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Mitchell v. Mitchell : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

* * * *

DORANN C. MITCHELL,

Petitioner/Appellee,

vs.

NATHANIEL M. MITCHELL,

Respondent/Appellant.

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APPELLANT'S REPLY BRIEF

Case No. 20091027-CA

* * * *

RESPONDENT'S APPEAL FROM A FINAL ORDER OF THE THIRD JUDICIAL
DISTRICT COURT, THE HONORABLE TYRONE E. MEDLEY PRESIDING

* * * *

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ARGUMENT

I. THE MDI "OBLIGATIONS" WHICH MS. MITCHELL ATTEMPTS TO CREATE ARE FICTIONAL AND IRRELEVANT.

Ms. Mitchell argues that at the time of the entry of the Decree of Divorce Mr. Mitchell owed MDI a debt or obligation for which he remained responsible under paragraph 19 of the Decree. She acknowledges that the May 7, 1998 assignment letter¹ "did relieve Mr. Mitchell of the debt of the judgments [sic]." (Resp. Br. 7). However, she contends that the assignment letter also created a obligations to MDI. In support of her contention, Ms. Mitchell quotes selectively from the May 7, 1998 assignment letter and asserts that

"Here the agreement evidenced by the Assignment Letter creates explicit obligations in Mr. Mitchell to continue collection of the Collins' [sic] Judgment through his attorney, Mr. Frank Mesmer, as well as an implicit obligation to determine 'his interest in the judgment' vis-a-vis his then wife."

(Resp. Br. 7).

Ms. Mitchell's contention misses the point. It is also unfounded. Even if Mr. Mitchell owed MDI obligations to continue collection of the Collins Judgment and to determine the extent of his joint interest in the judgment, those obligations would not be relevant. The only relevant debt or obligation which Mr. Mitchell ever owed to MDI was the obligation to pay money reflected in FDIC Judgment. If the FDIC Judgment remained

¹See Brief of Appellant, Addendum IV.

unsatisfied at the time of the entry of the Decree of Divorce, then it was a debt or obligation for which Mr. Mitchell was responsible under paragraph 19 of the Decree of Divorce. If, on the other, the FDIC Judgment was extinguished more than four years prior to the entry of the Decree of Divorce, as Mr. Mitchell contends and Ms. Mitchell now concedes², then it was clearly not Mr. Mitchell's individual "debt or obligation" within the plain unambiguous meaning of paragraph 19 of the Decree.

Furthermore, the May 7, 1998 assignment letter clearly did not "create[] explicit obligations in Mr. Mitchell to continue collection of the Collins' [sic] Judgment through his attorney, Mr. Frank Mesmer..."³ (Resp. Br. 7) In point of fact, the assignment letter says nothing whatsoever about Mr. Mitchell continuing to collect the Collins Judgment. While the letter does recognize MDI's desire that "Mr. Mesmer will continue to collect the judgment in accordance with the current arrangement ..., " it also specifically provides that "... we will consider

²Before the district court, Ms. Mitchell argued that the FDIC Judgment was not satisfied prior to the entry of the Decree of Divorce because the Mr. Mitchell's assignment of his interest in the Collins Judgment was "not an unconditional assignment." R. 141 (Ms. Mitchell's emphasis). Ms. Mitchell has abandoned that argument on appeal and now concedes that the assignment "did relieve Mr. Mitchell of the debt of the judgments..." (Resp. Br. 7).

³Ms. Mitchell refers to Mr. Mesmer as Mr. Mitchell's attorney. However, it should be noted that he was also Ms. Mitchell's attorney. (R. 174-175).

this letter to constitute the agreement and assignments. **You may then contact Frank Mesmer directly** and send me the notes and a copy of the Satisfaction of Judgment against [Mr. Mitchell].” (Brief of Appellant, Addendum IV) (emphasis added). The clear intent is that MDI would deal directly with Mr. Mesmer regarding collection of the judgment.

Nor does the assignment letter implicitly require Mr. Mitchell to “to determine ‘his interest in the judgment’ vis-a-vis his then wife.” Mr. Mitchell assigned to MDI “all of his interest in the judgment which he and his wife have against Steve Collins”⁴ period. The presumption is that where two or more persons hold property as tenants in common their shares are equal. *In the Matter of the Estate of Gorrell*, 765 P.2d 878, 789 (Utah 1988). Ms. Mitchell has never made any claim that she was entitled to more than an equal share of the proceeds from the Collins Judgment. However, even if she had done so, it would have been MDI’s responsibility to take whatever action it deemed necessary to determine the extent of the interest which it acquired from Mr. Mitchell. There is nothing in the assignment letter which would have required Mr. Mitchell to do so.

⁴Brief of Appellant, Addendum IV.

II. THE MDI ASSIGNMENT REMOVED MR. MITCHELL'S INTEREST IN THE COLLINS JUDGMENT FROM THE MARITAL ESTATE MORE THAN FOUR YEARS PRIOR TO THE PARTIES' SEPARATION AND DIVORCE.

Ms. Mitchell does not deny that she was aware of Mr. Mitchell's assignment of his interest in the Collins Judgment. She argues, however, that the assignment did not remove Mr. Mitchell's interest from the marital estate because the assignment "did not - and could not - determine Ms. Mitchell's part of the marital estate." (Resp. Br. 4). Ms. Mitchell's argument is without merit.

As set forth above, the Supreme Court of Utah recognizes the presumption that where two or more persons hold property as tenants in common their shares are equal. *In the Matter of the Estate of Gorrell*, 765 P.2d 878, 789 (Utah 1988). It is well recognized that tenants in common may freely sell or otherwise transfer their undivided interests as they choose. *E.g., Taylor v. Canterbury*, 92 P.3d 961, 964 (Colo. 2004).

"A tenancy in common is a form of ownership in which each co-tenant owns a separate fractional share of undivided property ... **Each co-tenant [] possesses the right to: unilaterally alienate his or her interest, through sale, gift, or encumbrance ...**"

Id. (citing *United States v. Craft*, 535 U.S. 274, 279-80, 122 S.Ct. 1414, 152 L.Ed.2d 437 (2002)) (emphasis added).

When MDI made contact with Mr. Mitchell in early 1998 attempting to collect the FDIC Judgment, Mr. Mitchell was entitled to and did assign his undivided interest in the FDIC

Judgment to MDI in order to put a stop to MDI's collection efforts.⁵ Accordingly, when the parties separated and divorced more than four years later, it was only Ms. Mitchell's interest in the Collins Judgment which remained as a marital asset.

Underlying Ms. Mitchell's position in this case is the unstated contention that she is somehow being treated unfairly by Mr. Mitchell, that Mr. Mitchell is attempting to require her pay one-half of a debt which she in fairness should not be required to pay, and that Mr. Mitchell is attempting to unfairly make claim to one-half of an asset which in fairness should be hers alone. The short response to this contention is that both the Collins Judgment and the FDIC Judgment arose out of Mr. Mitchell's failed business relationship with Mr. Collins. Accordingly, even if Mr. Mitchell's interest in the Collins Judgment had still been part of the marital estate at the time of the Decree of Divorce, it would not have been fair or reasonable that Ms. Mitchell be entitled to one-half of the proceeds from the Collins lawsuit (i.e., the up-side of Mr. Mitchell's failed business relationship with Mr. Collins), but that Mr. Mitchell be solely responsible for paying the FDIC judgment (i.e., the down-side of that very same failed business relationship with Mr.

⁵Ms. Mitchell and the Mitchell's children were, of course, direct beneficiaries of the assignment because it served to protect the family income and assets from being seized to satisfy the FDIC Judgment.

Collins).⁶

III. MS. MITCHELL'S BELATED DENIAL OF HER AWARENESS OF THE RECEIPT AND AMOUNT OF THE FIRST COLLINS LAWSUIT DISTRIBUTION IS NEITHER CREDIBLE NOR RELEVANT.

In part F of her Argument, Ms. Mitchell asserts that

"Mr. Mitchell inappropriately raises and argues facts, which were disputed and not established in the district court and which were not raised and are not at issue in this appeal. Indeed, the 'facts' raised by Mr. Mitchell in support of his inappropriate argument concerning Ms. Mitchell's awareness and involvement in Mr. Mitchell's interpretation of the Decree were disputed and refuted by Ms. Mitchell's proffered testimony in the hearing held April 22, 2009."

(Resp. Br. 10-11). Unfortunately, Ms. Mitchell fails to identify the "facts" to which she refers and she fails to explain how they were inappropriately raised and argued. Further, at no time did Ms. Mitchell make any proffer of testimony in the district court and, of course, the district court did not accept any proffer of testimony.

Mr. Mitchell speculates, however, that Ms. Mitchell may be referring to paragraph 10 of Mr. Mitchell's "Statement of Facts," which provides that:

10. In August 2002, approximately one month after the entry of the Decree of Divorce, Ms. Mitchell received a check in the mail from Mr. Mesmer in the amount of \$180,106.58 made payable jointly to the parties. (R. 78) This check was proceeds from the Collins lawsuit. Ms. Mitchell contacted Mr. Mitchell and both parties negotiated the check and returned it to Mr. Mesmer. Mr. Mesmer then sent Ms. Mitchell a second check in the amount of \$66,274.79, which

⁶It is worth noting that the only reason why Ms. Mitchell had any interest in the Collins Judgment at all is because she was Mr. Mitchell's spouse. (R. 121-138).

represented Ms. Mitchell's one-third share of the proceeds collected by Mr. Mesmer in connection with the Collins lawsuit. (R. 79) What would otherwise have been Mr. Mitchell's share of the proceeds was paid by Mr. Mesmer directly to MDI in accordance with the May 7, 1998 assignment. (R. 78) Ms. Mitchell deposited the \$66,274.79 check into her Wells Fargo checking account and, in accordance with paragraph 20 of the Decree of Divorce, gave Mr. Mitchell a check in the amount of \$33,137.40 as his one-half share of her one-third share of the proceeds from the Collins lawsuit. (R. 80)

(Brief of Appellant 5-6). These facts are clearly established not only in the cited pages of the record, but by the representations which Ms. Mitchell made before the district court. Ms. Mitchell argues on appeal that she "was unaware of the receipt or of the total amount of the first August 2002 check from attorney Mesmer, which was not disclosed or concealed by Mr. Mitchell." (Resp. Br. 15). However, in her "Response to Order to Show Cause and Counter Motion to Enforce Decree of Divorce" Ms. Mitchell represented to the district court that

"[s]ubsequent to the entry of the parties' decree of divorce, in August, 2002, a piece of mail arrived at the former marital home, **then solely occupied by [Ms. Mitchell],** addressed to the parties [from attorney Mesmer] ... **The piece of mail was a check from Mr. Mesmer representing payment to the parties stemming from the Collins judgment made out to both parties n [sic] the sum of approximately \$180,000.**"⁷

⁷To be fair, Ms. Mitchell first changed her story during the April 22, 2009 hearing, not on appeal. However, she did so only after Mr. Mitchell presented to the district court a copy of the check which Ms. Mitchell wrote on her personal checking account in the amount of \$33,137.40 (R. 80) and delivered to Mr. Mitchell as his one-half share of her share of the Collins lawsuit, which clearly refuted the representation which Ms. Mitchell made to the district court that it was Mr. Mitchell who "wrote a check to

(R. 58) (emphasis added).

Thus, before the district court Ms. Mitchell not only acknowledged that she was aware of the amount of the first August 2002 check, but she represented that it was she who retrieved it from her own mailbox. Accordingly, Ms. Mitchell's subsequent denial that she was aware of the receipt and amount of the first August 2002 check should be taken with a grain of salt.

Ms. Mitchell also faults Mr. Mitchell for failing to produce a copy of the \$180,000⁸ check which she now denies having seen:

"Mr. Mitchell also fails to acknowledge that a copy of the roughly \$180,00 endorsed check, which he claims Ms. Mitchell had full knowledge of, is conspicuously lacking, despite his ready supply of endorsed checks which he believes support his position ..."

(Resp. Br. 16). What Ms. Mitchell fails to acknowledge is that, as discussed above, it was she who first brought to district court's attention the fact that she received the check from Mr. Mesmer. (R. 58). It was not until the April 22, 2009 hearing that she changed her story and denied having received or seen the check. There was no reason for Mr. Mitchell to produce the check prior to the change in Ms. Mitchell's story because it was not at issue and it was, of course, too late to produce it when she did.

[Ms. Mitchell] from his personal checking account for approximately \$30,000.00 which according to [Mr. Mitchell] represented [Ms. Mitchell's] share of the [\$180,106.58 check] ..." (R. 58).

⁸The correct amount of the check is \$180,106.58. (R. 78).

Of course, Ms. Mitchell could also have obtained a copy of the check from Mr. Mesmer if she believed that it would substantiate her story.

Furthermore, even if Ms. Mitchell was unaware of the receipt and amount of the first August 2002 check, that fact has very little relevance. MDI was either entitled to one-third of the check or it was not. Mr. Mitchell either owed MDI a debt at the time of the Decree of Divorce or he did not. Ms. Mitchell's awareness or unawareness of the details does not change the analysis.

IV. THE STATUTE OF FRAUDS IS NOT APPLICABLE.

Ms. Mitchell argues that Mr. Mitchell's assignment of his interest in the Collins Judgment is barred by the provisions of the Statute of Frauds found in Utah Code Ann. § 25-5-4(1)(a) and (b). According to Ms. Mitchell the assignment was an agreement "which [was] not to be performed within one year or contain[ed] a promise to answer for the debt of another." (Resp. Br. 9).

Unfortunately, Ms. Mitchell fails to provide any analysis or explanation to support her argument and the only authority which she cites in support of her argument is case law involving entirely different provisions of the Statute of Frauds relating to transfers of real property. None of the cases which Ms. Mitchell cites is on point.

Mr. Mitchell respectfully submits that the May 7, 1998 assignment letter is clearly not an "agreement that by its terms is not to be performed within one year from the making of the agreement" within the meaning of § 25-5-4(1)(a). It was effective immediately upon its execution. *Cf. Pasquin v. Pasquin*, 988 P.2d 1, 6 (Utah App. 1999) ("... we reiterate the well-settled proposition that the one-year clause applies only to contracts that are literally *incapable* of being performed within one year"). Nor is there anything in the assignment letter which by any stretch of imagination could be construed to be a "promise to answer for the debt, default, or miscarriage of another." See Utah Code Ann. § 25-5-4(1)(b). With all due respect, Ms. Mitchell's Statute of Frauds argument is frivolous.

V. MR. MITCHELL PRESERVED THE ISSUES WHICH HE RAISES ON APPEAL.

Ms. Mitchell asserts that Mr. Mitchell did not preserve for appeal his objection to subparagraph C(iii) of the district court's Findings and Order (Hearing April 22, 2009)⁹. She explains that "[a]lthough, [sic] Mr. Mitchell made factual allegations which are contradictory to the language to which he take [sic] exception, he did not object to the form or content of the Findings and Order (Hearing April 22, 2009), as his Objection to Commissioner's Recommendation and argument therein was [sic] submitted prior to the district court's order."

⁹See Brief of Appellant, Addendum I.

Ms. Mitchell's assertion is frivolous. She cites no authority which would support the proposition that Mr. Mitchell was required to file a motion, presumably under Rules 59 or 60, *URCP*, objecting to the form or content of the Findings and Order to preserve his objection to its findings of fact for appeal. This Court has explained that "for an issue to be sufficiently raised [and preserved for appeal] ... it must at least be raised to a level of consciousness such that the trial judge can consider it." *Groberg v. Housing Opportunities, Inc.*, 2003 UT App 67, ¶ 19, 68 P.3d 1015 (quotations and citations omitted). All of the memoranda filed in the district court, and the arguments made at both hearings before the district court, addressed the facts and law related to the issues which Mr. Mitchell raises on appeal.

VI. MR. MITCHELL PROPERLY MARSHALED THE EVIDENCE.

Finally, in support of her contention that Mr. Mitchell failed to adequately marshal the evidence in support of subparagraph C(iii) of the district court's Findings and Order (Hearing April 22, 2009)¹⁰, Ms. Mitchell asserts that "Mr. Mitchell ignores the proffered testimony of Ms. Mitchell in the hearing held April 22, 2009..." Ms. Mitchell's assertion is untenable. At no time during the hearing did Ms. Mitchell make any proffer of testimony; nor did district court accept any

¹⁰See Brief of Appellant, Addendum I.

proffer of testimony. Ms. Mitchell's counsel presented Ms. Mitchell's arguments, but arguments of counsel do not constitute evidence.

CONCLUSION

Based on the foregoing, Mr. Mitchell respectfully requests that the district court's Findings and Order (Hearing April 22, 2009) be reversed and that this action be remanded to the district court for further proceedings consistent with this Court's decision.

DATED this ____ day of June 2010.

Scott B. Mitchell
Attorney for Appellant

MAILING CERTIFICATE

____ Undersigned certifies that two copies of the foregoing were mailed this ____ day of June 2010 via first class U.S. Mail, postage prepaid, to the following:

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