1969

Elaine Siddoway Richards v. Henry Ralph Siddoway, Mary Siddoway and Ben Morrison : Brief of Respondents

IN THE SUPREME COURT OF THE STATE OF UTAH

ELAINE SIDDOWAY RICHARDS,
Plaintiff and Appellant,

vs.

HENRY RALPH SIDDOWAY, MARY SIDDOWAY and BEN MORRISON,
Defendants and Respondents.

Case No. 11800

Brief of Respondents

Appeal from a Judgment of the Fourth Judicial District Court In and for Uintah County
Honorable Allen B. Sorensen, Judge

HUGH W. COLTON, Esquire
COLTON & HAMMOND
Attorneys at Law
55 East Main Street
Vernal, Utah

Attorney for Defendants-Respondents

William G. Gibbs, Esquire
CLYDE, MECHAM & PRATT
351 South State Street
Salt Lake City, Utah 84111

Attorney for Plaintiff-Appellant

TABLE OF CONTENTS

INDEX OF AUTHORITIES

COURT RULES

CASES CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

ELAINE SIDDOWAY RICHARDS,
Plaintiff and Appellant,

vs.

HENRY RALPH SIDDOWAY, MARY SIDDOWAY and BEN MORRISON,
Defendants and Respondents.

Case No. 11800

BRIEF OF RESPONDENTS

PRELIMINARY STATEMENT

Respondents concur generally with the statement of facts as set forth in Appellant's brief, except that certain items do require additional clarification.

ADDITIONAL STATEMENT OF FACTS

Lands from two entirely separate sources was the subject of the partition proceedings to which reference is made in the Appellant's statement of facts. (Tr. 11, 12, 13, 14)

The range land came by distribution through the will of William H. Siddoway, father of the four sons, wherein the range land was given in common to the four sons, three in fee, and the share of William Wallace Siddoway in the form of a life estate with a remainder over to the Appellant. This property is not in dispute. (Tr. 11, 12, 13, 14)

The so-called "McCarrell place," consisting of approximately 80 acres of farm ground came by distribution in common to the four sons from their mother's estate, with a fee interest residing in each. (Tr. 13, 14)

The prayer in the partition proceedings called for partition in the manner in which the ownership thus appeared, a life estate to William Wallace Siddoway in the range land, and a fee interest to William Wallace Siddoway in the "McCarrell place." (Tr. 4)

After the partition proceedings, William Wallace Siddoway conveyed the "McCarrell place" property to Benjamin Morrison in fee in payment of a debt owed from Siddoway to Morrison. (R. 14)

ARGUMENT

POINT I

THE DISTRICT COURT HAD THE POWER AND AUTHORITY TO CORRECT THE MANIFEST ERROR IN THE PARTITION DECREE

The question posed by the Appellant at Point I of her brief, is whether the Court has the right to

correct an error in the prior partition proceedings, to make the truth and the record conform. The contention is that as a matter of law, the court was precluded from correcting the error.

The Trial Court having heard and considered the evidence documentary and oral on the subject, concluded that an error existed, and that it was of a clerical nature, and that it would be unjust and inequitable to permit the appellant to take the land. (R. 81, 82, 83, 84, 85)

Rule 60 (a), Utah Rules of Civil Procedures authorizes the Court to correct clerical mistakes in judgments at any time.

> "Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time . . ."

The principle that clerical errors or mistakes are not limited to those errors of court personnel only is well established. Errors, made by attorneys have been recognized as "clerical errors."

In *Hawks v. McCormack*, 190 *Okla.* 569, 71 P. 2d 724, an erroneous journal entry prepared by counsel for the defendant and approved by counsel for the plaintiff was corrected as a clerical error.

An oversight in which there was a failure to reserve jurisdiction of the court in a written decree

of divorce was held to be a clerical error in *Silva* v. *Second Jud. Dist. Ct.*, 57 Nevada 468, 66 P. 2d 422.

In the case in re *Goldberg's* Estate, 10 Cal. 2nd 709, 76 P. 2d 508, the will in question provided for the distribution among four children. The petition prayed for distribution to those entitled and the decree granted distribution in accordance with the terms of the will. However, the decree inadvertently omitted one of the children provided for in the will. The Court held this to be a clerical error.

The test of a clerical error appears to be whether the Court was exercising judicial discretion in its application to the particular matter. *Benway* vs. *Benway*, 69 Cal. App. 2nd 574, 159 P. 2d 682, and cases cited above.

It seems clear in this case from the evidence which was undisputed, that the error came in re-typing the decree from the pleadings and that no judicial discretion was involved.

Counsel argues in his brief that Rule 60 (b) precludes the court from correcting an error in a judgment at any time after 90 days, except for fraud.

This argument is contrary to the actual wording of the rule and is clearly contrary to the intent of the rule and the expression of this court in the recent case *Haner* vs. *Haner*, 13 Utah 2nd 299, 373 P. 2d 577.

A fair reading of Rule 60 (b) indicates that only under situations (1), (2), (3) and (4) must the motion in the same proceedings be brought within three months. Situations under (5), (6), and (7) are excluded from the three months provision.

Following the reasoning in the Haner case, and the statement of this court therein, the trial court found this to be a case where the processes of justice will have been completely thwarted if the entire judgment in the partition proceedings were to be allowed to stand without correction.

The result otherwise would be a windfall of 20 acres of farm land to a party clearly not entitled thereto, at the expense of the heirs of Benjamin Morrison, Morrison having been deeded the property for value during his lifetime. (R. 14, Tr. 23, 24).

Rule 60(b) further provides:

> ". . . This rules does not limit the power of the the court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."

Thus, it is clear that authorization is granted for a motion within the same proceedings or in an independent action for relief from a judgment.

In the present instance, there is no effort to vacate the judgment. The substance of the judgment of the court in the partition suit stands and is affirmed by the parties. The only effort is to correct one portion of that judgment which by the evidence was erroneous and in need of correction.

It is also clear that authorization exists within the above-quoted portion of the rule, for relief to be granted for reasons other than fraud on the court, as argued by the appellant. *Haner* vs. *Haner*, 13 Ut. 2d 299, 373 P. 2d 577.

Independent of rule 60, however, it is asserted by the Respondents, that there is inherent power existing in the Court to correct its judgments, and that even a statutory limitation does not limit the power of the court to correct its judgment in a proper case. *Cazell* vs. *Cazell*, 133 Kans. 766, 3 P. 2d 479; In re Goldberg, 10 Cal. 2d 709, 76 P. 2d 508, where the statute fixed the period at one year and the correction was made 35 years later; In re Gold, 8 N.Y. S. 2d 714; Brown v. Cole 196 Ga. 843, 28 S.E. 2d 76; Partch v. Baird, 227 Mich. 660, 199 N.W. 692.

POINT II

RESPONDENTS WERE NOT PRECLUDED BY LACHES OR DELAY FROM ASSERTING THE RIGHT TO HAVE THE ERROR CORRECTED

The argument made by appellant relative to laches is one which more appropriately should be

addressed to the lower court before whom this matter was tried.

Respondents recognize the proposition asserted by Appellant. However, the trial court had before it all of the facts, including the fact that discovery by Respondents of the error came about only after appellant began her lawsuit, (Tr. 35, 36) and had before it all of the facts pertinent to the delays in filing of the answer seeking affirmative relief (R. 23).

The trial court ruled upon the matters concerning delay in the discovery of the error and in pressing action for relief from the error adversely to the appellant.

The facts sustain the Court in its order setting aside the default and allowing the answer asking affirmative relief to be granted. It appears from the record that much of the delay was also attributable to the appellant. The pre-trial order makes no further mention of the question of laches, and it was not an issue further raised by the appellant in the Trial Court.

POINT III

THE EVIDENCE JUSTIFIED THE LOWER COURT IN ITS DECISION TO CORRECT THE ERROR IN THE PROBATE DECREE

Although the Appellant states as Point III, that "the evidence does not justify finding of mistake,", the burden of the argument at this point is not that the evidence does not sustain the findings, but rather, that certain evidence should have been excluded because it violates certain rules of evidence, The Hearsay Rule, the Dead Man's Statute and the Legal Conclusions Rule.

Appellant fails to point out what oral evidence was violative of each or all of these rules of evidence, making only the broad generalized assertion that it does violate these rules of evidence.

It is not the intention of Respondents to analyze each answer of each witness in order to sustain each ruling of the trial court to matters of evidence, nor would it appear to be the duty or Respondents to do so.

It should be pointed out, however, that no objection was interposed to any of the testimony which was admitted on the basis of hearsay, or on the basis of the dead man's statute, and that on only two occasions did the appellant object to evidence on the ground that it was testimony about a legal conclusion. In each instance the answer was given prior

to the objection, and in neither instance did counsel ask that the testimony be stricken. In the one instance, cross examination, without objection, went into the same subject matter. (Tr. 33, 34, 35)

In the other instance, Anna B. Morrison who was the secretary who typed the findings and decree testified that the inclusion of the twenty acres in the decree with a remainder over to Elaine S. Richards was an error (Tr. 37). An objection was interposed to her answer, but no request was made that it be stricken. (Since it is apparent that as the typist she knew whether she had made an error in putting the document together, it would not appear that this testimony would be in the nature of an objectionable conclusion in any event.

CONCLUSION

It is respectfully urged that in this matter the Trial Court correctly applied the law to the facts and corrected what would otherwise have been a manifest injustice, and that the judgment of the Trial Court should be affirmed.

Respectfully submitted,

COLTON & HAMMOND
Attorneys for Respondents
Vernal, Utah

DEAN W. SHEFFIELD
On the brief