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# Heidi Metcalf v. Steve Walton : Petition for Rehearing

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

KET NO. 950429CA

**IN THE UTAH COURT OF APPEALS**

HEIDI METCALF,

Plaintiff and Appellant,

V. Case No. 950429-CA

STEVE WALTON,

Defendant and Appellant.

**PETITION FOR REHEARING**

Appeal from a final judgment of the Third District
Court, Salt Lake County, State of Utah
Honorable Kenneth Rigtrup, Presiding

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COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

HEIDI METCALF,

Plaintiff and Appellant,

v. Case No. 950429-CA

STEVE WALTON,

Defendant and Appellee.

PETITION FOR REHEARING

Plaintiff-appellant herewith makes and files her petition for rehearing from the Memorandum Decision (Not for Publication) of the Court dated and filed September 14, 1995, and with particularity state the points of law and fact overlooked or misapprehended by the Court, as follows:

Argument and authority:

1. At the pretrial conference on August 31 1994, the parties did not, as the Court suggests in its said memorandum decision "agree[] that appellee would be awarded the marital home subject

to all debts and obligations." The trial court's minute entry was to the effect that for plaintiff's one-half interest in the marital home she was to receive 11 monthly installments of $366.67 from defendant. Plaintiff then received a proposed judgment that incorporated this provision. Being unaware as to whether the proposed decree had been entered or not, plaintiff moved to alter or amend the same to in effect substitute a provision that the home be sold and the proceeds distributed equally between plaintiff and defendant. On October 31, 1994, at a hearing on plaintiff's motion to alter and amend, the trial court ruled that the provision in the proposed judgment as to payments for plaintiff's one-half interest in the home would not be allowed. In the minute entry evidencing the action of the trial court at the hearing of October 31, 1994, the final statement was ". . . All financial issues reserved." On November 14, 1994, the trial court entered findings,

conclusions, and judgment. On its face the judgment was final and appealable. The judgment did not reserve any issues for future consideration but in the recitals it was stated that "[a] subsequent hearing was held on October 31 1994 wherein the action for divorce was bifurcated from the remaining issues." It would seem to plaintiff that the November 14 1994 decree, being a final decree, was the result of such "bifurcation," if in fact there was one. The minutes of the October 31 1994 hearing state "All financial issues reserved," nothing is mentioned on the matter of bifurcation except in the documents that defendant's attorney prepared. And isn't equity served by each party retaining his one-half interest in the home property? Also, the trial court did not "set aside" anything; it merely dissallowed the payments from defendant for the quit-claim deed from plaintiff. The proposed judgment had not been, and was never entered. Plaintiff is unaware of any December 30 1994

order. But whatever it provided, the part thereof quoted in the Court of Appeals' memorandum decision "[I]ssues other than the granting of the divorce are bifurcated and set aside for separate consideration. These include issues 'relating to property, indebtedness of the parties and such . . .'", had no effect on the prior, November 14 1994 final decree. And plaintiff did not ask the trial court to "set aside" anything; by her motion to alter or amend plaintiff objected to the proposed judgment which was never entered. In its final decree the trial court, it may be assumed, thought it equitable that each party retain his or her one-half interest in the home which required nothing affirmative from the trial court, and there were no "financial issues" requiring affirmative action of the trial court. Certainly it cannot be the case that issues can be inserted in a cause after the fact [of a final judgment].

The Court of Appeals in its decision states the record to be that "[b]y her own motion,

appellant set aside the August 31, 1994, stipulation of the parties concerning the martital residence. This caused the trial judge to separate the granting of the divorce from the division of property." Plaintiff did not by motion "set aside the August 31, 1994 stipulation of the parties . . ." What she argued was entirely different; with the provision as initially formulated in force, plaintiff remained tied to the debt on the house which would inhibit her ability to contract for other financing in the future. She wanted defendant's agreement that either the house would be sold and the debt paid, or he would refinance in a manner to discharge the existing debt. And the Court of Appeals goes on to state "[t]his caused the trial judge to separate the granting of the divorce from the division of property." The Court of Appeals acknowledged that the separation occurred as the result of a December 30, 1994 order, and this was well after the entry of the final decree on

November 14, 1994 and therefore ineffective to accomplish its stated purpose. Defendant's only remedy was by appeal of the November 14 1994 decree, or by motion to vacate under URCivP 60(b), or the trial court to proceed under URCivP 60(a) to include the allegedly omitted matter in the November 14, 1994 decree.

2. The Court of Appeals then states "[f]or the doctrine [of res judicata] to apply, the November 14, 1994, decree must have finally resolved all issues between the parties." (citations omitted). "On its face, it is clear that the decree did not resolve all of the issues." In order for an issue to be finally resolved, as the Court requires, is it necessary that that the court in question affirmatively deal with the matter at hand; or can it, by leaving things as they are, accomplish its purpose? In this case, then, where the trial court intended that each party have his or her one-half interest in the house, for there to be a resolution, must

the trial court decree an already vested interest? In addition, res judicata operates not only on issues litigated and ruled upon, but also on issues that could have been litigated but were not. Schoney v. Memorial Estates, 863 P.2d 59 (Utah App. 1993). If In re Covington, 888 P.2d 675 (Utah App. 1994) cited by the Court of Appeals is to the contrary it is not the law in Utah because it would be in contradiction to Utah Supreme Court cases some of which are cited in Schoney, supra.

WHEREFORE, plantiff-appellant prays that Memorandum Decision (Not For Official Publication), filed September 14, 1995, be vacated and the decree of the trial court appealed herein reversed.

DATED October 2, 1995.

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On October 2 1995 true copy of the foregoing mailed to Gregory Wall, #800 Boston Building, Salt Lake City, Utah 84111.

Heidi Metcalf

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