

1997

Mary Ann Moon v. Stanley W. Moon : Brief of Appellee

Utah Court of Appeals

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**UTAH COURT OF APPEALS
BRIEF**

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DOCKET NO. 970542-CA

IN THE UTAH COURT OF APPEALS

MARY ANN MOON,

Petitioner/Appellee,

vs.

Appeals Ct. No. 970542 CA

STANLEY W. MOON,

Respondent/Appellant.

BRIEF OF APPELLEE

**AN APPEAL FROM THE THIRD DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH
HONORABLE HOMER F. WILKINSON, DISTRICT COURT JUDGE**

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Priority Classification: Rule 29(b)(15)
of the Utah R. App. P.

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IN THE UTAH COURT OF APPEALS

MARY ANN MOON,

Petitioner/Appellee,

vs.

STANLEY W. MOON,

Respondent/Appellant.

Appeals Ct. No. 970542 CA

BRIEF OF APPELLEE

JURISDICTION OF APPELLATE COURT

Jurisdiction is proper in this Court pursuant to U.C.A. §78-2a-3(2)(h).

ISSUES PRESENTED

A. Did the District Court have the authority to revise its prior order dismissing the Petitioner's Order to Show Cause and thereby reinstate the same?

– **Standard of Review:** Correction of Error. “We review questions of statutory interpretation for correctness giving no deference to the trial court's interpretation.” *Wells v.*

Wells, 871 P.2d 1036, 1038 (Utah App. 1994).

B. Under the facts of the case, was the Petitioner’s Order to Show Cause or the Petitioner’s Petition to Modify the appropriate pleading for seeking the Respondent’s compliance with his obligation to provide alimony for the Petitioner?

– **Standard of Review:** Abuse of Discretion. “The determination of the trial court that there [has or has not] been a substantial change of circumstances... is presumed valid.” *Wells v. Wells*, 871 P.2d 1036, 1038 (Utah App. 1994) quoting *Mitchell v. Mitchell*, 527 P.2d 1359, 1361 (Utah 1974). Correction of Error. *Whitehead v. Whitehead*, 836 P.2d 814 (Utah App. 1992).

C. Was the District Court’s rulings concerning the retroactivity of alimony in its Findings of Fact, Conclusions of Law and Order properly made?

– **Standard of Review:** Correction of Error. “[W]e review the district court’s decision for correctness and afford no special deference to the district court’s conclusions.” *Whitehead v. Whitehead*, 836 P.2d 814, 816 (Utah App. 1992).

D. Did the District Court properly rule that the Respondent’s K-1 distributions be deemed “income” for the purposes of calculating alimony payable to the Petitioner?

– **Standard of Review:** Abuse of Discretion. “We review the trial court’s valuation of partnership property under a ‘clearly erroneous’ standard of review, providing considerable discretion to the court’s property values. *Weston v. Weston*, 773 P.2d 408, 410 (Utah App. 1989); accord *Morgan v. Morgan*, 795 P.2d 684, 691 (Utah App. 1990). Such valuation is

presumed valid and will not be overturned in the absence of a clear abuse of discretion.” *Morgan v. Morgan*, 854 P.2d 559, 564 (Utah App. 1993).

E. Did the District Court abuse its discretion in awarding the Petitioner attorney’s fees?

– **Standard of Review:** Abuse of Discretion. “[T]he decision to award attorney fees... [is] within the sound discretion of the trial court.” *Whitehead v. Whitehead*, 836 P.2d 814, 817 (Utah App. 1992) quoting *Crouse v. Crouse*, 817 P.2d 836, 840 (Utah App. 1991).

CONSTITUTIONAL PROVISIONS

There are no constitutional provisions specifically at issue in this case.

STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal from the Findings of Fact, Conclusions of Law on Petitioner’s Order to Show Cause and Petition to Modify, and on Respondent’s Objection to Finding’s of Fact, Conclusions of Law and Order before the Third Judicial District Court, Salt Lake County, State of Utah, the Honorable Homer F. Wilkinson presiding. The trial occurred on May 29, 1997, wherein the trial court enforced the provisions for the payment of alimony as found in the original Decree of Divorce of August 26, 1992, made clarifications concerning the meaning of “income” for purposes of calculating alimony, and awarded attorney fees to the Petitioner.

B. Course of Proceedings

On June 30, 1995, the Petitioner filed an Order to Show Cause against Respondent seeking enforcement of the alimony provisions of a Decree of Divorce issued August 26, 1992. The matter was eventually heard before Commissioner Lisa A. Jones January 10, 1996. On February 12, 1996, Commissioner Jones filed a Minute Entry dismissing Petitioner's Order to Show Cause, ruling that the matter would more appropriately be dealt with under a Petition to Modify. March 22, 1996 a Petition for Modification was filed with the court. In a Pretrial Conference held May 23, 1997, the court, Judge Homer F. Wilkinson presiding, indicated it would hear both motions: the Order to Show Cause and the Petition to Modify. The case went to trial May 29, 1997.

C. Disposition by Trial Court

The trial court reinstated the original Order to Show Cause, determining that both motions were virtually identical in the relief requested of the court. The court granted the relief requested in the Order to Show Cause ruling in favor of the Petitioner and ordered the Respondent to pay the unpaid portion of the alimony owing since the original Decree of Divorce of August 26, 1992. The court also ruled against the Respondent by granting the Petitioner's request for attorney fees; however, the court reduced the requested amount by several thousand dollars. The court ruled that the Petitioner's failure to object to the Commissioner's initial ruling

dismissing the Order to Show Cause during pretrial proceedings was the cause for the reduction in allowed attorney fees. The Respondent filed an Objection to Findings of Fact, Conclusions of Law and Order on August 8, 1997. The Court issued an Order in response to the Respondent's Objection setting forth the types of income from which alimony could be calculated. The Respondent then brought this action appealing various issues related to the awarding of alimony and attorney fees.

STATEMENT OF FACTS

The Petitioner and Respondent initially settled their differences at the time of the divorce by a Stipulation (R at 1165) presented to the court at the Pretrial Hearing on June 30, 1992. Both the Petitioner and the Respondent were represented by their own counsel. The terms and conditions of the parties' Stipulation were incorporated into the Findings of Fact and Conclusions of Law (R at 492-502) by the parties.

In the Findings of Fact and Conclusions of Law, the trial court found that the Petitioner received \$1,750 gross monthly income and the Respondent received \$20,833 gross monthly income when his monthly salary and annual bonuses were combined (R at 494). Based upon the income of the parties, the Respondent agreed to pay the sum of \$2,400 per month as alimony on the first \$150,000 of his income (R at 497). The Respondent then further agreed to pay 30% of any additional income over and above \$150,000 (R at 497). At the time of the divorce, he was

receiving \$100,000 annually as a bonus (R at 497). A review of paragraph number 10, Findings of Fact (R at 496-497), goes into extensive detail about the obligation of the Respondent to pay 30% of his additional income over \$150,000. The amount of the additional alimony due then to the Petitioner would be \$30,000 based upon \$100,000 traditional income received in the form of a bonus (R at 497). The Decree incorporates the terms of the Findings of Fact. The Decree of Divorce incorporating the Findings of Fact was entered by the court on August 26, 1992 (R at 503-509).

Subsequent to the Decree of Divorce of August 26, 1992, during the year of 1993, Respondent, as an owner and member of the Board of Directors of M.S.T. Trucking and M.S.T. Financial changed the Respondent's salary from \$150,000 a year to \$200,000 per year and dramatically reduced any bonus that the Defendant would receive and changed the term "bonus" to "distribution" (R at 1036).

In 1993, the Respondent received the sum of \$7,500 which the Respondent represented to the Petitioner to be her 30% share of his bonus, leaving an unpaid balance of \$15,567.30 which should have been paid to the Petitioner. The Respondent based his reduction of payment on the fact that his salary was \$200,000 but only had to pay \$2,400 alimony rather than 30% of any increase over \$150,000 (R at 827).

In 1994, Respondent paid no additional alimony sums other than the \$2,400 a month for 1994 (R at 827) but continued to receive an income substantially above the \$150,000 minimum

and owes the Petitioner the sum of \$36,636.90.

In 1995, the Respondent paid, in addition to his base alimony payment, the sum of \$6,000 but did not provide any verification of his income for that year (R at 827). Petitioner believes that she is entitled to 30% of all income received by the Defendant over and above \$150,000 a year and believes that during 1995 he made additional sums greater than those represented by his payment of \$6,000 additional alimony. No additional alimony payments were made in 1996 other than the base alimony payment of \$2,400 per month (R at 1037). Although the August 26, 1992, Decree of Divorce required the Respondent to provide independent verification of all bonuses that Respondent receives (R at 1059), Respondent refused to do so and informed Petitioner that he no longer receives bonuses and is therefore not bound by the Decree of Divorce.

On June 30, 1995, the Petitioner brought an Order to Show Cause (R at 825-829) against the Respondent for payment under the terms and conditions of paragraph 10 of the Findings of Fact and Conclusions of Law (R at 1050) for a determination of the court that the Respondent had converted his bonuses to salary. The Petitioner, in her Order to Show Cause, requested that the court enforce the intent of the Findings of Fact and to clarify the 30% payment of all income over \$150,000 since 1993 (R at 828). No modification was requested by the Petitioner. Petitioner requested that full payment of all alimony of the Respondent to be subject to a 30% payment to the Petitioner from 1993 onward for amounts in excess of \$150,000 a year.

After substantial discovery and several postponements, the Order to Show Cause was finally heard on January 10, 1996 before Commissioner Lisa A. Jones. On February 12, 1996, Commissioner Jones filed her Minute Entry (R at 959-961) and found that the Respondent had changed his bonuses to salary and therefore his bonuses were significantly smaller than before. She ruled that this was a modification issue rather than an Order to Show Cause.

On March 22, 1996, a Petition for Modification (R at 962-966) was filed with the court incorporating the same terms and requests as the Order to Show Cause had. The change from Order to Show Cause to Petition for Modification was involuntary on the part of the Petitioner because it was a direct result of Commissioner Jones' ruling. However, none of the terms or conditions of the Decree were requested to be modified, just merely clarified so that its intent be enforced concerning the payment of alimony and the allocation of the 30% payment of all income of the Respondent over \$150,000.

This matter went to trial on May 29, 1997, before Judge Homer F. Wilkinson who revised the commissioner's prior ruling dismissing the Order to Show Cause. The Order to Show Cause was reinstated (*See* Addendum B: "Reporter's Partial Transcript of Trial Proceedings; Order to Show Cause/Modification: Court's Ruling" at 2) and the court then ruled in favor of the Petitioner, requiring the Respondent to pay alimony on all income, regardless of how his various forms of income might be characterized, with interest due on all amounts of alimony past-due since the Decree of Divorce of August 26, 1992. A reduced amount of attorney fees were also

awarded to the Petitioner (Addendum B at 8).

SUMMARY OF ARGUMENTS

1. Rule 54(b) of the Utah Rules of Civil Procedure allows a judge to revise an order or other form of decision “before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.” Therefore, Judge Wilkinson was able to revise the prior ruling of the court and reinstate the Petitioner’s Order to Show Cause, despite the fact that Petitioner had not filed a formal objection to Commissioner Jones’ earlier ruling that dismissed the Order and ruled that the action should be brought under a Petition to Modify.

2. The Petitioner’s Order to Show Cause was the appropriate motion through which to bring action in this matter. Judge Wilkinson ruled correctly when he reinstated the Order to Show Cause since the relief sought by the Petitioner was the payment of alimony in accordance with the original Decree of Divorce despite the efforts by the Respondent to divert income in the form of “bonuses” back to regular salary and other forms of compensation from a company in which he had a voting ownership interest. Because the Respondent’s “total income” remained essentially the same, a Petition for Modification of the Decree of Divorce was not necessary since there had been no substantial change in circumstances not originally contemplated within the Decree itself. The court ruled correctly when it ordered the recalculation of alimony retroactive to the date of the Decree despite the objections of the Respondent, because the court

was simply enforcing the intent of the Decree under the Order to Show Cause. Alternatively, even under the Petition for Modification, there is a fraud exception applicable in this case that would allow retroactive modification back to the date of the original Decree, not just the date of service of the Petition itself.

3. The District Court ruled correctly when it determined that K-1 distributions are “income” for the purposes of calculating alimony, since they were made as compensation to the Respondent from the Respondent’s company in which he had a large ownership interest. The case of *Morgan v. Morgan* 854 P.2d 559 (Utah App. 1993) recognizes that the court may consider K-1 income in dividing assets among parties to a divorce action.

4. The court did not abuse its discretion in awarding attorney fees in this matter since such an award is contemplated and specifically allowed by statute in U.C.A. §30-3-3 under an Order to Show Cause motion.

ARGUMENT

Point I: The Court Properly Reinstated The Petitioner’s Order to Show Cause.

A. Rule 54(b)

On June 30, 1995, the Petitioner brought an Order to Show Cause (R at 822-834) against the Respondent for payment under the terms and conditions of Paragraph 10 of the Findings of Fact and Conclusions of Law for a determination of the court that the Respondent had converted

his bonuses to salary. The Petitioner, in her Order to Show Cause, requested that the court enforce the intent of the Findings of Fact and that the court clarify the 30% payment of all income over \$150,000 since 1993. No modification was requested by the Petitioner. Petitioner requested that full payment of all alimony of the Respondent be subject to a 30% payment to the Petitioner from 1993 onward for amounts in excess of \$150,000 a year.

After extensive discovery and delays, the matter finally came before Domestic Relations Commissioner Lisa A. Jones who dismissed the Order to Show Cause in a Minute Entry (R at 959-961) dated February 12, 1996. Pursuant to the Commissioner's instructions in the Minute Entry, the Petitioner filed a Petition for Modification (R at 962-966) seeking the same relief as that specified in the Order to Show Cause. The Petitioner did not file a formal appeal to the ruling of the Commissioner but waited to address the matter directly in a Pretrial Hearing before Judge Homer F. Wilkinson who had authority to revise the prior ruling according to Rule 54(b) of the Utah Rules of Civil Procedure, which he did. Judge Wilkinson reinstated the Order to Show Cause. During the trial of this matter on May 29, 1997, Judge Wilkinson stated:

This court is of the opinion that this should be before the court on the Order to Show Cause and not on the Petition to Modify. I think counsel, Mr. Hunt, was wrong in not bringing an objection to the recommendation of the commissioner. I'm sure I signed her recommendation when it came before me. Unless there's an objection made to those, then they're automatically signed.

But I think, either way, about the only difference it makes as far as the Order to Show Cause or a Petition to Modify would be the question as far as retroactivity of any amounts which the court may

award. (Page 2 of the Reporter's Partial Transcript of Trial Proceedings; Order to Show Cause/Modification: Court's Ruling.)

Although, with hindsight, it may have been better to file an immediate objection to Commissioner Jones' ruling dismissing the Order to Show Cause, the fact remains that according to Rule 54(b) of the Utah Rules of Civil Procedure, Judge Wilkinson had the authority to change the court's prior ruling in the matter because the court had not made:

the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination by the court that there is no just reason for delay and upon an express direction for the entry of the judgment.

Until that time, as Rule 54(b) goes on to clearly state:

In the absence of such determination and direction, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

In *Trembly v. Mrs. Fields Cookies*, 884 P.2d 1306, 1311 (Utah App. 1994), this Court acknowledged that Rule 54 (b) allows “for the possibility of a judge changing his or her mind” and that when a court reconsiders a prior ruling it may evaluate several factors including the “‘manifest injustice’ [which] will result if the court does not reconsider the prior ruling” or the need for a court to “correct its own errors” or even the possibility that “an issue was inadequately briefed when first contemplated by the court.” (See also *Salt Lake City Corp. v. James*

Constructors, 761 P.2d 42 (Utah App. 1988) and *Timm v. Dewsnap*, 851 P.2d 1178 (Utah 1993).)

B. Appealability

Although an objection could have been raised, the issue could not have been appealed until after a final judgment was entered on the entire matter addressed by the Order to Show Cause and/or the Petition for Modification. In *Backstrom Family Ltd. Partnership v. Hall*, 751 P.2d 1157 (Utah App. 1988), this Court outlines the standard governing the appealability of rulings:

The Utah Supreme Court in *Pate v. Marathon Steel Co.*, 692 P.2d 765 (Utah 1984), set out the standard under which rulings are appealable under Rule 54(b). A ruling is subject to Rule 54(b) certification if 1) there are multiple claims or parties; 2) the ruling would be appealable but for the fact that other claims or parties remain in the action; and 3) the trial court determines that there is “no just reason” to delay the appeal. Appeal of such a ruling is available when the lower court “certifies” the order under Rule 54(b). However, even with certification, the order is not appealable unless it wholly disposes of a claim or party. *Pate*, 692 P.2d at 768. (*Id.* at 1159)

The Commissioner’s ruling dismissing the Petitioner’s Order to Show Cause and instructing the Petitioner to bring the claim under a Petition for Modification did not wholly dispose of a claim or party and was, therefore, not appealable at that time. Even if an appeal could have hypothetically been taken, such an appeal would be unlikely to survive appellate scrutiny because the issues to be adjudicated under the subsequent Petition to Modify would have been

substantially the same as those under the Order to Show Cause. As the Utah Supreme Court stated in *Bennion v. Pennzoil Co.*, 826 P.2d 137, 138 (Utah 1992): “Today we hold that a claim is not separate if a decision on claims remaining below would moot the issues on appeal.” (See also *Furniture Distribution Center v. Miles*, 821 P.2d 1165 (Utah 1991) and *Tyler v. Department of Human Services*, 874 P.2d 119 (Utah 1994).) Although an objection could have been filed to the Commissioners dismissal of the Order to Show Cause, the trial court was within its authority to revise its prior ruling concerning the Order to Show Cause and to reinstate the same.

Point II: Despite the Petitioner’s Filing of a Petition for Modification, the Order to Show Cause Filed Initially is the Appropriate Motion Through Which to Adjudicate this Matter.

A. Findings of Fact

In an effort to expedite the adjudication of the Petitioner’s claims against the Respondent, the Petitioner filed a Petition for Modification in accordance with the instructions of Commissioner Jones; however, when the matter went to trial Judge Wilkinson stated, “This court is of the opinion that this should be before the court on the Order to Show Cause and not on the Petition to Modify.” (See Addendum B, page 2.)

While Appellee acknowledges that Paragraph 7 of the 1997 Findings of Fact and Conclusions of Law (R at 1140-41) appears contradictory in relation to the other paragraphs of the Findings of Fact and Conclusions of Law, the trial court clarifies its meaning in Paragraphs 4, 5, 6, and 8 (R at 1138-41) concerning the relief sought in both the Order to Show Cause and

Petition for Modification and the issue of “change of circumstances”. While the trial court acknowledges that there has been a change in the structure of the payment of the Respondent’s income, the total income of the Respondent has not materially changed. As the Findings of Fact and Conclusions of Law indicate in Paragraph 6 (R at 1139-40):

Regardless of how you look at payment of his [Respondent’s] income, the [Respondent] was going to be paying alimony on his total income of \$250,000 a year.

Since that initial alimony payment structure was set up in the Findings of Fact and Conclusions of Law and Decree of August 26, 1992, the allocation of [Respondent’s] income has been restructured as to the allocation between the [Respondent’s] salary and his bonuses. The [Respondent] now receives little or no bonuses and his salary has been substantially increased. Despite the change in the structure of how the [Respondent’s] income is paid to the [Respondent], the meaning of the Divorce Decree and the Findings of Fact and Conclusions of Law have not changed.

Whether one views the relief sought by the Petitioner as better falling under an Order to Show Cause or a Petition to Modify, the relief granted by the trial court was appropriate under the circumstances: “If the nature of the motion can be ascertained from the substance of the instrument, we have heretofore held that an improper caption is not fatal to that motion.”

Gallardo v. Bolinder, 800 P.2d 816, 817 (Utah 1990) quoting *Armstrong Rubber Co. v. Bastian*, 657 P.2d 1346 (Utah 1983) (citing *Howard v. Howard*, 356 P.2d 275, 276 (1960)).

B. “Bonuses”

Despite the attempt of the Appellant to convince this Court that the Appellant’s previous bonuses were gratuities to which he had no right to make a demand, and that, therefore, Appellee is bound to accept a current calculation of alimony based on bonuses that no longer exist (Brief of the Appellant, page 16), the facts, the Divorce Decree, as well as the trial court’s Findings of Fact and Conclusions of Law clearly indicate that “bonus” in this case refers to a form of compensation from MST Trucking -- similar to a form of *yearly* salary (R at 1138). Both 15 U.S.C. § 1672(a) and Rule 64D(d)(vii) of the Utah Rules of Civil Procedure include “bonuses” in their definitions of “earnings” as being compensation paid for personal services. (*See Funk v. Utah State Tax Com’n* 839 P.2d 818, 821 (Utah 1992).) The Appellant’s bonuses, which were included in the original trial court’s calculation of his total income upon which a total amount of alimony should be based, have now been phased out and replaced with a larger amount of monthly salary, “cash distributions”, and K-1 distributions. However, the Appellants total income has not decreased, it has instead increased by over \$100,000 per year (R at 1167, page 24).

Yet despite this fact, Appellant argues that Appellee should forfeit \$30,000 a year in alimony (over 50% of the original amount of alimony contemplated in the 1992 Findings of Fact and Conclusions of Law and Decree of Divorce) because he claims that Appellee is bound by the original Settlement Proceedings (R at 1165) at which she agreed to accept alimony based on a combination of \$2,400 dollars a month and 30% of his bonuses which were \$100,000 a year at

the time (R at 1048).

The Appellant refers to the case of *Jense v. Jense*, 784 P.2d 1249, 1252 (Utah App. 1989) in his brief (page 16) in an attempt to show that not receiving a bonus does not amount to “a substantial change in circumstance not originally contemplated within the decree itself”. Despite the contradictory wording of Paragraph 7 of the Findings of Fact and Conclusions of Law (discussed above), Appellee agrees. The original trial court ordered, on August 26, 1992, the Respondent to pay alimony on his bonus income at the end of the year so that he would not be forced to pay month to month on income he had not yet, but would, receive at the end of the year (fiscal or calendar). As Paragraph 10 of the August 26, 1992 Findings of Fact and Conclusions of Law (R at 496-497) indicates:

Based upon the incomes of the parties, the [Respondent] has agreed to pay to the [Petitioner] the sum of \$2,400.00 per month as alimony. The [Respondent] will also pay to the [Petitioner], as additional alimony thirty percent (30%) of the gross amount of any bonuses he receives as additional income above his annual base salary which is currently \$150,000.00 without bonuses. The [Respondent] will provide independent verification to the [Petitioner] of any and all bonuses received. The parties agree that this form of payment of alimony is being adopted and agreed upon because the [Respondent] receives a monthly gross income of \$12,500.00 per month. Accordingly, after deductions for state and federal taxes, social security, health care premiums, child support and alimony, the [Respondent] will be left with approximately \$2,500.00 net income to meet his own monthly financial needs. The payment of alimony in the total amounts required when considering [Respondent's] annual income can only be made after the [Respondent] has received his bonus. The [Respondent] shall make distribution to the [Petitioner] of thirty percent (30%) of his

gross bonus immediately upon his receipt thereof, and the parties recognize that his will qualify as payment of alimony in addition to \$2,400.00 per month paid from [Respondent's] base salary. Based upon the [Respondent's] current bonus of \$100,000 per year, the amount of alimony paid from the [Respondent's] bonuses would be \$30,000.00 additional annual payment of alimony.

In *Jense*, a similar situation is presented:

When the trial court ordered defendant not to reduce her awards to judgment until April 1, 1987, its purpose was to allow plaintiff time to receive an anticipated bonus so that he could more easily pay this obligation. The failure of plaintiff to receive a bonus in 1987 is not a change of circumstances justifying a modification of the awards made in the decree because it is unrelated to the circumstances upon which the original awards were made by the trial court, and relates only to plaintiff's ability to pay them. (At 1252.)

In other words, the fact that the structure of Appellant's compensation changed is "unrelated" to the total amount in alimony which he must pay to Appellee, especially considering the fact that the total amount of his income has stayed substantially the same or *increased*. Whether he labels his income as "salary" or "bonuses" or K-1 distributions is irrelevant; the Appellant is still required to pay Appellee approximately \$58,800 a year in alimony. He has never met this obligation, that is why the Order to Show Cause was brought against him to enforce the original Decree and why the trial court ruled against him.

In addition to finding that this action was properly before the court on an Order to Show Cause, the trial court unfortunately chose to find that there was "a material change of

circumstances *in that the change in the structure of the payment of the [Respondent's] income was not foreseeable*" (emphasis added) in order to justify the Petitioner's Petition for Modification (R at 1140). Were it not for the context in which such an assertion was made by the trial court, Appellee might be inclined to agree that such a contradictory ruling was an abuse of discretion by the trial court. In this case however, the only practical difference, other than a finding of "material change in circumstances", between the two types of motions is the issue of retroactivity. As stated in the Findings of Fact and Conclusions of Law (R at 1143):

The cause of action brought by the [Petitioner] before this Court is upon the Order to Show Cause of the Plaintiff to enforce the terms of the Decree of Divorce of August 26, 1992. The relief requested by the [Petitioner] in either pleading is the same and requests only the enforcement of the Findings of Fact and Conclusions of Law and the Decree of Divorce of August 26, 1992. The only difference between the Order to Show Cause or the Petition to Modify would be the question as to the retroactivity of any amounts which the Court may award.

However, there are two doctrines that apply to this case by which a Petition for Modification may still be retroactive and thereby render it essentially the same as an Order to Show Cause. Appellee infers from the facts of the case as well as statements made by Judge Wilkinson that issues of equitable estoppel and fraud may be of significance.

C. Equitable Estoppel

Even though Appellant contends that he has not received any "bonuses" since the 1992

Decree of Divorce (page 13 of the Brief of the Appellant), he has received some small “cash distributions” in addition to an increase in his salary from \$150,000 to \$205,000 per year (R at 1167 page 28) and significant K-1 distributions of at least \$80,000 (Brief of the Appellant, page 19). Appellant paid Appellee 30% on the minor “cash disbursements” (Brief of the Appellant at 13, R at 1167 page 12) which he received after the 1992 Decree of Divorce, but Appellant claims that these were not bonuses and that he was not required to pay anything based on these amounts, since his corporation (of which he owns 20% according to Brief of the Appellant at 19) no longer paid “bonuses” after 1992.

Due to the Appellant’s own actions in paying alimony on amounts he now claims were not subject to alimony and due to the original Findings of Fact and Conclusions of Law, Appellant should be equitably estopped from claiming that his current income structure which he voted to change in 1992 as one of only four shareholders of MST Trucking (R at 1167 pages 7-9) excuses him from paying the full amount of alimony he owes to the Appellee simply because his bonuses are no longer referred to as “bonuses” by his own company.

According to *Wiese v. Wiese* 699 P.2d 700, 702 (Utah 1985), there are three elements to equitable estoppel: 1) representation 2) reliance and 3) detriment. It is clear from the 1992 Findings of Fact and Conclusions of Law that the Appellant represented that his income was paid as a base salary of \$150,000 a year and a \$100,000 bonus paid at the end of the year. It is clear from the 1992 Decree of Divorce (R at 503-509) and subsequent events that the Petitioner relied

on these representations by entering into the 1992 Settlement with the Respondent (R at 1165), and that such reliance was detrimental to the Petitioner when Respondent refused to pay the full amount of alimony owed to the Petitioner, in fact never paid any “bonus” money to the Petitioner whatsoever from 1992 to the present (other than a few small “cash distributions” which Respondent claims are not bonuses and therefore are not really owed to the Petitioner).

According to *Masters v. Worsley*, 777 P.2d 499, 502 (Utah App. 1989): “Equitable estoppel is only invoked when the conduct and circumstances would otherwise perpetrate a fraud or unfair advantage. *Kelly v. Richards*, 95 Utah 560, 83 P.2d 731, 734 (1938).” In this case, to deny the Appellee the full amount of alimony owed to her by the Appellant since 1992 would constitute a fraud.

D. Fraud

Even the Appellant acknowledges that the structure of the corporation had changed before the settlement conference of May 29, 1992 (Brief of the Appellant at 12). However, the official change was not complete (R at 1167, page 7) and would not have afforded the Appellee any way of knowing that there were to be no more bonuses, especially since the payment of salary and bonuses was subject to the whim of the four owners of MST Trucking, of whom the Appellant was one -- a voting member in addition to a 24% owner at the time (R at 1167, page 9). For the Appellant to now claim that the discontinuance of the payment of bonuses by MST

Trucking was a foreseeable event implies facts not in evidence and certainly not contemplated in the Decree itself. Although Appellant's prior attorney, Larry Kirkham, testified (over the objection of Appellee) that he had told Appellee's prior attorney (now deceased and unavailable to rebut the testimony) before the signing of the stipulations reached at the May 29, 1992 settlement conference that "any future bonuses were speculative at best" (R at 1167, pages 5-7), the trial court was unconvinced. Based on this unsubstantiated hearsay, Appellant claims that Appellee should have known that the bonuses would likely be discontinued and therefore such a change was foreseeable. The trial court made no such finding in the 1992 Decree of Divorce nor in its 1997 Findings of Fact and Conclusions of Law. As this Court ruled in *Jense v. Jense*, 784 P.2d 1249, speculation is not a proper basis for determining alimony in a divorce decree:

The trial court properly based these awards upon valuations and circumstances present at the time the decree was issued, not upon future speculation as to valuation or financial circumstances.

What Appellant's arguments do indicate, however, is that when the August 26, 1992 Findings of Fact and Conclusions of Law were issued, the Appellant both knew that there were to be no more bonuses (and that his salary was to be increased to 205,000 per year with \$80,000 - \$90,000 in K-1 income from MST Trucking to compensate for the cessation of bonus income) and that he had no intention of paying the additional \$30,000 in alimony required of him by the trial court in addition to the \$2,400 monthly amount that had been based on his prior salary of \$150,000. Such conduct constitutes a fraud on the court. Therefore an action, even a Petition for

Modification, would be an appropriate pleading by which to seek retroactive compensation for the unpaid amounts of alimony due and owing from 1992 till the present under these circumstances. Rule 60(b) states:

On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), or (3), not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

In effect, both the Order to Show Cause and Petition for Modification were “Clarification of Judgment” motions. While the original Findings of Fact and Conclusions of Law were clear to the court (R at 1144), the Appellant’s efforts at evading his alimony support obligation by changing his salary structure resulted in the need for the trial court to clarify to the Appellant that

his obligation concerning “bonus” money alimony had not disappeared. As this Court notes in *Kunzler v. O’Dell*, 855 P.2d 270 (Utah App. 1993):

Although a motion entitled “Clarification of Judgment” was not specifically provided for in the Utah Rules of Civil Procedure, because the substance of the motion was to make clear a judgment that was not already clear, the motion was sufficient to invoke Subdivision (b) of this rule.

Exactly this type of clarification was accomplished when the trial court ruled in its August 11, 1997 Findings of Fact and Conclusions of Law:

Pursuant to the Findings of Fact of August 26, 1992, in Paragraph 6, the income of the [Respondent] for 1992 is clearly stated as \$250,000.00 a year regardless of whether the income is structured as bonuses or salary.

In *Masters v. Worsley*, 777 P.2d 499, 501 (Utah App. 1989), this Court explained what must be shown to establish fraud:

To establish fraud, a party must demonstrate that a party made a false representation concerning a presently existing material fact, which the representor either knew to be false or made recklessly without sufficient knowledge, or omitted a material fact when there was a duty to disclose, for the purpose of inducing action on the part of the other party, with actual, justifiable reliance, resulting in damage to that other party. *Taylor v. Gasor, Inc.*, 607 P.2d 293, 294 (Utah 1980).

This failure of the Appellant to inform the Appellee that the form of his income (especially the cessation of bonuses) had *already* changed was a fraud on the court and a material fact omitted upon which the Appellee detrimentally relied.

E. Retroactivity

Due to the fact that the trial court reinstated the Petitioner's Order to Show Cause, retroactivity is, of course, not an issue since an Order to Show Cause by definition is brought to enforce an existing judgment or decree effective from the date of the order or decree itself. "Order to show cause proceedings are commonly used by parties seeking to enforce divorce decree provisions." *Wiles v. Wiles*, 871 P.2d 1026, 1029 (Utah App. 1994). However, in the alternative, even under a Petition for Modification of the original Decree of Divorce, the relief granted may be retroactive if fraud or material misrepresentation or concealment of financial condition is shown to have existed at the time of the divorce decree. In the case of *Shelton v. Shelton*, 885 P.2d 807, 808 (Utah App. 1994), this Court upheld an appeal to the awarding of retroactive temporary alimony:

[The Appellant] correctly observes that "once temporary support obligations become due, they are no more retroactively modifiable than final decrees." *Whitehead v. Whitehead*, 836 P.2d 814, 816 (Utah App. 1992). However, he incorrectly concludes from this rule of law that temporary support obligations *cannot* be modified. On the contrary, it is well established that

[a] material misrepresentation or concealment of assets or financial condition as a result of which alimony or property awarded is less or more than otherwise would have been provided for is a proper ground for which the court may grant relief to the party who was offended by such misrepresentation or concealment, absent other equities such as laches or negligence.... However, before relief can be granted, it must be determined that the alleged misrepresentation or concealment constitutes

conduct, such as fraud, as would basically afford the complaining party relief from the judgment. *Clissold v. Clissold*, 30 Utah 2d 430, 519 P.2d 241, 242 (1974) (citations omitted), *overruled in part on other grounds by St. Pierre v. Edmonds*, 645 P.2d 615, 619 n.2 (Utah 1982); *accord Boyce v. Boyce*, 609 P.2d 928, 931 (Utah 1980) (noting that “[c]learly, a court should modify a prior decree when the interests of equity and fair dealing with the court and the opposing party so require”); *Reid v. Reid*, 245 Va. 409, 429 S.E.2d 208, 211 (1993) (ruling that “[o]nce the amount of spousal support is determined, the statutes and case law specifically limit the divorce court’s authority to retroactively modify that amount, *absent fraud on the court*”) (emphasis added).

Point III: The District Court Ruled Correctly When It Determined That K-1 Distributions Are Income for the Purposes of Calculating Alimony.

Despite the entreaties of the Appellant (Brief of the Appellant, page 18), the trial court correctly determined that K-1 profit distributions were income properly subject to the calculation of alimony for purposes of the 1992 Decree of Divorce and the 1997 Findings of Fact and Conclusions of Law. Despite claims that the Appellant has no ability to affect the structure of MST Trucking and MST Financial from which he is paid salary, cash distributions and K-1 profit distributions in place of the salary and bonuses he was paid prior to his divorce, Paragraph 5 of the Affidavit of Craig Willet (R at 1127, 1128) confirms that the Appellant is “a 22.5% shareholder in MST Trucking and a 20% shareholder in MST Financial.” Appellant is a voting member of these corporations which are, according to the testimony of Larry Kirkham “primarily taxed the same as a partnership”(R at 1167, page 13, line 6). Since the change in corporate

structure in 1992, “profitability, whether it was distributed or undistributed, simply needed to be divided on the basis of stock” (R at 1167, page 14, line 14). And, significantly, it is evident from the Appellant’s own witness that K-1 profit distributions replaced the prior bonuses, “These profit distributions were not bonuses, they’re K-1 profit distributions, and that’s how the bonus structure has been ever since. There really are no bonuses, or the bonuses are very, very modest. There may have been one bonus in three years following the divorce decree, and after the company has become a Subchapter S [Corporation].” (R at 1167, page 12.) This Court indicated in *Morgan v. Morgan*, 854 P.2d 559, 566 (Utah App. 1993) that K-1 income is subject to valuation and distribution a divorce proceeding regardless of whether it is to be liquidated or not. In other words, it is irrelevant whether or not Appellant’s K-1 profit distributions are conveniently able to be liquidated or cashed out each month before he pays alimony; therefore, the trial court was correct in determining that the Appellant’s K-1 profit distributions which partially replaced his bonuses are, as the IRS would agree (since the Appellant is required to file K-1 profit distributions on a Schedule K-1 federal income tax return), income. (See *Muir v. Muir*, 841 P.2d 736, 740 (Utah App. 1992).)

While it is true that trial courts must consider:

- (1) [T]he financial conditions and needs of the receiving spouse;
- (2) the ability of the receiving spouse to produce a sufficient income for him or herself; and (3) the ability of the responding spouse to provide support. (*Morgan* at 567.)

Such considerations were addressed appropriately in the 1992 Findings of Fact and Conclusions

of Law that accompanied the Decree. This is sufficient under an Order to Show Cause proceeding, especially given the fact that the Appellant/Petitioner did not himself request a modification in the support obligations decreed in 1992. It is not necessary to relitigate those issues when it is the enforcement of the original Decree of Divorce that is being sought through an Order to Show Cause proceeding (R at 1040). Even if this Court finds that this action was more properly before the trial court as a Petition for Modification, the three factors that a court must consider above were re-evaluated by the trial court when it incorporated the original 1992 Findings of Fact and Conclusions of Law in the 1997 Findings of Fact and Conclusions of Law and made specific findings concerning the Appellant's income (R at 1140).

Point IV: The Court Did Not Abuse Its Discretion in Awarding Attorney Fees

Lastly, the court acted within its discretion when it ordered that the Respondent pay attorney fees in the Order to Show Cause action brought by the Petitioner. According to U.C.A.

§ 30-3-3(2):

In any action to enforce an order of custody, visitation, child support, alimony, or division of property in a domestic case, the court may award costs and attorney fees upon determining that the party substantially prevailed upon the claim or defense. The court, in its discretion, may award no fees or limited fees against a party if the court finds the party is impecunious or enters in the record the reason for not awarding fees.

The Petitioner did “substantially prevail upon [her] claim” and therefore, an award of attorney

fees was appropriate.

Appellant contends that Mr. Hunt, attorney for the Appellee, failed to submit an affidavit setting forth “the hours, the time spent, the hourly rate, the nature of the work performed and the work performed and thereafter the reasonableness of the work performed” in compliance with Rule 4-505 of the Code of Judicial Administration (Brief of the Appellant, page 22). Such an assertion is completely inaccurate. Mr. Hunt did indeed submit an affidavit entitled Plaintiff’s Affidavit for Attorney’s Fees, dated May 28, 1997. (*See* Addendum A.) This Affidavit is referred to as “Plaintiff’s Exhibit No. 5” in the trial transcript and it is referred to as Exhibit #5 in the Brief of the Appellant (page 23). The Affidavit was admitted by the trial court into evidence (R at 1166, page 35).

Considering the fact that the Affidavit for Attorney’s Fees combined with the ruling of Judge Wilkinson established that such fees were reasonable, the fact that the Appellee’s financial needs are well documented in the trial transcript (yearly income, excluding alimony and child support, of \$13,187.19 -- R at 1166, page 11); considering the fact that the Appellant’s income is many times that of the Appellee (in excess of \$370,000 per year -- R at 1167, page 24) he has the ability to pay, the trial court did not abuse its discretion (see *Wells v. Wells*, 871 P.2d 1036, 1040) in awarding attorney fees to Appellee/Petitioner regardless of whether this matter is evaluated to have been properly brought under an Order to Show Cause or Petition for Modification or both.

CONCLUSIONS


The trial court acted within its discretionary powers when it reinstated the Petitioner's Order to Show Cause and thereafter acted to enforce the 1992 Decree of Divorce. Despite the superficial changes in the form of the Respondent's income, that income was still received from the same corporations with no decrease in the overall amount (in fact, there appears to have been an overall increase of about \$100,000 per year in Respondent's income). The trial court's finding that the increases in "salary", the cash distributions and K-1 profit distributions were still "income" for the purposes of calculating alimony were factual findings well within the discretion of the trial court to make. Additionally, the trial court acted in accordance with statutory provisions in awarding attorney's fees. Retroactivity and the need to show a substantial change in circumstances *not contemplated in the Decree itself* are issues that only arise if this Court finds there was a need to satisfy the requirements of a Petition for Modification. Appellee argues that the trial court's seemingly inconsistent Findings for both an Order to Show Cause and Petition for Modification were not necessary (in that a finding in accordance with just the Order to Show Cause motion was sufficient), or, in the alternative that those requirements (of a Petition for Modification) have been met under such an alternative analysis with retroactivity being possible under theories of equitable estoppel and fraud.

Appellee urges this Court to affirm the trial court's order enforcing the Decree and the Findings of Fact and Conclusions of Law requiring the Respondent/Appellant to pay alimony of

\$2,400 based on the first \$150,000 of his income and 30% of all other income from MST Trucking and Financial to Petitioner/Appellee. Appellee also urges this Court to affirm the trial court's awarding of attorney fees.

Finally, as there is no clear basis in law for the Appellant to prevail on this appeal, Appellee asks this Court that the attorney fees and costs of this appeal be assessed against the Appellant: "[W]here the trial court has awarded attorney fees and the receiving spouse has prevailed on the main issues, we generally award fees on appeal." *Shelton v. Shelton*, 885 P.2d 807, 808 (Utah App. 1994) quoting *Rosendahl v. Rosendahl*, 876 P.2d 870, 875 (Utah App. 1994).

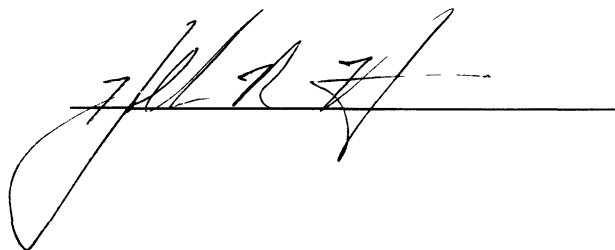
RESPECTFULLY SUBMITTED this 8 day of June, 1998.


HOLLIS S. HUNT
Attorney for the Petitioner/Appellee

CERTIFICATE OF MAILING

I hereby certify that I caused to be ~~mailed~~^{delivered} a true and correct copy of the foregoing BRIEF OF APPELLEE, by ~~placing~~^{hand delivery} the same in the United States Mail, in a postage prepaid sealed envelope, this 5th day of June, 1998. ~~mail~~

Randy S. Ludlow
336 South 300 East, Suite 200
Salt Lake City, Utah 84111

A handwritten signature in black ink, appearing to read "R. S. Ludlow", is written over a horizontal line.

ADDENDUM A

HOLLIS S. HUNT - #1587
Attorney for Plaintiff
243 East 400 South, Suite 200
Salt Lake City, Utah 84111
Telephone: 531-0099

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

MARY ANN MOON,	*	
Plaintiff,	*	PLAINTIFF'S AFFIDAVIT FOR
	*	ATTORNEY'S FEES
vs.		
	*	Case No. 904901685 DA
STANLEY W. MOON,	*	Judge Homer F. Wilkinson
Defendant.	*	

Plaintiff, by and through her attorney, submits the following
Affidavit in support of the attorney's fees the Plaintiff has
expended during the course of this action to enforce the Decree of
Divorce of August 26, 1992:

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

Hollis S. Hunt, being first duly sworn, deposes and states as
follows:

1. That I am an attorney authorized to practice law in the State of Utah and am a member of the Utah State Bar and have been since 1970.

2. That I have been retained by the Plaintiff to represent her in this action to enforce the Divorce Decree between Plaintiff and Defendant dated August 26, 1992.

3. That her initial attorney in the course of this current matter was Ephraim H. Fankhauser, who subsequently withdrew, and I was then retained to represent the Plaintiff.

4. **The Legal Basis For Award of Attorney's Fees.** Section 30-3-3(2) U.C.A. (1953 as amended), provides for payment of attorney's fees and costs for the party who substantially prevails on their claim of action. The Court, in it's discretion may award attorney's fees in these matters.

5. **Nature of Work Performed.** During the course of this matter before the Court, Plaintiff sought to enforce the Decree of Divorce in regard to the alimony payments. An Order to Show Cause was initially filed, together with numerous conferences with the client, extensive review of prior pleadings, and extensive discovery. A hearings on the Order to Show Cause was held, preparation of Petition to Modify, attendance at Pre-trial hearings and preparation of a Trial Brief and preparation and attendance at a Trial before the Court were all done. The work performed has taken place over a period of two (2) years from April, 1995 through the current date of May, 1997.

6. Reasonableness of Fees. The fees outlined below are reasonable fees charged within the area of Salt Lake City and Salt Lake County at the rate of \$150.00 per hour are mid-level fees for practitioners who have practiced in excess of twenty (20) years.

7. The following constitutes the name of the attorney, rate, hours and amount charged for services performed in this matter:

<u>NAME</u>	<u>RATE</u>	<u>HOURS</u>	<u>AMOUNT</u>
E. H. Fankhauser	150.00	11.33	1,700.00
Hollis S. Hunt	150.00	42.85	6,427.00
Total Attorney's Fees			\$ 8,127.00

8. The fees stated above represent the amount of attorney's fees through the date of Trial, May 29, 1997.

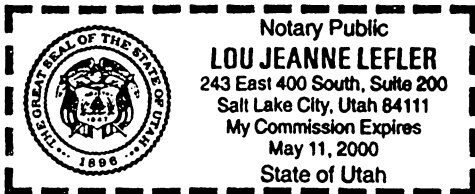
9. Affiant affirms that these fees are reasonable in nature and that the hours stated above accurately reflect the amount of work entailed in bringing this matter to trial.

DATED this 28 day of May, 1997.


HOLLIS S. HUNT
Attorney for Plaintiff

Personally appeared before me, the undersigned Notary Public,
Hollis S. Hunt, who acknowledged to me that he signed the foregoing
Affidavit and the matters contained therein are true.

Subscribed and sworn to before me this 28 day of
May, 1997.



Lou Jeanne Lefler

NOTARY PUBLIC
Residing in Salt Lake County, Utah
My Commission Expires: 5/11/2000

ADDENDUM B

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

MARY ANN MOON,	:	<u>Reporter's Partial Transcript</u>
	:	<u>of Trial Proceedings; Order</u>
Plaintiff,	:	<u>to Show Cause/Modification:</u>
	:	<u>Court's Ruling</u>
vs.	:	
	:	
STANLEY W. MOON,	:	Case No. 904901685 DA
	:	
Defendant.	:	Hon. Homer F. Wilkinson

BE IT REMEMBERED, that on the 29th day of May, 1997, the above-entitled matter continued in trial session in Courtroom No. 502 of the Courts Building, Metropolitan Hall of Justice, 240 East 400 South, Salt Lake City, Utah before the Honorable Homer F. Wilkinson, Judge in the Third Judicial District, State of Utah.

APPEARANCES

HOLLIS S. HUNT, Attorney-at-Law, 243 East 400 South, Suite 200, Salt Lake City, UT 84111 Telephone 531-0099 Fax 531-7928 appearing with and on behalf of the Plaintiff.

RANDY S. LUDLOW, Attorney-at-Law, 336 South 300 East, Suite 200, Salt Lake City, UT 84111 Telephone 531-1300 Fax 539-8236 appearing with and on behalf of the Defendant.

COPY

(Whereupon, the following proceedings continued in open court:)

THE COURT: Counsel, let me first indicate to you, as I started this morning, I indicated to you that this comes before the court not only on a petition to modify, but on the order to show cause. Mr. Ludlow has taken issue with that, which he has the right to do.

And the court took the position -- and I still take the position -- that , at the pretrial, this matter was discussed and expressed to both counsel as far as the order to show cause or petition to modify, and that the court would be looking at both of them.

This court is of the opinion that this should be before the court on the order to show cause and not on the petition to modify. I think counsel, Mr. Hunt, was wrong in not bringing an objection to the recommendation of the commissioner. I'm sure I signed her recommendation when it came before me. Unless there's an objection made to those, then they're automatically signed.

But I think, either way, about the only difference it makes as far as the order to show cause or a petition to modify would be the question as far as retroactivity of any amounts which the court may award.

So, I'm looking at this, at both of those, and I'm going to make a ruling on both. And if the failure to file an objection is controlling in it, as far as Mr. Hunt's position is concerned, then of course somebody else will have to tell us that.

First of all, I took considerable time in going over the pleadings in this case, and to me they're quite clear. I think they were drafted well and there's not a dispute as to the pleadings, which Mr. Hunt took that position and wanted to invoke the parol evidence rule, which I disallowed because of the fact that I knew there was some question as to whether it was clear to both parties.

I'm looking at the Findings of Fact first, which have been read here many times today, and Paragraph 6:

The defendant's income is

\$250,000.00 per year --

That's what is income is. It doesn't say anything about "bonuses," it doesn't say anything about "salary," that's what his income is.

-- which is based on \$150,000.00

as annual salary and bonus of

approximately \$100,000.00.

That still does not change what his income is: His income was \$250,000. And now look at Paragraph 10:

Based upon the incomes of

the parties --

the income being \$250,000

-- the Defendant has agreed to pay to the

Plaintiff the sum of \$2,400.00 per month

as alimony. The Defendant will also

pay to the Plaintiff, as additional alimony

thirty percent (30%) of the gross amount

of any bonuses he receives as additional

income above his annual base salary

which is currently \$150,000.00 without bonuses.

Also it states:

The Defendant will provide independent verification to the Plaintiff of any and all bonuses received.

Now, the next part -- and nobody's referred to that -- is the most important part to me in the whole pleading:

The parties agree that this form of payment of alimony is being adopted and agreed upon because the Defendant receives a monthly gross income of \$12,500.00 per month. Accordingly, after deductions for state and federal taxes, social security, health care premiums, child support and alimony, the Defendant will be left with approximately \$2,500.00 net income to meet his own monthly financial needs. The payment of alimony in the total amounts required when considering Defendant's annual income can only be made after Defendant has received his bonus. The Defendant will make distribution to the Plaintiff of thirty percent (30%) of his gross bonus immediately upon his receipt thereof,

and the parties recognize that this will qualify as payment of alimony in addition to \$2,400.00 per month paid from Defendant's base salary.

Then it goes on and says:

Based upon the Defendant's current bonus of \$100,000.00 per year, the amount of alimony paid from the Defendant's bonuses would be \$30,000.00 additional annual payment of alimony.

The decree of divorce merely states:

The Defendant shall pay to the Plaintiff the sum of \$2,400.00 as alimony plus thirty percent (30%) of the gross income of any bonus he may receive each calendar year.

And then, of course, it also provides that:

The Defendant shall also provide independent verification to the Plaintiff of all bonuses Defendant receives.

Now, to me, that was very clear. The defendant had a salary of \$250,000 per year. Because of the fact that, if he were to pay -- because of the fact that he was receiving part of that salary as a bonus annually and not monthly, it would work a considerable

hardship on the defendant, and it was done for the benefit of the defendant.

I'm sure both attorneys must have recognized it, that he would not have sufficient income to care for and support himself if he had to pay alimony each month on \$250,000.

So it was worked out that he would pay that on an annual basis when he received the bonus. But regardless of how you look at it, he was going to be paying alimony on \$250,000 a year.

Since that has taken place, there has been a change as far as the salary, as far as his bonuses, as far as the structure is concerned. But that does not change the meaning of the divorce decree and the findings of fact and conclusions of law.

The court rules that the defendant is responsible for the payment of alimony of \$2400 per month on the first \$150,000 he receives; and he's to pay 30 percent of all amounts he receives over that, whether that's income or bonuses or distributions or anything else as far as that goes.

Now, a lot's been said as far as K-1 distributions. The court is familiar and aware of this type of situation, but in many corporations, money has to be plowed back into the corporation for it to continue in existence. That still does not say that it is not income.

The fact that it's put back into the corporation, and the defendant does not receive that, does not mean it's not income to him, and that he would have a responsibility to pay to the plaintiff 30 percent as far as the increase which he has had; that being an income or increase to him.

Whether he takes it out or not, that's up to him. And the other partners may put all theirs back in, but he still has the responsibility to pay 30 percent of his increase.

Now, the question as far as the petition to modify, I think this does meet the statutory rule. It was not foreseeable, as far as the change of structure of the company, and certainly there has been a substantial and material change of circumstances from alimony on \$150,000 to 30 percent on the next -- well over that, and bonuses over that, and now receiving alimony at only \$2400 per month.

So the court, either way, feels that the plaintiff is entitled to enforcement of the order to show cause or enforcement of the petition to modify. Now, the question as far as the retroactivity, the court does take the position that this should be retroactive.

Certainly, when this matter was first brought to the attention of the court, being sent out to her, verification, that he had some knowledge to know of this fact, and the matter would be retroactive.

MR. LUDLOW: To what date, your Honor?

THE COURT: To the date of the divorce decree.

MR. LUDLOW: The order to show cause says it was served in 1995.

THE COURT: It doesn't go back until after the order to show cause. When you file an order to show cause, it goes back to the decree itself.

MR. LUDLOW: I understand.

THE COURT: Now, as far as attorneys fees, the court is going to award to Mr. Hunt attorneys fees of \$4,324 and award to the plaintiff \$1700 for the amount she paid to Mr. Fankhauser.

And the reason the court has decreased Mr. Hunt's attorneys fees is because I think Mr. Hunt was at fault in not bringing this matter immediately to the court on an objection to the recommendation of the commissioner, and has caused unnecessary pleadings and attorneys fees to be used in the filing of the petition to modify.

Now, I'm not going to go through each year; you have that material. If you can't work it out, then of course I have my notes here. But the plaintiff is first entitled -- .

MR. LUDLOW: Excuse me, your Honor, I couldn't hear what you said.

THE COURT: I didn't finish saying it, counsel. Let me finish for just a minute. This decree was signed in August of 1992, so he's entitled -- or, she's entitled to a verification for '93, '94, '95, '96, and of course we're into '97. Any questions?

MR. LUDLOW: Yes. I'm confused with regard to what this court is saying with regard to what Mr. Moon owes. Are you saying if she gets -- if she's bought out of those other years, and he has the K-1, with monies he doesn't receive, you're saying he owes money on that; or are you saying he owes money on the interest he received?

THE COURT: I'm saying he received -- he pays money on 30 percent of all increase he has over \$150,000.

MR. LUDLOW: Of salary.

THE COURT: No, increase -- listen to me, counsel: Increase. On the K-1 distribution, that's an increase. That becomes income to him. He can take that money out. If he wants to put that money back into the corporation, that's his choice. Otherwise, a person could never take money out, just enough to live on, and "I don't have any increase or any income."

MR. LUDLOW: Sir, is the court aware that on a K-1, if there is a pass-through to the IRS -- because the corporation is no longer paying tax, it's now paid by the individual. So when they pay those, they receive the monies, the K-1 is a pass-through or directly to the IRS. The individual never receives that.

It's the same when they never receive any income as a result of the additional valuation of an asset. There's no money his pocket.

THE COURT: That's what I said, counsel. It's an increase to him.

MR. HUNT: Your Honor, you didn't deal with the issue of interest.

THE COURT: There would be interest awarded on all past-due amounts. That's by statute.

MR. HUNT: Thank you, your Honor. Who do you want to prepare the pleadings?

THE COURT: I'll ask you, Mr. Hunt, to prepare the pleadings.

MR. HUNT: Thank you.

THE COURT: Court will be in recess.

MR. LUDLOW: Before the court leaves, I would ask for a stay with regard to execution with regard to those matters. We plan to appeal this.

THE COURT: Well, I won't grant any stay at this point. You do what you have to do as far as filing a motion to stay. That's up to you.

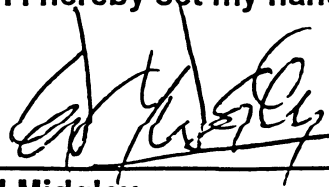
MR. LUDLOW: All right, judge.

(Whereupon, at the hour of 12:30 p.m., the instant proceedings came to a close.)

REPORTER'S CERTIFICATE

I, Ed Midgley, Official Court Reporter in the Third Judicial District, State of Utah, do hereby certify that the above and foregoing proceedings were, by me, stenographically reported at the times and places herein set forth; that said report was, by me, subsequently reduced to printed form, consisting of the enumerated pages herein appearing; and that said report so transcribed constitutes a true and correct transcription of testimony given, evidence adduced and/or proceedings had as in the foregoing annexed transcription herein set out, portion only of entire proceedings being herein transcribed pursuant to requested transcript content.

To which certification I hereby set my hand this 3rd day of June, 1997, at Salt Lake City.

A handwritten signature in black ink, appearing to read 'Ed Midgley', is written over a horizontal line.

Ed Midgley
Official Court Reporter

Utah CSR No. 22-104249-7801

ADDENDUM C

agreements that meet common law requirements. *Goodmansen v. Liberty Vending Sys.*, 866 P.2d 581 (Utah Ct. App. 1993).

Oral settlement agreements.

This rule does not preclude a trial court from enforcing an oral settlement agreement; thus, a settlement agreement was enforceable despite the fact that it had not been reduced to writing, signed by the parties, and entered on the minutes of the court. *John Deere Co. v. A&H Equip., Inc.*, 876 P.2d 880 (Utah Ct. App. 1994).

judgment to defendants did not invalidate the default judgment when defendants received the notice of default in time to move to set aside the judgment. *Lincoln Benefit Life Ins. Co. v. D.T. Southern Properties*, 838 P.2d 672 (Utah Ct. App. 1992).

Cited in *DeBry v. Fidelity Nat'l Title Ins. Co.*, 828 P.2d 520 (Utah Ct. App. 1992); *Reeves v. Steinfeldt*, 915 P.2d 1073 (Utah Ct. App. 1996).

Service of default judgment.

Plaintiffs' failure to mail a copy of the default

Rule 4-505. Attorney fees affidavits.

Intent:

To establish uniform criteria and a uniform format for affidavits in support of attorney fees.

Applicability:

This rule shall govern the award of attorney fees in the trial courts.

Statement of the Rule:

(1) Affidavits in support of an award of attorney fees must be filed with the court and set forth specifically the legal basis for the award, the nature of the work performed by the attorney, the number of hours spent to prosecute the claim to judgment, or the time spent in pursuing the matter to the stage for which attorney fees are claimed, and affirm the reasonableness of the fees for comparable legal services.

(2) The affidavit must also separately state hours by persons other than attorneys, for time spent, work completed and hourly rate billed.

(3) If the affidavit is in support of attorney fees for services rendered to a person or entity who has been assigned an interest in a claim for the purpose of collection or hired by the obligee to collect a debt, the affidavit shall also state that the attorney is not sharing the fee or any portion thereof in violation of Rule of Professional Conduct 5.4.

(4) If judgment is being taken by default for a principal sum which it is expected will require considerable additional work to collect, the following phrase may be included in the judgment after an award consistent with the time spent to the point of default judgment, to cover additional fees incurred in pursuit of collection:

"AND IT IS FURTHER ORDERED THAT THIS JUDGMENT SHALL BE AUGMENTED IN THE AMOUNT OF REASONABLE COSTS AND ATTORNEY'S FEES EXPENDED IN COLLECTING SAID JUDGMENT BY EXECUTION OR OTHERWISE AS SHALL BE ESTABLISHED BY AFFIDAVIT."

(5) Attorney fees may be awarded pursuant to this rule or pursuant to Rule 4-505.1.

(Amended effective January 15, 1990; May 1, 1993; November 15, 1995.)

Amendment Notes. — The 1995 amendment added Subdivision (3), made related sub-

division redesignations, and made stylistic changes.

report for the first time on appeal from district court order adopting the master's findings. *Score v. Wilson*, 611 P.2d 367 (Utah 1980).

Scope of appointment.

A special master who was directed to review requests for cost reimbursements exceeded the scope of his appointment by investigating and reporting on the issue of attorney's fees since the court had already ordered an award of attorney's fees and the parties had no notice that the master was to review that award nor did the parties have an opportunity to partici-

pate in the master's proceedings. *Plumb v. State*, 809 P.2d 734 (Utah 1990).

Status as judicial officer.

A special master has the duties and obligations of a judicial officer, and thus should not engage in unethical ex parte contacts with the judge overseeing the case on matters pertinent to the substance of the referral. *Plumb v. State*, 809 P.2d 734 (Utah 1990).

Cited in *Jones, Waldo, Holbrook & McDonough v. Dawson*, 923 P.2d 1366 (Utah 1996).

COLLATERAL REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d Equity §§ 226, 228; 66 Am. Jur. 2d References §§ 1 et seq., 30 et seq.

C.J.S. — 30A C.J.S. Equity §§ 515, 520, 521 to 528, 532, 533, 535, 537, 539 et seq.

A.L.R. — Bankruptcy, right of creditor who has not filed timely petition for review of referee's order to participate in appeal secured by another creditor, 22 A.L.R.3d 914.

Power of successor or substituted master or

referee to render decision or enter judgment on testimony heard by predecessor, 70 A.L.R.3d 1079.

Referee's failure to file report within time specified by statute, court order, or stipulation as terminating reference, 71 A.L.R.4th 889.

What are "exceptional conditions" justifying reference under Rule of Civil Procedure 53(b), 1 A.L.R. Fed. 922.

PART VII. JUDGMENT

Rule 54. Judgments; costs.

(a) *Definition; form.* "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment need not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) *Judgment upon multiple claims and/or involving multiple parties.* When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, and/or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination by the court that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) *Demand for judgment.*

(1) *Generally.* Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings. It may be given for or against one or more of several claimants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between or among themselves.

(2) *Judgment by default.* A judgment by default shall not be different in kind from, or exceed in amount, that specifically prayed for in the demand for judgment.

(d) *Costs.*

(1) *To whom awarded.* Except when express provision therefor is made either in a statute of this state or in these rules, costs shall be allowed as of

course to the prevailing party unless the court otherwise directs; provided, however, where an appeal or other proceeding for review is taken, costs of the action, other than costs in connection with such appeal or other proceeding for review, shall abide the final determination of the cause. Costs against the state of Utah, its officers and agencies shall be imposed only to the extent permitted by law.

(2) *How assessed.* The party who claims his costs must within five days after the entry of judgment serve upon the adverse party against whom costs are claimed, a copy of a memorandum of the items of his costs and necessary disbursements in the action, and file with the court a like memorandum thereof duly verified stating that to affiant's knowledge the items are correct, and that the disbursements have been necessarily incurred in the action or proceeding. A party dissatisfied with the costs claimed may, within seven days after service of the memorandum of costs, file a motion to have the bill of costs taxed by the court in which the judgment was rendered.

A memorandum of costs served and filed after the verdict, or at the time of or subsequent to the service and filing of the findings of fact and conclusions of law, but before the entry of judgment, shall nevertheless be considered as served and filed on the date judgment is entered.

(3) [Deleted.]

(4) [Deleted.]

(e) *Interest and costs to be included in the judgment.* The clerk must include in any judgment signed by him any interest on the verdict or decision from the time it was rendered, and the costs, if the same have been taxed or ascertained. The clerk must, within two days after the costs have been taxed or ascertained, in any case where not included in the judgment, insert the amount thereof in a blank left in the judgment for that purpose, and make a similar notation thereof in the register of actions and in the judgment docket.

(Amended effective January 1, 1985.)

Amendment Notes. — Subdivisions (d)(3) and (d)(4), relating to the award of costs by the appellate court and costs in original proceedings before the Supreme Court, were repealed with the adoption of the Utah Rules of Appellate Procedure, effective January 1, 1985. See, now, Rule 34(d), Utah R.App.P.

Compiler's Notes. — This rule is similar to Rule 54, F.R.C.P.

Cross References. — Continuances, discretion to require payment of costs, U.R.C.P. 40(b). Judges' retirement fee, taxing as costs, § 49-6-301.

State, payment of costs awarded against, § 78-27-13.

Stay of judgment upon multiple claims, U.R.C.P. 62(h).

Witness fees, taxing as costs, § 21-5-8.

NOTES TO DECISIONS

Absence of express determination.

Amendment of pleadings.

Appeal as of right.

Certification not determinative.

Costs.

— In general.

— Challenge of award.

— Depositions.

— Discretionary.

— Expenses of preparation for action.

— Extension of time for filing.

— Failure to object.

— Liability of state.

— Service on adverse party.

— Statutory limits.

— Untimely filing of memorandum.

— When not demanded.

Default judgments.

Effect of partial final judgment.

Final order.

— Appealability.

— Attorney's fee award.

— Certification.

— Claims for relief.

— Complete disposal of claim or party.

— No just reason for delay.

— Review of finality.

— Separate claims.

Inconsistent oral statements.

Interest on judgment.

Judgment based on unpleaded theory.

Judgment in favor of nonparty.

Motion to reconsider.

Pleading in the alternative.

Presumption of finality.

Real party in interest.

for purposes of appeal. The time for a judgment, tolled by a party's post-judgment motion, starts to run on when the trial court enters its signed finding the motion. *Gallardo v. Bolinder*, 816 (Utah Ct. App. 1990).
The captioned "Objections to the Findings, Conclusions and Judgment," is a post-trial motion was in substance under this rule, inasmuch as it asked to alter its findings and to amend its findings and judgments; therefore, defendant tolled the time for filing a notice until this motion was denied. *Reeves v. Idt*, 915 P.2d 1073 (Utah Ct. App.

The verdict made no award of general damages and was deficient in form, plaintiff's demand that the jury be sent back for deliberations, and her failure to object at a bench conference regarding correctness of the verdict constituted her right to a new trial or to appeal. *Cohn v. J.C. Penney Co.*, 537 P.2d 1975).

A special verdict failed to mention in regard to one part of a cause of action the plaintiff failed to raise this before the jury was discharged, was deemed waived and could not be a motion for new trial. *Ute-Cal Land v. Sather*, 605 P.2d 1240 (Utah 1980).

National Farmers' Union Property v. Thompson, 4 Utah 2d 7, 286 P.2d 1178 (Utah Ct. App. 1955); *Holmes v. Nelson*, 435, 326 P.2d 722 (1958); *Howard v. Utah* 2d 149, 356 P.2d 275 (1960); *Stan Katz Real Estate, Inc.*, 15 Utah 2d 798 (1964); *Hanson v. General Supply Co.*, 15 Utah 2d 143, 389 P.2d 61 (1964); *Porcupine Reservoir v. W. Keller Corp.*, 15 Utah 2d 318, 620 (1964); *Watson v. Anderson*, 29 36, 504 P.2d 1003 (1973); *Nichols v. Utah* 2d 231 (Utah 1976); *Edgar v. Utah* 2d 405 (Utah 1977); *Time Co. v. Brimhall*, 575 P.2d 701 (Utah 1978); *Montgomery v. Montgomery*, 607 P.2d 828 (1980); *Miller Pontiac, Inc. v. Osborne*, 800 (Utah 1981); *Mulherin v. Rand Co.*, 628 P.2d 1301 (Utah 1981); *Garden City*, 639 P.2d 162 (Utah 1983); *Portland Cement Co. v. Portland Cement Co.*, 668 P.2d 569 (Utah 1983); *Nelson v. Portland Cement Co.*, 669 P.2d 1207 (Utah 1983); *Golden v. Inc. v. Mantas*, 699 P.2d 730 (Utah 1985); *Kay*, 705 P.2d 1165 (Utah 1985); *Unqualified Washington County Officials*, 714 P.2d 679 (Utah 1986); *Yesterday*, 739 P.2d 618 (Utah 1987); *Fackrell*, 740 P.2d 1318 (Utah 1987); *Carlson*, 740 P.2d 1372 (Utah Ct. App. 1988); *Mut. Ins. Co. v. Schettler*, 768 P.2d 1178 (Utah Ct. App. 1989); *Paryzek v. Paryzek*, 78 (Utah Ct. App. 1989); *Allred v. Utah* 2d 974 (Utah Ct. App. 1992); *Ong A, Inc. v. 11th Ave. Corp.*, 850 P.2d

447 (Utah 1993); *Putvin v. Thompson*, 878 P.2d 1178 (Utah Ct. App. 1994); *Ron Shepherd Ins. v. Shields*, 882 P.2d 650 (Utah 1994); *Commercial Inv. Corp. v. Siggard*, 936 P.2d 1105 (Utah Ct.

App. 1997); *PDQ Lube Ctr., Inc. v. Huber*, 329 Utah Adv. Rep. 20 (Utah Ct. App. 1997); *PDQ Lube Ctr., Inc. v. Huber*, 949 P.2d 792 (Utah Ct. App. 1997).

COLLATERAL REFERENCES

Am. Jur. 2d. — 58 Am. Jur. 2d New Trial §§ 11 to 14, 29 et seq., 187 to 191.

C.J.S. — 66 C.J.S. New Trial §§ 13 et seq., 115, 116, 122 to 127.

A.L.R. — Consent as ground of vacating judgment, or granting new trial, in civil case, after expiration of term or time prescribed by statute or rules of court, 3 A.L.R.3d 1191.

Propriety and prejudicial effect of suggestion or comments by judge as to compromise or settlement of civil case, 6 A.L.R.3d 1457.

Necessity and propriety of counter-affidavits in opposition to motion for new trial in civil case, 7 A.L.R.3d 1000.

Quotient verdicts, 8 A.L.R.3d 335.

Propriety and prejudicial effect of instructions in civil case as affected by the manner in which they are written, 10 A.L.R.3d 501.

Prejudicial effect of unauthorized view by jury in civil case of scene of accident or premises in question, 11 A.L.R.3d 918.

Propriety and prejudicial effect of reference by counsel in civil case to result of former trial of same case, or amount of verdict therein, 15 A.L.R.3d 1101.

Absence of judge from courtroom during trial of civil case, 25 A.L.R.3d 637.

Juror's voir dire denial or nondisclosure of acquaintance or relationship with attorney in case, or with partner or associate of such attorney, as ground for new trial or mistrial, 64 A.L.R.3d 126.

Amendment, after expiration of time for filing motion for new trial, in civil case, of motion made in due time, 69 A.L.R.3d 845.

Authority of state court to order jury trial in civil case where jury has been waived or not demanded by parties, 9 A.L.R.4th 1041.

Deafness of juror as ground for impeaching verdict, or securing new trial or reversal on appeal, 38 A.L.R.4th 1170.

Jury trial waiver as binding on later state civil trial, 48 A.L.R.4th 747.

Court reporter's death or disability prior to transcribing notes as grounds for reversal or new trial, 57 A.L.R.4th 1049.

Propriety of limiting to issue of damages alone new trial granted on ground of inadequacy of damages — modern cases, 5 A.L.R.5th 875.

After-acquired evidence of employee's misconduct as barring or limiting recovery in action for wrongful discharge, 34 A.L.R.5th 699.

Excessiveness or adequacy of compensatory damages for personal injury to or death of seaman in actions under Jones Act (46 USCS Appx. § 688) or doctrine of unseaworthiness — modern cases, 96 A.L.R. Fed. 541.

Excessiveness or adequacy of awards of damages for personal injury or death in actions under Federal Employers' Liability Act (45 USCS §§ 51 et seq.) — modern cases, 97 A.L.R. Fed. 189.

Rule 60. Relief from judgment or order.

(a) *Clerical mistakes.* Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) *Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.* On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), or (3), not more than 3 months after the judgment, order, or proceeding

was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action. (Amended effective April 1, 1998.)

Advisory Committee Note. — The 1998 amendment eliminates as grounds for a motion the following: “(4) when, for any cause, the summons in an action has not been personally served upon the defendant as required by Rule 4(e) and the defendant has failed to appear in said action.” This basis for a motion is not found in the federal rule. The committee concluded the clause was ambiguous and possibly in con-

flict with rules permitting service by means other than personal service.

Amendment Notes. — The 1998 amendment deleted the former fourth ground for a motion in Subdivision (b), as described in the Advisory Committee Note above, and renumbered the grounds accordingly.

Compiler’s Notes. — This rule is similar to Rule 60, F.R.C.P.

NOTES TO DECISIONS

“Any other reason justifying relief.”

- Default judgment.
- Impossibility of compliance with order.
- Incompetent counsel.
- Lack of due process.
- Merits of case.
- Mistake or inadvertence.
- Mutual mistake.
- Real party in interest.
- Refund of fine after dismissal.
- Appeals.
- Clerical mistakes.
- Computation of damages.
- Correction after appeal.
- Date of judgment.
- Void judgment.
- Estate record.
- Inherent power of courts.
- Intent of court and parties.
- Judicial error distinguished.
- Order prepared by counsel.
- Predating of new trial motion.
- Court’s discretion.
- Default judgment.
- Effect of set-aside judgment.
- Admissions.
- Form of motion.
- Fraud.
- Burden of proof.
- Divorce action.
- Independent action.
- Constitutionality of taxes.
- Divorce decree.
- Fraud or duress.
- Motion distinguished.
- Invalid summons.
- Amendment without notice.
- Inequity of prospective application.
- Jurisdiction.
- Mistake, inadvertence, surprise or excusable neglect.
- Default judgment.
- Illness.
- Inconvenience.
- Meritorious.
- Merits of claim.
- Negligence of attorney.

- No claim for relief.
- Delayed motion for new trial.
- Factual error.
- Failure to file cost bill.
- Failure to file notice of appeal.
- Nonreceipt of notice and findings.
- Trial court’s discretion.
- Unemployment compensation appeal.
- Workmen’s compensation appeal.
- Newly discovered evidence.
- Burden of proof.
- Discretion not abused.
- Procedure.
- Notice to parties.
- Res judicata.
- Reversal of judgment.
- Invalidation of sale.
- Satisfaction, release or discharge.
- Accord and satisfaction.
- Discharging representative of estate from further demand.
- Erroneously included damages.
- Prospective application of judgment.
- Timeliness of motion.
- Confused mental condition of party.
- Dismissal for lack of prosecution.
- Fraud.
- Invalid service.
- Judicial error.
- Jurisdiction.
- Mistake, inadvertence and neglect.
- Newly discovered evidence.
- Order entered upon erroneous assumption.
- “Reasonable time.”
- Reconsideration of previously denied motion.
- Satisfaction.
- Unauthorized appearance.
- Void judgment.
- Basis.
- Lack of jurisdiction.
- Cited.

“Any other reason justifying relief.”

Subdivision (b)(7) embodies three requirements: First, that the reason be one other than those listed in Subdivisions (1) through (6); second, that the reason justify relief; and third, that the motion be made within a reasonable

justifying divorce, 82 A.L.R.3d 725.

Contract between husband or wife and third person promotive of divorce or separation, what constitutes, 93 A.L.R.3d 523.

"Incompatibility" within statute specifying it as substantive ground for divorce, what constitutes, 97 A.L.R.3d 989.

Modern status of views as to validity of premarital agreements contemplating divorce or separation, 53 A.L.R.4th 22.

Enforceability of premarital agreements governing support or property rights upon divorce or separation as affected by circumstances surrounding execution — modern status, 53 A.L.R.4th 85.

Enforceability of premarital agreements governing support or property rights upon divorce or separation as affected by fairness or adequacy of those terms — modern status, 53 A.L.R.4th 161.

Right to jury trial in state court divorce proceedings, 56 A.L.R.4th 955.

Lis pendens as applicable to suit for separation or dissolution of marriage, 65 A.L.R.4th 522.

Insanity as defense to divorce or separation suit — post-1950 cases, 67 A.L.R.4th 277.

Divorce and separation: effect of court order prohibiting sale or transfer of property on party's right to change beneficiary of insurance policy, 68 A.L.R.4th 929.

Joinder of tort action between spouses with proceeding for dissolution of marriage, 4 A.L.R.5th 972.

Pre-emptive effect of Employee Retirement Income Security Act (ERISA) provisions (29 USC §§ 1056(d)(3), 1144(a), 1144(b)(7)) with respect to orders entered in domestic relations proceedings, 116 A.L.R. Fed. 503.

Key Numbers. — Divorce ⇌ 12-38, 57-65.

30-3-2. Right of husband to divorce.

The husband may in all cases obtain a divorce from his wife for the same causes and in the same manner as the wife may obtain a divorce from her husband.

History: R.S. 1898 & C.L. 1907, § 1209; C.L. 1917, § 2997; R.S. 1933 & C. 1943, 40-3-2.

NOTES TO DECISIONS

ANALYSIS

Both parties at fault.
Cruel treatment.

Both parties at fault.

Marriage may be dissolved by making a grant of divorce to each party where each was equally at fault. *Mullins v. Mullins*, 26 Utah 2d

82, 485 P.2d 663 (1971).

Cruel treatment.

Acts constituting cruel conduct sufficient to cause great mental distress need not be aggravated and more severe when directed toward the husband than when directed toward the wife. *Hansen v. Hansen*, 537 P.2d 491 (Utah 1975).

30-3-3. Award of costs, attorney and witness fees — Temporary alimony.

(1) In any action filed under Title 30, Chapter 3, 4, or 6, and in any action to establish an order of custody, visitation, child support, alimony, or division of property in a domestic case, the court may order a party to pay the costs, attorney fees, and witness fees, including expert witness fees, of the other party to enable the other party to prosecute or defend the action. The order may include provision for costs of the action.

(2) In any action to enforce an order of custody, visitation, child support, alimony, or division of property in a domestic case, the court may award costs and attorney fees upon determining that the party substantially prevailed upon the claim or defense. The court, in its discretion, may award no fees or limited fees against a party if the court finds the party is impecunious or enters in the record the reason for not awarding fees.

(3) In any action listed in Subsection (1), the court may order a party to provide money, during the pendency of the action, for the separate support and maintenance of the other party and of any children in the custody of the other party.

(4) Orders entered under this section prior to entry of the final order or judgment may be amended during the course of the action or in the final order or judgment.

History: C. 1953, 30-3-3, enacted by L. 1993, ch. 137, § 1.

Repeals and Reenactments. — Laws 1993, ch. 72, § 10 repeals former § 30-3-3, Utah Code Annotated 1953, allowing a court to

order either party to pay for the separate support and maintenance of the adverse party and the children, and enacts the present section, effective May 3, 1993.

NOTES TO DECISIONS

ANALYSIS

Appeal from order.

Attorney fees.

—Appeal.

—Award to attorney not permitted.

—Contesting petition for modification.

—Need.

—Reasonable.

Attorney's lien on alimony.

Contempt proceedings.

Costs and expenses on appeal.

Discretion of trial court.

Enforcement of order or decree.

Jurisdiction.

Mandamus.

Order of court.

Stipulation and effect thereof.

Temporary alimony.

Cited.

Appeal from order.

Where there were no findings or evidence in record as to attorney's fees, Supreme Court remanded issue for disposition by trial court but allowed wife's attorney \$100 for services rendered with reference to husband's appeal from judgment modifying divorce decree. *Parish v. Parish*, 84 Utah 390, 35 P.2d 999 (1934).

Supreme Court assumed that evidence supported award of suit money to wife where no testimony as to wife's need was before the court on appeal on judgment roll from the decree of no cause of action in husband and awarding of expenses of suit, attorney's fees and temporary alimony to wife. *Weiss v. Weiss*, 111 Utah 353, 179 P.2d 1005 (1947).

Court should have made findings regarding need for reimbursement and ability to pay when one party sought reimbursement of accounting costs that had been incurred in prosecuting the action. *Rappleye v. Rappleye*, 855 P.2d 260 (Utah Ct. App. 1993).

Attorney fees.

Where decree of divorce was obtained by

mother of minor children against father, who was required to pay certain sum periodically for support, care, maintenance, and education of such children, and he, without sufficient cause, refused to comply with decree, as result of which mother was compelled to bring proceedings against him, father was required to pay counsel fees in such proceedings. *Tribe v. Tribe*, 59 Utah 112, 202 P. 213 (1921).

Court properly awarded attorney's fees to wife in subsequent proceeding on application of wife for arrears in alimony. *Christensen v. Christensen*, 65 Utah 597, 239 P. 501 (1925).

While fact that wife is able to pay expenses of defending husband's divorce suit or to obtain credit therefor should be considered by court in determining whether to make award for expenses of suit and amount thereof, such fact alone does not show that award is unjustified, and consequently fact that award to wife for expenses of defending suit was made after expenses were paid or credit extended therefor did not render award erroneous as showing that she had no need therefor. *Weiss v. Weiss*, 111 Utah 353, 179 P.2d 1005 (1947).

Although there was no detailed presentation of facts establishing the usual requisite factors to support an award of attorney's fees, trial court did not abuse its discretion in awarding attorney fees to plaintiff to enable her to prosecute an action to enforce a provision of the divorce decree where the facts implicit in the proceeding and the evidence necessarily presented to the trial court, together with the de minimis nature of the award, constituted a sufficient basis to sustain the exercise of trial court's discretion. *Beardall v. Beardall*, 629 P.2d 425 (Utah 1981).

Trial court properly denied wife's request for attorney fees in divorce proceeding where she offered no evidence at trial to show the nature or amount of any attorney fees incurred or any need for court-ordered assistance in the payment of such fees. *Warren v. Warren*, 655 P.2d 684 (Utah 1982).

except petitions constituting a challenge to a conviction of or the sentence for a first degree or capital felony;

(g) appeals from the orders on petitions for extraordinary writs challenging the decisions of the Board of Pardons and Parole except in cases involving a first degree or capital felony;

(h) appeals from district court involving domestic relations cases, including, but not limited to, divorce, annulment, property division, child custody, support, visitation, adoption, and paternity;

(i) appeals from the Utah Military Court; and

(j) cases transferred to the Court of Appeals from the Supreme Court.

(3) The Court of Appeals upon its own motion only and by the vote of four judges of the court may certify to the Supreme Court for original appellate review and determination any matter over which the Court of Appeals has original appellate jurisdiction.

(4) The Court of Appeals shall comply with the requirements of Title 63, Chapter 46b, Administrative Procedures Act, in its review of agency adjudicative proceedings.

History: C. 1953, 78-2a-3, enacted by L. 1986, ch. 47, § 46; 1987, ch. 161, § 304; 1988, ch. 73, § 1; 1988, ch. 210, § 141; 1988, ch. 248, § 8; 1990, ch. 80, § 5; 1990, ch. 224, § 3; 1991, ch. 268, § 22; 1992, ch. 127, § 12; 1994, ch. 13, § 45; 1995, ch. 299, § 47; 1996, ch. 159, § 19; 1996, ch. 198, § 49.

Amendment Notes. — The 1992 amendment, effective April 27, 1992, added Subsection (2)(h) and redesignated former Subsections (2)(h) through (j) as Subsections (2)(i) through (k).

The 1994 amendment, effective May 2, 1994, substituted “Board of Pardons and Parole” for “Board of Pardons” in Subsection (2)(h) and inserted “Administrative Procedures Act” in Subsection (4).

The 1995 amendment, effective May 1, 1995, substituted “School and Institutional Trust

Lands Board of Trustees, Division of Sovereign Lands and Forestry actions reviewed by the executive director of the Department of Natural Resources” for “Board of State Lands” in Subsection (2)(a).

The 1996 amendment by ch. 159, effective July 1, 1996, substituted “Division of Forestry, Fire and State Lands” for “Division of Sovereign Lands and Forestry” in Subsection (2)(a).

The 1996 amendment by ch. 198, effective July 1, 1996, deleted former Subsection (2)(d), listing appeals from circuit courts, and redesignated former Subsections (2)(e) to (2)(k) as (2)(d) to (2)(j).

This section is set out as reconciled by the Office of Legislative Research and General Counsel.

Cross-References. — Composition and jurisdiction of military court, §§ 39-6-15, 39-6-16.

NOTES TO DECISIONS

ANALYSIS

Decisions of Board of Pardons.

Extraordinary writs.

Final order.

Habeas corpus proceedings.

Post-conviction review.

Scope.

— Sentence reduction.

Cited.

Decisions of Board of Pardons.

The Court of Appeals hears appeals from orders on petitions for extraordinary writs challenging decisions of the Board of Pardons, except when the petition additionally challenges the conviction of or sentence for a first degree felony or a capital felony. Then the appeal is to be heard by the Supreme Court. *Preece v. House*, 886 P.2d 508 (Utah 1994).

Extraordinary writs.

The Court of Appeals had jurisdiction over a petition for a writ of mandamus directed against a judge of the district court based on its authority under this section to enforce compliance with a prior order and to issue writs in aid of its appellate jurisdiction. *Barnard v. Murphy*, 882 P.2d 679 (Utah Ct. App. 1994).

The term “original” in § 78-2-2(2) adds nothing to the Supreme Court’s writ jurisdiction — and its absence in Subsection (1) takes nothing from the jurisdiction of the Court of Appeals — because jurisdiction over petitions for extraordinary writs necessarily invokes a court’s jurisdiction to consider a petition originally filed with it as opposed to its appellate jurisdiction over cases that originated elsewhere. *Barnard v. Murphy*, 882 P.2d 679 (Utah Ct. App. 1994).

Because, under this section, the Court of

(3) The judges of the Court of Appeals shall elect a presiding judge from among the members of the court by majority vote of all judges. The term of office of the presiding judge is two years and until a successor is elected. A presiding judge of the Court of Appeals may serve in that office no more than two successive terms. The Court of Appeals may by rule provide for an acting presiding judge to serve in the absence or incapacity of the presiding judge.

(4) The presiding judge may be removed from the office of presiding judge by majority vote of all judges of the Court of Appeals. In addition to the duties of a judge of the Court of Appeals, the presiding judge shall:

- (a) administer the rotation and scheduling of panels;
- (b) act as liaison with the Supreme Court;
- (c) call and preside over the meetings of the Court of Appeals; and
- (d) carry out duties prescribed by the Supreme Court and the Judicial Council.

(5) Filing fees for the Court of Appeals are the same as for the Supreme Court.

History: C. 1953, 78-2a-2, enacted by L. 1986, ch. 47, § 45; 1988, ch. 248, § 7.

NOTES TO DECISIONS

Stare decisis.

A rule of law pronounced by a panel of the Court of Appeals governs all later cases involving the same legal issues decided by other

panels of that court and all courts of lower rank. *Renn v. Utah State Bd. of Pardons*, 904 P.2d 677 (Utah 1995).

78-2a-3. Court of Appeals jurisdiction.

(1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue all writs and process necessary:

- (a) to carry into effect its judgments, orders, and decrees; or
- (b) in aid of its jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

- (a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, School and Institutional Trust Lands Board of Trustees, Division of Forestry, Fire and State Lands actions reviewed by the executive director of the Department of Natural Resources, Board of Oil, Gas, and Mining, and the state engineer;
- (b) appeals from the district court review of:
 - (i) adjudicative proceedings of agencies of political subdivisions of the state or other local agencies; and
 - (ii) a challenge to agency action under Section 63-46a-12.1;
- (c) appeals from the juvenile courts;
- (d) interlocutory appeals from any court of record in criminal cases, except those involving a charge of a first degree or capital felony;
- (e) appeals from a court of record in criminal cases, except those involving a conviction of a first degree or capital felony;
- (f) appeals from orders on petitions for extraordinary writs sought by persons who are incarcerated or serving any other criminal sentence,