

1979

Beverly Kay Christensen v. Alfred Brent Christensen : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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BEVERLY KAY CHRISTENSEN, :
Plaintiff-Appellant, : Case No. 16459
v. :
ALFRED BRENT CHRISTENSEN, :
Defendant-Respondent. :

---oooOooo---

BRIEF OF APPELLANT

Appeal from the Judgment of the Third District Court
in and for Salt Lake County
Honorable Ernest M. Baldwin, Jr., Judge

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BRIEF OF APPELLANT

NATURE OF CASE

Plaintiff Beverly Kay Christensen (hereinafter "Mrs. Christensen") commenced Civil Action Number 239969 (hereinafter "the civil action") in the District Court seeking relief from a decree of divorce previously entered in Salt Lake County Domestic Relations Action Number D-20185 (hereinafter "the divorce case"). Consolidated with the civil action for trial was Mrs. Christensen's Motion for Modification in the divorce case.

DISPOSITION IN LOWER COURT

Following trial on February 14, 15, and 16, 1979, Judge Baldwin signed, on April 16, 1979, a Judgment dismissing

Mrs. Christensen's civil action (Civ. R. at 78-79), and an Order in the divorce case denying Mrs. Christensen's motion for modification (Div. R. at 103-05).

RELIEF SOUGHT ON APPEAL

Appellant Beverly Kay Christensen respectfully requests that this Court reverse Judge Baldwin's denial of Mrs. Christensen's Motion for Modification in the divorce case and remand the case for further proceedings.

STATEMENT OF FACTS

The parties' sixteen and one-half year marriage was dissolved by a decree of divorce entered by the Honorable Stewart M. Hanson, Sr., on December 19, 1975. (Div. R. at 31-38.) That decree was based upon a stipulation reached between the parties (Div. R. at 13-18).

It was Mrs. Christensen's contention in the civil action that the stipulation upon which Judge Hanson's decree had been based was the product of misrepresentations and fraud practiced upon her by Mr. Christensen. Specifically, Mrs. Christensen contended that Mr. Christensen affirmatively misrepresented and concealed from her his true financial condition and untruthfully and fraudulently represented to her that certain substantial real property holdings were, in fact, worthless. (Civ. R. at 9-13.) By

her Motion for Modification in the divorce case, Mrs. Christensen contended that even if Mr. Christensen's conduct complained of in the civil action did not rise to the level of actionable fraud, she was, nevertheless, entitled to a modification of the original decree based upon the apparent change in circumstances manifest by a comparison of the resources of Mr. Christensen as assumed to exist by the original Stipulation and Decree and those resources of Mr. Christensen which actually existed at the time. (Div. R. at 90.)

The property which is the central issue in this dispute is an apartment complex known as the Spring Hollow Apartments located at 320 Gordon Lane, in Salt Lake County. This 52-unit apartment complex was acquired and constructed by the parties during the course of their marriage. (Tr. at 10.) During the negotiations between the parties leading to the stipulation upon which the original Decree was based, Mrs. Christensen was in the position of having to rely upon Mr. Christensen's representations concerning the value and extent of their property, since he had never kept her apprised of their business affairs (Tr. at 3; 146; 202) and she could not afford to retain an appraiser to establish values of the property (Tr. at 25-26).

Mrs. Christensen testified that Mr. Christensen represented to her that the apartment complex was without any value since it had cost nearly twice as much to build as anticipated, the mortgage obligation was at least equal to its value at the time, and the rents were barely sufficient to service the mortgage obligation. (Tr. at 7.) It is undisputed that in December, 1975, when the Decree was entered, the mortgage obligation owed on the apartment complex was approximately \$368,000. (Tr. at 67.) While Mr. Christensen denied in his testimony that he stated to Mrs. Christensen that the complex had no value, he admitted that he told her that the gross value of the apartment complex was only \$460,000 (Tr. at 59), which would indicate an equity of only \$100,000.

While Mr. Christensen admitted telling his wife in December that the apartment complex was worth only \$460,000, less than a month earlier he had certified in a financial statement that the apartment complex had a fair market value of \$710,000. (Exhibits 8-P and 9-P.) Thus, less than a month before he told his wife either (her testimony) that the apartment complex was worthless or (his testimony) that it had a net equity of \$100,000, he had admitted in a financial statement that the complex had a fair market value

of almost three-quarters of a million dollars, which would indicate a net equity of \$342,000--three and a half times what he told his wife it was worth, even under his version of the facts. Moreover, within five months after Mr. Christensen admittedly represented to his wife that the complex was worth, at most, \$460,000, he listed the property for sale at \$950,000 (Tr. at 188), and rejected an offer to purchase the property for \$900,000 with a \$150,000 cash down payment (Tr. at 71; Exhibit 23-D).

It was the uncontradicted opinion of Mrs. Christensen's expert witnesses that the apartment complex was actually worth between \$750,000 and \$825,000 in December, 1975. (Tr. at 109-10.)

Upon learning of the discrepancy between the actual values of the property and those values attributed to the property by Mr. Christensen, Mrs. Christensen attempted to modify the original decree through an Order to Show Cause filed on August 12, 1976. On November 18, 1976, however, the Honorable Dean E. Conder ruled that since Mrs. Christensen sought to modify the original decree on the basis of fraud discovered more than three months after its entry, her only recourse was through an independent fraud action. (Div. R. at 60.) Thereafter, Mrs. Christensen filed the civil action

presently before this Court, which was later consolidated with her motion for modification filed in the original divorce case (Div. R. at 90).

Prior to trial, Mrs. Christensen's attorney entered into an agreement with Walter R. Ellett, the attorney representing Mr. Christensen, to the effect that Mr. Christensen and his accountant would produce in court all "books and records and check records sufficient to demonstrate [Mr. Christensen's] income production" for the year 1978. (Exhibit 24-P.) Notwithstanding the failure of both Mr. Christensen and his accountant to produce a single record relating in any manner to the year 1978 (Tr. at 151), Mr. Christensen was permitted to testify in conclusory and summary fashion as to his speculations and conjectures as to his income and expenses for that year (Tr. at 222-25). Mr. Christensen admitted that while these records existed, he had not bothered to bring them with him. (Tr. at 234-35.) Judge Baldwin was unable to see the "materiality" of either the agreement reached or the defendant's blatant disregard of it (Tr. at 234), and summarily rejected the proffer made by Mrs. Christensen's counsel (Tr. at 244-45). As a result, no meaningful evidence was adduced as to Mr. Christensen's 1978 income, expenses, or property holdings.

ARGUMENT

I. THE TRIAL COURT ERRED IN FAILING TO GRANT A MODIFICATION OF THE ORIGINAL DECREE.

It appears without question from the record that Mr. Christensen represented to his wife that the apartment complex was worth at most \$460,000, although only one month earlier he had certified that it was worth at least \$710,000 and five months later he listed the property for sale at \$950,000 and rejected an offer to purchase the property for \$900,000 with a \$150,000 cash down payment. The uncontradicted record also indicates that the property actually had a value of \$750,000 to \$825,000 in December, 1975. Even if the trial court was justified under these circumstances in finding that Mr. Christensen's conduct was not fraudulent, the court was not justified in its denial of Mrs. Christensen's motion for modification of the original property distribution.

If, as the trial court apparently believed, the assumption by Mrs. Christensen, her former attorney, and the original divorce court that the property had an equity of at most \$100,000 was the result of non-fraudulent, innocent errors or misapprehensions on the part of Mr. Christensen, it was nevertheless clear that the stipulation between Mr. and Mrs. Christensen was grossly inaccurate and had been

relied upon by the original divorce court in distributing their property. When a comparison is drawn between the value of the apartment complex as assumed by the original divorce court (an equity of at most \$100,000) and the actual value of the property at that time (an equity of between \$400,000 and \$500,000), a discrepancy in excess of one quarter million dollars is revealed.

Due to this discrepancy, there is an apparent (if not an actual) increase in Mr. Christensen's financial resources when a comparison is drawn between Mr. Christensen's resources as assumed to exist by the original divorce court and his actual resources. The trial court should have granted Mrs. Christensen's motion for a modification of the original decree based upon this apparent increase.

This Court has recognized and endorsed such a procedure. For example, in Kessinakis v. Kessinakis, 546 P.2 888 (Utah 1976), the factual situation was analytically identical with that present in these cases. The wife, as plaintiff, had been granted an uncontested divorce. Alleging that the decree had been based upon misrepresentations made by his wife as to the extent of his economic resources, the husband moved the trial court to set aside or modify the decree. As in this case, the motion was made more than 90

days following the entry of the original decree. While this Court held that the decree could not be set aside on the basis of the alleged misrepresentations, it was careful to demonstrate that the party aggrieved by the misrepresentations to the trial court was not without a means of obtaining relief, noting that the victim of the alleged misrepresentations was

not helpless. He may petition the trial court for modification of the terms of the decree, if there is a change of circumstances. While his actual earnings may now be the same as they were at the time of the divorce proceeding, neither party can at this late day, dispute the findings made by the court at the hearing. If [the husband's] earnings and wealth are now less than what the court found them to be, there is a change of circumstances which would justify a consideration by the court of the need to modify the original decree.

546 P.2d at 889 (emphasis added). Likewise in this case, Mr. Christensen as well as Mrs. Christensen is bound by the representations made to and the assumptions drawn by the original divorce court as to the marital assets of the parties. Comparison of the total amount of these assets as assumed to exist by the original divorce court with the actual amount of those assets as proved in the recent proceedings before the trial court, demonstrates

that the actual value of the assets far exceeded the value assumed by both Mrs. Christensen and the original divorce court.

Under the principles enunciated by this court in Kessinakis, the distribution of the original decree should be modified in recognition of the greater value clearly proven at the recent hearing. Such a modification is necessary both to provide Mrs. Christensen with a reasonable and equitable share of the marital assets and to prevent Mr. Christensen from unjustly profiting from his highly questionable conduct.

Although modification of a divorce decree based upon a change in circumstances more frequently relates to the alimony or child support, it is clear under the statutes of this state, and the decisions of this Court interpreting those statutes, that similar modification of the property distribution is appropriate. Section 30-3-5, Utah Code Annotated (1953 as amended), expressly states, in pertinent part, that:

The court shall have continuing jurisdiction to make such subsequent changes or new orders with respect to . . . the distribution of property as shall be reasonable and necessary.

Interpreting this statute, this Court has held:

[U]nder our statutes, the court retains jurisdiction of the parties to modify the decree with respect to the distribution of property.

Bott v. Bott, 20 Utah 2d 329, 437 P.2d 684 at 685 (1968)
(citations omitted).

In Larsen v. Daynes, 102 Utah 312, 133 P.2d 785 (1943), this Court expressly relied upon Section 30-3-5 in granting a subsequent modification of a property distribution.

For almost 100 years, since its decision in Whitmore v. Harden, 3 Utah 121, 1 Pac. 465 (1882), this Court has recognized the propriety of subsequent modification as to the property distribution as well as to the alimony and child support provisions of divorce decrees.

Accordingly, even if the trial court was justified in finding that Mr. Christensen's conduct did not constitute fraud, the trial court was clearly not justified in denying modification of the original decree. Even if the value of Mr. Christensen's property holdings has not increased since the entry of the original decree, there appears to have been an increase in the value of those holdings when the value which Mr. Christensen admits he placed upon those holdings-- which value must have been relied upon not only by Mrs. Christensen but also by the original divorce court--is compared with the true and actual value of the Christensens' property.

Under this Court's holding in Kessinakis, such an apparent change in circumstances was sufficient grounds for modification of the original property distribution. The trial court's refusal to grant such a modification constitutes clear error and should be reversed.

II. IN VIEW OF MR. CHRISTENSEN'S WILLFUL FAILURE TO PRODUCE HIS FINANCIAL RECORDS AS AGREED, THE TRIAL COURT ERRED IN PERMITTING HIS SELF-SERVING TESTIMONY AS TO HIS 1978 INCOME AND EXPENSES.

Mr. Christensen, through his counsel Walter R. Ellett, agreed that he would produce in court at the trial all of his "books and records and check records sufficient to demonstrate [his] income production" for 1978, without the necessity of Subpoenas Duces Tecum being served upon him and his accountant. While Mr. Christensen admitted the existence of these documents (Tr. at 234-35), he willfully failed to produce them in court. Notwithstanding Mr. Christensen's failure to produce these key documents, the trial court permitted him to testify to his conclusions and conjectures as to his 1978 income and expenses, over Mrs. Christensen's repeated objections. (Tr. at 222; 223; 224.) Moreover, the trial court denied Mrs. Christensen's motion

to strike this self-serving and unsupported testimony. (Tr. at 235.)

As a result of Mr. Christensen's willful failure to produce his records, the trial court's ruling, and Mrs. Christensen's reliance upon the good faith of attorney Ellett, she was effectively precluded from all opportunity of establishing the significant changes in Mr. Christensen's financial circumstances upon which a modification of the alimony provisions of the original decree might have been based. It is, therefore, appropriate that this Court remand this case to the trial court so as to permit Mrs. Christensen a reasonable opportunity to demonstrate Mr. Christensen's increased financial capabilities. *

As this court noted in Stevens v. Gray, 123 Utah 395, 259 P.2d 889 (1953), it is only under extremely unusual circumstances, explained to the trial court's complete satisfaction, that a party should be permitted to testify as to matters contained within records which have not themselves been produced. In that case, which was an action between two partners for an accounting, one of the partners claimed various credits and offsets for feed and wages allegedly expended on behalf of the partnership's affairs; however, he failed to produce at trial any of the records

supporting his claims, merely testifying, in a self-serving fashion as did Mr. Christensen, as to the amounts which he claimed were due and owing to him. This Court noted that where

records should have been kept, and are not produced, the court should look with extreme caution upon such secondary evidence [as the party's own unsupported testimony].

259 P.2d at 891. This Court then held that the party's unsubstantiated testimony was so unconvincing that it was error for the trial court to have relied upon it; accordingly, the trial court's finding based upon the party's unsupported testimony was reversed.

In this case, due to Mr. Christensen's willful disregard of the agreement that his attorney had assured Mrs. Christensen's counsel would be honored, there was no evidence, aside from Mr. Christensen's own unsupported, self-serving testimony, relating to his 1978 income and expenses. Without such testimony, it was impossible for the trial court to render any meaningful determination as to whether or not a change had occurred in Mr. Christensen's income capabilities. Absent such a determination, the trial court's denial of Mrs. Christensen's motion for modification cannot be supported. The case should, therefore, be remanded

to the trial court so as to permit Mrs. Christensen a reasonable opportunity to produce evidence of Mr. Christensen's increased financial capabilities.

CONCLUSION

Even assuming the trial court to have been justified in determining that Mr. Christensen's representations concerning the value of the parties' apartment complex were not fraudulent, it was error for the trial court to refuse to order a modification of the original decree, which was based upon conceded representations by Mr. Christensen that the apartment complex was worth at least a quarter million dollars less than its actual value. This Court has consistently construed the statutes of this state to permit modification of the property distribution. Moreover, this Court has held that where the original decree is based upon an assumption of the trial court which is later demonstrated to have been erroneous, there is an apparent (even if not an actual) change in circumstance. This apparent change in circumstance has been held to be sufficient to require modification of the original property distribution. In this case, the record makes clear that, even under the version of the facts recited by Mr. Christensen, he under-valued the parties' apartment complex by at least \$250,000. Accordingly,

there is an apparent increase of some \$250,000 when the value of the apartment complex as assumed by the trial court and the Christensens at the time the original decree is compared with the actual value of the apartment complex. The trial court's refusal to order a modification of the property distribution based upon this apparent change in circumstances was clearly erroneous.

Additionally, Mrs. Christensen's efforts to demonstrate that Mr. Christensen's income had increased significantly since the original decree were thwarted by Mr. Christensen's willful failure to carry through with the agreement reached between his counsel and Mrs. Christensen's. The trial court erred in permitting Mr. Christensen's self-serving and conclusory testimony as to his 1978 income and expenses in light of the fact that he had willfully failed to abide by the agreement reached with Mrs. Christensen's counsel. As a result of Mr. Christensen's conduct and the errors of the trial court, Mrs. Christensen has been deprived of any reasonable opportunity to establish on the record Mr. Christensen's significant increase in annual income since the original decree. Accordingly, this case should be remanded to the trial court so as to permit Mrs. Christensen²⁸

a reasonable opportunity to demonstrate Mr. Christensen's increased income.

RESPECTFULLY SUBMITTED this 23rd day of November, 1979.

DART & STEGALL

By


B. D. Dart

By


John D. Parken

MAILING CERTIFICATE

I hereby certify that I mailed two copies of the foregoing Brief to Walter R. Ellett, 5085 South State, Salt Lake City, Utah 84107, this 23rd day of November, 1979.
