

2006

Brad Russell Childs v. Heather T. Childs : Reply Brief

Utah Court of Appeals

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I. JURISDICTION OF APPELLATE COURT

The Court of Appeals has jurisdiction to hear this appeal pursuant to Section 78-2a-3(2)(h), Utah Code Ann. (2006).

II. STATEMENT OF THE ISSUE PRESENTED ON APPEAL

Whether the trial court erred in failing to adequately consider the priority of existing claims against appellant's equitable interest in the marital property when determining to offset past due child support obligations against said equitable interest.

1. Standard of Review

The above stated issue involves a question of law, which the court reviews for correctness without deference to the trial court's determination. *Brinkerhoff v. Brinkerhoff*, 945 P.2d 113 (Utah Ct. App. 1997).

III. CONSTITUTIONAL PROVISIONS

There are no constitutional provisions at issue in this case.

IV. STATUTORY PROVISIONS

Utah Code Annotated (2006):

Section 78-2a-3. Court of Appeals jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

...

(h) appeals from district court involving domestic relations cases, including, but not limited to, divorce, annulment, property division, child custody, support,

parent-time, visitation, adoption, and paternity;

Section 78-45-9.3. Payment under child support order -- Judgment.

(3) Each payment or installment of child or spousal support under any child support order, as defined by Section 78-45-2, is, on and after the date it is due:

(a) a judgment with the same attributes and effect of any judgment of a district court, except as provided in Subsection (4);

(b) entitled, as a judgment, to full faith and credit in this and in any other jurisdiction; and

(c) not subject to retroactive modification by this or any other jurisdiction, except as provided in Subsection (4).

V. RULES PROVISION

Rule 33, Utah Rules of Appellate Procedure. Damages for delay or frivolous appeal; recovery of attorney's fees.

(a) Damages for delay or frivolous appeal. Except in a first appeal of right in a criminal case, if the court determines that a motion made or appeal taken under these rules is either frivolous or for delay, it shall award just damages, which may include single or double costs, as defined in Rule 34, and/or reasonable attorney fees, to the prevailing party. The court may order that the damages be paid by the party or by the party's attorney.

(b) Definitions. For the purposes of these rules, a frivolous appeal, motion, brief, or other paper is one that is not grounded in fact, not warranted by existing

law, or not based on a good faith argument to extend, modify, or reverse existing law. An appeal, motion, brief, or other paper interposed for the purpose of delay is one interposed for any improper purpose such as to harass, cause needless increase in the cost of litigation, or gain time that will benefit only the party filing the appeal, motion, brief, or other paper.

(c) Procedures.

(1) The court may award damages upon request of any party or upon its own motion. A party may request damages under this rule only as part of the appellee's motion for summary disposition under Rule 10, as part of the appellee's brief, or as part of a party's response to a motion or other paper.

(2) If the award of damages is upon the motion of the court, the court shall issue to the party or the party's attorney or both an order to show cause why such damages should not be awarded. The order to show cause shall set forth the allegations which form the basis of the damages and permit at least ten days in which to respond unless otherwise ordered for good cause shown. The order to show cause may be part of the notice of oral argument.

(3) If requested by a party against whom damages may be awarded, the court shall grant a hearing.

VI. STATEMENT OF THE CASE

This case is an appeal from an Amended Decree of Divorce and an Order on Petitioner's Verified Motion for Contempt and For Order Appointing Clerk of Court to Release Trust Deed, both entered by the Third District Court on January

12, 2006. The Amended Decree incorporates by reference Findings of Fact and Conclusions of Law made by the trial court on October 5, 2001, following a bench trial held June 29, 2001.

RELEVANT FACTS

See Brief of Appellant, pages 9 through 11.

ARGUMENT

I. THE APPELLANT HAS NOT RAISED A NEW ISSUE ON APPEAL AND THE ISSUE WAS PROPERLY RAISED BEFORE THE TRIAL COURT.

The appellant has not raised a new issue on appeal. The issue of the trust deed conveyed by appellant to her attorney and its effect on her equitable lien was raised at trial and throughout the course of this action. To be preserved for appeal, an issue must be timely, specific, and supported by evidence of relevant legal authority. *Hart v. Salt Lake County Commission*, 945 P.2d 125, 130 (Utah App. 1997).

At the June 29, 2001 trial, appellant testified that she had conveyed her equitable interest to *Ludlow* with the trust deed and trust deed note entered into evidence as Exhibits 5 and 6, Partial Transcript, Page 41:5-22. The issue therefore was raised in a timely manner and supported by evidence. The remaining element, specificity, requires that the issue is “sufficiently raised to a level of consciousness before the trial court.” *Id.* (citations omitted).

The trial court was well aware of this issue, specifically ruling on it. Appellee argues that because appellant argued at trial that the court could not

offset the equitable lien because it had been conveyed away, the appellant is now raising a new issue on appeal by appealing the court's legal justification for doing so. The appellant is not appealing the court's ruling that it has the authority to offset the equitable lien but is instead appealing the court's application of the wrong statutory provision to determine that the support arrearages automatically trump all other valid liens on the appellant's equitable interest. The court, in its order, specifically cited a statutory provision that is not relevant and disregarded controlling statutory provisions regarding liens on real property. Appellant is directly appealing from that order.

II. CHILD SUPPORT ARREARAGES ARE AUTOMATICALLY REDUCED TO JUDGMENTS IF NOT PAID IN A TIMELY MANNER PURSUANT TO STATUTE

Appellee asserts that appellant's argument is flawed because it assumes that the trial court was obligated to reduce the child support arrearages to judgments before offsetting them. This assertion is incorrect, both as to appellant's assumption and as to what the law requires. The trial court is not obligated, or, in fact, under the controlling statute, given any discretion, to render past due support obligations into judgments. According to Section 78-45-9.3(3), Utah Code Ann. (2006), "[e]ach payment of child or spousal support . . . is, on and after the date it is due . . . a judgment with the same attributes and effect of any judgment of a district court."

The past due child support payments, by the operation of statute, became judgments on their due dates. As judgments, they are then subject to the various

provisions in the Utah Code regarding how judgments become liens on real property and the priority of those liens. The appellee wholly ignores the clear statutory intent and framework provided by the legislature for balancing the interests of real property lien holders. The case law appellee relies on regarding time barred child support judgments and homestead exemptions is not relevant to this issue. There is no need to extrapolate rules from case law when the legislature has provided clear direction to the courts in the form of specific statutes dealing with exactly the issue at hand.

III. THIS APPEAL IS NOT FRIVOLOUS UNDER RULE 33, UTAH RULES OF APPELLATE PROCEDURE

Appellee argues that because the court made factual findings that the appellant acted in bad faith in failing to pay her child support, that this appeal is necessarily frivolous under Rule 33, of the Utah Rules of Appellate Procedure. An appeal is frivolous if it has no “reasonable legal or factual basis.” *O’Brien v. Rush*, 744 P.2d 306, 310 (Utah Ct. App. 1987).

The appellant is not challenging the court’s findings regarding bad faith. What the appellant asks merely is that the court apply the correct statutes in offsetting her past due child support judgments against her equitable interest. This request has a reasonable legal basis, being based on a careful reading of the various statutory provisions controlling child support judgments and the priorities of liens against real property, as set forth in appellant’s earlier brief.

This appeal also has factual support. The trial court, in its minute entry of

November 7, 2000, specifically ruled that *Ludlow* was entitled to have a lien on the real property and that the court would determine the priority of claims on appellant's equitable interest in the property at trial or during a future evidentiary hearing. The trial court then, in its October 27, 2005 minute entry, denied appellee's Petition for Wrongful Lien Injunction on the grounds that the trust deed was not wrongful at the time it was entered into and recorded.

Appellant's only issue on appeal is whether the trial court correctly applied the law in determining the priority of claims against appellant's equitable interest. The appeal is based on statute and on the trial court's own minute entries finding the trust deed to be a valid existing lien on the appellant's equitable interest. It is not a frivolous appeal or an appeal brought in bad faith, and damages pursuant to Rule 33 should not be assessed against either appellant or her attorney.

CONCLUSION

For the reasons stated above, appellant, Heather T. Childs, requests this Court to reverse the district court's order offsetting all past due child support against the appellant's equitable interest in the marital property, and reverse the trial court's order to reconvey the trust deed. Appellant further requests for this Court to remand this matter to the trial court for detailed findings regarding the priority of the trust deed in relation to the child support judgments according to the statutory provisions set forth above, and to order the trial court to record such

documents necessary to restore the trust deed interest which appellant conveyed to Randy S. Ludlow to satisfy her attorney's fees.

Dated this 26 day of January, 2007.



RANDY S. LUDLOW

CERTIFICATE OF MAILING

I hereby certify that on this 21 day of January, 2007, I caused to be mailed, by deposit in the United States Mail, a true and ² correct copy of the ₁ foregoing **REPLY BRIEF OF APPELLANT** to the following:

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IN THE UTAH COURT OF APPEALS

BRAD RUSSEL CHILDS,

Appellee/Petitioner,

vs.

HEATHER T. CHILDS,

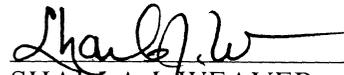
Appellant/Respondent.

CERTIFICATE OF SERVICE

Case No. 20060141
District Court Case No. 954901350

I hereby certify that on this 20th day of January, 2007, I caused to be mailed, by deposit in the United States Mail, a two (2) true and correct copy of the foregoing **REPLY BRIEF OF APPELLANT** to the following:

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SHARLA J. WEAVER
Legal Assistant
