1998

Betty L. Kessimakis v. Dale M. Kessimakis : Reply Brief

Utah Court of Appeals

E. Nordell Weeks.
Mitchell R. Barker; Thomas E. Stamos.

IN THE COURT OF APPEALS
FOR THE STATE OF UTAH

BETTY L. KESSIMAKIS,

Plaintiff/Appellant,

vs.

DALE M. KESSIMAKIS

Defendant/Appellee.

REPLY BRIEF
OF APPELLANT

Docket No. ~~960467~~ 981221-CA

District Court No. 7444914107 DA

Priority Classification 15

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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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A. THE LOWER COURT'S RULING THAT APPELLEE MR. KESSIMAKIS PAID APPELLANT HER INTEREST IN THE COMPANY WAS AGAINST THE WEIGHT OF EVIDENCE.

Mr. Kessimakis (Appellee) merely recites the lower court's ruling. In effect, in the Brief of Appellee, Mr. Kessimakis argues that because he testified that he paid Mrs. Kessimakis (Appellant) her interest in Kessimakis Produce ("the Company") in or about 1980, then it must be so. The fact this was indeed the lower court's ruling is undisputed. But it is equally clear that the ruling was dead wrong.

The evidence presented at trial, however, does not conform to the lower court's ruling. The issue as to whether Mrs. Kessimakis received her interest in the Company basically comes down to whether he produced any proof of payment (which he did not), and

whose testimony is more credible. The testimony of the two antagonists is contradictory on the point of an alleged "buy-out." In order to rule as the judge did in this case he must have concluded that Mrs. Kessimakis was not telling the truth, and that Mr. Kessimakis' evasive, inconsistent answers carried sufficient veracity to substantiate his holding.

Despite his claim of being consistent throughout, the Record speaks otherwise. Mr. Kessimakis' testimony throughout the litigation was a mass of evasive and contradictory statements and assertions. Appellant Mrs. Kessimakis presents the following for the Court's consideration:

1. Mrs. Kessimakis was awarded one-half of Mr. Kessimakis Mr. Kessimakis' interest in the Company in the divorce decree. R. 20.

2. Mr. Kessimakis stated under oath that (as a result of the award contained in the *Decree of Divorce)* Appellant Mrs. Kessimakis owned 10% of the Company in 1980. Tr. 74, R. 336, 337.

3. Mr. Kessimakis never delivered evidence of ownership in the Company to Mrs. Kessimakis. Tr. 12, 75, R. 337. This admission at trial is contrary to previous statements made under oath by Mr. Kessimakis, wherein he stated in an affidavit (submitted at trial as plaintiff Mrs. Kessimakis' Exhibit Number 1), (Tr. 73) **that he gave 3,000 shares "in the spring of 1976" representing 10% ownership in the Company** in the form of a stock certificate. Tr. 74-75 (*Affidavit*, Trial Exhibit 1, paragraph 5, emphasis supplied).

4. Mr. Kessimakis was never able to produce any evidence to establish that any stock certificates were delivered to her, **or even that they were issued**. See Record and Transcript in general, which contain no evidence.

5. In about 1980, Mr. Kessimakis and Appellant set up a joint stock account with a local broker. But (belying Mr. Kessimakis' assertion that the account was just for him to pay off his former wife), **both parties contributed** to the account. Tr. 81. Appellee Mr. Kessimakis testified that he deposited approximately "$18,000 or more" to open the account. Tr.81. Mrs. Kessimakis (it is undisputed) deposited a significant amount as well. Tr. 81. The total amount contributed was never established.

6. Mrs. Kessamikis understood that this was a joint investment, and not some kind of a buy-out. When ***Mr.*** Kessimakis redeemed almost all of the proceeds from the account, Mrs. Kessimakis was quite bitter. Tr. 138-142, Tr. 41. This is directly contrary to the argument set forth in Mr. Kessimakis's Brief, where he stated that she did not complain to her broker, her brother. Tr. 41.

7. At the time of opening the joint account, Mr. Kessimakis testified that the produce business was worth approximately $10,000 to $15,000. Tr. 72-73. As noted above, he had previously sworn under oath that he delivered stock certificates to satisfy her interest.

8. When asked by Mrs. Kessimakis' counsel under cross examination why,

when he had the present ability to cash her out of the Company in 1981, he simply testified that did not do it. He stated; "I didn't want to spend all my earnings. Besides that, I heard Les (the broker) done good." Tr. 81.

9. Mr. Kessimakis claims that he used the proceeds to "buy-out" Mrs. Kessimakis' interest over a period of time by giving her sums of money, i.e, cash. R. 337, Tr. 81. However, nowhere does he establish how or when. This would appear important in attempting to corroborate his story.

10. Rather, the undisputed testimony is that he redeemed most of the proceeds of the joint account. Id. He eventually settled on this tortured story of using a joint investment (which he alone took most of) as his latest story of why he should somehow be forgiven and found to have complied with the *Decree*. Id.

11. When asked why he did not document the cash transaction to buy Mrs. Kessimakis out by "even a hand written receipt," he explained, "I just didn't." Tr. 69. This is troublesome because he earlier testified that he got receipts from other transactions for his personal business affairs. Tr.71. Furthermore, he stated that he did not trust the Mrs. Kessimakis. Tr. 69. He kept records of child support payments made in cash to the Mrs. Kessimakis. Tr. 70. He showed these records to a judge in a previous Order to Show Cause Hearing on contempt,[1] for lack of paying his court ordered child support and alimony. Tr.

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[1] The Record in this case shows that at the hearing in 1977 he was asked by the former judge to prove that he had done anything to pay for the support of his wife and children pursuant

70. Even still, he claimed that the "buy-out" remained undocumented, which was wholly inconsistent with his *modus operandi.*

12. Mr. Kessimakis claims that Mrs. Kessimakis admitted that she did not complain to the Mr. Kessimakis or Mr. Anderton, her brother, who was the broker of the account concerning the redemption, (see Mr. Kessimakis's Brief @ 13), and that this somehow caused the lower court to question the Mrs. Kessimakis's credibility. This is not accurate. Under cross examination, counsel asked Mrs. Kessimakis concerning an "accusation that Les Anderton (Broker) assisted Dale (Mr. Kessimakis) in taking the money out of the account. . . ." Her response was "I was wrong. I apologized to my brother." Tr.41. She further testified under cross examination by Mr. Kessimakis' counsel, when asked why she did not complain to the stock brokerage firm that Mr. Kessimakis "had taken the money." She responded, "They said it was in both of our names, that either one of us could have taken the money. I believed -- I don't know. I was just really hurt." Tr. 142.[2]

13. Further, Mr. Kessimakis would like this Court to believe that it is

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to the Decree. He responded by producing a little black book, in which he recorded each hamburger, french fry or the like he bought for the children during visitation.

[2] It is apparent that the Mrs. Kessimakis was in fact bitter toward her brother when she discovered the redemptions, and complained to the brokerage house. Id. There is nothing in this which is inconsistent with her testimony, or could be seen by Judge Brian as somehow damaging her credibility. In effect, Mr. Kessimakis is again grasping at straws to find some rational basis for the lower court's wholesale adoption of his position.

irrational to suppose that Mrs. Kessimakis agreed to the investment in an attempt to reconcile with her for the family, and to continue the friendship between the parties. This despite testimony given by Mrs. Kessimakis under cross examination by the Mr. Kessimakis that her family was more important than money, and that she wanted harmony between the two of them. Tr. 144. She was lulled into inactivity by her former husband, who continually asked that she worked together, and promised that he would "do right by her."[3]

14. Mrs. Kessimakis testified that she was assured by Mr. Kessimakis that her interest in the Company would be "taken care of," even after the purported 1976 issuance of stock certificates to her representing her share of the Company, and even after the 1980 joint stock account was redeemed unilaterally by Mr. Kessimakis. Tr. 151-52. Further, Mrs. Kessimakis testified even after the closing of the joint account she requested a stock certificate evidencing her ownership interest in the company. Tr. 152. (He responded that such evidence would cause family discord.) Tr. 150.

15. The testimony of the Mrs. Kessimakis concerning events after 1980 indicates that she was never under the impression that the joint stock account was set up to "buy-out" her interest. Further, this testimony corroborates her position that she was never paid off and or bought out.

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[3] Of course the promises and assurance, and the interest in working and investing together, ended abruptly just after Mr. Kessimakis perceived that the statute of limitations might have expired.

16. Mr. Kessimakis would like this Court to believe that he did not change his story over time. See Mr. Kessimakis's Brief, @ pg. 12. However, the Record indicates the contrary. First, Mr. Kessimakis **claimed that he gave a stock certificate to the Mrs. Kessimakis, then he claimed he did not**. Tr. 73-75. Second, he **claimed that he bought her out in 1980, or 1981, or 1982.** Tr. 80. He did not know. Third, he **claimed he bought her out for $21, 000, or $22,000 or $24,000 or $25,000**. Tr. 77-78. He could only guess. Yet, the undisputed evidence indicates that **he put only $18,000 into the account** which he now claims was the vehicle of the buy-out. Fourth, he admits **he took most of the money out of the account.** Fifth, he claims he never kept records of personal cash transactions, but then testified that he produced a log book at previous a Order to Show Cause Hearing concerning purchases he claimed were child support along with child support and alimony payments (and in-kind contributions). Tr. 70.

Mr. Kessimakis now admits that there is no documented evidence that he **ever** paid Mrs. Kessimakis her interest in the Company. When asked why he did not document the "buy-out" his answer seems to be: I paid her off from the proceeds received from the sale of stock. How much, exactly? I know not. When, exactly? I know not. Where were you when you paid her off? I know not. The trial court, however, discounted the ebb and flow of Mr. Kessimakis' testimony, adopted his latest version, and then selectively focused all negative attention on just part of Mrs. Kessimakis's testimony.

Mrs. Kessimakis's testimony remained consistent and credible throughout the hearing. However, the lower court paid little or no attention to the evidence as related above. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous.[4] Based on the above, the great weight of evidence suggests that the lower court erred in its factual findings.

B. THE LOWER COURT'S RULING THAT UTAH CODE ANNOTATED SEC. 78-12-22(1) IS APPLICABLE TO DEFEAT AN INTEREST IN A CORPORATION ALREADY AWARDED IN A DIVORCE DECREE IS UNPRECEDENTED, TO SAY THE LEAST.

The trial court **ruled that an interest in a corporation awarded in a divorce decree is unrecoverable if, after eight years, the recipient has not formally taken delivery**. There is no authority for this, and none has been cited to by the lower court or by Mr. Kessimakis. In fact, he concedes that this is a **case of first impression** for the Court. See Mr. Kessimakis's Brief @ pg. 21.

Mr. Kessimakis urges this Court to follow an Oklahoma court ruling; *Chapman vs. Chapman*, 692 P.2d 1369 (Okl. 1984), claiming that the "situation [is] virtually identical to the case at hand." Id. However, that is far from accurate and the Oklahoma case is easily distinguishable. In that divorce case, the Oklahoma court, *inter alia*, denied a wife's petition to collect on a note and mortgage held jointly by her and her husband, when the wife had

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[4] *Southland Corp. vs. Potter*, 760 P.2d 320 (Utah App. 1988).

knowledge of when the note and mortgage came due. The Oklahoma court reasoned that since the wife had knowledge of the maturity date all along, she had reasonable time to "perfect" her claim.

In the instant case, however, there was no time frame from which to set a period of recovery. And there was no requirement or means of "perfection" such as recordation of some interest. **Corporate interests do not simply expire over time.** Tr. 116. The obvious logic and simplicity of this proposition probably explains why there are no cases addressing the issue. Further, Mrs. Kessimakis, over a period of time, repeatedly requested evidence of ownership from the Mr. Kessimakis, who continued to lull her into a false sense of security relative to her interest in the company. Tr. 151-52. There was not such a factual scenario in the *Chapman* case. And there, unlike here, the noncompliant husband had died, and it was his estate which was defending on the basis of a laches-like time-bar.

Moreover, *Chapman vs. Chapman* stands for another proposition that actually does assist this Court in rendering a decision. The Oklahoma court also ruled, in the same decision, that an asserted claim for life insurance proceeds based on a divorce decree award was timely **even though submitted fifteen years after the decree** was entered. Under the terms of the divorce decree, the husband was to keep in force a life insurance policy at his expense, and to maintain the former wife as beneficiary of one third of its value. Unbeknownst to the ex-wife, her former husband changed the beneficiary and cashed the life

insurance policy for its surrender value, using the proceeds for his own use.

The Oklahoma court ruled that wife's claim against the estate of the then dead husband was timely, since she could not invoke equitable remedies "because she did not know the status of the insurance policy." Id. at 1374. One could reason that she should have ascertained the status of the policy during the statutory period. But the Oklahoma court ruled this to be an unreasonably burdensome expectation.

In the instant case, it is at least as unreasonable to expect Mrs. Kessimakis to procure an interest in property that had already been awarded,[5] and in which she was assured repeatedly that she was secure. As stated previously, stock in a corporation does not simply expire over time. Tr. 116. The lower court erred when it rendered judgment against Mrs. Kessimakis upon this claim.

C. THE APPELLEE MR. KESSIMAKIS' ASSERTION THAT THIS APPEAL IS DEFICIENT IS ERRONEOUS.

Mr. Kessimakis urges this Court to award him costs and attorney fees incurred in defending this appeal. See Mr. Kessimakis' Brief, @ pg. 28. Mr. Kessimakis cites to

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[5] Paragraph 3(b) of the *Divorce Decree* awards to Mrs. Kessimakis, among other things, "One-Half (½) 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 interests. . . ." The key provision and intent was clearly to award her a then present interest in an existing family business. It was not some contingent, future order only, or some money judgment, either of which could conceivably expire with the passage of time. She was, from the date the divorce was entered in the 1970s, the actual owner of a share of the company.

U.R.A.P. 34 for authority. He further states that the factual findings are defensible, and that dissatisfaction with them is the sole reason for the appeal. Obviously the Mrs. Kessimakis is dissatisfied by the outcome of the case. Mr. Kessimakis argues that this "appeal is frivolous and serves no other purpose than to continue to increase legal fees and litigation costs of the Mr. Kessimakis." See Mr. Kessimakis's Brief pg. 28-29.

The irony of this statement cannot go unaddressed. It is the Mr. Kessimakis who, since the entry of decree of divorce, has forced the Mrs. Kessimakis to defend herself against repeated appeals to the Supreme Court at great expense to herself.[6] For Mr. Kessimakis to now claim to be a victim of harassment through appellate litigation is extremely disingenuous.

Mr. Kessimakis applies "terms of art" in trying to present legal support for his claim of a frivolous appeal. But those terms conform most closely to U.A.R.P. 33, which relates to damages for delay and/or frivolous appeals. A frivolous appeal has been defined by this Court to mean "one having no reasonable legal or factual basis." *O'Brien vs. Rush*, 744 P.2d 306 (Utah Ct. App. 1987). Further, this Court has stated that "[s]anctions for frivolous appeals should only be applied in egregious cases, to avoid chilling the right to appeal erroneous lower court decisions." *Porco vs. Porco*, 752 P.2d 365 (Utah Ct. App. 1988).

In the instant case, Mrs. Kessimakis is seeking reversal of factual findings, *inter alia,*

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[6] See prior appeals; *Kessimakis vs. Kessimakis*, 580 P.2d 1090 (Utah 1978) and *Kessimakis vs. Kessimakis*, 546 P.2d 888 Utah (1976).

based on contradictory oral testimony as to whether husband bought out wife's court ordered interest in a closely held corporation. Husband said he did, wife said he did not. Corroborating testimony and documentation (or lack thereof) as detailed in this appeal by Mrs. Kessimakis demonstrate that the great weight of evidence suggests that the lower court erred in rendering its decision.

Further, Mr. Kessimakis has conceded that applying U.C.A. 78-12-22(1) to a corporate interest property award is a case of first impression. See Mr. Kessimakis's Brief pg. 21. Appeal of **a case of first impression cannot be classified as frivolous**. By addressing this issue the Court has an opportunity to clarify the law as to property rights awarded in divorce decrees, as they relate to the statute of limitations.

IV. CONCLUSION[7]

The lower court's ruling that Mr. Kessimakis paid Mrs. Kessimakis her interest in the Company was against the weight of evidence. After considering Mrs. Kessimakis' full marshaling of evidence in support of Judge Brian's finding in her *Opening Brief of Appellant*, Mr. Kessimakis was unable to show that something was missed; that there is some real support in the Record for the decision. The findings of fact were clearly erroneous,

[7] Several items contained in the opening brief were ignored and not contested. So in accordance with the Rules of Appellate Procedure, those are not treated here. However, silence in this document is not, of course, a waiver of those arguments, some of which could be dispositive in Mrs. Kessimakis' favor.

based on the trial testimony and the court record. Mr. Kessimakis's unsupported testimony rested on his statement that he had paid Mrs. Kessimakis her interest in the Company. Corroborating evidence and Mrs. Kessimakis's testimony evidence only the contrary.

Moreover, the lower court certainly erred in ruling that U.C.A. Sec 78-12-22(1) applies to somehow wipe out an already-awarded interest in a corporation, established in a divorce decree. Such a ruling sets property and corporate law on their head. There surely can be no public policy (and none has been suggested) that would favor the Court carving out a narrow area of property ownership rights, and make them dissolve with time when they are created by a decree of divorce.

Public policy is clearly to the contrary, *a fortiori* in the divorce property division arena. As to such duties as payment of child support or signing a quit claim deed, it is necessary to wait until a Decree has been entered and some time has passed, to see if the party acts as he has been ordered. If he does not, and eight years passes, the beneficiary of the divorce court's decree may be barred (if she cannot show lulling or other tolling provisions). But where the property is awarded outright, and even with specific language that the interest is awarded no matter how the ownership rights are "evidenced," it would be folly to require that each beneficiary of a part of the property division come back to court within eight years just to somehow confirm that previously declared ownership. No such useless act can be impliedly required, especially in a court of equity (which abhors a forfeiture anyway).

Mr. Kessimakis's case in support of the lower court's ruling is sharply distinguishable, and applying the judgment statute of limitations to corporate interest awards is one of first impression.

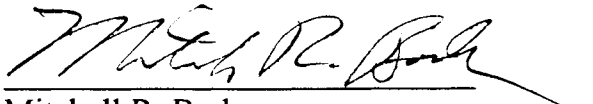
Failure to raise statute of limitations in his responsive pleadings waives that affirmative defense, and the lower courts are ill-advised to be making *sua sponte* rulings (as Commissioner Arnett did here) on issues not raised by the parties.

As a case of first impression and of contrary evidence, the case by definition cannot be classified as frivolous.

It is therefore requested that the Court reverse the trial court's legal rulings and findings, and remand the case with instructions to

- declare that Mrs. Kessimakis still owns ten percent of Kessimakis Produce, Inc.,
- Compel Mr. Kessimakis to legally transfer evidence of ownership in the Company to Mrs. Kessimakis,
- and to award to her costs and attorney fees at trial and on appeal.

Respectfully submitted this fifth day of November, 1998.



Mitchell R. Barker
Thomas E. Stamos

CERTIFICATE OF SERVICE

I hereby certify that on this fifth day of November, 1998, I mailed two true and correct copies of the foregoing to the following individual(s):

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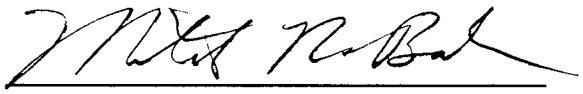

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