1995

Bonnie Harris, formerly known as Bonnie Spivey v. Theresa Gutirrez Spivey, the Estate of Glendon G. Spivey and Utah Retirement Systems : Reply Brief

Utah Court of Appeals

Charles A. Schultz; Attorney for Appellant.
Sidney S. Gilbert; Gilbert & Stewart.
Vernon L. Snow; Dale Jeffs.

IN THE UTAH COURT OF APPEALS

---ooo0ooo---

BONNIE HARRIS, f/k/a BONNIE SPIVEY, Plaintiff/Appellant, v. THERESA GUTIRREZ SPIVEY, the ESTATE OF GLENDON G. SPIVEY and UTAH RETIREMENT SYSTEMS, Defendants/Appellees.	:	*REPLY BRIEF OF APPELLANT BONNIE KAY HARRIS* **Appeal No. 950494CA**

---ooo0ooo---

This is an appeal from an order of the Fourth District Court, rendered by Judge Schofield dismissing Mrs. Harris' Petition seeking to modify the property distribution award of her divorce settlement with her former husband Glendon G. Spivey.

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Priority of Argument: 14

IN THE UTAH COURT OF APPEALS

---oo0oo---

Bonnie Harris, fka Spivey, Plaintiff and Appellant, v. Theresa Guitirrez Spivey, the Estate of Glendon Spivey, Defendant and Appellee.	ORDER Case No. 950494-CA

This matter is before the court upon appellee's motion to strike appellant's reply brief, filed June 17, 1996, and upon appellant's motion to enlarge time to respond to motion to strike, filed July 1, 1996.

On July 8, 1996, appellant filed her memorandum in opposition to the motion to strike.

IT IS HEREBY ORDERED that appellant's motion to enlarge time to respond to motion to strike is granted, with the memorandum filed on July 8, 1996, deemed timely filed.

IT IS FURTHER ORDERED that ruling on appellee's motion to strike appellant's reply brief is deferred pending assignment of the appeal to a panel of this court for disposition.

Dated this 18th day of July, 1996.

FOR THE COURT:

Gregory K. Orme, Presiding Judge

CERTIFICATE OF MAILING

I hereby certify that on July 18, 1996, a true and correct copy of the foregoing ORDER was deposited in the United States mail to the parties listed below:

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and a true and correct copy of the foregoing ORDER was deposited in the United States mail to the trial court listed below:

Fourth District Court
125 North 100 West
P.O. Box 1847
Provo, UT 84601

Dated this July 18, 1996.

By _____
Deputy Clerk

Case No. 950494-CA
Fourth District Court, Utah County, Case No. 954400677 DA

IN THE UTAH COURT OF APPEALS

---ooo0ooo---

BONNIE HARRIS, f/k/a BONNIE SPIVEY, Plaintiff/Appellant, v. THERESA GUTIRREZ SPIVEY, the ESTATE OF GLENDON G. SPIVEY and UTAH RETIREMENT SYSTEMS, Defendants/Appellees.	:	*REPLY BRIEF OF APPELLANT BONNIE KAY HARRIS* **Appeal No. 950494CA**

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I
PARTIES TO THE APPEAL

The parties to this Appeal are the Plaintiff/Appellant Bonnie Kay Harris (hereinafter, "Mrs. Harris") and the Defendant/Appellee Theresa Gutirrez Spivey (hereinafter, "Spivey").

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OBJECTIONS TO SPIVEY'S STANDARD OF REVIEW AND STATEMENT OF FACTS

Mrs. Harris objects to Spivey's erroneous standard of review for issues of facts on the appeal of her Motion to Dismiss. Motions to dismiss are reviewed under a correctness of error standard, both issues of fact and issues of law, without any deference to the trial

court's ruling, not under a clearly erroneous standard as Spivey asserts in her Brief. Barnard v. Utah State Bar, 857 P.2d 917 (Utah 1993), citing, Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985); Petersen v. Davis County School Dist., 855 P.2d 241 (Utah 1993).

Mrs. Harris also objects to paragraph No. 9 of Spivey's Statement of Facts. Glendon G. Spivey (hereinafter, "Glendon") did not change the beneficiaries on his retirement and 401K plan as Spivey asserts. Spivey made the changes and had Glendon sign the form at a time when he could neither read nor write beyond signing his name. Spivey admitted in a deposition subsequent to the Order of Dismissal in this matter that she is the one who made the changes on Glendon's retirement and pension plans.

Mrs. Harris objects to paragraph No. 10 of Spivey's Statement of Facts. Wade Spivey is not a beneficiary of Glendon's retirement and pension benefits and never was a beneficiary. Only Spivey was a beneficiary of the benefits, which have since been distributed to her.

Mrs. Harris objects to paragraph No. 11 of Spivey's Statement of Facts. Spivey and Wade are not dependent on Glendon's retirement and pension benefits for their health, welfare, education and living expenses. Wade receives approximately $900.00 per month social security benefits. Spivey also receives social security benefits, Spivey received all of Glendon's savings, checking accounts, life insurance benefits, credit union accounts and insurance. She lives in a $250,000.00 home with no mortgage. Her motor vehicles are owned free and clear of any loans, and she is presently employed.

Mrs. Harris objects to paragraph No. 14 of Spivey's Statement of Facts. Glendon was not deceased on stipulation as Spivey asserts.

Mrs. Harris objects to paragraph No. 15 of Spivey's Statement of

Facts. Paragraph No. 15 is not a statement of fact. What Spivey believes or what appears to be something in her mind is not a statement of fact. It is merely her opinion, speculation, and conclusion.

V

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES, AND OTHER AUTHORITIES

Cases:

Barnard v. Sutliff, 946 P.2d 1229, 1236 (Utah 1992)

Barnard v. Utah State Bar, 857 P.2d 917 (Utah 1993)

Carpenter v. Carpenter, 722 P.2d 230, 150 Ariz. 52 (Ariz. 1986)

Hamilton v. Dooley, 15 Utah 280, 29 P 769 (1897)

Jacobsen v. Jacobsen, 703 P.2d 303, 305 (Utah 1985)

Nelson v. Davis, 592 P.2d 594 597 (Utah 1979)

Petersen v. Davis County School Dist., 855 P.2d 241 (Utah 1993)

Roberts v. Braffett 92 P 789 (Utah 1907)

St. Pierre v. Edmonds, 645 P.2d 615, 619 (Utah 1982)

Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985)

Searle Bros v. Searle, 588 P.2d 689 (Utah 1978)

State in Interest of J.J.T., 877 P.2d 161 (Utah App. 1994)

Tanner v. Bacon, 103 Utah 494, 136 P.2d 957, 960 (1943)

Rules:

Utah Rules of Civil Procedure, Rule 11

Utah Code of Judicial Administration, Rule 4-508

Treatises:

24 Am Jur 2d, Divorce and Separation, § 487

24 Am Jur 2d, Divorce and Separation, § 492

46 Am Jur 2d, Judgments § 601

VI
SUMMARY OF ARGUMENT

The trial court erred as a matter of law in concluding that Mrs. Harris' Petition is barred by the doctrine of laches. The trial court also erred as a mater of law in concluding that Mrs. Harris' Petition is barred by the doctrine of res judicata. The trial court further erred, as a matter of law, in concluding that Mrs. Harris' Petition is barred by the holding of Throckmorton v. Throckmorton, 767 P.2d 121 (Utah App. 1988). And, the trial court again erred as a matter of law in determining that the divorce decree between Mrs. Harris and Glendon cannot be modified after Glendon's death.

VII
ARGUMENT

THE TRIAL COURT ERRED BOTH AS A MATTER OF FACT AND AS A MATTER OF LAW IN GRANTING SPIVEY'S MOTION TO DISMISS.

POINT I
THE TRIAL COURT ERRED AS A MATTER OF LAW IN CONCLUDING THAT MRS. HARRIS' PETITION WAS BARRED BY THE DOCTRINE OF LACHES.

Spivey has no legitimate response to Mrs. Harris' assertion that the court erred in concluding that Mrs. Harris' Petition was barred by the doctrine of laches. Spivey cannot cite this Court to any case or other authority contradicting the cases and treatises cited by Mrs. Harris in her Appeal Brief. Therefore, Spivey, in a pathetic attempt to breath life into her hapless argument, and in direct contravention of Rule 4-508 of the Utah Code of Judicial Administration, cites to the unpublished decision of Judge Schofield in this very case as precedential authority. Rule 4-508 of the Utah Code of Judicial

Administration specifically states:

> *Unpublished opinions, orders and judgments have no precedential value and shall not be cited in the courts of this state, except for purposes of applying the doctrine of the law of the case, res judicata, or collateral estoppel.*

If Spivey wishes to refer to Judge Schofield's decision in this case it should be as a cite to the record in Spivey's Statement of Facts, as a footnote in her Brief or as background for argument, but it should not be cited as authority in her argument in chief. It is the ultimate boot-strap effort to cite as authority the very decision of the trial court that is being appealed. Spivey's citation to Judge Schofield's decision is not only totally devoid of any precedential value, it is a direct violation of Utah law, and that portion of Spivey's brief should be stricken.

Spivey's assertion that laches applies in this case because Mrs. Harris allegedly had all facts concerning Glendon's assets available to her during the divorce proceeding is not only legally incorrect, but it is also factually untrue. Mrs. Harris never knew that Glendon had any retirement benefits to be apportioned in their divorce. Glendon falsely represented in documents filed with the Court, and signed under oath, that he had no retirement benefits. Mrs. Harris only learned of Glendon's retirement benefits in 1995, as a result of her counsel's research in the probate case of Glendon's estate. Therefore, and contrary to Spivey's assertion, it was not factually or legally possible for Mrs. Harris to assert her rights to a martial asset, i.e., Glendon's retirement and pension benefits, before she knew of its existence.

Spivey has failed to demonstrate that she has been prejudiced by Mrs. Harris' failure to assert her lawful right to her share of Glendon's retirement and pension benefits until this time. While

Spivey is clearly entitled to that portion of Glendon's retirement benefits earned after her marriage to Glendon, she is not legally or morally entitled to that portion of Glendon's retirement and pension benefits earned prior to the time she married him. Unless Spivey is willing to admit that she only married Glendon for his money and benefits, she cannot even assert that she is or will be prejudiced by Mr. Harris receiving her lawful share of Glendon's benefits that she should have been awarded in her divorce settlement with Glendon. The spouse of a person that is in possession of stolen or otherwise misappropriated property does not acquire any rights in that property simply because the rightful owner of the property does not learn of the property's whereabouts until after the party unlawfully in possession of the property dies.

A basic and fundamental principal of law, as previously stated in Mrs. Harris Appeal Brief, is that the mere passage of time does not constitute laches. 24 Am Jur 2d, Divorce and Separation, § 487 and § 492. The Utah Supreme Court has continually and repeatedly held that the mere laps of time, where the parties remain in the same relative position, the delay working no serious wrong to the adverse party and justice being possible, will not operate as laches. Roberts v. Braffett, 92 P 789 (1907), citing Hamilton v. Dooley, 15 Utah 280, 29 P 769 (1897).

Because Spivey has not and cannot demonstrate to this Court that she has been prejudiced in any manner whatsoever by a delay on the part of Mrs. Harris in asserting her lawful right to a share of Glendon's pension and retirement benefits, the doctrine of laches does not apply in this case. Likewise, because Spivey cannot demonstrate that she changed her position because of Mrs. Harris' delay in

asserting her lawful right to a share of Glendon's pension and retirement benefits, the doctrine of laches is inapplicable to this case.

Because the doctrine of laches is inapplicable to the facts of this case, the trial court erred both as a matter of fact and as a matter of law in concluding that Mrs. Harris' Petition was barred by the doctrine of laches. Therefore, the trial court's order dismissing Mrs. Harris' Petition was improper and must be reversed by this Court.

POINT II

THE TRIAL COURT ERRED AS A MATTER OF LAW IN RULING THAT MRS. HARRIS' PETITION WAS BARRED BY THE DOCTRINE OF RES JUDICATA.

The trial court erred as a matter of law in concluding that Mrs. Harris Petition was barred by the doctrine of res judicata. As previously set forth in Mrs. Harris's Appeal Brief, Utah courts have consistently and repeatedly declared that in order for the doctrine of res judicata to apply the person asserting the doctrine must establish three elements. First, both actions must involve the same parties or their privies. Second, the claim that is alleged to be barred must have been presented in the first suit or must be one that could and should have been raised in the first action. Third, the first suit must have resulted in a final judgment on the merits. State in Interest of J.J.T., 877 P.2d 161 (Utah App. 1994); Jacobsen v. Jacobsen, 703 P.2d 303, 305 (Utah 1985). Because Spivey was not a party to the divorce proceeding between Mrs. Harris and Glendon, the trial court erred as a matter of law in ruling that Mrs. Harris' Petition was barred by the doctrine of res judicata.

It is an undisputed fact that the divorce proceeding between Mrs. Harris and Glendon only involved Mrs. Harris and her former husband

Glendon. Spivey was not a party to the divorce proceeding, and she was not in privity with Glendon in the divorce proceeding. As previously set forth in Mrs. Harris' Appeal Brief, a privy is defined in Searle Bros. v. Searle, 588 P.2d 689 (Utah 1978), as follows:

> *The legal definition of a person in privity with another, is a person so identified in interest with another that he represents the same legal right, this includes a mutual or successive relationship to rights in property. Our Court has said that as applied to judgments or decrees of court, privity means "one whose interest has been legally represented at the time."*

citing Tanner v. Bacon, 103 Utah 494, 136 P.2d 957, 960 (1943).

Spivey asserts that she was in privity with Glendon because he assigned his rights to the retirement and 401K plans to her when he made her his beneficiary in 1990. (Spivey's Brief, page 18). As support for this ludicrous assertion, Spivey cites to Black's Law Dictionary. While Black's Law Dictionary is a well-respected publication, it is hardly an authority to be cited in contravention of a published definition of privity by the Utah Supreme Court. Spivey's cite to Black's Law Dictionary is, however, another indication of the weakness of Spivey's argument and an indication of her desperation to find anything to attempt to dispute the clear and controlling law that supports Mrs. Harris' lawful right to a share of Glendon's retirement and pension benefits.

Contrary to Spivey's assertion she was not in privity with Glendon with respect to his marriage with Mrs. Harris. Spivey stretches the boundaries of reason and logic in asserting to this Court that she was in privity with Glendon with respect to his divorce proceeding with Mrs. Harris. Spivey may have been in privity with Glendon with respect to some things subsequent to their marriage, but as a matter of law she was not in privity with him at the time of his marriage to Mrs. Harris. Spivey was also not in privity with Glendon

with respect to his marriage to Mrs. Harris, she was not in privity with Glendon in his marriage to Mrs. Harris at the time of his divorce from Mrs. Harris, unless Spivey married Glendon prior to the time he was divorced from Mrs. Harris. Does Spivey now want to claim she was also married to Mrs. Harris and that she was also divorced from Mrs. Harris in the divorce proceeding between Mrs. Harris and Glendon?

Because Spivey was not a party to the divorce action between Mrs. Harris and Glendon, and because she was not in privity with Glendon with respect to the marriage or the divorce proceeding between Mrs. Harris and Glendon, she is not legally entitled to assert the doctrine of res judicata as a defense to Mrs. Harris' Petition. Because Spivey is not legally entitled to assert the doctrine of res judicata as a defense to Mrs. Harris' Petition, the trial court erred as a matter of law in dismissing Mrs. Harris' Petition.

Spivey's assertion that Mrs. Harris' Petition is barred by Throckmorton v. Throckmorton, 767 P.2d 121 (Utah App. 1988) and Ostler v. Ostler, 789 p.2d 713 (Utah App. 1990) is simply not true. The factual situation of both Throckmorton, and Ostler, are distinguishable from this case. In neither Throckmorton nor Ostler did the parties seeking to modify the divorce decrees present uncontrovertible evidence that the other parties to the divorce proceedings had fraudulently misrepresented the nonexistence of martial property. Both of the parties seeking to modify the divorce decrees in Throckmorton and Ostler knew of the existence of their spouses' retirement and/or pension benefits. Mrs. Harris did not learn of Glendon's retirement and pension benefits until 1995 when her attorney discovered the existence of those benefits while conducting discovery in the probate case of Glendon's estate.

Because of Glendon's fraudulent representations to the court during his divorce proceeding with Mrs. Harris, the doctrine of res judicata as applied in Throckmorton and Ostler does not apply in this case. Res judicata does not apply if one of the parties to the previous proceeding committed fraud. See 46 Am Jur 2d Judgments, § 601 declaring:

> *[T]he principles of res judicata may not be invoked to sustain fraud, and a judgment obtained by fraud or collusion may not be used as a basis of the application of the doctrine of res judicata.*

Because the doctrine of res judicata, as announced in Throckmorton, does not apply to Mrs. Harris' Petition, the trial court erred as a matter of law in granting Spivey's Motion to Dismiss. That error was prejudicial and reversible. Therefore, this Court must reverse the trial court's order dismissing Mrs. Harris' Petition and enter instructions to the trial court to modify the Divorce Decree between Mrs. Harris and Glendon and instruct the trial court to award Mrs. Harris her rightful and lawful share of all of Glendon's retirement benefits, including his pension benefits, 401K Plans and 457 benefits.

Spivey asserts that Carpenter v. Carpenter, 722 P.2d 230, 150 Ariz. 52 (Ariz. 1986) as cited in Mrs. Harris' Appeal Brief does not support Mrs. Harris' assertion that this Court should adopt the better reasoned position that a divorce decree should be modifiable after the death of one of the parties to the divorce. Spivey claims that Carpenter only allowed modification of the divorce decree because Arizona is a community property state. While there is nothing in Carpenter to support that assertion, even if true, Carpenter still stands for the proposition that Mrs. Harris' divorce decree with Glendon should be modified.

What Arizona calls community property, Utah simply calls marital property. If Arizona permits modification of a divorce decree after the death of one of the parties to properly distribute "community property", then Utah should permit a divorce decree to be modified after the death of one of the parties to the action in order to properly distribute marital property.

What Carpenter really stands for is the clear trend of the majority of courts throughout this country to recognize that divorce decrees should be permitted to be modified after the death of one of the parties to the divorce action. Carpenter stands for fundamental principals of fairness, equity and justice by permitting a court to modify a divorce decree, after the death of one of the parties to the divorce, in order to distribute marital property, avoid fraud and further the interests of justice. Carpenter clearly supports Mrs. Harris' assertion that her divorce decree with Glendon should be modified and that she should receive her rightful share of Glendon's retirement and pension benefits, benefits of which she was wrongfully and fraudulently denied.

Fraud upon the court justifies a court modifying a divorce so obtained. See St. Pierre v. Edmonds, 645 P.2d 615, 619 (Utah 1982). Because Glendon's sworn statement, made in the divorce proceeding in the with Mrs. Harris, indicating that he had no pension or retirement benefits was fraudulent, Mrs. Harris is legally entitled to have the divorce with Glendon modified.

POINT III

WHETHER A DIVORCE DECREE CAN BE MODIFIED AFTER THE DEATH OF ONE OF THE PARTIES TO THE DECREE IS A QUESTION OF FIRST IMPRESSION THAT THIS COURT SHOULD DECIDE.

As previously stated in Mrs. Harris' Appeal Brief, Mrs. Harris'

counsel has not found any Utah case that addresses the issue of modification of a divorce decree after the death of one of the parties to the decree. And, as previously stated, the only real issue in this appeal is whether this Court will take the position that a divorce decree may be modified after the death of one of the parties to the decree.

In her argument against Mrs. Harris' assertion that this Court should adopt the majority, and better-reasoned position that a divorce decree may be modified after the death of one of the parties, Spivey, again, in direct contravention of Rule 4-508 of the Utah Code of Judicial Administration, cites to Judge Schofield Memorandum Decision in this case as authority in her Brief. (Spivey's Brief at pages 20-21). Again, Spivey's citation to Judge Schofield's Memorandum Decision as authority for this appeal is not only totally devoid of any precedential value; it is a direct violation of Utah law and should be stricken. However, the portions of Judge Schofield's decision cited by Spivey are particularly enlightening, though not correct or controlling.

Judge Schofield states in his Memorandum Decision that:

> *A divorce decree settles the rights of the two divorcing parties. In this case Bonnie and Glendon were divorced in May 1980, some fifteen years before this modification proceeding was brought. At that time their respective interests in marital assets were determined. Now Bonnie asks that this Court modify that aged divorce decree. Yet, one of the parties is not present, nor can he be present as he died three months before the filing of this action. His property rights were fixed when he died. If Bonnie had any claim against him, it would be a claim against his estate, not a claim to modify the divorce decree. Yet she is asking this Court to ignore the fact of his death and determine the rights which she and Glendon have concerning a retirement benefit which, accrued, if at all during a marriage which terminated fifteen years ago.* (Emphasis added).

Judge Schofield citing Farrell v. Porter, 830 P.2d 299, 301 (Utah App. 1992), which in turn cited to Nelson v. Davis, 592 P.2d 594, 597 (Utah 1979), then goes on to declare:

> *If Farrell and Nelson have meaning, it is that as between divorcing parties, property rights are fixed and at the time of death and divorce cannot change or modify the effect of death in fixing property rights. If that is so in Farrell, it is more so in this case as Bonnie brought this action well after Glendon's death. Any property rights which she may have had in common with Glendon were fixed and would have need to be decided in the context of a probate of his estate, not by resort to a modification of the old divorce decree.* (Emphasis added).

Judge Schofield's decision, while incorrect, is particularly interesting because Judge Boyd K. Park of the Fourth District Court, when asked by Spivey to in the probate proceeding to decide whether or not Glendon's retirement and pension benefits were part of Glendon's estate and whether or not division and distribution of Glendon's pension and retirement could be made in the probate proceeding, ruled that Glendon's pension and retirement benefits were not part of Glendon's estate and that a determination and distribution of Glendon's retirement and pension benefits could not be made in the probate proceeding. A copy of Judge Park's Memorandum Decision is included in the Addendum to this Reply Brief.

If Judge Schofield is right then Mrs. Harris is required to litigate her claims to her share of Glendon's retirement and pension benefits in the probate case. However, if Judge Park is right Mrs. Harris cannot litigate her claims in the probate case because Glendon's retirement and pension benefits are not part of his estate. Therefore, Mrs. Harris must litigate her claims in another proceeding. Mrs. Harris cannot litigate her claims in the original divorce proceeding because the divorce court lost jurisdiction over the case upon the death of Glendon. Consequently, Mrs. Harris was required to file a new case, i.e., this case in order to litigate her lawful claim to a portion of Glendon's retirement and pension benefits. If Mrs. Harris is not allowed to litigate her claim anywhere, then her due process rights under both the U.S. Constitution and the Constitution

of Utah have been violated. Mrs. Harris must be afforded a forum where she is able to litigate her lawful claim to a portion of Glendon's pension and retirement benefits.

Spivey admits under the prevailing authority, a divorce decree may be modified after the death of one of the parties to the divorce when the surviving spouse has been wrongfully deprived of their right to a marital asset or marital property by the deceased spouse. (Spivey's Brief, page 21). Spivey, however, then asserts that Mrs. Harris is not entitled to modify her divorce decree with Glendon because there was no fraud. That assertion is a blatant lie. It is undisputable that during his divorce with Mrs. Harris, Glendon falsely represented that he had no retirement benefits. (Record at pages 24-23 & 117-118). That representation was fraudulent.

Spivey then asserts that because a "trial" was held that Glendon's false representations are somehow sanitized. Spivey advances the novel idea that fraud and misrepresentation in the context of a trial is acceptable, if the fraud and misrepresentation is not discovered. However, fraud and misrepresentation in a default setting is bad, but fraud is not bad if the person being defrauded is represented by counsel. But for some reason, Spivey cites no authority for that inane proposition.

Spivey next cites this Court to Karren v. Karren, 25 Utah 87, 60 P 465 (1902) as authority that a divorce decree cannot be modified after the death of one of the parties to the divorce. Karren is based on a former statute, i.e., Utah Revised Statutes, § 1212. Because Karren is based on old law and a non existent statute, it is of no precedential value in this case.

Spivey has not, and cannot, cite this Court to any Utah case

declaring that a petition to modify a divorce decree, in a case in which one party has died, must be filed in the divorce proceeding. There is no such case.

POINT IV

MRS. HARRIS PETITION TO MODIFY THE DIVORCE DECREE BETWEEN HER AND GLENDON IS PROPER.

A petition to modify a divorce decree need only allege changed circumstances if the party seeking the modification is seeking to modify the decree with respect to some provision that was decided or addressed in the original decree. A divorce decree can be modified to include items that were omitted, incorrectly included or to correct mistakes in the decree. In such cases, an allegation of change in circumstances in not necessary.

Because Mrs. Harris is only seeking to modify her divorce decree with Glendon with respect to the retirement and pension benefits of Glendon that were acquired during their marriage and because the distribution of those benefits was not addressed during the divorce between Mrs. Harris and Glendon, there was no need for Mrs. Harris to allege a change in circumstances in her Petition. Nonetheless, Mrs. Harris set forth facts in opposition to Spivey's Motion to Dismiss which clearly establishes a change in Mrs. Harris' circumstances since her divorce from Glendon, facts which satisfy any requirements justifying a modification of her divorce decree with Glendon.

Furthermore, Spivey never raised the issue of any defect in Mrs. Harris' Petition in the trial court. Therefore, she is estopped to do so on appeal.

Spivey's reference to state and federal rules and regulations concerning distribution of retirement or pension benefits and the

designation of beneficiaries of retirement or pension benefits is totally irrelevant to any issue in this proceeding.

Contrary to Spivey's assertion, Mrs. Harris is not seeking alimony or support. Mrs. Harris is not seeking to vacate the divorce decree between her and Glendon. Mrs. Harris is simply seeking to modify the divorce decree between her and Glendon in order to receive what rightfully and legally belongs to her, i.e., that portion of Glendon's retirement and pension benefits that she helped earn during her eighteen year marriage to Glendon. Retirement and pension benefits that under Utah law are marital property. Property rights of which she was unlawfully and improperly deprived because of Glendon's fraudulent representations to the divorce court.

It is extremely hypocritical and disingenuous of Spivey to claim out of one side of her mouth that Mrs. Harris' Petition is improper because Mrs. Harris did not specify the changes in her circumstances since her divorce from Glendon in her Petition. Yet, out of the other side of her mouth, claim that Mrs. Harris' undisputed changes in her circumstances are irrelevant. Spivey demands that Mrs. Harris specify changes supporting her Petition, yet, asserts that any changes are irrelevant.

Spivey's hypothetical examples do not give credence to her position. In both hypotheticals the spouse should and would be permitted to modify the divorce decree to obtain their lawful share of marital property which they failed to receive, and which the divorce courts failed to distribute, due to the fraud of the other spouse. Yes, Elizabeth Taylor would and should be permitted to modify a divorce decree that is 40 years old if her husband fraudulently represented the nonexistence of marital property, and Ms. Taylor was

denied her lawful share of that marital property by the fraudulent representations of her spouse.

Judge Schofield simply erred in concluding that Mrs. Harris is not entitled to modify the divorce decree between her and Glendon in order to obtain her rightful and lawful share of Glendon's pension and retirement benefits. Benefits that are indisputably marital property, benefits which Mrs. Harris was deprived of because of the fraudulent representations made by Glendon in the divorce proceeding.

The Utah Supreme Court specifically held in St. Pierre v. Edmonds, supra, that a divorce decree that is obtained through fraud may be challenged in an independent action. Id, at 619. Therefore, Mrs. Harris' Petition to modify the divorce decree between her and Glendon is proper, and contrary to Judge Schofield's decision, Mrs. Harris did not need to seek a modification of the divorce decree in the divorce case.

The trial court clearly committed reversible and prejudicial error when it granted Spivey's Motion to Dismiss. Therefore, the trial court's order dismissing Mrs. Harris' Petition must be reversed and the trial court directed to modify the Divorce Decree between Mrs. Harris and Glendon, awarding Mrs. Harris her rightful and legal share of all of Glendon's retirement benefits, including his pension benefits, 401K Plans and 457 benefits.

POINT V

THE TRIAL COURT DID NOT ERR IN REFUSING TO GRANT SPIVEY'S REQUEST FOR ATTORNEY'S FEES UNDER RULE 11 OF THE UTAH RULES OF CIVIL PROCEDURE.

The trial court correctly ruled that Mrs. Harris' Petition was not a violation of Rule 11 of the Utah Rules of Civil Procedure

(hereinafter, "Rule 11"). Therefore, Spivey's Cross-Appeal requesting attorney's fees must be denied.

In her attempt to convince this Court that there is a "vendetta" against her, Spivey makes references to alleged actions that allegedly transpired in the probate case of Glendon's estate. Those alleged facts, even if true, do not constitute a violation of Rule 11. The mere fact that Charles Schultz represents Mrs. Harris and also represents Don Spivey, Cynthia Sorensen and Lisa Spivey in the probate proceeding regarding Glendon's estate does not mean that a vendetta is taking place against Spivey. Nor, does the fact that Charles Schultz represents Don Spivey, Cynthia Sorensen and Lisa Spivey in the probate proceeding regarding Glendon's estate constitute a violation of Rule 11 in this case. The two cases have nothing in common other than the fact that Mrs. Harris' counsel learned of Glendon's pension and retirement benefits and learned that Mrs. Harris did not receive her rightful and lawful share of those benefits in her divorce with Glendon while conducting research in the probate case.

Mr. Schultz has also represented Mrs. Harris and Lisa Spivey in actions with Salt Lake City Corporation. Could there be a vendetta against Salt Lake City Corporation? Is Mr. Schultz's representation of Mrs. Harris and Ms. Spivey in the cases with Salt Lake City Corporation a violation of Rule 11?

In pertinent part, Rule 11 states as follows:

> *Signing of pleadings, motions, and other papers; sanctions.*
>
> *Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name who is duly licensed to practice in the state of Utah. . . . The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or*

reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . .

Even if this Court chooses to affirm Judge Schofield's decision and chooses to adopt the position that in Utah a divorce decree cannot be modified after the death of one of the parties to the divorce, Mrs. Harris' Petition is not a violation of Rule 11. Mrs. Harris' counsel conducted extensive research in this case before filing Mrs. Harris' Petition, more so than any other case he has ever filed. There is an overwhelming amount of authority supporting the validity and appropriateness of Mrs. Harris' Petition. See e.g., 24 Am Jur 2d, Divorce and Separation, § 487, 24 Am Jur 2d, Divorce and Separation, § 492, 46 Am Jur 2d, Judgments § 601, and Carpenter v. Carpenter, supra.

There is clear and undisputable authority to justify Mrs. Harris' argument for this Court adopting the position that a divorce decree can be modified after the death of one of the parties to the divorce. It is undisputed that there is no case law on this issue in Utah by a Utah appellate court. Therefore, Mrs. Harris' argument is, even under worst case scenario, a good faith argument for the extension, modification, or reversal of existing law. Mrs. Harris' Petition was not filed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. Spivey flatters herself. Spivey is just not important enough for Mrs. Harris to waste her time and money on a "vendetta" against Spivey.

The standard of review for an alleged Rule 11 violation is a clearly erroneous standard. See Barnard v. Sutliff, 946 P.2d 1229, 1236 (Utah 1992). The Utah Supreme Court further declared in Barnard v. Sutliff that an attorney need not reach the correct conclusion to avoid Rule 11 Sanctions. He only needs to make a reasonable inquiry.

ıle 11 does not require a perfect search, only a search that is ›jectively reasonable. Therefore, even if this Court agrees with ıdge Schofield's decision to dismiss Mrs. Harris's Petition, Mrs. ırris' argument in support of her Petition and the research conducted :ior to filing that Petition and the authorities cited by Mrs. Harris ı support of her Petition clearly and unequivocally establish that ıder no set of circumstances was Mrs. Harris' Petition filed in ŀolation of Rule 11.

Though Judge Schofield erred in dismissing Mrs. Harris' Petition, ɜ correctly held that, even under the improper law he applied to this ɜse, Mrs. Harris' Petition was not a violation of Rule 11. That ɹling was correct. Therefore, Spivey's appeal of Judge Schofield's ɜnial of Rule 11 sanctions must be denied and Judge Schofield's ɜnial of Spivey's request for attorney's fees affirmed, irrespective f how this Court decides on the issue of modification of a divorce ecree after the death on of the parties to the divorce.

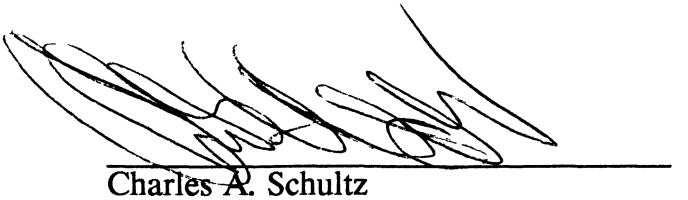
X

CONCLUSION AND REQUEST FOR RELIEF

The trial court committed reversible and prejudicial error when t granted Spivey's Motion to Dismiss. Therefore, the trial court's rder dismissing Mrs. Harris' Petition must be reversed and the trial ourt directed to modify the Divorce Decree between Mrs. Harris and lendon, awarding Mrs. Harris her rightful and lawful share of all of lendon's retirement benefits, including his pension benefits, 401K lans and 457 benefits.

WHEREFORE, Mrs. Harris respectfully request that this Court reverse the order entered by the trial court dismissing her Petition and enter instructions directing that she be awarded her rightful and legal share of the pension and retirement benefits of her former husband, Glendon G. Spivey, including his 401K plans and 457 plans.

Dated this 3rd day of June 1996.



Charles A. Schultz
Attorney for Bonnie Kay Harris

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of June 1996, I served a true and correct copy of the foregoing Reply Brief to the persons at the addresses listed below by depositing a copy in the United States Mail, postage prepaid.

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ADDENDUM

Utah Rules of Civil Procedure, Rule 11

Utah Code of Judicial Administration, Rule 4-508

24 Am Jur 2d, Divorce and Separation, § 487

24 Am Jur 2d, Divorce and Separation, § 492

46 Am Jur 2d, Judgments § 601

Memorandum of Judge Boyd K. Park in case No. 943400572 PB

COLLATERAL REFERENCES

Am. Jur. 2d. — 61A Am. Jur. 2d Pleading §§ 23 to 56, 69, 117.

C.J.S. — 71 C.J.S. Pleading §§ 5, 9, 63 to 98, 371 to 375, 418.

A.L.R. — Propriety of attaching photographs to a pleading, 33 A.L.R.3d 322.

Propriety and effect of use of fictitious name of plaintiff in federal court, 97 A.L.R. Fed. 369.

Key Numbers. — Pleading ⇐ 4, 13, 15, 38½ to 75, 307 to 312, 340.

Rule 11. Signing of pleadings, motions, and other papers; sanctions.

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name who is duly licensed to practice in the state of Utah. The attorney's address also shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certification by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

(Amended effective Sept. 4, 1985.)

Compiler's Notes. — This rule is similar to Rule 11, F.R.C.P.

NOTES TO DECISIONS

ANALYSIS

Amendment of complaint.

Amendment by an attorney of the facts stated in a complaint was sufficient to establish those facts as they would have been by a verified complaint before the changes made by this rule making verification unnecessary. Calder v. Third Judicial Dist. Court ex rel. Salt Lake County, 2 Utah 2d 309, 273 P.2d 168 (1954).

Appeals.

After voluntary dismissal by plaintiffs, the trial court's retention of jurisdiction to enforce sanctions under this rule did not legally prejudice plaintiffs and there was no final appealable order. Barton v. Utah Transit Auth., 872 P.2d 1036 (Utah 1994).

Nature of duty imposed.

This rule emphasizes an attorney's public duty as an officer of the court, as opposed to the attorney's private duty to represent a client's interest zealously. Clark v. Booth, 821 P.2d 1146 (Utah 1991).

Reasonable inquiry.

Certification by an attorney "that to the best of his knowledge, information, and belief formed after a reasonable inquiry the complaint is well grounded in fact and is warranted by existing law" does not require him to obtain a favorable expert medical opinion before filing a medical malpractice action. Deschamps v. Pulley, 784 P.2d 471 (Utah Ct App. 1989).

Under this rule a party need not have reached the correct conclusion he need only

Statement of the Rule:

(1) At the time of depositing with the Clerk of the Court any proceeds from a trustee's sale in accordance with Utah Code Ann. Section 57-1-29, the trustee shall file an affidavit with the clerk setting forth the facts of the deposit and a list of all known claimants, including known addresses. The clerk shall notify the listed claimants within 10 days of receiving the affidavit of deposit.

(2) Any claimant may then file a petition for adjudication of priority to these funds and request a hearing before the court. The petitioner requesting the hearing shall give notice of the hearing to all claimants listed in the trustee's affidavit of deposit and any others known to the petitioner. All persons having or claiming an interest must appear and assert their claim or be barred thereafter.

(3) Pursuant to the determination hearing, the court will establish the priorities of the parties to the trustee's sale proceeds and enter an order with the clerk of the court or county treasurer directing the disbursement of funds as determined.

Rule 4-508. Unpublished opinions.

Intent:

To establish a uniform standard for the use of unpublished opinions.

Applicability:

This rule shall apply to all courts of record and not of record.

Statement of the Rule:

Unpublished opinions, orders and judgments have no precedential value and shall not be cited or used in the courts of this state, except for purposes of applying the doctrine of the law of the case, res judicata, or collateral estoppel. (Added effective January 15, 1990.)

Rule 4-509. [Reserved.]

Rule 4-510. Alternative dispute resolution.

Intent:

To establish a program of court-annexed alternative dispute resolution for civil cases in the District Courts.

Applicability:

These rules shall apply to cases filed in the District Court in the Third and Fifth Judicial Districts. The rules do not apply to actions brought under Chapters 3a and 6 of Title 78, Chapter 6 of Title 30, Chapter 12 of Title 62A, Chapter 20a of Title 77, Rule 65B of the Utah Rules of Civil Procedure, or to uncontested matters brought under Chapter 1 of Title 42, Title 75, and Chapters 22a, 30 and 41 of Title 78.

Statement of the Rule:

(1) Definitions.

(A) "ADR" means alternative dispute resolution and includes arbitration, mediation, and other means of dispute resolution, other than court trial, authorized by this rule and URCADR;

(B) "ADR program" means the alternative dispute resolution program described in by Chapter 31b, Title 78;

(C) "Binding arbitration" means an ADR proceeding in which the award is final and enforceable as any other judgment in a civil action

jurisdiction,[37] or which is void on its face,[38] may be vacated at any time, in the absence of laches or estoppel.[39] A statute which prescribes a time within which one must file a petition to vacate on the ground of mistake, inadvertence, surprise, or excusable neglect, does not affect the time within which the court may exercise its inherent power to vacate on the ground of fraud[40] or lack of jurisdiction.[41]

The power of a court of equity to set aside a judgment of divorce procured by fraud is not restricted by a statute allowing a new trial to be granted within one year after entry of a fraudulent judgment, where the fraud remained undiscovered for that time and could not have been discovered within it by any reasonable diligence.[42]

§ 487. Laches.

Generally, in divorce cases, whoever wishes to have a judgment set aside on the ground that it was obtained by fraud, duress, accident, mistake, or surprise must act diligently in seeking relief.[43] Independent of statute, delay in instituting the proceeding may constitute such laches as will deprive the applicant of the right to have the judgment or decree in a divorce case vacated.[44] In a proper case laches is a defense even if the complainant asserted his grounds for vacating the judgment within the statutory time.[45] Even though the decree is void for want of good service of process, laches may prevent the vacation of the decree.[46]

The mere lapse of time does not constitute laches within the foregoing rules; it must appear that the delay has caused injury.[47] Instances of prejudice

ability of insanity, death removes the disability, and thereupon the time for instituting the proceedings begins to run. Wood v Wood, 136 Iowa 128, 113 NW 492.

37. Chisholm v Chisholm, 98 Fla 1196, 125 So 694; Baker v Baker, 221 Ga 332, 144 SE2d 529; Williamson v Williamson, (Iowa) 161 NW 482; Huffman v Huffman, 47 Or 610, 86 P 593.

Annotation: 6 ALR2d 638, § 11; 22 ALR2d 1325, § 10.

38. Fraunhofer v Price, 182 Mont 7, 594 P2d 324; Shaver v Shaver, 248 NC 113, 103 SE2d 791.

In Alabama the view has been taken that a divorce decree which is void on the face of the record for want of jurisdiction may be vacated at any time, but that if the decree is not void on the face of the record it cannot be vacated on a motion made more than 30 days after it was rendered. Aiello v Aiello, 272 Ala 505, 133 So 2d 18.

39. As to laches and estoppel, see §§ 487, 488, infra.

40. McGuinness v Superior Court of San Francisco, 196 Cal 222, 237 P 42, 40 ALR 1110.

41. Swift v Swift, 239 Iowa 62, 29 NW2d 535.

42. Wood v Wood, 136 Iowa 128, 113 NW 492.

43. Pryor v Pryor, 240 Md 224, 213 A2d 545; Cook v Cook, 167 Or 480, 118 P2d 1070; Grant v Grant, 233 SC 433, 105 SE2d 523.

Annotation: 12 ALR2d 163, § 5.

44. Horton v Stegmyer (CA8 Colo) 175 F 756; Multer v Multer, 280 Ala 458, 195 So 2d 105; Re Marriage of Wipson (2d Dist) 113 Cal App 3d 136, 169 Cal Rptr 664 (delay of more than three years in seeking relief from dissolution of marriage judgment); McElrath v McElrath, 120 Minn 380, 139 NW 708; Cratin v Cratin, 178 Miss 896, 174 So 255. Watkinson v Watkinson, 68 NJ Eq 632, 60 A 931. Bidwell v Bidwell, 139 NC 402, 52 SE 55. Hartford v Hartford, 53 Ohio App 2d 79, 7 Ohio Ops 3d 53, 371 NE2d 591; Grant v Grant, 233 SC 433, 105 SE2d 523; Karren v Karren, 25 Utah 87, 69 P 465.

Annotation: 12 ALR2d 163, § 6.

As to the effect of laches on the part of the petitioner after remarriage of the spouse obtaining the divorce, see § 492, infra.

Practice Aids.—Answer alleging laches by plaintiff in asserting grounds for vacating divorce decree. 8A Am Jur Pl & Pr Forms (Rev), Divorce and Separation, Form 789.

45. Van De Ryt v Van De Ryt, 6 Ohio St 2d 31, 35 Ohio Ops 2d 42, 215 NE2d 698, 16 ALR3d 271.

46. Swift v Swift, 239 Iowa 62, 29 NW2d 535.

47. Leathers v Stewart, 108 Me 96, 79 A 16; Meyer v Meyer, 326 Mass 491, 95 NE2d 645.

Annotation: 6 ALR2d 639, § 11; 12 ALR2d 163, § 5.

resulting from delay are the cases in which the prevailing party, after a reasonable delay, married an innocent third party.[48] Another instance of prejudice is the case where the person who obtained the divorce died a few years after obtaining it, for then the question as to the right to the divorce cannot be tried again and the testimony of the plaintiff cannot be made available.[49]

The delay which is significant is that which has occurred with knowledge or notice of the facts giving the right to relief. If, therefore, the defendant was not given adequate notice of the pendency of the action, and he sought relief with reasonable promptness after discovering the facts, he is not guilty of laches.[50]

§ 488. Estoppel.

One seeking relief from a divorce decree may be estopped from attacking it.[51] The estoppel may arise from conduct after the entry of the decree. Thus, one cannot be relieved from a judgment of divorce after using the privileges which it confers; in other words, one cannot accept benefits of a decree and not be bound by its burdens.[52] The wife's acceptance of alimony allowed in a divorce decree granted to the husband is an element which, in combination with other elements, may estop the wife from having the decree set aside, despite the existence of good grounds for annulling it.[53] Likewise, the wife's acceptance of money and property in lieu of alimony and as a property settlement, and her use of the money and property for her own benefit for several years, may estop her from having the decree set aside.[54] If the wife, after the husband obtains a decree of divorce, brings action against him as an unmarried woman to recover certain personal property in his possession belonging to her, she is estopped from afterward questioning the validity of the divorce.[55]

Generally, if one against whom a divorce decree has been granted remarries, he or she is thereafter estopped to assail the validity of the divorce,[56] although

48. § 492, infra

49. Horton v Stegmyer (CA8 Colo) 175 F 756, Carr's Admr v Carr, 92 Ky 552, 18 SW 453, McElrath v McElrath, 120 Minn 380, 139 NW 708

50. Lindley v Lindley, 274 Ala 570, 150 So 2d 746

Annotation: 12 ALR2d 166, § 7.

51. Reichert v Appel (Fla) 74 So 2d 674, Wetherington v Wetherington, 216 Ga 325, 116 SE2d 234; Attebery v Attebery, 172 Neb 671, 111 NW2d 553, Karren v Karren, 25 Utah 87, 69 P 465

As to the necessity for pleading estoppel in a proceeding to vacate a divorce decree, see § 496, infra

52. Tennessee v Barton, 210 Ark 816, 198 SW2d 512, Cratin v Cratin, 178 Miss 896, 174 So 255, Attebery v Attebery, 172 Neb 671, 111 NW2d 553

A divorce judgment would not be set aside by bill of review where the complainant, who was under no financial compulsion to do so, voluntarily accepted the benefits of the judgment and continued to accept those benefits after her former husband's alleged fraud was discovered and after a bill of review was filed, and where the rights of the former husband would be prejudiced if the judgment was set aside. Biggs v Biggs (Tex Civ App 14th Dist) 553 SW2d 207, writ dism w o j.

53. Mohler v Shank's Estate 93 Iowa 279, 61 NW 981, Bidwell v Bidwell, 139 NC 402, 52 SE 55

54. McDonald v Neale, 35 Ill App 2d 140, 182 NE2d 366, cert den 372 US 911, 9 L Ed 2d 719, 83 S Ct 725

55. Baily v Baily, 44 Pa 274

56. Arthur v Israel, 15 Colo 147, 25 P 81, later app 18 Colo 158, 32 P 68, error dismd 152 US 355, 38 L Ed 474, 14 S Ct 583, Reichert v Appel (Fla) 74 So 2d 674, Davis v Davis, 191 Ga 333, 11 SE2d 884, Coombes v Coombes, 91 Idaho 729, 430 P2d 95, Re Marriage of Gryka, 90 Ill App 3d 448, 45 Ill Dec 820, 413 NE2d 153, Justus v Justus, 208 Kan 879, 495 P2d 98, Rouse v Rouse, 219 La 1065, 55 So 2d 246, Joy v Miles, 190 Miss 255, 199 So 771, Attebery v Attebery, 172 Neb 671, 111 NW2d 553, Hanks v Hanks (SD) 296 NW2d 523, later app (SD) 334 NW2d 856

Annotation: 12 ALR2d 169, § 8.

will take into consideration the public policy to prevent the bastardizing of children of the second marriage and also the resulting injury to the innocent party to the second marriage.[82] Nevertheless, the mere lapse of time does not constitute laches; the delay must have caused injury, and if the second marriage occurred soon after the divorce and at a time when the other party to the decree could not have been expected to seek relief, as where the divorce was procured by fraud and the innocent party could not reasonably have learned of the fraud in time to prevent the second marriage by bringing a proceeding to set aside the decree, the delay does not cause sufficient injury to warrant the application of the doctrine of laches.[83] A delay of several months or years after learning of the entry of a divorce decree before seeking to have it set aside has been held not to constitute laches as a matter of law, where the remarriage occurred before the first wife learned of the decree, so that the delay in seeking relief after discovering the facts was not the cause of the second wife's unfortunate situation.[84] Clearly, where a proceeding to vacate a decree has been instituted before the second marriage occurs, the second marriage is not entitled to consideration when determining whether to grant the motion or petition to vacate.[85]

§ 493. Death of party.

The general rule is that an application to vacate a decree of divorce does not lie after the death of a party, where property rights are not involved, since death itself severs a marital relation and the only object to be accomplished by the vacation of the decree would be sentimental or illusory.[86] Some courts have recognized an exception to this rule where the decree was obtained by fraud, the theory being that in such a case the court must be resolute to preserve its integrity against imposition and that the party against whom the divorce was rendered should have opportunity to disprove his guilt of the

82. Bussey v Bussey, 95 NH 349, 64 A2d 4, 12 ALR2d 151, Hyatt v Hyatt (1st Dept) 57 App Div 2d 809, 395 NYS2d 2, Grant v Grant, 233 SC 433, 105 SE2d 523, Karren v Karren, 25 Utah 87, 69 P 465

Annotation: 17 ALR4th 1153

83. Leathers v Stewart, 108 Me 96, 79 A 16, Connelly v Connelly, 190 Md 79, 57 A2d 276, Hall v Hall, 70 Mont 460, 226 P 469

Annotation: 12 ALR2d 163, § 5

The remarriage and subsequent death of the plaintiff husband in a divorce suit, prior to the filing by the divorced wife of a petition to strike out the divorce decree, do not preclude the first wife from attacking the divorce decree as a fraud upon the court but are factors in considering the application of laches and the necessary prejudice resulting from the first wife's unwarranted delay of 13 years in filing the petition Pryor v Pryor, 240 Md 224, 213 A2d 545

The prevailing husband who remarried within one week after entry of the divorce decree was not prejudiced by his former wife's six months' delay in filing a motion to vacate the decree Van De Ryt v Van De Ryt, 6 Ohio St 2d 31, 35 Ohio Ops 2d 42, 215 NE2d 698, 16 ALR3d 271

84. Brandt v Brandt, 76 Ariz 154, 261 P2d 978, Connelly v Connelly, 190 Md 79, 57 A2d 276, Hall v Hall, 70 Mont 460, 226 P 469.

In a divorced wife's bill of review action to set aside the divorce judgment and alternatively the property division portion thereof, the defendant's remarriage, creation of a new community estate, and disposal of some assets received in the divorce judgment, did not as a matter of law entitle the defendant to a summary judgment, where there was no showing that whatever prejudice defendant might have experienced could not be remedied on retrial of the case DeCluitt v DeCluitt (Tex Civ App 10th Dist) 613 SW2d 777, writ dism w o j

85. Womack v Womack, 73 Ark 281, 83 SW 937, motion to modify decree den 73 Ark 290, 85 SW 1136

Annotation: 12 ALR2d 162, § 4

86. Dawson v Mays, 159 Ark 331, 252 SW 33, 30 ALR 1463 Lawrence v Nelson, 113 Iowa 277, 85 NW 84, Scheihing v Baltimore & O R R, 180 Md 168, 23 A2d 381 Bussey v Bussey, 94 NH 328, 52 A2d 856, Towns v Towns (Tex Civ App 7th Dist) 290 SW2d 292, writ dism w o j

Annotation: 6 ALR2d 645, § 13, 22 ALR2d 1323, § 8

the fraud was extrinsic, that is, it deprived the opposing party of the opportunity to appear and present his case [95]

With respect to extrinsic fraud, the doctrine of res judicata will not shield a blameworthy defendant from the consequences of his own misconduct [96] Accordingly the principles of res judicata may not be invoked to sustain fraud [97] and a judgment obtained by fraud or collusion may not be used as a basis for the application of the doctrine of res judicata [98] This is true also of the doctrine investing a judgment with conclusiveness as against a third person who is liable over to the judgment debtor with respect to the cause of action adjudicated [99]

In accordance with the above principles, where the omission of an item from a single cause of action is caused by the fraud or deception of the opposing party, the judgment in the first action does not bar a subsequent action for the omitted item [1] There are some cases, however, in which the second action is

95. Eichman v Fotomat Corp (4th Dist) 147 Cal App 3d 1170, 197 Cal Rptr 612 later proceeding (CA9 Cal) 759 F2d 1434, 1985-1 CCH Trade Cases ¶ 66606, later proceeding (CA9 Cal) 871 F2d 784, 1989-1 CCH Trade Cases ¶ 68485 reported at (CA9 Cal) 880 F2d 149 Cramer v Metropolitan Sav Asso , 136 Mich App 387 357 NW2d 51

A former wife s suit on a promissory note was barred by res judicata where the wife had, in the prior divorce proceeding, dismissed with prejudice her counterclaim based on the note, where the wife s claim that fraud had been perpetrated on the dissolution court by the husband by reason of his perjured testimony wherein he denied execution of the note did not qualify as fraud on the court, and where the wife knew that her husband denied execution of the note in the dissolution action and could have litigated the genuineness of his signature and the enforceability of the note in the prior action Truitt v Truitt (Fla App D5) 383 So 2d 276 (criticized on other grounds as stated in DeClaire v Yohanan (Fla) 453 So 2d 375)

96 Riehle v Margolies 279 US 218 73 L Ed 669 49 S Ct 310 In re Bloomer (BC WD Mich) 32 BR 25 McCarty v First of Georgia Ins Co (CA10 Okla) 713 F2d 609 Fleming v Cooper 225 Ark 634 284 SW2d 857 58 ALR2d 694 Edmonds v Glenn-Colusa Irrigation Dist 217 Cal 436, 19 P2d 502 Epstein v Chatham Park Inc (Super) 52 Del 56 153 A2d 180 Kent v Sutker (Fla) 40 So 2d 145 James W Glover Ltd v Fong 42 Hawaii 560 Butler v Butler 253 Iowa 1084 114 NW2d 595 Carroll v Fullerton 215 Ky 555 286 SW 847 (ovrld on other grounds in part by Ward v Southern Bell Tel & Tel Co Ky 436 SW2d 794) Cianchette v Verrier 155 Me 74 151 A2d 502 Christopher v Sisk 133 Md 45 104 A 355 Skinner v Township Board for Argentine Tp 238 Mich 533 213 NW 680 In re Shea s Will 309 NY 605 128 NE2d 864 Shaw v Eaves 262 NC 656 138 SE2d 520 Heasley v Lanz (ND) 142 NW2d 606 Norwood v McDonald, 142 Ohio St 299, 27 Ohio Ops 240, 52 NE2d 67, Howard v Huron, 5 SD 539, 59 NW 833, reh den 6 SD 180, 60 NW 803, Haudenschilt v Haudenschilt, 129 W Va 92, 39 SE2d 328

97. Halloran v Blue & White Liberty Cab Co , 253 Minn 436, 92 NW2d 794, New York Life Ins Co v Nashville Trust Co 200 Tenn 513, 292 SW2d 749, 59 ALR2d 1086 Haudenschilt v Haudenschilt, 129 W Va 92, 39 SE2d 328

98. New Orleans v Gaines s Adm r, 138 US 595 34 L Ed 1102, 11 S Ct 428 Weil v Defenbach, 36 Idaho 37 208 P 1025 Ball v Reese, 58 Kan 611 50 P 875, King v Emmons, 283 Mich 116, 277 NW 851 115 ALR 564 Halloran v Blue & White Liberty Cab Co , 253 Minn 436, 92 NW2d 794, Nichols v Stevens, 123 Mo 96, 25 SW 578 27 SW 613, affd 157 US 370, 39 L Ed 736, 15 S Ct 640, Robertson Lumber Co v Progressive Contractors (ND) 160 NW2d 61 cert den and app dismd 394 US 714 22 L Ed 2d 671 89 S Ct 1451 Robinson v Phegley 94 Or 124 163 P 1166 Seubert v Seubert 68 SD 195 299 NW 873 later proceeding 69 SD 143 7 NW2d 301 New York Life Ins Co v Nashville Trust Co 200 Tenn 513, 292 SW2d 749 59 ALR2d 1086 Butcher v J I Case Threshing Mach Co (Tex Civ App) 207 SW 980 Haudenschilt v Haudenschilt 129 W Va 92 39 SE2d 328

99 Pezel v Yerex 56 Cal App 804 205 P 475 Kim Poo Kum v Sugiyama 33 Hawaii 545 Gerber v Kansas City 311 Mo 49 277 SW 562 Hartford Acci & Indem Co v First Nat l Bank & Trust Co 281 NY 162 22 NE2d 424 123 ALR 1149

1 United States Rubber Co v Lucky Nine Inc (Fla App D3) 159 So 2d 874 Johnson v Provincial Ins Co 12 Mich 216 Gaither Corp v Skinner 241 NC 532 85 SE2d 909 Hyyti v Smith 67 ND 425 272 NW 747 (ovrld on other grounds in part by Hopkins v McBane (ND) 427

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

IN THE MATTER OF THE ESTATE OF GLENDON G. SPIVEY, Deceased.	**RULING ON MOTION FOR PARTIAL SUMMARY JUDGMENT AND MOTION TO STRIKE** CASE NO. 943400572 DATE: January 24, 1996 BOYD L. PARK, JUDGE

This matter came before the Court on Petitioner Theresa G. Spivey's Motion for Partial Summary Judgment and Motion to Strike, which were submitted for decision on December 5, 1995.

Counsel for Theresa Spivey filed a request for oral arguments on November 8, 1995. Opposing counsel did not file a request. Because counsel could add nothing which would affect the Court's decision on this matter, the request for oral arguments is denied.

The Court, having read the motions, accompanying memorandum in support and in opposition, affidavits, and having reviewed the file and being fully advised in the premises now makes the following:

RULING

1. On September 18, 1995, Theresa Spivey filed her "Verified Petition for Exempt Property, and Omitted Spouse's Share of Decedent's Property." In this petition, Theresa Spivey prays for the payment of a $5,000 exempt property as surviving wife and for a court order granting her an omitted spouse's share under §75-2-301.

2. Theresa Spivey filed her "Motion for Partial Summary Judgment" on November 1, 1995. In her motion, she asks the Court to rule that the retirement interests and 401K plan

proceeds and the family home are not assets of the estate. Motion for Partial Summary Judgment at 1-2.

3. Along with the memorandum in support of the motion, she filed the affidavit of Dr. Brian P. Tudor, who treated decedent for his brain tumor. Dr. Tudor recites a brief medical history of the decedent and states his opinion that the decedent was "totally competent" from 1990 through 1992. Affidavit of Brian P. Tudor ¶6.

4. Lisa Spivey, Don Spivey, Cynthia K. Sorensen, and Bonnie K. Harris (hereinafter Lisa Spivey) filed a memorandum in opposition on November 13, 1995. In this memorandum, they argue that the decedent was incompetent when he executed the deed and retirement documents upon which Theresa Spivey relies. Attached to this memorandum were the affidavits of George Morse, John Wilkinson, Dale Childs, Stephen Hedger, Maggie Hedger, Carolyn McDougall, Gary Thomas Spivey, Cynthia K. Sorensen, and Bonnie Harris. The affiants were co-workers or otherwise acquaintances of the decedent and offer various opinions as to his competence and some specific instances to demonstrate incompetence, such as an inability to read and comprehend after he suffered his first seizure.

5. On November 21, 1995, Theresa Spivey filed a motion to strike the affidavits of the above persons. In arguing her motion to strike, Mrs. Spivey argues that the affidavits are merely conclusory in form, based on information and belief and so must be rejected under Rule 56(e), that the affidavits contain hearsay, and that the affiants are incompetent to testify since none of them indicate they had any knowledge of the decedent executing deed or retirement documents. *See* Theresa Spivey's Memorandum in Support of Her Motion to Strike Affidavits of: George Morse, John Wilkinson, Dale Childs, Stephen Hedger, Maggie Hedger, Carolyn McDougall, Gary Thomas Spivey, Cynthia K. Sorensen, Bonnie Harris.

6. The Court will first address the motion to strike and then move on to the motion for partial summary judgment.

MOTION TO STRIKE

7. One of the reasons that Theresa Spivey gives to strike the affidavits is that the affiants

do not have any knowledge of the decedent executing the documents in question. However, the affidavits were offered to show incompetence on the part of the decedent at the time he executed the documents. An affiant does not need to know of a persons act in executing a document in order to testify to the mental condition of the person during that time. Each of the affiants were acquainted with decedent during or immediately prior to the time the documents were executed. As such, they do have personal knowledge of his actions, demeanor and nature and are able to testify as to their observations at the time--this goes to the weight of the evidence rather than the admissibility.

8. Theresa Spivey also argues that the affidavits merely contain conclusory statements and hearsay and as they are based on information and belief, should be rejected under Rule 56(e). The Court notes that the affidavits do contain some specific instances and observations of the affiants which could cause one to question the competence of the decedent. However, they are primarily statements of the opinions of the affiants as to the competence of the decedent. The question then is whether these lay opinions of mental competence are proper evidence.

9. The courts of Utah have allowed lay witness opinion testimony on competency and mental condition. In *First Interstate Bank, et. al. v. David O. Kesler, et. al.*, 702 P. 2d 86 (Utah 1985), the Utah Supreme Court affirmed the trial court's admission of lay witness opinion that the testator was incompetent even though they had little contact with her in the last few years of her life and about one year prior to the execution of the will. It should also be noted that the testimony in Kesler was admitted in opposition to the testimony of two psychiatrists who interviewed the testator on the day she signed the will and pronounced her competent. In a liable action, the Court of Appeals allowed lay witnesses to testify on the mental condition of the plaintiff to show the truth of statements that he was "mentally deranged" and a "paranoid schizophrenic." *Jenkins v. Weis*, 868 P.2d 1374 (Ut. Ct. App. 1994).

10. So long as the lay opinions meet the requirements of Rule 701, they are proper both

at trial and in affidavits. That the witness may not be an expert or fault may be found with their observations goes to the weight to be given the evidence by the fact finder, not its admissibility.

11. The Court finds that the affiant's testimony, subject to appropriate foundation, may be competent as to the mental condition of the decedent during the time they were acquainted with him.

12. The Court denies Theresa Spivey's Motion to Strike.

MOTION FOR PARTIAL SUMMARY JUDGMENT

The Family Home

13. The first item upon which Theresa Spivey's asks for summary judgment is that the family home is not a part of the estate of decedent. Lisa Spivey argues that at the time the home was deeded by decedent to himself and Theresa Spivey in joint tenancy, he was incompetent to deed the property, relying on the affidavits discussed above.

14. The affidavits provided by Lisa Spivey show there are genuine issues of material fact sufficient to preclude summary judgment.

15. The Court denies Theresa Spivey's Motion for Partial Summary Judgment as to the family home. The Court will require an evidentiary hearing to address the issue of the decedent's competence at the time he executed the deed.

Decedent's Retirement Interests and 401K Plan Proceeds

16. The second item which is the subject of Theresa Spivey's motion is the decedent's retirement interests and 401K plan proceeds (hereinafter benefits). She argues that if the proceeds did not pass to her by the documents decedent signed prior to his death, they pass to her by operation of law, citing Utah Code Annotated §49-1-606(1).

17. Lisa Spivey offers three arguments why summary judgment should not be given on the benefits. The first is that the decedent was incompetent to change his beneficiaries at the time he executed the documents designating Theresa Spivey. Whether decedent was competent or not does not affect whether the benefits passed to his spouse by operation of

law.

18. She also argues that "the Deceased's 401K plan and benefits are voluntary participation plans that are only made available through the State Retirement System" and therefore §49-1-606(1) does not apply. Memorandum in Opposition to Theresa Gutirrez [sic] Spivey's Motion for Partial Summary Judgment at 8. However, she does not cite any statutory authority or case law for this position, nor does she offer any evidence that they are somehow different from other plans offered by the State Retirement System other than this single assertion.

19. The documents which the decedent used to designate Theresa Spivey as beneficiary bear no indication that the plans were somehow different or separate from the Utah Retirement System or that they were subject to rules other than those found in the Utah State Retirement Act. Neither has the Court been able to find support for different treatment in the Act or other statutes.

20. The final argument is that the benefits are the subject of an appeal in another case. The other case deals with whether the decedent's former wife may claim some of the benefits. Apart from the same benefits being the subject matter of the cases, the appeal and this case do not share the same issues. The Court's determination that the benefits are not a part of the estate will not be affected should the appeal result in the former wife having an interest in the benefits. Accordingly, the Court sees no impediment to a grant of summary judgment that the benefits are not a part of decedent's estate.

21. The Court finds that there are no genuine issues of material fact that preclude judgment as a matter of law that the retirement interests and 401K plan proceeds are not a part of decedent's estate.

22. Summary judgment is granted as to the retirement interests and 401K plan proceeds.

Dated at Provo, Utah this 24 day of January, 1996.

BY ~~THE~~ COURT:

BOYD L. PARK, JUDGE

cc: Charls A. Schultz
Vernon L. Snow
M. Dayle Jeffs