1980

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

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

BEVERLY KAY CHRISTENSEN)
)
Plaintiff-Appellant)
)
vs.)
) Case No. 16459
ALFRED BRENT CHRISTENSEN)
)
Defendant-Respondent)

BRIEF OF RESPONDENT

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

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TABLE OF CONTENTS

CASES CITED

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	)	
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BRIEF OF RESPONDENT

NATURE OF THE CASE

Plaintiff, Beverly Kay Christensen, commenced a civil action against the defendant, Alfred Brent Christensen, Case No. 239969, in the District Court of Salt Lake County, claiming fraud in connection with a divorce decree previously entered by that court in Case No. D-20185. During the pendency of the fraud action (No. 239969), plaintiff filed a motion and order to show cause in the

divorce matter, seeking both modification and enforcement of the divorce decree. Both matters were consolidated for hearing.

DISPOSITION IN LOWER COURT

Both matters were heard before the Honorable Ernest F. Baldwin, Jr., on the 14, 15 and 16 days of February 1979. Thereafter, and on April 16, 1979, Judge Baldwin entered his order in the fraud action (No. 293369), finding in favor of the defendant and against the plaintiff, No Cause for Action. He also entered an order upon order to show cause in the divorce matter (No. D-20185), granting plaintiff partial relief under the petition for enforcement of the decree, and denying her claim for modification.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks to have the denial of the lower court to modify the decree reversed, and to have that aspect of the court's decision recommended for further proceedings. Defendant seeks to have the lower court's decision affirmed.

STATEMENT OF FACTS

On October 31, 1975, plaintiff commenced a divorce action against the defendant, seeking termination of a 16 year marriage. Plaintiff was represented by counsel, who prepared a complaint which set forth in substantial detail all of the assets of the marriage (R D-20185, p. 2-7). Thereafter, the parties and plaintiff's counsel negotiated a settlement agreement which was the result of several telephone conferences, and at least one face-to-face conference between the parties and plaintiff's counsel (T. 164). Plaintiff's counsel prepared a stipulation and property settlement agreement which was executed by the parties and incorporated into the Findings of Fact, Conclusions of Law, and Decree of Divorce entered by the court.

During the negotiations and discussions, defendant was requested to give his opinion as to the value of the properties of the parties, which he did (T. 165, 206, 207). Plaintiff discussed these properties and their values with her attorney (T. 32, 33), who advised her to have the properties appraised, if she had any questions about their values (T. 25, 167), and with Clement Tebbs, a friend

and an accountant (T. 32, 137), who also advised her to have an appraisal made (T. 137). Plaintiff opted to proceed without additional information, and executed and filed the agreement her attorney had prepared.

Plaintiff also, based upon the agreement and the other representations to the court, obtained an order waiving the statutory 90 day waiting period, and the statutory interlocutory period.

On August 5, 1976, plaintiff filed an affidavit to support an order to show cause, claiming that defendant had misrepresented the value of the assets, and that she had been prevented by the defendant from presenting to the court and fully litigating the issue of her rights to the properties acquired during the marriage (R. D-20185, p. 45-46). Defendant objected, and the Honorable Dean E. Conder ruled that plaintiff's relief properly should be sought by a separate action. Plaintiff thereafter, on January 13, 1977, commenced Civil Action No. 239969, alleging fraud and requesting the court to impress a constructive trust upon the property awarded to defendant by the Decree of Divorce, and to award damages to

plaintiff (R. 229969, p. 2-5).

Plaintiff's main complaint centers around an apartment complex located at 320 Gordon Lane, Salt Lake County, known as the Spring Hollow Apartments, and which were listed in plaintiff's divorce complaint. Defendant testified that the value of the apartments was estimated by him, based upon information given to him by the mortgage holder, at approximately $460,000 (R. 59). Exhibit 20-D, the work notes of E. H. Fankhauser, plaintiff's attorney, shows the value figure at $485,000. In addition, plaintiff, prior to exexution of the settlement agreement, talked with Clement Tebbs, who gave his opinion as to value at $550,000 (R. 187). All of these estimated values were known by plaintiff, and were referred to in her discussions with her attorney and, in fact, during one conference with her attorney, plaintiff was advised that the proposed settlement would give her "about sixty-nine thousand, and him two hundred and three," and that the proposal was not reasonable, and for her "not to take it" (R. 162). The parties thereafter continued to negotiate, and an agreement was made, which plaintiff advised her attorney she wanted to accept,

although he still expressed concern over the values used (R. 168). Plaintiff was well represented, had made independent inquiries, chose not to have the properties appraised, and was in no way excluded by the defendant from making any determination she or her attorney desired to make.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN FAILING TO GRANT PLAINTIFF'S MOTION FOR MODIFICATION.

The matter of modification of a Decree of Divorce has been left to the discretion of the trial court, with the controlling legal principal being:

> "... that a divorce decree may not be modified unless it is alleged, proved and the trial court finds that the circumstances upon which it was based have undergone a substantial change."
>
> See Chaffee v. Chaffee, 63 U 261, 225 P 76; Osmus v. Osmus, 114 U 216, 198 P. 2d 233; and Gale v. Gale, 123 U 277, 258 P. 2d 986.

It has likewise been the position of this court that the public interest requires that there be an end to litigation and, as stated in Klein v. Klein, 544 P. 2d 472:

> "... and that judgment having been affirmed by this court in July 1973, it became final and absolute; and that the trial court could not properly change or modify that decree except for subsequent change in circumstances. The correctness of that proposition under usual circumstances and as applied to a definite and final judgment and decree in a divorce action, to the end that the same matters cannot be litigated anew, is acknowledged." (Emphasis mine).

Here, the plaintiff has attempted a two-edged attack on a divorce decree that she obtained, based upon an agreed stipulation negotiated and prepared by her attorney. She claims fraud on one side, and change of circumstances on the other.

The court heard this matter at length, and all evidence presented by plaintiff was presented to support both edges of her attack. The trial court was not impressed with the fraud claim of plaintiff, and found that there were neither wilful misquotations by defendant, fraudulent representations by defendant, concealment of assets or financial condition by defendant, nor reliance by plaintiff (R. Case No. 239969, p. 80, 81, 82).

Since the plaintiff is not appealing from the court's finding in Case No. 239969, the fraud action, the matter to be considered is

whether or not a material change of the circumstances upon which the decree was based exists. This subject was addressed by this court in the case of Perkins v. Perkins, 522 P. 2d 709, where the court, quoting Anderson v. Anderson, 13 U2. d 36, 368 P. 2d 264, said:

> "... the generalization of Title 30-3-5, Utah Code Annotated 1953, contemplates an opportunity for the divorced litigants to come into court for modification of the original decree based upon changed circumstances, and that any dissatisfaction with such decree is a matter of appeal. Absent on appeal, it is not subject to modification except where such changed conditions are demonstrated."

Speaking also to this, the court, in Trego v. Trego, 565 P. 2d 74, said:

> "When there has been an adjudication on one set of facts, that should be res adjudicata, and there should be no modification unless some substantial change of circumstances would warrant doing so."

It appears from the evidence presented that the plaintiff feels that had she followed the advice of her attorney, and had she used the information that was always available to her, that she may have received more by way of property settlement than she agreed to accept. This all apparently is based upon the great real estate appraisal tool of

"perfect hind sight." What she overlooks is that the defendant was required to pay all of the mortgages --- whether sufficient income is generated or not --- and pay all of the taxes and property insurance on her property and house. These are benefits to her that must be considered in reviewing the settlement agreement.

In the case of Sorensen v. Sorensen, 20 U. 2d 360, 438 P. 2d 180, this court said:

> "... Generally, the court is required to give such a decree the final status accorded to any civil judgment and to apply the doctrine of res judicata thereto ... Our statute permits subsequent changes which are reasonable and proper. This has been construed to empower the court to make a modification where there has been a substantial change in the material circumstances of either one or both of the parties since the decree was entered. An application for a modification should be subjected to thorough scrutiny by the court."

It appears that the trial court did subject the request for modification to a thorough scrutiny and, considering all of the facts, including the values placed upon the properties by the various witnesses before the court, determined that the circumstances since the entry of the decree have not changed sufficiently to warrant a modification to

increase plaintiff's property holdings, as she requested.

Since the trial court did not find the distribution of assets to be unjust or inequitable to either party, defendant submits that the "latitude of discretion" allowed the trial court in the matter of Klein v. Klein (supra) should be allowed the trial court here, and the decision should not be disturbed.

CONCLUSION

From the evidence, it appears that the court properly determined that no change of circumstances exists, and that appellant's complaint before the court is one relative to her dissatisfaction with the settlement negotiated by her and her attorney at the time of the divorce.

Under the facts before the court, the determination of the trial court should stand.

Respectfully submitted,

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