

1988

Monica Gillett v. James Anthony Gillett : Brief of Respondent

Utah Court of Appeals

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880413

IN THE UTAH COURT OF APPEALS

MONICA GILLETT,

Plaintiff/Respondent,

v.

JAMES ANTHONY GILLETT,

Defendant/Appellant.

CASE NO. 880413-CA

PRIORITY NO. ~~218~~

140

RESPONDENT'S BRIEF

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY

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IN THE UTAH COURT OF APPEALS

MONICA GILLETT,

Plaintiff/Respondent,

V.

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RESPONDENT:

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) PRIORITY NO. 146
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IN THE UTAH COURT OF APPEALS

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Plaintiff/Respondent,)	
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v.)	
)	PRIORITY NO. 146
JAMES ANTHONY GILLETT,)	
)	
Defendant/Appellant.)	

RESPONDENT'S BRIEF

JURISDICTION OF THE COURT

This Court has jurisdiction over this appeal pursuant to Utah Code Annotated, Section 78-2a-3(2)(h).

NATURE OF THE PROCEEDINGS

Plaintiff, a New York resident, filed an action in Third District Court, Salt Lake County, Utah to enforce the terms of a non-judicial Separation Agreement entered into by the parties in 1970 and amended by the parties in 1977. This appeal stems from the trial court granting Plaintiff's Motion for Reconsideration of the trial court's earlier denial of Plaintiff's Motion for Summary Judgment, and granting Plaintiff's Motion for Summary Judgment pursuant to the Motion for Reconsideration.

DETERMINATIVE STATUTES

There are no determinative statutes, constitutional provisions or ordinances.

STATEMENT OF THE CASE

The Plaintiff/Respondent, Monica Gillett ("Ms. Gillett"), and Defendant/Appellant, James Anthony Gillett ("Dr. Gillett"), were married on May 7, 1938 in Banstead, England. There were four children as issue of the marriage. (R: pg 13) Dr. Gillett is a medical doctor. His career led the parties to live in Australia during a portion of the marriage, and to change their residences frequently throughout the marriage, making it impossible for Ms. Gillett to pursue a career during the marriage. Additionally, Dr. Gillett's medical career limited the time which he spent with his children, leaving Ms. Gillett with the full responsibility to provide a home for the family.

After thirty-two years of marriage, Dr. Gillett, a psychiatrist, became romantically involved with one of his patients and wished to divorce his wife in order to marry his patient. (R: pg 75-76) Ms. Gillett, without any marketable skills, and with no work experience, feared that Dr. Gillett would lose his medical license if his involvement with a patient became public knowledge. Accordingly, when Dr. Gillett approached her with a demand for a Mexican divorce, to circumvent the year-long waiting period then required by New York law, Ms. Gillett agreed. She never consulted counsel before signing a Separation Agreement dated March 31, 1970; neither did she consult an attorney before agreeing that Dr. Gillett could take a Mexican divorce against her. (R: pg. 75-76)

On March 31, 1970, the parties entered into a Separation Agreement, which was drafted by Dr. Gillett's counsel, and which was not reviewed by anyone representing Ms. Gillett's interests. (R: pg 13-17, 75-76) Both parties were residents of Fulton, New York when the original Separation Agreement was signed, and both signed it in Oswego, New York. (R: pg 17) The Separation Agreement provided, in pertinent parts:

1. Dr. Gillett shall pay Ms. Gillett \$650 a month, payable on the first day of each month, and shall, in addition, pay the monthly rental on Ms. Gillett's residence.
2. Dr. Gillett shall continue the life insurance policies on his own life, shall pay the premiums on those policies and shall continue to maintain Ms. Gillett as beneficiary on those policies.
3. Should the parties divorce, the Separation Agreement should not be merged into the Decree of Divorce, but should survive the Decree, and "be forever binding and conclusive on the parties,..." (R: pg 15-16)

The parties were divorced in Juarez, Mexico on April 28, 1970. The Separation Agreement was incorporated into the Decree of Divorce, but was not merged with it. (R: pg 11-12)

Dr. Gillett fell into arrears in his support obligations for the period January 1, 1973 to July 1, 1975, forcing Ms. Gillett to bring an action against him in the Supreme Court, Onondaga County, State of New York on or about July 22, 1975. (R: pg 18-19) In settlement of that action, the parties, though their

counsel, amended the Separation Agreement in open court on September 20, 1977. Subsequently, the parties executed an Amended Separation Agreement dated September 23, 1977, in which they modified the fifth paragraph of the Separation Agreement to fix Dr. Gillett's support obligation at \$800 each month. In the Amended Separation Agreement, the parties "reiterate, reallege and reaffirm all the agreements as previously set out in the Separation Agreement dated the 31st day of March, 1970." The Amended Separation Agreement did not provide that the Decree of Divorce be modified in accordance with its provisions. (R: pg 18-19) The Decree remains unaltered. Neither the Decree of Divorce, the Separation Agreement, nor the Amended Separation Agreement was ever incorporated into a judgment or order of an American court.

Dr. Gillett made support payments to Ms. Gillett in accordance with the Amended Separation Agreement for eight years. Then, in May 1985, Dr. Gillett decreased his payment from the agreed-upon \$800 each month to \$400. He paid \$540 in June, \$800 in July, and from August 1985 through August 1986, paid \$650 a month in support. (R: pg 21-22, 53-54) After Ms. Gillett filed this action to recover the arrearages owed her in late August 1986, Dr. Gillett refused to make any payments to her. (R: pg 126-127)

Dr. Gillett has never argued that the Amended Separation Agreement provides justification for his refusal to make the required payments to Ms. Gillett. Neither has he suggested that

there is a change in his circumstances which renders it difficult, impossible, or unjust for him to continue the payments to Ms. Gillett. Certainly, Dr. Gillett has not availed himself of his opportunity under New York law to attempt to have his support obligation reduced. Apparently, he just decided that he had paid enough, and that he would relieve himself of the obligation to continue to support the woman who had been his wife for thirty-two years, and who had borne him four children.

When nonjudicial attempts to convince Dr. Gillett to resume full payments under the Amended Separation Agreement failed, Ms. Gillett filled an action in the Third District Court seeking a judgment for the amount of arrearages and an order of specific performance of the Amended Separation Agreement. (R: pg 2-22) On November 21, 1986, Ms. Gillett moved for summary judgment. (R: pg 29, 31-56) While Dr. Gillett never filed a responsive pleading, he did have a Memorandum in Opposition to the Motion for Summary Judgment delivered to Ms. Gillett's counsel shortly before the scheduled hearing on the Motion. On October 31, 1988, Dr. Gillett had his Memorandum in Opposition inserted into the Record of this case. (R: No page numbers, located at end of Volume I of the Record)

The Court heard arguments on Ms. Gillett's Motion on December 15, 1986. During the course of oral argument, counsel for Ms. Gillett erroneously informed the Court that her client had been represented by counsel when the Separation Agreement was negotiated and drafted. (Trans: pg 10)

After hearing argument, the Court ruled in a Minute Entry dated December 17, 1986, that "There does appear to be an ambiguity in the agreement concerning the duration of the obligation to pay plaintiff..." (R: pg 59) The Court's Order denying Ms. Gillett's Motion for Summary Judgment was entered January 20, 1987. (R: pg 60-61)

During much of 1987, the parties attempted to negotiate a settlement of the controversy. Ms. Gillett propounded discovery to Dr. Gillett, which was never answered. (R: pg 99)

On October 19, 1987, Ms. Gillett sought a reconsideration of the Court's earlier denial of her Motion for Summary Judgment. (R: pg 71-76) Counsel had learned that Ms. Gillett had not been represented by counsel at the time that the Separation Agreement was negotiated, drafted, and signed. Counsel was informed that Ms. Gillett had been terrified at the time of the divorce that Dr. Gillett's involvement with his patient would become public knowledge, and that Dr. Gillett would lose his license to practice medicine. Counsel discovered that Ms. Gillett wished only to have the divorce taken as quietly as possible to protect herself and her two college-age children who were dependent upon Dr. Gillett for support.

Knowing that ambiguities are to be interpreted against the party drafting a contract, Ms. Gillett's counsel believed that the Court had been misled during oral argument by her assertion

that Ms. Gillett had been represented by counsel when the Separation Agreement was drafted. Therefore, counsel determined to seek the Court's reconsideration of its earlier decision.

Ms. Gillett filed her Motion to Reconsider on October 19, 1987. The Motion was heard on November 30, 1987, and was taken under advisement. On December 1, 1987, the Court held in its Minute Entry that:

"upon review of the file and supporting affidavits the Court determines that it did in fact err in denying Plaintiff's Motion for Summary Judgment. A re-reading of the Separation Agreement convinces the Court that no ambiguity exists..." (R: pg 101)
(Emphasis added)

Accordingly, the Court reversed its earlier ruling, and granted Ms. Gillett's Motion for Summary Judgment.

The Court mailed its Minute Entry to counsel on December 10, 1987. Ms. Gillett submitted her proposed Judgment and Order on December 18, 1987, which Judgment and Order were signed and entered by the Court on December 29, 1987. (R: pg 117-118)

Prior to her submission of the proposed Judgment and Order, counsel for Ms. Gillett telephoned counsel for Dr. Gillett, and asked him to contact her if he believed that she had made a computational error in determining the amount of arrearages owed by his client. Counsel never contacted Ms. Gillett's counsel concerning the calculation of arrearages. (R: pg 123-124) Rather, Dr. Gillett filed an Objection to the Proposed Findings and Order and Motion for Amendment of Judgment or Relief from the Order on December 23, 1987. (R: pg 103-116) In his Motion for

Amendment or Relief, Dr. Gillett for the first time raised the defense that he had made payments to Ms. Gillett in 1970-1973 in addition to those required under the Separation Agreement, and that he was entitled to credit for those payments.

The Court heard argument on Dr. Gillett's Objection and Motion, and denied both. (R: pg 140) The Court gave Ms. Gillett leave to file an Amended Judgment and Order, which was signed and entered by the Court on May 16, 1988. (R: pg 143-144)

SUMMARY OF ARGUMENTS

1. While Ms. Gillett concedes that the Utah Rules of Civil Procedure do not specifically provide for a Motion to Reconsider, the Court may change a ruling until a final judgment on the case is rendered.

2. The Separation Agreement and the Amended Separation Agreement must be interpreted in accordance with New York law, in that the parties entered into the Separation Agreement in New York State, stipulated in a New York Court to the modifications set forth in the Amended Separation Agreement, and the beneficiary of the Separation Agreement has at all times remained a resident of New York State, providing New York with the most substantial interest in the contract. Nevertheless, since Utah law and New York law are substantially similar with respect to the legal issues here presented, the Court's decision would be the same whether New York or Utah law applies.

3. There was no ambiguity in the Separation Agreement or Amended Separation Agreement under either New York or Utah law.

4. Under New York law, the Separation Agreement and Amended Separation Agreement are enforceable, and cannot be set aside unless unconscionable. The facts on the record do not demonstrate that these Agreements were unconscionable at the time they were executed, nor that enforcement now would work a hardship on Dr. Gillett.

5. Dr. Gillett has failed to justify his failure to pay alimony to Ms. Gillett by any interpretation of the so-called "ambiguous" portions of the Separation Agreement.

6. Dr. Gillett is not entitled to credit against his arrearages for payments he allegedly made to Ms. Gillett in 1970 through 1973.

7. Dr. Gillett has appealed the decision of the trial court only to delay, and has failed to raise any valid legal claims. Accordingly, Ms. Gillett should be awarded her fees and costs.

LEGAL ARGUMENTS

I. WHEN THE COURT IS CONVINCED THAT IT ERRED, IT MAY CHANGE ITS RULING UNTIL A FINAL JUDGMENT IS ENTERED.

Dr. Gillett argues that the Utah Rules of Civil Procedure do not provide for a Motion to Reconsider. Ms. Gillett concedes that Dr. Gillett is correct that the Rules do not explicitly identify such a procedure. Neither do the Rules identify a

Motion for Extension of Time, Motion for Leave to Withdraw, or any of the other Motions which attorneys propound on behalf of their clients each day.

The denial of a Motion for Summary Judgment is interlocutory in nature; it cannot be appealed. See, for example, All Weather Insulation, Inc. v. Amiron Development Corp., 702 P.2d 1176, 1177 (Utah 1985); Marathon Steel Company v. Placers, Inc., 692 P.2d 765, 768 (Utah 1985); Little v. Mitchell, 604 P.2d 918, 919 (Utah 1979). Under Utah law, "any judge is free to change his or her mind on the outcome of a case until a decision is formally rendered." Bennion v. Hansen, 699 P.2d 757, 760 (Utah 1985). As a general rule, courts do follow "the law of the case", to avoid delay. But the doctrine of the "law of the case" exists to serve "the interests of economy of time and efficiency of procedure..." Richardson v. Grand Central Corp., 572 P.2d 395, 397 (Utah 1977).

In this case, the Court, "convinced" that "it did in fact err in denying Plaintiff's Motion for Summary Judgment," served the interest of judicial economy by reversing itself. Believing that there was no issue of material fact existing, the Court could not justify holding a trial to hear testimony which could have no relevance to its decision. For the Court of Appeals to compel a trial judge to try a case for no purpose is absurd, and a waste of the judicial resources of the State of Utah.

The Federal Rules of Civil Procedure, like the Utah Rules, do not explicitly provide for a Motion to Reconsider, yet the federal courts may, either upon motion or sua sponte, reconsider

denials of a summary judgment at any time. See, for example, Lindsey v. Dayton-Hudson Corporation, 592 F.2d 1118 (10th Cir. 1979); Warner Brothers v. American Broadcasting Company, Inc., 720 F.2d 231 (2nd Cir. 1983). In this case, after the Court learned that Ms. Gillett was not represented by counsel at the time she executed the Separation Agreement, and after review of the relevant law of both New York State and Utah, which terminates the obligation for the payment of alimony upon the death of either party or the remarriage of the payee, the Court determined that it had erred. It must be permitted to correct such errors when given new information or additional legal precedence. Any other rule would unacceptably limit a trial court's discretion.

In addition, it is clear that Rules 54(b), 59 and 60 of the Utah Rules of Civil Procedure permit a Court, under certain circumstances, to "reconsider" its earlier decision, and to reverse it, even after a final order has been entered. It is illogical to deny the Court the right to do the same thing when an order is interlocutory in nature and those Rules are not applicable.

II. THE COURT MUST APPLY NEW YORK LAW IN INTERPRETING THE SEPARATION AGREEMENT AND ITS AMENDMENTS.

Dr. Gillett claims that Utah law, not New York law, governs the interpretation of the Separation Agreement and Amended Separation Agreement. He is absolutely wrong. Utah courts apply

the lex loci contractus rule, and look to the law of the place of making the contract in interpreting it. Chevron Chemical Co. v. Mechem, 536 F.Supp. 1036, 1040 (D. Utah 1982). In this case, the Separation Agreement was made and executed in New York. The parties stipulated to the Amended Separation Agreement in a New York Court. Ms. Gillett executed that document in New York, which Dr. Gillett executed it in Washington. Clearly, under Utah choice of law principles, New York law governs the Agreements.

However, even if the Court were to adopt the position set forth in Restatement (2d) of Conflict of Laws, it would reach the same result. Section 188 states that the rights and duties of the parties are determined by the local law of the state with the most significant relationship to the transaction, and the Courts should consider the following in identifying that state:

- (a) place of contracting
- (b) place of negotiation
- (c) place of performance

In this case, the Agreements were negotiated and made in New York. The real property which the Separation Agreement distributed was located in New York State. The purpose of the alimony provision of the Agreements, to provide Ms. Gillett with a dependable income and to keep her from becoming a public charge. Indeed, if Ms. Gillett were to become a public charge, it is New York taxpayers who would have to support her. The Court therefore should apply New York law.

However, even if the Court were to apply Utah law, the result would be the same. New York and Utah law are substantially identical with respect to the matters at issue.

III. THE COURT WAS CORRECT IN ITS HOLDING THAT THERE WAS NO AMBIGUITY IN THE AMENDED SEPARATION AGREEMENT.

Dr. Gillett has argued that The Separation Agreement and Amended Separation Agreement are ambiguous, in that neither sets forth specific duration for Dr. Gillett's obligation to pay support to Ms. Gillett. Dr. Gillett is in error for numerous reasons.

The language of the Separation Agreement, which was reaffirmed in the Amended Separation Agreement, states that:

"the parties hereto agree that they shall be bound by all the terms of this agreement and that this agreement shall not be merged in any decree or judgment that may be granted in such (divorce) action but shall survive the same and shall be forever binding and conclusive on the parties..." (R: pg 15-16)

The Agreements do not state that they are binding on either parties' heirs, assigns, and the like. It is obvious from the language of the documents that they are to terminate upon the death of either party.

Further demonstrating the fact that the Separation Agreement was designed to provide support for Ms. Gillett for the duration of her life, without charge to Dr. Gillett's estate, is the fact

that Dr. Gillett is required under the terms of the Separation Agreement to continue Ms. Gillett as beneficiary of his life insurance policies.

Under both New York and Utah law, ambiguity in a contract is not established simply because the parties disagree about the meaning of the contract. The intent of the parties is to be ascertained, if possible, from the content of the document itself. Libra Bank Ltd. v. Banco Nacional De Costa Rica, S.A., 570 F.Supp. 870 (S.D.N.Y. 1983); Valley Bank v. Tanner, 636 P.2d 1060 (Utah 1981). Here, both the language and the provisions of the Agreements spell out the intent of both parties at the time the documents were executed. Both parties agreed to a scheme that would provide Ms. Gillett, nearly fifty-five years old and without employment experience or skills, with some financial security for the remainder of her life, unless she remarried.

Even if the Agreements themselves did not clearly spell out the duration of Dr. Gillett's support obligation, both New York and Utah law provide that the obligation to pay alimony terminates upon death of either party or remarriage of the recipient spouse. Cohen v. Cronin, 382 N.Y.S.2d 724,726 (1976) ("well-accepted proposition that husband's obligation to support terminates with death"); Perry v. Perry, 444 N.Y.S.2d 490,491 (App.Div.3rd Dept. 1981); Chiarmonte v. Chiarmonte, 435 N.Y.S.2d 523 (S.Ct., Nassau Co. 1981); In the Estate of Donahue, 357 N.Y.S.2d 777,782 (Sur.Ct.N.Y.Co. 1974); Gandelman v. Gandelman, 331 N.Y.S.2d 977 (App.Div.2d Dept. 1972); Ehrler v. Ehrler, 328

N.Y.S.2d 728 (S.Ct., Nassau Co. 1972); New York Domestic Relations Law, Section 236B(1)(a); Utah Code Annotated, Section 30-3-5(5).

Even assuming that the Agreements were ambiguous, and that the law did not "fill in the blanks", the Court was still correct in granting summary judgment for Ms. Gillett. Under both New York and Utah law, a contract should be construed against its maker. This rule of contract interpretation is particularly persuasive when, as in this situation, the other party was not represented by counsel. Jacobsen v. Sassower, 499 N.Y.S.2d 381 (1985); Parks Enterprises, Inc. v. New Century Realty, Inc., 652 P.2d 918 (Utah 1982).

Finally, even if the Agreements were ambiguous, and even if that alleged ambiguity were not to be construed against Dr. Gillett, Dr. Gillett is barred from claiming a defect in the Agreements. Under New York law, "a party to a separation agreement may not attack the validity of the agreement collaterally after it has been incorporated into a valid, bilateral foreign decree of divorce." Galyn v. Schwartz, 453 N.Y.S.2d 624 (1982). Here, while the Separation Agreement was not merged with the Decree of Divorce, it was incorporated into it, just as the parties agreed it might be. (R: pg 11, 16) Therefore, Dr. Gillett is bound by its clear provisions, that he is to pay Ms. Gillett \$800 each month until either party dies or she remarries.

IV. THE SEPARATION AGREEMENTS WERE NEITHER UNCONSCIONABLE, NOR VIOLATIVE OF PUBLIC POLICY, AND THEY SHOULD BE ENFORCED.

Dr. Gillett apparently is claiming that the Separation Agreement, into which he entered with the advice of counsel, and for the purpose of enabling him to obtain a "quickie" Mexican divorce from his wife of thirty-two years, was unconscionable at the time he entered into it. His claim is unbelievable, given the facts on the record. At the time of the divorce, Dr. Gillett was a successful medical doctor, who wished to marry a younger woman, while Ms. Gillett was, by the doctor's own admission, a fifty-five year old woman without marketable skills.

Amazingly, Dr. Gillett cites Christian v. Christian, 365 N.E.2d 849 (N.Y. 1977) to support his position. That case, in all its particulars, supports Ms. Gillett's position in this action. New York's highest court held in Christian that "generally, separation agreements which are regular on their face are binding on the parties unless and until they are put aside." 365 N.E.2d at 855. At most, separation agreements are voidable, not void. Id. Here, neither the Separation Agreement nor the Amended Separation Agreement has been put aside, and Dr. Gillett is bound by them. Dr. Gillett unilaterally decided to reduce, and then terminate, payments to Ms. Gillett without seeking the permission of the Court to do so.

Further, the Court in Christian stated:

"Judicial review is to be exercised circumspectly, sparingly and with a persisting view to the encouragement of parties settling their own differences... Furthermore, when there has been full disclosure between the parties...and there has been an absence of inequitable conduct or other infirmity... courts should not intrude so as to redesign the bargain arrived at by the parties..." Id.

The Court set forth the circumstances under which it would refuse to enforce a Separation Agreement as follows:

"To warrant equity's intervention, no actual fraud need be shown, for relief will be granted if the settlement is manifestly unfair to a spouse because of the other's overreaching. In determining whether a separation agreement is invalid, courts may look at the terms of the agreement to see if there is an inference, or even a negative inference, of overreaching in its execution. If the execution of the agreement, however, be fair, no further inquiry will be made." 365 N.E.2d at 856.

In this case, Dr. Gillett has alleged no facts which would indicate that Ms. Gillett overreached at the time the Separation Agreement was executed. The facts are quite to the contrary. Dr. Gillett was represented by counsel, while Ms. Gillett was without the assistance of counsel. Dr. Gillett was economically strong and independent, while Ms. Gillett was without job skills or work experience. If there was any overreaching here, it was done by Dr. Gillett, not Ms. Gillett. The Agreements should be enforced.

The provisions of the Separation Agreement similarly do not violate Utah public policy. A women married to a successful medical doctor for thirty-two years, who was without marketable

skills at the time of the divorce would likely be awarded permanent alimony in Utah, even today. See, for example, Rasband v. Rasband, 752 P.2d 1331 (Ut.Ct.App. 1988).

V. EVEN IF THE AGREEMENTS WERE AMBIGUOUS AS TO DURATION, APPELLANT HAS PROVIDED NO REASON FOR HIS REFUSAL TO SUPPORT RESPONDENT OTHER THAN A DISINCLINATION TO DO SO.

Dr. Gillett argues that the Separation Agreement and the Amended Separation Agreement are ambiguous, in that they don't set forth a specific duration for his obligation to pay alimony to his former wife. Under the law, absent an agreement to the contrary, Dr. Gillett's obligation continues until either party dies, Ms. Gillett remarries, or the Court relieves him of the future obligation to pay support. Unless Dr. Gillett shows good cause for a failure to seek invalidation of the Separation Agreement or modification of it, there can be no retroactive reduction of alimony. Benjamin v. Benjamin, 417 N.Y.S.2d 479, 481 (App.Div.1st Dept. 1979); Larsen v. Larsen, 561 P.2d 1077, 1079 (Utah 1977).

Here, Dr. Gillett has never alleged any reason for failing to seek the Court's assistance. He merely decided to decrease his alimony payments. When Ms. Gillett sought the assistance of the Court, he punished her by stopping payment altogether, perhaps hoping that she would be unable to afford to assert her rights to alimony. The Court of Appeals should not permit Dr.

Gillett to continue to deprive Ms. Gillett, now seventy-two years old, of the support to which she is entitled and on which she has depended to enable her to avoid a poverty-stricken old age.

VI. APPELLANT IS NOT ENTITLED TO CREDIT FOR SUMS ALLEGEDLY PAID TO RESPONDENT IN LIEU OF ALIMONY.

Dr. Gillett claimed, for the first time, in his Motion for Amendment of Judgment or Relief from Order that he had made payments to Ms. Gillett in addition to the support payments under the Separation Agreements. It is undisputed that any such "additional" payments were made between 1970 and 1973. Dr. Gillett first mentioned them fifteen years later, in 1988. Even if such payments were made, which Ms. Gillett disputes, Dr. Gillett is not entitled to an offset as a matter of law. Accordingly, there is no material facts in dispute concerning the amount owed by Dr. Gillett to Ms. Gillett.

Both Utah and New York law are clear that such payments, if they occurred, may not be credited against other amounts due and owing under a separation agreement or decree of divorce. Soltow v. Soltow, 364 N.Y.S.2d 28, 30 (App.Div.2d Dept. 1975); Horne v. Horne, 292 N.Y.S.2d 411, 415 (1968) ("The general rule (is) that payments made 'voluntarily and not pursuant to a divorce decree may not be credited by him against other amounts due and owing....'). See also Ross v. Ross, 592 P.2d 600, 603 (Utah 1979).

Such claims are barred by laches. Under New York law, alimony and support payments may be recovered for only six years. Tauber v. Lebow, 493 N.Y.S.2d 1008 (1985); Galyn v. Schwartz, 434 N.Y.S.2d 1,3 (App.Div.1st Dept. 1980). See also Utah Code Annotated, Section 78-12-23. Dr. Gillett failed to make alimony payments to Ms. Gillett under the Separation Agreement in 1970, which payments she has never sought. (R: pg 127) Ms. Gillett cannot now seek an offset against any payments Dr. Gillett may have made on her behalf in 1970-1973. Accordingly, equity forbids the Court from permitting Dr. Gillett to claim credit for his payments, if he indeed made them.

Further, the parties litigated the issue of arrearages in an action brought in 1975 in a New York court. If Dr. Gillett failed to raise a claim of offset in those proceedings, he is barred from doing so now. If the question was raised at that time and he was then granted such offset, he may not claim it again.

Finally, even if there is a dispute as to amount of arrearages, this Court should affirm the trial court's ruling that Dr. Gillett has a continuing obligation to pay alimony, and remand for further hearings on the amount presently owed.

VII. APPELLANT BROUGHT THIS APPEAL ONLY TO DELAY PAYMENT OF THE SUMS AWARDED RESPONDENT, AND RESPONDENT SHOULD BE AWARDED THE FEES AND COSTS SHE INCURRED IN RESPONDING TO IT.

Dr. Gillett has never pointed to a single statement in the Separation Agreement, Amended Separation Agreement, or Decree of Divorce which, under any reading, justifies his reduction or termination of alimony payments to Ms. Gillett. Yet, for nearly two and one half years, Dr. Gillett has delayed the inevitable, and increased Ms. Gillett's costs by filing Memoranda and appeals with the most minimal legal basis. Under Rule 33(a) of the Rules of the Utah Court of Appeals, this Court may award "just damages", and single or double costs. Ms. Gillett asks that she be awarded the attorneys' fees and costs she incurred since the inception of this action as damages, and be granted double her fees and costs in defending this appeal.

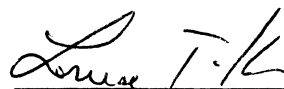
Under New York law, she would be entitled to the fees and costs she incurred in enforcing this Separation Agreement, Galyn v. Schwartz, 434 N.Y.S.2d at 4. The Utah courts should do no less, particularly since she would likely recover these fees and costs if she were collecting arrearages under a Decree of Divorce rather than in a breach of contract action.

CONCLUSION

Respondent, Monica Gillett, respectfully asks that the Utah Court of Appeals:

1. Affirm the decision of the Third District Court, that Appellant, James Anthony Gillett, is bound by the clear provisions of the Amended Separation Agreement, and must pay alimony in the amount of \$800 each month until the death of either party or remarriage of Ms. Gillett.
2. Award Ms. Gillett all arrearages accrued to the time of the decision of the Court of Appeals on this matter, including interest, and either enter a Judgment in that amount or remand to the Third District Court with an order that it enter such a Judgment.
3. Enter a Order for specific performance of the Amended Separation Agreement, or remand to the Third District Court with instructions that it enter such an Order.
4. Award as damages to Ms. Gillett all fees and costs incurred by her since the inception of this action.
5. Award Ms. Gillett double the fees and costs incurred in defending against Dr. Gillett's appeal.
6. Such other remedies as this Court finds just and reasonable.

DATED this 10th day of January, 1989.



Louise T. Knauer
Attorney for Plaintiff/Respondent

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing was mailed by United States mail, postage prepaid, on this 7th day of January, 1989, to the following:

Elliott Levine, Esq.
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James T. K.