1999

Diana Childs v. William K. Callahan : Brief of Appellee

Utah Court of Appeals

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990051

IN THE UTAH COURT OF APPEALS

DIANA CHILDS (fka Diana Callahan),	)	
Petitioner/Appellant,	)	
v.	)	
WILLIAM K. CALLAHAN,	)	Case No. 990051-CA
Respondent/Appellee,	)	Priority 15

BRIEF OF APPELLEE
(Oral Argument Requested)

Appeal from the Judgment of the
Second District Court of
Weber County, State of Utah
THE HONORABLE ROGER S. DUTSON
DISTRICT COURT JUDGE

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BRIEF OF APPELLEE

The Appellee, William K. Callahan, pursuant to Rule 24 of the Utah Rules of Appellate Procedure, submits this Brief on appeal.

Jurisdiction

This Court has jurisdiction over this appeal pursuant to *Utah Code Annotated* § 78-2a-3(2)(h) 1953, as amended. The order appealed from is a final order dismissing the Petition to Modify the Decree of Divorce of Appellant.

TABLE OF AUTHORITIES

Issues on Appeal

Did the trial court correctly rule that a change in law is not a change of circumstances which permits a trial court to reopen and reconsider the provisions of a Decree of Divorce.

Did the trial court err in denying Appellee his costs and attorney's fees.

Statement of Case

At the time the parties were divorced, no military retirement had been accumulated by the Appellee and no order was made regarding Appellee's rights to any military retirement. The Decree of Divorce entered March 10, 1982 (R. 51) which was during the "gap" period that is, after the decision of **McCarty v. McCarty**, 453 U.S. 210 (1981) and before enactment of the Uniform Services Former Spouses' Protection Act, (hereinafter USFSPA), codified as 10 USC 1401 § 1041 et. seq. (between June 26, 1981 and February 1, 1983). Under the provisions of the USFSPA, states were empowered to provide for the division of accumulated military retirement, however, actual division decisions were left as discretionary with the state courts.

This Court in **Throckmorton v. Throckmorton**, 767 P.2d 121 (Utah App. 1988) ruled that a change in the law (permitting division of retirement accounts) enacted after the entry of the Decree of Divorce was not a material change of circumstance that would permit the reopening of a Decree of Divorce to consider division of retirement accounts. In **Toone**

v. Toone, 952 P.2d 112 (Utah App. 1998) this Court specifically ruled that enactment of USFSPA, which permitted the divisions of military retirement benefits after February 1, 1983, was as the Court had previously ruled in **Throckmorton**, not a material change in circumstances that would permit the reopening of the Decree. Consequently, the trial court correctly granted Appellee's Motion To Dismiss the Petition of the Appellant to permit her to reopen the Decree of Divorce and divide the military retirement, which was accumulated by Appellee after the entry of the Decree of Divorce. The fact that the decree was entered during the gap period is legally insignificant.

Summary of Arguments

Since Appellant pursued a clearly barred claim, her action is frivolous and pursued in bad faith. Consequently, the trial court should have awarded Appellee his costs and attorney fees under **Allred v. Allred**, 807 P.2d 350 (Utah App. 1991).

Utah law clearly provides that a change in the law permitting division of retirement benefits which could not be divided at the time of the entry the Decree is not a material change in circumstances which permit reopening the Decree to divide that asset at a later date. **Toone v. Toone**, 952 P.2d 112 (Utah App. 1998), **Throckmorton v. Throckmorton**, 767 P.2d 121 (Utah App. 1988).

Where the law is clear and an invalid claim is pursued, the action is frivolous and/or pursued in bad faith. **Allred v. Allred**, 807 P.2d 350 (Utah App. 1991) and **Brigham City v. Mantuo Town**, 754 P.2d 1230 (Utah App. 1988).

ARGUMENT

THE TRIAL COURT CORRECTLY RULED APPELLANT'S CLAIM AS A MATTER OF LAW FOR DIVISION OF MILITARY RETIREMENT ACCUMULATED AFTER THE DECREE OF DIVORCE BASED ON A CHANGE IN THE LAW WAS NOT A CLAIM RECOGNIZED UNDER UTAH LAW

In this case, the trial court correctly ruled the decision of this Court in **Toone v. Toone**, 952 P.2d 112 (Utah App. 1998), governed the claim of the Appellant that she had a right to division of the Appellee's military retirement accumulated after the entry of the Decree of Divorce and dismissed that claim. In **Toone**, the final Decree of Divorce was entered after enactment of USFSPA. That is, after February 1, 1983. In this case, the decree was entered between the decision of the U.S. Supreme Court in **McCarty v. McCarty**, 453 U.S. 210 (1981), on June 26, 1981 and February 1, 1983, the effective date of the USFSPA, the "gap" period. This is legally insignificant under the principles articulated by this Court in **Throckmorton v. Throckmorton**, 767 P.2d 121 (Utah App. 1988), that is, a change in the law which permits division of retirement, which could not previously be divided, is not

a material change of circumstances permitting reopening of the Decree of Divorce. The only basis on which any military retirement rights accumulated by Respondent could have been divided after entry of the decree of divorce would have to be based on a change in the law.

In this case, Appellant attempts to distinguish **Toone v. Toone** because it occurred after closure of the gap period, while Appellant's claim arose during the gap period. That is not a valid distinction and the trial court correctly rejected her contention. The ability to divide a military retirement during the gap period is permissive and as such, is even less mandatory a claim than one asserted after the gap period.

In addition, there was no military retirement divisible at the time of the divorce. On the undisputed facts in this case, at the time the decree was entered, Appellee had served only thirteen (13) years in the military and he had been separated from the service for three years. (R. 57-58). Then, years after the parties were divorced the Appellee returned to reserve duty and commenced to accumulate the time credits necessary to secure a military retirement. (R. 58). No retirement existed as of the date of the Decree of Divorce.

In this case, prior to reaching the other equitable and legal defenses (e.g. latches and statute of limitations), the trial court correctly ruled that under these facts, **Toone v. Toone**, 952 P.2d 112 (Utah App. 1998) required the Court to rule the Appellant's claim for a portion

of Respondent's military retirement was not valid. (R. 62-64). This Court's opinion in **Toone** very clearly states:

> "This court considered whether the recognition of a new legal right constitutes a change of circumstances sufficient to reopen a divorce decree in *Throckmorton v. Throckmorton*, 767 P.2d 121 (Utah Ct.App.1998). In that case, a former wife sought to reopen the parties' 1976 divorce decree in order to obtain a share of her former spouse's civil retirement benefits. *See id.* at 122. The wife claimed that although she was aware of the retirement account at the time of the divorce, she was unaware that she had any legal rights in it because at that time, Utah law did not recognize pension benefits as marital assets distributable upon divorce. *See id.* at 123. On appeal, the wife argued that the Utah Supreme Court's recognition of pension benefits as marital assets in *Woodward v. Woodward*, 656 P.2d 431, 432-33 (Utah 1982) (holding trial court may consider "all of the parties' assets and circumstances, including retirement and pension rights" accrued during marriage, and may equitably distribute them in a divorce decree), constituted a substantial change of circumstances and precluded the application of res judicata. *See Throckmorton,* 767 P.2d at 123.
>
> This court disagreed and held that the subsequent legal recognition of a new property interest is not a substantial change of circumstances sufficient to override the "'compelling policy interest favoring the finality of property settlements.'" *Id.* At 124 (quoting *Guffey v. LaChance*, 127 Ariz. 140, 618 P.2d 634, 636 (Ariz. Ct.App. 1980)).
>
> We believe the *Throckmorton* decision is controlling and precludes Parkhurst's claim of a substantial change of circumstances. She has failed to assert any change of circumstances other than her claim that the passage of USFSPA constitutes such a change. That enactment does not, under *Throckmorton*, constitute a substantial change sufficient to justify reopening the decree." 952 P.2d at 114.

Appellant turns to the next sentence in the **Toone** decision to attempt to distinguish it. That sentence provides:

> "Moreover, USFSPA was enacted and took effect before the Toone's divorce was finalized, so its passage does not properly constitute a "change" which has occurred since the divorce.[1]
>
> [1] Parkhurst admitted at oral argument that although she could have raised the issue of Toone's military retirement by filing a Rule 59 motion for new trial within ten days of entry of the final decree, or, alternatively, a Rule 60(b) motion for relief from judgment within three month after the decree was entered, she did not do so. *See* Utah R. Civ. P. 59, 60(b)." 952 P.2d at 114-115.

However, that is not a distinguishing feature as a matter of law, because the provisions of USFSPA are permissive, not mandatory. In addition, in this particular case, the Appellant sought modification of the decree in 1985, (R. 58) that is two years after enactment of USFSPA and did not request a modification as to the military retirement act at that time.

By her statement of facts and the record in this case, it is clear that another thirteen years passed before Appellant returned to court seeking division of the military retirement. This makes her position weaker than Parkhurst's both because at the time of entry of the Decree of Divorce there was no retirement to be divided and because she returned to Court seeking a modification in the Decree of Divorce in 19854 after passage of USFSPA. There

is no valid basis on which to distinguish **Toone** or **Throckmorton** by simple reference to the gap period.

THE APPELLEE SHOULD BE AWARDED HIS COSTS AND ATTORNEY'S FEES

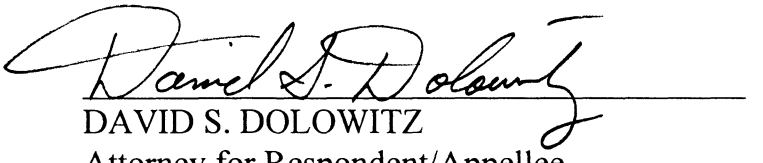
The trial court denied Appellee the attorney fees and costs he incurred in defending the Petition even as Judge Dutson believed this was a close case (R. 141-145). As pointed out above, under **Toone v. Toone**, supra., this is not a close case. This case presents a claim clearly barred by **Throckmorton** and **Toone**. The Appellant's claim is not one pursued in good faith. It is legally frivolous and Appellee should be awarded the costs and attorney fees he has incurred in defending this case, including this appeal. **Allred v. Allred**, 807 P.2d 350 (Utah App. 1991), **Brigham City v. Mantua Town**, 754 P.2d 1230 (Utah App. 1988).

CONCLUSION

The decisions in **Throckmorton** and **Toone** completely bars Appellant's claim. She asserts to this court that based on the decision of this Court in **Masters v. Worsley**, 777 P.2d 499 (Utah App. 1989), because she had no knowledge of the alleged facts supporting her claim she did not present it to the court and she should be allowed to proceed. That case involved a claim of fraud, not one that involved enactment of a federal statute of which Appellant is charged with knowledge. The statute was enacted two years prior to her return

to court in 1984. The trial court correctly ruled that Appellant's claim as not a valid claim in law under **Toone v. Toone**, *supra.* and granted the Appellant's Motion To Dismiss. This Court, following its own precedence in **Toone** and **Throckmorton** must affirm. In addition, the Court should award Appellee his attorney's fees based upon Appellant's frivolous bad faith pursuit of a clearly invalid claim.

RESPECTFULLY SUBMITTED this 13th day of August, 1999.



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CERTIFICATE OF SERVICE

I hereby certify that I am a member of and/or employed by the law firm of COHNE, RAPPAPORT & SEGAL, P.C., 525 East 100 South, Suite 500, Salt Lake City, Utah 84102, and that on the 13th day of August, 1999, I caused **two** true and correct copies of the foregoing **Brief of Appellee,** to be served, via U.S. Mail, postage prepaid, upon:

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