1966

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

In the Supreme Court of the State of Utah

MYRTLE FLEWELLING CHRISTENSEN,
Plaintiff and Appellant,

vs.

HAROLD ELWOOD CHRISTENSEN,
Defendant and Respondent.

Case No. 10696

RESPONDENT'S BRIEF

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STATE OF UTAH

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STATEMENT OF FACTS

The facts set forth by plaintiff are substantially correct, but contain gratuitous statements such as the first, second, third, and fifth paragraphs of Page three (3) of the Statement of Facts which contain extraneous matter not to be found in the transcript of record on appeal. Apparently, plaintiff desired to explain her position as a fact rather than as argument. In an effort to facilitate a proper understanding of the facts it is well to examine them chronologically.

March 3, 1965, plaintiff signed complaint, March 4, 1965, complaint was filed. (Record No. 1) The complaint prayed for an equitable settlement for the adjustment in circumstances brought about by the marriage. March 3, 1965, the defendant signed a stipulation. (Record No. 9) March 3, 1965, the defendant signed an Entry of Appearance, specifically reserving unto himself 20 days in which to plead to plaintiff's complaint. (Record No. 7) March 12, 1965, the defendant exercised the reservation contained in his Appearance and filed an Answer denying to plaintiff the right to any property

and Counterclaiming for a divorce for himself. (Record No. 2)

No further pleadings, motions or proceedings were filed until September 30, 1965, at which time the matter came on regularly for trial and was tried. (Record No. 21) November 2, 1965, the plaintiff filed an Affidavit of Prejudice. November 19, 1965 the Court executed its Order denying the Affidavit of Prejudice, giving plaintiff time in which to file a Brief. (Record No. 8) January 4, 1966, Memorandum Decision. (Record No. 10) This Memorandum directed the plaintiff to prepare Findings of Fact, Conclusions of Law and Decree. None were filed and the record discloses no reason such was not done. So that on March 10, 1966, the defendant prepared Fndings of Fact, Conclusions of Law and Decree which were executed by the Court on March 11, 1966. The plaintiff's counsel did not receive Notice of filing of these documents upon their execution and as a result she thereafter filed objections and an Order vacating these Findings of Fact, Conclusions of Law and Decree; (Record No. 15) and plaintiff's counsel submitted his own Findings of Fact, Conclusions of Law and Decree, which were executed on March 17, 1966. (Record No. 18) These likewise were submitted and executed without notice to the defendant who was afforded on opportunity, timewise, to object.

The record discloses that both Findings of Fact, Conclusions of Law and Decree as submitted by both parties were executed without notice to either party.

The problems of objections and motions came on for argument on May 2, 1966, as demonstrated by the Court's Order. (Record No. 16)

The transcript of the original proceedings indicate that the defendant was willing to stipulate as to his income, property and the income and property of the plaintiff. (Tr. 9-11) That neither plaintiff nor plaintiff's counsel objected to such stipulation nor did they approve the same. In order to clarify this situation the Memorandum Decision of May 2, 1966, directed the defendant and the plaintiff either to stipulate to the respective properties and the value thereof or that the Court would accept further testimony directed thereto. (Record No .23) The plaintiff refused to stipulate as to value. On June 24, 1966 the Court reopened the matter to take testimony as to the value of the property of the parties. (Record 17, 22) At the conclusion, the Court re-executed the Findings of Fact, Conclusions of Law and Decree theretofore submitted by the defendant. The record discloses that the plaintiff was possessed of real property having a value of $68,500.00. (Record No. 22) That the defendant owned 4½ acres of land of a nominal value with an income of $100.00 per annum. (Record No. 22) That defendant at the time of this divorce was age sixty-eight and had an income of $200.00 per month, pension. (Record No. 21) That plaintiff owned her own home with a rental apartment situate therein. That she lost $80.00 per month Social Security by reason of her marriage to the defendant. (Record No. 21)

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN CONTINUING TO HEAR AND DETERMINE THE ISSUES IN SAID CAUSE AFTER THE FILING OF AN

AFFIDAVIT OF PREJUDICE UNDER RULE 63(b) U.R.C.P.

The record is devoid of any statements of the Court relative to the plaintiff except, "I know Mrs. Christensen has a house on 25th Street. I know when she bought it from Archie McIntosh, and I know when she converted it into an apartment, so that is very well within the province of the Court." (Record No. 21, p. 9) "The Court: Whether voluntary or involuntary, generally when persons marry they're going to take some loss and some gain. Now she knew she had social security at the time she married Mr. Christensen, and she knew that when she married him she was going to lose it. I know Mrs. Flewelling is too smart to not know that." (Record No. 21, p. 12).

The Affidavit of Prejudice, which was subsequently filed, indicates that the Court was prejudiced because he was personally acquainted with the plaintiff and had knowledge of her business transactions and past personal life. No contention was made as to how said knowledge would prejudice the plaintiff or the defendant. Obviously, the Court had been acquainted with the plaintiff, which the plaintiff had to have known and had known from the time the case was filed until after it was tried. Notwithstanding that, no Affidavit or Motion of Prejudice was filed until after the trial.

The part of Rule 63 that is applicable to this is as follows:

> Utah Rules of Civil Procedure, Rule 63(b) "Disqualification. Whenever a party to any action

> or proceeding or his attorney shall make and file an affidavit that the Judge before whom such action or proceeding is to be tried or heard has a bias or prejudice, either against such party or his attorney or in favor of any opposite party to the suit, such judge shall proceed to further therein, except to call in another judge to hear and determine the matter.

The meaning of this paragraph is clear, unequivocal and in no way ambiguous. The pertinent part of the paragraph is *"to be tried or heard."* This clearly implies future proceedings. *Anderson v. Anderson,* 13 Utah 236; 368 P2d 264, is a case where a Petition was brought by the divorced husband for an Order to Show Cause why the award of custody to the divorced wife should not be vacated and why support money should not be terminated. Prior to the time of taking evidence on said petition the defendant filed an Affidvait of Bias and Prejudice against the Court who was to sit, and did sit, on the case. Prior to taking the evidence the trial Court denied removal of the cause to another Judge.

The Supreme Court held that was in error.

However, the plaintiff cites no case wherein after a proceedings has started and evidence has been taken that the rule applies. The reason for this is obvious. Any competent trial lawyer would proceed to trial armed with an Affidavit of Prejudice and at any time during the proceedings, if he felt the Court was leaning toward the other side or he did not like the rulings of the Court on the admission of evidence he could immediately file the Affidavit of Prejudice, terminate the proceedings and start all over with another Judge.

This could continue ad infinitum until plaintiff's counsel felt that he was obtaining rulings favorable for his clinent, assuming that of course opposing counsel at that time did not file a similar Affidavit of Prejudice on behalf of his client. If plaintiff's position is to be sustained, then obviously no trial would proceed without the filing of an Affidavit of Prejudice and litigation would continue interminably.

The clear intent of the rule, as it explicitly provides, is to afford either party an opportunity to disqualify a judge at any time prior to the taking of evidence. It does not purport and cannot be so interpreted to purport permission for either party to interrupt and terminate a trial that has been presented or partially presented theretofore by the mere filing of an Affidavit of Bias and Prejudice.

It is submitted that the trial court had no alternative but to rule that the filing of the Affidavit of Bias and Prejudice was in fact untimely and to deny the same.

POINT II

THE COURT DID NOT ERR IN REFUSING TO FOLLOW THE ALLEGED STIPULATION OF PARTIES,

(a) *Because the same waived alimony.*
(b) *Because plaintiff did not challenge the Stipulation.*
(c) *Because defendant did not claim that the same was obtained by fraud, duress or misrepresentation.*

(a) *Because the same waived alimony,*

(b) *Because plaintiff did not challenge the Stipulation*

The two points set forth above will be considered jointly by the defendant.

The defendant did in fact upon the day of execution of the complaint execute a stipulation. At the same time he executed an Entry of Appearance reserving unto himself 20 days to contest the matter. He subsequently did contest all of the application of the plaintiff in his Answer and additionally executed his Counterclaim against the plaintiff asking that a divorce be granted unto himself. At the time of trial the defendant conceded that prior to the time he had employed counsel and prior to the time he decided what he was going to do he had executed the stipulation. (Record 21, pp. 2, 3) The only real issue at the time of trial was the question of the property. (Record 21 pp. 2, 3) The plaintiff was well aware of the situation but argued that having executed the stipulation without benefit of counsel he has no right at any time to contest this matter. The difficulty with this position is that it is contrary to law. The rule is well stated in 27B Corpus Juris Secondum, page 409."

> "Property settlement agreements are binding when approved by the court and embodied or merged in the decree entered by the court in a divorce proceeding unless it appears that the decree was procured through fraud."

Further, at Page 411:

> "it has been asserted generally that property settlement agreements must be approved by the Court and embodied in the Decree in order to give them validity and efficacy, that it is the court's

decree which gives such settlement its validity."

"'* * * While it is true that husband and wife cannot lawfully enter into an agreement for divorce, yet it is well settled that the amount of alimony which the husband is to pay to the wife, the terms of the payment and the length of time during which such payment is to continue, may be all arranged between them by consent, *subject to the ratification of the court.*' " (Emphasis supplied.)

In the same case, North v. North the court held that it was the duty of the court to examine the agreement and further held that it was the duty of the court to approve the agreement if it found the contract was free from fraud, collusion, or compulsion and was fair to the wife. Thus we find that the mere entering into the contract between the parties and the filing of the contract in the cause do not make it a part of the judgment of the court until the court examines the entire contract and ratifies or approves it, either by a minute on the trial docket of the Judge or by making some other appropriate order or direction. In addition to what has been said in the North case about the need for approval or ratification of the agreement, we have a provision in the "Stipulation" in the instant case that specifically calls for approval by the trial court.

Therefore, from what has been pointed out regarding the need for approval of the "Stipulation" by the trial court, the only question before this court is whether there is sufficient evidence of judicial action by the trial court in connection with the hearing of plaintiff's petition for divorce in May, 1948 showing that the Court approved

all of the terms of the "Stipulation."

A similar conclusion was stated in the Virginia case *Higgins v. McFarland,* 86 S.E. 2d 168; 196 Va. 889,

> A decree for alimony is not founded on contract, but on the natural and legal duty of the husband to support the wife. No agreement of the parties has any effect on the decree awarding alimony unless it is ratified and made effective by judicial sanction. Capell v. Capell, 164 Va. 45, 178 S.E. 894; Branch v. Branch, 144 Va. 244, 132 S.E. 303; Henebry v. Henebry, supra. Judgments and decrees are contracts of the highest order and especially is this so when entered by consent of the parties. Roberts' Admr. v. Cocke, etc. 28 Grat. 207, 69 Va. 207; Hounshell v. Hounshell, 116 Va. 675, 82 S.E. 689.

See also, Arizona, *Wright v. Stidman,* 390 P2d 107; Georgia, *Kaiser vs. Kaiser,* 114 S.E. 2d 397; Wisconsin, *Bergevin v. Bergevin,* 170 N.W. 820; California, *Anthony v. Anthony,* 211 P2d 331.

The Supreme Court of Utah has not specifically ruled on this question, however, it would appear that there can be no doubt that it would follow this rule. The very cases cited by the plaintiff as authority for its position clearly state that a trial court is not bound by any stipulation. That such stipulation, while not to be considered lightly, is advisory only and that the Court, in the exercise of its sole discretion, may adopt or reject a stipulation. Thus in *Madsen v. Madsen,* 276 P.2d 917; 2 Utah 2d 423, the Court had before it an appeal by a wife where the trial court had not abided by the proposed stipulation. The Supreme Court, in affirming the trial court, stated:

> In so assuming she erred, since the trial court, in divorce matters, where the state is an interested party, need not abide, necessarily, with the terms of the litigants' stipulations, although such stipulations should be respected and great weight given thereto. Plaintiff's only complaint in this respect, would be, not that the court was duty bound and erroneously refused to carry out the terms agreed upon, but that it abused its discretion by entering an inequitable decree, a matter we must determine on review. Unless there is a clear abuse of discretion, we cannot disturb the trial court on such matters.

This is precisely contrary to the statement of the plaintiff that the court has not ruled upon the power of the Court to alter a stipulation unless it be shown that there be fraud, duress, or misrepresenation. An examination of *Madsen v. Madsen* does not indicate any place that these allegations were present in the case or that an issue was framed thereon.

Similarly, *Mathie v. Mathie,* 363 P.2d 779; 12 Utah 2d 116, was a case where the wife appealed from a Decree of Divorce insofar as it disclosed the property. The Supreme Court affirmed the trial court with some modifications that it deemed necessary for the purpose of clarification, saying, in part:

> It is apparent that the trial court, being convinced that the parties had come to a necessary parting of the ways, and that grounds for divorce were established, proceeded to consider the various factors proper to take into account and in the light thereof made such adjustment of their property rights as he thought would provide the best foundation for each to live separately. Having

> done so, it is our duty to give deference to his advantaged position and prerogatives, and not to disturb the decree unless it is shown clearly and persuasively to be so unfair and inequitable as to manifest an abuse of the wide discretion reposed in the trial court in such matters.
>
> The parties cannot by contract completely defeat the authority expressly conferred upon the Court by our statute, Sec. 30-3-5, U.C.A. 1953, in cases of divorce to "make such orders in relation to * * * property * * * as may be equitable." Under it there can be no doubt of the court's prerogative to make whatever disposition of the property, including the rights in such a contract, as it deems fair, equitable and necessary for the protection and welfare of the parties. There is no basis for concluding that the decree entered in the instant case is so manifestly inequitable or unjust that we should upset it.

The Mathie case was a case identical to the case at Bar to the extent that in the Mathie case no alimony or support was asked or awarded. This is precisely the same factor that plaintiff relies on to take it out of the decisions of Utah. The very cases cited by plaintiff are actually authority for the proposition that the fact that a stipulation does not contain provisions for alimony or support money are not binding upon the Court in the absence of fraud, undue influence or misrepresentation. Again the court in the Mathie case does not cite the problem of fraud, undue influence or misrepresentation, nor did it find it necessary to find these elements before a court could deviate from the terms of the stipulation. The remaining cases cited by the plaintiff, to-wit: *Callister v. Callister,* 261 P.2d 944; *Barraclough v. Barra-*

clough, 11 P.2d 792 — 100 U. 196; *Hall v. Hall,* 177 P.2d 731 — 111 U. 263; and *Jones v. Jones,* 139 P.2d 222 — 104 U. 275, do not support plaintiff's position. *Hall v. Hall* was a case involving contempt proceedings. While it discussed the power of the Court to adopt or reject a stipulation, an examination of the facts indicate that the evidence discloses that he had been out of work, remarried, had attempted to borrow money from the bank to keep the payments current and that he had done all he could do and had done all that his wife had requested him to do. The Court found that the adjudication of contempt was not well founded. The other three cases, *Jones v. Jones, Barraclough v. Barraclough,* and *Callister v. Callister* were concerned with the power of the Court to modify a decree of divorce where such decree either incorporated therein or approved a stipulation theretofore entered. In each of these cases the Court recognizes the authority inherent in the trial court to subsequently modify a decree, notwithstanding the fact that it was entered into with the accordance of stipulation by the parties.

Thus in *Barraclough v. Barraclough,* 11 P.2d 792, 100 U. 196, the Court stated:

> Therefore, the trial court erred in determining that the agreement here constituted a "complete and final settlement of all alimony between the parties, and that such settlement has become a final judgment as to alimony * * * insofar as a petition to modify is concerned." In a divorce action the trial court should make such provision for alimony as the present circumstances of the parties warrant, and any stipulation of the parties

in respect thereto serves only as a recommendation to the court. If the court adopts the suggestion of the parties it does not thereby lose the right to make such modification or change thereafter as may be requested by either party based on some change in circumstances warranting such modification. And where an appeal is taken from the judgment of the trial court in such case we will review the record to determine whether or not the applicant is entitled to the relief sought in the petition to modify the alimony decree. *Hampton v. Hampton,* 86 Utah 570, 47 P.2d 419; Openshaw v. Openshaw, 80 Utah 9, 12 P.2d 364.

In *Jones v. Jones,* 139 P. 2d 222, 104 U. 275, the Court cited the Barraclough case with approval.

In *Callister v. Callister* 261 P.2d 944, the Court stated:

> . . . an agreement or stipulation between parties to a divorce suit as to alimony or payments for support of children is not binding upon the court in entering a divorce decree, but serves only as a recommendation, and if the court adopts the suggestion of the parties it does not thereby lose the right to make such modification or change thereafter as may be requested by either party, based upon change of circumstances warranting such modification. Jones v. Jones, 104 Utah 275, 139 P.2d 222; Barraclough v. Barraclough, 100 Utah 196, 111 P.2d 792.

In said decision the Court discussed the decisions that hold that a Court has no power after judgment to modify a decree, based upon an agreed property settlement, and held:

> But insofar as the decision might be considered

> authority for the doctrine that the court has no jurisdiction to modify an award of alimony in a case where there has been a property settlement, we are not inclined to follow it.

It is obvious therefore that rule in Utah requires (1) an agreed stipulation by the parties, and (2) that even though an agreed stipulation is submitted by the parties to the Court that it is advisory only and that the trial court need not adopt the same, and that this power to deviate includes the power to modify the same, whether the same incorporates the stipulation or not.

In this case the defendant elected to contest the provisions of the stipulation. He further elected to dispute her right to any property *acquired by the defendant prior to the marriage.* Further, the trial court found that it would be unequitable and unjust to award her substantially all of the property owned by the defendant after only one year of marriage. Even so the court did in fact award her approximately one-third of the assets that he had prior to entering into the marital agreement. This is in accord with the rule that has long been recognized in Utah on an award of one-third of the husband's property to the wife. *Griffin v. Griffin,* 18 Utah 98, 55 P84; *Porter v. Porter,* 109 Utah 444, 166 P.2d 516; *Bullen v. Bullen,* 71 Uah 63, 262 P. 292.

The decision of the trial court was entirely within the scope of cases previously approved by the Supreme Court of the State of Utah. The plaintiff does not contend that there was an abuse of discretion per se. She merely says that the amount of money allocated was insufficient and that the court did not cooperate and

abused its discretion by following the rules set down by the State of Utah.

(c) *Because he did not claim that the Stipulation was obtained by Fraud, Duress, or Misrepresentation.*

As has heretofore been seen the trial courts in Utah do have the right to disregard a stipulation and in fact have the power to modify a Decree which adopted or approved the same. The only cases that the Court cites are two California decisions, *Alexander v. Alexander,* 199 P.2d 348, and *Hallowell v. Hallowell,* 179 P.2d 22. Both of these cases are California decisions. They hold that a Court cannot modify a decree of divorce wherein the decree adopts a stipulation voluntarily entered by the parties as has been previously seen. The Utah Court has considered this precise argument in *Barraclough v. Barraclough* and chose specifically not to adopt the same.

Even this rule is not as rigid as counsel would have the Court believe. Thus in *Morgan v. Morgan,* 234 P.2d 782, the Court had before it the problem of one party demanding that the prior property settlement be enforced upon their spouse who claimed that the agreement had been in fact cancelled and terminated. The trial court agreed with the latter contention and upon appeal so did the Court of appeals say:

> Whether, in such a case, the agreement does or does not continue in force, depends upon the mutual intentions and understanding of the parties. It is to be determined by the court as a question of fact, and upon indirect evidence in the absence of direct evidence. As said in Estate of Boeson, 201 Cal. 36, 42, 255 P. 800, 802: "Prop-

erty settlements entered into by the spouses, it is true, should be set aside in cases where the acts, conduct and relations of the parties thereafter are of such a character as to justify the conclusion that they intended and agreed orally to abrogate the same (citing cases)." It has frequently been held, at least as to executory provisions of a property settlement agreement, that cancellation will be inferred and former rights will be restored by reconciliation and resumption of marital relation. Mundt v. Connecticut Gen. Life Ins. Co., 35 Cal, App. 2d 416, 95 P.2d 966; Wells v. Stout, 9 Cal. 479; Sargent v. Sargent, 106 Cal. 541, 39 P. 931; Lloyd Corp., Ltd. v. Ind. Acc Comm., 61 Cal. App. 2d. 275, 142 P.2d 754; Gregg v. Manufacturers Bldg. Corp., 134 Cal. App. 147, 25 P.2d 1014. See also, 30 C.J. 1065, 1066, 42 C.J.S., Husband and Wife, 601; Nelson on Divorce, Vol. 1, p, 495, sec. 13.14.

Each case is to be decided on its own facts. It is unnecessary to distinguish the cases relied upon by appellant which had only that the evidence was sufficient to support findings contrary to the claim that the several property settlement agreements were abrogated by subsequent oral agreements.

The gist of this argument by the plaintiff is that she now requests the Supreme Court to set forth and adopt the California minority view, which it has heretofore rejected.

POINT III

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION.

The plaintiff states that as a rule of law the Supreme Court has a right to modify under proper circumstances

the decision of a trial court in a divorce action, and that as a consequence the Supreme Court should in this case modify the trial Court's decision. The plaintiff does not say why it should be modified, how and in what manner the Court abused its discretion, how and why the decision of the trial court is inequitable other than the fact that she does not like the decision.

As the records previously set out indicate the parties had been married approximately one year; that at the time of their marriage the plaintiff had properties of a value of $68,500.00, had a home with a rental apartment therein. That the defendant, a man of 68 years of age, unemployed with a $200.00 a month pension, a $5,000.00 savings account and an unimproved piece of ground from which he receives the sum of $100.00 per year. All of the property had been acquired by both the plaintiff and the defendant prior to the time of their marriage. The Court awarded plaintiff $1500.00 of the $5,000.00 savings acquired by the defendant.

The plaintiff does not say how or in what manner this is unjust or inequitable, and cites no authority that it is. Counsel's only argument is that defendant should be bound by a repudiated stipulation and that the court, contrary to law, should also be bound by such repudiated stipulation and as a consequence the trial court so clearly abused its discretion that it committed error. No authorities were cited in support of this other than the repudiated California decisions. It is submitted on the facts and on the law that no abuse of the law was in fact made and there is no reason for this court not to affirm the trial court's findings.

POINT IV

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

Refusal of the Court to admit the proffered evidence is again without foundation in fact and in law. The plaintiff was afforded an opportunity to present evidence as to her need, value of her property, as well as the value of the property of the defendant; she made no effort to do so. Instead she chose to ignore her relative wealth and the relative poverty of the defendant and complained of her lost Social Security benefits. Having waived the right to introduce actuarial evidence when it should have been presented, she chose to attempt to expand the order of the trial court for her own purposes. Now, having failed to avail herself of even that extension complains because it was not extended further. Having waived her opportunities she now complains that the trial court erred because it did not grant further opportunities.

It is respectfully suggested that no authorities have been submitted, because none existed, which support this view that prejudicial error was committed.

CONCLUSION

It is respectfully submitted that the appeal of the plaintiff should be dismissed and that the defendant should be awarded his costs herein.