

1987

Mary Carolyn Sill Fitzgerald v. Perry Glenn Fitzgerald : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS

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UTAH COURT OF APPEALS

MARY CAROLYN SILL FITZGERALD, : BRIEF OF APPELLANT
Plaintiff/Respondent, : (Priority 14 b.)
vs. : No. 87-0439-CA
PERRY GLEN FITZGERALD, :
Defendant/Appellant. :

Appeal from the Third Judicial District Court of
Salt Lake County, Honorable James S. Sawaya, Judge.

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I

LIST OF ALL PARTIES

The caption of the case on appeal contains the names of all the parties of record. As set forth in the brief hereafter, however, the appellant contends that the real respondent is not the respondent of record but the assignee of said respondent, to wit one Keith L. Gurr.

II

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IV

JURISDICTION OF COURT

Sec. 78-2a-3(h) U.C.A. 1953 confers jurisdiction on this Court to hear this appeal since this is a domestic relations case.

V

ISSUES PRESENTED FOR REVIEW

(1) Whether the lower court erred in not amending Exhibit "A" to the property settlement referred to in their divorce decree to carry out the intent of the parties. (Reformation.)

(2) Whether the lower court erred in not determining that the parties intended that the divorce decree leave open the issue of ownership of the subject property to be determined at a later date and in then not determining that under the circumstances it should be awarded now to defendant. (Distribution of property not disposed of by divorce decree.)

(3) Whether the lower court erred in not amending the decree due to changed circumstances. (Changed circumstances.)

(4) Whether the lower court erred in awarding attorneys fees to plaintiff inasmuch as the real party in interest as to such fees was Keith L. Gurr rather than the plaintiff. (Attorneys fees.)

VI

DETERMINATIVE EXPRESS LAW

No constitutional provisions, statutes, ordinances, rules or regulations is determinative of the issues in this case.

VII

STATEMENT OF CASE

Nature of Case

The proceedings which are the subject matter of this appeal consist of the property settlement involved in the 1982 divorce proceeding between the parties, a money judgment taken thereafter in the names of both parties which was based on certain real property concerning which the divorce decree is silent as to its ownership and a petition by appellant (hereinafter "Perry") to amend the divorce decree referred to above to make certain the award to him of the property upon which the judgment was based.

Disposition in the Court Below

The trial court denied Perry's motions to amend the divorce decree of the parties by amending Exhibit "A" to their Property Settlement and Child Custody Agreement for one or more of the following reasons: (1) carry out the intention of the parties, (2) because the decree was deliberately intended to leave open the question of who should be awarded the property in question pending later developments and the later developments show that in

fairness Perry should have that property, (3) a material change of circumstances, to wit the subsequent assignment to a third party, one Keith L. Gurr (hereinafter "Gurr") of the fruits of that property for 0% of the value of the judgment.

The lower court did not expressly address the latter two grounds urged as a basis for the relief requested, but by implication denied Perry's requested amendment on those grounds [given numbers (2) and (3) above].

The trial court also awarded Carolyn \$6,765.00 in attorney's fees.

Facts

1. FIRST ISSUE (REFORMATION)

Carolyn filed suit for divorce against Perry on the 16th day of September, 1981 (R. 6).

At the time of the divorce suit those parties were party defendants in a law suit in Utah County (No. 50224) filed by one Boyd Corbett and Keith Gurr and they filed a counterclaim against those defendants and were awarded certain real property known as The Grayson Apartments before the divorce decree was entered Corbett v. Fitzgerald, 709 P2d 384 (Utah, 1985).

Prior to the divorce suit Carolyn's father, Sterling W. Sill (hereinafter "Sill") arranged through his attorney, Allen M. Swan (hereinafter "Swan") to have

several properties owned by the Fitzgeralds transferred into the Sterling Company, a family corporation, which later deeded those properties to a trust set up for the benefit of the Fitzgeralds' nine minor children (Deposition of Allen M. Swan, R. 141, P. 3, 4). The final trust document was dated August 6, 1982, two days before the divorce decree was entered (Swan, P. 5). The family residence of the Fitzgeralds in Draper had been foreclosed upon and purchased by Carolyn's brother, David Sill, who later deeded it to Carolyn. Before the divorce decree was entered it was agreed that Carolyn was to receive 25 acres in the Cedar Valley area of Utah County, which was then deeded to her and a house in Lehi, Utah. The Fitzgeralds lost the Lehi house during the divorce proceedings, so in lieu thereof Perry's stepfather, Eric Bennion (hereinafter "Eric"), deeded one-third of an acre lot adjacent to the family home. It was agreed that Perry was to receive all the remaining real property and that was itemized on an Exhibit "A".

The agreements as to land referred to above were incorporated, together with other matters, in various drafts of the proposed Property Settlement and Child Custody Agreement referred to above (Exhibits 5-P, 6-P, 7-P, 18-P, 19-P). Carolyn's attorney, Glen Lee Rudd (hereinafter "Rudd") prepared three drafts and on each of them the real property, which is the subject of this

lawsuit, to wit "2140 acres purchased from Corbett and Gurr or Leland Fitzgerald" hereinafter "2140 acres") was the first item listed as Exhibit "A". The final draft was sent to Perry's counsel by letter dated May 4, 1982 (Exhibit 9-P). It was approved with certain minor changes on the second page (which dealt with visitation rights with the children) and mailed to Rudd. Perry's signature was notarized by Rudd on June 6, 1982 and Carolyn signed it two days later (the same date she received the deed from Eric referred to above) (Exhibit 18-P).

On May 11, 1982 Rudd requested by letter that the 2140 acres referred to above be deeded to the Sterling Company for the benefit of the children (Exhibit 10-P) but this request was not carried out (Swan, R. 141, P. 7; Appendix A, Par. 6, Rudd, P. 32, 33).

During discovery it was also established that Carolyn herself was not aware of the fact that Exhibit "A" in the court file did not include the 2140 acre property. She testified on that point (this after Gurr started urging her to sell out to him whatever she owned) as follows:

The Witness: Mr. Benneson (sic) was explaining, I suppose, Perry's position in that at the time of the divorce that the Corbett and Gurr property was on Exhibit "A". And he showed me a rough draft that he had made himself, Mr. Benneson (sic), showing that it was on there.

And at that time, I said to him, "I would like it in writing, the final copy, showing that it's still there."

And he said at that time that "Perry was going to, or had gone down to the City and County Building to get a copy of the Divorce Decree to see if it was there."

And I explained my position as far as -- as far as the phone call from my father and his attorney and that I would need more proof for what actually happened with that piece of property before I could make a decision.
(Carolyn, R. 144, P. 25)

To be fair it should be pointed out that in the deposition just quoted she later testified that "we (Rudd and Carolyn) decided that whereas a decision has been made that I would like my share of that judgment" (R. 144, P. 72). However, she also testified that said decision was implemented by Rudd's letter of May 11, 1982 and that documents were executed to carry it out (R. 144, P. 73). Swan testified positively it was not done. He testified as follows on page 7 of R. 141:

Q. In connection with that, did you read the letter that he wrote to me, which I think is Exhibit "E"--I'll show you a copy of that dated May 11, 1982?

A. Yes, I read it.

Q. Do you recall a reference to the trust that we've been talking about in that letter?

A. I remember reading this. And I heard Mr. Rudd make mention of it in his deposition.

Q. As you recall, in his deposition he said he wasn't sure whether there ever had been a transfer to the trust.

A. Yes. I'm sure there was not.

At various times after it was discovered in November, 1985 that the Exhibit "A" in the court file was different from all the prior Exhibit "A"s, Carolyn told Perry, Eric and one Joseph Sanchez that the amount of her claim had not changed (R. 136, P. 16, P. 32, 33, P. 44, 45).

After the Utah Supreme Court affirmed the decision of the Fitzgeralds against Corbett and Gurr on November 1, 1985, Carolyn and her attorney met Perry and his attorney (Eric Bennion and Joseph Sanchez were there too and the former fixed the date as being November 25, 1985 -- R. 136, P. 32-34) at the Draper Bank and Trust Company and at that time she expected that bank to pay its letter of credit which guaranteed payment of the judgment up to \$90,000.00 (Exhibit 21-P) and from that she would receive the support money due her of \$11,000.00 plus \$3,500.00 and she then asked only \$3,500.00 more (R. 136, P. 47, 48 and 76, 77).

2. SECOND ISSUE (DISTRIBUTION OF PROPERTY NOT
DISPOSED OF BY DIVORCE DECREE)

Carolyn and Rudd intended that the divorce decree would not determine ownership of the 2,140 acres in dispute but leave the ownership for determination at a later date (Carolyn, R. 144, P. 20, 21).

At the time of the divorce the value of the parties' assets was much less than their debts. Rudd testified on this subject (R. 136, P. 3 and Appendix A. Par. 6, P. 35).

Perry's income since the divorce had been so minimal he had not even had to file income tax returns prior to the trial of this matter (R. 136, P. 24, 25). He then owed some \$4,900.00 in past due child support (Exhibit 1-D, R. 136, P. 24) (this in addition to the \$11,000.00 in support and alimony and \$2,886.22 attorney's fees paid through Gurr) and over \$50,000.00 in other debts (Exhibit 1-D).

3. THIRD ISSUE (CHANGED CIRCUMSTANCES)

The change of circumstances that occurred between August 8, 1982 and the petition to modify were primarily the purchase on December 19, 1985 by Gurr of "whatever interest, if any" Carolyn then had in the judgment of April 19, 1983 affirmed by the Supreme Court on November 1, 1985 (Gurr, R. 139, Exhibit 3). That purchase was for a price of 0% on the dollar according to Gurr's attorney's calculation on page 10 of his Memorandum dated April 8, 1986 (Appendix B) computed as follows:

(1) Carolyn's interest in judgment	\$38,351.35
(2) Carolyn's child support and attorney's fees	13,720.42
(3) Carolyn's real property claim	9,616.56

- (4) Carolyn's payment for interests
(1) through (3) above \$21,500.00
(her deposition, page 19)

Total payment to Carolyn 21,500.00

Payment for (2) above \$13,720.42

Payment for (3) above \$9,616.56

\$23,336.98

"Profit" Gurr made by buying (2) and
(3) with (1) thrown in "for free" \$1,836.98

In order, however, to compute the sum, if any,
Gurr paid for Carolyn's judgment interest, one would need
to back out the interest between when she was paid on
December 20, 1985 and the date of March 6, 1986 used in
Gurr's computation set forth above.

As of December 20, 1985:

- (1) Carolyn's interest in judgment
(\$38,351.25 (Gurr's figure above)
less 32 days (not 767 because Gurr's
interest on judgment computed only
to January 21, 1986) at \$32.93 per
day (\$28,322.88 divided by 860,
number of days from 4-19-83 to
1-21-86 which comes to \$1,053.76 \$37,297.59
- (2) Carolyn's child support and
attorney's fees (\$13,720.42, less
\$4.38 per day for 15 days from
December 5 to December 20, which
amounts to \$65.70 \$13,654.72
- (3) Carolyn's real property claim
(\$9,616.567 - see \$1,000.00 error on
Gurr's total of \$8,616.56 - less
76 days from December 20 to
March 6, 1986 at \$1.91 per day,
which totals \$145.16) \$9,471.40
- (4) Carolyn's payment for interests
of (1) through (3) above \$21,500.00

Payment for (2) above \$13,654.72

Payment for (3) above \$ 9,471.40

Total for interest other than judgment \$23,126.12

Paid for "judgment interest"

Profit Gurr made by buying (2) and
(3) with (1) thrown in "for free" \$1,626.12

4. FOURTH ISSUE (ATTORNEY'S FEES)

Carolyn was approached by Gurr through his attorney within seven days after the judgment against him was affirmed by the Utah Supreme Court on November 1, 1985 (Corbett v. Fitzgerald, 709 P2d 384, Utah, 1985) to sell whatever interest, if any," she had in the judgment against him (Gurr, R. 139, P. 15, Exhibit 3; Swan, R. 141, P. 8; Appendix A, Par. 6, Rudd, P. 16). Rudd, her attorney, made sure that she would not be liable to Gurr for any express or implied warranties regarding any interest transferred to Gurr (Appendix A, Par. 6, Rudd, P. 16). She had been paid in full the \$21,500.00 agreed upon (Carolyn, R. 144, P. 19) which purchased a claim against Perry of \$13,720.42 for child support and attorney's fees and a property claim including interest of \$9,616.56 (Appendix B). Carolyn had no financial interest at all in these proceedings including the payment of any attorney's fees (Gurr, R. 139, P. 16).

VIII

SUMMARY OF ARGUMENTS

1. AS TO FIRST ISSUE (REFORMATION)

The parties intended that Perry should receive the subject property ("2140 acres purchased from Corbett and Gurr or Leland Fitzgerald") because (1) the decree states "7. REAL PROPERTY. The real property acquired by the parties during their marriage should be distributed to the parties as follows: a. Plaintiff - none, b. Defendant - See Exhibit 'A'." (2) Carolyn testified at trial that the parties had agreed that all the Cedar Valley property (which included the 2140 acres in question) should go to Perry except 25 acres that she received at the time of the divorce (R. 136, P. 47). (3) This property was not deeded to the Sterling company as requested by Rudd's letter of May 11, 1982. (4) Carolyn went to the Draper State Bank on November 25, 1985 with the intention and expectation that she would receive \$11,000.00 for back child support and alimony of \$3,500.00 for the Lehi property she didn't receive as intended by the parties (due to a title defect). (5) She told Perry, Eric and Joseph Sanchez after November 1, 1985 and prior to November 25, 1985, that she was not changing her demand due to learning that the 2140 acres were not listed in the Exhibit "A" filed with the divorce decree. (6) She told Perry after November 25, 1985 and prior to December 19, 1985, he'd better get her some

money soon as she was about to "cave in" to pressure at a time just before Christmas when she was in financial distress.

2. AS TO THE SECOND ISSUE (DISTRIBUTION OF PROPERTY NOT DISPOSED OF IN THE DIVORCE DECREE

Since the divorce decree says Carolyn is to receive none of the real property and since the subject 2140 acres (from which the judgment in question is the fruit thereof) is not listed on the Exhibit "A" attached to the divorce decree which listed the real property Perry was to receive, it logically follows that this 2140 acres was not distributed by the divorce decree and thus remained as marital property that should be distributed by clarifying or amending the decree and a fair distribution would award the property to Perry in view of the marital obligations Perry was ordered to pay (in addition to \$1,000.00 per month for alimony and child support) being "far in excess" of the value of their assets.

3. AS TO THE THIRD ISSUE (CHANGE OF CIRCUMSTANCES)

Due to changed circumstances here (sale of Carolyn's interest, if any, for \$21,500.00 -- which was less than the amount of her claim for unpaid child support, alimony and loss of property) Perry stands to lose \$38,351.35 plus interest if the modification is not made which the trial court has the power to grant and in equity

should do to avoid Gurr from obtaining a "windfall gain" as a result of economic distress Carolyn was under just before Christmas of 1985 when the "sale" was made.

4. AS TO THE FOURTH ISSUE (ATTORNEY'S FEES)

The legal services performed by Carolyn's attorney of record in these proceedings (not her attorney in the divorce case) were 100% for the benefit of Gurr (this same attorney represented Gurr in the "sale" of the judgment in question) and 0% for the benefit of Carolyn. The real party in interest, to wit, Gurr, not Carolyn or Perry should pay for those services. Gurr and Carolyn so agreed prior to the December 19, 1985 assignment of any interest Carolyn had in the subject judgment.

IX. ARGUMENT

1. REFORMATION

There are abundant precedents that the remedy of reformation is appropriate to reform any contract so it is consistent with the intention and agreement of the parties. See generally 66 Am. Jur. 2d 556, "Reformation of Instruments" Sec. 29 et seq.

Several recent Utah Supreme Court cases have dealt with this subject. In Hattinger v. Jensen, 684 P2d 1271 (Utah, 1984) the Court granted reformation of a deed even after the property had been sold where the purchaser had at least constructive notice of the error in the deed. In Briggs v. Liddell, 669 P2d 770 (Utah, 1985) reformation was

denied because the mistake, if any, was only unilateral. Absent fraud both parties must have intended a result different than that embodied in the instrument in question.

In the instant case Perry gave direct testimony that the Exhibit "A" to the divorce decree was contrary to his intent (R. 136, P. 5). Carolyn testified to the same effect without direct reference to Exhibit "A". At page 47 of the transcript of the trial (R. 136) she testified as follows:

Q. Mrs. Knepper, at the time that you were negotiating for settling your property rights wasn't it true that it was agreed that all the Cedar Valley property should go to Mr. Fitzgerald except twenty-five acres which you received?

A. Yes.

Q. When did you receive the twenty-five acres?

A. At the time of the divorce.

Since the subject 2140 acres are in Cedar Valley (R. 144, P. 43) it is clear that Exhibit "A" did not represent Carolyn's intention any more than it did Perry's. Thus the mistake was mutual and equity requires reformation of Exhibit "A".

The foregoing mistake as to Carolyn is further corroborated by additional clear and convincing evidence which consists of the following circumstantial evidence: (1) Rudd, Carolyn's attorney, had the 2140 acres set forth

on every copy of the Exhibit "A" transmitted to Perry (Exhibits P-5, P-6, P-7, P-19). (2) The fact that this property was not deeded to Sterling company as requested by Rudd's letter of May 11, 1982 (Exhibit P-10). (3) Carolyn went to the Draper State Bank on November 25, 1985, which was after the time it was discovered that the 2140 acres in question were not on the Exhibit "A" in the divorce court file, with the intention and expectation she would receive \$11,000.00 for back child support and alimony and \$3,500.00 in lieu of the Lehi property she did not receive (due to a title defect) from the letter of credit for \$90,000.00 that bank gave to Gurr and his partner in lieu of a supersedeas bond while he appealed the judgment in question to the Utah Supreme Court. (4) Carolyn told Perry, Eric Bennion and Joseph Sanchez after November 1, 1985 and prior to November 25, 1985, that she was not changing her demand due to learning that the 2140 acres were not listed on the Court's Exhibit "A". (5) Carolyn told Perry that he'd better give her some money soon as she was about to "cave in" to pressures at a time just before Christmas of 1985 when she was in financial distress (R. 136, P. 44, 45).

2. DISTRIBUTION OF PROPERTY NOT DISPOSED OF BY THE DIVORCE DECREE

Was the subject property distributed in the divorce decree and if so to whom? Since the decree itself expressly stated that Carolyn was to receive "none" of the

real property, the subject property was awarded to Perry if it was awarded to anyone.

The problem is it was not listed on the Exhibit "A" to the divorce decree that presumably listed all property awarded to Perry.

If it was not awarded to either party, then it must be distributed now.

Sec. 30-3-5(3) U.C.A. 1953 provides as follows:

The court has continuing jurisdiction to make subsequent changes or new orders for the support and maintenance of the parties, the custody of the children and their support, maintenance, health, and dental care, or the distribution of the property as is reasonable and necessary.

Since the real property from which the judgment in question was derived was not in fact distributed by the divorce decree, then the property produced by it (the judgment entered in Utah County in case No. 50224) necessarily must be distributed at this time in order that the judgment might be satisfied by the proper party. The 1882 case of Whitmore v. Harden, 3 U. 121, 1 P. 465, held that the right of the Court to modify any order for distribution of property does not necessarily apply to the identical property held at the time of the divorce but generally as to any property held by the party against whom the modification is sought.

The parties at the time of their divorce owed far more in debts than they had assets (Appendix A, Par. 6, Rudd, P. 35). Even so, all the real property assets not involved in litigation went to Carolyn or her children (Carolyn, R. 144, P. 20 and 21; Swan, R. 141, P. 5; Exhibit 10-P). The situation now in this regard is essentially the same. Faced with minimal income which is irregular, the debts from the marriage hang over Perry's head (Exhibit 1-D). It is clearly equitable that this asset be distributed to him to assist in the liquidation of those debts including a substantial amount for unpaid support money due Carolyn (\$4,900.00 as of the trial date) (Exhibit 1-D). Furthermore, to award that property or its replacement to her is not to benefit her but Gurr, who paid absolutely nothing for it. See pages of this Brief supra.

3. CHANGED CIRCUMSTANCES

Sec. 30-3-5-(3) U.C.A. 1953 quoted above expressly applies to property awards as well as other aspects of divorce such as alimony, support money and custody.

In the case of Foulger v. Foulger, 626 P2d 412 (Utah, 1981) the Court pointed out that such modifications should be done "only with great reluctance and based on compelling reasons."

Another applicable case is that of Becker v. Becker, 694 P2d 608 (Utah, 1984). There the Court emphasized the principle that the change of circumstances

must relate to that aspect of the decree that is being modified (there the custodial aspects).

Perry's case clearly meets both the compelling reasons test of Foulger and the relationship of changed circumstances to the aspect to be modified test of Becker.

It is hard to imagine a more drastic change of circumstances than for one to possess a half interest in a piece of property or a judgment that is worth several thousand dollars and then to lose it for nothing in return.

Is such modification doing an injustice to Gurr? Certainly it would deprive him of an enormous profit from his December 19, 1985 purchase which he could apply to the judgment against him if Carolyn had the interest he claims for her. But would that be unfair? Did he not make his "investment" knowing the risks? Surely his attorney must have told him of the risks recognized by the other attorneys involved. Rudd said "I didn't believe anybody would purchase her interests" and "too good to be true that anybody would actually come along and pay money for that to the tune of what I thought might be of value to her" (Appendix A, Par. 6, Rudd, P. 15-16). Swan said "and Lee and I pretty well agreed there would have to be a further hearing, in effect a supplemental hearing to the divorce" (Swan, R. 141, P. 13). These proceedings are the hearing referred to by Swan and the statute set forth above makes it clear that any such purchase would be subject to the

continuing jurisdiction of the Court. Certainly Gurr was no bona fide purchaser without notice of Perry's claim. No one could have been a bona fide purchaser of the judgment because neither the subject property nor the judgment in question were awarded to Carolyn in the divorce decree (R. 34-38).

The equities between a modification that will benefit one whose work and toil created an asset he preserved through two district court trials and an appeal to the Utah Supreme Court and the denial of that modification for someone who literally bought "something for nothing" seems too self evident to require any further argument.

4. ATTORNEY'S FEES

The rationale for awarding attorney's fees in divorce cases is set forth in Sec. 589 of "Divorce and Separation" in 24 Am. Jur. 2d 594 as follows:

"Suit money," which includes counsel fees, may be defined as the money necessary to enable a spouse to carry on or defend a matrimonial action. The rules that govern the allowance of suit money, including attorney fees, are ordinarily the same as those that govern the allowance of temporary alimony. It has been said that in suits for divorce it is usual to award, in addition to what a spouse may be entitled to as costs, a sum of money sufficient to prosecute or defend the suit in an efficient manner to a final hearing, and that such allowances are absolutely essential to the proper assertion of marital rights which a spouse might be unable to establish if

the other spouse were not required to assist in this regard. The right to suit money for the purpose of enabling a spouse to protect rights exists even though the sum awarded ultimately belongs to an attorney.

A limitation thereon is set forth in the following section as follows at page 599:

If the proceeding wherein the services were rendered does not involve marital rights, the dependent spouse is not entitled to an allowance to compensate the attorney.

In this instance we have exactly such a situation. Carolyn's marital rights, if any, in the 2140 acres upon which the money judgment against Gurr came into existence were established by the divorce decree entered in August, 1982, not by the action tried on November 5, 1986.

The legal services performed by James Brown, the attorney who represented Gurr in the purchase of Carolyn's interest, if any, in the judgment against Gurr in the action in question benefited only Gurr and not Carolyn at all.

It was known at the outset, that is at the time of the assignment of any rights in the subject judgment which occurred on December 18, 1985, that fees for legal services would be borne by Gurr not Carolyn. This was so obviously the lawyer and sellers intention that it was not even discussed. As to that understanding the deposition of Gurr at page 16 (R. 139) reads as follows:

Q. (By Mr. Hansen) All right. Did she have any obligation to pay any fees in connection with claims that were being assigned to you?

A. I don't know what her deal was with her attorney, and she didn't have any agreement with me on anything that she would be held for payment. It wasn't even discussed.

Q. But let's put it this way. You didn't expect her, did you, to pay any legal expense that you would have in pursuing a claim she was assigning to you?

A. No. I'll handle these here expenses on that document that we bought her deal (indicating).

Q. And that includes attorney's fees?

A. It should do.

Even when the award of attorney's fees are proper the allowance of them is discretionary. See Sec. 591 "Discretion of Court" 24 Am. Jur. 2d 596 which reads inter alia as follows:

Whether an allowance of suit money and counsel fees shall be made in the case at bar rests in the judicial discretion of the court, to be exercised in view of the conditions and circumstances of each case. Abuse of discretion is necessarily subject to review;

* * *

While the allowance of suit money or attorney fees is within the discretion of the court, the power should not be exercised unless a spouse establishes a prima facie right thereto (Citation omitted).

In the instant case an award of any amount was not proper since no benefit to Carolyn was involved. Even if some marital right were involved to some extent the award was an abuse of discretion under all the circumstances of this case.

X. CONCLUSION

The divorce decree should be modified by amending Exhibit "A" thereof to conform to all the copies thereof that Perry ever saw and the decree should expressly award all interest in the judgment of April 19, 1983 to Perry on the basis of either reformation, distribution of undistributed property or on the basis of changed circumstances (sale of December 19, 1985) to do equity under all the circumstances. Also the award of \$6,750.00 attorney's fees should be vacated as those fees should be paid by Gurr, the sole beneficiary thereof.

Respectfully submitted this 12th day of January, 1989.

Robert B. Hansen
Attorney for Appellant

MAILING CERTIFICATE

I certify that I mailed two true and correct copies of the foregoing Appellant's Brief to Attorney for Respondent addressed to James R. Brown, Attorney at Law, 370 East South Temple, Suite 401, Salt Lake City, Utah 84111, this 12th day of January, 1989.

Robert B. Hansen

APPENDIX A

STATE OF UTAH)
)ss.
COUNTY OF SALT LAKE)

Robert B. Hansen, being first duly sworn upon his oath,
deposes and says:

1. He is counsel for defendant in the case of Fitzgerald v. Fitzgerald, D81-3721.

2. The deposition of Lee Rudd who represented the plaintiff in said case at the time of the parties divorce in 1982 and until the present proceeding began was deposed in said case on the 5th day of May, 1986.

3. In the instant proceedings counsel of the parties stipulated that the deposition transcript of the said Lee Rudd, though unsigned, should be part of the evidence in this case subject to objection as to relevancy (R. 136, P. 3).

4. The preparation of the record in this case was delayed when said deposition transcript and others could not be located (R. 145).

5. After all due diligence the transcript of Lee Rudd's deposition has not been located, hence this affidavit.

6. The following are exact quotations of the testimony of the said Lee Rudd taken from affiant's copy of said transcript:

Page 15, line 8 through Page 16, line 3:

Q. Didn't you make a notation somewhere in your records as to what the opening offer was?

A. I could have. There were--initially I would have heard from Carolyn; and whether I wrote it down--to be honest with you, I guess I thought that it was, initially was--I didn't believe anybody would purchase her interests.

Q. Why is that?

A. I guess I thought it was too good a thing to be true that anybody would actually come along and pay money for that to the tune of what I thought might be of value to her.

Q. Was the amount increased as a result of your negotiations?

A. I don't believe that amount was increased. I wish I could remember even what it was. I think that it was more of talking what Carolyn's warranties or protections, interests of what she was conveying. That was the main discussions that we had. And, as I remember, that was the main redrafting of the document. It wasn't, as I recall, from Day One that she said, "Well, I won't sell for this price," or "I've got to have more money." That was never the obstacles.

Page 16, lines 4-12:

Q. The final agreement makes it very clear that she didn't warrant that she had any interest?

A. That was what I was attempting to do in the thing. I think there are some warranties, although it says not in some ways. But I think there were some inherent, and--but--the main thing, we didn't understand a great deal of what the judgment was, and it had never really been to the Supreme Court. I think I read the order, but it was in the process. We didn't know what was out there.

Page 32, line 12 through Page 33, line 1:

Q. Now with respect to your Exhibit "E" to that affidavit, your letter dated May 11 to me where you propose that Carolyn execute an assignment and quitclaim of any interests she has in the property or the results of your suit to the Sterling company, was that ever done?

A. Which one, now? Are you in the letter?

Q. Second paragraph.

A. Which part?

Q. Right in the middle. "I would propose."

(Witness examines.)

Q. It's the third sentence.

A. I don't recall if that was ever actually done. There was an assignment and quitclaim deeds to the Sterling company and to the trust. As to whether one was for that particular one, I'm not sure.

Page 35, lines 10-16:

Q. In her deposition I represent to you that Carolyn's recollection was that the liabilities exceeded the assets. Is that your recollection also?

A. I suppose that that would have a great deal of bearing on what value you put on the assets, but it would be my testimony that the liabilities far exceeded the assets, yes.

7. Attached hereto is a certified copy of the order which consolidated the case which is the subject matter of this appeal with Case No. C86-551. This is to tie in with the record cited on page 10 of this brief.

Dated this 11th day of January, 1989.

Robert B. Hansen

Subscribed and sworn to before me this _____ day of January, 1989.

Notary Public
Residing at Salt Lake City, Utah

My Commission Expires:

ROBERT B. HANSEN A-1344
Attorney for Plaintiff
320 South 500 East
Salt Lake City, Utah 84102
322-5804

APR 11 1986

H. David Hinckley, Clerk, Salt Lake County
[Signature]
County Clerk

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY
STATE OF UTAH

PERRY G. FITZGERALD,	:	
	:	
Plaintiff,	:	STIPULATION FOR AND ORDER
	:	
vs.	:	OF CONSOLIDATION
	:	
KEITH L. GURR and DRAPER	:	D81-3721 with this case
BANK & TRUST COMPANY	:	<u>C86-551</u>
	:	
Defendant	:	Judge: James Sawaya

STIPULATION

Comes now the parties hereto through their undersigned counsel and stipulate and agree that the order set forth below should be entered pursuant to Rule 42, URCP because of the questions of law and fact that are common to both actions.

Dated this 3rd day of April, 1986.

[Signature]
ROBERT B. HANSEN
Attorney for Plaintiff

[Signature]
JAMES R. BROWN,
Attorney for above defendants and for
Carolyn Knepper, plaintiff in D81-3721.

O R D E R

Upon reading the above stipulation and good cause appearing
therefore

IT IS ORDERED that this case and the case of D81-3721 be

consolidated for the purpose of trying the issues now pending in these two cases.

Dated this 10 day of April, 1986.

BY THE COURT

J. L. Sowers
J U D G E

ATTEST
H. DIXON HINDLEY
Clerk

By [Signature]
Deputy Clerk

CERTIFY THAT THIS IS A TRUE COPY OF AN
ORIGINAL DOCUMENT ON FILE IN THE THIRD
DISTRICT COURT SALT LAKE COUNTY STATE OF
UTAH

DATE January 11, 1989
My Bastian
CLERK

Attorneys for Defendant.
370 East South Temple, Suite 400
Salt Lake City, Utah 84111
Telephone: (801) 532-7700

DEC 8 4 06 PM '86
H. BRUCE HINCHLEY CLERK
JUDICIAL DISTRICT
Earlene Matheson
DEPUTY CLERK

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

PERRY G. FITZGERALD,)	
)	
Plaintiff,)	
)	
vs.)	
)	
KEITH L. GURR and DRAPER)	
BANK & TRUST COMPANY,)	
)	
Defendant.)	MEMORANDUM IN SUPPORT
)	OF GURR'S MOTION FOR
)	PARTIAL SUMMARY JUDGMENT

KEITH L. GURR,)	
)	
Plaintiff/)	
Counterclaimant,)	
)	
vs.)	
)	
PERRY G. FITZGERALD,)	Civil No. C 86-551
ROBERT B. HANSEN, and)	Judge James S. Sawaya
SALT LAKE COUNTY SHERIFF,)	
)	
Defendants.)	

COMES NOW Defendant Gurr by and through counsel of record, James R. Brown, Esq. of Jardine, Linebaugh, Brown & Dunn and submits the following Memorandum in Support of his Motion for Partial Summary Judgment.

1. On May 4, 1982, Perry Fitzgerald and Carolyn Fitzgerald were awarded a Judgment against Gurr and Corbett in the Utah County Case No. 50224, ordering Corbett and Gurr to return an Apartment Building.

2. Subsequently it was determined that the Apartment Complex could not be returned and a money judgment was rendered in favor of Perry and Carolyn Fitzgerald on April 19, 1983.

3. Corbett and Gurr filed an Appeal on the Judgment in 50224 which Appeal was decided on November 1, 1985, in favor of Perry and Carolyn Fitzgerald.

4. Gurr purchased the interest of Carolyn Fitzgerald (now Carolyn Knepper) on December 19, 1985, of her one-half of the Judgment in 50224, some past due child support due from Perry to Carolyn in the amount of \$10,440.00, attorney fees in the amount of \$2,886.22 and a claim of \$7,000 arising out of the property settlement of the divorce.

5. Gurr caused to be tendered to Plaintiff and/or Plaintiff's counsel the following:

- A. All attorney fees of \$36,598.00;
- B. Satisfaction of the past due child support Judgment and attorney fees, and real property claim which totalled \$23,077.95;
- C. The payment of \$15,135.23 to Perry Fitzgerald;
- D. And coupled with the interest previously owned by Carolyn Knepper, the entire judgment in Case No. 50224.

5. Subsequent to the Affirmance, Defendant Gurr tendered on three occasions full satisfaction of the Judgment:

- A. January 17, 1986 in person to B. Hansen;
- B. January 21, 1986 hand delivery to B. Hansen;
- C. January 21, 1986 hand delivery to B. Hansen at Sheriff's Sale.

7. On 9-16-81 Carolyn Knepper filed for a Divorce against Perry Fitzgerald under Case No. D81-3721 in Salt Lake County.

8. That the parties had acquired a number of parcels of real property during the term of the marriage.

9. Prior to the Divorce action, Robert B. Hansen represented both Perry and Carolyn Fitzgerald in the pending Utah County Case No. 50224.

10. Negotiations were commenced to effectuate a settlement between the parties and to this end Exhibit "A" attached hereto is a proposed Settlement Agreement which was drafted in February, 1981.

11. On May 4, 1982, Judge Bullock rendered his decision in Case No. 50224, a copy of which is hereto attached as Exhibit "B".

12. On May 5, 1982, Robert B. Hansen called Lee Rudd who was counsel for Carolyn Knepper and advised him of Judge Bullock's ruling.

B. Hansen who was representing Perry Fitzgerald in the Divorce matter asserting that Carolyn wanted an interest in the Corbett-Gurr property and/or judgment, a copy of said letter is attached hereto as Exhibit "C".

14. In response thereto, Robert B. Hansen wrote a letter to Mr. Rudd, a copy of which is hereto attached as Exhibit "D", wherein the Corbett-Gurr property is removed from the Settlement Agreement as per Mr. Hansen's request.

15. On June 8, 1982, the Settlement Agreement is executed by Perry Fitzgerald and Carolyn Fitzgerald which Agreement specifically changes the Awarding of the "Corbett-Gurr" property to Perry. (Exhibit "E").

16. On August 4, 1982, after reviewing the proposed Findings of Fact and Decree, Mr. Hansen executed and delivered to Mr. Rudd a Consent to Default Judgment and Waiver, Exhibit "F".

17. On July 2, 1983, and again on August 6, 1983, Mr. Hansen wrote to Mr. Rudd to update him on the Corbett-Gurr matter.

18. In early November, 1985, Mr. Hansen advised Mr. Rudd by telephone that the Judgment in the Corbett-Gurr matter had been affirmed.

19. On November 22, 1985, Mr. Rudd wrote to Mr. Hansen about the distribution of the Corbett-Gurr Judgment, Exhibit "G".

(Perry and Carolyn)

Arrived at a Judgment for past due child support and attorney fees, a copy of which is attached as Exhibit "H".

21. Thereafter, Gurr purchased the one-half interest of Carolyn Knepper, the Judgment for past due support and attorney fees and other claims.

22. Gurr tendered full satisfaction and finally payment was made after an Order of this Court provided for Satisfaction.

23. Plaintiff and Plaintiff's counsel having full knowledge of all of the foregoing facts held a Sheriff's sale on January 21, 1986.

24. Gurr has had to incur costs and attorney fees to remove the Sheriff's sale and to secure execution of the Satisfaction, Exhibit "F" to the Findings of Fact heretofore made by this Court.

25. During these proceedings, Defendant Gurr has been denied credit as a result of the Sheriff's sale, and has lost two potential sales of real property because of the Sheriff's sale on two parcels "sold at said Sheriff's sale."

ARGUMENT

I

THERE ARE NO MATERIAL ISSUES
OF FACT IN DISPUTE AND GURR IS
ENTITLED TO THE RELIEF SOUGHT

The Affidavit of Lee Rudd sets forth in detail the negotiations, changes and final execution of the Property Settlement and Child Custody Agreement between Perry and Carolyn Fitzgerald in the Divorce action. It is undisputed that:

A. In the initial negotiations Perry was to receive the Corbett-Gurr property;

B. After May 4, 1982, (the date of ruling) there was a change wherein Carolyn wanted her share of the Corbett-Gurr judgment;

C. There was correspondence between the respective counsel, May 11, 1982, Rudd to Hansen, and June 1, 1982, from Hansen to Rudd;

D. The Corbett-Gurr property and others were removed from Exhibit "A" to the Settlement Agreement;

E. The parties executed the final Agreement with the Corbett-Gurr matter removed.

Gurr's subsequent purchase of Carolyn Knepper's interest was a means of satisfying the Judgment. Gurr is entitled, as a matter of law to a Declaratory Judgment declaring that the one-half interest he purchased from Carolyn Knepper is his and to quiet title to him of said interest.

II

PLAINTIFF SLANDERED GURR'S TITLE

On January 21, 1986, in utter disregard of the tenders of payment, Plaintiff and Plaintiff's counsel caused the Salt Lake County Sheriff to conduct a sale of certain of Mr. Gurr's real property. This sale was done at a point in time when Plaintiff knew:

- A. Gurr owned one-half of the Judgment;
- B. Gurr had tendered the remaining payment.

The sale placed a cloud on the title and was done for the sole purpose of causing Gurr damage and injury. There can be no other basis for the Sheriff's Sale inasmuch as full payment had earlier been tendered. To add further evidence of the bad faith of Plaintiff, Plaintiff refused to execute the Satisfaction of Judgment heretofore ordered by the Court.

Under § 38-9-1 et seq. the Legislature provided a penalty for wrongfully claiming "an interest in, or a lien or encumbrance against, real property . . .". Plaintiff, by the sale, by not satisfying the Judgment subjected himself to damages of \$1000 or treble actual damages, whichever is greater and for reasonable attorney's fees.

Mr. Gurr has incurred attorney fees and costs of this action for the blatant and willful clouding of his title to the real property.

III

CHAMPERTY DOES NOT LIE AGAINST MR. GURR

Mr. Gurr had an express right to satisfy the Judgment in 50224 by paying one of the joint owners of the judgment a sum for her interest. It is well stated in 14 Am.Jur. 2d P. 848 § 10 Champerty and Maintenance which provides in part:

The common-law doctrine of champerty and maintenance has been relaxed so that the bona fide assignee of a chose in action or a judgment can generally sue in any court of law or equity, the defendant retaining all legal or equitable defenses that he might have asserted against the assignor.

The cases cited under the foregoing are dispositive of this matter. In Holmes v. Clark 274 Ky. 349, 118 SW2d 758 the court declared that the outright purchase of the entire beneficial interest in a chose of action is deemed to be free from the taint of champerty. They went further to distinguish the situation wherein advancement is made to aid prosecution of a claim in exchange for a share of the proceeds.

Gurr purchased outright the interest of Carolyn Knepper. He is not sharing the proceeds with anyone. The litigation was completed before his purchase. He simply wanted to satisfy the adverse judgment. Plaintiff asserts some secret interest in the one-half owned by Carolyn Knepper and then accuses Gurr of champerty. If any champerty and/or maintenance has occurred it is on the part of Plaintiff.

IV

INTEREST IS APPROPRIATE AS A MATTER OF LAW

Plaintiff asserts that there should not be any interest assessed him on:

A. The Judgment for past due child support and attorney fees;

B. And on the claim for \$7,000.

Plaintiff does not deny the validity of both the Judgment and the claim.

Under 15-1-4 UCA, the Legislature provided:

Any judgment . . . shall bear interest at the rate of 12% per annum.

In the case of Dairy Distributors Inc. v. Local Union 976, 16 U.2d 85, 396 P.2d 47, our court declared that under the provisions of 15-1-4 UCA, interest as provided in the statute follows the judgment as a matter of law and would be collectible even though the judgment did not so provide.

Under 15-1-1 UCA, the Legislature provided in part:

Except when parties to a lawful contract agree on a specified rate of interest, the legal rate of interest for the loan or forbearance of any money, goods, or chose in action shall be 10% per annum.

The parties, Perry and Carolyn Fitzgerald, did not agree or specify any rate of interest, therefore 10% is the rate of interest due to Carolyn Knepper (now Gurr) on the forbearance

of the admitted \$7,000 due to her. The following is therefore the calculation of interest on both the Judgment and the \$7,000 claim:

Judgment

Child Support	\$10,440.50
Attorney fees	2,886.22
TOTAL JUDGMENT	\$13,326.22

Interest @ 12% = \$4.38 per day
 Interest from December 5, 1985 to
 March 6, 1986 = 90 days = \$394.20
 Total Judgment with interest = \$13,720.42

Interest on \$7,000 Claim

Carolyn received a Deed for property dated June 8, 1982. The property was to be free and clear but was encumbered by a prior agreement in favor of Angell.

\$7,000 @ 10% interest from June 8, 1982 to March 6, 1986 is 3 years, 8 months, and 26 days or \$2,616.56.

Interest on the 50224 Judgment is calculated as follows:

Principal of Judgment =	\$ 62,100.00
interest from 3-6-78 to 5-14-81 = \$11,822.21	
interest from 5-14-81 to 4-19-83 = 11,994.61	
	23,876.82
	85,976.82
interest from 4-19-83 to 1-21-86 =	28,322.88
Sub total through 1-21-86	\$114,300.70
Less credits from Executions	1,000.00
Net due as of 1-21-86	\$113,300.70

Amounts Paid

Total Judgment 1-21-86	\$113,300.70
Attorney fees to Robert Hansen	36,598.70
	76,702.70
One-half to Carolyn	38,351.35
	38,351.35
 Credit to Judgment	 \$ 13,720.42
Credit to \$7,000 claim	8,616.56
	23,336.98

~~Net Due to Perry~~
Amount paid to Perry
Over payment due to Gurr

15,014.37
15,135.23
120.86

CONCLUSION

Gurr is entitled to the following Judgment:

A. Declaratory Judgment in his favor establishing that one-half of the judgment in 50224 belonged to Carolyn Knepper and now Keith L. Gurr;

B. A Decree quieting title to certain real property and for damages of \$1000 or treble actual damages, whichever is greater, and attorney fees and costs against Fitzgerald and Hansen jointly and severally;

C. For Summary Judgment in favor of Gurr denying any relief for Plaintiff for champerty;

D. For Judgment against Defendant Perry Fitzgerald in the amount of \$120.86;

E. Reserving only the cause of action for offset on the pending Fourth District Court matter.

DATED this 8 day of April, 1986.

JARDINE, LINEBAUGH, BROWN & DUNN

By

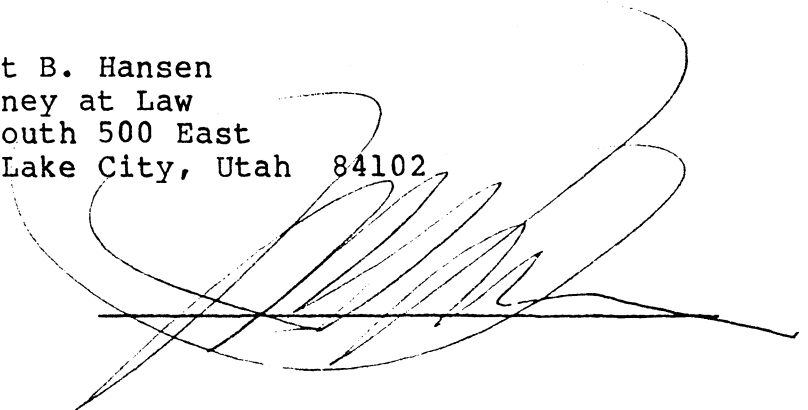
JAMES R. BROWN

Attorneys for Defendant

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing MEMORANDUM IN SUPPORT OF GURR'S MOTION FOR PARTIAL SUMMARY JUDGMENT was mailed by United States mail, postage prepaid, on this 8 day of April, 1986, and addressed to the following:

Robert B. Hansen
Attorney at Law
320 South 500 East
Salt Lake City, Utah 84102



JRB-P235

I CERTIFY THAT THIS IS A TRUE COPY OF AN ORIGINAL DOCUMENT ON FILE IN THE THIRD DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH.

DATE: January 11, 1989

Carla R. Littell

DEPUTY COURT CLERK