

1987

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

Utah Court of Appeals

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UTAH COURT OF APPEALS
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A10 MARY CAROLYN SILL FITZGERALD,)
DOCKET NO. 87-0439)
Plaintiff/Respondent,) BRIEF OF RESPONDENT
vs.) (Priority 14 b.)
PERRY GLEN FITZGERALD,) No. 87-0439-CA
Defendant/Appellant.)

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, STATE OF UTAH,
HONORABLE JAMES S. SAWAYA

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JURISDICTION

Jurisdiction is conferred on the Utah Court of Appeals pursuant to § 78-2a-3(h) and Rule 4 of the Utah Rules of the Court of Appeals.

STATEMENT OF NATURE OF PROCEEDINGS

Carolyn Fitzgerald (hereinafter "**Carolyn**") sought a divorce from Perry Fitzgerald (hereinafter "**Perry**"), by filing a Verified Complaint on September 16, 1981. The parties had extensive negotiations and in June 1982 entered into a Property Settlement and Child Custody Agreement (hereinafter "**Property Settlement**"). On August 4, 1982, Perry's counsel, Mr. Hansen, executed a Consent to Default and Waiver. A default divorce was granted on August 6, 1982. No appeal was filed. Before the Property Settlement was entered into, a Utah County case entitled Corbett & Gurr v. Fitzgerald, Case No. 50244, (hereinafter "**Case No. 50244**" or "**Corbett-Gurr Judgment**"), was decided by Judge Robert Bullock. This decision changed the terms of the Property Settlement.

Perry filed an action entitled Perry G. Fitzgerald v. Keith L. Gurr, Case No. C86-551, on January 24, 1986. This case was consolidated with Fitzgerald v. Fitzgerald, D81-3721, on April 10, 1986.

On February 7, 1986, Perry filed a petition to amend the decree of divorce. Carolyn responded. The Commissioner, Sandra Peuler, recommended the petition be denied. Perry objected. The matter was tried before the Honorable James S. Sawaya on November 5, 1986. The trial court denied Perry's petition on January 14, 1987. Perry moved for a new trial. The motion for a new trial was denied on August 28, 1987. Perry filed this appeal on September 28, 1987.

ISSUES PRESENTED ON APPEAL

Perry asserts that the trial court erred in not amending or modifying the decree of divorce:

- I. to reflect the interest of the parties;
- II. to distribute the Corbett-Gurr Judgment to Perry as opposed to allowing the parties to share equally;
- III. for not finding a compelling change of circumstance which would allow a modification of the decree from the stipulated Property Settlement;
- IV. and awarding attorney fees to Carolyn.

Carolyn seeks affirmance of the trial court and attorney fees and costs against Perry and Mr. Hansen, jointly and severally for this appeal.

STATEMENT OF FACTS

An action was commenced in Utah County entitled Corbett v. Fitzgerald, Civil No. 50224, wherein Fitzgerald's (hereinafter "**Carolyn and Perry**") counterclaimed against Corbett and Gurr for rescission. Carolyn and Perry obtained 2140 acres in Cedar Valley from Corbett and Gurr in exchange for an eightplex. The eightplex was sold by Corbett and Gurr to a third party and hence rescission would not lie, so money damages was awarded to Carolyn and Perry against Corbett and Gurr (R.85). Initially, Carolyn and Perry were represented by Richard C. Howe and then later by Robert B. Hansen in Civil No. 50224 (R.85). Civil No. 50224 was decided by the trial Court before the divorce action was heard. The property involved in Case No. 50224 was designated as "2140 Acres - purchased from Corbett and Gurr" in the Property Settlement and drafts (R.273).

Carolyn filed an action against Perry to terminate the marital relationship. The action was commenced September 16, 1981 (R.2). Carolyn, in the Verified Complaint, asserted that the parties had acquired numerous real property holdings, bank accounts, contract receivables, of which she was not totally familiar and that Perry should be required to disclose the same and divide them equally with her. (R.3).

Perry admitted in his Answer that the parties had in fact acquired numerous real properties, bank accounts and

contracts receivables and that "the parties' entire estate should be equally divided" (R.17). Thereafter, the parties through their respective attorneys, Mr. Rudd representing Carolyn and Mr. Hansen representing Perry, conducted numerous discussions for purposes of negotiating a settlement. (Rudd Depo. pp. 30-41).

There were a number of drafts of the Property Settlement prepared and considered by the parties (Exhibits 5-P, 6-P, 7-P, 16-P, 18-P and 19-P, R.219-254).

Prior to May 1, 1982, at least three drafts of the proposed Property Settlement and Child Visitation Agreement were submitted to Mr. Hansen by Mr. Rudd (R.213). Initially, the parties, Carolyn and Perry, were discussing awarding the "2140 Acres - purchased from Corbett and Gurr" property to Perry (R.213). However, on May 4, 1982, Mr. Hansen called Mr. Rudd and told him that there was a ruling in the Utah County Case No. 50224 which was favorable to Carolyn and Perry (R.214 and 228).

In light of the Utah County Court's ruling on May 4, 1982, Carolyn and her father felt that she should be awarded her share of the judgment (R.214). On May 11, 1982, Mr. Rudd wrote a letter to Mr. Hansen in which Mr. Rudd requested of Mr. Hansen:

The only question or problem I have at the present time, is dealing with the return of the apartment home and/or your money settlement with Corbett and Gurr. Because

the divorce is not finalized and a settlement signed, my client is interested in obtaining a portion of that real property or judgment (R.230).

Thereafter, on June 1, 1982, Robert Hansen wrote to Mr. Rudd authorizing certain changes (R.236 and 237); Part of the changes is on Exhibit "A" to the Property Settlement. The "2140 Acres - purchased from Corbett and Gurr" property was crossed off and a new Exhibit "A" to the Property Settlement was prepared (R.237).

The final Property Settlement and Child Custody Agreement was executed on June 8, 1982 by Carolyn and on June 5, 1982 by Perry (R.245-251). On August 4, 1982, Mr. Hansen executed a Consent to a Default Judgment and Waiver (R.252), wherein he acknowledged the Property Settlement signed by Perry on June 5, 1982. The Decree of Divorce (R.34-39) reflects the terms and conditions of the Property Settlement (R.21-27).

Corbett and Gurr appealed the judgment in Case No. 50224. There was a series of three letters exchanged between Mr. Hansen and Mr. Rudd which discussed the appeal and the results of the appeal. Mr. Hansen wrote July 2, 1983 advising Mr. Rudd that Corbett and Gurr had appealed. On August 6, 1983, Mr. Hansen wrote to Mr. Rudd that a supersedeas bond had been filed. The supersedeas bond was in favor of Perry, Carolyn and Mr. Hansen. On November 22, 1985, Mr. Rudd, in

response to a telephone call from Mr. Hansen, acknowledged the successful outcome of the appeal and Carolyn's desire to pay her share of the fees and to receive her share of the proceeds (R.305-306).

Perry had not been current on child support almost from the beginning and a judgment for past due support and attorney's fees was entered against Perry on December 23, 1985 (R.52-54) in the amount of approximately \$23,000.00.

Gurr purchased from Carolyn her interest in and to the Corbett-Gurr Judgment and the past due judgments of \$23,000.00 (R.264). The court allowed an offset of the \$23,000 judgment and Gurr satisfied the remainder of Perry's interest in the Corbett-Gurr Judgment. (R.146-151).

Perry asserted in his petition to modify and the concurrent action against Mr. Gurr that the Corbett-Gurr Judgment should be his sole property and that Carolyn had no interest therein. Or, in the alternative, that there was a material change of circumstances which would allow a modification to the decree and that as a result of his debts, he needed to be awarded the sole ownership of the Corbett-Gurr Judgment.

The trial court, after a full hearing, adopted the Commissioner's recommendation and held that there was no change of circumstance which would allow a modification to the Decree of Divorce (R.94-95) and that the interest of the parties was clear from the documentation.

SUMMARY OF ARGUMENT

I

The trial court's findings should be affirmed because there is substantial evidence in the record to support the findings. The trial court found:

a) The parties had extensive negotiations about the Corbett-Gurr Judgment before executing the final Property Settlement.

b) There were numerous contacts between the parties in which the intent of the parties was manifest before the Property Settlement was entered into and the testimony of Carolyn and Mr. Rudd was corroborative of the written agreements.

c) The Property Settlement is in writing and adopted by the trial court in granting the divorce.

d) There was no change of circumstance which would allow a modification.

e) Each party owned one-half of the Corbett-Gurr Judgment.

f) The parties stipulated to the awarding of attorney fees based upon affidavit in the trial held before Judge Sawaya.

Based upon the trial court's findings, the interest of the parties is clear and each owned one-half of the judgment.

II

The Bullock Judgment was awarded to Perry G. Fitzgerald and Carolyn S. Fitzgerald. Mr. Hansen represented both parties in Case No. 50244. The Corbett-Gurr Judgment was removed from the Property Settlement on purpose so that both parties would share equally in the judgment.

III

Perry failed to show any change of circumstance which would allow the trial court to modify or amend the Decree of Divorce. Where the parties have stipulated to the Property Settlement, which Property Settlement was adopted by the court, the Appellant must show "compelling reasons" to modify the same. See Foulger v. Foulger, 626 P.2d 412 (Utah 1981).

The only evidence of a change of circumstance was the testimony of Perry. The testimony of Perry was in direct conflict with the written documentation between the parties, the written Property Settlement, the letters from Mr. Hansen to Mr. Rudd, the testimony of Carolyn and Mr. Rudd.

IV

The awarding of attorney fees and costs was appropriate under the evidence submitted to the court and the stipulation of the parties at trial. The evidence reflects the need for Carolyn and the reasonableness of the fees. See Backstrom Family Ltd. Partnership v. Hall, 751 P.2d 1157 (Ut. Ct. App. 1988).

V

Attorney fees and sanctions should be awarded jointly and severally against Perry, and counsel for Appellant, inasmuch as this Appeal is violative of Rule 11, Utah Rules of Civil Procedure, Rule 33, Utah Rules of Appellate Procedure, § 30-3-3 and § 30-3-5 and case law. See O'Brien v. Rush, 744 P.2d 306 (Ut. Ct. App. 1987) and Porco v. Porco, 752 P.2d 365 (Ut. Ct. App. 1988).

ARGUMENT

POINT I

THERE IS SUBSTANTIAL EVIDENCE SUPPORTING THE TRIAL COURT'S FINDINGS

It is the trial court's prerogative to hear and weigh the evidence and to make findings of fact. These findings of fact will not be upset when supported by substantiated evidence in the record. Kramer v. Kramer, 738 P.2d 624 (Utah 1987), Fontenot v. Fontenot, 714 P.2d 1131 (Utah 1986), Mineer v. Mineer, 706 P.2d 197 (Utah 1985).

The Issues as framed by Appellant are:

- 1) Did the trial court err in not amending Exhibit "A" to the Property Settlement?
- 2) Did the trial court err in determining the interest of the parties as to the Corbett-Gurr lawsuit?

3) Was there a change of circumstances?

4) Did the lower court err in awarding attorney's fees?

The findings of fact of the lower court are all substantiated by ample evidence in the record and the lower court's ruling should be affirmed and attorney's fees and costs awarded to Carolyn under both Rule 11 and § 30-3-5 U.C.A. 1953 as amended.

The issues raised by the Appellant will be discussed in their respective order.

POINT II

THE TRIAL COURT WAS CORRECT IN NOT AMENDING THE PROPERTY SETTLEMENT

Perry asserted that the Corbett-Gurr property was to be awarded to him solely. However, the evidence was to the contrary. It is obvious that substantial negotiations were carried on between the parties before the Property Settlement was finalized. Before the final Property Settlement, Case No. 50224 was decided by Judge Bullock. The Bullock decision was discussed by Mr. Hansen and Mr. Rudd. Exhibit "A" to the Property Settlement was changed as a direct result of the discussions following Judge Bullock's decision. The parties executed the Property Settlement in June 1982 after the decision by Judge Bullock in 50224 and after the discussions between Mr. Hansen and Mr. Rudd.

Mr. Hansen had first hand actual knowledge of the extensive negotiations between the parties. He personally telephoned Mr. Rudd, gave a copy of the Bullock decision to Mr. Rudd, received letters from Mr. Rudd all concerning the very change in removing the "2140 Acres - Corbett and Gurr" property from Exhibit "A" to the Property Settlement. Mr. Hansen questioned Carolyn under oath, wherein Carolyn testified at page 44 of her deposition as follows:

Q You say "it was withdrawn." (The Corbett and Gurr property.) Explain what you mean by that.

A That before the divorce became final, I believe a judgment had been made and we withdrew that from Exhibit "A" in order to get my half of whatever came out of it.

Q You say "you withdrew," what do you mean by that?

A It was on Exhibit "A" on an earlier draft, but the judgment came down on it, or however, and so we withdrew it.

Q Did Mr. Perry Fitzgerald agree to that?

A Yes.

Annexed in the Appendix to this Brief are copies of Exhibit "A" to the Property Settlement draft no. 3, the working copy which Mr. Rudd testified he changed after consultation with Mr. Hansen, and the Exhibit "A" to the executed final Property Settlement. These documents disclose the changes and how the changes came about as a direct result of the ruling of Judge Bullock.

Perry's counsel cites the testimony of Carolyn as dispositive that Carolyn did not know of her interest in the Corbett-Gurr Judgment. (See pages 8 and 9 of Appellant's Brief). However, even a casual review of that testimony reveals that she did know of her interest and that she intended to benefit from that interest. At page 25 of Carolyn's testimony, she testified:

The Witness: Mr. Benneson 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, 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's "position" was that she owned one-half interest in the judgment. This was consistent with the extensive negotiations after Judge Bullock's ruling of May 4, 1982.

On May 4, 1982 and May 6, 1982 Mr. Hansen telephone Mr. Rudd and advised him of the ruling by Judge Bullock. On

May 13, 1982, Mr. Hansen sent to Mr. Rudd a copy of the pertinent part of Judge Bullock's ruling (R.232-235). On May 11, 1982 Mr. Rudd advised Mr. Hansen that Carolyn wanted her share of the Corbett-Gurr Judgment by the following language:

Because the divorce is not finalized and a Settlement signed, my client (Carolyn) is interested in obtaining a portion of that real property or judgment (R.230).

On June 1, 1982, there was a letter from Mr. Hansen to Mr. Rudd agreeing to the changed Property Settlement which eliminated the "2140 Acres - Corbett and Gurr" from properties to be awarded solely to Perry.

Finally, on June 5, 1982, Perry executed before a notary, the Property Settlement (R.21-27). On August 4, 1982, Mr. Hansen executed the Consent to a Default Judgment and Waiver, which specifically recited the Property Settlement of June 1982 (R.29).

Carolyn testified at pages 69 through 74:

Q (By Mr. Hansen) . . . How many different drafts were there as you recall for the Property Settlement that led up to the Divorce Decree?

A Probably about four.

* * *

Q . . . When was the draft that was finally executed prior the divorce, what conferences were there, or maybe there was just one, that led up to the final draft, okay?

A All right. I believe you phoned my attorney, Lee Rudd, in May and informed him

of the decision of Judge Bullock. And I believe he wrote to you after that conversation after he had talked to me. And we decided that whereas a decision has been made that I would like my share of that judgment.

Q Do you have a copy of that letter?

A Yes.

Q Do you have it here?

A Yes.

* * *

Q (By Mr. Hansen) Is this document that's been marked as Deposition Exhibit No. 3 the letter that you just referred to?

A Yes.

Q Pursuant to that letter, were documents executed to carry out his suggestion there?

A Yes.

Q Do you have a copy of those?

A Yes.

* * *

Q (By Mr. Hansen) I'm showing you what has been marked for identification as Deposition Exhibit No. 4. Would you look at that and tell us if that's the document you referred to?

A Yes, it is.

Exhibit 3 to the deposition is Mr. Rudd's letter to Mr. Hansen dated May 11, 1982 wherein Mr. Rudd wants to have Carolyn share in the Corbett-Gurr Judgment. Exhibit 4 to the deposition is the final Property Settlement wherein the "2140 Acres" is

removed from Exhibit "A" to the Property Settlement as a result of the negotiations.

Carolyn further testified of discussions of her interest at page 26 of her testimony as follows:

Mr. Hansen: I want to know who she talked with about that subject. (Carolyn having an interest in the Corbett-Gurr Judgment.)

* * *

Q (By Mr. Hansen) At any time before today and other than conversations with your attorney which you've invoked the privilege on, tell us who else you had any discussion with on that subject.

A My father's attorney, Allen Swan, with my attorney, Lee Rudd, and I did discuss it some with my father. Are you asking just whoever I talked to?

Q Whoever you talked with on that subject.

A My Husband, Don.

Q Okay.

A Of course, Mr. Benneson and Perry.

Q Mr. Benneson and who?

A Perry.

Q Okay.

A That's all that I can remember.

That testimony is consistent with the extensive negotiations and exchanges between May 4th and August 4, 1982. Mr. Sill, Carolyn's father, called Mr. Rudd on May 6, 1982 and insisted that Carolyn obtain a share of the Corbett-Gurr Judgment (R.214-229).

Mr. Rudd testified at pages 36-37 of his deposition as follows:

Q (By Mr. Hansen to Mr. Rudd) Now, was it intended in the Divorce Decree that that would be a final distribution of all the assets, or were there some that were being held in abeyance for a subsequent distribution?

A You mean in the total -- the Decree itself?

Q Yes.

A The final Decree? I would -- as I recollect -- and we went back and forth with numerous things -- but I would assume that we structured it so that certain assets went out of their ownership prior to the Decree, specifically to the trust. And there may have been others.

Then the Decree and the Property Settlement talked about those items that are specifically enumerated therein. And then anything that was not discussed and not transferred would have remained in their joint ownership.

Q Well, was it your intent to leave certain property in joint ownership?

A If it was not discussed and handled.

Q Well, that might be a legal effect. But I'm asking you, was it intended to be that way?

A I believe so. I believe that --

Q What was the purpose for that?

A I suppose because there were certain things that were not known what the resolution was or where it was going and no agreement to be made as to really what to do with those.

Q What were those unknowns?

A At this time and without this reference, I really don't know. Apparently, as I recall now, the Corbett and Gurr property and lawsuit. There may have been others that I haven't taken the time to review back through. I think there were some other properties out in Cedar Valley, too. (Emphasis supplied.)

It was clearly the intent of Carolyn, Mr. Sill (her father), and Mr. Rudd to obtain an interest in the Corbett-Gurr Judgment. Mr. Hansen and Perry both executed documents which granted to both parties an equal interest in the Corbett-Gurr Judgment. That result is in accord with the pleadings in the case. The trial court did not err in holding that the interest of the parties is manifest by the written agreements executed by both parties and adopted by the court in granting the divorce.

Mr. Hansen acknowledged all of the interchanges between himself and Mr. Rudd about the Corbett-Gurr Judgment (R.136 Pages 60-68). Mr. Hansen admitted that he read every draft of the Property Settlement. At page 65 of the transcript (R.136), Mr. Hansen testified:

Q And was this entered knowingly -- had you read the stipulation and settlement agreement dated the 8th day of June, 1982?

A I read all the drafts that were sent to me.

Carolyn testified at the November 5th hearing at pages 72 and 73 of the transcript (R.136), as follows:

Q Now, what changed your mind about that?

A Mr. Hansen called, said that Judge Bullock had decided in Perry's favor and then at that time it was still -- had not been decided that it would go all to Perry, that it was also -- some of it was to come to me.

Q And then did you have further discussions and negotiations with your husband at that time either through counsel or direct about whether or not he would be awarded the Corbett-Gurr property only?

A After May?

* * *

Q Was there some discussions that would not go solely to Mr. Fitzgerald?

A Yes, there was.

Q And as a result of that, did you read Exhibit 18 before you signed it?

A Yes.

Q And did you understand that Exhibit 18 excluded the Corbett-Gurr property?

A Yes.

POINT III

THERE IS NO CHANGE OF CIRCUMSTANCE TO ALLOW A MODIFICATION

The trial court was guided by the law as enunciated in Foulger v. Foulger, 626 P.2d 412 (Utah 1981), wherein our Supreme Court declared at page 414 that the level of change of circumstances required to modify a decree is:

Where a disposition of real property is in question, however, courts should properly be more reluctant to grant a modification. In the interest of securing stability in titles, modifications in a decree of divorce making disposition of real property are to be granted only upon a showing of compelling reasons arising from a substantial and material change in circumstances.

The above holds true a fortiori where the property disposition is the product of an agreement and stipulation between the parties, and sanctioned by the trial court. Such a provision is the product of an agreement bargained for by the parties. As such, a trial court should subsequently modify such a provision only with great reluctance, and based upon compelling reasons. (Citations omitted.)

The parties, with the help of counsel, negotiated at length to arrive at the Property Settlement. The trial court properly found no compelling reason to alter that stipulated contract between the parties. The follow up letters of Mr. Hansen to Mr. Rudd is further evidence of the interest of the parties. Not one bit of evidence exists in the record to support Perry's contention other than his own self serving testimony which is contrary to his own written agreement.

The trial court specifically concluded at page 91 of the record:

1. That where the parties have stipulated by agreement to the property disposition and said property distribution is a product of an agreement and approved by the court and was entered into after substantial and lengthy negotiations without duress or undue influence that the property distribution

should not be set aside or modified without compelling reasons. See Foulger v. Foulger, 626 P.2d 412 (1981).

* * *

3. No such material or substantial change of circumstances has been proven to the court inasmuch as all parties were well aware of and substantial negotiations were entered into and about the Corbett-Gurr properties and judgment.

There simply is no change of circumstance other than the affirmance on appeal of the Corbett-Gurr Judgment. It certainly would be contemplated by all parties the possibility of the judgment being affirmed. As the court in Foulger, supra, declared at 414:

Matters such as payments on the home, and maintenance and upkeep thereof, certainly must have been within plaintiff's contemplation at the time she agreed to the disposition set forth in the original divorce decree.

Equally, the parties surely must have contemplated that the Corbett-Gurr Judgment could be affirmed. What other possible change is there? The record is devoid of any change other than the manifestation of Perry's greed and avarice by asserting sole ownership of the judgment when the judgment was awarded jointly to the parties.

POINT IV

ATTORNEY'S FEES SHOULD BE AWARDED FOR THIS APPEAL

Attorney fees are awardable under both statutory provisions and case law to a prevailing party, i.e.; § 30-3-4 and § 30-3-5, Utah Code Annotated, 1953, as amended. See Porco v. Porco, 752 P.2d 365 (Utah 1988) and Huck v. Huck, 734 P.2d 417 (Utah 1986). The parties stipulated at the end of the trial that the prevailing party would submit by affidavit the evidence of the amount of attorney's fees. See Findings of Fact No. 36 (R.90). An affidavit appears in the record at pages 78-83. There is evidence of the reasonableness thereof uncontroverted by Appellant.

The record is replete of the need for Carolyn to receive assistance in these proceedings. Carolyn has had difficulty in collecting even child support in the past, has been unemployed and has a large family. Mr. Rudd and Carolyn testified of the difficulty of collecting the judgment against Perry, and the past due condition of her house payments. Carolyn had no means with which to defend this action brought by Perry. She was the prevailing party and the trial court appropriately awarded fees and costs.

On appeal, the rule of law for attorney's fees for a prevailing party is still found in the statutory and case authority heretofore cited. However, in addition, there is

authority for attorney fees to be awarded against Perry and Mr. Hansen under Rule 11 of the Utah Rules of Civil Procedure, Rule 33(e) of the Rules of the Utah Court of Appeals, and the cases of O'Brien v. Rush, 744 P.2d 306 (Ut. Ct. App. 1987), Barber v. The Emporium Partnership, 750 P.2d 202 (Ut. Ct. App. 1988), Backstrom Family Ltd. Partnership v. Hall, 751 P.2d 1157 (Ut. Ct. App. 1988), Porco v. Porco, 752 P.2d 365 (Ut. Ct. App. 1988), and Brigham City v. Mantua Town, 754 P.2d 1230 (Ut. Ct. App. 1988).

Under the guidelines of Backstrom Family Ltd. Partnership, supra, this court gave direction to Mr. Hansen to make a decision to appeal "after careful consideration by counsel and client."

Mr. Hansen had actual first hand knowledge of the extensive negotiations between the parties. He personally wrote letters, gave a copy of the Bullock decision to Mr. Rudd, received letters from Mr. Rudd all concerning the very change in removing the "2140 Acres - Corbett and Gurr" property from Exhibit "A" to the Settlement Agreement. Mr. Hansen had actual knowledge of Carolyn's testimony and the testimony of Mr. Swan and Mr. Rudd.

Mr. Hansen, if he doesn't know, should have known of the scope of review before this court. The trial court's findings of fact will not be disturbed if there is sufficient

evidence in the record to substantiate the findings. Clearly the evidence in the record substantiates the trial court's findings. In fact, the only evidence to support the claims of Perry's alleged change in circumstance is the unsupportable testimony of Perry, which testimony is in direct conflict with the pleadings, the negotiations, the written Property Settlement and the testimony of Carolyn and Mr. Rudd.

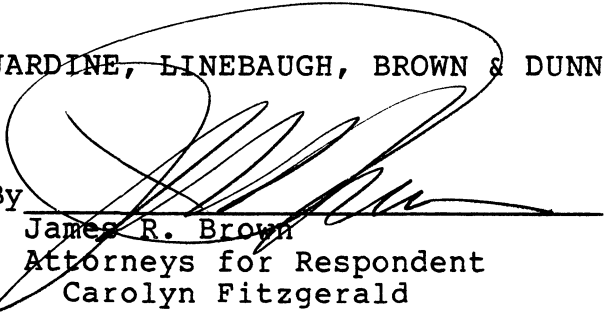
CONCLUSION

The trial court's decision should be affirmed and the matter remanded for an award of attorney's fees and costs to be assessed jointly and severally against Appellant and Appellant's counsel.

RESPECTFULLY SUBMITTED this the 13 day of February 1989.

JARDINE, LINEBAUGH, BROWN & DUNN

By

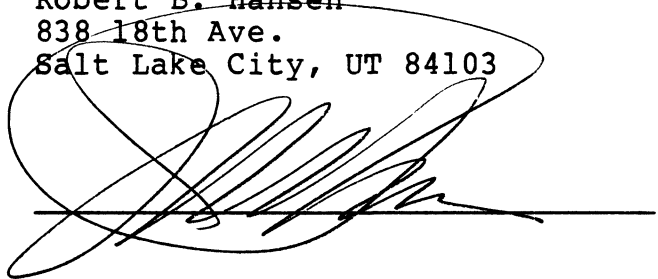


James R. Brown
Attorneys for Respondent
Carolyn Fitzgerald

MAILING CERTIFICATE

I hereby certify that four true and correct copies of the foregoing Brief of Respondent was mailed by United States mail, postage prepaid, on this 13 day of February, 1989, addressed to:

Robert B. Hansen
838 18th Ave.
Salt Lake City, UT 84103

A large, stylized handwritten signature in black ink, written over a horizontal line. The signature is cursive and appears to be 'R. B. Hansen'.

JRB-P2295

APPENDIX

APPENDIX

E X H I B I T 'A'

- A. 2140 acres - purchased from Corbett & Gurr or Leland Fitzgerald.
- B. 1840 acres - purchased from Calvin Hall.
- C. 320 acres - purchased from Hutchings.
- D. 80 acres - purchased from Murdock.
- E. 1.75 acres - T3S R1E, Section 5 - Sandy.
- F. 180 acres - purchased from Davis and others.
- G. 415 Post Street, Salt Lake City.
- H. 4143 Parkview Drive, Salt Lake City.
- I. 36 Holden Street, Midvale.
- J. 156 West Lennox Street, Midvale.
- K. 119 3rd Avenue, Midvale.

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E X H I B I T 'A'

~~2100 acres - purchased from Corbell or Gu. or
Leonard Fitzgerald.~~

✓ B.A. 1840 acres - purchased from Calvin Hall.

✓ B.B. 320 acres - purchased from Hutchings.

✓ B.C. 80 acres - purchased from Murdock.

~~175 acres - 135 R1E, Section 3 - Sandy~~

✓ B.D. 180 acres - purchased from Davis and others.

✓ B.E. 415 Post Street, Salt Lake City.

~~1115 Parkway Drive - Salt Lake City~~

✓ B.F. 36 Holden Street, Midvale.

✓ B.G. 156 West Lennox Street, Midvale.

✓ B.H. 119 3rd Avenue, Midvale.

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