

1987

J. Douglas Jacobsen v. Mollie Kimball : Brief of Appellant

Utah Court of Appeals

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870117-CA

IN THE UTAH COURT OF APPEALS

J. DOUGLAS JACOBSEN,)	
)	
Plaintiff/Respondent,)	Case No. 870117-CA
)	
vs.)	
)	
MOLLIE KIMBALL,)	Priority 14b
)	
Defendant/Appellant.)	

On Appeal From the Circuit Court, State of Utah
Salt Lake County, Salt Lake City Department
Honorable Maurice D. Jones, Judge

BRIEF OF APPELLANT MOLLIE KIMBALL

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COURT OF APPEALS

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IN THE UTAH COURT OF APPEALS

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BRIEF OF APPELLANT
Appeal From the Circuit Court, State of Utah
Salt Lake County, Salt Lake City Department
Honorable Maurice D. Jones, Judge

STATEMENT OF ISSUES

1. Did the Court err in finding that Plaintiff (Jacobsen) "loaned" Defendant (Kimball) \$5,700.00 to purchase an automobile?
2. Was the \$5,700.00 a gift?
3. Did the Court err in failing to consider the value of current goods and services furnished to Jacobsen by Kimball as an offset to the \$5,700.00?
4. Did the Court err in failing to find that the value of property returned by Kimball to Jacobsen constituted payment or offset to the vehicle purchase?
5. Is the four-year Statute of Limitations a complete bar to the action?

STATUTE

78-12-25 U.C.A., 1953:

Within four years:

(1) an action upon a contract, obligation or liability not founded upon an instrument in writing; also on an open account for goods, wares and merchandise, and for any article charged in a store account; also on an open account for work, labor or services rendered, or materials furnished; provided, that action in all of the foregoing cases may be commenced at any time within four years after the last charge is made or the last payment is received.

(2) an action for relief not otherwise provided for by law.

STATEMENT OF CASE

Plaintiff and Defendant became acquainted in 1979. Defendant Kimball was divorced. Plaintiff Jacobsen was not divorced at the time, but had been separated from his wife for a number of years and later became divorced. Both had children from their prior marriages, and these children were in high school or beyond in 1979. Plaintiff moved into Defendant's home shortly after they became acquainted and lived there for five years, at least two years full time and on weekends during the balance of the time because he worked out of town. Marriage was contemplated by the parties but the relationship terminated in 1984.

During the course of the relationship, Defendant Kimball provided a home for Plaintiff Jacobsen; paid all the household expenses, including taxes, utilities and other

payments; provided all the food consumed in the home, Plaintiff's beer and cigarettes; and an automobile and upkeep thereon. All of this was done without any financial contribution on the part of Defendant, except for the purchase of the automobile. A joint bank account with Plaintiff was opened and some \$8,000.00 was deposited into that account; an Ed Fraughton sculpture was purchased; a boat was purchased; and Kimball was given a valuable silver bullion collection. All of these items and all funds in the joint account, except the car, were given to Plaintiff when the relationship terminated.

This lawsuit stems from a controversy concerning the automobile. In early 1981, the parties were looking for an automobile to replace Kimball's car. On February 8, 1981, a suitable car was located and Jacobsen purchased the car for Kimball for \$5,700.00. He sued for that amount on March 27, 1985.

STATEMENT OF FACTS

As first witness, Plaintiff called his daughter, Sallee Jacobsen Orr. She testified that at the time of the car purchase, her father maintained a joint account with her and that, at his request, on February 8, 1981, she made out a check to one Wayne Schilling, for \$5,700.00 and gave the check to her father. Noted on the check is the statement for "Mollie's car" (Tr. 14). A copy of the check (Exhibit 1) is appended to this Brief.

Later, in August 1981 (Tr.18), while Mollie, Jacobsen and Sallee were riding in the Fiat automobile, there was a conversation concerning the car. Sallee was evidently upset with the fact that her father had purchased Mollie a car and had never purchased Sallee a car. Sallee felt she deserved a car too. Comments were made and, in response, Mollie said that she would put money in an account and pay Jacobsen back in one lump sum. Jacobsen did not enter the conversation, but merely told them to "ease up" (Tr. 24).

Douglas Jacobsen then testified, identifying the check (Exhibit 1) as being the check he handed to Mollie to buy a car. He testified that after the car had been purchased, there was a discussion about Mollie's other car and he testified that Mollie said she would sell the older car and put the money received on the new car. Jacobsen responded by telling her to put the money in an account and when I need it I'll get it (Tr. 22-23).

He remembered a conversation at the time the older Fiat was sold where he said he did not need the money, and Mollie said she would put it in a special account, add to it and pay him back (Tr. 24). He recalled a conversation of August 1981 where he, Mollie and his daughter were riding in the new Fiat. Sallee asked about the money, and Mollie said that she deserved it, and said further that the money was in a special account and that she would pay her dad back (Tr. 24).

After that, nothing was said about the car and the payments (Tr. 25). Jacobsen acknowledged that there was never a writing relative to the money for the car being a loan (Tr. 26).

Carol Gordeen, a social acquaintance of both parties, testified that they belong to a group that met at each other's homes on weekends (Tr. 55). She recalled the Fiat automobile and a conversation concerning the car and statements made by Jacobsen. Her testimony:

Q (By Mr. Garrett) Just tell us what you remember, or who you remember making those statements?

A Mr. Jacobsen showing the car to us, this is Mollie's new car, it's my--you know, gift to Mollie, I bought this new car for Mollie.

(Tr. 56)

Mollie Kimball testified as a witness on her own behalf. She first became acquainted with Mr. Jacobsen in July 1979 and from that time until 1984, they resided together in her home. He lived with her on a full time basis for two years and the rest of the time stayed with her at her home on weekends because he was out of town (Tr. 38).

In 1981, Mollie Kimball was looking for a vehicle to replace her car. She and Jacobsen looked at the car that was purchased, and she asked him to write a check for it, which he did (Tr. 39). At that time, she had credit with the credit union at LDS Hospital and would have been able to

borrow \$5,700.00 had she needed to (Tr. 35). At the time the check was given, he did not make any demand that she pay it back (Tr. 40). She, on the other hand, told him she would give him the money from the sale of her old car (Tr. 40). When the car was sold, she received approximately \$2,800.00. The car was sold within a month or less from the time the new car was purchased on February 8, 1981 (Tr. 41).

At the time the old car was sold, Mollie offered Jacobsen the money received. He responded by saying he didn't want it and told her to put it in her credit union. Nothing else was said (Tr. 42).

During the period of time that the relationship continued, Mollie made the house payments, paid for the groceries, paid the utilities, all of the upkeep on the home (Tr. 36). Exhibit 2, in Mollie Kimball's handwriting, a copy of which is appended to this Brief, provides a breakdown of household expenses provided to Jacobsen from 1979-1984. This exhibit is uncontraverted and shows \$225.00 per month for two years, total \$5,400.00; and \$20.00 per weekend for three years, total \$3,120.00; grand total, \$8,520.00.

Mollie Kimball again referred to Exhibit 2 relative to personal property that had been given to her by Jacobsen during the term of their relationship. In response to a question about the personal property, she stated:

A . . . I asked him one time, I said, it's funny, I work every week, I get a paycheck and it goes for expenses. You

work every week and buy investments, and he said I have you in mind with all of these things that I buy, I only do it with you in mind.

(Tr. 51)

This property consisted of an Ed Fraughton bronze sculpture - \$3,500.00; silver bullion - \$6,000.00; joint bank account - \$8,000.00; and a boat - \$1,200.00 (Exhibit 2).

All of the foregoing money and items of value were returned to Mr. Jacobsen by Mollie Kimball when the relationship terminated. The total value of the property was \$18,700.00. Of that amount, Mollie had contributed \$100.00 on the purchase of the Fraughton sculpture and \$800.00 on the boat.

On the question of when the older car was sold and the \$2,800.00 offered to Jacobsen, there may be an issue. Jacobsen said:

A Oh, two--two and a half, maybe three months, I don't know when.

(Tr. 23)

Mollie Kimball testified:

Q Do you recall saying at that time, I put it in the paper and tried to sell it, I would say within a couple of months?

A I think that it was totally sold by then, it could have been in a month. I cannot put a date on that, and I told you before, I tried to get that date, and I have not been able to come up with it.

(Tr. 52)

Based upon the facts as set forth above, the Court found:

1. That Jacobsen loaned Kimball \$5,700.00 to purchase a car.
2. That Kimball told Jacobsen she would pay back the \$5,700.00.
3. That Kimball would pay to Jacobsen the money she received from the sale of her old car and the balance as she made it.
4. The car was sold within a couple of months.

Based upon those findings, the lower Court awarded judgment to Jacobsen in the amount of \$5,700.00 with interest from March 10, 1981.

Kimball filed a Motion for New Trial and a Motion to Amend the Findings of Fact to address the following issues:

1. The date the Statute of Limitations commenced to run;
2. The effect of the reasonable value of the services and goods provided by Kimball;
3. The effect and value of the sculpture, bullion, bank account and boat; and
4. The value of the use of the vehicle by Jacobsen.

The Court denied the Motion for New Trial and the Motion to Amend the Findings, but directed the entry of an Amended Judgment providing that interest would run only from the date of Judgment.

SUMMARY OF ARGUMENT

Given the relationship of the parties and the circumstances surrounding the purchase of the car, the Court erred in finding that the purchase was a loan of money rather than a gift.

Jacobsen received food, shelter and care from Kimball in the uncontested value of \$8,520.00 and the return of all investments of \$18,700.00. The Court erred in not ruling that a fair division of property had occurred and that Jacobsen was not entitled to more by way of a judgment.

This action was commenced over four years after the car was purchased for Mollie Kimball. The Court did not address the Statute of Limitations, although it was specifically pled as a defense. There was no agreement between the parties as to the time of repayment. Such being the case, the Statute commenced on the date the car was purchased, and the Four-Year Statute of Limitations is a complete bar.

ARGUMENT

POINT I: THE COURT ERRED IN FINDING THAT THE \$5,700 CAR PURCHASE WAS A LOAN RATHER THAN A GIFT.

When a party attacks the findings of a lower court, the standard for appellate review is as follows:

"The standard for appellate review of factual findings affords great deference to the trial court's view of the evidence unless the trial court has misapplied the law or its findings are clearly against the weight of the evidence."
Garcia vs. Schwendiman 645 P2d 651 (Utah).

A more strident view of the same rule is contained in Sharf vs. BMG Corporation 700 P2d 1068.

To mount a successful attack on the trial court's findings of fact, an appellate must marshall all the evidence in support of the trial court's findings and then demonstrate that even viewing it in the light most favorable to the court below, the evidence is insufficient to support the findings.

The same rule does not apply in an equity case.

In equity cases our scope of review is broad, and this court may weigh the evidence and determine the facts. Bustamante vs. Bustamante 645 P2d 40 (Utah).

This case presents an interesting question as to whether it is in fact a law or equity case. At the time of the transaction giving rise to this lawsuit, the parties were living together virtually as husband and wife. The many transactions between them, such as the car, the joint bank account, the purchase of the sculpture, the purchase of the boat, the receipt of the silver bullion, the providing of food, shelter and care for a number of years, all point to the type of transactions occurring between husband and wife and not the single transaction between those dealing at arms' length. All of the transactions, including the car, must be considered. So considered, it is the equitable standard that should be applied in this case, rather than the law standard. However, even under the law standard, the findings of the Court are not supported by the evidence.

The question as to property rights between parties who live together, although unmarried, has not been determined

by the Utah Courts and there is no statute on the subject. California has addressed this matter in many cases. All are cited and a rule formulated in the case of Michelle Marvin vs. Lee Marvin 557 P2d 106. That case is commended to this Court for the detailed analysis of the law and for the adoption of that rule. The California Court makes an interesting statement relative to the concept of gift. Page 121 of the citation:

There is no more reason to presume that services are contributed as a gift than to presume that funds are contributed as a gift; in any event, the better approach is to presume, as Justice Peters suggested, that 'the parties intended to deal fairly with each other'. (Keene v. Keene, supra, 57 Cal.2d 657, 674, 21 Cal.Rptr. 593, 603, 371 P.2d 329, 339 (dissenting opn.); see Bruch, op. cit., supra, ---- Family L.Q. ----, ----.)

When examined under the concept of fairness, we find that Jacobsen received all of the property accumulated during the relationship after its termination and then brought suit for the balance, claiming it was a loan. If the Judgment is allowed to stand, he will have received property valued at \$27,200 -- Kimball, nothing.

There is no evidence to support the conclusion that the \$5,700 was a loan.

Mollie Kimball testified that when the vehicle was purchased, Jacobsen made no demand on her to pay the money back. She testified that she felt obligated to give him the

money received from the sale of her older car and when she received \$2,800 for that car, she offered it to Jacobsen. He said he didn't want it or didn't need it at that time, and for her to put it in her credit union (TR 40 and TR 42).

The testimony on the subject is vague and inconclusive as to the transaction being a loan. There is nothing in writing between the parties. Mollie's offer to pay did not extend beyond the offer to pay the money received from the sale of the old car and when in fact sold, Jacobsen rejected the money and told her to deposit it in an account. This was three years before the relationship terminated. During that time, there is no testimony of a demand for payment and no discussions concerning the automobile until this lawsuit was filed over four years after the money had been advanced.

Considering the circumstances of the parties, being virtually husband and wife, considering also the value of services received by Jacobsen and the settlement and delivery of property values at the time the relationship terminated, it is clear that the Court erred in finding the purchase of the vehicle to be a loan.

POINT II: THE COURT ERRED IN FAILING TO CONSIDER THE VALUE OF PROPERTY ACCUMULATED DURING THE RELATIONSHIP AND THE VALUE OF SERVICES RENDERED PLAINTIFF BY DEFENDANT.

Much of what is said here has been covered, in part, under Point I. Both Points have the same factual basis but

should be considered separately because the legal principles are somewhat distinct.

The Complaint filed in this case alleges a loan of \$5,700.00 to Defendant. Defendant, in her Answer, denies the loan and alleges affirmatively that the automobile was a gift.

Exhibit 2, which shows the value of services rendered to Jacobsen by Kimball during the relationship and the value of other items of property given to her during the relationship was offered as an exhibit in the nature of an offset to the claim of Jacobsen for \$5,700.00, and also to show the motivation of Jacobsen in making the vehicle a gift to Kimball. The Court admitted the exhibit but only for the purpose of showing the motivation for gift, and not as an offset (Tr. 7). On the point of offset, Mr. Marsden, counsel for Jacobsen, said:

I think that's the key issue. I might say the other issue from this exhibit is, as I understand the position, although not pled, they're claiming an offset and that's what--this is an itemization of living expenses while this--these two people lived together, as I understand it. I think it's irrelevant, but that seems to be an issue to be decided.

(Tr. 7)

The Court should have admitted Exhibit 2 as an offset as it would in any domestic relations case under the equitable powers of the Court, particularly when counsel, albeit reluctantly, agrees that it is an issue to be tried.

There is no question that the Court was given an opportunity to consider these issues, which it refused to do. None of the equitable issues of a fair division of property are addressed in the Court's Findings and Conclusions (Record, 38-39). The Court was given a further opportunity to address these issues in Defendant's Motion to Amend the Findings of Fact and Motion for New Trial (Record, 32-34). The Court refused and entered an Order denying the Motion to Amend and the Motion for New Trial (Record, 46-47).

Although our courts have not considered the precise issue of a fair division of property when parties live together, the lower court was not entirely without precedent in this matter. In the Utah case of Jenkins vs. Jenkins, 153 P.2d 262, the parties contracted a marriage at a time when the divorce of the wife was interlocutory only and had not become final. The Supreme Court ruled that the later marriage was void and not validated by continued cohabitation. The defendant contended that the only power of the lower court under those circumstances was to dismiss the case. The Supreme Court ruled to the contrary and said that the lower court had the equitable power to provide for a disposition of property and custody and support of the minor child born to the parties.

Already addressed in Point I is the value of services rendered Jacobsen by Kimball and his statement, not

contraverted, that the property he purchased and gave or delivered to her was done only with her in mind.

It was error for the Court not to make findings on those issues which were clearly presented in the evidence. Fairness would dictate that the Court below should have considered the matter of fairness, at least under the concept of gift set forth in the pleadings or, more precisely, under the concept of a fair division of property.

POINT III: THE FOUR-YEAR STATUTE OF LIMITATIONS IS A BAR TO THE ACTION (78-12-25).

The check for the car was written on February 8, 1981, the car purchased that day. Suit was brought by Jacobsen on March 7, 1985, a period of time in excess of four years.

There is no comment in the Findings on the Statute of Limitations defense. In the Motion to Amend Findings and Motion for New Trial, the Court was invited to address the issue of when the Statute began to run. It refused, denying the Motions.

The evidence on this point is not in serious conflict and is contained in the testimony of Plaintiff and Defendant. The best case Plaintiff can make on this point is that on the date he purchased the vehicle for Mollie Kimball, he did not set a time for payment and when Mollie offered to pay, he simply stated, put the money in the account, I'll let you know when I need it. He stated this again when he was offered the money from the old car that

had been sold. It must be concluded that there was no agreement as to repayment.

Cases construing similar situations have held that such a loan is repayable immediately and the statute begins to run on the date the loan was made.

These cases are collected in 14 A.L.R.4th 1385. From the annotation:

Thus, in the circumstances of the following cases, the courts held or recognized that statutes of limitation begin to run on actions based on oral promises to pay money, which did not contain provisions for the time of repayment, from the date the promises were made.

Plaintiff will direct the attention of the Court, as he directed the lower court, to the case of O'Hair vs. Kounalis, 463 P.2d 799 (Utah). In that case, suit was commenced 5½ years after the loan had been made and arrived at the Supreme Court by way of summary judgment procedures. The lower Court held that the action was barred by the four-year statute. The Supreme Court reversed for trial on the merits to determine whether or not there was a loan, whether the parties intended payments to be made at a future time, whether a date of payment could be established, and what constituted a reasonable time under the circumstances. The plaintiff's version of the case which necessitated a factual determination was that it was the intention of the parties that repayment was to be made but was not to be made for some number of years in the future.

Our case is clearly distinguishable. In the O'Hair case, money was to be repaid but not for some five years in the future. In our case, there was to be no payment until demanded. There is a vast conceptual difference between the two types of cases. Where a loan is made (Defendant denies it was a loan), the lender has a right to set the terms and if that lender simply states I'll let you know when I want the money, it is a demand loan, the cause of action accrues from when the loan is made, and the statute of limitations begins to run on that date.

CONCLUSION

During the five-year period that Plaintiff and Defendant lived together, there were a number of transactions between them, such as an \$8,000.00 joint account, the purchase of several items for investment, and the purchase of a vehicle. The appropriate decision in this case would be for this Court to conclude that the return of all the invested items, including the \$8,000.00 joint account, to Plaintiff was a fair settlement of property rights and that the vehicle or its proceeds retained by Plaintiff was a fair settlement to her, which in some measure would compensate her for maintaining and paying for all the groceries and expenses on a home of benefit to Plaintiff.

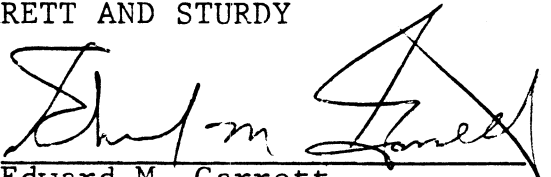
On the other hand, if the Court chooses not to determine the case on the basis of equitable division of

property between these two people, then at all events, the claim of Plaintiff for \$5,700.00 is barred by the Four-Year Statute of Limitations. If that fails, the case should be referred back to the lower Court for a new trial on the various issues.

Respectfully submitted this 27th day of July, 1987.

GARRETT AND STURDY

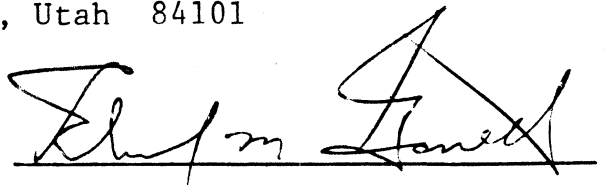
By


Edward M. Garrett

CERTIFICATE OF MAILING

I hereby certify that on the 27th day of July, 1987, four (4) true and correct copies of the foregoing Brief of Appellant were mailed, postage prepaid, to:

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1245
Lynn
held

SALLEE JACOBSEN
OR J. DOUGLAS JACOBSEN
1050 WOOD AVENUE 467-1009
SALT LAKE CITY, UTAH 84105

Advantage 230

768 1981 31-1/1240

Pay to the order of Wayne Schilling \$ 5,700.00

Five Thousand Seven Hundred and No/100 Dollars

SUGARHOUSE OFFICE
First Security Bank of Utah
NATIONAL ASSOCIATION
1065 E. 21ST SO. • SALT LAKE CITY, UTAH 84108

For Mother's Car

Sallee Jacobsen

⑆124000012⑆ 52 14557 25⑈ 0230 ⑈0000570000⑈

EXHIBIT "1"

monthly output Mollie Hemball 1974-1984

226.00	House
100.00	Gas (average)
75.00	power (average)
400.00	Food
25.00	Water
50.00	upkeep
25.00	car Insurance
<hr/>	
901.00	

Average \$225.00 per person per month.

or \$5400.00 for 2 years

3 years of weekends at \$20.00 per weekend
\$3120.00

Total living expenses for Mrs. Jacobson
\$8520.00

Car repairs or shops paid by MK
vacation / weekend trips divided equally
Gas for car divided
and Car for all our transportation

Brass Sculpture \$3500.00 given to Mrs. Jacobson
Silver Chalice \$6000.00 given to Mrs. Jacobson
ink account \$8000.00 given to Mrs. Jacobson
it purchased from art \$1200.00 given to Mrs. Jacobson
\$18,700.00

Returned at end of relationship.