1971

George Ghost v. Thelma Ghost : Appellant's Brief

In the Supreme Court of the State of Utah

GEORGE GHOST,
Plaintiff-Respondent,

vs

THELMA GHOST,
Defendant-Appellant.

Case No. 12252

APPELLANT'S BRIEF

Appeal from Judgment of the
Third Judicial District Court for Salt Lake County
Honorable Emmett L. Brown, Judge

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STATEMENT OF THE KIND OF CASE

This is an action by Plaintiff for a divorce, and by Defendant-Counterclaimant for a decree of separate maintenance.

DISPOSITION IN LOWER COURT

The lower court awarded a decree of divorce to the Plaintiff and denied the Defendant any relief on her counterclaim for separate maintenance. The Defendant was denied the award of any alimony. In addition, the Defendant was awarded the balance of the checking account in the amount of $454.89, the furniture, and furnishings in the apartment of the parties which were

accumulated during the marriage, and $125.00 attorney's fees for the use and benefit of her attorney in this action. The lower court awarded the Defendant real property which is the subject of a probate presently pending before the same court, and in which estate the Defendant-Appellant is the only prospective heir.

RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the lower court's decree awarding a divorce to the Plaintiff, and respectfully requests that this Court direct the lower court to enter a decree of separate maintenance in favor of the Defendant-Appellant. In the alternative, should this Court not reverse the lower court's decree of divorce, then the Defendant-Appellant seeks the award of alimony. Defendant requests an award of her costs and attorney's fees on this appeal.

STATEMENT OF FACTS

On December 9, 1969, the Plaintiff filed a complaint seeking a divorce in this case (R. 1-2). On March 25, 1970, the Defendant filed a counterclaim seeking a decree of separate maintenance (R. 13-18). The matter was tried in the lower court on May 7, 1970 (R. 22).

Most of the evidence adduced at the trial was uncontroverted, and the evidence which was disputed

was minimal. Uncontroverted facts which are material to the case are that the parties were married on February 26, 1937 (R. 73); that the Plaintiff was 78 years of age (R. 62), and that he was in poor health, suffering from kidney trouble, a heart condition, bladder trouble, and diabetes, all of which has required some hospitalization over the past five years (R. 73-74); that the Defendant-Counterclaimant was 68 years of age, has rheumatoid arthritis, a bad back with two fused discs, is totally blind in one eye, and is losing the sight in the other eye, and must have help and assistance because of her vision problems (R. 74, 75 & 79); that the Plaintiff is retired and receives railroad retirement pay of $190.75 per month, and Social Security of $59.30 per month (R. 50); that the Defendant receives railroad retirement pay of $80.55 per month, *which will terminate with a granting of a divorce in this case*, and Social Security of $21.70 per month (R. 8); that on or about December 18, 1969, there was a balance in the checking account with Zion's First National Bank in the amount of $454.89 (R. 9); that there had been a joint bank account in 1961 with an approximate balance of $1,700.00 (R. 3); that the Plaintiff retired from Denver & Rio Grande Railroad in 1959 (R. 53); and that the Plaintiff continued to work for several years for Ketchum's, and he earned $712.00 during 1961, $1,290.00 during 1962, $1,200.00 during 1963, more than $2,000.00 during 1964 and $150.00 in 1965 (R. 56); that Defendant had done crocheting for several years and had earned from $50.00 to $60.00 per month (R. 90); that

the Defendant had managed the financial affairs for many years, and that all of the money was turned to the Defendant to handle, except for small amounts of money which the Plaintiff kept from checks before he gave the money to the Defendant, and except for small amounts given weekly by the Defendant to Plaintiff for spending money (R. 53, 54, 57 & 66); that the Defendant required approximately $175.00 to $180.00 per month to take care of her living expenses (R. 87); that the Defendant is the sole heir of Margaret Michaelsen, deceased, and the Defendant anticipates inheriting a five-unit furnished apartment house located at 468 South Eighth West, Salt Lake City, Utah, one of which apartments is occupied by the Defendant, and which remaining four apartments yield a gross rental income of $245.00 per month, less annual taxes of $255.00, lights, gas, water, repairs and maintenance, advertising and reduction in income because of vacancies (R. 92, 98, 99, 100 & 101); and that the Defendant, with the consent of the Plaintiff, expended out of family savings or estates monies derived from rental income approximately $2,000.00 to repair the apartment house which was in deplorable condition, and to replace refrigerators and ranges, and $1,000.00 attorney's fees in connection with the gaurdianship of Margaret Michaelsen, and some substantial amounts for the funeral and burial expenses of two aunts of the Defendant, which amounts are not clear from the record (R. 71, 81, 94, 96, 97, 98 & 101).

As to the grounds for divorce and separate maintenance, and the conduct of the parties, there is some dispute. The Plaintiff testified that the parties had lived in separate beds for 28 years, and that they lived together but had nothing to do with each other (R. 50-51). There is no mention either through question of counsel or through answer of witnesses of intercourse or cohabitation or lack thereof. The Plaintiff further testified that on or about November 29, 1969, that the Defendant told the Plaintiff to get his clothes and get out of her property, and threw his suitcase at him. In addition, the Plaintiff testified that she hit him a couple of times, and that she slapped him (R. 51). He further testified that she gave him small amounts of spending money, although he indicated at one point that he cashed the checks and kept some money for himself, and at another point that she treated him all right after his retirement (R. 54 & 57). The Plaintiff testified that the Defendant had called him a "son of a bitch," but that she had not called him any name since July of 1967 (R. 59).

On the other hand, the Defendant testified that there had been no objections by the Plaintiff to the way the finances were handled until November of 1969 (R. 82), that the Plaintiff left in November because the Defendant wouldn't give the Plaintiff gambling money (R. 89), that the parties quit sleeping together approximately five years ago when the Defendant had a back operation, and that she had not called him a "son of a bitch," but "an

old Greek" (R. 106). She further indicated that she told the Plaintiff if they could not get along, that they may as well separate, and he would likely get along better up town with his friends (R. 107).

As a result of the above-described conduct, the Plaintiff testified that he felt badly (R. 51).

In support of her claim for separate maintenance, the Defendant-Counterclaimant testified that the Plaintiff had threatened her, had used foul language, had accused her of staying over night with a bachelor tenant, had called her a "dirty bitch," "chippy," "son of a bitch" and a "dirty whore" (R. 82). In addition, she testified that the Plaintiff had brandished a switch-blade knife and kitchen knives during arguments, and that his cursing all the time and ordering tenants out of the house provoked her to ask him to leave (R. 85-86). She indicated that she had washed his clothes, put them away, made his bed, got his meals on time, saw to it that he had taken his medicine, and nursed him while convalescing (R. 83). The Defendant admitted that there had been stormy times during the marriage, and that the Plaintiff had left on four or five occasions, and she concluded that separation was better for all concerned (R. 111).

ARGUMENTS

POINT I

PLAINTIFF FAILED TO ESTABLISH CRUEL TREATMENT WHICH CAUSED HIM GREAT MENTAL DISTRESS, AND THERE ARE COMPELLING REASONS JUSTIFYING THE DENIAL OF THE DIVORCE TO THE PLAINTIFF.

Plaintiff alleged in his complaint "that for more than one year last past the Defendant has treated the Plaintiff cruelly causing him great mental and physical suffering and distress." Section 30-3-1 (7), Utah Code Annotated 1953, vests the courts with power to grant a divorce for cruel treatment, "to the extent of causing bodily injury or great mental distress to the plaintiff."

The lower court's finding concerning mental cruelty is not supported by the evidence. The court found that the parties had not cohabited for 28 years when, in fact, the evidence was that the parties were married on February 26, 1937, and lived together as man and wife since that time until late 1969, with the exception of several brief periods of separation. There is no evidence in the record that there was not intercourse, or cohabitation, or that the parties did not hold themselves out to the world as man and wife. *Ballentine's Law Dictionary,* 3rd edition (1969), defines cohabitation as a dwelling

together of man and woman in the same place and manner as husband and wife, and further indicates that it does not necessarily imply sexual intercourse between man and wife. Moreover, the record does not indicate that the Defendant called the Plaintiff names on numerous occasions. Plaintiff himself testified that she had not called him names since the summer of 1967. The record is almost silent on continual nagging and quarreling, but there is some minimal reference to a few spats or fights during the marriage. However, at one point, the Plaintiff testified that the Defendant had treated him all right since he retired. It is not perfectly clear from that statement what he meant, as is the case with most of his testimony which was confusing at best, notwithstanding the fact that the Plaintiff was spoon-fed through the major portion of his direct case with leading questions. There is no reference in the record to the Defendant throwing the clothes of the Plaintiff out on the porch, but the Plaintiff did testify that his suitcase was thrown out, and he was asked to leave. The only evidence in the record to support the trial court's conclusion that Plaintiff had been caused great mental suffering was the statement of the Plaintiff that he felt badly. In response to Defendant's objection to Finding number four, the lower court struck the sentence therefrom indicating that the Defendant had tried to strike the Plaintiff on the head with a chair during the summer of 1969. That incident purportedly took place during 1968, and the trial court concluded that that was too remote.

Other evidence in the record supporting the lower court's conclusion of mental suffering was that the Defendant had slapped the Plaintiff, that the Defendant had only given the Plaintiff $5.00 or $6.00 per week for spending money, and that the Defendant had made a will, and had excluded the Plaintiff as a beneficiary therein. Defendant testified that because of Plaintiff's gambling he started wanting $10.00 or $20.00 per week, and when the Defendant refused to give him more money, he got sore. Considering the modest income of the parties, it would seem that the Defendant was wise in being judicious in her efforts to conserve family funds. There is no evidence in the record that Defendant might have needlessly squandered money. However, she did fix up the apartment house, and did discharge family responsibility by seeing that her two aunts were properly put to rest. This was discussed by the parties, and the Plaintiff told the Defendant to go ahead and make such expenditures.

The tenor of the Plaintiff's case seemed to be that he had worked hard all of his life, had earned all of the money, and that the Defendant had taken everything from him, and that he had nothing left. The trial court had definitely gained such impression, as he so indicated when he announced his decision at the conclusion of the trial. This author indicated to the court that it would be his recommendation to the Defendant that she deed an undivided one third interest in the apartment house to

the Plaintiff so that he would not feel disinherited, as a preferable solution to the divorce. It was reported back to the court that the Defendant was so willing to convey an undivided one third interest in the real property to the Plaintiff so that he would have an inheritance. Said offer was declined, and a divorce was promptly granted to the Plaintiff.

In addition to the paucity of evidence affirmatively supporting a conclusion of mental suffering, there is substantial reason for the court not to grant a divorce. Both of the parties are aged and are in poor health, and would be better off having the mutual support of the other spouse. In addition, they have limited sources of income, which would go much further being pooled, rather than being divided to maintain the two of them separately. The most cogent fact is that the divorce automatically strips the Defendant of much needed income by terminating the $80.55 monthly railroad retirement benefits. Should the parties not be in position to abide the physical presence of one another, then a decree of separate maintenance would allow and permit the Plaintiff reasonable freedom, and would preserve this much needed income.

Considering the fact that the parties have been married since February 26, 1937, and the fact that there have been some differences in the past, some physical separations, and reconcilliations thereof, one must con-

clude that the Plaintiff was hard-pressed to come up with grounds when much he relied upon was both stale and petty, and would seemingly have been condoned over many years. See *Shaw v. Shaw,* 122 Mont. 593, 208 P.2d 514, 522 (Mont., 1949).

This Court has followed the mandate of the legislature, and has indicated in many opinions that the Plaintiff must prove cruel treatment which causes great mental distress. *Stevenson v. Stevenson,* 13 U.2d 153, 369 P.2d 923 (Utah, 1962); *Curry V. Curry,* 7 U.2d 198, 321 P.2d 939, 940 (Utah, 1958). Moreover, this Court has taken the position in several cases that the conduct on the part of the woman ought to be more aggravated to constitute cruelty to the man, than in cases where the wife seeks the divorce on the ground of cruelty. See *Alldredge v. Aldredge,* 119 Utah 491, 229 P.2d 681, 682-83 (Utah, 1951), and cases cited therein.

In the case of *Hyrup v. Hyrup,* 66 Utah 850, 245 Pac. 335 (Utah 1926), this Court was faced with a very similar case as is before the Court in this appeal. The 70-year-old wife for the divorce of a marriage which had lasted for 45 years on the ground of mental cruelty. He had alleged, and there was evidence in the record in support thereof, that his wife was of mean and cross disposition, that she had persistently and habitually abused him and called him vile and insulting names, and that she had addressed him with indecent and humiliating remarks. More-

over, he alleged that she had been sullen and cross and had moped about the house without speaking to him or noticing him, except to sneer at him. In addition, he alleged that she had manifested great hatred for him and had despised him, and that his life was nothing but hell. Also, he alleged that she had asked him to leave her and get a divorce on many occasions. The Utah Supreme Court concluded that there was an utter failure on the part of Plaintiff to show that he had suffered great mental distress because of his wife's alleged cruel conduct. The court also indicated that there was no direct testimony upon the subject, and that the evidence was not such that this essential fact could be therefrom inferred. The trial court was directed to dismiss the action. See also *Cordner v. Cordner,* 91 Utah 466, 61 P.2d 601 (Utah, 1936).

POINT II

THE EVIDENCE IS SUFFICIENT TO SUPPORT A DECREE OF SEPARATE MAINTENANCE IN FAVOR OF THE DEFENDANT-COUNTERCLAIMANT.

Section 30-4-1, Utah Code Annotated 1953, provides that when a man deserts "his wife *without good and sufficient cause,* or being of sufficient ability to support her shall have neglected or refused to properly provide for or suitably maintain her" the district court may require such a husband to pay such sums for costs,

expenses, fees, and support as it shall deem necessary and proper. (Emphasis added.)

Plaintiff testified that the Defendant told him to get out. On the other hand, the Defendant testified as to abusive and provocative conduct on the part of the Plaintiff, which was uncontroverted and which if believed by the court would surely justify her telling the Plaintiff to behave or get out. She indicated that she told Plaintiff if they couldn't get along, it would be well for them to separate, and that he would be better off with his friends. The tenor of her testimony seems to imply a suggestion rather than a command. It is respectfully submitted that the Plaintiff's testimony is full of inconsistencies and confusion, whereas the testimony of Defendant is more consistent and understandable. Accordingly, this Court might conclude that Defendant is the more creditable witness. Viewing the evidence in this light, one might conclude that Plaintiff's leaving Defendant was hasty and ill-advised and without good and sufficient cause.

It is readily apparent that Plaintiff does not have a great deal of income from which to pay Defendant separate maintenance. However, a token award of such separate maintenance by this Court would at least preserve $80.55 per month in railroad retirement benefits to

the Defendant. Moreover, should the decree of separate maintenance not be followed up with a later decree of divorce, then the Defendant would receive some small death benefits through the railroad retirement program.

POINT III

THE EVIDENCE DOES NOT SUSTAIN THE CONCLUSION BY THE LOWER COURT THAT DEFENDANT IS NOT ENTITLED TO ALIMONY.

A fairly similar case was before this Court in the *Alldredge* case, *supra*. In that case, the 64-year-old husband filed for a divorce against his 53-year-old wife to terminate a marriage of nearly 37 years. The parties had lived togeher as husband and wife all that time. That case differed from the case before this Court in that the Alldredges had 11 children, whereas the Ghosts have none. The Supreme Court found that the conduct of Mrs. Alldredge was sufficient to support a decree of divorce in favor of her plaintiff husband; however, it concluded that her conduct was not so grevious as to deprive her of alimony. The Court concluded at page 685 that "a wife of long standing does not forfeit all right to alimony or a share in the property because of recent misconduct nor in cases where the husband may be equally at fault nor in cases where there is a doubtful preponderance against the wife because judges, being human, cannot penetrate the family drama with complete understanding."

This author submits that the granting of a divorce to Mr. Ghost and the denial of alimony to Mrs. Ghost is manifest injustice. The marriage had endured nearly 33 years; the conduct of the Defendant was not gross, nor did it involve any moral turpitude; the Defendant is 68 years of age, in failing health, and is unable to earn any additional income; and her physical frailties impose a great degree of dependence upon her. By comparison with the length of the marriage, the marital trouble which spawned this case was of rather recent origin. Other previous separations have not led to such drastic results. It is certainly unfortunate that the debilities not the fault of either led to this action. That such debilities ultimately resulted in the trial court granting a divorce and depriving the Defendant of all substantial rights stemming from such a long-standing marriage is a bewildering mystery and a tragedy of the greatest magnitude.

POINT IV

IT WAS ERROR FOR THE LOWER COURT TO REQUIRE DEFENDANT'S COUNSEL TO CHOOSE BETWEEN CONTINUED PARTICIPATION IN THE TRIAL AND GIVING TESTIMONY CONCERNING THE REASONABLE VALUE OF HIS ATTORNEY'S FEES.

Defendant's Counsel endeavored to testify as to the reasonable value of his services in support of Defendant-

Counterclaimant's claim for such fees. Plaintiff's Counsel objected to such testimony and urged that it was an established rule of court that Counsel for the Defendant could not testify and then continue to participate in the trial as an advocate. The trial judge agreed with this point of view and required Counsel for the Defendant to choose between testifying about the reasonable value of his fee or continuing participation as advocate and attorney for the Defendant. Accordingly, Counsel for the Defendant chose to not testify, so that he would be in a position to continue to participate in the trial and to offer a closing argument in behalf of his client.

Section 78-24-1, Utah Code Annotated 1953, provides that "all persons, *without exception,* otherwise than as specified in this chapter, who, having organs of sense, can perceive, and perceiving can make known their perception to others, may be witnesses." (Emphasis added.) Said chapter on witnesses does not make any exception as to the qualifications of an attorney to testify. There are ethical considerations concerning an attorney acting as a witness, and such considerations are set forth in the new *A.B.A. Code of Professional Responsibility,* Canon 5 (DR 5-102). The notes to Canon 5 indicate that an attorney should not be a witness, except as to formal matters.

This Court has ruled on several occasions that a claim for attorney's fees cannot be solely supported by

the suggested bar schedule, but that the moving party must introduce evidence to establish the reasonable value or worth thereof. See *Utah Savings & Loan Association v. Nunley, et al.*, 17 U.2d 348, 411 P.2d 838 (Utah, 1966); *F.M.A. Financial Corp. v. Build, Inc.*, 17 U.2d 80, 404 P.2d 670 (Utah, 1965).

Counsel for the Defendant clearly pointed out to the lower court that there was no intention to offer evidence through him as to any matters in dispute between the two parties, but that his testimony would be limited solely to the value of services rendered in connection with the prosecution of the case before the court. Accordingly, it is submitted that such testimony is a formal matter, and that an attorney is, therefore, under no ethical prohibition to not testify about the value of his fees. It has been long-standing practice among the members of the bar of this state to appear in probate court regularly and testify as a subscribing witness to a will. It would seem that in such cases there might be greater room for future conflict and problem than where an attorney testifies about the value of services which he rendered.

Services which an attorney renders in a given case are peculiarly matters of knowledge to that attorney. Testimony from any other attorney would have to be based upon mere speculation and conjecture. In the event a hypothetical question were to be posed to another attorney, that hypohetical could only be grounded upon

hearsay. The only attorney who would have actual knowledge of the time and efforts expended, or who would have business records at his disposal indicating the time and efforts expended, would be the participating attorney.

The only Utah cases found by this author support the conclusion herein contained. In the case of *MacClaren v. Gillespie*, 19 Utah 137, 56 Pac. 680 (Utah, 1899), the Utah Supreme Court ruled that the attorney for one of the parties could testify about facts which tended to contradict statements made by the opposing party. The court recognized that such practice should only be indulged in cases where necessity dictated. In the case before the court, the attorney was the sole attorney for the defendant, and the court concluded that the exigency of the case dictated that the counsel testify to protect the interests of his client. The Utah court was confronted with a more imposing set of facts in the case of *State v. Greene,* 38 Utah 389, 115 Pac. 181 (Utah, 1911), but still concluded that the attorney could testify. The attorney in question had been the district attorney. At that time the charges were preferred against the defendant, he was the district attorney and had participated in the investigation of the case. During the course of the investigation, said attorney had obtained an admission from the defendant about a material fact to the charge involved. When the case came on for trial, said attorney was no longer in office as the district attorney. However, his

successor associated him in the case, and the ex-district attorney actively participated in the prosecution of the trial of the case. Notwithstanding the participation in the trial of the case, the court permitted him to testify as a witness, even though the defendant had not received advance notice that the State intended to use said attorney both as an advocate and as a witness.

POINT V

THE WEIGHT OF THE EVIDENCE SUPPORTED THE AWARD OF A LARGER ATTORNEY'S FEE.

The fee awarded Counsel for the Defendant is certainly much less than is commensurate with the reasonable value of the services rendered and based upon the evidence before the court. However, considering the financial circumstances of the parties, perhaps it was not prejudicial error for the lower court to not award a more customary fee for similar services. Yet, it is respectfully submitted, that because of the necessity of this appeal, this Court should allow some increase in the awarded fees to compensate Defendant's Counsel for his efforts which have been required to perfect and pursue this appeal.

CONCLUSION

A careful review of the record must surely support the conclusion that the ends of justice will best be served

by the award of a token amount of separate maintenance to the Defendant. Should this Court decline to reach such a result, then an award of alimony should be granted the Defendant, even though in token amount. The rights of the Defendant should be preserved so that she will be in a position to later receive help and assistance from the Plaintiff, assuming that necessity so dictates. This Court should award an increased fee to Counsel for the Defendant for efforts expended in perfecting and pursuing this appeal.

Accordingly, the decision of the lower court should be reversed and an appropriate order should issue from this Court directing the lower court to enter a new decree more compatible with the foregoing.

Costs should be awarded the Appellant.

Respectfully submitted,

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