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Morris L. Peters v. Virginia S. Peters : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
OF THE
STATE OF UTAH E D

MORRIS L. PETERS,

Plaintiff — Appellant,

— vs —

VIRGINIA S. PETERS,

Defendant — Respondent.

APR 16 1964

Clerk, Supreme Court, Utah

Case No. 10059

BRIEF OF APPELLANT

Appeal From the Judgment of the
Second Judicial District Court for Weber County
Hon. Parley Norseth

UNIVERSITY OF UTAH

JUN 30 1964

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IN THE SUPREME COURT OF THE STATE OF UTAH

MORRIS L. PETERS,
Plaintiff — Appellant,

— vs —

VIRGINIA S. PETERS,
Defendant — Respondent.

Case No. 10059

BRIEF OF APPELLANT

STATEMENT OF NATURE OF THE CASE

The appellant has appealed from a decision of the Honorable Parley E. Norseth, Judge, Second Judicial District, Weber County, denying the appellant's complaint for divorce from the respondent, granting the respondent a divorce on her counterclaim, and awarding the respondent the sum of \$2,500.00, lump sum in lieu of alimony.

DISPOSITION IN LOWER COURT

On October 28, 1963, the appellant filed a complaint for divorce against the respondent in the District Court of Weber County (R-2). On the same day an order to show cause and temporary restraining order were also issued and served (R-3, 13, 14). On October 30, 1963, the respondent filed an Answer and Counterclaim (R-4), a motion to vacate the restraining order (R-6) and an affidavit of prejudice (R-7). On November 1, 1963, the appellant

filed his reply to the respondent's counterclaim (R-8). On November 4, 1963, the case was referred to Judge Norseth's Court (R-9). Judge Norseth allowed the respondent to remain in the home with the appellant and set a special hearing on the merits for November 13, 1963 (R-10). On November 5, 1963, the respondent filed an "amended" Answer and Counterclaim (R-11). Trial was had on 13 November, 1963 (R-14). On January 3, 1964, Findings of Fact, Conclusions of Law and a Decree awarding respondent a divorce and \$2,500.00 lump sum in lieu of alimony was entered by the Court (R-21, 22). The Court also awarded the appellant real estate "now standing in the joint names of the parties" (R-22). On January 31, 1964, the appellant filed his notice and designation of record to this Court (R-31, 32). Thereafter, on February 5, 1964, after appeal of this case respondent petitioned the trial court for appeal costs, attorney's fees, and temporary alimony pending appeal (R-33). On February 19, 1964, Judge Norseth ordered \$50.00 per month temporary alimony on appeal and \$300.00 attorney's fees on appeal (R-39).

RELIEF SOUGHT ON APPEAL

The appellant asks the Court to reverse the trial court's decision granting the respondent a divorce on counterclaim and order the trial court to grant appellant a divorce as prayed, and additionally and in the alternative, that the court reverse the trial court's award of a lump sum in lieu of alimony. Further, appellant seeks an order vacating the trial court's awards of alimony and attorney's fees pending appeal.

STATEMENT OF FACTS

The appellant and respondent were married on November 6, 1961 in Preston, Idaho (T-6). At the time of the instant action, the appellant was age 54 and the respondent, age 40 (T-93). Both the appellant and respondent had been married before (T-6, 20). The appellant had the custody of a young girl, Jacklyn Peters, at the time of his marriage to respondent. The child had been taken in by appellant when she was small, but had not been adopted (T-6). Subsequent to the marriage between appellant and respondent, both parties adopted Jacklyn Peters (T-33). At the time of this action Miss Peters was 18 years old (R-59).

Prior to the time of marriage, the parties entered into an antinuptial agreement (R-16, etc.) Generally, the agreement gave the appellant the home he then had, which was under option to purchase for \$25,000.00, and provided that should he sell the property the respondent would waive all claims to the sale monies (R-16, etc.). Other properties the appellant brought into the marriage were to be disposed of in a varied manner. The terms of this disposition are not material to this appeal.

At the time of marriage between the appellant and respondent, the respondent was working and earning the sum of \$270.00 per month, and was indebted in the sum of about \$1,000.00 after a previous illness (T-9, 10, 74). The respondent's only contribution to the marital property at marriage was a few items of furniture (T-9, 41). At the time of trial the respondent was employed at the same place as at the time of marriage and was earning \$325.00 per month (T-10, 89). The respondent indicated this employment was temporary, but did not explain the basis for her

conclusion, although she had been employed for some time prior to the instant action (T-76, 89). No testimony was given indicating that at the time of suit the respondent was indebted, or otherwise had substantial obligations of any kind. Respondent did not testify to any "need" in excess of her present earning capacity or otherwise show an inability to provide for herself.

The evidence disclosed at the time of marriage, subject to the antinuptial agreement, the appellant owned a home under option of sale for \$25,000.00; \$4,300.00 in cash on deposit; a boat; and an automobile and household furnishings (R-16, etc., T-8). At the time of the instant action, he was employed by a railroad where he had a gross income of \$10,000.00 per year, and a net income of approximately \$6,000.00 per year (T-44, 51).

The appellant had prior to the instant action filed for divorce and obtained a default decree, which was thereafter set aside upon mutual agreement (T-8, 38, 78). At that time, February 1963, the respondent signed over to appellant all interest in their present home, which had been purchased with appellant's money and which the Court awarded appellant (R-37, 39, Exhibit 1, T-16, 22).¹

The appellant filed the instant action on October 28, 1963 on the grounds of mental cruelty (R-2). The respondent answered denying the cruelty and counterclaimed (with "amended" counterclaim) alleging mental and physical distress for one year "last past" (R-4, 11). The respondent alleged facts and made argument in support of condonation, but the trial court made no finding of condonation (R-21).

¹ Contrary to the trial court's decree, the real property was not in joint names (R-22).

The evidence in support of the appellant's claim for relief disclosed that the respondent had indicated she wanted their daughter, Jacklyn, to leave the house (T-14). The respondent accused the appellant of having sexual relations with their daughter and referred to her as a "whore" and "bastard kid" (T-15, 24, 28, 29). The respondent had no use for their daughter (T-42). She objected to the appellant supporting the daughter or spending money for her education (T-16, 18). The respondent criticized the appellant's activities and purchases such as his car, his eating and way of life (T-25, 26, 27). She called him "dirty" and disliked appellant's personal habits (T-26, 27). Further, the respondent had contacts with her former husband (T-20). The respondent's attitude towards the appellant was characterized as cool and indifferent (T-20, 24, 27) and there was little peace and harmony in the home (T-24). Appellant testified respondent told him she didn't love him and urged him to get a divorce (T-19).

The respondent contended the appellant had struck her on one occasion after the instant action was filed (T-87). That they argued over the appellant's property (T-76) and that appellant was indifferent to her personal needs and expenses (T-76). The respondent denied calling Jacklyn Peters a whore and claimed that the appellant had called respondent such a name (T-80). She further testified she had provided gifts and clothing for their adopted daughter (T-81). The respondent stated that she had contributed some household items to the marriage. The appellant told respondent her son was unwelcome in the home after their marriage and as a result, he left (T-90).

The appellant denied calling respondent names (T-57) and denied hitting her (T-47). No evidence that respond-

ent ever suffered any mental anguish was shown, or that appellant caused any such anguish.

The only independent evidence, apart for the parties themselves, was furnished by Jacklyn Peters, 18 years old, adopted daughter of the parties.

Miss Peters testified that there had been discord and disharmony between the parties since May, 1963. She indicated the respondent became upset when the appellant and she were together and that respondent accused Jacklyn of conspiring against her (T-60, 61). Jacklyn further stated that the respondent had accused her and appellant of "sleeping together" and wanting to live as husband and wife (T-62). Respondent also accused Jacklyn of being independently promiscuous and objected to money spent on the child's education, arguing that the child could support herself (T-62, 65). Jacklyn indicated that originally the respondent's attitude towards her had been friendly, and that respondent had made her clothes and bought her some items (T-71).

Based upon the above evidence, the trial court made the award of \$2,500.00 lump sum in lieu of alimony to respondent, and awarded her a divorce on her counterclaim. The appellant was awarded the real property that was in fact in his name.²

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN AWARDING THE RESPONDENT A LUMP SUM IN LIEU OF ALIMONY.

It is submitted that the trial court erred in awarding the respondent a lump sum in lieu of alimony of \$2,500.00. In

² Although evidence of condonation was introduced, the Court made no such finding against the appellant, but found he had failed to prove his claim (R-22).

Nelson, *Divorce and Annulment*, 2 Ed., § 14.23, it is stated:

"However, as a rule, although not always, a lump sum award should be made only in those instances where some special equities require it or make it advisable . . ."

In *Stefonick v. Stefonick*, 167 P.2d 848 (Mont., 1946), the Montana Supreme Court recognized the general rule that ordinarily an award of a lump sum in lieu of alimony should be avoided. That case is similar to the instant one in that the parties were married only a relatively short time, and had prior to marriage entered into a prenuptial agreement. The Court noted with reference to the policy of lump sum payments:

"This Court has held on several occasions that it is inadvisable, except for special reasons and under special circumstances, to make an award of alimony in gross or in a lump sum."

The Court went on to reverse the trial court's determination in favor of a lump sum award and did so noting:

"While the terms of an award of alimony or support to the wife are generally a matter within the sound discretion of the trial court, such discretion must be supported, we think, by evidence as to the circumstances of the particular case. An award of a lump sum should be supported by some impelling reason for its necessity or desirability."

It is submitted that the facts of the instant case demonstrated no necessity or desirability for making the respondent the award of a lump sum in lieu of alimony. The award of alimony is to be determined primarily, although not exclusively, on the needs of the wife and financial ability of the husband. Nelson, *Divorce and Annulment*, 2 Ed., § 14.34. In *Pinion v. Pinion*, 92 Utah 255, 67 P.2d 265 (1937), this Court noted that fault or cruelty has no place in making a property award. Consequently, the right of the respondent to alimony should be dependent upon her needs

and contribution to the property and accumulations of the parties. In *Foreman v. Foreman*, 111 Utah 72, 176 P.2d 144 (1946), the Utah court recognized that a lump sum alimony award was not totally improper where there was some substantial reason for it, relying upon the *Pinion* case. In *Pinion v. Pinion*, supra, this court laid out the tests for settlements of property which are applicable to alimony. When the facts of the instant case are examined against the standards set out in *Pinion*, it is clear that no alimony should have been awarded. The court laid down the following standards as determinative of proper awards: (1) The amount and kind of property owned by each of the parties; (2) whether the property was acquired before coverture or accumulated jointly; (3) the opportunity and ability of each to earn money; (4) the financial condition and *necessities* of the parties; (5) the health of the parties; (6) the standard of living of the parties; (7) the duration of the marriage; (8) the wife's economic status as a result of the marriage, and (9) the parties' age. In the instant case, all the economic assets of the marriage came from the appellant and were accumulated prior to marriage. The appellant contributed the home, car and what cash he had in the bank. The respondent contributed only a few items of furniture and entered the marriage heavily in debt. Each were employed at the time of marriage and were employed at the time of the instant action. The respondent's income was better at divorce, being \$325.00 per month against \$270.00 per month at marriage. At the time of divorce, respondent was apparently free from debt. No testimony was offered wherein she indicated any need for alimony or that her income would not adequately meet her needs; nor was any evidence offered to demonstrate her needs. Respondent's health had apparently improved since marriage. The re-

spondent was 40 the appellant 54. Appellant had apparently disposed of cash assets other than the proceeds of the home. Consequently, it cannot but be concluded that there was any basis for an award of alimony.

In Foster, *Family Law*, 1962 Annual Survey of American Law, pp. 603, 618, it is noted:

"Unfortunately, it is impossible to report that there is any general trend in recent cases toward a more realistic attitude in support and alimony awards. On the one hand, employment opportunities or the earning potential of women are too often ignored, and, on the other, courts typically adopt the policy that the wife is entitled to maintain that standard of living to which she became accustomed during marriage and thus indirectly penalize the husband for his marital fault. It is not unusual for pseudo-punitive damages to become involved in the determination of the amount, even though it requires but little reflection to reach the conclusion that in matrimonial actions it is all but impossible to allocate fault with any assurance of accuracy."

The need of courts to free themselves from award concepts unrelated to modern society and needs cannot be overemphasized. In *Morgan v. Morgan*, 59 Wash. 2d 639, 369 P.2d 516 (1962), the Washington Supreme Court noted:

"Alimony is not a matter of right. When the wife has the ability to earn a living, it is not the policy of the law of this state to give her a perpetual lien on her divorced husband's future income."

By the same token, where the evidence is so overwhelming in demonstrating the lack of need for the instant award, this Court should not approve the decision of the trial court which in effect circumvents the parties antinuptial agreement.³ The award was contrary to law and reason and should be vacated by this Court.

³ No evidence was received to show that appellant had assets available to satisfy the lump sum award exclusive of the proceeds of Class I property under the antinuptial agreement.

POINT II

THE TRIAL COURT ERRED IN GRANTING THE RESPONDENT A DIVORCE FROM THE APPELLANT ON THE BASIS OF HER COUNTERCLAIM SINCE

- A. THE DECISION OF THE COURT IS CONTRARY TO THE WEIGHT OF THE EVIDENCE;
- B. NO EVIDENCE WAS OFFERED BY RESPONDENT SHOWING THAT APPELLANT'S CONDUCT RESULTED IN EXTREME MENTAL ANGUISH.

A. The trial court ruled that the appellant had failed in his burden of proof and that the respondent was entitled to a decree of divorce on her counterclaim. It is submitted the trial court erred in failing to accord all the testimony the evidentiary weight to which it was entitled, and in deciding the case contrary to the only independent evidence corroborating either party.

The evidence favoring the respondent shows that there were arguments between the respondent and appellant over property. That according to the respondent, the appellant had on one occasion referred to her as a "whore" and a "gold digger." Respondent further testified that the appellant had made her pay her own medical bills. Further, there was testimony that after filing the divorce on one instance, the appellant struck the respondent with his open hand. This was the extent of the respondent's evidence which was based on her testimony. No independent corroborative evidence was offered to support the contentions. It is admitted that if no other evidence had been received that this would be sufficient under the law to allow the respondent a divorce. *Stevenson v. Stevenson*, 13 Utah 2d 153, 369 P.2d 923 (1962). However, in the instant case, the respondent's testimony was offered on counterclaim and was clearly less onerous than the testimony of the tribulations suffered by

the appellant because of respondent's conduct. In addition, appellant denied the respondent's assertions.

The testimony of the appellant was to the effect that the respondent accused him of illicit relations with their adopted daughter, called the child a whore and bastard and constantly resented her presence. The respondent disliked the appellant assisting their daughter in her education, and demanded the child support herself. The respondent according to the appellant had shown him very little affection after he agreed to their previous decree being vacated. The respondent told the appellant she did not love him and told him to get a divorce. In addition, she had some association with her ex-husband. She nagged appellant and complained about his eating, personal habits and accused him of being a dirty old man. The course of conduct of the respondent had carried on for several months.⁴ The totality of the appellant's evidence demonstrated a long period of cruel treatment by respondent far more severe than that offered in support of respondent's counterclaim.

The only independent corroborative testimony came from the parties' adopted daughter, Jacklyn. She supported the appellant's testimony. According to Jacklyn, there had been substantial discord in the home generated by the respondent. The respondent accused Jacklyn of sleeping with her father, of wanting to live with him, and of being generally promiscuous. Further, Jacklyn corroborated her father's testimony that her mother resented her and resented money being spent on her for school. Thus, the overwhelming weight of testimony supported the appellant's claims. Under such circumstances, the divorce should have been granted to the appellant, or at least to

⁴ Contrary to the Court's finding, it is submitted that the evidence does not show misconduct of the appellant over any sustained period.

both parties. *Sartain v. Sartain*, 389 P.2d 1023 (Utah 1964). In *Hendricks v. Hendricks*, 123 Utah 178, 256 P.2d 366 (1953), this Court commented:

“In view of the fact that neither spouse is accused of the commission of a felony, adultery⁵ or any other heinous offense but the reciprocal claims rest upon various acts and omissions alleged to constitute cruelty to the other, the trial court would best perform its function in the administration of justice by determining which party *was least at fault*, granting a divorce and adjusting their rights . . .” (Emphasis Added)

In *Steiger v. Steiger*, 4 Utah 2d 273, 293 P.2d 418 (1956), the Court again recognized the rule that the divorce should be granted the party least at fault. Although the Court therein indicated it would not overturn the award of the divorce for the wife, the case is distinguishable from the instant situation since: (1) the only independent evidence supports the appellant, (2) the appellant’s evidence when compared to the respondent’s conclusively shows he was less at fault and that the respondent’s misconduct was the more severe in time and quality. In *Carlton v. Carlton*, 104 So. 2d 363 (Fla., 1958), the husband was awarded a divorce because of nagging, criticizing and kindred complaints by the wife. In *Suffredini v. Suffredini*, 138 A.2d 710 (Conn., 1957), and *Brandman v. Brandman*, 138 A.2d 869 (Pa., 1958), divorces were granted to husbands because of false accusations of adultery and annoying telephone calls by wives. These precedents support the awarding of the divorce to appellant in this case.

B. Additionally, it is submitted the trial court erred in awarding the respondent the divorce since she offered no testimony that any of the conduct caused her mental an-

⁵Although not alleged by complaint the respondent was alleged to have accused appellant of sexual relations with his daughter which would be adultery.

guish. In *Stevenson v. Stevenson*, 13 Utah 2d 153, 369 P.2d 923 (1962), this Court stated:

"To establish mental cruelty, plaintiff must prove that her husband's cruel treatment caused her to suffer great mental distress."

Further, the mental anguish must be proved by substantial and satisfactory evidence. *Hyrup v. Hyrup*, 66 Utah 580, 245 Pac. 335 (1926). In this case, although respondent related various events and occurrences, she did not indicate or demonstrate that as a result she was caused to suffer great mental anguish. Consequently, the divorce was not properly awarded to her. *Hyrup v. Hyrup*, supra.

It is submitted that this Court should reverse the trial court's decree and order the divorce awarded to the appellant.

POINT III

THE TRIAL COURT ERRED IN AWARDING ALIMONY AND ATTORNEY'S FEES PENDING APPEAL SINCE THE TRIAL COURT WAS WITHOUT JURISDICTION.

Subsequent to the notice of appeal having been filed, the respondent petitioned the trial court and received an award of temporary alimony and attorney's fees on appeal. It is submitted that this order of the trial court is void because the trial court no longer had jurisdiction. Once the notice of appeal was filed jurisdiction over the case vested in the Supreme Court, subject only to whatever residual jurisdiction the Rules of Civil Procedure allow the District Courts. Rule 73(a) (b), U.R.C.P. The rules do not provide that orders during appeal, governing the conduct of the parties, are to be made by the District Court. The District Court was therefore without jurisdiction to award temporary alimony or attorney's fees after the appeal had been filed. Rule 73(a), U.R.C.P. cf., Rule 73(g). The petition should have been directed to the Supreme Court. This Court could, if it desired, have referred the matter to the District Court for

evidentiary findings, this then would have conferred jurisdiction on the District Court to that limited extent. Precedent supports the jurisdiction of this Court alone to award alimony and costs pending appeal. *Cast v. Cast*, 1 Utah 128 (1874) ; *Hendricks v. Hendricks*, 91 Utah 564, 65 P.2d 642 (1937) ; *Peterson v. Peterson*, 112 Utah 542, 189 P.2d 961 (1948) ; 136 A.L.R. 502; Nelson, *Divorce & Annulment*, § 12.49.

Since no appeal or petition from the respondent has been addressed to this Court, *Cast v. Cast*, supra, no award could be made nor is there any demonstrated need before *this* Court for such relief.

CONCLUSION

The record in this case demonstrates the unfortunate attitude of courts to treat divorce cases in an off-hand manner. This is supported by the many obvious conflicts between the findings and the evidence. It is clear that no basis for any alimony or lump sum in lieu thereof was presented to the trial court sufficient to sustain the decree. Additionally, it is manifest that the weight of evidence required the appellant be awarded the divorce. He was least at fault, presented a more compelling case and sustained his burden by independent corroboration. The Court should reverse.

Respectfully submitted,

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