1980

Lola B. Mitchell v. Gary A. Mitchell : Defendant-Appellant's Petition For Rehearing

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

LOLA M. MITCHELL, Plaintiff and Respondent, vs. GARY A MITCHELL, Defendant and Appellant.	DEFENDANT - APPELLANT'S PETITION FOR REHEARING No. 16137

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of Utah.

The appellant, Gary A. Mitchell, presents this petition for a rehearing of the above-entitled cause and, in support thereof, respectfully shows:

1. The appeal in the cause was argued before this Court on the 16 day of Dec, 1979.

2. On April 21, 1980, this Court rendered its decision in favor of the Respondent and against the Appellant, affirming the judgment of the Second Judicial District Court of Weber County, State of Utah.

3. The Appellant seeks a rehearing upon the following grounds:

a. This Court misconstrued the facts regarding the Respondent's filing of lis pendens.

b. This Court misconstrued the facts and misapplied the statutory and common law regarding conservatorship and receivership.

For the foregoing reasons, it is urged that this petition be granted.

DATED this 8 day of May, 1980.

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CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Petition for Rehearing to C. DeMont Judd, Attorney for Respondent, 2650 Washington Blvd., Suite 102, Ogden, Utah, 84401, on this 9th day of May, 1980.

Secretary of
STEPHEN W. FARR
Attorney for Appellant

IN THE SUPREME COURT OF THE

STATE OF UTAH

LOLA H. MITCHELL, Plaintiff and Respondent, vs. GARY A. MITCHELL, Defendant and Appellant.	)	Case No. 16137

APPELLANT'S BRIEF OF POINTS AND AUTHORITIES

IN SUPPORT OF HIS

PETITION FOR REHEARING

Petition for Rehearing of Decision on Appeal from the Judgment of the Second Judicial District Court of Weber County, State of Utah, Honorable L. Kent Bachman, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

LOLA H. MITHCELL, Plaintiff and Respondent,	)	Case No. 16137
vs.	)	
GARY A. MITCHELL, Defendant and Appellant.	)	

STATEMENT OF THE NATURE OF THE CASE

Appellant incorporates by reference his previous Statement of the Nature of the Case as set forth in his original Brief in this matter.

RELIEF SOUGHT ON REHEARING

Appellant seeks modification of this Court's decision of April 21, 1980, and requests a decision ordering a reversal of the Order Appointing a Receiver, entered by the Second Judicial District Court of Weber County, State of Utah.

STATEMENT OF FACTS

Appellant incorporates by this reference his previous statement of facts as set forth in his original Brief in this matter, and also incorporates by this reference the factual statements as set forth in Respondent's Statement of the Nature of the case in Respondent's Brief in this matter.

time of filing lis pendens, this Court misconstrued the facts by saying that the Weber County Order To Show Cause was the underlying action.

POINT III

THIS COURT MISCONSTRUED THE FACTS AND MISAPPLIED THE STATUTORY AND COMMON LAW REGARDING CONSERVATORSHIP AND RECEIVERSHIP

In her Affidavit and Ex-Parte Motion of August 17, 1978, Respondent originally requested "an injunction upon the property pending further hearing..." The lower Court entered an Order appointing a conservator to collect rents and profits. A review of Sections 75-5-401 et seq., Utah Code Annotated (1953), as amended, shows that there was no compliance with Utah's statutory requirements regarding appointment of conservators. Respondent, on appeal, changed positions and argued pursuant to Rule 66, Utah Rules of Civil Procedure. It is submitted that this Court misconstrued the facts and law concerning appointment of a receiver in this case.

Generally, a receiver may be appointed in, and only in, a pending cause. 75 C.J.S. Receivers, Section 8. Receivership is regarded as a drastic remedy of last resort, to be used when other remedies are inadequate. 75 C.J.S., supra. Courts in other jurisdictions have held that a receiver will not be appointed where an adequate remedy is afforded by notice of lis pendens, Gunther v. Dorff, 296 S.W. 2d 638 (Tex. Civ. App. 1952); an injunction or restraining order, Fagan v. Clark, 238 Ind. 22, 148 N.E. 2d 407 (1950); or by an attachment, Murphy v. Murphy, 261 N.C. 95, 134 S.E. 2d 148 (1953).

As noted in 24 Am. Jur. 2d, Divorce and Separation, Section 741:

> A receivership is often a harsh remedy. Aside from the fact that it may be expensive, it deprives the owner of the right to the custody, management and protection of his own property. And so it is held that a receivership should not be resorted to in a matrimonial action except in a clear and urgent case, and even then the power to appoint a receiver should be exercised prudently and cautiously. [Brown v. Brown, (cited in footnote)]. More obviously, when the wife does not give the husband notice of an application for a receiver, the court must exercise extreme caution. [Tormohlen v. Tormohlen, 210 Ind. 328, 1 N.E. 2d 596 (1936)(cited in footnote)].

In this case, the Respondent was looking to her former husband's assets to secure payment of past due support and alimony debts. In Utah, alimony and support payments become debts as they accrue. Larsen v. Larsen, 561 P. 2d 1077 (Utah 1977). However, Respondent would have to first reduce Appellant's alleged arrearages to judgment and then execute on any of Appellant's property in the county where the judgment is rendered and in those counties where the judgment has been docketed. Respondent did not do this in the instant case, and is therefore not entitled to have a receiver appointed, a drastic remedy, simply because under another set of facts she may have been so entitled, i.e., if she had an arrearage judgment.

This Court misconstrued the facts in this regard, because it was Respondent who argued that Appellant had quitclaimed the property to his brother, both in her Brief and in oral argument. Respondent had the burden of showing that the

property belonged to Appellant, and the record shows that Respondent made no effort to determine ownership of the property. If she was apprehensive as to a transfer of the property, she could have had it attached, a remedy less drastic than a receivership. The fact that Respondent had a more effective remedy in the way of an execution or a docketing of a judgment lien in Davis County does not make it proper for a court to grant her relief to which she was not entitled. As Mr. Justice Stewart noted in his dissenting opinion herein:

> It is simply a non sequitor for the majority to state that because the [Respondent] could have perfected a lien on the Davis County property by docketing the Weber County judgment in Davis County - something she did not do - she is therefore entitled to a receivership on property located in Davis County which was not owned by the [Appellant] - a fact totally uncontested in this case.

CONCLUSION

Based on the above and foregoing, it is submitted that this Court has misconstrued the facts concerning both the lis pendens and the receivership. Respondent had other, less drastic means of accomplishing her objectives. The order of the lower Court should be reversed.

Respectfully submitted this 8th day of May, 1980.

STEPHEN W. FARR
Attorney for Appellant

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Brief to C. DeMont Judd, Attorney for

Respondent, 2650 Washington Boulevard, Suite 102, Ogden, Utah, 84401, on this 9 day of May, 1980.

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