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Lola H. Mitchell v. Gary A. Mitchell : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
OF THE
STATE OF UTAH

LOLA H. MITCHELL,)
 Plaintiff-Appellant,) Case No. 15790
vs.)
GARY A. MITCHELL,)
 Defendant-Respondent.)

BRIEF OF APPELLANT

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FILED

TABLE OF CONTENTS

	Page
STATEMENT OF THE NATURE OF THE CASE	1
DISPOSITION IN LOWER COURT	3
RELIEF SOUGHT ON APPEAL	3
STATEMENT OF FACTS	3
ARGUMENT	5
POINT I. THE TRIAL COURT ABUSED ITS DISCRETION IN NOT FINDING THAT JUDGE PALMER COULD NOT DO EQUITY IN VIEW OF THE MISSING PAGES	5-7
POINT II. SINCE NO TRIAL COURT JUDGE SEEMS WILLING TO GIVE EQUITY THIS COURT SHOULD REVIEW THE FILE (IT IS ASSUMED THAT ALL OF IT WILL BE TRANS- MITTED TO THE COURT) AND ALL OF THE TRANSCRIPTS AND DETERMINE WHETHER OR NOT THIS PLAINTIFF- APPELLANT HAS RECEIVED HER FAIR SHARE OF THE ASSETS OF THE PARTIES.	7-9
CONCLUSIONS	9

CASES CITED

Glen vs. Player, 326 P2d, 717 7 U. 2d, 428	8
Carbon Canal Co. vs. Sanpete Water Users Assn., 425 P2d 405, 19 U.2d 6	8
Pack vs. Jamison, 364 P2d 1 and 2 U. 2d, 241	8
Graham vs. Street, 27 P2d, 456, 2 U. 2d, 144	8
Warren vs. Dixon Ranch Co., 260 P2d, 741, 122 Utah 416 .8	
Watson vs. Watson, Utah, 561 P2d 1072	8

IN THE SUPREME COURT OF THE STATE OF UTAH

LOLA H. MITCHELL,)	
Plaintiff-Appellant,)	
vs.)	Case No. 15790
GARY A. MITCHELL,)	
Defendant-Respondent.)	

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

This is an extension for an action of divorce. The wife, appellant herein, received a divorce in lower court on the 18th day of December, 1975, which was continued until the 22nd day of April, 1976, and the 28th day of April, 1976, wherein the Court granted a Decree of Divorce to both parties on the 6th day of January, 1976, and on the 10th day of May, 1976, filed an Amended Decree of Divorce. After that time the defendant filed an appeal in the Supreme Court, Case No. 14738, which was heard by the Supreme Court and decided on the 8th day of June, 1977, Justice Wilkins writing for the Court. During the period of time from the granting of the divorce until the ruling of the Supreme Court, the defendant failed to make the payments on the mortgage on real property which had been awarded to the plaintiff. Relief and in-

junctive relief was sought from the lower court and from the Supreme Court without success and the property was sold on April 1, 1977. Defendant's debts were paid and plaintiff was left without assets. After that a hearing was held before Judge Christoffersen who found the defendant in contempt of court for failure to protect the interest of the plaintiff. At a hearing before Judge J. Duffy Palmer, Judge Palmer heard evidence with respect to the disposition of the property and without benefit of the file (said file not having been available to him) he made a bench ruling. After that time, the Order on Order to Show Cause was filed by defendant's attorney and said Order on Order to Show Cause was docketed but was then hidden from sight in the Clerk's Office and at a Motion for Rehearing, having been denied, plaintiff sought further relief from the Order before Judge Tibbs, Judge Palmer having disqualified himself. Plaintiff, therefore, having appeared before Judge Gould, Judge Christoffersen, the Judges of the Supreme Court, Judge Christoffersen, Judge Palmer, Judge John F. Wahlquist, Judge Tibbs, continues to seek relief. For Judge Tibbs, on the 29th day of March, 1978, ruled that he was without jurisdiction since Judge Palmer had ruled on February 14, 1978, that he was without jurisdiction to modify the Order on Order to Show Cause rendered by him on August 31, 1977.

DISPOSITION IN LOWER COURT

After the Supreme Court decision Judge Christoffersen held a hearing and found the Defendant-Respondent in contempt of court, permitted the Plaintiff-Appellant to withdraw \$15,000.00 of funds and disqualified himself. Judge Palmer, on a hearing on Order to Show Cause, without benefit of the file, distributed the assets of the parties requiring the Plaintiff-Appellant to pay the debts of the Defendant-Respondent without any concomitant distribution of assets to the Plaintiff-Appellant. Judge Palmer disqualified himself after a Motion for a New Hearing. Judge Tibbs refused to do equity in that he found that there was no change of circumstances between the August hearing and the March hearing.

RELIEF SOUGHT ON APPEAL

Lola Hope Mitchell, the Appellant herein, seeks relief as follows:

1. Reversal of the Trial Court's Order with respect to distribution of assets.
2. Disbursement of assets by this Court since no other Court seems capable of (or disposed to) distributing the assets.

STATEMENT OF FACTS

The Plaintiff-Appellant and the Defendant-Respondent

were residents of the jurisdiction and were intermarried on February 14, 1969, in Weber County, Utah. The Trial Court in the first instance found values in the amount of \$107,437.00, of which a substantial amount was the real property in Uintah (the home of the parties). During the course of a previous appeal, that home was sold at a foreclosure of Trust Deed Note for the value of \$81,200.00. The Decree of Divorce had provided that the Defendant-Respondent should pay the \$51,000.00 Trust Deed Note and should also pay other mortgages against said property. As a result of the foreclosure of Trust Deed Note, the \$51,000.00 amount was paid (when finally computed it amounted to \$67,031.95, plus \$4,495.00 paid to Dale T. Browning on another mortgage.) Defendant-Respondent ended up with real property of the value of \$336,000.00 (four 4-plexes at \$84,000.00 each) (T 25, Line 13) less a mortgage in the amount of \$153,000.00, together with his Marilyn Drive house, his automobile, camper and business. Plaintiff-Appellant received a lien against the sixteen (16) units in the amount of \$20,000.00 and \$15,000.00 from the sale of the Uintah property. In the distribution of the assets as envisioned by Judge Christoffersen, each was to receive one-half. In the final distribution of assets, Plaintiff-Appellant paid

Defendant-Respondent's debts in the sum of approximately \$80,000.00, received \$15,000.00 and an unpaid equity of \$20,000.00. Defendant-Respondent received all of the rest of the property.

ARGUMENT

POINT I

THE TRIAL COURT ABUSED ITS DISCRETION IN NOT FINDING THAT JUDGE PALMER COULD NOT DO EQUITY IN VIEW OF THE MISSING PAGES.

The Defendant-Respondent, Gary A. Mitchell, was found in contempt of court by Judge Christoffersen for his failure to protect the assets of the Plaintiff-Appellant. After that time Judge Palmer, despite the fact that he did not have the file, made a ruling which granted equity to the Defendant-Respondent whose net effect was to require the Plaintiff-Appellant to pay the debts of the Defendant-Respondent. Judge Palmer, at a subsequent hearing, testified that he did not have the file in front of him (see T pages 27-29) wherein the Judge, responding to a question, "At the time of the hearing in August were there parts of the file that were missing" Answer: "Well, in fact, the entire file was missing with the exception of some few papers." Despite Judge Palmer's response in that regard and despite having framed the misrepresentation to the Court, Judge Tibbs failed to

find that Judge Palmer's ruling could not have done equity to the Plaintiff Appellant herein. The file reflects that, in fact, the Defendant-Respondent was in contempt of court. The file reflects further that the Plaintiff-Appellant paid all of the debts of the parties with the exception of the mortgage on the sixteen (16) units. The file further reflects that each Judge, Judge Palmer and Judge Tibbs, was aware of the fact that this was an inequitable position with respect to the distribution of assets. Judge Tibbs, in spite of the definitive statement on the part of Judge Palmer, did not do equity to the Plaintiff-Appellant.

One is reminded of the words of St. Luke, Chapter 18, Verses 1 through 7, "And He spake a parable unto them to this end, that men ought always to pray, and not to faint; Saying, There was in a city a judge, which feared not God, neither regarded man: And there was a widow in that city; and she came unto him, saying, Avenge me of mine adversary. And he would not for a while: but afterward he said within himself, Though I fear not God, nor regard man; Yet because this widow troubleth me, I will avenge her, lest by her continual coming she weary me. And the Lord said, Hear what the unjust judge saith. And shall not God avenge his own elect, which cry day and night unto him, though he bear long with them?" Must the Plaintiff-Appellant wait for that long sought

day of the Lord's coming to get equity? Neither Judge Gould, Judge Christoffersen, the Supreme Court, Judge Christoffersen, Judge Wahlquist, Judge Palmer, nor Judge Tibbs has ever given her equity with respect to the distribution of the property. When, oh when, shall such equity occur?

POINT II

SINCE NO TRIAL COURT JUDGE SEEMS WILLING TO GIVE EQUITY THIS COURT SHOULD REVIEW THE FILE (IT IS ASSUMED THAT ALL OF IT WILL BE TRANSMITTED TO THE COURT) AND ALL OF THE TRANSCRIPTS AND DETERMINE WHETHER OR NOT THIS PLAINTIFF-APPELLANT HAS RECEIVED HER FAIR SHARE OF THE ASSETS OF THE PARTIES.

At the time of the hearing before Judge Palmer on the 31st day of August, 1977, the Court, at page 112, line 22, said, "I wish I knew what was in Judge Christoffersen's mind when he made the order. I can't tell you that." The Plaintiff-Appellant here does not know what is in the mind of any Judge and is unable to see the equity of the rulings where the Defendant-Respondent received a disparate amount of property, which when translated into money approximates \$80,000.00 more than she received, she being required to pay his debts which he was obligated under the original Amended Decree to pay. Where the Defendant-Respondent

did not have clean hands, how could the Court determine that he should receive an inordinate amount of the assets? It is a well established maximum of the law that he who seeks equity must do equity. Glen vs. Player, 326 P2d, 717 7 U.2d, 428; and Carbon Canal Co. vs. Sanpete Water Users Assn., 425 P2d 405, 19 U.2d 6; and Pack vs. Jamison, 364 P2d 1; and 2 U. 2d, 241. That Plaintiff-Appellant should receive not less than one-half of the total value of the sixteen (16) units located in Layton, Utah.

The Court in Graham vs. Street, 27 P2d, 456, 2 U. 2d, 14, and Warren vs. Dixon Ranch Co., 260 P2d, 741; 122 Utah 416, has specifically said that equity is the function of the courts and that remedies not otherwise achievable should be achieved in equity and that he who is in a relationship of trust and confidence may not profit from his own wrong doing. (Since the time of the filing of this appeal, Defendant-Respondent has taken the children for visitation and has refused to return them and has now secreted himself from the Court to the extent that an indictment for kidnapping has been returned against him out of the State of Texas.)

In Watson vs. Watson, Utah, 561 P2d 1072. this Court has said that where it appears that the Court failed to correctly apply principles of law or equity, that evidence clearly preponderates against finding, or

the judgment has so failed to do equity that it manifests a clear abuse of discretion the Supreme Court on review will take appropriate corrective action in interest of justice.

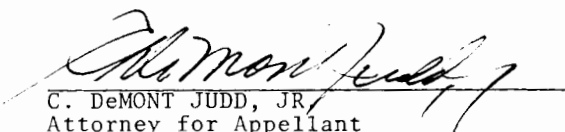
CONCLUSIONS

Plaintiff-Appellant respectfully submits that this Honorable Court should enter its order as follows:

1. Transferring to the Plaintiff-Appellant equity in the only remaining asset of the parties in an amount equal to one-half of its value.

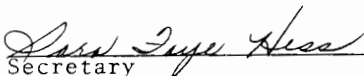
2. Determine that Judge Tibbs clearly failed to meet his responsibility of doing equity by his failure to modify Judge Palmer's ruling.

Respectfully submitted.


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CERTIFICATE OF MAILING

A copy of the foregoing Brief of Appellant was posted in the U.S. mail, Postage prepaid, and addressed to the Attorney for Respondent, Stephen W. Farr, Esq., at 2447 Kiesel Avenue, Ogden, Utah, 84401, this 20th day of September, 1978.


Secretary