

1998

Oletta Cummings v. Clyde Kay Cummings : Reply Brief

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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UTAH COURT OF APPEALS

OLETTA CUMMINGS,)	
)	
Appellee,)	Case No. 981307
)	
vs.)	
)	Priority No.
CLYDE KAY CUMMINGS,)	
)	
Appellant,)	
)	

REPLY BRIEF OF APPELLANT

Appeal from the Ruling of the Third District Court, Salt Lake County, State of Utah
The Honorable Glenn K. Iwasaki, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES IN REPLY	1
STATEMENT OF FACTS RELEVANT IN REPLY	1
ARGUMENT	2
I. WHETHER THE ALLEGATION OF "UNCLEAN HANDS" IS A BAR TO THE APPEAL.....	2
II. WHETHER RES JUDICATA APPLIES AS A BAR TO ISSUES APPEALED.....	2
III. WHETHER THE APPEAL IS A "FRIVOLOUS APPEAL"	4
A. Not grounded in fact.	4
B. Not warranted by existing law.	4
C. Not based on good faith argument.	4
IV. WHETHER AWARD OF ATTORNEY'S FEES IS APPLICABLE	5
CONCLUSION.....	5

TABLE OF AUTHORITIES

CASES

<i>Rappleye v. Rappleye</i> , 855 P.2d 260, 263 (Utah App. 1993).....	3
<i>Action v. J.B. Deliran</i> , 737 P.2d 996 (Utah App. 1987)	4
<i>Carlton v. Carlton</i> , 756 P.2d 86 (Utah App. 1988)	4
<i>Watson v. Watson</i> , 837 P.2d 1 (Utah App. 1992)	5
<i>Walters v. Walters</i> , 812 P.2d 64 (Utah App. 1991)	5

RULES

Utah Rules of Appellate Procedure, Rule 33	4
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Appellant, Clyde Kay Cummings, files his Reply Brief as follows:

STATEMENT OF ISSUES IN REPLY

1. Whether the allegation of “unclean hands” bars appeal;
2. Whether *res judicata* applies to claims of appellant;
3. Whether appeal is a “frivolous appeal”; and
4. Whether appellee should be awarded attorney’s fees and costs.

STATEMENT OF FACT RELEVANT IN REPLY

1. The trial court on remand from appeal significantly changed and altered the distribution of assets in the divorce. (TR. p. 2608.)
2. Upon entry of the Amended Decree of Divorce, the division of assets in the original Decree of Divorce was materially amended which gave rise to the issues now on appeal that were not identical to the issues raised in the first appeal.
3. The court’s finding of contempt had no bearing upon the issues raised in this appeal but dealt solely with issues of cooperation in dealing with the financial assets divided in the Amended Decree of Divorce which, if appeal is sustained, would alter and change those findings and considerations. (TR. p. 2910.)
4. The trial court did not award attorney’s fees, nor costs to either party in the retrial of the issues on remand from which this appeal arises. (TR. p. 2608.)
5. Upon retrial, the trial court altered and amended the distribution of assets in the divorce. Defendant contends that the amended distribution fails to meet the court’s stated objective of a 50/50 distribution between the parties. (TR. p. 2608.)

ARGUMENT

Plaintiff makes no response in her brief as to the failure of the Court to achieve its own requirement of a 50/50 distribution of marital assets. Plaintiff, therefore, admits that the disparity in distribution as shown in Exhibit "A" is factual and that no rationale was ever provided by the Court as to why the required 50/50 distribution was not awarded. Plaintiff's only response is a claim of four defenses.

I. WHETHER THE ALLEGATION OF "UNCLEAN HANDS" IS A BAR TO THE APPEAL.

Subsequent to entry of the Amended Decree of Divorce, defendant was ordered to cooperate in the lease or sale of the business property. The separate property interests of the parties had been divided by the court in the Amended Decree of Divorce -- 75% to plaintiff and 25% to defendant. Defendant had no control over the sale of the property. Defendant was ordered to establish a fund to pay the interest on the outstanding loan on the property. Defendant alleged that he had no funds to meet that order. (TR. p. 2816.) The court found defendant in contempt of that order. (TR. p.2910.) That Finding and Order of Contempt took place after entry of the Amended Decree of Divorce on remand, and did not concern issues raised on appeal herein. They are actions subsequent to the filing of appeal. Such a claim of "unclean hands," even if valid, did not arise from the Amended Findings of Fact and Amended Decree of Divorce which are the subject of this appeal.

II. WHETHER RES JUDICATA APPLIES AS A BAR TO ISSUES APPEALED.

This court, by its first decision on appeal, remanded issues for the trial court to resolve. The court elected to retry the issues remanded, and in retrial, materially altered and changed the distribution of the marital assets between the parties. It changed not only the division of the

assets subject to the original appeal, but materially altered and changed the division of the marital assets between the parties which assets were not the specific issues in the original appeal. The court, on remand, resolved the issue of the business surplus determining that the same was not an asset, and in resolving that issue in favor of defendant, entered an Amended Decree of Divorce amending the division of the business property of the parties 75% to plaintiff and 25% to defendant. The amendment was to make up for the error of the court in considering the business surplus as an asset. The Court of Appeals previously found that the findings of fact do not sufficiently explain the court's "equitable and 50/50 division" of the marital property, citing *Rappleye v. Rappleye*, 855 P.2d 260, 263 (Utah App. 1993). These same issues remain unresolved and are now exacerbated by the unequal distribution of marital assets upon retrial.

Further, the trial court had to resolve the issue of assessed lease payments or rent since the business property was originally awarded 100% to plaintiff and is now to be divided between the parties from the date of the Amended Decree of Divorce.

Appellee concurs and concedes in her Brief at p. 6 that the trial court on remand "determined that his (Judge Iwasaki's) prior finding concerning the value of the business was in error. On retrial, the Court determined that the retained earnings had no separate value, and should not have been included in the valuation of the business." (TR p. 2608.)

With these findings, the entire distribution of marital assets between the parties originally provided in the Decree of Divorce had to be altered and changed. The court, on retrial, reiterated its own requirements for a 50/50 distribution of the assets re-evaluated at retrial, and then the Court proceeded to ignore that express purpose by dividing the assets 63% to plaintiff and 37% to defendant as set forth in Exhibit "A." (Exhibit "A" is attached to the Brief of Appellant.) The

trial court failed and refused to make any findings as to why that inequality was either equitable or required in the circumstances.

III. WHETHER THE APPEAL IS A "FRIVOLOUS APPEAL"

The issues before the Court are the court's stated purpose of dividing the marital assets 50% to 50% between the parties, and the refusal and failure of the court to meet its own stated objectives. It was the court's failure to provide any findings as to why its own objectives were not met that became the basis for appeal.

A frivolous appeal is defined by Rule 33, URAP, as one which is:

A. Not grounded in fact.

The facts are succinct and clear that the court refused and failed to meet its own required 50/50 division of assets and failed to give any basis or rationale for its actions.

B. Not warranted by existing law.

The existing law requires the court to make specific findings which support and sustain its refusal and failure to divide the marital assets 50/50 between the parties as the court itself specifically required. *Action v. J. B. Deliran*, 737 P.2d 996 (Utah App. 1987); *Carlton v. Carlton*, 756 P.2d 86 (Utah App. 1988).

C. Not based on a good faith argument.

The good faith action of defendant was manifested in Exhibit "A," attached to Appellant's Brief. It was introduced to the court, and was ignored by the court in its findings when the court refused to mandate the 50/50 division of assets between the parties as exemplified therein.

There is no delay nor needless cost in the appeal as the issues are clear and well defined. They are based on the trial court's failure to follow its own mandate or to provide specific facts or findings or rationale upon which the court deviated from its mandated equal division of assets between the parties.

IV. WHETHER AWARD OF ATTORNEY'S FEES IS APPLICABLE.

In the original appeal, no attorney's fees were awarded on appeal since none were awarded by the court in the original proceedings.

On remand and retrial, no attorney's fees were awarded by the trial court, and the same conclusion must be reached in this appeal. When the trial court refused the petition for attorney's fees in retrial on remand, the appeals court should also not award attorney's fees in the appeal. *Watson v. Watson*, 837 P.2d 1 (Utah App. 1992) and *Walters v. Walters*, 812 P.2d 64 (Utah App. 1991).

The only attorney's fees included in the Amended Decree of Divorce were those fees awarded in the original Decree of Divorce arising out of enforcement actions and not out of the trial. Those fees had been paid in full prior to retrial on remand. No attorney's fees were awarded to either party on retrial on remand, and none should be awarded on appeal.

CONCLUSION

Plaintiff makes no response in her brief to the issues raised on appeal. Plaintiff then must be taken to admit that the issues are valid and that remand to re-evaluate these issues is appropriate.

Defendant takes this appeal of issues based upon the failure of the court to meet its own stated requirements for an equal division of marital assets between the parties. Those issues are

brought on appeal in which the equitable doctrine of "unclean hands" is not applicable. The doctrine of *res judicata* does not apply as the issues on appeal are not identical to issues previously considered on appeal. The issues are not frivolous and are brought in good faith, and the claim for attorney's fees on appeal should not be assessed.

Appellants should be granted judgment and the matter remanded to provide a 50/50 division of marital assets between the parties or to make specific findings or rationale as to why the trial court will not achieve its own mandate of an equal distribution of marital assets between the parties.

DATED this 27th day of July, 1999.

/s/
M. Byron Fisher
FABIAN & CLENDENIN, a Professional Corporation
Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of July, 1999, I caused to be faxed and mailed, first class mail, a true and correct copy of the Reply Brief of Appellant, to:

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