1995

Joyce H. Garrick v. Richard P. Garrick : Reply Brief

Utah Court of Appeals

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IN THE UTAH STATE COURT OF APPEALS
DOCKET NO. 950112CA

JOYCE H. GARRICK,

Plaintiff/Appellee
and Cross-Appellant,

vs.

RICHARD P. GARRICK,

Defendant/Appellant
and Cross-Appellee.

REPLY BRIEF OF APPELLEE AND CROSS-APPELLANT

Appeal No. 950112-CA

Priority No. 15

REPLY BRIEF OF APPELLEE AND CROSS-APPELLANT

APPEAL FROM AN ORDER IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR UTAH COUNTY, STATE OF UTAH,
THE HONORABLE GUY R. BURNINGHAM PRESIDING

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ARGUMENT

POINT I

THE COURT'S "FINDING" THAT THE DEFENDANT'S VOLUNTARY RETIREMENT WAS NOT ANTICIPATED IS PROPERLY A CONCLUSION OF LAW.

The trial court based its conclusion that the Defendant's voluntary retirement was not anticipated entirely on the fact that the voluntary retirement was not mentioned in the Findings of the original divorce. The Plaintiff does not dispute the fact that the Findings of the original divorce proceeding do not mention the Defendant's anticipated retirement.

The question is whether the Defendant's intention to voluntary retire, as he had repeatedly expressed it during the course of the original divorce proceedings, constitute "circumstances reasonably contemplated at the time of the

divorce." Dana v. Dana, 789 P.2d 726 (Utah Ct. App. 1988) and Muir v. Muir, 841 P.2d 736 (Utah Ct. App. 1989).

The question then becomes whether the mere absence of any reference to the Defendant's plans are a satisfactory or sufficient factual basis to conclude that the voluntary retirement was not contemplated at the time of the divorce.

The Defendant had repeatedly asked the divorce trial judge to relieve him of the temporary order of the court and allow him to voluntarily retire. The Defendant had also asked the court to structure a divorce decree that would allow him to voluntarily retire upon his 65th birthday. The Court refused to do either. The fact that the divorce trial judge did not refer to the Defendant's plan to voluntarily retire, is a further indication that the Defendant's request lacked merit. The absence of any reference in the divorce Findings of Fact, Conclusions of Law, or Decree simply suggest that the court found no merit in the Defendant's claim.

POINT II.

THERE WAS NO EVIDENCE WHATSOEVER THAT THE DEFENDANT'S PHYSICAL HEALTH HAD CHANGED DURING THE GRANTING OF THE DECREE OF DIVORCE AND THE MODIFICATION TRIAL.

The Defendant testified that he retired for health and other reasons. However, those health reasons were the same reasons referred to at the time of the divorce trial. The only change that occurred between the time of the divorce trial and the modification trial was the advancing of the Defendant's age.

Contrary to the Defendant's statement in his brief, this case involves a person who has "irresponsibly, voluntarily elected to retire." (Defendant's Brief, p. 3). The Plaintiff and the Defendant differ as to the significance of an imaginary "appropriate retirement age." Furthermore, the Defendant does nothing to dispute the Plaintiff's factual statement that the Defendant failed to pay any alimony whatsoever following his voluntary retirement and the sale of his business and continues to refuse to pay any spousal support whatsoever.[1] This fact alone strongly suggests that the Defendant's retirement was intended to create an imaginary set of circumstances based upon which the Defendant sought a modification and reduction in his alimony obligation.

POINT III.

FINDINGS OF THE TRIAL JUDGE IN REGARDS TO THE DEFENDANT'S CONTEMPT ARE ADEQUATE.

The Defendant suggest that the findings of the trial judge in this matter are inadequate because there is no finding that the Defendant "intentionally refused to obey the court ordered support payment." Based upon the subsidiary findings of the court, it is obvious that the Defendant did have the ability to pay at least $1,000 a month, and continued to have that ability. In the face of that ability to pay, the Defendant paid nothing whatsoever following his 65th birthday. The court can conclude from the findings which were made by the court, that the Defendant intentionally failed to obey the court order. This

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[1] The Defendant also fails to dispute that the Defendant has, since the Decree of Divorce in this case, conveyed all of his assets, without adequate consideration, to other parties.

inference is acceptable when the subsidiary findings are adequate. See Schaumberg v. Schaumberg, 875 P.2d 598 (Utah App. 1994).

POINT IV.

THE DISPOSITION OF THE PROPERTY AT 1130 NORTH 1200 EAST WAS RULED ON AND NO APPEAL WAS TAKEN.

The Defendant ignores the fact that the property at 1130 North 1200 East was brought to the attention of the divorce trial judge and ruled upon prior to the entry of the divorce Findings, Conclusions and Decree. The Defendant did not appeal either the Divorce Decree or Judge Christensen's ruling on his objections which included this very issue.

CONCLUSION

The very facts relied upon by the Defendant to modify the Decree were litigated in the original divorce proceeding. The mere fact that the Defendant did what he said he would do should not be sufficient to modify the Decree merely months later. The trial judge made adequate findings to support a finding of contempt of the Defendant. Judge Christensen, the divorce judge, ruled on the question of the property at 1130 North 1200 East, Lehi, Utah. Neither party appealed that ruling. The trial court in this case properly found that that issue had been decided by the divorce trial judge. In view of the Defendant's contempt, and ongoing contempt, the Plaintiff should be awarded her costs and fees incurred for purposes of this appeal.

DATED THIS 11 day of December, 1995.

Respectfully Submitted,

GREEN & BERRY

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and Cross-Appellant

CERTIFICATE OF SERVICE

I, Frederick N. Green, certify that on the _____ day of December, 1995, I served a copy of the attached Reply Brief of Appellee and Cross-Appellant upon Nolan J. Olsen, OLSEN & OLSEN, the counsel for Defendant/Appellant and Cross-Appellee in this matter by mailing a copy by first class mail with sufficient postage prepaid to the following address: 8138 South State Midvale, Utah 84047.

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