

1994

Patricia S. Draper v. Emmert S. Draper : Reply Brief

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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940137

IN THE UTAH COURT OF APPEALS

PATRICIA S. DRAPER, :
 :
 Plaintiff and :
 Appellee, :
 vs. :
 :
 EMMERT S. DRAPER, :
 :
 Defendant and :
 Appellant. :

Case No. 940137-CA

APPELLANT'S REPLY BRIEF

APPEAL FROM AN ORDER OF THE SIXTH JUDICIAL DISTRICT
COURT OF SEVIER COUNTY, THE HONORABLE LOUIS G. TERVORT
FAILING TO AWARD THE DEFENDANT ANY PORTION OF THE
IRA RELATED ACCOUNTS ACCRUED DURING THE PARTIES' MARRIAGE

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FILED

DEC 19 1994

COURT OF APPEALS

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ARGUMENT

POINT I

THERE IS NO EVIDENCE THAT PROCEEDS FROM THE HOUSE SALE
WENT INTO THE IRA ACCOUNTS AND SAVING ACCOUNTS.

The Appellant's/Defendant's statement of facts paragraph 4 reads as follows:

4. Exhibit No. 3 from the trial summarized the current status of the parties' IRA related accounts. (Transcript, pages 26 and 27.) (See Addendum for a copy of Exhibit No. 3.) All of the money listed on Exhibit No. 3, except the first three entries, which were the parties' current checking account balances, and \$400.00 deposited in the four months immediately prior to their marriage, was placed in the accounts by the Plaintiff from earnings she earned during the course of the marriage. (Transcript, pages 29 through 32, 45 and 46.)

The Appellee's/Plaintiff's statement of facts paragraphs 2 and 4 read as follows:

2. Plaintiff received \$63,000.00 from the sale of a home she owned prior to the parties marriage (Transcript, page 19.) Some of the \$63,000.00 went into savings accounts which became IRA's (Transcript, page 19.).

4. Plaintiff contributed to the IRA accounts prior to the parties marriage (Transcript, page 27.) Plaintiff contributed to the IRA accounts during the entire time of the parties separation from October 1983 to November 1985 (Transcript, page 15.)

In the Appellant's/Defendant's statement of facts, the source of the IRA accounts and savings accounts is the Plaintiff's "earnings" during the course of the marriage. However, in the Appellee's/Plaintiff's statement, the sources of

the IRA accounts and savings accounts are money from the sale of a house and the Plaintiff's earnings.

The statement of the Appellee/Plaintiff that some of the IRA accounts and savings accounts monies came from the sale of the house is contrary to the evidence offered at trial by the Plaintiff. She offered Exhibit 3 (sometimes referred to as Exhibit C), wherein the source of all of the parties' bank accounts is itemized. (Exhibit 3 was submitted with the Appellant's Brief's Addendum and it is also attached to this Reply Brief as part of the Addendum.) The trial testimony wherein Exhibit 3 is offered and explained appears in the Transcript at pages 26 through 32. (See the Addendum to this Reply Brief.)

At trial the Plaintiff, through her counsel's questioning, confirmed the written words on Exhibit 3. The source of the IRA accounts and savings accounts was her "wages". There was no mention of the Plaintiff putting money into these accounts from the sale of a house. (Transcript, pages 26 through 32.)

The only issue that was at all unclear was the amount of money placed in the IRA accounts by the Plaintiff prior to their marriage. This was clarified in cross-examination of the Plaintiff. This testimony appears on pages 45 and 46 of the transcript, wherein it was concluded that four \$100.00 payments were made prior to the marriage of the parties on May 3, 1980, i.e., only \$400.00 was placed in the IRA accounts by the

Plaintiff prior to the marriage. (See Addendum to this Reply Brief.)

The trial court divided up the equities in the parties' real estate and neither party has challenged that division. The Appellee's/Plaintiff's assertion that some unspecified portion of the monies from the sale of the house went into the IRA accounts and savings accounts is not supported by her own testimony and exhibit at trial.

POINT II

IT IS UNFAIR TO DEDUCT THE \$6,500.00 THAT THE PLAINTIFF WAS TO PAY THE DEFENDANT FOR THE DEFENDANT'S SHARE OF THE HOUSE FROM THE TOTAL AMOUNT OF THE MONIES IN THE IRA ACCOUNTS AND SAVINGS ACCOUNTS.

On the last page of the Appellee's/Plaintiff's Argument, her attorney claims that his client really only has \$12,200.00 from the IRA accounts and savings accounts and not \$18,700.00. (See page 7 of the Appellee's Brief.) This calculation is not immediately explained. However, on the second to last page of the brief, it is further stated as follows:

The total IRA funds at issue are in the approximate sum of \$12,200.00 (\$18,700.00 less \$6,500.00 which Plaintiff has already paid the Defendant.)

The only money the Plaintiff has paid to the Defendant was the \$6,500.00 that the court required her to pay by April 22, 1994, for his interest in the parties' real property. (See Decree of Divorce, paragraphs 4, 5, and 6.)

It is patently unfair for the Appellee/Plaintiff to claim that there are less IRA account and savings account monies, because she has paid off the lien her ex-husband was granted on the house. The trial court separated these items of property and so should the appellate court.

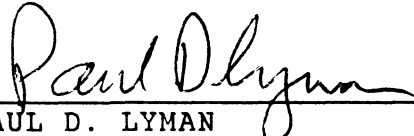
CONCLUSION

The court should look at the evidence actually introduced at trial in making its decision. The factual statement of the Appellee incorrectly tries to have some of the IRA account and savings account monies come from the sale of the house. That was not her testimony and should not be considered.

It is unfair for the Appellee to ask the court to reduce the IRA account and savings account monies by the amount of money she had paid to her ex-husband to pay his lien interest against the house.

As argued in the Appellant's Brief, the court should find an abuse of discretion by the trial court and direct that the IRA related accounts be shared equally between the Plaintiff and Defendant.

DATED this 15th day of December, 1994.



PAUL D. LYMAN
Attorney for Appellant

MAILING CERTIFICATE

I hereby certify that a full, true and correct copy of the above and foregoing APPELLANT'S REPLY BRIEF was placed in the

United States mail at Richfield, Utah, with first-class postage
thereon fully prepaid on the 15th day of December, 1994,
addressed as follows:

Mr. Paul Frischknecht
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Manti, Utah 84642

Paul Dlynn

ADDENDUM

Exhibit No. 3 (also marked as Exhibit C) from the trial
Trial Transcript, pages 26 through 32.
Trial Transcript, pages 45 and 46.

EXHIBIT "C"

FUNDS

1st Interstate Bank	approx. 126.58	Defendant's Funds
1st Security Checking	approx. 57.05	Plaintiff's Funds
1st Security checking	approx. 300.00	Plaintiff's Funds
IRA Bank of America opened in 1984 from Plaintiff's wages during parties separation	approx. 6,593.40	Plaintiff's Funds
IRA 1st Security Bank opened in 1985 from Plaintiff's wages during parites separation	approx. 8,477.97	Plaintiff's Funds
1st Security Bank Savings derived from Plaintiff's IRA	approx. 2,818.28	Plaintiff's Funds
Zions Bank Savings derived from Plaintiff's IRA	approx. 1,230.00	Plaintiff's Funds

1 A There was practically all of that. There was--I
2 had a little bit. I bought the stove that's listed on
3 there, that Golden Flame stove. I bought that.

4 Most of it was my mother's because I kept a
5 little bit in savings so that we could have a little if we
6 needed a little for one thing or another. But like I said,
7 it was my--all of mine that bought the property. But it was
8 almost totally my mother's money that paid for those things.

9 1 Q When you--you say almost totally all of that
10 \$44,000, approximately; do you think \$40,000 of that came
11 from your mother? or \$35,000 from your mother?

12 A At least. Because when we totalled everything up
13 when we were building the home, we came out with more than
14 what that shows. We figured we had, and Mert agreed and had
15 said at the time and we all felt that there was
16 approximately \$65,000 altogether in the house. But
17 somewhere along the line there were just some checks that I
18 couldn't come up with and they were probably the checks that
19 my mother herself wrote out. And she has, over the last few
20 years, thrown away all of her stuff and when I tried to get
21 things from the bank, I--I would just not be able to get
22 copies. It showed statements of things that she paid out,
23 but it didn't say what they were for.

24 I didn't know what they were for.

25 2 Q Let me show you again EXHIBIT NO. 3 and ask if

1 you can identify it.

2 A Yes. This is our bank--our bank funds. My
3 husband has his banking in Interstate Bank. He has written
4 all of his checks out of there. I have never deposited
5 anything into that account for him. And we have one in
6 First Security checking. Well, actually there's two now,
7 First Security Bank. That has always been just my money and
8 Mert had never made a deposit into that checking account.

9 The Bank of America is my IRA, and part of those
10 IRA's were started before he and I were married. The
11 doctors I worked for started a Keogh account that was later
12 transferred into an IRA.

13 1 Q Pat, let me just interrupt you there. As you
14 look at that exhibit, is that the total amount of the funds,
15 so far as you know, that you have?

16 A Right now I brought the new statements, and since
17 these--now this was done, I think, in April and I do have
18 the new statements. I think they're approximately \$100. I
19 have them in my briefcase. The interest has come up on
20 those IRA's on the largest ones on them. There isn't too
21 much difference in it at all, because I think they're just 2
22 percent now on the interest.

23 2 Q Even though those figures may have come up a
24 little bit with the generation of some interest, so far as
25 you know, is that the total of the accounts that you have?

1 A Yes.

2 MR. FRISCHKNECHT: Your Honor, we'd ask that NO.
3 3 be received.

4 THE COURT: Mr. Lyman, what about EXHIBIT 4?

5 MR. LYMAN: I don't any objection to EXHIBIT 4.

6 THE COURT: All right. Go ahead.

7 MR. LYMAN: On EXHIBIT 3 I'm concerned that we
8 don't have the actual statements here. We don't have any
9 history. We have just got her guesses or approximations as
10 to what it is, so we need some kind of information for the
11 Court.

12 For what it's worth, it is all a list of
13 approximations here. She obviously doesn't have the
14 original documents here. I think we need some figure there.
15 So for what it's worth, I don't know that its credibility is
16 gonna stand very long. But we wouldn't object to it.

17 THE COURT: All right. Let's proceed on that
18 basis.

19 MR. FRISCHKNECHT: Q Pat, I'm going to
20 hand you a copy of that.

21 WITNESS: A Okay. Like I said, I do have
22 the new--

23 1 Q You have a more recent statement?

24 A A more recent statement in my briefcase there.

25 [INDICATED]

1 1 Q Without, Pat, referring to the exact amount of
2 what those accounts may be, I'll ask you to look at the
3 first one that's in the Interstate Bank--

4 A Um-hm.

5 2 Q --that's identified as Defendant's Funds?

6 A And that's the day that we listed. That's what
7 he told me he had in his checking account at that particular
8 day that we listed it.

9 3 Q Do you have or do you make any claim to that
10 account?

11 A No.

12 4 Q So far as you're concerned, he can have it, it's
13 his account?

14 A It's always been his account.

15 5 Q The second one is a First Security checking
16 account?

17 A Now that one, when I did this I was just getting
18 ready to get my Social Security for the first time, so I
19 left that amount, \$57.05, and I think that's exactly what's
20 in that one. I just left that amount in the account.

21 I opened me that a new account where I could have
22 my Social Security sent into my new account just in my name
23 only. So my Social Security payment each month goes into
24 that second First Security Bank account.

25 6 Q Is that \$57.05, was that your money?

1 A Yes.

2 1 Q Now the second one that you opened to deposit
3 your Social Security in, is that all your money?

4 A Yes. Mert does not deposit into those accounts.

5 2 Q And is that approximately still \$300?

6 A It varies. Now I get--

7 3 Q Is that the one you write on?

8 A That's the one I write all my checks currently
9 on, yes.

10 4 Q The 4th one listed, a Bank of America IRA, where
11 did those funds come from, Pat?

12 A Oh, let's see. That--I think those two--both of
13 those IRA's--one of them was started like I said, a Keogh
14 account. I was working for the doctors. But it just--it
15 switched over. When I quit, they switched it over to an IRA
16 for me and it started off as Lahoya Bank in Vista,
17 California, and I think it was First Security--First
18 National something bought them out. And then Bank of
19 America bought them out and that's how it ended up in the
20 Bank of America account.

21 5 Q Did that one start, Pat, when you began working
22 for the doctors in 1979?

23 A It didn't. It didn't start right then. I think
24 they started that one for me after I worked for them about a
25 year. And it was started--the Keogh account was started in

1 American Savings in Sandy.

2 1 Q Is that the second one--which one are you talking
3 about?

4 A Well, that's still one of those accounts. And
5 I'm not sure which one--which one of those IRA's were the
6 ones that was started first--

7 2 Q Well, you--

8 A --because I just, you know, I just have a \$2,000
9 IRA and then I keep adding to it. And as I was working and
10 I'm not sure which one started first on those.

11 3 Q With regard to the 4th one on the list that is
12 identified as the Bank of America IRA,--?

13 A Um-hm.

14 4 Q --did all of those funds come from your
15 employment?

16 A Yes.

17 5 Q Did Mr. Draper contribute anything to that fund?

18 A No.

19 6 Q The second IRA listed on the exhibit is with
20 First Security?

21 A Um-hm.

22 7 Q Did Mr. Draper contribute any of the amounts to
23 that fund?

24 A No.

25 8 Q Did that come from your employment? Or do you

1 recall?

2 A Yes.

3 1 Q The second to the last one is a savings account,
4 the exhibit in First Security.

5 A Um-hm.

6 2 Q Where did the funds come from?

7 A I made a withdrawal from--we had run our savings
8 down. The money that I had left when we originally purchased
9 the house we had gradually used up for different things. I
10 have no medical. There's been medical and different
11 expenses that I've had to pay out on, so I had gradually
12 used up all my money. So I took a withdrawal from one of
13 the IRA's and put into--excuse me--I had another IRA in
14 Downey Savings and that was \$3,600. And I closed that out
15 and I put this \$1,200 of that I put in Zions Savings Bank
16 and the rest I put in that Security--my First Security Bank
17 in the savings. And that's just for savings accounts for
18 emergencies, because I do have to pay half property taxes
19 and property insurance and I have to have some money in the
20 savings account.

21 3 Q So both the First Security savings and the Zions
22 Bank savings came from an IRA withdrawal?

23 A Yes.

24 4 Q That was all your funds?

25 A Yes.

1 how much more you sold it for than you bought it for was how
2 much? About \$20,000?

3 A It would--no. It wasn't \$20,000.

4 1 Q What would it be?

5 A It would be probably about--oh, I'd have to have
6 the papers out. I didn't look enough to see the exact
7 amount. I think it ran around \$15,000 more than what I paid
8 for it.

9 2 Q All right. And did you sell it for \$68,000?

10 A I think it was \$69,000. I think it was 68 or 69.

11 3 Q And you believe there was \$15,000 in
12 appreciation.

13 I'm going to change directions again.

14 Okay. Now I'd like to ask you about the
15 information on EXHIBIT C--or EXHIBIT 3, which is the IRA's?

16 A Um-hm.

17 4 Q Your testimony was that you went to work in
18 January 1979 for the doctors and one year later they started
19 a Keogh account with you, which would be January 1980; is
20 that correct so far?

21 A Approximately. I can't--I don't have the exact
22 amounts. I mean I didn't bring all the papers or look up
23 all the papers of when they started it.

24 5 Q Do you remember how much in January of 1980 they
25 started to withdraw from your check? or how much you

1 contributed to that on a monthly basis?

2 A They gave--instead of \$100 raise, they put \$100
3 in the Keogh.

4 1 Q Okay.

5 And you got married to my client in May of 1980;
6 is that right?

7 A Yes.

8 2 Q You stated, with regard to the last two items on
9 EXHIBIT 3, that--that they were funded from a withdrawal you
10 made from a Downey--some place called Downey, in California;
11 is that right?

12 A Ah, one of--oh, one of my IRA's that I opened. I
13 just have a tendency when I open a different bank account,
14 sometimes I don't keep them all in one bank. And I had one
15 IRA that I had put in. I think I started \$2,000 in Downey
16 Savings & Loan, and that when I cashed it out, because it
17 was--I had opened it when we got good interest. When I
18 cashed it out, it was \$3,600 and that was the money that I
19 put in that savings in First Security Bank and in Zions Bank
20 that's on that statement.

21 3 Q So--

22 A And I have had to use a little bit there.

23 4 Q On EXHIBIT 3 these last two items were funded
24 from your Downey Savings IRA?

25 A There would have been--I think there was