

1998

Kessimakis v. Kessimakis : Brief of Appellee

Utah Court of Appeals

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UTAH
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IN THE COURT OF APPEALS

DOCKET NO

980221-CA

FOR THE STATE OF UTAH

BETTY L. KESSIMAKIS,

Plaintiff/Appellant,

vs.

DALE M. KESSIMAKIS,

Defendant/Appellee.

Case No. 980221-CA

Priority No. 15

BRIEF OF THE APPELLEE

APPEAL FROM THE RULING
OF THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE PAT BRIAN PRESIDING

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FILED

Utah Court of Appeals

OCT 06 1998

Julia D'Alesandro
Clerk of the Court

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FOR THE STATE OF UTAH

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III. JURISDICTION

The Court of Appeals has jurisdiction in this matter, which was obtained upon assignment from the Utah Supreme Court. The Utah Supreme Court originally obtained jurisdiction over this matter pursuant to U.C.A. §78-2-3(j) (1958 as amended).

VI. ISSUES PRESENTED BY THE APPEAL

Issue: Did the Trial Court err when it found that the defendant paid the plaintiff for her interest in the Company awarded by the Decree of Divorce?

This issue is a question of fact. Accordingly, the trial court's findings should not be set aside upon appellate review unless it is determined that the trial court's determination was clearly erroneous. Barker v. Francis, 741 P.2d 548 (Utah 1984).

Issue: Did the Trial Court err when it found that the statute of limitation set forth in U.C.A. §78-12-22(1) barred plaintiff's action to enforce paragraph 3b of the Decree of Divorce?

The issue as to whether U.C.A. §78-12-22(1) or another statute of limitation applies to paragraph 3b of the Decree of Divorce is a question of law which should be reviewed for "correctness." Gramlich v. Munsey, 838 P.2d 1131, 1132 (Utah 1992). The issue as to whether an applicable statute of limitation was suspended by estoppel, lulled, or tolled, is a question of fact, which should be reviewed under the clearly erroneous standard. Brower v. Brown, 744 P.2d 1337. 138-39 (Utah 1987).

Issue: Did the Trial Court err in failing to address the issue of a constructive trust or to find that a constructive existed in favor of the plaintiff?

The issue of whether a court should impose a constructive trust is primarily a question of fact. Mattes v. Olearain, 759 P.2d 1177 (Utah App. 1988). The trial court found that the plaintiff had previously received payment for her interest in the Company and accordingly did not make findings concerning the plaintiff's theory of constructive trust. The primary question on appeal is whether the trial court should have addressed the issue despite the court's finding that no continuing interest existed to be held in trust.

Issue: Did the Trial Court render a decision on an issue not presented before it for determination?

Findings made by a court that are not requested by the parties or which are based on issues neither raised nor trial are carefully scrutinized on review. Combe v. Warren's Family Drive-Inns, Inc., 680 P.2d 733 (Utah 1984). There exists however, a preliminary issue as together this scenario is presented by the case at hand, which may be determined by a review of the record.

Issue: Did the trial court err in failing to issue discovery sanctions against the defendant?

A decision as to whether sanctions on discovery are appropriate is primarily the prerogative of the trial court but is reviewable for error upon appeal. See Morton v. Continental Banking Co., 938 P.2d 271 (Utah 1977). This issue may be determined by a review of the records and the orders of the court.

VI. RELEVANT PROVISIONS OF STATUTES & RULES

Utah Code Annotated §78-12-22

An action may be brought within eight years:

- (1) upon a judgment or decree of any court of the United States, or of any state or territory within the United States;
- (2) to enforce any liability due or to become due, for failure to provide support or maintenance for dependent children.

VII. STATEMENT OF CASE

A. Nature of the Case

This appeal stems from plaintiff/appellant's filing of an order to show cause that requested several types of relief, including an affirmation, calculation, and delivery of plaintiff's interest in Kessimakis Produce, Inc. (hereinafter "the Company"), and requests for an accounting of the current assets of the Company. (R. 328). All of plaintiff's requests were pursuant to paragraph 3b of the Decree of Divorce, which reads as follows: "[The Plaintiff is awarded] [o]ne-half (1/2) of Defendant's interest in Kessimakis Produce, Inc., whether the same be evidenced by stock certificate or otherwise and the Defendant is ordered to execute and deliver appropriate instruments evidencing the transfer of such interest." (R. 19-20).

Defendant contended that he had already paid the plaintiff for her interest and that plaintiff's action was untimely. The trial court held for the defendant on both counts. The same issues are appealed by the plaintiff.

B. Procedural History

The Decree of Divorce was entered on August 28, 1974. The case was appealed on two previous occasions, with the second appeal concluding in 1978. The language of paragraph 3b was unchanged by the appeals process.

Plaintiff/appellant filed an order to show cause on November 10, 1994, seeking enforcement of paragraph 3b of the Decree of Divorce. (R. 328). The order to show cause was heard by Commissioner Arnett, who recommended that the action be dismissed as it was barred by the statute of limitations. (R. 348). Plaintiff objected to the commissioner's recommendations (R. 349-366, 375-378). Defendant filed a memorandum in support of the recommendations (R. 367-374).

Before the objection was resolved with Judge Pat Brian, plaintiff set a second hearing before the commissioner, seeking a determination that defendant had not delivered the interest, the same relief already requested in paragraph 2 of the original order to show cause. (R. 328, 387). The commissioner recommended that no delivery of the shares had been made as no documentary evidence had been located at that time.¹ (R. 454). Defendant objected to the proposed order. (R. 459-65, 500-02, 510-13).

At the time plaintiff requested the second hearing, she also filed written discovery requests and, later, a subpoena duces tecum requesting, among other things, current financial information from the Company. (R. 404, 455).

¹ Prior to the second hearing, Judge Brian signed the plaintiff's proposed order, which was not in conformity with the commissioner's recommendation of dismissal, because he had not noticed defendant's objections. (R. 409). Judge Brian later signed an order verifying that the statute of limitations was an issue in the case in order to correct the mistake. (R. 531).

A hearing on the plaintiff's objection to the recommendation of dismissal was held before Judge Brian on February 27, 1996. Both parties filed trial briefs prior to the hearing (R. 521, 532). The judge issued a minute entry stating that it would review the statute of limitations question. (R. 539). Thereafter, Judge Brian issued a minute entry stating that the statute of limitations set forth in U.C.A. §78-12-22(1) was applicable to plaintiff's action. (R. 547).

The parties were unable to agree on an order and the parties again met with Judge Brian on December 5, 1996, and made proffers of testimony and evidence. At that time, the court made specific rulings on the outstanding discovery issues, ordered discovery on limited issues, and continued the matter. (R. 598-601).

C. Disposition at the Trial Court

A bench trial was held on May 28, 1997 (R. 614) and was concluded on October 2, 1997. (R. 631). The trial court issued findings and an order on October 17, 1998, holding, among other things, (1) that the defendant had paid plaintiff for her interest under paragraph 3b of the Decree of Divorce, (2) that defendant had not waived the statute of limitations defense, (3) that U.C.A. §78-12-22(1) barred plaintiff's action, and (4) that plaintiff did not establish any lulling, tolling, or other defense to the running of the statute of limitations. This appeal followed.

VII. STATEMENT OF FACTS

Mr. and Mrs. Kessimakis were divorced on August 23, 1974. (R. 19).

Paragraph 3b of the Decree of Divorce reads: “[The Plaintiff is awarded] [o]ne-half (1/2) of Defendant’s interest in Kessimakis Produce, Inc., whether the same be evidenced by stock certificate or otherwise and the Defendant is ordered to execute and deliver appropriate instruments evidencing the transfer of such interest.” (R. 19).

The defendant appealed the Decree of Divorce on two occasions (Kessimakis v. Kessimakis, 546 P.2d 888 (Utah 1976); Kessimakis v. Kessimakis, 580 P.2d 1090 (Utah 1978)). The language of the Decree of Divorce was not altered in either appeal.

At the time of the entry of the Decree of Divorce in 1974, the defendant owned a Twenty percent (20%) interest in the Company. (R. 337).

The parties created a joint stock trading account administered by the plaintiff’s brother, Les Anderton, in 1980. (Tr. 17-18, 54, 81-82).

The defendant testified that he initially placed about \$18,000 in the account (Tr. 81). Plaintiff claimed in her deposition that she initially deposited “about five or \$6,000.” (Deposition of Betty Kessimakis, p. 21).

Testimony at trial from the defendant and Mr. Anderton indicated that approximately \$26,000 in profits were paid out of the joint trading account in 1980. (Tr. 60-63, 117, 121, 124). This number was corroborated by defendant’s introduction at trial of trading receipts and an accounting of profits. (Tr. 60-63).

The plaintiff testified that the value of the Company in 1980 was approximately \$10,000 to \$15,000. (Tr. 55). Plaintiff did not contradict this testimony.

The defendant testified that he paid the plaintiff \$21,000 to \$24,000 of the profits on the joint trading account in return for her interest in the Company in 1980 or 1981. (R. 337; Tr. 57-58, 82,98). Plaintiff denied that she received any funds from the account. (Tr. 18-20, 37-38).

Maintaining that she had not been paid, plaintiff testified that defendant committed actions and made statements that constituted estoppel or a lulling or tolling of the statute of limitations (Tr. 13-14, 21-25, 42-47, 152). Defendant denied the allegations. (Tr. 59-60, 64, 88).

VIII. SUMMARY OF ARGUMENT

This appeal is brought by the plaintiff /appellant due to her dissatisfaction with the trial court's factual findings. The trial court found, as a issue of fact, that in 1980, plaintiff received payment for the interest awarded to her in Kessimakis Produce, Inc. pursuant to paragraph 3b of the Decree of Divorce. This finding should not be disturbed absent a showing of clear error. The testimony and evidence support the trial court's decision.

The other issues raised by the appellant are secondary to the issue of payment. If the payment issue is upheld, there is no need to address them. Appellant argues that defendant/appellee's assertion of the affirmative defense of statute of limitations was waived; that no statute of limitations applies to paragraph 3b of the Decree; and that in the event the statute of limitations does apply, its running was estopped, lulled, or tolled. The statute of limitations was not waived. It was raised by the

very first responsive document that was filed by the defendant and was extensively discussed and briefed by both parties before the trial court. The case law from this jurisdiction and others show that paragraph 3b of the Decree is indeed subject to a statute of limitations, specifically U.C.A. §78-12-22(1). Finally, the court made a factual finding, after hearing extensive testimony, that there was no estoppel, lulling, or tolling of the running of the statute of limitations.

Appellant raises another secondary issue, claiming that the trial court committed error by failing to address the issue of a constructive trust. Because the trial court found that plaintiff/appellant's interest in the Company ceased in 1980 when she was paid for that interest, her theory that the interest was held in trust by the defendant/appellee, thereby defeating the running of any statute of limitations, was moot. The trial court did not err in failing to address this issue.

In another secondary issue, appellant claims the court committed error (1) by making findings based on issues not properly before the court (i.e. the statute of limitations she claims was waived) and (2) by granting relief that neither party requested. The first assertion is the same issue as that raised above and the record and facts show that the statute of limitations defense was properly raised before the court. In addition, plaintiff does not dispute that the issue of payment, which was the primary reason for the trial court's denial of plaintiff's claim, was properly before the court. As for the second assertion, the trial court was fully justified in denying plaintiff's action as the denial was a direct response to the relief requested by the plaintiff and the defendant.

Lastly, the appellant claims that appellee should be subject to sanctions for failure to comply with discovery requests. The record shows that the judge first suspended discovery and then specifically limited the discovery issues based on defendant's motion for a protective order. The parties complied with the court's order and there is no justification for sanctions.

Plaintiff's appeal requests the court to overturn findings of fact that were clearly sustainable and justified by the facts and testimony before the trial court and is frivolous in nature. The appellee should be awarded costs and attorney's fees incurred on appeal.

IX. ARGUMENT

A. Did the Trial Court err when it found that the defendant paid the plaintiff for her interest in the Company awarded by the Decree of Divorce?

The trial court correctly found, based upon the evidence and testimony before it, that the plaintiff was paid for her interest in the Company through the proceeds of the joint stock trading account. This conclusion was based upon a factual determination of the trial court.

The standard of review for this issue is the clearly erroneous standard. In order to successfully challenge a trial court's factual findings, the appellant "must marshal the evidence in support of the finding and then demonstrate that despite this evidence, the trial courts findings are so lacking in support as to be 'against the clear weight of the evidence' thus making them 'clearly erroneous.'" In Re Estate of Bartell, 776 P.2d 885, 886 (Utah 1989) (quoting State v. Walker, 743 P.2d 191, 193 (Utah 1987)).

There is more than adequate evidence and testimony to substantiate defendant/appellee's assertion that he paid the plaintiff for her interest in the Company eighteen years ago.

The defendant testified that he set up a joint stock trading account in his and the plaintiff's names (Tr. 54, 81-82; confirmed by plaintiff Tr. 17-18) with the understanding that the proceeds from the joint trading account were to be used to purchase the plaintiff's interest in the Company. (Tr. 54-56). Plaintiff denied that this was the purpose of the account. (Tr. 137-38). Defendant testified that the parties used the plaintiff's brother, Les Anderton, as the stock broker on the account (Tr. 64) and that the plaintiff's address was the primary address on the account. (Tr. 56). These two facts were confirmed by Les Anderson in his testimony (Tr. 101-102, 122) and by the plaintiff (Tr. 17-18, 35, 37, 49-50). Mr. Anderton also testified that the plaintiff had as much authority over the trading account as the defendant and could freely withdraw funds. (Tr. 122).

Mr. Anderton testified that, according to company records, \$26,245.65 was paid out as earnings on the account. (Tr. 117, 121, 124). The defendant produced carbon copies of trading receipts from the trading account, a record of the stock trades prepared by his secretary and girlfriend at the time the account was in existence, and a summary of these records. (Tr. 60-63). This evidence was consistent with the accounting produced by Les Anderton. No party was able to locate any cancelled checks, tax returns, or other physical evidence as to where the profits from the account were distributed. Such records would have been approximately 17 years old. Mr. Anderton testified that he did not know the purpose for the account and that he did not know whether earnings went to the plaintiff or defendant. (Tr. 117, 120-122). The defendant testified that he paid

approximately \$21,000 to \$24,000 of the earnings to the plaintiff. (R. 337; Tr. 57-58, 81-82, 98-99). The plaintiff stated that she was not paid any funds from the account. (Tr. 18-20, 37-38). However, the plaintiff also testified that she claimed one-half of the profits from the account on her tax returns. (Tr. 22-23, 40).

The defendant testified that the value of the Company in 1980 was approximately \$10,000 to \$15,000. (Tr. 55). At trial, the plaintiff offered no evidence or testimony to contest defendant's valuation.

During trial, and now upon appeal, plaintiff claims that defendant "changed his story" about the time and his method of payment for plaintiff's interest in the Company. This assertion is not reasonable. In his response to the initial Order to Show Cause, defendant stated the following in an affidavit: "In or about 1981 or 1982, I paid to the plaintiff the sum of approximately Twenty-one Thousand Dollars (\$21,000.00) or Twenty-two Thousand Dollars (\$22,000.00) for the purchase of her interest in Kessimakis Produce, Inc." (R. 337, ¶7). Plaintiff claims this statement is inconsistent with defendant's later statements that the joint trading account was the source of funds for the payment. At the time of the submission of the responsive affidavit, defendant had not had reasonable opportunity to locate any 15-year-old records to enable him to specify a specific date or amount for the payment. It was not until later that defendant was able to find the joint stock trading account records that evidenced the payment. The stock trading records very closely corroborate and support defendant's recollections, showing that approximately \$26,000 of profit was paid out of the joint account during 1980.

Plaintiff also states that the defendant's changed because he claimed that he had paid her off in cash. (Brief of Appellant, p. 18). Defendant's affidavit makes no such claim. Defendant did testify at trial that he gave the trading account profits to the plaintiff in cash as it was his practice to deal in cash at the time. (Tr. 57-59). Plaintiff admitted that virtually all of defendant's alimony and child support payments were paid in cash prior to her filing this action. (Tr. 145). There was no change in defendant's story. The trial court agreed and found the defendant's testimony and evidence to be credible.

The plaintiff's testimony was less credible than the defendant's testimony. Plaintiff testified that the account was merely a friendly investment between the parties and that the defendant was trying to reconcile with her (Tr. 137-38), despite the fact that, at the time, defendant had a live-in girlfriend, had a poor record of paying child support (Tr. 51-52), and the parties had just undergone an extremely contentious divorce which was appealed to the Utah Supreme Court twice.

Plaintiff's testimony apparently caused the trial court to question plaintiff's veracity on other facts as well. When the defendant closed the joint account in 1981, he transferred the existing balance of the account, approximately \$36,000, into a personal account in his name only. (Tr. 95-96, 124). The defendant said this was done because the plaintiff had at that point been paid for her interest. (Tr. 95-96). However, the plaintiff claimed that, in addition to her not receiving any of the profits of the account, she had also been wronged by the defendant's transfer. (Tr. 39). She testified that she was "bitter" about the transfer because the balance contained funds that she had placed in the account. (Tr. 138-142). Despite this, plaintiff also admitted that she did not complain to the

defendant or Mr. Anderton, her brother, who was the broker for the account. (Tr. 39-40, 142-144, 153-156). Mr. Anderton also testified that the plaintiff did not inform him of any concerns about payments from the account or its closing. (Tr. 123-125). These inconsistencies were addressed by Judge Brian in a question to counsel during closing statements (Tr. 172-173), indicating that the Judge may have had concerns about the credibility of the plaintiff's testimony.

Finally, it should be noted that this action stems from plaintiff's order to show cause which was first scheduled before a commissioner and then set for a review and trial before Judge Brian. Plaintiff's assertion that the commissioner's findings are the "law of the case" and are not changed by Judge Brian's findings after a full evidentiary trial is untenable. The Utah Code of Judicial Administration states that "the Commissioner's recommendation is the order of the court until modified by the court." U.C.J.A. 6-401(4). Plaintiff objected to the commissioner's recommendation, properly setting the matter for review before the judge pursuant to U.C.J.A. 6-401(5). Accordingly, plaintiff's second hearing before the commissioner while the objection to the first recommendation was still unresolved was improper.

It is the prerogative and, indeed, the duty of a trial court to attribute veracity and weight to the testimony of witnesses and the evidence presented during a trial. A trial court's determination of a factual issue should not be disturbed on appeal unless the determination is clearly erroneous. Barker v. Francis, 741 P.2d 548 (Utah 1984); Teratron General v. Institutional Investory Trust, 569 P.2d 1198, 1201 (Wash. 1977) (stating that "unraveling and deciphering of the evidence is a function of the trial judge, and we will

not upset his interpretation of the testimony when any reasonable view substantiates his findings even though there may be other reasonable interpretations.” (quoting Kaas v. Privette, 529 P.2d 23,26 (Wash. 1974)). In the present case, the trial court made a reasonable and well-founded decision that the plaintiff received money from the defendant for the purpose of paying for her interest in the Company and that such funds were sufficient to cover any interest she had been awarded in the Company. This decision was based upon on the facts and evidence before the trial court and should not be disturbed on appeal absent a showing that the trial court’s interpretation of the facts was clearly erroneous. The court’s determination that the plaintiff had been paid for the interest awarded to her pursuant to paragraph 3b the Decree should not be disturbed.

If the trial court’s decision on this first issue discussed above is upheld, there is no need to address the remaining, secondary, issues on appeal. If the plaintiff was paid in 1980 for her interest awarded in paragraph 3b of the Decree of Divorce, the other issues presented on appeal, other than the issue of discovery sanctions, are moot.

B. Did the Trial Court err when it found that the statute of limitations barred plaintiff’s action to enforce paragraph 3b of the Decree of Divorce?

1. The defendant did not waive the affirmative defense of statute of limitations or the other affirmative defenses alleged to have been waived

The trial court found that even disregarding its finding that plaintiff was paid for her interest in the Company, her action would have been barred by the statute of limitations. The arguments on this issue and those that follow assume that these issues

need only be addressed if it is determined by the appellate court that the trial court committed clear error in finding that plaintiff was paid for her interest in the Company.

The affirmative defense of statute of limitations was not waived and was a proper issue for the trial court to address. The plaintiff cites cases, including Tygesen v. Magna Water Co., 375 P.2d 456 (Utah 1962) and American Coal Co. v. Sandstrom, 689 P.2d 1 (Utah 1984), to support her argument that an affirmative defense, specifically, a statute of limitations, must be waived if it is not raised in a timely manner. These two cases involve situations where the statute of limitations issue was raised for the first time upon appeal. Staker v. Huntington Cleveland Irrigation Co., 664 P.2d 1188 (Utah 1988) involves a case where a party sought to amend his answer to include a statute of limitations defense on the morning of trial. These situations are very different from that presented in the present case.

In the present case, it is undisputed that the statute of limitations issue was argued before the commissioner on the very first hearing on the law and motion calendar. The issue was raised in the defendant's Response to Plaintiff's Order to Show Cause and supporting Affidavit, the first documents filed by the defendant. The defendant noted that significant time had passed since the entry of the Decree of Divorce and stated that "[t]he plaintiff has not, since 1981, made any demand on the defendant for any evidence of ownership of Kessimakis Produce, Inc., for financial information, notice of meetings or otherwise...." (R. 345). While the defendant did not specifically state the words "Statute of Limitation", it should be noted plaintiff's action was a motion brought on the law and motion calendar before a commissioner and that such motions and responses are typically

not as specifically plead as pleadings such as answers and complaints. In addition, there is a reduced time frame for responses in comparison with pleadings such as answers and counterclaims.

It is clear that defendant discussed the significant length of time that had passed since the entry of the Decree and plaintiff's failure to act to enforce her interest, which the defendant argued had already been purchased. The commissioner's recommendation that the statute of limitations barred plaintiff's action was a result of his review of the defendant's response and affidavit, not an issue that he raised *sua sponte* out-of-the-blue. In any event, plaintiff objected to the recommendation and evidentiary hearings and a trial was subsequently held on all issues raised by the parties.

The purpose of statutes of limitation is to protect parties from the difficulties inherent in cases that deal with factual issues that have not occurred in the recent past. Staker v. Huntington justified the trial court's refusal to address a new defense raised on the day of trial with the following explanation: "Plaintiff's case was not subject to the evidentiary difficulties that statutes of limitation are designed to prevent, such as lost evidence, faded memories, and absent witnesses." 664 P.2d 1188, 1190 (Utah 1983). The difficulties of providing evidence and the discrepancies attributable to faded memories that were evident in this case (R. 336, Tr. 91-92, 40-41) are precisely the reasons that statutes of limitation exist. Even though the defense could have ideally been pled more specifically, there is no question that the statute of limitations was an issue in this matter from the very beginning. (R. 336, ¶ 8-12, 16, 17).

There was no surprise to the plaintiff. Plaintiff had more than adequate time to prepare to meet the statute of limitations defense. In fact, the defense was discussed in virtually every argument submitted by the plaintiff in the subsequent hearings. The plaintiff was given the opportunity to object to the commissioner's recommendation of dismissal and was given every opportunity to prepare for and present arguments relating to the statute of limitations issue at subsequent hearings and trial. Plaintiff urges an extremely strict application of Rules 8(c) and 12(h) of the Utah Rules of Civil Procedure and a very narrow view of the facts when she asks that the statute of limitations be excluded as a proper issue before the court. In Williams v. State Farm Ins. Co., 6565 P.2d 966 (Utah 1982), the Utah Supreme Court specifically addressed Rule 8(c) among the other rules of civil procedure, stating that

they must all be looked to in the light of their even more fundamental purpose of liberalizing both pleading and procedure to the end that the parties are afforded the privilege of presenting whatever legitimate contentions they have pertaining to their dispute. What [the parties] are entitled to is notice of the issues raised and an opportunity to meet them. When this is accomplished, this is all that is required.

The defendant sufficiently raised the statute of limitations issue at the earliest stages of this action. Plaintiff was in no way prejudiced in her opportunity to prepare for and argue against the defense. Based upon the facts and the record, Judge Brian correctly ruled that defendant did not waive the statute of limitations as a defense to plaintiff's action.

2. Utah Code Annotated §78-12-22(1) is applicable to a property award required to be delivered under the Decree

The trial court properly ruled that the plaintiff's request to require an affirmation and delivery of her interest in the Company was untimely. The trial court

properly held that the eight-year statute of limitations set forth in Utah Code Annotated §76-12-22(1) applied to paragraph 3b of the Decree of Divorce, and that the plaintiff had a duty to act to enforce her award within the eight-year statute of limitations.

In her brief, plaintiff/appellant presents several cases (Brief of Appellant, pp. 12-13) supporting the assertion that Utah courts consider a divorce to be equitable in nature. Plaintiff argues that, under U.C.A. §30-4-5 and supporting case law, an appellate court has the equitable power to modify a trial court's division of marital property. Defendant does not disagree. However, plaintiff's argument is inappropriate. Neither party has sought to modify the property award under the Decree. The cases cited by the plaintiff involve requests to review a trial court's division of property, an action that was taken in this case over twenty years ago. Plaintiff did not request a change in the property award and now is not the time to revisit the question of equitable property division.

Plaintiff cites 27A C.J.S. Divorce, Section 94 stating that divorce actions are not barred by laches if there is a continuing cause of action. This section refers to the time for filing an action for divorce, and is not applicable to the issue at hand.

The Utah Supreme Court determined in 1978, at the conclusion of the second appeal of this case, that the property division contained in the Decree of Divorce was equitable. No change was made to the Decree. At that point, defendant was obligated to "execute and deliver appropriate instruments evidencing the transfer" of plaintiff's interest in the Company. (Decree of Divorce, Paragraph 3b, R. 20). If the defendant failed to act as ordered, the plaintiff would be obligated to bring an action to enforce her rights under the Decree. There is a time limit set for such actions.

Utah Code Annotated §78-12-22(1) states that “[a]n action may be brought within eight years upon a judgment or decree of any court of the United States, or of any state or territory within the United States.” Utah law is clear that awards of alimony and child support arrearages are subject to an eight year statute of limitations from the date the obligation is incurred. U.C.A. §78-12-22(2); Seeley v. Park, 532 P.2d 684, 685 (Utah 1975). Plaintiff cites a Florida case, Johnson v. Johnson, 676 So.2d 458 (Fla. App. 5 Dist. 1988), showing that Florida considers alimony and child support to be equitable in nature and specifically exempts such obligations from the running of a statute of limitations. Although both Utah and Florida consider divorce issues to be basically equitable in nature, Utah and other states have chosen not to provide a blanket exemption for child support and alimony and subject such awards to a statute of limitations, which in the case of Utah, is eight years in length. U.C.A. §78-12-22(2). Section 78-12-22(1) similarly applies to judgments in the State of Utah regardless of whether the underlying action is equitable in nature or not.

In Mason v. Mason, 597 P.2d 1322 (Utah 1979), the Utah Supreme Court held that U.C.A. §78-12-22 barred an ex-spouse’s attempt to renew the judgment she obtained for past alimony. The court stated:

the purpose of statutes of limitation is that controversies should not lie dormant indefinitely, to spring into life and action at the whim or caprice of a claimant, but should sometime come permanently to rest. It is for this purpose that the different limitations of the time in which various actions may be brought, for example as to real property, written contracts, open accounts, liabilities created by statute, etc.... But the losing of such causes of action by the lapse of time can be avoided by filing an action in court within the period so prescribed.

Id. At 1323. As of June 2, 1978, the date of the decision on the second appeal of the Decree of Divorce, plaintiff had eight years to enforce the Decree of Divorce in the event the defendant failed to execute and deliver instruments evidencing the transfer.

Plaintiff cites Shill v. Shill, 765 P.2d 140, (Idaho 1988), in support of her argument that no statute of limitations should apply, stating that the Idaho Supreme Court had not recognized the running of a statute of limitations in a case dealing with failure to deliver pension funds awarded by a decree of divorce. (Brief of Appellant, p. 14). However, the Shill court was addressing the issue of lack of prosecution, not a statute of limitations. That court merely declined to reverse the trial court's decision that there was not lack of prosecution, stating that a factual showing of lack of prosecution "is addressed to the sound discretion of the trial court." (Id. At 143). The Idaho Supreme Court did not address a specific statute of limitations. In fact, it appears that, unlike Utah, the State of Idaho does not have a statute of limitations for actions on court orders and decrees.

In a situation virtually identical to the case at hand, the Oklahoma Supreme Court held that an Oklahoma statute of limitations barred an action to enforce property awards under a Decree of Divorce. In Chapman v. Chapman, 692 P.2d 1369 (Okl. 1984), a spouse sought to enforce her decree of divorce which assigned her the balance of a note and mortgage. The Oklahoma court denied her cause of action, emphasizing that she could have brought actions to enforce her interest and failed to timely do so under both a reasonableness standard and an applicable statute of limitation. Id. At 1375. The court stated that the party seeking to enforce the decree's property award "could have enforced the assignment provision by contempt", could have "given notice to the obligor and

demanded that he make the payments” , or could have “instituted an action against him to compel the enforcement of the decree-conferred assignment”. Id. Instead, she waited 15 years to institute an action to compel enforcement of the assignment and the court ruled that her claim was barred as untimely.

It appears that there is no case in this jurisdiction that is directly on point. However, the clear language of U.C.A. §78-12-22(1) and established case law dealing with similar awards of property and judgments indicate that an accrued interest awarded in a Decree of Divorce must be enforced within eight years absent some legally recognized justification for delay. The Court should follow the decision of the Oklahoma court. Its decision is more consistent with existing Utah law than those decisions presented by the plaintiff. The Decree of Divorce awarded an accrued interest to the plaintiff and ordered the defendant to “execute and deliver” instruments evidencing that interest. (R. 20). The trial court properly ruled that that U.C.A. §78-12-22(1) applies to the award, requiring plaintiff to act to enforce the Decree of Divorce within eight years if the documents had not been delivered.

3. The trial court made an appropriate and supportable factual finding that defendant’s actions did not amount to estoppel or a lulling or tolling of the statute of limitations

Despite the application of the statute of limitations, plaintiff would still be entitled to bring an action to enforce the award granted under the Decree of Divorce if she could prove estoppel or lulling or tolling of the statute of limitations. Plaintiff was unable to establish this before the trial court. The question as to whether an applicable statute of limitation was suspended by estoppel, lulled, or tolled, is a question of fact,

which should be reviewed under the clearly erroneous standard. Brower v. Brown, 744 P.2d 1337, 1338-39 (Utah 1987).

The trial court had adequate evidence and testimony before it to support its finding that there were no facts or actions that constituted an estoppel, lulling, or tolling. Plaintiff testified that she occasionally received produce from the defendant and alleged that this evidenced her interest in the Company. (Tr. 15, 24). She also presented testimony that defendant made promises and delayed delivery of the stock certificates. (Tr. 13-14, 21-25, 42-44, 146-47, 152). Contradicting this testimony, defendant testified that plaintiff had not asked him for her stock certificates or other evidence of her ownership in the Company since 1980. (Tr. 59-60). He testified that she had not asked for dividends (Tr. 59), had not asked for corporate records (Tr. 67), and had not otherwise sought to participate in the activities of the Company until she filed suit in late 1994. He contradicted the plaintiff's testimony, stating that he had never told her he would care for her financially or hold her stock ownership for her after the divorce. (Tr. 88). He testified that he had never discussed delivery of the stock as she had testified. (Tr. 64). He testified that plaintiff had never entered the Company's place of business since the divorce. (Tr. 64-65). Plaintiff testified that she had been in the Company's previous building since the divorce. (Tr. 33).

The plaintiff testified that the defendant never made a written promise to deliver evidence of her interest in the Company. (Tr. 45). She testified that she did not believe there was any injunction or other issue that would have precluded her from claiming her stock from the date of the divorce. Id. She testified that she never gave the

defendant authority or proxy to act on her behalf for the Company and that she had no business dealings with the defendant after 1980. (Tr. 47-48).

Plaintiff testified that she did, however, act judicially to enforce her interest in child support. (Tr. 51-53; See also Kessimakis v. Kessimakis, 580 P.2d 1090 (Utah 1979) (defendant held in contempt of court for child support delinquencies)). The record shows that she took no legal action regarding her stock interest until late 1994.

The trial court had an adequate factual foundation to find that the defendant's actions did not amount to estoppel, lulling, or tolling. The court also had adequate facts before it to find that plaintiff knew, from the date of the Decree of Divorce, that documents evidencing her interest in the Company had not been delivered and that she took no steps to enforce either delivery of the documents or her claimed interest in the Company's profits and affairs until 20 years after the entry of the Decree.

C. Did the Trial Court err in failing to address the issue of a constructive trust or to find that a constructive existed in favor of the plaintiff?

The trial court did not address the issue of a constructive trust in its findings and accordingly did not find that the plaintiff was the beneficiary of a constructive trust which would act to hold her interest in the Company in the name of the defendant, thereby defeating the statute of limitations. The trial court properly excluded this theory in its findings.

It was not necessary for the trial court to address the constructive trust issue in light of the trial court's finding that the plaintiff's interest had been previously

purchased by the defendant. Because the trial court found that the plaintiff had already been paid for her interest in the Company, the theory of constructive trust was moot. It also appears that plaintiff did not emphasize the issue of a constructive trust in her Trial Briefs, which very specifically listed several issues, numbering each issue for the Court, but mentioned a trust theory only in a footnote (R. 522, fn 2; R. 623, fn 2).

Even if the trial court had found that the plaintiff was not paid for her interest, there was not sufficient evidence to support the theory of a constructive trust. The question of whether a constructive trust should be invoked is primarily a question of fact. See Close v. Adams, 657 P.2d 1351 (Utah 1983); Mattes v. Olearain, 759 P.2d 1177, 1179, (Utah App. 1988) (stating that such a trust must be established by clear and convincing evidence). A constructive trust may only be imposed by a court upon a showing of fraud or a confidential relationship between the parties. Hawkins v. Perry, 253 P.2d 372 (Utah 1953). The plaintiff never alleged fraud relating to the failure of defendant to deliver, or her failure to exercise, her interest in the Company. A confidential relationship requires the exertion of extraordinary influence or power over the other party. Von Hake v. Thomas, 705 P.2d 766 (Utah 1985); see also Mattes v. Olearain, at 1179, (holding that affection, confidence, and trust are not sufficient absent a showing of superiority over the other party). An example of successful assertions of a constructive trust in Utah involve a sixteen year-old boy and a minister (Hawkins v. Perry, 253 P.2d 372 (Utah 1953)) and a husband who used harassment and treats of bodily harm and physical abuse to force his spouse to convey property to him (St. Pierre v. Edmonds, 645 P.2d 615 (Utah 1982)). These elements are not present in this case.

The trial court committed no reversible error in failing to address the issue of a constructive trust in light of its finding that the defendant purchased the plaintiff's interest in the Company. In addition, there was not sufficient factual evidence to support the plaintiff's theory.

D. Did the Trial Court render a decision on an issue not presented before it for determination?

This issue has already been partially addressed in section B1 of the argument. That section deals with the issue of the alleged waiver of the statute of limitation defense. In that section, defendant has shown that the statute of limitations issue was properly before the court and that both the commissioner and the judge were justified in finding that it was a valid basis for denial of plaintiff's action.

Again, plaintiff cites cases that present situations not comparable to the case at hand. Nielsen v. Nielsen, 780 P.2d 1264 (Utah App. 1989) and Girard v. Appleby, 660 P.2d 245 (Utah 1983) involve cases where an award of attorney's fees was awarded sua sponte despite the fact that there were no arguments on that issue at trial. Combe v. Warren's Family Drive-Inns, Inc., 680 P.2d 733 (Utah 1984) involves a situation where a trial court dissolved a corporation and distributed the assets when neither party had asked for such an action. Id. at 735. That court held that "[a] court may not grant judgment for relief which is neither requested by the pleading nor within the theory on which the case was tried." and that "[i]t is error to adjudicate issues not raised before trial and unsupported by the record." In the case at hand, the issue of the statute of limitations was raised and debated from the beginning. The commissioner's decision was appealed at the

request of the plaintiff and the parties were afforded the opportunity of presenting issues, arguments, and evidence to the judge at trial before the final decision was rendered. The standards set forth in Combe were met.

Plaintiff also contends that it was improper for the court to dismiss the case as no party had requested dismissal. This is not a sustainable argument. Plaintiff's order to show cause requested an order "confirming her ownership of such interest in the company." (R. 328). The trial court's decision to deny her cause of action was a responsive finding that she had no such interest. Defendant's response to plaintiff's order to show cause specifically requested that the order to show cause be dismissed. (R. 344).

The trial court appropriately responded to the relief requested by the parties and based its decision on issues raised by the parties and supported by the record.

E. Should the Defendant be sanctioned for failure to comply with discovery requests?

The issues of discovery were adequately and specifically addressed by the trial court in its orders issued in response to defendant's motion for a protective order. The trial court issued rulings suspending discovery and then later specifically limited discovery to specific issues. Because the trial court found that plaintiff had been paid for her interest in the Company and therefore had no current ownership interest, there was no obligation to order additional discovery on the matter.

While the parties were still attempting to resolve the objections to plaintiff's proposed order on Commissioner Arnett's recommendation of dismissal, plaintiff sent discovery requests to the defendant (R. 404) requesting, among various

other things, information on the Company's current finances, assets, and operations. Defendant responded to the discovery, and plaintiff filed a Motion to Compel Discovery (R. 415) claiming that defendant's responses were not adequate. Plaintiff then filed a subpoena duces tecum requesting from the defendant records of "any and all stock, and any and all record book of the company Kessimakis Produce, Inc." (R. 455). Defendant responded to the motion to compel and moved for a protective order requesting limitation of the scope of discovery. Defendant's objections were based on the fact that the commissioner's recommendation to dismiss the action was currently under review and that at that stage in the proceedings, the current assets of the Company were therefore irrelevant and protected. (R. 452, 484)

While a decision on the Motion for a Protective order was pending with the Judge, the commissioner ruled on plaintiff's Motion to Compel, finding that the discovery responses were not complete. The commissioner did not address defendant's motion for a protective order. (R. 479, 514).

Defendant's Motion for a Protective Order was then heard by Judge Brian, who suspended all motions and discovery pending a hearing before him. (R. 520, 531). When that hearing was held on December 5, 1996, the court made specific rulings on the outstanding discovery issues, ordering discovery on specific, limited issues. (R. 598-601). Discovery was had on those issues with both parties providing all information that they had under the revised discovery order. After trial, the court held that plaintiff had no continuing interest in the Company, rendering any further discovery needless and

inappropriate. The defendant has fully complied with the court's discovery requests and there are no grounds for sanctions.

F. Defendant/Appellee is entitled to an award of attorney's fees and costs under rules 33 and 34 of the Utah Rules of Appellate Procedure

In the event of dismissal of this appeal, defendant should be awarded its costs and attorneys fees incurred in defending the appeal.

Pursuant to U.R.A.P. 34, "if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court." This case is an appropriate candidate for an award of costs. The appeal is based primarily upon plaintiff's objection to factual findings based upon a trial court's careful consideration of the testimony and evidence before it. The appellant has produced no credible showing of error in the court's factual findings.

Appellee is also entitled to an award of attorney's fees pursuant to U.R.A.P. 33. This appeal is based primarily upon the appellant's dissatisfaction with the trial court's factual conclusion. The testimony and evidence of the parties clearly supports the trial court's finding that plaintiff was paid for her interest. All other issues are secondary. If the trial court's factual finding is upheld, there exists no good faith argument to extend, modify, or reverse existing law and the secondary issues are moot. The issue of sanctions for discovery is not supported by the face of the record. This appeal is frivolous and serves no other purpose than to continue to increase the legal fees and litigation costs of the appellee.

Appellee should not be penalized financially simply because the appellant simply wishes to express dissatisfaction with a trial court's findings by filing an appeal. This is especially true where there exists a solid factual and evidentiary basis for the trial court's decision. Appellant bears the responsibility for determining whether filing an appeal is reasonable and should also bear the financial burden of filing appeals that are not grounded upon reasonably sustainable grounds.

X. CONCLUSION

This is an appeal based primarily on plaintiff/appellant's disagreement with the trial court's factual findings. The appellant has failed to marshal all of the evidence to show that the court's findings were clearly erroneous. The testimony before the court clearly supports the court's interpretation of the evidence, finding that plaintiff was paid for her interest. That finding should not be disturbed.

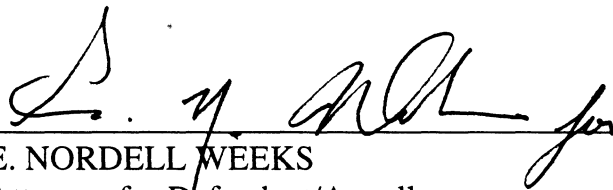
If the court's factual findings set forth above are upheld, the issues of the statute of limitations and constructive trust are moot because the plaintiff accordingly has no interest to enforce under these theories. If the factual findings of the court are not upheld, the plaintiff's arguments on these two issues do not arise to a reversible error for the reasons set forth above. In a related question, the court committed no reversible error in making its findings. The court did not make a decision on issues not presented to it, nor did it make a decision not requested by the parties.

Finally, there is no evidence that defendant failed to comply with plaintiff's discovery requests. The trial court heard the arguments on plaintiff's motion to compel

and defendant's motion for a protective order and made an appropriate and specific order limiting discovery. The parties complied with this order. There is no sustainable argument in support of sanctions against the defendant on discovery issues.

The trial court's holdings should be affirmed and the appellee should be awarded costs and attorney's fees.

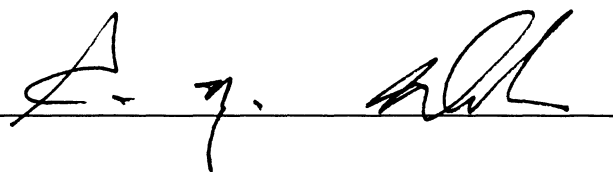
Respectfully submitted this 6th day of October, 1998.


E. NORDELL WEEKS
Attorney for Defendant/Appellee

X. CERTIFICATE OF SERVICE

I hereby certify that I cause an original and seven additional copies of the foregoing, pursuant to rule 26(b) of the Utah Rules of Appellate Procedure, to be filed with the Clerk of the Court of Appeals. I also certify that I cause two copies thereof to be mailed, via United States mail, postage prepaid, on this 6th day of October, 1998, to the following address:

Mitchell R. Barker, Esq.
Thomas E. Stamos, Esq.
Attorney's for Plaintiff/Appellant
3530 South 6000 West
West Valley City, Utah 84128



XI. ADDENDA

- A. Decree of Divorce
- B. Plaintiff's Motion for Order to Show Cause
- C. Defendant's Response and Affidavit in Support
- D. U.C.A. §78-12-22
- E. Commissioner's Recommendation, dated January 19, 1995
- F. Order dated February 8, 1996
- G. Minute entry of the court dated April 16, 1996
- H. Order dated February 10, 1997
- I. Findings of Fact and Order dated October 17, 1997
- J. Excerpts from Defendant's Testimony
- K. Index of Record

Tab A

FILMED

BRANT H. WALL
Attorney for Plaintiff
Suite 500 Judge Building,
Salt Lake City, Utah 84111
Tel. No. 521 - 8220

AUG 20 1974

W. Sterling Evans, Clerk of District Court
BY W. R. Haus

IN THE DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH

BETTY L. KESSIMAKIS,

Plaintiff,

v.

DALE M. KESSIMAKIS,

Defendant.

BA 130 NC. 3091
9-13-74 - 8:58 AM,

DECREE OF DIVORCE.

Civil No. D-14107

The above entitled matter having been heretofore heard and the Court having acquired jurisdiction of the Parties and of the subject matter of this cause, and having decided the same in accordance with the Findings of Fact and Conclusions of Law on file herein, NOW THEREFORE, pursuant to said Findings of Fact and Conclusions of Law, IT IS HEREBY ORDERED, ADJUDGED AND DECREED, as follows:

1. Plaintiff is granted a Decree of Divorce from the Defendant on the grounds of mental cruelty, said Decree to become absolute and final at the expiration of three (3) months from date of entry of this Decree.

2. The Plaintiff is awarded the sole care, custody and control of the minor children of the Parties, subject, however, to rights of visitation by the Defendant at reasonable times and places.

3. That the Plaintiff is hereby awarded as her sole and separate properties, the following:

a. Residential dwelling at 4520 Atwood Blvd., Murray, Salt Lake County, State of Utah, and more particularly described as follows:

"Beginning at a point on the westerly side of Atwood Boulevard, said point being South 3°12'15" East 265.58 feet and North 39°52'45" East 825.18 to a County Monument at the intersection of 4500 South and State Street, North 89°51' East along the 4500 South Street monument Line 1437.07 feet, South 0°02'45" West parallel with State Street 200 feet and South 89°51' West 6.97 feet from the West 1/4 corner of Section 6, Township 2 South, Range 1 East, Salt Lake Base and Meridian; thence South 1°58'45" West along the West side of Atwood Boulevard 90.46 feet; thence South 89°51' West 170.63 feet; thence North 0°02'45" East 76.9 feet; thence North 89°51' East 80.65 feet; thence North 0°01'45" East 13.5 feet; thence North 89°5' East 93.03 feet to the point of beginning."

together with all of the furniture, contents and appliances contained in said family residence;

b. One-Half (1/2) of Defendant's interest in Kessimakis Produce, Inc., whether the same be evidenced by stock certificate or otherwise and the Defendant is ordered to execute and deliver appropriate instruments evidencing the transfer of such interest;

c. One (1) 1969 Oldsmobile automobile presently in the possession of the Plaintiff;

d. Personal effects, clothing and such items of personalty as Plaintiff is in possession of.

4. That the Defendant is awarded as his sole and separate property, the following:

a. His personal clothing and effects;

b. One-Half (1/2) of the interest acquired by the Defendant in Kessimakis Produce, Inc.;

c. Such other items of personalty now in his possession except as awarded to the Plaintiff hereinabove.

5. That the Defendant is ordered and required to pay to the Plaintiff as support of the three (3) minor children of the Parties the sum of One Hundred Dollars (\$100.00) per child per month from and after entry of this Decree.

6. The Plaintiff is hereby awarded alimony in the sum of Two Hundred Dollars (\$200.00) per month, which the Defendant is ordered and required to pay.

7. Defendant is ordered and required to pay all debts and obligations incurred by the Parties during the course of the marriage including the assumption and payment of the mortgage balances owing on the family residence described hereinabove.

8. Plaintiff is awarded Judgment against the Defendant for attorney's fees incurred herein in the sum of Five Hundred Dollars (\$500.00) together with costs of this action.

DATED, this 28th day of August, 1974.

BY THE COURT:

ATTEST
M. STERLING EVANS
CLERK

[Signature]
M. Sterling Evans

[Signature]
J U D G E

Tab B

Mitchell R. Barker, #4530
Attorney for Plaintiff
165 South West Temple, # 400
Salt Lake City, Utah 84101
Telephone (801) 486-9638

RECEIVED
JAN 11 1967
John C. Barker

THIRD DISTRICT COURT, SALT LAKE COUNTY,
STATE OF UTAH

BETTY L. KESSIMAKIS,

Plaintiff,

vs.

DALE M. KESSIMAKIS,

Defendant.

MOTION FOR ORDER TO SHOW
CAUSE, FOR CONTEMPT, FOR
JUDGMENT AND TO REQUIRE PAYMENT
OR PROPERTY CONVEYANCE

Civil No. D 14107 (DA)

144914107
Judge *Brian*

Plaintiff Betty L. Kessimakis, through counsel, respectfully
moves the Court for an order as follows:

1. Awarding her money judgment against defendant Dale M. Kessimakis for the value of her interest in the business, Kessimakis Produce Company;
2. Fixing the amount or value of her interest in the company and its assets, by evidentiary hearing if necessary;
3. Confirming her ownership of such interest in the company;
4. Compelling defendant to buy out and pay her for her interest;

5. Finding him in contempt of Court for failure to convey to her the appropriate interest prior to now;

6. Order a business appraisal of Kessimakis Produce Company at defendant's expense;


7. Ordering payment to plaintiff of suit money in the sum of \$2,000;

8. Authorizing the employment of a certified public accountant to assist plaintiff in this matter, with the cost and initial retainer to be borne by defendant;

9. Awarding attorney fees and costs and such other relief as the Court deems appropriate; and

10. Requiring defendant Dale Kessimakis to appear before the Court at a time and place convenient to the Court, then and there to show cause, if any he has, why the above relief should not be granted to the plaintiff.

Respectfully so moved this 10th day of November, 1994.



Mitchell R. Barker, attorney for
Betty Kessimakis, Plaintiff

Tab C

FILED DISTRICT COURT
Third Judicial District

JAN 19 1995

SALT LAKE COUNTY

By [Signature]
Deputy Clerk

E. NORDELL WEEKS (3412)
Attorney for Defendant
320 Kearns Building
136 South Main Street
Salt Lake City, Utah 84101
Telephone: 322-2800

IN THE THIRD JUDICIAL DISTRICT COURT,
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

BETTY KESSIMAKIS,)	
)	DEFENDANT'S RESPONSE TO
Plaintiff,)	PLAINTIFF'S ORDER TO
)	SHOW CAUSE
vs.)	
)	
DALE KESSIMAKIS,)	Civil No. D 14107 DA
)	
Defendant.)	Judge <u>[Signature]</u>

COMES NOW the defendant, DALE M. KESSIMAKIS, by and through his undersigned counsel, E. NORDELL WEEKS, and hereby files this response to the plaintiff's Motion for Order to Show Cause.

STATEMENT OF CASE

The Decree of Divorce in this matter was entered on August 18, 1974. The plaintiff, at that time, was awarded a one-half interest in whatever ownership interest the defendant had in Kessimakis Produce, Inc., a Utah corporation. Kessimakis Produce, Inc., was incorporated on November 12, 1973. The defendant owned a total of six thousand (6,000) of the thirty thousand (30,000) shares of outstanding stock in the corporation at the time of entry of the Decree of Divorce.

Subsequent to the entry of the Decree of Divorce herein, the plaintiff is believed to have received, in 1976, from Kessimakis Produce Inc., a stock certificate for three thousand (3,000) shares of Kessimakis Produce, Inc.

Thereafter, the defendant, in 1981 or 1982, purchased the stock of the plaintiff in Kessimakis Produce, Inc., for a payment in excess of Twenty Thousand Dollars (\$20,000.00).

ARGUMENT

The defendant, because of passage of time, has not been able to locate the corporate records or his personal financial records for the period of time 1980 through 1982, to document that payment has been made.

Certain of the corporation's legal counsel and accountants for the period 1976 through 1982, are now deceased and records have been difficult to obtain.

The plaintiff has not, since 1981, made any demand on the defendant for any evidence of ownership of Kessimakis Produce, Inc., for financial information, notice of meetings or otherwise, because she has received full payment for her interest in the business and knew she had no on-going ownership interest in Kessimakis Produce, Inc.

The defendant has served discovery documents on the plaintiff to obtain her financial records to document the payment for the stock of Kessimakis Produce, Inc.

The Motion for Order to Show Cause was filed by the plaintiff to vex, harass and annoy the defendant.

Even assuming that the defendant has not paid the plaintiff (which is disputed), the plaintiff has asked for relief not provided in the Decree of Divorce and seeks modification of the Decree of Divorce which cannot be accomplished by means of an Order to Show Cause.

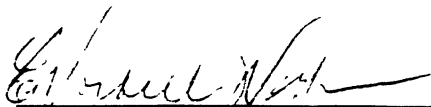
The defendant was never ordered in the Decree of Divorce to determine the value of plaintiff's interest in Kessimakis Produce, Inc., or to purchase the plaintiff's interest in Kessimakis Produce, Inc.

CONCLUSION

The Order should be denied or the matter set for evidentiary hearing.

The defendant should be awarded his attorney's fees incurred herein.

DATED this 16 day of January, 1995.



E. NORDELL WEEKS
Attorney for Defendant

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing to:

Mitchell R. Barker, Esq.
Attorney for Plaintiff
3530 South 6000 West
West Valley City, Utah 84120

by United States Mail, postage prepaid thereon, this 16th
day of January, 1995.

Mindy K. K...

W.mw9-KESSIMAKIS.RESPONSE

FILED DISTRICT COURT
Third Judicial District

JAN 19 1995

SALT LAKE COUNTY

By K. L. [Signature]
Deputy Clerk

E. NORDELL WEEKS (3412)
Attorney for Defendant
320 Kearns Building
136 South Main Street
Salt Lake City, Utah 84101
Telephone: 322-2800

IN THE THIRD JUDICIAL DISTRICT COURT,
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

BETTY KESSIMAKIS,)	
)	
Plaintiff,)	AFFIDAVIT OF
)	DALE KESSIMAKIS
vs.)	
)	
DALE KESSIMAKIS,)	Civil No. D 14107 DA
)	
Defendant.)	Judge <u>Bejcek</u>

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

DALE KESSIMAKIS, being first duly sworn, deposes
and says:

1. I am the defendant in the above-captioned matter.
2. Kessimakis Produce, Inc., was incorporated on November 12, 1973 (see Exhibit "A" attached hereto and by reference made a part hereof).
3. The plaintiff was awarded one-half of any interest I owned in Kessimakis Produce, Inc., as of the date of entry of the Decree of Divorce on August 18, 1974.

4. At the time the Decree of Divorce was entered, I owned twenty percent (20%) of Kessimakis Produce, Inc., represented by six thousand (6,000) shares (see Exhibit "B" attached hereto and by reference made a part hereof).

5. Upon information and belief, a stock certificate was delivered to the plaintiff in the spring of 1976 in the amount of three thousand (3,000) shares, representing ten percent (10%) of the stock ownership of Kessimakis Produce, Inc.

6. I received a replacement stock certificate for three thousand (3,000) shares representing my ten percent (10%) ownership interest in Kessimakis Produce, Inc.

7. In or about 1981 or 1982, I paid to the plaintiff the sum of approximately Twenty-one Thousand Dollars (\$21,000.00) or Twenty-two Thousand Dollars (\$22,000.00) for the purchase of her interest in Kessimakis Produce, Inc.

8. I have been unable to locate the corporate records which document the issuance of the stock certificate in Kessimakis Produce, Inc.

9. The corporation has had three attorneys since 1974, of which two are deceased and the other does not have any corporate records.

10. The present accountant for the corporation, Michael Smith, was searching for the corporate records of

Kessimakis Produce, Inc., to assist in responses to the plaintiff's Motion herein, but passed away unexpectedly on January 12, 1995, and the officers and directors of the corporation have not been able to verify whether or not the corporate records regarding stock certificates were in his possession (see Exhibit "C" attached hereto and by reference made a part hereof).

11. I have not been able to locate my financial records for the 1981 and 1982 periods to determine the date and amounts paid to the plaintiff for her stock.

12. I believe that the plaintiff will have deposit slips, stock purchase documents or other financial records for 1981 and 1982 which will document that she received sums from me in excess of \$20,000.00, for her interest in Kessimakis Produce, Inc.

13. I have, through my counsel, served discovery on the plaintiff, seeking her records for the periods in question.

14. The plaintiff never returned to me her stock certificate for 3,000 shares of stock of Kessimakis Produce, Inc.

15. The plaintiff has never made any demand on me since 1981, for the purchase of her stock or evidence of her ownership, since she had received full payment for the stock of Kessimakis Produce, Inc., in 1981 or 1982.

16. The defendant has never demanded any financial information or notice of meetings on Kessimakis

Produce, Inc., since 1981, as she was aware she held no interest in Kessimakis Produce, Inc.

17. This action is without merit and is intended to harass me.

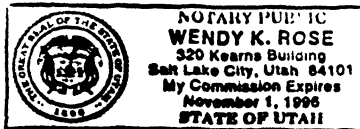
18. I have found it necessary to retain an attorney to defend me in this action.

18. The plaintiff should be ordered to pay my attorney's fees incurred in defending this action.

DATED this 16th day of January, 1995.

Dale Kessimakis
DALE KESSIMAKIS

SUBSCRIBED, sworn to and acknowledged before me this 16th day of January, 1995, by DALE KESSIMAKIS.



Wendy K. Rose
NOTARY PUBLIC

W.mw9-KESSIMAKIS.AFF

Nov. 19, 19 - Mailed Corporation Charter to Keith Dennison.

November 12, 1973

Mr. Keith Dennison
Arch Accounting Service
190 West 2950 South
Salt Lake City, Utah 84115

Re: Utah Incorporation Of:
Kessimakis Produce, Inc.

Dear Keith:

Filed Articles of Incorporation with the Utah Secretary of State today. Charter will be mailed to my office in about one week. You should contact the Utah Tax Commission about license, etc.

Costs expended by me are as follows, vouchers enclosed:

1. Secretary of State- Filing Fee	\$75.00
2. Instats- for 9 photocopies of Articles	3.31
TOTAL DUE	<u>\$78.31</u>

Please have Mike send me his check for the above amount.

Enclosed 5 photocopies of Articles of Incorporation, 2 of which should be kept in your office, since you will do all the book work, and 1 given to Mike, Dale and Gary Kessimakis.

If you have any questions, please call me.

With kind regards, I am,

Respectfully yours,

A. T. DIAMANT

ATD/md
Enclosures

EXHIBIT "A"

MINUTES OF THE FIRST MEETING OF THE INCORPORATORS AND SUBSCRIBERS OF
KESSIMAKIS PRODUCE, INC, 4540 ATWOOD BLVD., MURRAY, UTAH 84107,
held at 546 West 6th South in the city of Salt Lake City, Salt Lake County,
State of Utah, on the 12th day of November, 1973 at 4 o'clock in the
afternoon.

Mr. Mike Kessimakis, a subscriber to the Certificate of Incorporation of
this corporation called the meeting to order.

On motion duly made, seconded and carried, Mr. Mike Kessimakis was
elected chairman of the meeting, and Mr. Gary Kessimakis secretary thereof.

Both these gentlemen accepted their respective offices, and proceeded
with the discharge of their duties. The Secretary then called the roll and
found that the following incorporators and subscribers to the capital stock
were present in person:

Name	Address	Number of shares
Mike Kessimakis	4540 Atwood Boulevard Murray, Utah 84107	18,000
Gary Kessimakis	4560 Atwood Boulevard Murray, Utah 84107	6,000
Dale Kessimakis	4520 Atwood Boulevard Murray, Utah 84107	6,000

The Secretary then presented and read to the Meeting a copy of the
Certificate of Incorporation of the Company and reported that on the
12th Day of November, 1973, the original thereof was duly filed and
recorded in the office of the Secretary of State, that the organization
tax had been duly paid and that a receipt therefore had been issued by
the Secretary of State on the 12th day of November, 1973 and that a
photostatic copy of said Certificate had been duly filed in the office
of the Clerk of the County of Salt Lake.

Upon motion duly made and carried, it was resolved that said report
be accepted as correct, and the Secretary directed to spread a copy of
such certificate and receipt at length upon the minutes of this meeting.

As prescribed by articles X and XI of the articles of Incorporation
election of officers and directors were voted upon with the following being
duly elected:

Name		
Mike Kessimakis	4540 Atwood Boulevard Murray, Utah 84107	President & Director

Dale Kessimakis

4520 Atwood Boulevard
Murray, Utah 84107

Vice President & Director

Gary Kessiamkis

4560 Atwood Boulevard
Murray, Utah 84107

Secretary, Treasurer
& Director

Therebeing no further business before the meeting, the same was, on motion, duly adjourned. Dated, the 12th day of November, 1973.

DALE KESSIMAKIS

Chairman of Meeting

GARY KESSIAMKIS
Secretary of Meeting

W. Michael Smith

William Michael Smith, age 57, passed away January 12, 1995 in Murray, Utah.

Born May 24, 1937 in Salt Lake City, Utah to Archibald Theron and Kathryn Young Smith. Married Sharon Ruth Park January 17, 1958, Salt Lake Temple. An active member of the LDS Riverside 1st Ward, he loved music and served as the ward organist. Worked in the baptistery at the Jordan River Temple. He was self-employed as a CPA. Member of the Optimist Club and the USPA.



Survived by wife, Sharon; children, Sherry (Kelly) Johnson; Melanie Stevens; Miriam (Darren) Lee; David P. (Heather) Smith; brother, Richard Smith; sisters, Margaret "Peggy" Denison; Janet Noorda; nine grandchildren; and many nieces and nephews. Preceded in death by his parents and granddaughter, Kira.

Funeral services will be held Monday, January 16, 1995, 12 noon, at the Riverside 1st Ward, 5425 So. 600 West, Murray, Utah. Friends may call Sunday evening from 6-8 p.m. at Larkin Mortuary, 260 East South Temple, and at the ward on Monday one hour prior to services. Interment, Larkin Sunset Gardens Cemetery.

T 1/14

N 1/14

Tab D

ARTICLE 2

OTHER THAN REAL PROPERTY

78-12-22. Within eight years.

An action may be brought within eight years:

(1) upon a judgment or decree of any court of the United States, or of any state or territory within the United States;

(2) to enforce any liability due or to become due, for failure to provide support or maintenance for dependent children.

1996

Tab E

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

KESSIMAKIS, BETTY L	:	MINUTE ENTRY
	:	
PLAINTIFF	:	CASE NUMBER 744914107 DA
	:	DATE 01/19/95
VS	:	HONORABLE THOMAS N. ARNETT
	:	COURT REPORTER TAPE 2-1:05-3:90
KESSIMAKIS, DALE M	:	COURT CLERK KAD
DEFENDANT	:	

TYPE OF HEARING: MOTION HEARING
PRESENT: PLAINTIFF DEFENDANT

P. ATTY. BARKER, MITCHELL R.
D. ATTY. WEEKS, E. NORDELL

BASED ON THE STATUTE OF LIMITATIONS, THIS COURT IS WITHOUT JURISDICTION AND THIS MATTER IS THEREFORE DISMISSED.

Tab F

FEB 9 1996

By *Patricia Adams*
Deputy Clerk

Mitchell R. Barker, #4530
Attorney for Plaintiff
3530 South 6000 West
Salt Lake City, Utah 84120
Telephone (801) 963-6558

**THIRD DISTRICT COURT, SALT LAKE COUNTY,
STATE OF UTAH**

BETTY L. KESSIMAKIS,

Plaintiff,

vs.

DALE M. KESSIMAKIS,

Defendant.

ORDER #1744914107

Civil No. D-14107-(DA)

Judge Brian
Commissioner Arnett

On December 13, 1995 this matter came before the Court pursuant to notice, with the Honorable Pat Brian, Third District Judge, presiding. Plaintiff Betty Kessimakis appeared through her counsel, Mitchell R. Barker. Defendant Dale Kessimakis appeared personally and through his counsel, E. Nordell Weeks.

After having heard brief arguments from respective counsel, and having reviewed the various issues and factual disputes pending in this matter, and respective counsel having stipulated to a hearing, and good cause appearing, it is now therefore

ORDERED as follows:

1. The parties and their counsel shall appear before this Court on February 7, 1996 at 1:00 p.m., for an Evidentiary Hearing and argument.

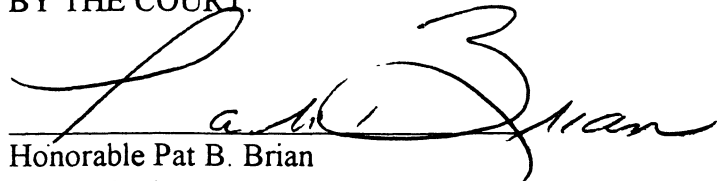
2. The Motion for a Protective Order relating to the Subpoena served upon Kessimakis Produce, Inc. Is not currently before this Court.

3. At the February hearing, this Court will take evidence and hear arguments on the facts relating to the applicability of the statute of limitations and other issues which are before this Court.

4. Between now and the February hearing, all current outstanding motions and discovery are suspended. However, the parties may submit a summary to the Court of the matters which they wish to have determined at the February hearing.

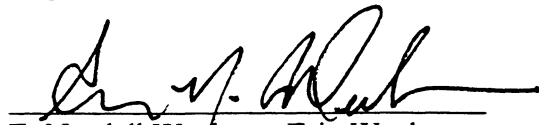
So ORDERED this 8 day of ~~January~~ ^{February}, 1996

BY THE COURT:



Honorable Pat B. Brian
Third District Court Judge

Approved:



E. Nordell Weeks or Eric Weeks
Attorneys for Defendant

CERTIFICATE OF SERVICE

I certify that on the 17th day of January, 1996 I mailed a copy of the foregoing to the following individual at the address indicated by postage prepaid mail

Nordell Weeks, Esq
Eric Weeks, Esq
320 Kearns Building
136 South Main #320
Salt Lake City, Utah 84101



Mitchell R. Barker

Tab G

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

KESSIMAKIS, BETTY L	:	MINUTE ENTRY
	:	
PLAINTIFF	:	CASE NUMBER 744914107 DA
	:	DATE 04/16/96
VS	:	HONORABLE PAT B BRIAN
	:	COURT REPORTER BRAD YOUNG
KESSIMAKIS, DALE M	:	COURT CLERK BHA
DEFENDANT	:	

TYPE OF HEARING: HEARING
PRESENT: PLAINTIFF DEFENDANT

P. ATTY. BARKER, MITCHELL R.
D. ATTY. WEEKS, NORDELL E

THE MATTER IS BEFORE THE COURT FOR RULING RE: DEF'S MOTION FOR PROTECTIVE ORDER. THE COURT RULES THAT THE PLF'S COLLECTION ACTION IS BARRED BECAUSE IT WAS NOT TIMELY FILED WITHIN THE 8-YEAR STATUTE OF LIMITATIONS TIME. COUNSEL FOR DEF IS TO PREPARE THE FINDINGS AND ORDER AND SUBMIT TO THE COURT BY 5/1/96

Tab H

Mitchell R. Barker, #4530
Attorney for Plaintiff
3530 South 6000 West
West Valley City, Utah 84128-2610
Telephone: (801) 963-6558

FILED DISTRICT COURT
Third Judicial District

FEB 1 0 1997

By Becker Young
Deputy Clerk

**IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH**

BETTY L. KESSIMAKIS,

Plaintiff,

vs.

DALE M. KESSIMAKIS,

Defendant.

ORDER

Civil No. D-14107 (DA)

~~744910107~~ 744914107

Commissioner Arnett
Judge: Brian

On December 5, 1996 the above matter came before the Court for an evidentiary hearing on the issues related to the availability of the statute of limitations defense. The Honorable Pat B. Brian was presiding. Plaintiff Betty Kessimakis appeared personally, and through her counsel, Mitchell R. Barker. Defendant Dale M. Kessimakis appeared personally, and through his counsel, Nordell Weeks and Eric Weeks.

The Court convened a pre-trial conference in chambers at the time appointed for trial. The in chambers conference involved all of the above parties and counsel.

The Court having heard proffers in chambers, and having been newly shown stock trading confirmation documents, which were brought to the attention of the Court and of plaintiff for first time in chambers, entered certain rulings.

Thereafter, a proposed *Order* was submitted by counsel for plaintiff, to which an objection

was filed by the defendant, and deemed timely. The Court engaged both counsel in a conference call, and sustained said objection.

Thereafter, a second proposed *Order* was submitted by plaintiff's counsel, to which an objection was also filed by the defendant. The Court engaged both counsel in another conference call on January 28, 1997, and sustained the objection. This *Order* is to comport with that ruling.

Now, good cause appearing, it is hereby

ORDERED as follows:

1. The trial is continued to March 11, 1997 at 1:00 p.m., which is a second place setting before Judge Brian.

2. The Court finds that the plaintiff did not file her order to show cause within the eight years permitted to enforce a judgement. However, the Court reserves for decision at the upcoming trial the issues of whether tolling, lulling or other equitable exceptions to the statute of limitations may apply.

3. The Court rules that the defendant did not waive the statute of limitations as a defense in response to the Order to Show Cause in this matter and that the statute of limitations bars the plaintiff's action absent conduct of the defendant in the nature of tolling, lulling, or other prejudicial conduct.

4. Among other things, the Court orders that the parties provide evidence at the trial as to the Wilson-Davis joint stock account, including when it was opened, why it was opened, who was involved, how much money was contributed by each of the parties, how much money was generated

by the account, what happened to the money in the account when it was closed, why it was closed, and why the parties do not do business together at this time.

5. Between now and trial the parties may conduct discovery on the above issues and others, with a discovery cut off date of March 1, 1997. Included in the discovery may be the taking of the deposition of plaintiff's brother, Mr. Les Anderton, by the defendant, and the taking of the depositions of each of the parties by the opposing party.

6. By January 15, 1997 each of the parties is ordered to produce, through respective counsel, a complete copy of his or her 1979, 1980, 1981, and 1982 federal income tax report.

7. Both parties shall produce for one another copies of all records in their control which relate to the joint Wilson-Davis account and, to the extent available, any other stock trading accounts which were active during 1979 through 1982.

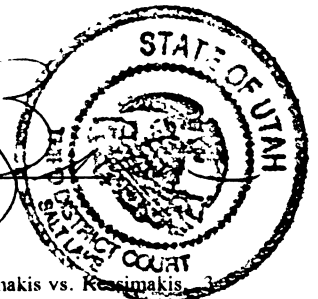
8. Defendant is ordered to produce by January 15, 1997 a copy of any Will and other testamentary document in existence which was prepared by or on behalf of Mike Kessimakis, who is deceased, or which disposes of or purports to dispose of any part of his estate.

9. The issue of attorney fees claimed by plaintiff, including those related to discovery, as well as attorney fees claimed by defendant, are reserved for trial.

SO ORDERED this 10 day of January, 1997.

BY THE COURT:


HONORABLE PAT B. BRIAN




Kessimakis vs. Kessimakis 3

CERTIFICATE OF MAILING

I certify that on January 28, 1997, I faxed and mailed a true and correct copy of the foregoing to the following individual:

Nordell Weeks, Esq.
320 Kearns Building
136 South Main #320
Salt Lake City, Utah 84101



Mitchell R. Barker

Tab I

OCT 17 1997
P.B. Brian

**IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH**

BETTY KESSIMAKIS, Plaintiff, v. DALE KESSIMAKIS, Defendant.	FINDINGS OF FACT AND CONCLUSIONS OF LAW CASE NO. 744514107 D-14107 DA DATE: 9 OCT. 1997 JUDGE: PAT B. BRIAN
---	---

This matter came before the Court at trial on October 2, 1997 before the Honorable Pat B Brian, District Court Judge, the Court sitting without a jury. The plaintiff Betty Kessimakis appeared in person and was represented by counsel Mitchell R. Barker. The defendant Dale Kessimakis appeared in person and was represented by counsel E. Nordell Weeks.

FINDINGS

1. The Decree of Divorce between the parties was entered on April 7, 1975.
2. Pursuant to the Decree of Divorce, the plaintiff was awarded (among other assets) "One-half (½) of the interest acquired by the defendant in Kessimakis Produce, Inc., whether the same be evidenced by stock certificate or otherwise" and was ordered to "execute and deliver appropriate instruments evidencing the transfer of such interest."
3. Although appealed to the Utah Supreme Court twice (Kessimakis v. Kessimakis, 546 P 2d 888 (Utah 1976); Kessimakis v. Kessimakis, P.2d 1090 (Utah 1978)), the Decree of

Divorce was not modified.

4. On November 11, 1994, the plaintiff filed a Motion for an Order to Show Cause seeking (I) a money judgment against the defendant for the value of her interest in Kessimakis Produce (hereinafter the “Business”), (ii) an order fixing the amount or value of her interest in the Business, (iii) an order confirming her ownership of an interest in the Business, (iv) an order compelling the defendant to buy out her interest in the Business, (v) an order finding the defendant in contempt for failure to convey her interest prior to the Motion, (vi) an order for appraisal of the Business, (vii) a request for court costs, (viii) a request for costs for a Certified Public Accountant to assist in fixing her amount of interest in the Business, and (ix) attorney’s fees.

5. The above-stated Motion for an Order to Show Cause was the first legal action by the plaintiff for enforcement of, affirmation of, or recovery of the assets awarded in the Divorce Decree

6. The plaintiff had continuing knowledge that the defendant had not delivered instruments evidencing the transfer of an interest in Kessimakis Produce, Inc.

7. The plaintiff failed to attend or request to attend any stockholder’s meetings of Kessimakis Produce, Inc. during all of the period subsequent to the entry of the Decree.

8. Prior to November 11, 1994, the plaintiff failed to make any written or verbal demand upon the company or to take any other meaningful action to exercise or demonstrate her right of stock ownership or to request delivery of instruments evidencing such ownership.

9. The defendant and plaintiff had communication with each other during all of the

years since entry of the Decree of Divorce.

10. The defendant did not make representations or promises regarding the delivery of the assets of the marriage which would constitute tolling, lulling, or a stay of the statute of limitation.

11. The plaintiff and defendant jointly managed a joint trading account in 1980 from which both parties could draw funds.

12. The defendant and the plaintiff established the joint stock trading account as a device whereby the defendant paid the plaintiff in excess of \$20,000 for her stock interest in Kessimakis Produce, Inc.

13. The plaintiff failed to take any action to recover the joint stock trading account funds she asserts were converted to his use upon closing the account.

CONCLUSIONS OF LAW

1. The statute of limitation set forth in Utah Code Annotated §78-12-22(1) applies to the matter before the Court.

2. The defendant has not waived the statute of limitations defense, nor has he waived his affirmative defenses for payment, release, accord and satisfaction, or novation. Testimony and evidence in the pleadings and affidavits submitted by counsel and the parties show that these issues were raised in a timely manner.

3. The eight-year statute of limitation set forth in Utah Code Annotated §78-12-22(1) began to run on June 2, 1978, the date of the conclusion of the second appeal on the Decree of

Divorce.

4. None of the defendant's conduct served to lull or otherwise toll or stay the statute of limitation period.

5. The plaintiff had eight years, absent a sustainable defense to the running of the statute of limitation, to bring an action to compel receipt of title to stock in the corporation and enforce the Decree.

6. The plaintiff's Motion for Order to Show Cause (which was filed on November 11, 1994) constitutes an "action" under the language of Utah Code §78-12-22(1) and was an attempt to enforce the Decree of Divorce.

7. The plaintiff failed to commence an action for enforcement of or execution on her judgment awarded by the Decree of Divorce until she filed her Motion for an Order to Show Cause on November 11, 1994.

8. Plaintiff's action is untimely based on the statute of limitation and the facts, evidence, and testimony presented to the Court.

9. Utah Code §78-12-22(1) is applicable to the matter at hand and bars the plaintiff's Motion.

10. The facts and testimony indicate that the defendant did not waive the statute of limitation defense or his affirmative defenses of payment, release, accord and satisfaction, or novation.

11. The facts and testimony indicate that the plaintiff's conduct has not constituted a

lulling or otherwise toll of the statute of limitation period.

12. The facts and testimony indicate that the judgment contained in the Decree of Divorce entered herein has not been stayed, lulled, or tolled.

13. The facts and testimony indicate that the plaintiff does not have a claim for laches as relates to the statute of limitation period.

14. The court is persuaded that in 1980 the plaintiff either received payment for the awarded interest in Kessimakis Produce, Inc. or had the legal right to either contest the defendant's claim of payment or act to bring action to enforce the award granted in the Divorce Decree.

15. The Court finds that there is sufficient evidence and testimony to show that the plaintiff was paid for her interest and in the less likely event that she was not bought out, she has failed to contest the payment or enforce the rights under the Decree of Divorce within the statute of limitation by failing to bring any action to enforce the Decree until November 11, 1994, nearly 14 years later.

16. The plaintiff's cause of action relating to her affirmation of, collection of, request for delivery of instruments evidencing ownership of, or any other action relating to enforcing the Decree's award of "One-Half ($\frac{1}{2}$) of the interest acquired by the Defendant in Kessimakis Produce, Inc." is barred.

17. The plaintiff's contention that defendant should be held in contempt for failure to comply with plaintiff's discovery requests is without merit. Pursuant to the order of this Court at a meeting with the parties, all ongoing discovery was stayed and the parties were ordered to

produce specific documents requested by this Court.

DATED this 17 day of October 1997

BY THE COURT:

A handwritten signature in cursive script, reading "Pat B. Brian". The signature is written in black ink and is positioned above the printed name "PAT B. BRIAN, JUDGE".

PAT B. BRIAN, JUDGE

DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of _____, 1997, I caused to be mailed, first class postage prepaid, a true copy of the foregoing ORDER to:

MITCHEL R. BARKER
ATTORNEY AT LAW
3530 South 6000 West
West Valley City, UT 84120-2610

E. NORDELL WEEKS
ERIC N. WEEKS
WEEKS LAW FIRM
320 Kearns Building
136 South Main Street
Salt Lake City, Utah 84101

DATED this ____ day of _____, 1997

Clerk

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

FILED 10/13/97
22. Young

BETTY KESSIMAKIS,	ORDER
Plaintiff,	744914107
v.	CASE NO. D-14107 DA
DALE KESSIMAKIS,	DATE: 9 OCT. 1997
Defendant.	JUDGE: PAT B. BRIAN

THIS MATTER was called and heard at trial before the Honorable Pat B. Brian, District Court Judge, sitting without a jury. The plaintiff, Betty Kessimakis, appeared in person and was represented by counsel, Mitchell R. Barker. The defendant, Dale Kessimakis, appeared in person and was represented by counsel, E. Nordell Weeks. The Court, having heard the arguments, testimony, and evidence presented by the parties and witnesses, and having conducted a review of the applicable law, legal precedent, and documents and pleadings on file herein, and being fully advised thereto, having previously entered its Findings of Fact and Conclusions of Law, and for good cause appearing,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

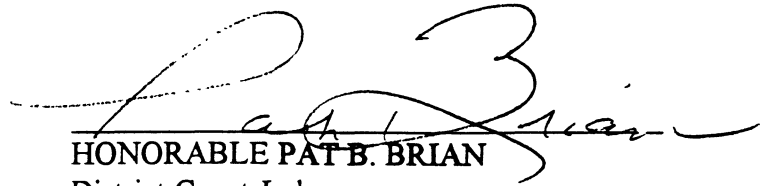
1. Plaintiff's action for enforcement of the Decree of Divorce is untimely and is

hereby dismissed with prejudice.

2. Plaintiff has no ownership interest in Kessimakis Produce, Inc.

MADE AND ENTERED this 17 day of October, 1997.

BY THE COURT:



HONORABLE PAT B. BRIAN
District Court Judge

Tab J

1 THE COURT: You may step down.

2 Any other witness?

3 MR. BARKER: No, your Honor.

4 THE COURT: You rest?

5 MR. BARKER: I do.

6 THE COURT: Counsel, call your witness.

7 MR. WEEKS: Like to call Dale

8 Kessimakis, please.

9 DALE KESSIMAKIS,

10 called as a witness by the defendant, being first
11 duly sworn, was examined and testified as follows:

12 DIRECT EXAMINATION

13 BY MR. WEEKS:

14 Q. Mr. Kessimakis, please state your name and
15 address, please.

16 A. Dale Kessimakis. I live at 10980 South
17 1300 East, Sandy, Utah.

18 Q. Where are you employed, Mr. Kessimakis?

19 A. Kessimakis Produce.

20 Q. It is true, I guess, that you had a
21 difficult divorce?

22 A. Yes.

23 Q. And that you subsequently went to the
24 Supreme Court a couple of times?

25 A. Yes.

1 Q. Did you continue to have difficult times
2 with your ex-wife?

3 A. Yes.

4 Q. What kind of relationship did you have?

5 A. It was on and off. Mostly not that good.

6 Q. What was the relationship right after you
7 finished in the court actions?

8 A. We didn't really get along that good right
9 after the divorce.

10 Q. For how many years after?

11 A. Oh, I would say probably a couple of years.

12 Q. Did you ever make an attempt in the period
13 after the Court actions to reconcile?

14 A. No.

15 Q. Did your father, Mike, like your former
16 wife?

17 A. No, he did not.

18 Q. Had he ever indicated to you that he wanted
19 to see that she was protected?

20 A. Never. He never thought very much of
21 Betty.

22 Q. What was the impetus to try and buy her out
23 of the -- of her interest in the company?

24 A. Well, I opened the stock account, and with
25 some help from my father and some other income that I

1 had, I put some money into the stock market, along
2 with Betty, and it was our agreement that I would buy
3 her out for \$25,000 for her share of the Kessimakis
4 Produce.

5 Q. Was your father the instigator of that
6 joint account?

7 A. Pardon?

8 Q. Was your father the instigator of that
9 account?

10 A. No.

11 Q. But he did help you fund it?

12 A. Yes.

13 Q. And the purpose of it was to buy out her
14 interest?

15 A. Yes.

16 Q. What did you think the company was worth in
17 1980?

18 A. I would say probably \$10,000 to \$15,000.

19 Q. Your share in it?

20 A. That's the total amount.

21 Q. That it would have been worth?

22 A. Uh-huh (affirmative).

23 Q. So it was just a family business?

24 A. Yes.

25 Q. Did you have discussions with Betty about

1 the opening of that account?

2 A. Yes.

3 Q. Where were the discussions held?

4 A. I think she stopped over at my place.

5 Q. Did you discuss this plan to buy her out?

6 A. Yes.

7 Q. What did she say?

8 A. She said that was fine.

9 Q. Was there a reason why you put the stock
10 account in one stock brokerage as opposed to another?

11 A. Well, Les was the brother, and I figured
12 that he would do a real good job, because he was
13 investing for both of us.

14 Q. That was Les Anderton?

15 A. Yes.

16 Q. Why was her name put on the joint account
17 with you?

18 A. Well, she was -- I really don't know why,
19 to tell you the truth.

20 Q. Was that the suggestion of someone, I
21 guess?

22 A. Yes.

23 Q. Did the account go to her, the account
24 mailings, did that information go to her?

25 A. Yes. And I think I received some, too.

1 Q. Did she have the authority to trade in the
2 account, buy and sell?

3 A. Not to my knowledge. Les usually took care
4 of most of the buying and selling.

5 Q. So he handled it, but she had the authority
6 to pick stocks?

7 A. Yes.

8 Q. Did she do that?

9 A. I really don't remember. Not to my
10 knowledge.

11 Q. So it was an account that either one of you
12 could have access to?

13 A. Yes.

14 Q. Could she have taken money out?

15 A. She could have.

16 Q. Do you know if she took money out?

17 A. Not to my knowledge.

18 Q. How did the money come out of the account?

19 A. Les would sell stocks, and then he would
20 send me the checks.

21 Q. Then what would you do with the checks?

22 A. I would cash them.

23 Q. Then give them to her?

24 A. Yes.

25 Q. So you paid her in cash?

1 A. Yes.

2 Q. Has that always been your practice?

3 A. Yes. I always pay cash for everything.

4 Q. Have you ever paid alimony in anything but
5 cash?

6 A. I pay alimony and everything in cash.

7 Q. Have you recently changed your practice of
8 paying other than cash on alimony?

9 A. Yes.

10 Q. When did you do that?

11 A. After the lawsuit.

12 Q. Before that you had never paid anything by
13 check?

14 A. No, always cash.

15 Q. So you have no check records at all?

16 A. No.

17 Q. Betty knew that?

18 A. Yes.

19 Q. So you would get money out of the joint
20 account, and it would go to Betty as cash?

21 A. Yes.

22 Q. And you paid it to her?

23 A. Yes.

24 Q. Did you pay her all of the proceeds of that
25 account?

1 A. She got approximately \$25,000.

2 Q. And the rest, you got?

3 A. Yes.

4 Q. That was pursuant to your arrangement with
5 her?

6 A. Yes.

7 Q. Did she ever make demand on you for the
8 proceeds of that joint account?

9 A. No.

10 Q. She has never said anything about it until
11 the last couple of years?

12 A. She has never said anything.

13 Q. Was that your understanding that she was
14 being paid for her stock in Kessimakis Produce?

15 A. Yes, it is.

16 Q. Did she ever, since 1980, ask you for stock
17 in Kessimakis?

18 A. No, she never has.

19 Q. She has never said to you, "When am I going
20 to get my stock?"

21 A. Never.

22 Q. Never said, "When do I get my dividends?"

23 A. Never. She has never even spoken about
24 dividends, ever.

25 Q. Ever talked about getting stock

1 certificates or going to meetings?

2 A. No, nothing.

3 Q. This account was not set up to try and
4 reconcile the marriage?

5 A. No.

6 Q. You were living with someone else?

7 A. Yes.

8 Q. I direct your attention to Exhibit A, and
9 ask you if you are familiar with that stock trading
10 account, and the accounting that's with that?

11 A. Yes.

12 Q. Did you prepare the little, hard-copy pages
13 that are attached to that, that shows the profits and
14 losses?

15 A. My girlfriend, my former girlfriend, did
16 that.

17 Q. She did that at the time the account
18 trading was going on?

19 A. Yes.

20 Q. She did that under your instructions?

21 A. Yes.

22 Q. As the trades were made?

23 A. Yes.

24 MR. WEEKS: I would like to move for
25 admission of Exhibit A.

1 THE COURT: Any objection?

2 MR. BARKER: I need to look at it, I
3 guess, based on what was just testified to.
4 I wasn't aware there was a summary attached.

5 THE COURT: You may approach the
6 witness and examine the exhibit.

7 MR. BARKER: I have no objection to
8 admission of Exhibit A, with the exception
9 of the two attached pages, just because I
10 don't have a copy, I don't think, and I am
11 not familiar with their contents.

12 THE COURT: What are the two
13 attachments, Counsel?

14 MR. WEEKS: Let me let you look at
15 them. They are kind of hard to describe.

16 THE COURT: You ought to make a record
17 on foundation.

18 Q. Mr. Kessimakis, you indicated these were
19 prepared as your trades were made in the joint
20 account?

21 A. Yes.

22 Q. Is this a format that you set up?

23 A. Yes.

24 Q. This what I call a Venetian blind or
25 something that kind of folds? And you sat there.

1 Did you sit with the girl and show her what to do and
2 write down here?

3 A. Yes.

4 Q. That was off trading slips; is that
5 correct?

6 A. Yes.

7 Q. And that, basically, is a -- your own
8 record of the trading slips as they came in?

9 A. Yes.

10 Q. Why did you do your own record in addition
11 to trading slips?

12 A. I just wanted to keep track of everything.

13 Q. Do they show more -- these little hard
14 pages show a little different view of the account
15 than the trading slips?

16 A. No, I don't think so.

17 Q. You think they are exactly like the trading
18 slips?

19 A. Yes.

20 Q. Do they show more information than the
21 trading slips show?

22 A. I don't think so.

23 Q. You say they are just taken right off
24 there?

25 A. Yes. They are right off the trading slips.

1 Q. In your presence?

2 A. Yes.

3 Q. Under your supervision?

4 A. Yes.

5 Q. By your girlfriend?

6 A. Yes.

7 Q. What was her name?

8 A. Claudia Zinner.

9 Q. How long did you live with Claudia?

10 A. Probably about I would say around seven
11 years.

12 Q. During 1980 you were living with Claudia?

13 A. Yes.

14 MR. WEEKS: I have no other questions,
15 your Honor.

16 THE COURT: Any objection to the
17 exhibit?

18 MR. BARKER: May I see it one more
19 time, please? I have no objection to it
20 being admitted, as long as we are talking
21 about illustrating what those sheets say,
22 which is what he has testified to, if I can
23 have a photocopy of them.

24 THE COURT: The exhibit is received.
25 The clerk will provide copies at the break.

1 Other questions?

2 Q. Let me ask you about the opening of the
3 account. You indicated, briefly, that you went to
4 Les Anderton, and that's Betty's brother?

5 A. Yes.

6 Q. You opened the account there. Was there a
7 reason to use Les?

8 A. Yes. I thought he would do a good job, and
9 he was Betty's brother and a friend of the family.
10 That's the reason why I chose him. He had a good
11 track record.

12 Q. Mr. Kessimakis, Betty has testified that
13 you went to a 7-Eleven at one point in 1973, or '83.
14 I guess it was 1993. She testified you went to the
15 7-Eleven to talk to her. Do you recall going to a
16 7-Eleven to talk to her about stock in the company?

17 A. I have never been to a 7-Eleven to talk to
18 her about stock.

19 Q. Never on any occasion?

20 A. Never.

21 Q. Do you recall the last time Betty was in
22 the Kessimakis Produce, either location?

23 A. I don't ever remember her ever coming in.

24 Q. Since the divorce?

25 A. No. I never remember seeing her ever come

1 in. I don't think she would show her face in the
2 produce company.

3 Q. Why is that?

4 A. Because my brother dislikes her. And I
5 don't think she would have nerve to come in.

6 Q. So, to your recollection, she has never
7 been in Kessimakis Produce?

8 A. Never.

9 Q. In either location?

10 A. No.

11 Q. Did you have occasion to call Betty and
12 tell her that Mike wanted to talk to her?

13 A. I never did.

14 Q. You have never asked her to go talk to Mike
15 about financial --

16 A. My father dislikes her immensely. He would
17 never ask me to call her.

18 Q. Do you know if she went on her own?

19 A. He would never invite her over.

20 Q. Did he leave you a larger share of stock in
21 the company?

22 A. I really don't know.

23 Q. You don't recall?

24 A. No, I don't.

25 Q. What stock, what percentage of the stock do

1 you own now?

2 A. Right now?

3 Q. Right now.

4 A. Fifty percent.

5 Q. And your brother Gary owns the other
6 50 percent?

7 A. Yes.

8 Q. So that you didn't get any extra share in
9 the split in the estate?

10 A. No, I did not.

11 Q. The estate was settled in 1981; is that
12 correct?

13 A. Yes.

14 Q. There was no real estate in the company, so
15 there was no reason for her to call you about any
16 inheritance or anything out of Mike's estate that was
17 real estate that the company may have had an
18 ownership interest in?

19 A. No.

20 Q. Did you have occasion to try and get tax
21 returns for the 1980 years, '81, '82?

22 A. Yes. But -- we tried to get them, but they
23 were not available.

24 Q. You couldn't get those? Over the years you
25 have heard her make statements that she talked to you

1 on several occasions about getting your stock. Did
2 you give her any indication she was going to get
3 stock after 1980?

4 A. No, I did not. She never said a thing.

5 Q. Did you tell her she was in your will for a
6 fourth?

7 A. No, I did not. I don't even have a will.

8 Q. How many children do you have?

9 A. Three.

10 Q. But nobody -- you have never told her that
11 she was a fourth heir of your estate?

12 A. No.

13 Q. What is your title in the company?

14 A. President.

15 Q. Have you ever had any requests from Betty
16 or her attorney for corporate records?

17 A. Just recently.

18 Q. Since the lawsuit was filed?

19 A. Yes.

20 Q. Nothing prior to that?

21 A. No.

22 Q. Have you ever, in your capacity as an
23 officer in the corporation, ever had any occasion to
24 give her notice of annual meetings?

25 A. She was never in the company, so I had no

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Plaintiff - Appellant,

V.S.

DALE M. KESSIMAKIS,
Defendant - Appellee.

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Plaintiff - Appellant,

V S.

DALE M. KESSIMAKIS,
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Plaintiff - Appellant,

V.S.

DALE M. KESSIMAKIS,
Defendant - Appellee.

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