

2017

Michael Stevens, Appellant, v. Mary Ellen Robertson, Appellee : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MICHAEL STEVENS,

Appellant,

v.

MARY ELLEN ROBERTSON,

Appellee.

APPELLEE'S BRIEF

App. Ct. No. 20170415

Dist. Ct. No. 144700136

Appeal from the State of Utah Second District Court
The Honorable Ernest W. Jones
Weber County, Ogden Division

Oral Argument Requested

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INTRODUCTION

This case arises from the dismissal of a Petition to Modify a Decree of Divorce and the denial of preliminary injunctive relief. About 13 months after Michael Stevens (Ex-Husband) and Mary Ellen Robertson (Ex-Wife) were divorced, Ex-Husband sought relief from the divorce court to prospectively enjoin the speech of Ex-Wife on a preliminary and permanent basis, alleging that her speech was defamatory and an invasion of his privacy. Ex-Wife opposed Ex-Husband's motion for preliminary injunctive relief and moved to dismiss his Petition to Modify under Utah R. Civ. P. 12(b)(6). The district court denied Ex-Husband's request for preliminary injunctive relief and granted the Motion to Dismiss. The district court reasoned that (1) the request for preliminary injunctive relief should be denied on the merits because Ex-Husband made no showing of a threat of immediate and irreparable harm; (2) both the motion and the Petition to Modify addressed what amounted to tort claims that could not be litigated within the parties' divorce case;¹ and (3) the Petition to Modify failed to allege a substantial and material change in circumstances. This appeal followed.

While the district court properly denied the motion and dismissed Petition to Modify, there was one additional reason that the district court failed to rule upon that supports its conclusions: that granting Ex-Husband's requested relief would amount to an unconstitutional prior restraint on Ex-Wife's speech. As detailed below, the district court's order should be affirmed on this alternative basis.

¹ Ex-Husband filed a separate civil action against Ex-Wife for defamation and invasion of privacy, which is pending in Second District Court, Civil No. 170902157.

STATEMENT OF THE ISSUES

I. STANDARD OF REVIEW

With respect to the dismissal of the petition to modify, the standard of review is *de novo*. *Rawcliffe v. Anciaux*, 2017 UT 72, ¶ 8. With respect to the denial of preliminary injunctive relief, the standard of review is abuse of discretion. *Zagg, Inc. v. Harmer*, 2015 UT App 52, ¶ 4.

II. PRESERVATION

All issues and arguments set forth in this brief were addressed in multiple rounds of briefing at the district court level and (*See, e.g.*, April 5, 2017 Hearing Tr. 17:3 - 21:21.)

STATEMENT OF THE CASE

I. STATEMENT OF FACTS AND PROCEDURAL HISTORY

1. Ex-Husband and Ex-Wife were divorced by the Utah Second District Court on November 10, 2015, via stipulation. (*See* November 10, 2015 Decree of Divorce.)

2. There were no children of the marriage. (*Id.* ¶ 5.)

3. In connection with the divorce, the parties specifically negotiated the scope of a non-disparagement clause. In that regard, the Decree of Divorce, at paragraph 22, states, “Non-disparagement. Mary Ellen shall not tell third parties that (1) Michael kicked her out of the house, or (2) Michael has stolen marital assets.” (*Id.* ¶ 22.)

4. On November 15, 2016, Ex-Husband filed a Petition to Modify the Decree of Divorce, alleging that, since entry of the Decree of Divorce, Ex-Wife made statements that were defamatory and invaded his privacy.² Ex-Husband also filed a Motion for Temporary Restraining Order on the same day.

5. The Petition to Modify and the Motion for Temporary Restraining Order requested broad prospective injunctive relief regarding Ex-Wife’s speech. For example, the Motion for Temporary Restraining Order requested that Ex-Wife be enjoined as follows:

That [Ex-Wife] be restrained from making any statements regarding their marriage or divorce or relationship to third parties which could cause [Ex-Husband] any embarrassment or humiliation or otherwise reflect negatively on the [Ex-Husband] or cause the [Ex-Husband] to be held in a false light or in disrepute.

That [Ex-Wife] shall not share any legal documents í or any other communication arising out of this divorce action, including any specific details about the final resolution or actions taken in the course of modifying the divorce decree, with any third party except as follows: legal counsel for the parties,

² While Ex-Wife denies that any statements she made are correctly characterized, in context, and/or otherwise actionable, given the standard of review for a Rule 12(b)(6) motion, Ex-Wife does not address those issues in this appeal.

immediate family, or when such disclosure is required by a subpoena í .

í [Ex-Wife] shall refrain from making any communication through any medium, either orally, nonverbally or in writing í that may be construed as harmful, embarrassing, humiliating or otherwise disparaging, or that defames, impugns, damages or assails the reputation, casts in a misleading light or causes or tends to cause the recipient of a communication to question the integrity, competence, good character, professionalism, or reputation of [Ex-Husbandø] immediate family members and/or any private third party and/or the employees or board members of organizations with which [Ex-Husband] is connected í .

(November 15, 2016 Motion for Temporary Restraining Order, ¶¶ 1-3.)

6. The Petition to Modify did not articulate a single change in circumstance. Rather, the Petition to Modify merely set forth the unsupported conclusion that, òthere has been substantial and material changes in circumstances since the entry of the Decree not contemplated in the Decree í .ö (November 15, 2016 Petition to Modify, at 1.)

II. DISTRICT COURT DISPOSITION

On December 6, 2016, the Honorable Commissioner Christina Wilson orally recommended that Ex-Husbandø's motion for preliminary injunctive relief be denied. This recommendation was memorialized via written order entered by the Honorable Ernest W. Jones December 20, 2016.

On March 7, 2017, the Honorable Commissioner Christina Wilson recommended that Ex-Wifeø's Motion to Dismiss be granted. This recommendation was memorialized via written order entered by the Honorable Ernest W. Jones March 27, 2017.

On April 28, 2017, the Honorable Ernest W. Jones entered a final order entitled òOrder on Objections to Recommendation of Commissioner of December 6, 2016, and March 7, 2017ö in which he ordered that Ex-Husbandø's motion for preliminary injunctive relief be denied and Ex-Wifeø's Motion to Dismiss be granted.

SUMMARY OF THE ARGUMENT

To the extent Ex-Husband wishes to assert claims against Ex-Wife for any statements she has made, Ex-Husband is free to do so, and actually has done so, by filing a civil action just as if the speaker was someone to whom he was never married. *See supra*, footnote 1. However, Ex-Husband may not prospectively enjoin Ex-Wife's speech through a petition to modify their Decree of Divorce. While Ex-Husband was not asking for money damages, the only basis for his Petition to Modify was that Ex-Wife had allegedly defamed him and invaded his privacy. This alone cannot act as the basis of a petition to modify their Decree of Divorce. Accordingly, the district court properly determined that Ex-Husband was improperly attempting to litigate tort claims in a divorce proceeding and properly dismissed his Petition to Modify.

Moreover, Ex-Husband had not properly alleged any change in circumstances, let alone one that would justify modifying the Decree of Divorce. The parties already had a narrow, non-disparagement provision in their Decree of Divorce, which Ex-Wife had not violated. The parties and the divorce court had therefore contemplated this specific issue at the time the Decree of Divorce was entered, making it unavailable to serve as a basis to modify the Decree of Divorce.

Finally, prior restraints on speech such as that requested by Ex-Husband in this case are presumptively unconstitutional. Claims by spouses or ex-spouses seeking prospective injunctive relief of adult-to-adult speech have been rejected across the country as unconstitutional. While the district court did not rule on this issue, this Court should affirm the district court's order on the additional basis that Ex-Husband's requested relief was an unconstitutional prior restraint.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DISMISSED THE PETITION TO MODIFY.

A. The District Court Correctly Concluded that Ex-Husband's Allegations Sounded in Tort and Dismissed the Petition to Modify.

1. Divorce Courts do not Retain Jurisdiction Over the Parties Beyond Their Marital Relationship.

When married persons divorce, they become legal strangers but for enforcement of the terms of their decree of divorce. While divorce courts retain jurisdiction over the parties to divorce to enforce or modify the decree, divorce courts do not retain jurisdiction to address every dispute between formerly married persons forever. Any legal claims arising after the divorce, particularly those that sound in tort, are addressed in civil courts just as if the parties had never married.

In this regard, Utah law is clear that "[a]ctionable torts between married persons should not be litigated in a divorce proceeding." *Masters v. Worsley*, 777 P.2d 499, 503 (Utah Ct. App. 1989); accord *Bayles v. Bayles*, 1999 UT App 128, ¶ 14, 981 P.2d 403; *Noble v. Noble*, 761 P.2d 1369 (Utah 1988). Utah law is equally clear that a petition to modify a decree of divorce is not a proper vehicle to address alleged torts between ex-spouses. See *Masters*, 777 P.2d at 503 ("the trial court correctly dismissed the fraud claim as being improperly raised in the petition for modification of the divorce decree").

Here, as in *Masters* and the other cases cited, Ex-Husband improperly attempted to use a tort claim as an entrée to relief in a divorce case. While he may not have requested a jury trial or that the divorce court award him damages, the crux of his allegations was that because Ex-Wife had committed a tort, he was entitled to equitable relief from the divorce court. Ex-Husband has never cited any authority for the argument that allegations of torts invoke the equitable powers of

the divorce courts and open the door to tort-related injunctive relief in divorce cases. Indeed, the case law holds the opposite. *See id.* As such, his requested relief was properly denied by the district court.

2. Ex-Husband Takes *Bayles* Out of Context.

Ex-Husband cites one sentence from *Bayles* out of context to support his argument that divorce courts should be the proper forum for tort cases. While *Bayles* does indeed state, “divorce courts are free to address” tort claims, the entire context of that statement from *Bayles* is:

Defendant’s allegations against plaintiff in support of his petition to modify sound in tort. Although divorce courts are free to address them, actionable torts between married persons should not be litigated in a divorce proceeding. A claim of fraud is considered a tort, and thus is not properly addressed in a petition to modify a divorce decree.

* * *

We hold that a claim of fraud, in almost every instance, is not properly addressed in a petition to modify a divorce decree.

Bayles, 1999 UT App 128, ¶¶ 14, 20. The *Bayles* court was not inviting the litigation of tort cases within divorce cases, nor was it stating that the allegation of a tort is the basis for modification of a domestic order. Indeed, the *Bayles* holding is directly the opposite. *See id.*

B. The District Court Correctly Concluded that Ex-Husband’s Petition to Modify Failed to Allege a Proper Change in Circumstances.

1. Ex-Husband Failed to Articulate Any Change in Circumstances in His Petition to Modify.

“A party requesting that a divorce decree be modified must demonstrate that there has been a substantial change of circumstances occurring since the entry of the decree that was not contemplated in the decree itself.” *Cantrell v. Cantrell*, 2013 UT App 296, ¶ 19, 323 P.3d 586. Here, Ex-Husband’s Petition to Modify did not specify a single change in circumstance. Rather,

the Petition to Modify set forth the conclusion that, “there has been substantial and material changes in circumstances since the entry of the Decree not contemplated in the Decree,” and then followed with his requested relief. The Petition to Modify was properly dismissed on that basis alone.³

2. Possible Disparagement was Specifically Contemplated in the Decree of Divorce.

Further, the matter about which Ex-Husband complained—Ex-Wife’s disparagement of him—was specifically addressed by the Decree of Divorce at paragraph 22. Therefore, because the disparagement issue was “contemplated in the decree itself,” alleged disparagement cannot serve as a change in circumstances to modify the Decree of Divorce. *See Cantrell*, 2013 UT App 296, ¶ 19.

C. The District Court’s Order Should be Affirmed on the Alternative Ground of Unconstitutional Prior Restraint.

The United States Constitution and Utah Constitution both protect the free speech rights of their citizens. U.S. Const. Amend. I; Utah Const. Art. I, Sect. 1. As to the Utah Constitution specifically, Article I, Section 1 protects citizens’ free speech rights even more broadly than the United States Constitution, protecting “the inherent and inalienable right” of citizens to “to communicate freely their thoughts and opinions.” Moreover, both in Utah and under federal law, prior restraints on speech are presumptively unconstitutional. *Midvale City Corp. v. Haltom*, 2003 UT 26, ¶ 14, 73 P.3d 334, 339 (“any system of prior restraint [on speech] comes to the Court bearing a heavy presumption against its constitutional validity”) (citing *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225 (1990)).

³ The district court was not required to allow Ex-Husband leave to amend. Even assuming review of leave to amend was preserved for appellate review, the district court properly concluded that amendment would be futile.

In the context of divorce, state appellate courts across the country have rejected similar claims by spouses or ex-spouses seeking injunctive relief as to adult-to-adult speech. *See, e.g., In re Marriage of Candiotti*, 34 Cal. App. 4th 718, 726 (Cal. 1995) (prior restraint on ex-spouse's speech unconstitutional ***even if remarks are rude, unkind, motivated by hostility, or even libelous***) (emphasis added); *Wutzel-Frez v. Frez*, 2015 WL 6557830, at *8 (Conn. Super. Ct. Oct. 1, 2015) (‘‘a broad order limiting the defendant’s speech online is an impermissible prior restraint on speech’’); *In re Marriage of Newell*, 192 P.3d 529, 536 (Colo. Ct. App. 2008) (restriction of father’s free speech rights by divorce court unconstitutional); *In re Marriage of Meredith*, 201 P.3d 1056, 1062 (Wash. Ct. App. 2009) (prior restraint on speech in divorce case unconstitutional). These cases recognize that although divorce courts may restrain speech to children to further the best interests of those children, ‘‘impinging on a parent’s right to speak about another adult, outside the presence of the children í constitutes undue prior restraint of speech.’’ *See In re Marriage of Candiotti*, 34 Cal. App. 4th at 725.

Although any private party has the right to seek redress from the courts if he is the victim of a tort by filing an action at law, requesting a broad and vague prior restraint of speech from a divorce court is a vastly different and more problematic request. Ex-husband’s position before the district court cannot survive the strict scrutiny of the United States and Utah constitutions. Any interest he may have in being free from tortious activity can be (and must be) addressed in a separate civil action. Thus, while the district court was correct in dismissing his petition and denying his motion for injunctive relief, it could have and should have determined that the requested relief would have amounted to an unconstitutional prior restraint.

II. THE DISTRICT COURT PROPERLY DENIED INJUNCTIVE RELIEF.

Ultimately, denial of injunctive relief was proper because the Petition to Modify

was properly dismissed. For all the reasons supporting dismissal of the Petition to Modify, including that any injunction would be unconstitutional, denial of injunctive relief was also proper because Utah R. Civ. P. 65A(e)(4) requires that there be ða substantial likelihood that the applicant will prevail on the merits of the underlying claim, or the case presents serious issues on the merits which should be the subject of further litigation.ö Where a party does not have valid claims for relief in an underlying pleading, preliminary relief necessarily fails as a matter of law.


Further, the district court also did not abuse its discretion in finding that Ex-Husband had failed to demonstrate a threat of immediate and irreparable harm warranting injunctive relief. Ex-Husband had provided little more than conclusory allegations of fears of harm. The district court was within its discretion to determine that Ex-Husband's claims of harm were merely speculative and that the high standard of a threat of immediate and irreparable harm had not been met.

CONCLUSION

For the foregoing reasons, the order of the district court should be affirmed.

Dated this 9th day of March, 2018.

LIEBERMAN SIEBERS, LLC

By: 
[Electronically Signed]
Ben W. Lieberman

Attorney for Appellee

CERTIFICATE OF COMPLIANCE, FILING AND SERVICE

I hereby certify that:

- (1) This brief contains 2,603 words, in compliance with the brief limitations of this Court;
- (2) This brief complies with Utah R. App. P. 21, governing public and private records;
- (3) On the 9th day of March, 2018, this brief was e-filed with the Utah Court of Appeals, with an electronic copy to counsel for Appellant;
- (4) On the 9th day of March, 2018, six copies of this brief were filed with the Utah Court of Appeals; and
- (5) On the 9th day of March, 2018, two copies of this brief were served by mail upon counsel for Appellant.

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ADDENDUM



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**IN THE SECOND JUDICIAL DISTRICT COURT
WEBER COUNTY, STATE OF UTAH – OGDEN DIVISION**

MARY ELLEN ROBERTSON,

Petitioner,

v.

MICHAEL STEVENS,

Respondent.

**ORDER ON OBJECTIONS TO
RECOMMENDATIONS OF
COMMISSIONER OF
DECEMBER 6, 2016,
AND MARCH 7, 2017**

Civil No. 154901439

Judge Jones

Commissioner Wilson

This matter comes before the Court upon the objections by both Petitioner Mary Ellen Robertson (“Petitioner”) and Respondent Michael Stevens (“Respondent”) to two recommendations of The Honorable Christina L. Wilson, one recommendation orally made on December 6, 2016 (the “December 6, 2016 Recommendation”), which was memorialized in a written order entered December 20, 2016, and the other recommendation orally made on March 7, 2017 (the “March 7, 2017 Recommendation”), which was memorialized in a written order

entered March 27, 2017. Oral argument on all objections was held on April 5, 2017, before this Court, with both parties present and represented by counsel. Based upon the submissions of the parties and the arguments of counsel at the hearing, it is hereby **ORDERED** as follows:

1. Respondent's objection as to the December 6, 2016 Recommendation address the denial of Respondent's request for preliminary injunctive relief. The Court overrules the objection and finds the request for preliminary injunctive relief was properly denied. The Court finds that divorcing parties often say disparaging things about each other before, during and after the divorce. Unless a party can show immediate and irreparable harm, a temporary restraining order or preliminary injunction cannot be maintained. The Court finds there is no evidence that Respondent lost his job or that there was a reduction in his income. It is not enough to allege that the actions of Petitioner are damaging Respondent's reputation unless there is some real harm. The Court finds that Commissioner Wilson did not abuse her discretion in dissolving the temporary restraining order and denying Respondent's request for preliminary injunctive relief. The Court finds that the divorce case is not the right forum to litigate what amounts to allegations of a tort action.

2. The Court overrules Petitioner's objection as to the December 6, 2016 Recommendation as moot.

3. Respondent's objection as to the March 7, 2017 Recommendation addresses Petitioner's Motion to Dismiss. Commissioner Wilson recommended that Petitioner's Motion to Dismiss be granted on the basis of failure to allege a substantial and material change in circumstances, but that Respondent be given leave to file an amended petition. The Court

overrules the objection and finds there is not substantial and material change in circumstances not contemplated at the time the Decree of Divorce was entered.

4. Petitioner's objection to the March 7, 2017 Recommendation is sustained in part and overruled in part. Commissioner Wilson's recommendation is modified to remove the permission for leave file an amended petition. The Court finds that the allegations set forth in the Petition to Modify amount to an allegation of tort claim and, therefore, the divorce action is not the proper forum to litigate a tort claim. The Court finds the Commissioner abused her discretion by granting leave of court to amend the Respondent's Verified Petition to Modify Decree of Divorce. All other portions of Petitioner's objection to the March 7, 2017 Recommendation are overruled.

5. The Court does not address the arguments raised by Petitioner as to the constitutionality of the relief requested by Respondent to restrict the speech of Petitioner.

6. This case is **DISMISSED**. This is the final order of the Court and no further order is required.

**THIS ORDER IS ELECTRONICALLY SIGNED BY THE DISTRICT JUDGE ON THE
FIRST PAGE OF THE DOCUMENT AND ENTERED AS OF THE DATE.**

END OF ORDER

Approved as to form:

/s David W. Read (with permission)

David W. Read

Counsel for Respondent