

2001

Gail Patricia Menz v. William Jeffrey Menz : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

GAIL PATRICIA MENZ,)
 :
)
 Petitioner/Appellant : CASE NO. 20010567
)
 v. :
)
 WILLIAM JEFFREY MENZ, :
 :
) Dist. Ct. # 984908014
 Respondent/Appellee :
 and Cross-Appellant)
 :
)

REPLY BRIEF OF CROSS APPELLANT WILLIAM JEFFREY MENZ

AN APPEAL FROM THE THIRD DISTRICT COURT
FOR SALT LAKE COUNTY,
THE HONORABLE WILLIAM A. THORNE, and THE HONORABLE
LEON A DEVER, JUDGES

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ARGUMENT PRIORITY CLASSIFICATION 15

REQUEST FOR PUBLICATION

FILED
Utah Court of Appeals

FEB 26 2003

Paulette Stagg
Clerk of the Court

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GAIL PATRICIA MENZ,)
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 v.) CASE NO. 20000266-CA
 :
 WILLIAM JEFFREY MENZ,)
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)
 Respondent/Appellee)
 and Cross-Appellant :
)
 :
)

William Menz, the respondent and cross-appellant, will not reply to each and every point and argument made by Gail Menz for the reason that Mr. Menz feels his original brief adequately covers the issues. However, certain arguments and statements raised by Mrs. Menz in her reply brief merit some brief response. Mr. Menz therefore replies as follows:

POINT I:

THERE ARE TWO SETS OF FINDINGS AND TWO DECREES, AND JUDGE DEVER DID IN FACT MAKE MORE THAN THE ALLOWED NUMBER OF MODIFICATIONS TO THE DECREE.

Regardless of what Mrs. Menz contends, it is clear from the record that Judge Thorne signed the findings and decree from the trial that he had heard, and which was not heard by Judge Dever. Mrs. Menz admits this. The fact that there was a joint motion doesn't alter the position or arguments of Mr. Menz, nor the facts in the case. There was never any stipulation on the part of

William Menz that by filing the motion he was agreeing that the pleadings signed by Judge Thorne were of no effect, or didn't exist. One of respondent's claims is that the so called conference between Judges Thorne and Dever was not adequate in addressing the problem, nor, we submit, did it really follow the spirit of the order issued by this appellate court. Judge Thorne, who tried the case and could have supplied valuable insights as to what had occurred and why, seems to have merely brushed the matter aside and let Judge Dever, who had heard no testimony in the case, make the final decisions.

Next we have Gail Menz arguing that Mr. Menz has distorted the facts by using various terms she cites at page 6 of her brief. But all one need do is count the number of times Judge Dever went through and modified what Judge Thorne had done. This is no distortion. The record is clear. By the time Judge Dever got done many of the key points had been drastically changed by a judge who had heard absolutely no testimony in the matter, and ignored the involvement of a judgment who had two years experience with the case.

POINT II:

JUDGE DEVER ABUSED HIS DISCRETION BY MAKING THE CHANGES
HE MADE TO THE ORIGINAL RULING

Regardless of how many times Judge Dever changed the decree, and regardless of what stance one takes on the efficacy of Judge Thorne's findings and decree, the fact remains that Judge Dever made numerous changes to the original ruling by Judge Thorne. It is beyond dispute that Judge Thorne did in fact make a ruling on

all issues. It is also beyond dispute that Judge Dever made repeated changes to the original ruling by Judge Thorne.

Gail Menz argues that because Mr. Menz doesn't complaint about Judge Dever's correction of crediting Mr. Menz with \$18,000 for an automobile he somehow supposedly has acquiesced in everything else that went on. This is folly. This particular change was made because there was simply an oversight by Judge Thorne, and even Gail Menz did not oppose this correction because it was obvious it had happened. Mr. Menz does not agree, as Mrs. Menz argues, that Judge Dever's award of property was the same except to correct a defect in calculations. The change in calculation that Mr. Menz did not object to was the crediting of the automobile which Judge Thorne had overlooked. The net outcome of Judge Dever's ruling did drastically change the findings because it resulted in a net loss of over \$80,000 to Mr. Menz.

Mrs. Menz cites Rule 63 regarding the disability of disqualification of a judge. But how does nit apply? There is no showing that Judge Thorne was unable due to any type of disability or disqualification to perform his duty to correct the findings or rule upon objections. The fact that Judge Thorne was very available is one of the complaints of Mr. Menz. By the order of this appellate court it was assumed that Judge Thorne, who was available, would get involved, but he didn't. If he had actively participated we submit that this appeal may very well not being taking place.

Menz's retirement account increased after Gail Menz took what she figured was her share from the joint Fidelity account. The only evidence available is that this came from an increase in the value of the account, and NOT from some secretly sequestered funds held by Bill Menz that he suddenly transferred from some unnamed source. Mr. Menz provides shows in the record where the money came from. Gail Menz can cite nothing in the record. Even ignoring the ruling of Judge Thorne, Judge Dever has clearly made a mistake in his determination of what fund are available for disbursement, and their source. The result is that Gail Menz ends up with far more than she is entitled to, and Bill Menz loses over \$80,000 due to such a miscalculation, and frankly, a misunderstanding of the facts of the case.

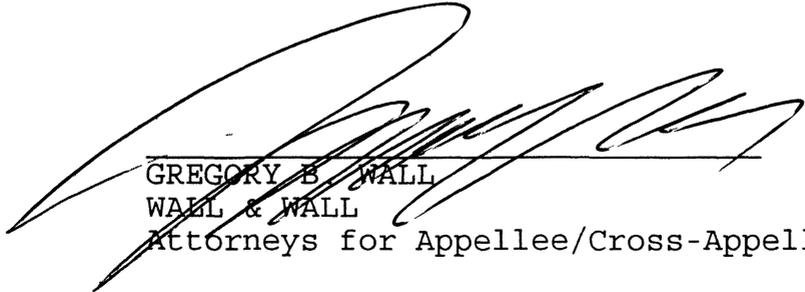
Accordingly, we submit that the relief requested in the original brief of Mr. Menz should be granted. We will not address the issue of attorney's fees and bad faith on the part of Mr. Menz because it is felt the argument is so without merit it should not merit a response.

CONCLUSION

The reply brief of Gail Menz oversimplifies the issues, and misses the point on key matters. Her arguments lack evidence in the record to support her claims. It is the position of Bill Menz that the court made one change to the ruling of Judge Thorne, which essentially left the conclusions in place. That ruling, or the ruling of Judge Thorne should be reinstated, and become the controlling ruling in this case. The claims of Gail Menz in her

appeal regarding the increased value of Mr. Menz's account are completely unsupported and are at the heart of the error made by Judge Dever.

RESPECTFULLY SUBMITTED this 26th day of February, 2003.

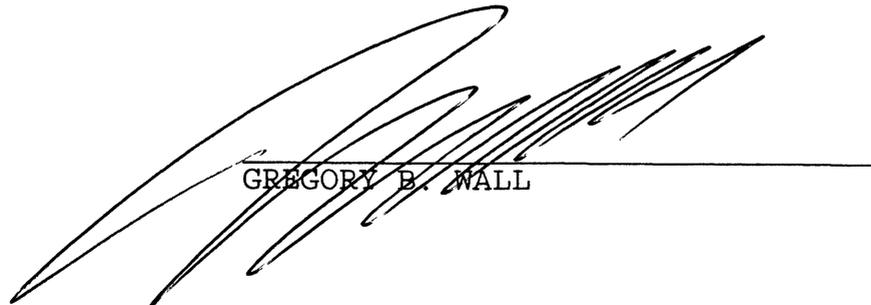


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CERTIFICATE OF MAILING

This is to certify that two (2) true and correct copies of the foregoing Reply Brief of Appellant were mailed, postage prepaid, to the following on the 26th day of February, 2003:

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