title to the property in the name of the plaintiff.

Respectfully submitted,
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