

1980

Melvin J. Abbott v. Larae Victor (A/K/A Larae Parkes) : Appellant'S Brief

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

MELVIN J. ABBOTT, :
Plaintiff and Respondent :
vs. : No. 16931
LaRAE VICTOR (a/k/a :
LaRAE PARKES), :
Defendant and Appellant. :

APPELLANT'S BRIEF

Appeal from the Final Judgment and Order
of the 4th District for Duchesne County,
Honorable Allen B. Sorensen, Judge

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TABLE OF CONTENTS

STATEMENT OF THE CASE	1
DISPOSITION IN LOWER COURT	1
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF	2
STATEMENT OF	5
ARGUMENT	6
I. INVOLUNTARY DISMISSAL OF A COMPLAINT, WITHOUT PREJUDICE, DOES NOT CONSTITUTE ABANDONMENT OF A CLAIM RAISED THEREIN SO AS TO ESTOP THE DISMISSED PLAINTIFF FROM RAISING THE CLAIM AS A DEFENDANT IN A SUBSEQUENT ACTION.	6
II. THE EVIDENCE IS TOTALLY INSUFFICIENT TO SUPPORT THE FINDING THAT APPELLANT IS ESTOPPED FROM SEEKING AN EQUITABLE DISTRIBUTION OF THE PARTIES' MARITAL PROPERTY.	9
III. APPELLANT IS ENTITLED TO AN EQUITABLE DISTRIBUTION OF THE MARITAL PROPERTY BY THE DISTRICT COURT EVEN IF THAT DIVISION DIFFERS FROM THE TERMS OF THE SETTLEMENT AGREEMENT.	13
A. The District Court has a statutory duty to make an equitable distribu- tion of the parties' marital property.	13
B. The District Court is not bound by the agreement of the parties in making its equitable division of the marital property.	14
CONCLUSION	15

CASES CITED

Archambault v. Sprouse, 215 S.C. 336, 55 S.E.2d 70 (1949)
Barker v. Dunham, 342 P.2d 867 (Utah 1959)
Bomer v. Ribicoff, 304 F. 2d 427 (6th Cir. 1962)
Callister v. Callister, 261 P.2d 944 (Utah 1953)
Corbet v. Corbet, 472 P.2d 430 (Utah 1970)
Fitch v. Whaples, 220 A.2d 170 (Me. 1966)
Hall v. Hall, 326 P.2d 707 (Utah 1958)
J.P. Koch, Inc. v. J.C. Penney Co., Inc.,
534 P.2d 903 (Utah 1975)
Kelly v. Richards, 83 P. 2d 731 (Utah 1938)
Leaver v. Grose, No. 16477 (Utah Supreme Court,
decided April 2, 1980)
Mathie v. Mathie, 363 P.2d 779 (Utah 1961)
Morgan v. State Board of Lands, 549 P.2d 695 (Utah 1976)
Papanikolas Bros. Enterprises v. Sugarhouse Shopping
Center Assoc., 535 P. 2d 1256 (Utah 1975)
Pearson v. Pearson, 561 P.2d 1080 (Utah 1977)
Pinney v. Pinney, 245 P.2d 239 (Utah 1926)
Power Train, Inc. v. Stuver, 550 P.2d 1293 (Utah 1976)
Stewart v. Stewart, 242 P.2d 947 (Utah 1925)

STATUTES AND SECONDARY SOURCES

Utah Code Ann. §30-3-5

Utah Rules of Civil Procedure 41(b)

Wright & Miller, 9 Federal Practice and Procedure 231

STATEMENT OF THE CASE

Respondent filed this action in the District Court in November, 1978 seeking recognition of the Mexican divorce obtained by Respondent and Appellant in 1972 and seeking an order declaring a 1973 Settlement Agreement as the valid property settlement as between the parties. Record on Appeal p. 0003. Appellant, by way of her Amended Answer, admitted the Mexican divorce but alleged that the Settlement Agreement was unfair, unconscionable, and inadequate with regard to the provisions for child support and the division of the marital property. Record on Appeal, p. 0017, 0018.

DISPOSITION IN LOWER COURT

A trial was held on November 28, 1979. Judgment was filed on January 16, 1980 awarding Appellant custody of the parties' three minor children and child support of \$100.00 per month per child. In addition, judgment was entered in favor of the Respondent as to the Settlement Agreement, with the District Court holding it to be valid between the parties for the reason that the Appellant had "abandoned any action to void said agreement or, by her conduct, having been estopped from asserting any claim for voidance thereof." Record on Appeal, pp. 0049-0050. This later portion of the Judgment is the subject of this appeal.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the judgment below insofar as it held her to be totally estopped from seeking an equitable distribution of the marital property any different than that contained in the Settlement Agreement. Appellant further seeks a remand of this matter to the District Court for a full hearing and equitable distribution of the marital property.

STATEMENT OF FACTS

Melvin J. Abbott and LaRae Victor, now known as LaRae Parkes, were married on August 15, 1959 in Salt Lake City. There were four children born to the marriage, of whom three are still minors in Appellant's custody. Record, p. 0045. For nearly eight of the years between 1962 and 1972 the parties lived in Duchesne County at the dairy farm of Mr. Abbott's father. During that time the Appellant took care of the farm household, cooking meals and cleaning for the children, Mr. Abbott, her brother-in-law and her father-in-law. Record, p. 0102; Transcript at 36.

During the course of the marriage the parties purchased numerous parcels of real property, some suitable for farming or pasturing and some valuable for its oil, gas or mineral rights. Testimony of Melvin Abbott, Record, p. 0124-0129; Tr. at 63. In 1966 Mr. Abbott purchased a half-interest in his father's dairy farm at a cost of \$1,200 each year until his father's death. Also purchased were the farm's livestock and equipment and dairy stock. Record, p. 0127-0129; Tr. at 61-63.

The real estate and personal effects held at the time of the parties' divorce, and their values, are detailed in the Respondent's Answers to Interrogatories, Record, pp. 0027-0032.

The parties obtained a Mexican divorce in September, 1972 which did not contain provisions as to child support or property division. During the year following the divorce, the parties discussed reaching a property settlement. Record, pp. 0105-0106; Tr. at 39-40. Mr. Abbott retained an attorney, David Sam, to draw up a formal agreement. The Appellant, who was not represented by separate counsel, met once with Mr. Abbott and Mr. Sam but did not reach an agreement at that time. Record, p. 0113; Tr. at 47. Mr. Abbott presented to Appellant a written settlement agreement on October 10, 1973 and the parties signed it on that date. Record, p. 0106, 0113; Tr. at 40,47.

By the terms of this Settlement Agreement the Appellant received custody of the parties' minor children and child support of \$50.00 per month per child. She received as her separate property a 1971 LTD and a 14' x 68' mobile home. Mr. Abbott received as his separate property:

- 334 shares of General Dairies, Inc. Class D stock
- 159 shares of Hi-Land Dairy Class A Stock
- 454 shares of Hi-Land Dairy Class C Stock
- 1965 Ford F-350, serial number 35DR673322
- 1963 Cadillac Deville, serial number 63B153075
- 1955 Ford Fairlane, serial number 5RT135931
- Hydrosnift Boat, serial number TC125J, Utah license #402
- Suzuki Motorcycle, serial number 16195
- Cemetery lot, Block 11, Lot 7, Duchesne City cemetery
- 1256 Base permit from Hi-Land Dairy Corporation
- Livestock: 40 cows, 20 two year olds, 10 one year olds,
40 range cattle, and 30 one year old cattle
- Forest Permit for 89 head of cattle in Sowers Canyon

In addition, Mr. Abbott received numerous parcels of realty, the fixtures and improvements thereon, the water rights, and the mining interests. These properties are described in full in the Settlement Agreement, Record at pp. 0008-0009, and in Mr. Abbott's Answers to Interrogatories, Record at pp. 0027-0032.

At the time of this Settlement Agreement, the Appellant had been remarried for two months. She was about to move to Singapore with her new husband and she signed the document only a day or two before her departure. Record, p. 0106; Tr. at 40. Mr. Abbott was anxious to have the Agreement signed, and had told the Appellant that she received more by its terms than she would get if the parties went to court about it. Record, pp. 0107, 0115.

In 1977 the Appellant secured an attorney to represent her whose services were paid for through the local Assistance Payments office. She filed suit in the fall of that year, seeking equitable distribution of the marital property belonging to her and Mr. Abbott in Victor v. Abbott, No. 6320 (District Court, Duchesne County), including modification of the 1973 Settlement Agreement.

In August 1978 Mr. Abbott's attorney filed a motion to strike Appellant's complaint in Civil No. 6320 for her failure to appear at a deposition. A copy of that motion is attached hereto as Exhibit A. Appellant's counsel in that action failed to respond to that motion and her complaint was stricken and ordered dismissed without prejudice on September 25, 1978. A

certified copy of that order is attached hereto as Exhibit B.

In November 1978 Mr. Abbott filed the instant action seeking recognition of the Mexican divorce and an order approving the Settlement Agreement as the valid distribution of the marital property. Record, pp. 0001-0009. A trial was held on November 28, 1979, at which time the District Court heard argument as to whether or not the doctrine of equitable estoppel would apply to prevent the Appellant herein from challenging the Settlement Agreement and seeking a different distribution of the marital property. Record, pp. 0079, 0085-88, 0095-96, 0140. In its ruling dated January 2, 1980 the District Court took judicial notice of the previously dismissed civil action and held that the Appellant is estopped to challenge the Settlement Agreement, having abandoned the prior action. Record, p. 0044. This was incorporated into the Court's Findings of Fact and Conclusions of Law, Record pp. 0045-0048, and into the Judgment, Record pp. 0049-50. Appellants' objections to these findings were denied. Record, p. 0054.

Appellant appeals from the Judgment entered in this matter only as to the issue of the Settlement Agreement.

STATEMENT OF POINTS

1. The District Court erred in holding that the Appellant is barred from challenging the 1973 Settlement

Agreement because her earlier lawsuit (Victor v. Abbott, Civ. No. 6320 Fourth District Court, Duchesne County) was dismissed without prejudice on September 25, 1978, two months before the commencement of the instant action.

2. There is insufficient evidence to support the finding of the District Court that the Appellant is by her conduct estopped from seeking a distribution of the marital property other than that contained in the 1973 Settlement Agreement.

3. The District Court erred in failing to make an independent equitable distribution of the marital property with the 1973 Settlement Agreement as one factor to be considered.

ARGUMENT

I. INVOLUNTARY DISMISSAL OF A COMPLAINT,
WITHOUT PREJUDICE, DOES NOT CONSTITUTE
ABANDONMENT OF A CLAIM RAISED THEREIN
SO AS TO ESTOP THE APPELLANT FROM
RAISING THE CLAIM AS A DEFENDANT IN A
SUBSEQUENT ACTION

Rule 41(b) of the Utah Rules of Civil Procedure states:

(b) Involuntary Dismissal: Effect Thereof.
For failure of the plaintiff to prosecute or
to comply with these rules or any order of
court, a defendant may move for dismissal of
an action or of any claim against him. ...
Unless the court in its order for dismissal
otherwise specifies, a dismissal under this
subdivision...operates as an adjudication on
the merits.

U.R.C.P 41(b) (emphasis added). The case law in Utah and other jurisdictions is clear that the effect of a dismissal without prejudice is the discontinuance of the complaint. See, e.g., Power Train Inc. v. Stuver, 550 P.2d 1293, 1294 (Utah 1976); Although numerous courts have addressed the issues of estoppel or res judicata in cases involving prior dismissals with prejudice, few have had to resolve the issue of the estoppel effect of a dismissal without prejudice.

The reason for this is apparent - most courts have recognized that the doctrine of estoppel is totally misplaced in the context of a dismissal where there has been no determination of facts or adjudication on the merits of a plaintiff's complaint. Wright and Miller explain the difference between dismissals with and without prejudice in terms of their effects on the ability of the dismissed party to raise the same claim or litigate the same facts later.

Even though the dismissal is with prejudice, if no facts have been adjudicated, as when the dismissal is for want of prosecution, the judgment, though a bar to a second suit on the same claim, does not establish any facts to which the doctrine of collateral estoppel can be applied in later litigation on a different claim.

Wright & Miller, 9 Federal Practice and Procedure 231. On the other hand, a dismissal without prejudice carries with it no estoppel consequences; it "creates no problem and a second suit is not barred." Id. at 233; Power Train, Inc. v. Stuver, supra.

In the instant case, Judge Sorensen took judicial notice

of the fact that Appellant had filed an action in 1977 seeking an equitable distribution of the marital property. He also took notice that the previous action had been dismissed without prejudice in September 1978 because she had failed to attend her deposition. In his ruling, however, Judge Sorensen turns this fact into a finding that she had abandoned her challenge to the Settlement Agreement and, therefore, is estopped to raise it in the instant case. Record, p. 0044.

In the aforementioned Ruling, and in the subsequent Findings and Judgment of the District Court, it is apparent that "action " forming the basis for the estoppel is the Appellant's failure to appear at a deposition and the subsequent dismissal of her complaint. This leap was made by the Court without even hearing testimony from the Appellant as to the circumstances surrounding the dismissal of her complaint.

For purposes of this appeal, however, it is only important that, for whatever reasons, Judge Bailif ordered her prior suit dismissed without prejudice. Exhibit B. Appellant has no intention of arguing about whether that order, in Civil No. 6320, should or should not have been entered. But the holding of the court below, if allowed to stand, results in the transformation of a dismissal without prejudice into a dismissal with prejudice. It is hard to imagine how the Appellant could be any more prejudiced than she was by the holding below that her dismissal without prejudice in the other suit is now an absolute bar to her raising a challenge to the Settlement Agreement by which her husband received the bulk of their marital property.

This result is nonsensical, contrary to the law, and patently unjust to the Appellant. As this Court stated in Power Train, Inc., supra:

The dismissal of an action, although without prejudice, constitutes an abatement for the time being. ... A dismissal not only postpones the action as a stay might have done, it discontinues the complaint completely, so as an entirely new suit must be instituted to bring the cause before the court again.

550.P.2d at 1294, citing Fitch v. Whaples, 220 A.2d 170 (Maine 1966). Thus, LaRae Parkes could have filed another complaint identical to the one dismissed in Civil No. 6320, if Mr. Abbott had not beat her to it. However, the District Court holding herein barred her from raising the identical claim as a defendant she could have raised as a plaintiff. The fact that the court applies the labels of "abandonment" and "estoppel" to her act of being dismissed does not change anything; the appellant was severely prejudiced by the court's use of an order that is supposed to be without prejudice. This distortion of the law and Rule 41(b) should be reversed.

II. THE EVIDENCE IS TOTALLY INSUFFICIENT TO SUPPORT THE FINDING THAT APPELLANT IS ESTOPPED FROM SEEKING AN EQUITABLE DISTRIBUTION OF THE PARTIES' MARITAL PROPERTY.

In J.P. Koch, Inc. v. J. C. Penny Co., Inc., 534 P.2d 903 (Utah 1975), this Court articulated the test for the invocation of the doctrine of estoppel as

whether there is conduct, by act or omission, by which one party knowingly leads another party, reasonably acting thereon, to take some course of action, which will result in his detriment or damage if the first party is permitted to repudiate or deny his conduct or representation.

Id. at 905, citing Kelly v. Richards, 93 P.2d 731 (Utah 1938).

See also Morgan v. Board of State Lands, 549 P.2d 695 (Utah 1976); Leaver V. Grose, No. 16477 (Utah Supreme Court, decided April 2, 1980).

The appropriateness of this doctrine to the case at bar is questionable, at best. Assuming, arguendo, that a divorced spouse could be estopped from challenging a property settlement, this record is devoid of evidence to support such a finding. The court's Findings, Judgment and Ruling make no mention of any action of Appellant, other than her action in having her prior complaint dismissed without prejudice. Record, pp. 0044, 0046-4' 0049-50. Presumably, it is, therefore, this act which the court found as the basis for its holding that she is estopped because she abandoned her claim. There is no testimony about any of her actions between the signing date of the Settlement Agreement and the dismissal of her suit. There are conflicting representations of counsel as to why she was not present at her deposition, but surely the Respondent could not claim detrimental reliance merely on her failure to appear at a deposition, whether justifiable or not.

The position of the Respondent adopted by the District Court apparently is that Appellant is estopped to challenge the fairness and equity of the Settlement Agreement because he relied

on its validity. The court was requested to inquire into both the validity and the fairness of the agreement and make a fair distribution of the property. That judicial scrutiny was never entered into because of the invocation, however inappropriately, of the shield of estoppel. Appellant contends that the doctrine of estoppel should not be cavalierly applied as a defense to prevent a court from scrutinizing the validity or fairness of a property settlement, in the absence of any inducive conduct by her to the Respondent's detriment. The record is not remotely sufficient to support a finding that the doctrine of estoppel should apply in this case.

The record would also not support any finding that the related equitable doctrine of laches applies. As this court pointed out in Leaver, supra:

The availability of the defense of laches is contingent upon the establishment of two elements: (1) the lack of diligence on the part of plaintiff; and (2) an injury to defendant owing to such lack of diligence.

State of Utah Bulletin, May 1, 1980 at 56. As argued above, the mere "act" of Appellant in having her prior suit dismissed, without prejudice, cannot serve as the basis for a finding of the equitable defense. To do so would totally rewrite existing law which governs the effect of such a dismissal order.

The record below contains no other possible basis for the finding except for the fact that the Settlement Agreement was executed in 1973 and the Appellant filed her suit in 1977.

There is no evidence in the record to demonstrate the reasons for this four-year wait or whether it was reasonable or justifiable under the circumstances. We could, of course, speculate as to a possible explanation for LaRae Parkes' inaction for four years: as a young mother with minor children able to work only infrequently, Record, p. 0114, she was hardly in any position to afford legal action. It was only when she was provided with an attorney paid by the public assistance office that she was able to seek a judicial division of the property.

Speculation aside, it was the Respondent's burden to prove the elements of the defense he raised. This was not met in the case at bar merely by the establishment of a four year gap between the execution of the Settlement Agreement and the filing of Civil No. 6320. Laches is not merely delay.

Papanikolas Bros. Ent. v. Sugarhouse Shopping Center Assoc.; 535 P2d 1256, (Utah 1975); Archambault v. Sprouse, 215 S.C. 336, 55 S.E. 2d 70 (1949).

In addition to delay, factors considered by the courts in determining the existence or nonexistence of laches are the relative harm to defendant, in view of plaintiff's delay

Papanikolas, supra at 1260.

The record below contains no evidence other than delay on which the lower court could properly base a finding of the applicability of this equitable defense. In light of this, the findings should be reversed to prevent manifest injustice to the

Appellant. Papanikolas, supra; Barker v. Dunham, 342 P.2d 867 (Utah 1959); Corbet v. Corbet, 472 P.2d 430 (Utah 1970); Hall v. Hall, 326 P.2d 707 (Utah 1958).

III. APPELLANT IS ENTITLED TO AN EQUITABLE DIVISION OF THE MARITAL PROPERTY BY THE DISTRICT COURT EVEN IF THAT DIVISION DIFFERS FROM THE TERMS OF THE SETTLEMENT AGREEMENT.

A. The District Court has a statutory duty to make an equitable distribution of the parties' marital property.

Pursuant to Utah Stat. Ann. §30-3-5, the District Court had the power to make custody awards and distribute the marital property of divorced parties. Although requested by Appellant to do so, the court chose not to make any independent determination of a fair division of the parties' marital property. As argued previously, the court declined to make that inquiry and instead misapplied the law as to estoppel and dismissal without prejudice. This choice, furthermore, allowed the court to avoid its statutory duty to order the reasonable and necessary distribution of the property contemplated by U.C.A. 30-3-5.

The actual division of property is, of course, a matter within the judge's discretion. Absent an abuse of this discretion the trial courts' distribution of property will not be disturbed on appeal. Stewart v. Stewart, 242 P. 947 (Utah 1925); Pinney v. Pinney, 245 P. 239 (Utah 1926).

The lower court in the instant case never even got to the point of making a division of the marital property. The

effect of the judgment below is to rubberstamp an inequitable division contained in the agreement whereby Mr. Abbott received nearly everything, while Appellant received almost nothing. The courts implicit adoption of this inequitable division is an abuse of discretion resulting in gross injustice to LaRae Parkes.

It should be noted that the lower court did not refuse to inquire into the child custody or support issues, despite its holding that the Appellant was estopped to challenge the Settlement Agreement. Although that agreement set support at \$50.00 per child monthly, the court awarded her double that amount in its judgment.

B. The District Court is not bound by the agreement of the parties in making its equitable division of marital property.

In carrying out its authority under U.C.A. § 30-3-5, the court's discretion to make a fair and equitable distribution of property cannot be totally defeated by a contract or agreement between the divorcing parties. Mathie v. Mathie, 363 P.2d 779 (Utah 1961); Pearson v. Pearson, 561 P.2d 1080 (Utah 1977). The same has been held with regard to parties' agreements relating to alimony or child support. See Callister v. Callister, 261 P. 2d 944 (Utah 1953). The Callister explanation for this interpretation of U.C.A. 30-3-5 is equally applicable to property agreements. In the middle of an emotional period of marriage breakdown or separation or divorce, the parties may agree to a division which, in light of all the circumstances, may be unfair

As the Callister court pointed out, it is usually children or divorced wives, like LaRae Parkes, who lose out most frequently in these agreements.

In Mathie, the Court addressed the issue of whether the District Court could make a property division inconsistent with a contract entered into by the parties during their marriage. The Court emphasized that careful scrutiny should be given to these agreements by the equity court before the agreement is given any effect. 363 P.2d at 784. Such agreements should be "analyzed on their own facts and ... enforced by the courts only if they are fair and equitable... ." Id.

Finally, this Court made it clear in Pearson, supra, that although the agreements or contracts of divorcing parties should be respected and given weight, the trial court is not bound to adopt its terms as determinative. 561 P.2d at 1082. As this case demonstrates, such a rule would result in gross injustice necessitating the intervention of this Court on appeal.

Having failed to accept its duty to exercise sound discretion in dividing the marital property, the Judgment of the District Court should be overturned and an equitable distribution made after full hearing upon remand.

CONCLUSION

For the reasons stated, Appellant prays that this Honorable Court:

a) reverse the Findings and Judgment of the lower court insofar as they bar Appellant from seeking an equitable distribution of marital property;

b) remand this case to the District Court for a hearing and determination of a fair and equitable distribution of marital property between the parties;

c) award Appellant her costs and attorney's fees in prosecuting this appeal; and

d) award Appellant such other and further relief as equity and good conscience require.

Respectfully submitted,



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Dated: May 21, 1980.