

1987

Gail Kathleen Throckmorton v. Cecil Dee Throckmorton : Reply Brief

Utah Court of Appeals

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Nolan J. Olsen; Olsen & Olsen; Attorney for Respondent.

Robert M. McRae, Harry H. Souvall; McRae & DeLand; Attorneys for Appellant.

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GAIL KATHLEEN THROCKMORTON, :

Plaintiff/Respondent, :

vs. :

Case No. 870400-CA
Category 14

CECIL DEE THROCKMORTON, :

Defendant/Appellant. :

REPLY BRIEF OF APPELLANT

APPEAL FROM AN ORDER OF THE THIRD JUDICIAL DISTRICT
COURT OF SALT LAKE COUNTY, STATE OF UTAH
The Honorable Homer F. Wilkinson, Presiding

ROBERT M. McRAE
HARRY H. SOUVALL
McRAE & DeLAND
Attorneys for Appellant
209 East 100 North
Vernal, Utah 84078

NOLAN J. OLSEN
OLSEN & OLSEN
Attorneys for Respondent
8138 South State Street
Midvale, Utah 84047

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COURT OF APPEALS

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ROBERT M. McRAE
HARRY H. SOUVALL
McRAE & DeLAND
Attorneys for Appellant
209 East 100 North
Vernal, Utah 84078

MOLAN J. OLSEN
OLSEN & OLSEN
Attorneys for Respondent
138 South State Street
Midvale, Utah 84047

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Defendant/Appellant. :

REPLY BRIEF OF APPELLANT

STATEMENT OF ISSUES

On this appeal defendant/appellant Cecil Dee Throckmorton raised the following issues:

1. Did the plaintiff meet her burden in establishing a substantial and permanent change in circumstances sufficient to justify the trial court's modification of the Divorce Decree?

2. Did the trial court adequately consider the Paffel criteria prior to awarding plaintiff alimony?

On cross appeal the plaintiff/respondent Gail Kathleen Throckmorton raised the following issues:

1. Is plaintiff's claim against defendant's retirement account barred by the doctrine of res judicata?

2. Did the trial court abuse its discretion in failing to award plaintiff any interest in defendant's retirement account ?

Defendant/Appellant raises the following additional issue:

Is plaintiff's claim against defendant's retirement account barred by the relevant statute of limitations?

STATEMENT OF FACTS

In addition to the statement of facts contained in Respondent's Brief, Appellant submits the following facts:

1. Plaintiff/Respondent was aware of the existence of defendant's retirement plan at the time of the divorce in 1976 and failed to assert a claim against it at that time and again failed to assert a claim against it in 1980 when this decree was modified. (TR p.35, lines 1-4)

2. At the time the parties were divorced defendant's interest in the retirement plan amounted to \$9673. (TR p.17, lines 13-14)

ARGUMENT

POINT I

PLAINTIFF'S CLAIM AGAINST DEFENDANT'S RETIREMENT ACCOUNT IS BARRED BY THE DOCTRINE OF RES JUDICATA BECAUSE PLAINTIFF KNEW OF THE RETIREMENT ACCOUNT AT THE TIME OF THE DIVORCE AND ALSO IN 1980 WHEN THE DECREE WAS MODIFIED AND FAILED TO ASSERT A CLAIM AS THOSE TIMES.

The Utah Supreme Court has repeatedly recognized that res judicata applies to divorce actions. Jacobsen v. Jacobsen, 703 P.2d 303, 305 (Utah 1985); Kessimakis v. Kessimakis, 580 P.2d 1090, 1091 (Utah 1978).

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As the Court in Jacobsen stated:

When there has been an adjudication, it becomes res judicata as to those issues which were either tried and determined, or upon all issues which the party had a fair opportunity to present and have determined in the other proceeding.

Jacobsen at 305 (quoting Mendenhall v. Kingston, 610 P.2d 1287, 1289 (1980)).

In the case at hand the court found the plaintiff knew of the existence of defendant's retirement account at the time of the divorce in 1976. Plaintiff failed to assert any claim on the benefits at that time.

The court's finding is supported by testimony of both parties. At the divorce hearing plaintiff testified that she knew of the retirement benefits at the time of the divorce in 1976. (TR p.35, lines 1-4, Direct examination of plaintiff)

Q Did you ever have any information in regard to the fact that he (defendant) had a retirement?

A Yes. I knew he had a retirement. I did not know that I was legally entitled to any portion of that.

Plaintiff therefore knew of the retirement in 1976 and had a fair opportunity to litigate the issue at that time. Indeed plaintiff was the party represented by counsel. Defendant signed a consent to default. Therefore, the trial court correctly ruled that the issue should have been raised at the time the original divorce decree was entered into and plaintiff is now barred by res judicata from asserting a claim to defendant's benefits.

POINT II

PLAINTIFF'S CLAIM TO DEFENDANT'S RETIREMENT BENEFITS IS BARRED BY §78-12-25 U.C.A. AND THE DOCTRINE OF LACHES.

Section 78-12-25 provides that an action for relief not otherwise provided by law shall be brought within four years. As the court ruling indicates plaintiff was aware of the retirement plan at the time of divorce in 1976. Plaintiff's claim is now barred by the applicable statute of limitations.

Moreover, plaintiff's claims are barred by laches. The Supreme Court held that laches essentially contains two elements: (1) the lack of diligence on the part of the plaintiff; and (2) an injury to defendant due to the lack of diligence. Leaver v. Grose, 610 P.2d 1262, 1264 (Utah 1980).

In this case the court clearly held that plaintiff was aware of the retirement in 1976 and waited ten years to assert a claim against it. At the time of the divorce in 1976, when plaintiff should have asserted her claim, defendant's total interest in the retirement plan was \$9673. Pursuant to the Divorce Decree, plaintiff obtained the equity in the parties home of \$24,000 which was realized by plaintiff through the sale of the home in 1983. The defendant received his retirement and was ordered to pay and assume \$12,000 in debts of the marriage. Plaintiff now wishes to relitigate the "bargain" but has nothing to offer in return. If plaintiff had asserted a right to the \$9673 retirement account in 1976,

the debts may have been more evenly distributed, or the parties may have split the equity in the home. In sum it is now inequitable to relitigate the property distribution ten years later after plaintiff has received and spent the benefits of the agreement. Plaintiff's delay has prejudiced defendant and is therefore barred.

POINT III

THE RECORD LACKS SUFFICIENT EVIDENCE TO ESTABLISH PLAINTIFF'S HEALTH PROBLEMS AND THERE IS NO EXPERT TESTIMONY OR OTHER SUFFICIENT EVIDENCE THAT THESE PROBLEMS PERMANENTLY DISABLE PLAINTIFF AND PREVENT HER FROM WORKING AT ANY EMPLOYMENT WHATSOEVER.

Plaintiff argues that the material change in circumstances is due to health problems that prevent her from obtaining employment. It is the plaintiff's burden of proof to prove that these problems: (1) exist, (2) are permanent and (3) essentially render her unemployable.

Defendant respectfully submits that the record is devoid of such proof. Although the plaintiff is competent to testify regarding her perception of her problems, she is not an expert as to their permanance or to what extent her problems render her permanently disabled. In fact, the record indicates that plaintiff's problems can be corrected by surgery. (TR p.6, lines 19-22)

This Court faced a similar finding of fact in Rusham v. Rusham, 65 Utah Adv. Rep. 29, 31 (Utah App. 1987) where the court held that a finding that plaintiff had heart problems was unsupported by the evidence. Id. at 31.

As in Rusham, the trial court did not have sufficient evidence to support its finding that plaintiff's health problems render her permanently disabled and unemployable. Plaintiff should be required to present expert testimony as to her problems prior to a finding of permanent disability. Because plaintiff failed to meet her burden of proof defendant respectfully requests that the award of alimony be reversed and plaintiff's petition to modify be dismissed.

CONCLUSION

For the above reasons, defendant respectfully requests that the decision of the trial court regarding alimony be reversed and that the court's ruling regarding defendant's retirement be affirmed.

Respectfully submitted this 3rd day of March, 1988.

McRAE & DeLAND



HARRY H. SOUVALL
Attorney for Appellant

CERTIFICATE OF MAILING

I do hereby certify that I mailed, postage prepaid, four true and correct copies of the foregoing Reply Brief of Appellant to Nolan J. Olsen, Attorney for Respondent, 8138 South State Street, Midvale, Utah 84047 on this 3rd day of March, 1988.


