1966

Myrtle Flewelling Christensen v. Harold Elwood Christensen : Appellant's Brief

Case No. 10696

IN THE

SUPREME COURT

OF THE STATE OF UTAH

MYRTLE FLEWELLING CHRISTENSEN,
Plaintiff and Appellant,

vs.

HAROLD ELWOOD CHRISTENSEN,
Defendant and Respondent.

Appellant's Brief

GLENN W. ADAMS
Attorney for Appellant

INDEX

Case No. 10696

IN THE

SUPREME COURT

OF THE STATE OF UTAH

MYRTLE FLEWELLING CHRISTENSEN,

Plaintiff and Appellant,

vs.

HAROLD ELWOOD CHRISTENSEN,

Defendant and Respondent.

STATEMENT OF FACTS

The plaintiff and defendant were married January 22, 1964. Pleadings and T-4. Plaintiff had been previously married and widowed, T-4. Defendant had children by prior marriage, T-5. The plaintiff was 61 (in error being 68) years of age, T-11. Defendant was 67 years of age, T-11. No children were born to them nor are any expected.

The plaintiff's action seeking a divorce was dated March 3, 1965. On the same day the defendant signed an appearance and waiver and the parties signed a stipulation in which each released claims against the property of the other and the plaintiff waived all alimony (paragraph 7). It is further provided that the defendant pay the plaintiff

$5,000.00 by transferring monies in a savings account and accrued benefits in Fireman's Credit Union (paragraph 2). Withdrawal instruments were signed by the defendant and the funds within a few days of March 3 were delivered to the plaintiff.

The defendant on March 12 filed an answer and counter-claim. Neither the answer nor the counter-claim referred to the stipulation nor asked relief from its provisions.

The cause came on for trial September 30, 1965, with the parties and counsel present. The Court inquired, "Is there any contest on the divorce?", to which defendant's counsel answered "No, sir," and at T-3 the Court said: "There is no contest on the issues for the grounds of divorce." Mr. Patterson: "That's right, your Honor".

The plaintiff then testified in support of her allegation of mental cruelty. No effort was made to cross examine the plaintiff concerning her cause of action, and the Court indicated that she had shown a prima facie case of cruelty, and "I'll grant a divorce on those grounds," T-9.

Testimony was then offered that Mr. Christensen moved into the home owned by Mrs. Christensen which was fully furnished. That he brought an old car, and that the plaintiff owned an automobile. That she withdrew money and paid her own expenses on the honeymoon, T-8. That the plaintiff lost social security benefits of $80.00 per month, T-10. The balance of the hearing is principally statements of counsel to the Court with the Court recessing the proceedings with the observations made at T-13 and 14.

The transcript does not indicate any instructions concerning the submission of briefs, but reference is made to them in the minute entry entered in said cause under the date of September 30, 1965.

The Court's determination to reject the stipulation without pleadings or testimony attacking it, together with a misunderstanding of plaintiff's counsel in a conversation had with the Court prompted the plaintiff to file her affidavit of prejudice. In counsel's conversation with the Court, counsel erroneously concluded that the judge was reluctant to continue in the trial of said cause, and that if an affidavit of prejudice were filed that this cause would be assigned to another department of the court. On order assigning the case to another judge for trial was submitted on hearing denied and went unsigned.

Plaintiff's counsel, anticipating the transfer, filed no memorandum of authorities within the time allotted. Thereupon the defendant moved the Court to enter an order finding the issues of law reserved by the Court in the defendant's favor. Hearing on said motion was had on the 15th day of November, 1965, after which the Court extended to plaintiff an opportunity within ten days to file his memorandum for the assistance of the Court. Such memorandum was filed, with the defendant's counsel filing an answering brief.

On receipt of counsel's brief, the Court, having deemed the matter to be under advisement awaiting briefs, entered its memorandum decision on the 4th day of January, 1966, as the same appears in the files herein.

Being advised that a reconciliation was under consideration by the parties, plaintiff's counsel did not prepare any findings of fact nor conclusions of law. That there-

upon the defendant submitted to the Court his findings of fact and conclusions of law which were signed by the Court on the 11th day of March, 1966, although the plaintiff did not receive a copy of said findings of fact, conclusions of law, or decree until the 15th day of March, 1966.

Plaintiff then filed her objections to the memorandum decision; a motion for an order vacating the entry of the defendant's findings, and a motion for the entry of plaintiff's findings. The defendant made objections to the plaintiff's findings.

Thereafter the Court, under the date of March 17, 1966, signed the plaintiff's findings and entered an order vacating the entry of the defendant's findings of fact and conclusions of law.

Thereafter on May 2, 1966, the Court with counsel indicated its dissatisfaction with the plaintiff's findings, indicated that questions concerning the plaintiff's and defendant's properties were not fully gone into at the time of the trial, and continued the matter for further hearing "for the sole purpose of receiving testimony concerning the property and the value of the property of the parties." The transcript of proceedings, May 2, 1966, P-2.

Thereafter on June 24, 1966, further hearing was had in said matter. At said hearing, the defendant offered testimony concerning the value of the properties of the parties, and the plaintiff made proffers of proof.

The Court thereupon entered its order affirming its previous memorandum of decision and directing the defendant's findings of fact, conclusions of law, and decree be entered as the judgment in said cause.

RELIEF SOUGHT ON APPEAL

The plaintiff seeks a reversal of that portion of the judgment requiring the plaintiff to return $3,500.00 of the $5,000.00 paid to the plaintiff by the defendant under the Stipulation signed by the parties and seeks to have this Court enter its own order approving the Stipulation and authorizing the retention by the plaintiff of the $5,000.00 paid to her under the Stipulation.

ARGUMENT

POINT 1:

ERROR OF THE TRIAL COURT IN CONTINUING TO HEAR AND DETERMINE THE ISSUES IN SAID CAUSE AFTER THE FILING OF AN AFFIDAVIT OF PREJUDICE UNDER RULES 63 (B) U.R.C.P.

Anderson vs. Anderson 13 Utah 2d 36, 368 P 2nd 264 the Court on page 265 commented on a situation where an Affidavit of Prejudice had been filed against the trial judge and said as follows,

> "If the rule means anything at all it means that what is plainly stated to the effect that the Judge against whom the Affidavit of Bias and Prejudice thereafter cannot proceed to hear the issue himself. Our only conclusion is that any order of judgment based on evidence thereafter taken by him would be ineffective against the affiant. It follows that this case must be remanded for another trial of the issues."

POINT II

ERROR OF THE COURT IN CHANGING THE STIPULATION OF THE PARTIES WHEN:

A. THE STIPULATION WAIVED ALIMONY AND WAS A PROPERTY SETTLEMENT.

B. WHEN THE PLAINTIFF DID NOT CHALLENGE THE STIPULATION NOR SEEK ANY DEPARTURE FROM IT.

C. WHEN THE DEFENDANT DID NOT CHALLENGE THE STIPULATION BY PLEADINGS NOR OFFER ANY TESTIMONY THAT THE SAME WAS NOT ACCEPTABLE NOR THAT THE SAME WAS OBTAINED BY FRAUD, DURESS, OR MISREPRESENTATION.

The power of the Court to change the stipulated provisions of the parties regarding alimony and support money is generally conceded based upon public policy considerations, See

Barraclough vs. Barraclough, 111 P 2d 792 - 100 U 196
Callister vs. Callister, 261 P 2d 944 - UCA Section 30-3-4
Jones vs. Jones, 139 P 2d 222 - 104 U 275
Madsen vs. Madsen, 276 P 2d 917 - 2 Utah 2d 423
24 Am Jur 2d Section 670

So far as counsel has been able to find, this Court has never been called upon to answer the following proposition. Does the Court have discretion to change a stipulated property settlement agreement without provisions for alimoney or support money where the defendant does not by pleadings or testimony show the same to be unfair or to have been procured by undue influence, fraud or misrepresentation.

In the Hall case, (177 P 2d 731) a property settlement was presented to the Court which provided that the de-

fendant pay to the wife $65.00 per month in semi-monthly payments. The defendant did not answer nor appear. At the hearing where the plaintiff testified that the sum was reasonable for her support and that her husband was earning $150.00 per month. The Court struck from the findings the figure of $65.00 and changed it to $80.00 per month. The defendant became delinquent on the basis of the $80.00 per month whereupon the plaintiff filed an affidavit alleging the arrearage. The defendant was found in contempt for failure to pay the $80.00 per month. From this contempt finding an appeal was taken.

The Stipulation signed by the parties was specific in several aspects.

a. It is provided that the award to the plaintiff shall be a property settlement of all claims against the defendant.

b. There was no provision for periodic payment.

c. There was no provision for alimony but rather a provision that the payment was in lieu of alimony.

d. The settlement was a lump sum and was accepted in lieu of alimony support money or loss of social security payments.

e. It released claims against each other's property together with all other claims including promises made prior to the marriage, obligations accruing during the marriage, or subsequent thereto.

f. Settlement money was paid and partly spent.

Admittedly, the Courts have under public policy considerations:

a. Ignored the label put on the property settlement

Ross vs. Ross, 403 P 2d 19

b. Found periodic property settlement provisions to have been alimony, 24 Am Jur Section 670.

c. Modified property settlement provisions where parts of the Stipulation made provision for alimony, 24 Am Jur Section 670.

Conceding the desirability of such public policy there would still seem to be equally as important a public policy for the Court not to over ride the obvious contractual desires and provisions of parties desiring to settle between themselves the financial side of their separation. Certainly this should not be done until it has been established that the Stipulation was improperly obtained.

In the Hall case, page 733: "It is true that we have held that a Stipulation for an alimony settlement is only a recommendation from the Court." See Jones vs. Jones 104 Utah 275 139 P 2d 222, "But we did not mean by that that it was to be given no weight at all. Lacking any proof to the contrary the lower Court could assume that the parties best know their own financial standing and capabilities and accept their Stipulation for its face value unless the Court Records before the Court obviously indicate that to accept the Stipulation would not accomplish equity. To ignore the wishes of the parties without grounds for doing so clearly is an arbitrary and capricious act." The judgment of contempt was reversed.

In the Mathie case, (363, P 2d 779 12 Utah 2d 116,) following a prior divorce suit, the parties entered into a reconciliation agreement. In a second subsequent action the plaintiff did not seek alimony or support money, and none was awarded, but the Court generally followed the

pattern set by the parties in the reconciliation agreement. The appeal was taken attacking the disposition of the property. The Court makes rather an extensive review of the authorities but notes "However, we are not disposed to disagree with the proposition that where neither spouse is in a position of undue disadvantage and they voluntarily enter into a contract which affects their rights only, it should be regarded as presumptively valid, and the Court should give it effect unless there are persuasive reasons for doing otherwise."

In Adams vs. Adams 177 P 2d page 265, the parties had reached a stipulation providing for the division of their property and for the payment of alimony for 18 months only and support for a minor child. The plaintiff indicated her acceptance of the stipulation and her counsel noted the negotiations preceding the settlement. Despite this the Court refused to approve the property settlement, directed the plaintiff to file an amended complaint seeking a greater sum. The defendant refused to stipulate the change and after default the Court entered an order for the larger sum consistent with his notions. The defendant appealed, contending that the property settlement is valid in the absence of a finding; that it is inequitable or was procured by fraud or compulsion and should have been approved by the trial Court.

The Court analyzes three categories of support and maintenance provisions noting a third category where the wife by contract waives all support and maintenance. The Court on page 267 notes as follows. "Property settlement agreements occupy a favored position in the law of this state and are sanctioned by the Civil Code." "When the parties have finally agreed upon the division of their

property, the Courts are loath to disturb their agreement except for equitable considerations. A property settlement agreement, therefore, that is not tainted by fraud or compulsion or is not in violation of the confidential relationship of the parties is valid and binding on the court."

"If the contract was not fradulent when made, and there was no violation of the confidential relationship, it will be binding on the Court and there can be no modification of the payments after the decree without the consent of the parties." The Court notes on page 269: "If her consent to the agreement was procured through fraud or compulsion, or if circumstances are such that the Court finds the agreement inequitable, the Court may withhold approval of the agreement . . . since nothing was shown to indicate that the agreement was inequitable, the parties are bound by the agreement."

For the Court without a challenge from either party by pleadings or testimony challenging the manner in which the Stipulation was obtained to arbitrarily impose new terms upon the parties was an abuse of discretion. Alexander vs. Alexander 199 P 2d 348 and Halloway vs. Halloway, 179 P 2d 22 held that a property settlement agreement containing provisions for support and maintenance of wife as part of the division of property of the parties is binding on the trial court in absence of fraud, duress, undue influence, violation of confidential relation, or other circumstances showing the agreement to be inequitable, and after approval of trial court, such provisions cannot be modified by the Court without consent of the parties.

The binding effect of a wife's contractual waiver of alimony must be recognized unless appropriate procedures

are envoked to avoid the waiver. See Cockrum vs. Cockrum, 328 P 2d 1000.

POINT III

THE TRIAL COURT SO CLEARLY ABUSED ITS DISCRETION THAT THIS COURT SHOULD SUBSTITUTE ITS JUDGMENT FOR THAT OF THE TRIAL COURT AND ORDER JUDGMENT ENTERED PROVIDING THAT THE PLAINTIFF RETAIN ALL OF THE $5,000.00 PAID HER UNDER THE STIPULATION.

Despite the advantages generally felt to exist in the trial Court and this Court's disposition to affirm if there is any evidence to sustain the position taken by the trial Court, this Court has the right to substitute its judgment for that of the trial Court under proper circumstances. See Wilson case, 296 P 2d 977 5 Utah 2d 79, where the Court said on page 981 as follows, "It is true as defendant contends, that a divorce proceeding is equitable and that it is within the prerogative of this Court to review the evidence and to substitute its judgment for that of the trial Court under proper circumstances." See also, Curry vs. Curry, 321 P 2d 939 7 Utah 2d 198, where this Court reduced the period over which the defendant was required to pay alimony.

POINT IV

REFUSAL OF THE COURT TO ACCEPT THE PLAINTIFF'S PROFFERS OF PROOF.

The Court's memorandum decision contains the statement "The plaintiff, however, having considerable more property than the defendant" was a finding reached by the Court without any testimony supporting it. The

plaintiff complained of this in her objections to the memorandum decision. To reach this objection, the Court scheduled the second hearing for "the sole purpose of receiving testimony concerning the property and the value of the property of the parties."

The plaintiff offered to prove the cost to her of a single premium no reserve or terminal fund annuity which would provide the benefits of her social security loss by the marriage and also the amount of $5,000.00 received by her that remained unspent. These were in view of the plaintiff, proper testimony concerning "the property of the parties." While its receipt would not likely have changed the Court's view, the same should have been received in evidence.

CONCLUSION

This Court should on its own initiative order the decree modified to permit the plaintiff to retain the $5,000.00 paid her under the Stipulation.

Respectfully submitted,

GLENN W. ADAMS

Attorney for Appellant