2000

Robert D. Klein v. Mary Avalon Klein : Petition for Rehearing

Utah Supreme Court

13997

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The Honorable Justices of the
Supreme Court of the State of Utah
State Capitol Building
Salt Lake City, Utah 84114

Re: Klein v. Klein
Case No. 13994

To the Honorable Justices:

Mr. Robert D. Klein has this date submitted to me for my review his self-written Petition for Rehearing. Said statement was prepared by Mr. Klein without the assistance of myself or any other member of my office. His statement is solely his own and without any correction or suggestion from me.

I believe the matters set forth in Mr. Klein's petition to be of considerable relevance and to warrant your attention and review.

Mr. Klein's petition and statement are submitted by him alone and with my consent as his counsel. Should you have any questions concerning this matter, I shall be happy to discuss them at your convenience.

Very truly yours,

HATCH & PLUMB

By _____
Orrin G. Hatch

OGH/sa

IN THE SUPREME COUMT

OF THE STATE OF UTAH

ROBERT D. KLEIN, Plaintiff and Appellant, vs. MARY AVALON KLEIN, Defendant and Respondent.	PETITION FOR REHEARING Appeal No. 13994

Gentlemen of the Supreme Court, I desire to accept the affirmation ruling dated December 16, 1974 of your august court.

While these proceedings have been taking place during the last four and one-half years, I find myself in the following state:

I have gone into debt in excess of $300,000; have had my reputation systematically maligned; have been totally restricted from the practice of my occupation; have been stripped of a capacity to economically assist my children, which has had a resulting deteriorating effect on what had been a close and binding relationship; and have been excommunicated from the L.D.S. Church.

Having expended this much effort and having found

myself in this state, I would beg the Court to address itself to some questions and aspects of this case that will enable me to put the matter to rest psychologically and with a good conscience, knowing that I made every effort to understand and accept what has happened.

In personally making this request for rehearing and/or reconsideration, I would like to express my appreciation for my attorney and for his efforts in my behalf.

I wish to be able to accept the Court's judgment, and it is for this reason, a kind of "peace of mind" if you will, that I seek a rational explanation of issues that to me seem to have been overlooked.

Upon careful analysis of what has been written in the affirmation ruling, I see no tendencies or inclinations that suggest the possibility of reconsideration. Nevertheless, in view of my belief in myself, and my own conclusions, I must speak to the issues as I, being their principle author, know them. The affirmative and concurring view seems to say that by my stipulation I "consented" to a judgment. Although I disagree with Judge Taylor, his court has executed an order confirming that I have given my "consent". There is of course a dissenting viewpoint.

In the spirit of that "close proximity observation", does the lower court have any responsibility to listen to the timely pleadings of a litigant who makes an effort to explain why he believes he cannot legally and/or practically comply with a given stipulation?

Consider the following five points:

(One) The alleged $1,748,809.98 evaluation of the marital estate is based upon the additional inclusion and not necessarily the reevaluation of properties. The total appraised value of these inclusionary properties approximates $1,200,000. Three of the additionally included properties were not included in the Faux decree. They are:

(1) Holidair Lands, Inc. (Sandberg property)

(2) Award Homes, Inc. stock

(3) The Seegmiller property

Two of the above-mentioned properties were and are not now owned by myself. They are:

(1) The Sandberg property

(2) Award Homes stock

Part of my understanding of the "goings on" consisted of the grasping and understanding of facts like these. Is it "proper" or correct law for properties that I don't own to be included in the evaluation of a marital estate? Should I or should I not advise the court of my stipulating to such an inaccuracy? Two of these inaccurate factors of ownership exist today and have been confirmed by the appellant court's affirmation. Is the Court aware of this?

The Seegmiller property appears to me to have been acquired under circumstances that are deserving of some consideration. When I bought it I thought I was doing so because it was awarded to me and that Faux had wanted me to be able to go on

and practice my occupation of land developer. Because of this, I thought Faux awarded this property to me. The effect of this judgment has the opposite result and actually, if included as a part of the marital estate, has the effect of punishing me for taking the bold action to acquire it. Would the Court please address itself to this acquisition. Should it actually have been included as a part of the marital estate or not? For what reasons?

(Two) Another "goings on" that I came to comprehend within hours after my "so spoken by Robert D. Klein" stipulation was that Holidair Lands, Inc., a corporation, with a 17.5% minority stockholder owner, had placed upon it a judgment, even though it was not a party to a divorce action. As an individual I had stipulated to pay approximately $60,000 of Holidair assets at the expense of a minority stockholder interest. This to me seemed to be in conflict with my fiduciary responsibility as President of Holidair Lands. Question: Is this a proper finding? Should I or should I not make an effort to point this out to the Court? To me I felt I wanted to do so and that I had to do so. Granted, that Judge Taylor may not have understood this as I pleaded with him to permit me to withdraw my stipulation, but I was nevertheless explicit that I could not give my consent to such a legitimate legal conflict of interest. This inconsistency has not been dispensed with by the Court through its present action. Not my then attorney, or the Defendant's attorney, or the Court pointed this out to me. I discovered this on my own and made an effort to withdraw my consent on my own, in part

because of this. I really don't understand how I can stipulate to such an inconsistency. No one it seemed would listen to me, and now in the present action I am suffering a frustration in this particular. This is a real puzzlement for me. I just don't understand what to do or how to comply with this aspect of the imposed judgment. This aspect of the judgment will in all likelihood precipitate a third party lawsuit.

(Three) Another inconsistency that seems to me to be unenforceable relates to my agreeing to deliver 14 apartments, 7 of which were not and are not now owned by myself. I have actually made the effort to acquire these 7 additional apartments, but even at this time I have not been able to do so owing (1) to my mother's control of the Award Homes, Inc. stock, and (2) owing to the loyalty of her attorneys, who assisted her in preparing the trust that apparently this consent judgment disregards. By the terms of the judgment, I find my situation to be that I must ask my mother, who has already contributed $50,000 from her savings toward the acquisition of the marital estate, to ask three trustees to relinquish stock that she had put in trust for her grandchildren. I am one of those trustees, and the other two are Leo Jardine, who is my mother's attorney, as well as my own, and Harvard Hinton, a longstanding friend of our family.

This aspect of the judgment, if insisted upon, will in all likelihood produce a third party lawsuit. It illustrates further my conundrum and why I made a timely effort to be absolved from stipulating thereto. Is it the intent of this Court to

ratify that aspect of the presently imposed judgment? Actually, in this connection, while the facts are true, the matter was not discussed in the briefs although the record does address itself to the issue herein outlined. A third party lawsuit is likely to result from this issue if executed in its present form.

(Four) Another potential third party lawsuit that this judgment can and will probably induce is related to the security measure of delivering Major Enterprises stock to the court for its disposal. Mr. O'Brien has exercised an option entitlement and is in fact acquiring Major stock consistent with the provisions and terms of the stockholder agreement.

In court I agreed to deliver this stock to the lower court, not fully taking into account the restrictive provisions of the stockholders agreement. I have made an effort to comply with this aspect of the judgment and tried to elucidate upon this through my attorney in oral argument but was not afforded the opportunity to discuss this matter because the Court disregarded the defendant's Major Enterprise stock offer and our acceptance of same, which again is also confusing to me in its incompleteness.

The "consent" judgment has not disposed of this matter, and again this is a matter that I tried to elaborate on to Judge Taylor, who preferred not to listen, I suppose in accordance with his responsibilities as a judge. But I nevertheless withdrew my consent to comply with this aspect even as I will have to

do so at such time as I am requested to make delivery. It was not in my power then when I stipulated to do so, and I don't believe it is in my power now to comply. Does the present Court affirmation effectively dispense with this delivery of stock issue? Again, I tried to tell the lower court this when I withdrew my "consent" to the stipulation. Is this a proper and reasonable judgment conclusion?

In summary at this point, let me make an effort to make sure that my points are understood:

(1) I was asked to stipulate to the ownership of properties that I do not own at this time. These properties have been additionally included to arrive at $1,700,000 marital estate value, and they were not included in Faux's decree.

(2) There are three points of law that the affirmation does not dispense with:

(a) An illegal judgment against Holidair who was not a party to a divorce.

(b) The unenforceability of the delivery of 14 apartments, 7 of which I don't own.

(c) The illegality of the delivery of Major Enterprises Stock as a security measure.

(Five) My one last and significant point is a point of marital estate evaluation and is distinct from the principle of additional inclusion of properties. When these two principles, inclusion and evaluation, are taken and worked together, it is possible to create an illusion of $1,700,000 marital estate

net worth. This is at the heart of the dilemma of my case and where I feel the most grossly misunderstood as I tried to explain to Judge Taylor and this Court.

On pages 38 and 39 of the respondent's brief, the respondent's attorney states that Judge Taylor made an evaluation of Major Enterprises stock by the employment of the deadlock statute. Is this a legally permissible conclusion if there is no deadlock possibility? (See stockholder agreement contained in sealed brown envelope submitted by defendant's counsel after the preparation of abstract of record.) To the detriment of my interest, this resulted in a $343,000 evaluation error. This error, if coupled with inclusion errors, became the means by which an additional $1,500,000 of artificial value was created on paper and accounts in substantial part for the difference of $225,000 marital estate evaluation arrived at in the Faux decree.

Departing from "procedure for a moment, if I may, I would like to state that in my opinion that evaluation was too low and now, in hindsight, I can see that an adjustment should have been made but an apprisal evaluation of $1,700,000 is equally bad and the degree of its badness exceeds by far the badness of the Faux evaluation. The degree of that badness will likely keep spawning antagonisms into the future. This affirmation ruling has not addressed itself to that issue and accordingly does not effectively put this case to rest, even now. Can this court explain to me why this is a "proper" finding?

I feel that in dividing up the ocean, I have been given the bottom half and that the $200,000 gesture referred to in the

last paragraph of the affirmation ruling, when taken into account with the inclusion of the Seegmiller piece of property is as fictitiously generous as it is fictitious in its origin.

An answer to the question, Was Taylor entitled to make an evaluation of Major Enterprises stock on the basis of a deadlock statute if there in fact could be no "corporate deadlock", would do a great deal to expose what has really gone on in the Taylor hearing. He never understood this distinction, even with "close proximity observation". Again, I tried to bring this to his attention as a legitimate basis of why I felt in good conscience I had to withdraw my stipulation.

Gentlemen of the august Supreme Court of the State of Utah, if you do nothing else, please comment to this issue, as I have grown unusually weary from asking this highly germane question. The affirmation ruling, it seems to me, has missed this "deadlock statute" dimension entirely, and I believe it to be a significant point of law.

Esteemed and honorable gentlemen of the Court, if the December 16, 1975 affirmative ruling in its first two pages establishes a "tone" or, if you will, a "slant" that Judge Faux had the insight to provide a kind of protective device in his decree, in those two pages it is assumed from the beginning that the protection somehow was there for the exclusive benefit of the defendant.

Perhaps he meant that interpretation be employed. Again, I am not sure, I am just confused. I know he said this, and I see no reference to it in the ruling, and it may be

deserving of some comment.

In the Memorandum Decision, preliminary to the preparation of the Findings of Fact of the final Faux decree, on page 27, the following comment by Judge Faux appears:

> I have had difficulty settling upon defendant's proposal of dividing the various properties between the parties as the safe and equitable means of disposing of the economic problems involved. Frequently such a division is a satisfactory plan. I am now convinced that division of the interest in the corporate entities will result in destruction of the whole complex which has had unusual growth, to a large extent, because of plaintiff's business courage, foresight and decisiveness. I prefer to adopt a plan more promising of continued growth.

Again, on page 43 of the Abstract of Record in Judge Faux's "Findings" and "Conclusions", he stated:

> 4. That Plaintiff is awarded as his sole and separate property all other properties of whatsoever nature not awarded defendant in the foregoing paragraph.

which as I read and understand gave me the right to purchase the Seegmiller property.

This affirmative ruling, it seems to me, has the effect of the exact opposite of the implied intent of the now retired Judge and to suggest otherwise is again difficult for me to comprehend.

One last question, gentlemen: if this "affirmation" and "judgment" accomplishes what it purports to do, namely to grant to the plaintiff a "larger share", that he should have no reason to complain, let the author of this affirmative ruling ask the defendant's counsel to demonstrate once and for all, orally or in writing, where rebuttle is possible, one item, including even my $24,000 annual salary, that the present decree

at the time of its issuance, December 16, 1975, grants to the plaintiff that doesn't have at least one of the following elements:

(1) The value is other than what has been represented.

(2) That it has been paid for with funds developed after the marriage.

(3) That it is so encumbered that as a practical matter it is not functionable in the practice of the plaintiff's trade.

(4) Or that it in fact does not even exist at all.

(5) Or that does not have the strong likelihood of being lost by reason of foreclosure or withering away because of excessively high interest rates--this contrasted to the reverse being the case in what the defendant has been granted.

In conclusion, most esteemed gentlemen, please accept my humble inquiries as prompted by an effort on my part to accept emotionally and psychologically the imponderables that this affirmation ruling imposes. This decision seems to have the effect of not granting me a divorce from the nature of the things that I was trying to separate myself from, namely the continuing assertion of power and influence over my life that I concluded four and one-half years ago was unbearable and undeserved.

Respectfully submitted,

Robert M. Klein