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Mona McBroom v. Howard Kirtley McBroom : Plaintiff's Petition for Rehearing

Utah Supreme Court

Leland S. McCullough; Attorney for Plaintiff;
McBroom & Hyde; Attorneys for Defendant;

IN THE SUPREME COURT of the STATE OF UTAH

MONA McBROOM,
Plaintiff and Respondent

v.

HOWARD KIRTLEY McBROOM,
Defendant and Appellant.

Case No. 9702

MONNA McBROOM,
Plaintiff and Appellant,

v.

HOWARD KIRTLEY McBROOM,
Defendant and Respondent.

Case No. 9726

PLAINTIFF'S PETITION FOR REHEARING

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INDEX OF CASES CITED

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PLAINTIFF'S PETITION FOR REHEARING

Plaintiff respectfully petitions this Honorable Court for rehearing of its decision in the above entitled matter rendered on the 28th day of August, 1963, for the following reasons:

THE SUPREME COURT HAS ERRED IN OVERRULING THE TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS, AND THE DECISION OF THIS COURT IS INCONSISTENT

WITH AND CONTRARY TO THE PRIOR DECISIONS RENDERED BY THIS COURT.

For the purpose of this petition, it is not the intention of petitioner, the plaintiff wife, to argue the findings of fact which this court has set forth in its decision, and to show that they are inconsistent with and contrary to the testimony of the plaintiff wife and the witnesses that the plaintiff wife produced, such as the school teacher and the neighbors. It is obvious from a reading of the court's decision, that the court chose to believe the testimony of the defendant husband and to give little credit, if any, to the testimony of the plaintiff wife, the school teacher and the neighbors that testified in this action. There is little to be gained by entertaining a dispute with the Supreme Court as to which witness they chose to believe. However, it is disconcerting to have a trial court spend better than four and a half days grinding through the testimony of the numerous witnesses and exhibits that were presented in this case, listening to the arguments of counsel, rendering a decision based upon the trial judge's determination of whom to believe and whom not to believe after having heard the witnesses personally and listened to the oral testimony and the arguments of counsel over this long period of time, listening to the numerous motions to amend findings, and then to have the Supreme Court upon a reading of the cold record state in effect to the trial judge, "your decision is

entirely wrong, because based upon our findings of the fact and the substituting of our judgment for yours, your decision should be reversed." Certainly there must be greater significance to a trial judge's integrity, position and diligence than has been accorded to the trial judge in this case.

Petitioner staunchly agrees with the court's decision to the effect that a divorce case of this kind is equitable in nature and that this court must review both the law and the facts. However, it is petitioner's contention that this court has made a decision which is entirely beyond the scope of review of an appellate court in an equity case.

In one of the early decisions of this court, the case of *Wells* v. *Wells*, 7 Utah 68, 75, 76, 24 P 752, 754, this court set up the scope of review by an appellate court in equity cases:

> "* * * At the trial the plaintiff and defendant and Daniel H. Wells, Jr. and a number of other witnesses testified, and the evidence is all before us, and we have examined it carefully, and think it sustains the findings. But even if upon a reading of the testimony this court might reach a different conclusion as to the facts, or some of them, this would not be grounds for reversal. Where a case is tried on oral testimony before the court without a jury, its findings of fact are conclusive in this court on appeal, unless they are so palpably erroneous and unsupported by the evidence as to unmistakably demonstrate that the court committed some oversight, or acted under some

mistake, and this rule applies in equitable as well as legal actions."

Again in the case of *Dooly Block* v. *Rapid Transit Co.*, 9 Utah 31, 45; 33 P 229, this court stated:

"* * * There appears to be some conflict in the evidence on this point, but, the learned judge having heard the evidence and having had the opportunity to observe the manner and bearing of the witnesses while testifying, this court will not disturb the conclusions reached, especially since the record shows them to be fair and logical deductions from the testimony. Where a case is tried in a court sitting in a court of chancery, the findings of fact are conclusive in the appellate court, unless they are so manifestly erroneous as to demonstrate some oversight or mistake, * * *."

Again in the case of *Stahn* v. *Hall*, 10 Utah 400, 403; 37 P 585, this court stated:

"* * * The findings of fact having been adopted by the court, and the referee having heard the evidence, and having had an opportunity to observe the several witnesses on the stand, and notice their conduct and bearing, this court will not disturb the conclusions reached, in the absence of a clear showing that there is a mistake or oversight which materially affects the substantial rights of the appellants. * * *"

Again, in the case of *Gorringe* v. *Read*, 24 Utah 455, 459, 68 P 147, this court stated:

"* * * Suffice it to say, for the purposes of this decision, that the material facts appearing from the evidence of the plaintiff have been either denied, or explained adversely to

her, by the proof submitted by the defendant. It thus now appears that the findings of the court, and the decree and judgment appealed from, herein, are based upon conflicting evidence; and, upon careful examination, we are unable to say that such findings, decree, and judgment are not supported by the proof. Such being the character of the evidence as it is now presented, and the trial court having had an opportunity to observe the witnesses while giving their testimony, and their bearing on the stand, and the apparent candor and frankness with which they made their statements, this court will not, in the absence of manifest oversight or mistake on the part of that court, disturb either the findings or the decree or judgment. Such has been the uniform holding under similar circumstances in this state. * * *"

Again in the case of *McKay* v. *Farr*, 15 Utah 261, 264, 49 P 649, this court stated:

"* * * There is nothing to show that the son would have any interest in opposing, or inclination to oppose, his father's interest; and it is much more charitable to entertain a view that the conflict in the evidence is the result of an admitted defective memory than to hold that either the father or son committed perjury. This is especially so to us who have had no opportunity to observe the conduct of the witnesses while on the stand, or to test their powers of recollection. The trial court having had such opportunity, we will not, in view of the conflicting testimony, and under the peculiar circumstances of this case, hold that its findings are not supported by the evidence, or that the findings do not support

the judgment. While we have the power, under the constitution, to review questions of fact in an equity case, still, when such cases have been regularly tried before a court of chancery, and facts found on all material issues, we will not disturb such findings unless they are so manifestly erroneous as to demonstrate some oversight or mistake which materially affects the substantial rights of the appellant. * * *"

See also *McCormick* v. *Mangum*, 20 Utah 17, 19, 20; *Stevens* v. *Improvement Co.*, et al, 20 Utah 267, 280; *Campbell* v. *Gowans*, 35 Utah 268, 281; also, *Whitesides* v. *Green*, 13 Utah 96, 107, 108; 69 P 719.

These decisions are a part of the Utah law and whole structure of the appellate jurisdiction of this court. If it is the contention of this court that a new rule should be established wherein divorce cases, child custody cases, property settlements and awards of attorneys fees should be governed by some rule of law other than the general equity rule of law with reference to appellate review, then this court should expressly so state that and overrule these prior decisions as pertaining to proceedings in a divorce case.

Nowhere in this decision does the court explain where there is a manifest oversight or mistake in the trial judge's findings and conclusions. If for no other reason than to guide the lower court in further proceedings in this case the Supreme Court should point out this "manifest oversight or mistake."

Further, there have been no oral arguments of counsel before this court. It was agreed between counsel for plaintiff and defendant that the appeals be submitted without such argument. However, if this court deems that it is within its jurisdiction to substitute its judgment as to findings of fact and conclusions for those of the trial court, then counsel for plaintiff and defendant should be given equal opportunity and time to orally argue this matter before this court. It is only in this way that this voluminous record can be adequately presented to the court.

WHEREFORE, petitioner, the plaintiff wife, respectfully requests that this court grant a rehearing of these combined appeals, and that the decision of Judge Jeppson be reinstated. However, if this court feels that it is within its appellate jurisdiction to substitute its judgment for that of the trial court, then petitioner requests that this court grant petitioner's counsel an opportunity to orally argue the facts before this court.

Respectfully submitted,

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Counsel for Petitioner and
Plaintiff Wife