

1978

## Sharron Kathleen Robertson v. Donald Lee Robertson : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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SHARRON KATHLEEN ROBERTSON, )

Plaintiff and Respondant, )

vs. )

Civil No. 15719

DONALD LEE ROBERTSON, )

Defendant and Appellant. )

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APPELLANT'S BRIEF

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APPEAL FROM DECREE OF DIVORCE OF THE  
FOURTH JUDICIAL DISTRICT COURT OF UINTAH COUNTY  
HON. J. ROBERT BULLOCK, JUDGE

---

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SHARRON KATHLEEN ROBERTSON, )  
Plaintiff and Respondant, )  
vs. )  
DONALD LEE ROBERTSON, )  
Defendant and Appellant. )

DONALD LEE ROBERTSON, )  
Defendant and Appellant. )

## STATEMENT OF NATURE OF THE CASE

This is an appeal by the defendant, Donald Lee Robertson from the decree of divorce entered on the 22nd day of February, 1978, by the Honorable J. Robert Bullock, Judge of the Fourth Judicial District Court in and for Uintah County, State of Utah whereby defendant seeks to have the Decree of Divorce amended with respect to the equity in certain real property.

The trial court granted plaintiff a decree of divorce from defendant and awarded to the plaintiff certain real and personal property and ordered the defendant to pay support, alimony, and the debts incurred by the parties during their marriage.

Plaintiff and defendant were married in May, 1970 and had two children as issue of the marriage and acquired a home in Vernal, Utah, where they resided at the time of the

filing of the divorce action. (R. 1)

Plaintiff filed a complaint for divorce on the 27th day of September, 1977, (R. 1) and simultaneously filed an affidavit in support of a motion for an order to show cause to which was attached a list of the amount of money allegedly necessary to support the plaintiff pending a determination of the action and a list of all the debts owed by the parties. (R. 4, 5, 6).

Defendant having been served with summons he filed his answer on or about the 17th day of October, 1977, (R. 12, R. 13). Thereafter, in preparation for trial the defendant filed a statement of assets and liabilities on January 27, 1978 (R. 23, 24, 25).

The matter was tried before the Honorable J. Robert Bullock sitting without jury on the 24th day of January, 1978, whereupon after having heard testimony, received evidence, and argument of counsel he took the matter under advisement and on the 27th day of January, 1978, rendered his memorandum decision. (R. 28, 29). Thereafter, plaintiff's counsel prepared findings of fact and conclusions of law and decree of divorce and submitted them to the court for its signature which were signed on or about the 21st day of February, 1978 (R. 30-36).

On March 2, 1978, defendant served his notice of appeal which was filed with the Clerk of Court on March 7, 1978 (R. 27).

The defendant specifically appeals from the Court's

decision as it relates to the allowance of certain obligations as debts of the parties to be paid by the defendant and to the distribution of the equity in the real property under the Findings of Fact and Conclusions of Law and Decree which are in conflict with the memorandum decision rendered by the Court.

#### POINT ONE

THE COURT ERRED IN REQUIRING DEFENDANT TO PAY ALLEGED CERTAIN DEBTS.

At the time of the commencement of the action the plaintiff filed an affidavit to which she attached a list of all of the debts and obligations incurred by the parties during their marriage. This affidavit failed to allege any debts owing to the father, mother or brother of the parties. At the time of trial, however, plaintiff testified that her father assisted the parties in acquiring a down payment for a home in the sum of \$2400.00 (R. 56, 57). With respect to this loan, she testified that it was made in March of 1973 and was oral. She also testified that over \$1,000.00 had been advanced over a period of the past five or six years to plaintiff and defendant by plaintiff's parents (R. 58, 59).

She went on and testified that when the parties first were married they lived with her parents and there were advances or loans of between \$3,000 to \$3,500.00 to them by her parents. (R. 60, 61). This was denied by defendant. It was not until cross examination that the time frame when these advances were made was developed wherein the plaintiff

testified that it was in 1970 through November of 1971 (R. 71). Defendant moved the court to strike all testimony relating to the \$2400.00 for the down payment of the home on the basis that the statute of limitations had run with respect to this debt, also with respect to the borrowings from the mother between November, 1970 to October of 1971 and the \$1,000.00 from the father over a period of five to six years, all on the basis of the running of the statute of limitations (R. 72). The Court denied the motion to strike and said: "I am not going to strike the testimony, but I'll take that into consideration when I'm deciding the case." (R. 72).

The Court when it made its decision ruled that a "reasonable credit attributable to plaintiff's parents and other relatives on account of contributions to the parties during their marriage for the down payment, rent, living expenses, etc. is the sum of \$7,500.00. (R. 28) The Court went on and said:

"It is reasonable and proper that the net equity after adjustment for contributions of plaintiff's parents and other relatives be divided equally between the parties."

In the pleadings, no allegation was made by the plaintiff at the time of the filing of her complaint, or her affidavit in support of her motion for an order to show cause anything at all with respect to the alleged indebtedness due to her parents. Consequently, the defendant when he filed his answer did not affirmatively allege the running of the statute of limitations, because nothing was plead with



respect to any indebtedness which would be barred by the statute of limitations.

At the time of trial, however, plaintiff testified to these matters and after the dates were ascertained as to when the indebtedness were incurred, the defendant moved to strike the testimony. No motion pursuant to Rule 15(b), to amend the pleadings, was made by the plaintiff.

78-12-25(1), UCA, 1953, as amended (statute of limitations) provides:

"Within four years; (1) an action upon a contract, obligation or liability not founded upon an instrument in writing."

The uncontroverted facts in this case show that the statute of limitations had run with respect to each and every one of the alleged indebtedness due to the parents of the plaintiff. The defendant, having raised the issue of the running of the statute of limitations shifted the burden onto the plaintiff to show, affirmatively, that the statute of limitation had not run or that the running of the statute was tolled by some act or conduct. Clawson vs. Boston Acme Mines Development Company, 72 U. 137, 269 P. 147; Snyder v. Clune, 15 U.2d 254, 390 P.2d 915.

The Court clearly erred when it did not take into consideration the running of the statute of limitations as to the claimed indebtedness of the parties.

It is not disputed that the Court, in exercising its discretionary powers with respect to divorce and divorce settlements may order one party to discharge the indebtedness

incurred by the parties during their marriage, however, that discretionary power cannot be invoked to compel the re-institution of a debt which is no longer viable in the law. In the recent case of Westenskow vs. Westenskow, (1977, Utah) 562 P.2d 1256 the Supreme Court of Utah affirmed the Court's decree off-setting indebtedness due to family members, however, the Court observed:

"The Court further stated one of the reasons plaintiff was granted the lien on the home was the alleged debt to his grandmother. It was questioned whether this debt would ever be paid, but the distribution was made on the basis it was a valid obligation." (Emphasis mine)

In the case now at bar, the obligations owing to the parents of the plaintiff are not valid obligations by reason of the fact that they are barred by the statute of limitation and therefore the Court clearly erred in allowing an off-set of \$7500.00 against the equity that the parties had in the real property.

The Utah Courts have long held that the Court has discretion to order one party to pay debts incurred by the parties during their marriage and that such order is not an abuse of discretion, however, where it is shown that the Court misapplied the law resulting in substantial and prejudicial error such a decree of divorce will be modified upon appeal. Baker vs. Baker, (1976 Utah) 551 P.2d 1263.

The Supreme Court of Utah in the case of English vs English (1977, Utah) 565 P.2d 409 observed:

"The trial court, in a divorce action, has considerable

latitude of discretion in adjusting financial and property interest. A party appealing therefrom has the burden to prove there was a misunderstanding or misapplication of the law resulting in substantial and prejudicial error; or the evidence clearly preponderated against the findings; or such a serious inequity has resulted as to manifest a clear abuse of discretion."

The law throughout the United States is clear that the defense of the Statute of Limitations is a right to which all men are entitled to invoke, and that it is favored by the Courts. Quitmeyer v. Theroux, (Mont. 1964) 395 P.2d 965. In an earlier Oklahoma case, Carter v. Collins, (Okla, 1935) 50 P.2d 203, in quoting from 17 R.C.L. 668 it was stated:

"As a general rule, however, statutes of limitations are now considered as wise and beneficent in their purpose and tendency, and as furnishing a defense as meritorious as any other and one to which all men are entitled as a right."

the legal work 51 Am Jur 2d 593, Limitation of Actions, §4 states:

"The right to assert the statute of limitations as a complete defense is considered to be property within the protection of a constitutional guaranty of due process of law."

The trial court recognized the existence of the legal effect of the Statute of Limitations when it observed:

"The amount paid to her mother for board and room or whatever it was during the period they lived there and the amount advanced (Sic) by her father and her brother for living expenses, et cetera, it's true I think that if they were bringing the action there would be no recovery, because I think it would be barred by the statutes of limitations."

(R.84--TR 39)

However, in spite of the statute of limitations the Court did totally ignore the effect of the statute when it

made its final ruling and this was error and abuse of discretion to reinstate a claim of the plaintiff's parents and award to the plaintiff from the equity in the real property enough money to satisfy the purported claims of the parents.

In the case of Gray Realty Co. v. Robinson, 111 U 521, 184 P.2d 237, the Supreme Court in speaking of the statute of limitations observed:

"Section 104-2-23, which can be designated as a general statute of limitations, is a statute of repose enacted as a matter of public policy to fix a limit with which an action must be brought or the obligation is presumed to have been paid. The underlying purpose is to prevent the unexpected enforcement of stale claims concerning which persons interested have been thrown off their guard by want of prosecution."

The attempted enforcement of the claims, some as old as eight years, in the divorce action whereby the plaintiff was awarded the equity in the home to pay these debts, which is highly questionable as to whether she would in fact ever do, or be expected to do by her parents, is to say the least the "unexpected enforcement of stale claims."

#### POINT TWO

THE COURT ERRED IN SIGNING FINDINGS OF FACT WHICH WERE AT VARIANCE WITH ITS MEMORANDUM DECISION.

The Court in its memorandum decision provided that the equity in the home that was awarded to the defendant was to be paid over to him within 18 months of the date of the decree (R. 28,29), however the findings of fact as prepared by the plaintiff and submitted to the court provided that this equity would not be paid over for 18 years. (R. 32) This was not the intent of the Court. Furthermore, the

findings did not state what was to happen when the plaintiff remarried. She did in fact remarry shortly after the divorce became final.

Plaintiff's counsel in preparing the findings of fact and conclusions of law saw fit, for their own purposes, to amend the Court's decision in this matter, and the Court through inadvertence executed the findings of fact and conclusions of law and decree presented to it by plaintiff's counsel.

The Judge's memorandum decision in this matter stands as a finding of fact within the meaning of Rule 52(a) Utah Rules of Civil Procedure. Thomas v. Thomas, (1977, Utah) 569 P.2d 1119.

It is submitted that when the Court requests the prevailing party to draw findings of fact and conclusions of law in conformity with his decision that it is incumbent upon counsel in preparing such findings to do so consistent with the court's findings. The Utah Court in the case of Boyer Company v. Lignel, et al, (1977, Utah) 567 P.2d 1112 discusses the mechanical adoption of findings of fact and conclusions of law and states:

"The discretion of adopting the findings as submitted to the trial Court is exclusively in that Court as long as the findings are not clearly contrary to the evidence."

In this respect the trial court having made its own findings of fact and conclusions with respect to the equities in the real property, such findings should have been incorporated into the formal findings of fact and conclusions of law as

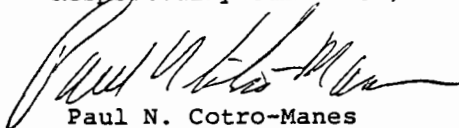
prepared for the Court's signature.

When counsel for plaintiff was contacted about this variance they refused to do anything about making any correction. As defendant felt that error had been committed with respect to the amount of the equity set aside for the benefit of the parents of the plaintiff no motion objecting to the findings of fact was made and pursuant to rule 52(b), Utah Rules of Civil Procedure no objection or motion to amend is required.

#### SUMMARY

It is respectfully submitted that the Court order that the decree of divorce be amended to strike therefrom the off-set of \$7,500.00 from the equity in the real property, and that the said \$7,500.00 be divided equally between the parties, and that further, the decree be amended to provide that the equity due the defendant be paid over to him within the 18 months specified in the Memorandum Decision, and for costs of appeal.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that on the 26<sup>th</sup> day of May, 1978,  
I mailed, postage prepaid, two copies of the Brief of Appellant  
to P. Keith Nelson, Esq. and George Sutton, Esq., Attorneys  
for Plaintiff and Respondant at 48 Post Office Place, P. O.  
Box 2465, Salt Lake City, Utah 84110.



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