1971

George Ghost v. Thelma Ghost : Respondent's Brief

IN THE SUPREME CO
OF THE STATE OF

THELMA GHOST,
Defendant

vs.

GEORGE GHOST,
P

RESPON

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IN THE SUPREME COURT OF THE STATE OF UTAH

THELMA GHOST,
Defendant-Appellant.

vs.

GEORGE GHOST,
Plaintiff-Respondent,

Case No. 12252

RESPONDENT'S BRIEF

ADDITIONAL STATEMENTS OF FACT

The plaintiff was employed by the Denver and Rio-Grande Railroad for a period of 48 years, R-53. He was so employed when the parties were married on February 26, 1937, R-48, and continued such employment to December 31, 1959, R-53, when he was retired. The defendant received all of the money realized from this, R-54, 59, and the later employment, R-56, 59, of the plaintiff up to the date of the separation of the parties on November 29, 1969, R-54.

In 1960, the parties went to Santa Cruz, California for a year, where the plaintiff worked on a ranch, R-53. The parties returned to Salt Lake City in late 1960 and the plaintiff obtained employment at Ketchum's. In 1961 he earned $712, in 1962 $1,290, in 1963 $1,200, in 1964, because he was 72 years of age and he could earn any amount without affecting the social security benefit being paid, he earned $2,000, in 1965 he earned $150 before he was separated from his employment because of the state of his health, R-65, and has not worked since that time.

The defendant removed the plaintiff's name from a joint tenancy bank account in Zions First National Bank in 1960, R-53. The balance in said account was about $2,000 less $108 for bringing the car back from California, R-5. The defendant has had full control of the plaintiff's earnings since the marriage, R-107. The defendant expended better than $2,000 from plaintiff's funds to repair an apartment house which the defendant inherited from Margaret Mickaelsen, in addition, she expended from family funds $1,000 for attorney's fees in a guardianship proceeding of Margaret Mickaelson, incompetant, R-97. The defendant paid the funeral expenses of Margaret Mickaelson from the plaintiff's funds, R-44, of $900 plus $90 for a liner for her casket, $60 for opening the grave, $200 per month for nursing home care, R-95. She paid $90 for a liner for the casket, $60 for opening the grave, and $700 for the funreal of Marie Duffy, R-71.

The defendant gave the plaintiff $5 or $6 per week during the time he worked for the Denver and Rio Grande railroad, out of which he had to pay transportation of $4 or $5 per week, R-54.

During the time he worked for Ketchum's the defendant gave him $5 per week, R-56.

According to the plaintiff's testimony, his wife has never worked, R-52. Plaintiff has not slept with the defendant for 28 years, R-94. The defendant told the plaintiff to stay away from her, R-94.

ARGUMENT

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.

The trial court found that the defendant had treated the plaintiff in a cruel manner for more than one year last past and particularly the defendant had not cohabitated with the plaintiff for a period of 28 years. That the defendant on numerous occasions has called the plaintiff a son of a bitch and a dirty Greek, and has continually nagged and quarrelled with the plaintiff, and on or about the 29th day of November, 1969, the defend-

ant threw the plaintiff's clothes out on the porch and told him to "get out, this is my property." All of which acts caused the plaintiff great mental suffering, R-23.

In support of these findings, the plaintiff testified with reference to the lack of cohabitation with the defendant.

Under direct question by plaintiff's counsel, R-50, plaintiff testified as follows:

> Question: And calling your attention to your married life, have you lived in separate beds for a number of years?
>
> Answer: Yes, for 28 years.
>
> Question: You haven't lived together as man and wife?
>
> Answer: We lived together, but we have different beds.
>
> Question: And did you live together as man and wife?
>
> Answer: Yes.
>
> Question: Or did you live separately and had nothing to do with each other.
>
> Answer: Nothing to do with each other, Yes.

On redirect examination the plaintiff testified further about the lack of cohabitation.

> Question: George, I asked you if you'd lived as man and wife with your wife for the last 28 years?
>
> Answer: Yes.
>
> Question: Have you slept with her?

Answer: No.

Question: And how long a period has that been?

Answer: Since that time. May, 1937 we lived together but we never sleep together. She say stay away, because you know why? I'll tell you why. 1947 I went to doctor for I get my life insurance. I go to one doctor up there to test my blood pressure. Do you know what the doctor tell me? He says: Take care of Mrs. Ghost. She have gonorrhea. That's what he tells be, honest to God.

Question: Well, I know. George, that is not admissible what the doctor told you. If she were not present, it's hearsay. But have you slept with her, that's what my question is.

Answer: No.

Question: And when was that date, 1947?

Answer: 1945 when I went to the doctor to get my life insurance.

Question: Have you slept with her since that time?

Answer: No, I never sleep since 1940, '41.

Counsel submits that this testimony substantiates the finding of the trial court on the question of lack of cohabitation for 28 years.

Defendant said they have not slept together for 5 years, R-106.

Relative to the defendant calling the plaintiff names and quarrelling, R-58-59. Questions propounded by plaintiff's counsel to plaintiff:

Question: Did she call you some names?

Answer: Called me a son of a bitch the last time after she got the property. She got the property in 1967.

Question: And then was that a regular or a casual—Did she do it often?

Answer: All the time. She called me everything. She never called me those names after she got the property. 1967, the 6th of July, 1967, she got the property. She went to make a will for some friends of hers and she put one dollar for me. That's all. And she got all my money from Ketchum, the railroad retirement, Social Securit, she got all my money. She never give me a penny. In 1968, she give me $15. After that I went to the boss, I got paid $9 from the boss to ride every day except Sunday. Give me five or six dollars, you know, to spend.

Question: Well, what about right before you left in November, how many meals a day could you eat? R-57

Answer: Before only two meals a day. Sometime she raise hell and give me—I had a dish of cucumbers, you know. Took and peeled them. She come along, it was Sunday, and hit the dish, break the dish and I lose everything. I never eat.

Question: And did she treat you that way all the time?

Answer: All the time.

The Witness: I'll tell you another thing. She got up from the chair and slap me. I lose my glasses. She break my glasses.

Question (By Mr. Macfarlane): Now, when was this?

Answer: Oh, a long time ago, about in '67.

Mr. Rigtrup: I would object to that.

The Witness: '68, all the way. '67, '68, and '69 through, hit me all the time, slap me because I call Stella. She don't want to hear of Stella, our friend, and I lose my glasses. I had a hell of a time finding them. R-58

Question (By Mr. Macfarlane): Did she do that in '69?

Answer: Yes.

Mr. Rigtrup: I would object to Stella's conduct. She's a friend and not the defendant, and her cruel treatment is not actionable grounds for the plaintiff in a divorce action .

Mr. Macfarlane: I agree with that and I didn't perhaps get the answer properly.

Mr. Rigtrup: Well, as I understood it—

Question (By Mr. Macfarlane): Did your wife hit you or did Stella hit you?

Answer: No, my wife. I just call Stella.

Mr. Macfarlane: That was my understanding, Ken. It's hard for me and I'm sure for you to understand, but I understood—

The Witness: I just call her name, Stella. She get up and slap me.

Question (By Mr. Macfarlane): It was not Stella that slapped you?

Answer: No. Her. I lost my glasses five or six times. Cost me $10 and I can't fix it. I got no money to fix it. R-58

The plaintiff testified that on the 29th day of November, 1969, that the defendant told the plaintiff to get out, to get his clothes and get out, this is my property. She threw the suitcases out. The plaintiff retrieved the suitcases, packed his clothes, went uptown and borrowed some money from a friend, returned and got his clothes and went up to 214 West Second South, where he is now living, R-51.

The defendant has a severe hearing impairment and had trouble understanding the questions propounded to him. The following dialogue illustrates this, R-51.

> Question: Now, did that cause you great mental suffering and distress?
>
> Answer: What?
>
> Question: Did this conduct of hers of asking you to get out, did that cause you some suffering, pain? Did you feel badly about it?
>
> Answer: Sure I feel badly, yes. I don't know why. She was too nervous. I don't know. She told me to get out. That's all.

The respondent submits that there is ample proof to sustain the trial courts findings and decision. It must be remembered that the lower court saw the witnesses and in a case of this kind much could be determined from their demeanor and from the way they answered the questions put to them in the court. The Utah court in the recent case of Stone vs. Stone, September, 1967, 19 Utah 2nd 378, 431 P. 2nd 802, held as follows:

> "The Findings and Order are endowed with a presumption of validity and the burden is upon

the appellant to show they are in error . . . accordingly we recognize that it is the perogative of the judge to judge the credibility of the witnesses, and in case of conflict we assume that the trial court believed the evidence which support the finding. We review the whole evidence in the light most favorable to them; and we will not disturb them merely because this court might have viewed the matter differently, but only if the evidence clearly preponderates against the findings."

In the case of Stevenson vs. Stevenson, 13 Utah 2nd 153, 369 P. 2nd 923, the Utah court held as follows:

> "However, there is no public interest in the preservation of a marriage where one of the parties can no longer endure the relationship without impairing his or her health; or where the conduct of one party has deteriorated the relationship to the extent that the parties will no longer continue cohabitation and the marriage exists only in name and not in fact citing Hendricks vs. Hendricks, 123 Utah 178, 257 P. 2nd 366; Wilson vs. Wilson, 5 Utah 279, 296 P. 2nd 977; Curry vs. Curry, 7 Utah 2nd 198, 321 Pacific 2nd 939."

In the case of Anderson vs. Anderson, 18 Utah 2nd 286, 422 P. 2nd 193, the Utah Court said:

> "Recent pronouncements of this court, and the policy to which we adhere are to the effect that the trial Judge has considerable latitude of discretion in such matters and that his judgment should not be changed lightly and in fact not at all, unless it works such a manifest injustice or inequity as to indicate a clear abuse of discretion."

POINT II.

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

The defendant relied for proof in support of his prayer for a decree of separate maintenance on the provisions outlined in Section 30-4-1, Utah Code Annotated, 1953, which 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 for such sums of costs, expenses, fees and support as it shall deem necessary and proper.

The defendant in November, 1969, when the separation of the parties occurred, told the plaintiff to get out, that the property belonged to her and threw his suitcases out, R-51, and further told the plaintiff that if they could not get along it would be well for them to separate and he was better off with his friends uptown, R-107. This testimony certainly counteracts any idea that there was a willful desertion of the defendant by the plaintiff. Separation in which both parties willingly confer is not lawful desertion of one by the other—Speak vs. Speak, 81 Utah 423, 19 P. 2nd 386, March 22, 1933.

The testimony also shows that the defendant recieved all of the fruits of the plaintiff's labor from the date of the marriage in 1938 to the date of separation in

1969. The defendant was awarded all of the furniture, fixtures and effects which were accumulated during the marraige including the bank account, the apartment house in which the defendant has an apartment without cost to her and which has no encumbrances against it and which has been appraised for $22,000, R-101. The defendant expended better than $2,000 for repairs out of the plaintiff's funds, R-25-26. In view of this testimony it cannot be urged that the plaintiff failed to support his wife who received all the fruits of his employment plus all of accumulations made during the marriage. The defendant has gross income from rentals of the apartment house in the sum of $245 per month plus $21.70 from Social Security, and up to the present time has been receiving $80.55 on account of the plaintiff's Railroad Retirement earned by him in 48 years of labor with the Denver and Rio-Grande Railroad Company. The trial court was aware of the fact that the defendant would lose the $80.55 of Railroad Retirement when the divorce became final.

The trial court had all the facts before it as to the relative amounts of income of each party. The plaintiff, husband recieves $190.75 monthly Railroad Retirement and $59.30 Social Security, a total of $250.05.

Plaintiff respectfully submits that the trial court made a fair and equitable distribution of the income and property in the estate and that his findings are supported by competant evidence.

POINT III.

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

With relation to the right of a wife who had been married for a number of years to be granted permanent alimony, in the recent case of Pickens vs. Pickens, August 6, 1970, 24 Utah 2nd 409, 473 P. 2nd 397, the Supreme Court quotes with approval from Christensen vs. Christensen, 21 Utah 2nd 263, 265, 444 P. 2nd 511, 512, as follows:

> "Whether we as individual judges would or would not have arrived at the exact same formula as to what the most practical and just treatment of the economic aspects of this situation is not the question on this appeal.
>
> "Even though it is the established rule that divorce cases being in equity it is the duty of this court to review and weigh the evidence, it is equally true that we have invariably recognized the advantaged position of the trial judge and given deference to his findings and judgment, declaring that they should not be upset unless the evidence clearly preponderates against them or unless the decree works such an injustice that equity and good conscience demands that it be revised. . . .
>
> "Defendant's argument carried to its conclusion would mean that whenever a marriage has lasted for a considerable number of years the wife would always be entitled to permanent alimony.

> "We do not regard that as the law. Citing McDonald vs. McDonald (1951) 120 Utah 573, 236 P. 2nd 1066; Dahlberg vs. Dahlberg 77 Utah 157, 292 P 214; Hendricks vs. Hendricks 91 Utah 553, 63 P. 2nd 277.

In the case of Allen vs. Allen, 109 Utah 2nd 99, 165 P. 2nd 872, 875, the Utah Court said:

> "We believe that the great weight of authority supports the rule that a decree of the trial court in divorce proceedings relative to alimony and division of property will not be modified except when the trial court has abused its discretion. Otherwise the appellate court by its own actions would alter the purpose for which it was created. An appellate court cannot remain a court of appeals and invite a review of every case decided by a lower tribunal where its judgment fails to satisfy one or both parties to the litigation."

Our Supreme Court has repeatedly held that the granting of alimony and the distribution of property in a divorce action rests within the sound discretion of the trial court. In this case, the defendant wife, was awarded all of the property accumulated during the marriage, including an apartment house valued at $22,000, in which the defendant lived rent free, with a gross rental of $245 per month, plus $21.70 from Social Security making a gross of $266.70 and an apartment free of rent. The plaintiff was awarded a total of $250.05 per month and no property.

Plaintiff submits that this distribution of property and income was fair and equitable to both parties and the findings are supported by competant evidence.

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.

The Revised rules of the Utah State Bar governing professional conduct and discipline were adopted May 28, 1946 and approved by the Supreme Court of the State of Utah March 1, 1937, with amendments effective March 19, 1940 and June 18, 1952, as published in Volume XXII, special number, November, 1952, of the Utah Bar Bulletin. These rules remained in effect until the Code of Professional Responsibility was approved by the Supreme Court of the State of Utah on February 19, 1971. The case at bar was tried on April 23, 1970.

Rule III Conduct Prescribed by Rule, Section 32, in paragraph 19, page 12, in effect when the case was tried, provided:

> "When a lawyer is a witness for a client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in court in behalf of his client."

It appears that the court made the proper ruling in this matter as the testimony of the defendant's counsel

was not essential to further the ends of justice, in that his testimony was to relate only to the amount of his attorney's fees, which is not merely a formal matter.

Defendant also cited the case of MacClaren vs. Gillespie, decided in 1899, and State vs. Greene decided in 1911. The applicable rule above cited governing professional conduct and discipline had not been adopted at the time these two cases were decided and hence they are not applicable in this matter.

Defendant cites ABA Code of Professional Responsibility, Canon 5 (DR 5-102) this canon was not in effect in Utah at the time of the trial April 23, 1970.

Defendant has cited two Utah cases in support of his position that a claim for attorney's fees cannot be solely supported by the suggested bar schedule but the moving party must introduce evidence to establish the reasonable worth thereof. In the case of FMA Financial Corporation vs. Build, Inc., 17 Utah 2nd 80, 404 P. 2nd 670, the Utah Court held:

> "There is merit in the defendant's challenge to the award of $775 attorney's fees to the plaintiff without any evidence or stipulation in the record.
>
> "In the instant case there was both evidence elicited by defendant from the plaintiff's counsel, R-93, under oath and a stipulation by plaintiff's counsel that the court could fix the attorney's fee from his experience. R-86"

The other case cited was Utah Savings & Loan Association vs. James D. Nunley, 17 Utah 2nd 348, 411

P. 2nd 838. Appeal from an award of attorney's fees in a foreclosure action in which the defendant had filed a general denial of the amount of the fee claimed.

No testimony was offered and no stipulation was agreed to by the parties as to what was a reasonable fee. After the defendant's counsel had left the courtroom, the plaintiff's counsel suggested a fee consonant with the County Bar Association schedule. The trial judge made such an award. These facts are distinguishable from the instant case where we have both testimony and a stipulation as to the reasonable amount of the attorney's fee.

Plaintiff submits that the trial court ruled correctly governing professional conduct in force at the time of the trial.

POINT V.

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

The defendant complains of the amount of the attorney's fees found by the trial court in the sum of $125. The weight of his objection seems to be that the trial court did not fix a fee for the appeal of the cause.

The Utah Supreme Court in the case of Anderson vs. Anderson, decided April 7, 1919 reported in 54 Utah 309, 181 Pac. 168, 169 held that the trial judge had the right to consult his own experience and knowledge, with-

out taking testimony as to what was reasonable in the particular case. This case was cited with approval in the case of Gardner vs. Gardner, 118 Utah 496, 222 P. 2nd 1056, 1058.

Plaintiff submits that the matter of fixing of attorney's fees was stipulated to by the plaintiff and testified to by plaintiff's counsel and the trial court fixed the fee from his own experience and knowledge.

CONCLUSION

We believe the evidence abundantly justifies the Decree of the trial court and should be affirmed by the Supreme Court. The defendant received all the fruits of a lifetime of labor by the plaintiff and all the property acquired during the marriage. Defendant is adequately provided for. The court's judgment will permit the plaintiff to have a few years to enjoy life without the restraining influence of the defendant. The plaintiff hopes that he can spend his last days in his native country, Greece.

Respectfully submitted,

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