

1988

Wanda Marie Sackett Bagshaw v. Joseph Arthur Bagshaw : Brief of Appellant

Utah Court of Appeals

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John Spencer Snow; Attorney for Plaintiff-Respondent.

Randall Gaither; Attorney for Defendant-Appellee.

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IN THE UTAH STATE COURT OF APPEALS

WANDA MARIE SACKETT BAGSHAW,)

Plaintiff-Respondent,)

vs.)

JOSEPH ARTHUR BAGSHAW,)

Defendant-Appellant.)

Case No. 880647-CA
(Priority No.)

BRIEF OF APPELLANT

Appeal from a Judgment entered in a civil case in the Third Judicial District Court, in and for Salt Lake County, State of Utah, The Honorable J. Dennis Frederick presiding.

RANDALL GAITHER
Attorney for Defendant-Appellant
321 South 600 East
Salt Lake City, Utah 84102
Telephone: (801) 531-1990

JOHN SPENCER SNOW
Attorney for Plaintiff-Respondent
261 East 300 South, Suite 350
Salt Lake City, Utah 84111
Telephone: (801) 364-4940

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IN THE UTAH STATE COURT OF APPEALS

WANDA MARIE SACKETT BAGSHAW,)

Plaintiff-Respondent,)

vs.)

JOSEPH ARTHUR BAGSHAW,)

Defendant-Appellant.)

Case No. 880647-CA
(Priority No.)

BRIEF OF APPELLANT

JURISDICTION

This is an appeal from a final judgment in a civil domestic relations action filed within 30 days from the entry of the Order and Judgment. Jurisdiction is conferred on this Court pursuant to Utah Code Annotated, Section 78-2a-3, (1953, as amended), which grants to the Court jurisdiction in subparagraph 2(h) of matters concerning divorce.

NATURE OF PROCEEDINGS

This is a direct appeal in a civil case from a Findings of Fact and Conclusions of Law and Judgment ruling that the Plaintiff was entitled to a Judgment for back due alimony in the sum of \$19,400.00.

ISSUES PRESENTED ON APPEAL

1. Did the Court err in not ruling that good cause existed to enter a Nunc Pro Tunc Order modifying the Decree of Divorce previously entered on November 28, 1973?

2. Did the Court err in applying and giving retroactive effect to the legal requirements set forth in *Brown v. Brown*, 744 P. 2d 333 (Utah, App. 1987)?

3. Did the Court err in not estopping the Plaintiff from enforcing a Judgment for alimony?

4. Did the Court err in finding that the Plaintiff, by making representations that alimony did not exist in the Decree and that she would sign an agreement vacating the alimony, waived her right to alimony after November, 1973?

DETERMINATIVE CONSTITUTIONAL AND STATUTORY PROVISIONS

Utah Code Annotated, Section 30-4a-1 (1953, as amended), states as follows:

"A Court having jurisdiction may, upon it's finding of good cause and giving of such notice as may be ordered, enter an Order Nunc Pro Tunc in a matter relating to marriage, divorce, legal separation or annulment of marriage."

STATEMENT OF THE CASE

A. Nature of the Case.

A Divorce Decree was entered in this case, based upon the Default Consent signed by the Defendant without an attorney, on January 10, 1973. In that Decree, the Defendant was ordered to pay to the Plaintiff \$200.00 per month as alimony pursuant to Paragraph 3 of the Divorce Decree. The Defendant filed an Order to Show Cause seeking modification of the Decree and termination of the

alimony award, dated June 13, 1973. The matter was brought on for hearing on November 28, 1973, at which time the Minute Entry reflected that a written Stipulation was reached between the parties.

On February 25, 1988, the Plaintiff filed with the Court an Order to Show Cause seeking Judgment for unpaid alimony arrearages for the 8 years preceding the Order to Show Cause. The Defendant moved the Court to enforce the previous Stipulation referred to in the November 24, 1973 minutes. The Defendant requested the Court enter the Order, Nunc Pro Tunc, terminating the alimony or, in the alternative, to find that the Plaintiff had cohabited since the date of the Divorce Decree and was no longer entitled to any award of alimony.

Judge J. Dennis Frederick found that the Plaintiff was entitled to a Judgment against the Defendant in the sum of \$19,400.00 because there was not an enforceable Stipulation entered into between the parties. The Court did not find that no agreement took place, but found instead that the agreement was not enforceable. The Court also ruled that the Plaintiff did not unlawfully cohabit subsequent to the entry of the Divorce Decree.

The Plaintiff received a Judgment based upon the written Findings of Fact and Conclusions of Law and Order entered by the Court and the Defendant/Appellant has filed a timely Appeal.

B. Course of Proceeding.

The Complaint was filed in this case on April 7, 1972 (file document 000002). A Decree was entered January 10, 1973, originally pursuant to a Stipulation of the parties and the Default of the Defendant in 1973 concerning the Default Divorce (see attachments). At the time the Divorce Decree was entered, the Defendant was not represent by counsel. After the Divorce Decree was entered, the Defendant obtained legal counsel who filed a Petition for Order to Show Cause on May 17, 1973 alleging that the Decree of Divorce provided for alimony contrary to representations made by the Plaintiff to the Defendant that there would be no alimony (see file document 000016, attachment 1). An Order to Show Cause was entered on June 26, 1973 (see attachment 2).

The Defendant's Petition for Order to Show Cause was noticed for hearing on November 28, 1973. The Minute Entry indicated that based on the Stipulation of respective counsel, the Court ordered that the Order to Show Cause was continued pending written Stipulation and Order (see file document 000023, attached). The trial Judge at that time was the Honorable G. Hal Taylor.

When the Plaintiff filed an Order to Show Cause in February, 1988, to enforce alimony, this matter came on first before the Domestic Relations Commissioner of the Court, Sandra Peuler. The Commissioner entered a recommendation ruling in favor of the Plaintiff and the Defendant filed an objection. The objection came on for hearing before the Honorable J. Dennis Frederick of the Court and an evidentiary hearing was held before the Court on July

21, 1988. The Defendant called, as witnesses, both the Plaintiff and Defendant's prior attorneys, and his present wife, Darlene Bagshaw. The Plaintiff called as a witness the Plaintiff, Wanda Marie Sackett Bagshaw as a witness.

The Court took the matter under advisement and after receiving Memorandum from the parties, entered a Minute Entry which states:

This Court is not persuaded that the parties arrived at an enforceable Stipulation to modify the Decree of Divorce to eliminate alimony. *Brown v. Brown*, 744 P.2d 333 (Utah App., 1987).

C. Disposition at Trial Court.

The Plaintiff received a Judgment against the Defendant for the sum of \$19,400.00 to and including unpaid child support due to March 31, 1988 and each party was ordered to assume their own attorney's fees and costs.

RELEVANT FACTS

At the hearing, the Defendant called to the stand Darlene Bagshaw, the Defendant's new wife, who appeared with him at the time of the hearing on November 28, 1973. She indicated that she came with Mr. Bagshaw to the hearing which took place in the Third District Court (Transcript, Page 3). She testified that on the day before the hearing, she received a telephone call from the Plaintiff, the Defendant's ex-wife, Wanda Bagshaw (Page 4). She heard Joseph Bagshaw indicate to Wanda Bagshaw that there was Court on the following day and he made a threat to her concerning Court (Pg. 4). The next day, she appeared with her husband at Court where they met her husband's attorney, Mr. Gilbert Athay. The

witness recalled that Wanda Bagshaw's lawyer came up to them and indicated that Wanda was not going to appear that day because she was upset concerning the threats Joe had made to her (Pg. 5). She testified that on the day of the Court hearing, that the two attorneys, Wanda Bagshaw's attorney and her husband, Joseph Bagshaw's, attorney, went into a small room in the back of the Courtroom at which conversations took place concerning settling the case that day (Pg. 7). She indicated that her husband, Mr. Bagshaw, said that he would let go of his claim concerning the Jeep and his portion of a Federal Tax Return, which Wanda Bagshaw had taken and also agreed not to press charges against her for theft concerning the Jeep in exchange for her dropping the alimony charges. She recalled that Mr. Bagshaw had stated during the meeting that he didn't know that there had been alimony provisions placed in the Divorce Decree until his brother had read the Decree to him.

Darlene Bagshaw testified that an agreement was reached over the phone and that her lawyer represented that she was talking to Wanda Bagshaw and Wanda Bagshaw indicated that she had agreed to the settlement. She indicated that the attorneys were to draw up a Stipulation, that his portion of the Federal check was to go towards child support and that Joe would not press any theft charges concerning the Jeep and that the alimony would be dropped from the Divorce Decree (Pg. 8).

She indicated that after the meeting, her husband attempted to call attorney Gil Athay on several occasions to see whether or

not the papers had been completed (Pg. 9). Even though the papers were never completed, she indicated that her husband believed that the alimony amounts had been paid (Pg. 10).

Joseph Arthur Bagshaw was sworn as a witness and testified that at the time he signed the document allowing her to proceed to a default divorce, that he did not have an attorney and did not read at the time (Pg. 13). Mr. Bagshaw testified that his wife at the time, Wanda Bagshaw, in a telephone conversation from St. George, Utah said that she wanted a quick divorce and child support and that he merely sign the papers at the place where she indicated that he needed to sign and mail them back to her (Pg. 14). He indicated that after the Divorce Decree was entered, his brother read the Decree to him and he found out for the first time that he was paying \$200.00 in alimony (Pg. 15). After trying to contact Mrs. Bagshaw concerning the alimony, he retained Robert Van Sciver to act as his attorney and on May 17, 1973, he signed a document which was a Petition for Order to Show Cause.

1. That he is the Defendant in the above-entitled matter. That he is unable to read and that it was represented to the Defendant by the Plaintiff that he, if he executed certain documents, there would be no alimony.
2. That the Decree of Divorce entered herein provides for alimony and based upon such misrepresentations, the Defendant acquiesced in securing of a Decree of Divorce. Therefore, the same should be modified eliminating that provision relating to alimony.
3. Further, there has been the taking, by the Plaintiff of Income Tax Return, a portion of which should be paid to the Defendant. (See Petition for Order to Show Cause entered July 13, 1973 as part of the record in this matter, attached hereto.)

Mr. Bagshaw indicated that on the day of Court on November 28, 1973, an agreement was reached that there would be no alimony if he would drop the charges of her taking the Jeep and the Federal check (Pg. 18). He indicated that *"half the check would go to her and half would come to me but then we agreed that all of it would go to her because"* he was giving her his portion of the check as credit for child support. He indicated that she agreed to drop the alimony based upon his foregoing of filing any theft charges against her concerning the taking of the Jeep and that he fulfilled his part of the bargain by not pursuing the theft charges. In his presence at the time of the meeting between the attorneys on the day in question, he stated that he heard her attorney, Spencer Haycock, indicate that she had agreed to the proposal (Pg. 19). From the time of the Court hearing on November 28, 1973 until he received the Order to Show Cause in February, 1988, his ex-wife, Wanda, did not make any claims for any alimony, even though she did bring an action concerning child support through the Department of Social Services (Pg. 20). Exhibits were introduced in this matter that indicated that documents were served on him in February, 1986 concerning the child support obligations which were initiated by the Plaintiff, Wanda Bagshaw. On July 16, 1987, he reached an agreement fully settling the child support debt with the Department of Recovery Services (Pg. 21 and Exhibit "3").

Mr. Bagshaw testified that in 1975, his ex-wife, Wanda Bagshaw, informed him that she was expecting a child and was

pregnant (Pg. 24). Mr. Bagshaw stated that he had not had sexual relations with her and was not the father of the child (Pg. 25). He indicated that it was not until February of 1988 that he discovered that she was still making a claim for alimony despite the agreement of November, 1973 (Pg. 26).

The Defendant called as witnesses, both of the attorneys representing the parties at the November 28, 1973 hearing. D. Gilbert Athay testified that in 1973 he was a partner with Robert Van Sciver, the attorney who filed the Petition on behalf of Mr. Bagshaw (Transcript Vol. II, pg. 4). Mr. Athay testified that after hearing the testimony of Darlene Bagshaw and Joseph Bagshaw, that he did not have a recollection as to the events of November, 1973 (Pg. 5).

The Plaintiff's attorney in 1973 was Mr. Spencer Haycock (Pg. 7). Mr. Haycock testified that he, like Mr. Athay, did not have any independent recollection of the November 28th hearing. He did say that he had a limited recollection that his client had cashed a check and sold the Jeep and that the parties had come back to Court (Pg. 9).

The Defendant/Appellant also called as a witness Joseph Lavar Bagshaw (Vol. II, Pg 32). He testified that he was the son of the parties and lived with his mother, the Plaintiff, after the Divorce until 1980. In 1975, his mother gave birth to another child. Prior to that time, he saw male individuals at the residence but could not testify as to whether these persons stayed overnight.

Wanda Marie Sackett Bagshaw was called to testify as to her recollection of the proceedings (Vol. II, Pg. 15). She testified that she knew her ex-husband had retained an attorney and that she met with the attorneys (Pg. 17). She acknowledged that there was a dispute with her ex-husband over a Federal check and the Jeep automobile (Pg. 19). She stated that she did not verbally agree to waive alimony.

The Plaintiff/Respondent admitted that she gave birth to a child in 1975 (Pg. 26). She also testified that in 1972 she assigned to the Department of Recovery Service of the State of Utah the right to receive child support and alimony (Pg. 17). She acknowledged that from 1972 until 1981, she received public assistance and for a few months in 1984 (Pg. 16). She stated that during this period of time when she was receiving assistance, she was required to pay over any money she received for alimony to the Department of Recovery Services (Pg. 17). The Assignment of Collection of Support Payments was filed with the Court in 1975 when the State of Utah, Department of Social Services was joined as a party (see file document 000024 and 000025, attached).

SUMMARY OF ARGUMENT

1. Did the Court err in not ruling that good cause existed to enter a Nunc Pro Tunc Order modifying the Decree of Divorce previously entered on November 28, 1973?

2. Did the Court err in applying and giving retroactive effect to the legal requirements set forth in *Brown v. Brown*, 744 P.2d 333 (Utah, App. 1987)?

3. Did the Court err in not estopping the Plaintiff from enforcing a Judgment for alimony?

4. Did the Court err in finding that the Plaintiff, by making representations that alimony did not exist in the Decree and that she would sign an agreement vacating the alimony, waived her right to alimony after November, 1973?

ARGUMENT

POINT I

GOOD CAUSE EXISTS FOR THE COURT TO ENTER A NUNC PRO TUNC ORDER MODIFYING THE DECREE AS OF NOVEMBER 28, 1973, BASED ON EITHER THE STIPULATION OR THE MERITS OF THE PENDING ACTION.

Utah Code Annotated, 30-4a-1 (As Amended, 1984) states:

A Court having jurisdiction may, upon its findings of good cause and giving of such notice as may be ordered, enter an order Nunc Pro Tunc in a matter relating to marriage, divorce, legal separation or annulment of marriage.

The first case interpreting this broad and remedial statute which is unique in Utah to domestic proceedings is the recent case of *Horne v. Horne*, 737 P.2d, 244 (Utah App. 1987). In this decision the Court of Appeals set forth for the first time the parameters of the Nunc Pro Tunc statute giving discretion to a court to grant special relief in domestic matters when errors or omissions occur. The Defendant respectfully submits that the trial Court had jurisdiction and authority to enter an order modifying the alimony provision of the Bagshaw Decree as of November 28, 1973, setting

aside and vacating the alimony provisions on agreement of the parties under the authority of the statute.

In *Horne*, the Court of Appeals discussed in detail the legislative history of *Utah Code Annotated, 30-4a-1, (1984)*, and indicated that the history of the Nunc Pro Tunc statute revealed "an intent to give to the courts broad discretion to enter orders Nunc Pro Tunc in domestic proceedings where an obvious injustice would otherwise result." The Court found that the statute applied to all aspects of domestic proceedings and was not limited to cases involving only marital status of the parties as under the former statute which it replaced.

Under common law and previous Utah decisions, the doctrine of Nunc Pro Tunc required a condition precedent that the Court find that a previous final order has been made at an earlier date. See for example, *Preece v. Preece*, 682 P.2d 288, (Utah, 1984). Thus, prior to enactment of the statute, an order could only be entered after a previously final order, a court could remedy only a prior accomplished act which arose to the status of a final order.

The Court in *Horne* ruled that the analysis and holding of *Preece v. Preece*, was statutorily overruled and that unlike common law, the Court only needs to find "good cause" to correct errors or supply omissions. The Court held that the statute gives to courts wide discretion to prevent "obvious injustices", and to accurately reflect that which in fact took place without the technical restraints under previous law.

The Utah Court of Appeals stated:

"The meaning of 'good cause' must be determined on a case by case basis, in light of all of the surrounding circumstances, or equity and justice required.

The Court, in reversing the trial Court's application of the statute in the *Horne* divorce, indicated that the statute should be applied to give effect to the parties' prior intentions and not to substitute the Court's judgment for the judgment of the parties.

Mr. Bagshaw proved to the trial Court that he would suffer an obvious injustice if the trial Court did not enter a Nunc Pro Tunc Order modifying the alimony provisions of the Decree. Judgment was entered against him and in favor of the Plaintiff for alimony which he had reasonably believed was resolved by Stipulation fifteen years prior to Plaintiff's Order to Show Cause. The Plaintiff, Mrs. Bagshaw, on the other hand, admitted that she did not demand or prosecute her purported claim for alimony until only recently, even though there had been payment demands and full payment of child support.

The Defendant established good cause under the special circumstances of this case, upon which the Court could have enforced the agreement, or granted Motion on the merits. Those include any of the following:

1. The original decree was a default decree based upon the Plaintiff's misrepresentation that no alimony would be in the decree.
2. At the time of the Consent to Enter Default, the Defendant could not read and relied on the Plaintiff, without consulting an attorney.

3. The hearing was noticed by Defendant's counsel for the date of November 28, 1973 and not by Plaintiff's counsel.
4. The Defendant's testimony and minute entry reflects that the parties intended to file a written stipulation to be reduced to an order and the alimony issue was the primary contention between the parties.
5. The Defendant forgave his claim for the funds from the forgery of his name on the check and the unauthorized taking of the Jeep and the Plaintiff admitted to the unauthorized acts.
6. The Plaintiff assigned to a governmental third party agency the right to collect alimony and had never actively pursued her claim until 1988 (see Exhibit concerning assignment with Recovery Services).
7. No alimony collection proceedings were ever instituted by the Plaintiff after November 28, 1973, until the present action, or the Department of Recovery Services even though the Defendant fully resolved and satisfied all child support claims.
8. The Defendant was present in Utah and was not aware of the omission to formally enter the stipulation and was never notified of the omission by any enforcement by the Plaintiff.
9. The Order to Show Cause was continued pending the Stipulation and the matter was still pending and had never been adjudicated.

The broad remedial power to correct injustices in domestic matters under *Utah Code Annotated, 30-4a-1 (1984)*, should have been invoked by the Court in this matter. The Defendant does not need to prove the existence of a written stipulation or unsigned court order under the broad powers granted under the statute as interpreted by the Court in *Horne v. Horne*. In *Horne*, the Court noted that even under the common law power of Nunc Pro Tunc, the Court was allowed to correct errors or supply omissions to the record accurately

reflecting that which in fact took place. The Court could and should have considered the merits of the Defendant's Petition which had never been denied or dismissed.

The expanded scope of the doctrine under the statute should include errors by attorneys in submitting orders as well as the traditional clerical errors. In a domestic matter, the trial Court has continuing equity jurisdiction and the Court should have rendered the unjust, harsh and inequitable situation created without fault of the Defendant personally. This case presents the exact type of situation which the legislature designed the Nunc Pro Tunc Statute. That is, a technical defect unnoticed by one party and not prosecuted by the other party that is brought to the Court's attention pursuant to the continuing power to make equitable decisions in domestic matters.

Therefore, the Court should reverse the trial Court decision and enter an order effective November 28, 1973 setting aside and vacating the alimony provision of the Decree.

The Court did not consider entering the Order Nunc Pro Tunc and, instead, merely found the agreement unenforceable because it had not been reduced to a writing. The record itself reflects that the Defendant's Order to Show Cause to vacate alimony was continued pending a written Stipulation (see attachment 4).

The Nunc Pro Tunc statute was designed to avoid the injustice which results from the trial Court's technical application of *Brown v. Brown* and in not considering this matter beyond the Stipulation.

The Court should have ruled that the alimony should have been modified and then retroactively entered this Order to avoid the harsh injustice of the ruling.

The Defendant's Petition to Modify the Decree, pending since 1973, has never been denied. The trial Court should have ruled that the alimony should have been vacated and used the Nunc Pro Tunc statutes to enter the Order as of 1973. The Court did not have to enforce the Stipulation and could have ruled on the merits because, under the Plaintiff's theory, the Stipulation was unenforceable because it was not technically signed or entered.

The Nunc Pro Tunc statutes gave the Court the power to inquire into this injustice. Instead, the Court refused to consider this matter and enforced the alimony without consideration of the remedial statute.

POINT II

THE COURT SHOULD NOT HAVE APPLIED THE REQUIREMENTS OF *BROWN V. BROWN* TO FIND THE STIPULATION UNENFORCEABLE.

The Judge ruled in this case that the parties had not arrived at an enforceable Stipulation to Modify the Decree of Divorce and specifically cited the recent case of *Brown v. Brown*, 744 P. 2d 333 (Utah App., 1987).

In *Brown*, the Court of Appeals ruled that under Utah Rules of Practice of the District Court, 4.5 (b), a stipulation not continued in a writing signed by the parties or filed with the clerk was not an enforceable stipulation. In *Brown*, the Court noted in discussing what constituted a stipulation, that stipulations

could be enforceable to the extent that justice requires enforcement in view of potential change of position in reliance on the promise or agreement (Citing Restatement (Second) of Contracts, Section 94 (1987)). The *Brown* Court also quoted a section of American Jurisprudence, which stated that stipulations could be asserted if 'entered upon the Minutes of the Court'.

In *Brown*, the Court said that the Statute of Frauds and Rules of Practice 4.5 (b), that Stipulation was made not in Court in the context of a hearing, but at a Deposition where the agreement was read on the record by the attorneys.

However, in 1973, there was no rule in effect such as Rule 4.5 (b) of the Utah Rules of Practice. The trial Court should not have applied the ruling and requirements of *Brown v. Brown*, which was based upon the rule of practice to the 1973 Stipulation. In *Jensen v. Eames*, 519 P.2d 236 (Utah, 1974), the Utah Supreme Court announced the basic rule that rules of procedure, if it impairs rights of a party, should not be applied and that only if there is no impairment, that the amended procedure will be applied (see also *Cheney v. Rucker*, 381 P.2d 86 (Utah, 1963) and *Utah Sand and Gravel v. Tolbert*, 402 P.2d 703 (Utah, 1965)).

The Court should not have applied the technical requirements of *Brown v. Brown* in this case and should have proceeded to determine whether the Stipulation to terminate alimony should have been enforced under the Nunc Pro Tunc statute. In this case, the hearing of November 1973, was being held on the Petition and Notice of the Defendant to vacate the alimony provisions. The parties

were present at the Court and a Minute Entry was filed indicating the Order to Show Cause of the Defendant was continued pending written Stipulation and Order (see attachment 4).

In any event, the Court should not have denied the Petition by not considering the power to enter an Order under the Nunc Pro Tunc statute. The requirements of *Brown* were applied retroactively in a case where the merits should have been reviewed under the Court's equity power.

POINT III

IN THE ALTERNATIVE, THE COURT ERRED IN NOT FINDING, UNDER CONTINUING EQUITY JURISDICTION, THAT THE PLAINTIFF IS ESTOPPED FROM REDUCING THE ALIMONY AWARD TO A JUDGMENT.

In cases such as *Larsen v. Larsen*, 300 P.2d, 596 (Utah, 1956) and *Ross v. Ross*, 592 P.2d 600 (Utah, 1979), the Utah Courts have recognized that under equitable jurisdiction of the Court, a party may be estopped from enforcing the provisions of a divorce decree. In those cases, the party must prove that the other party by her representations or actions led him to believe he need not pay alimony and the party in reliance on such representations damaged his position to his detriment. In such cases, the hardship and injustice because of enforcement of the decree under the circumstances is the reason for applying the doctrine of estoppel.

The cases relied on by the Plaintiff such as *Scott v. Scott*, 430 P.2d 580 (Utah, 1967), involve enforcement issues concerning foreign divorces and do not overrule *Larsen* and *Ross*. In the case before the trial Court, the Decree was originally entered by the Court and this

action was the first time both parties had been before the Court on the issue since 1973.

In *Larsen*, the Court ruled that the doctrine of estoppel is applicable to both child support and alimony. While subsequent decision may have reduced the applicability of *Larsen* to child support cases, the doctrine should be found to be applicable to alimony claims. While the Court did not apply or consider the Defendant/Appellant's arguments based on *Larsen*, this Court can review these claims in this equitable proceedings. *Harding v. Harding*, 488 P. 2d 308 (Utah, 1971). In the alternative, the Court should reverse this matter for consideration as to whether the Plaintiff should be estopped from seeking alimony on the basis of waiver.

The record supports the following reasons for finding the Plaintiff had made representations waiving alimony relied upon, to the Defendant's detriment.

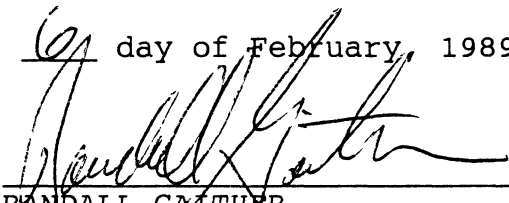
- 1) The Plaintiff had assigned her right to alimony to the Department of Recovery Services and the Defendant had fully settled the case with Recovery Services.
- 2) The Plaintiff had made misrepresentations at the time of
 - a) obtaining the consent for default, and
 - b) in agreeing to vacate and forego the alimony.
- 3) The Defendant had relied, to his detriment, on these misrepresentation in not bringing the Order to Show Cause back to Court to enforce the Stipulation.
- 4) The Defendant continued to pay child support and did not obtain compensation for the Jeep or forged endorsement on the check.
- 5) The Defendant's Petition to Vacate Alimony was still pending when the Plaintiff attempted to obtain a Judgment.

CONCLUSION

The Defendant/Appellant discovered that his Petition to Set Aside the Alimony was never formally resolved when the Plaintiff/Respondent sought to enforce alimony for the first time since 1973. The trial Court did not attempt to remedy the injustice by ruling on the merits of the original Petition or by applying the Nunc Pro Tunc statute. Instead, the trial Court focused on the "enforceability" of the Stipulation.

This Court should confront the issue raised by the Defendant/Appellant by either determining that the Nunc Pro Tunc statute was applicable and reversing and setting aside the Judgment, or in the alternative, remanding this matter back for a new hearing with directions to the trial Court to consider the merits of the still pending Petition to Set Aside the Alimony Provisions under the broad remedial powers of the Nunc Pro Tunc statute as interpreted by this Court.

RESPECTFULLY SUBMITTED this 69 day of February, 1989.



RANDALL GAITHER
Attorney for Defendant-Appellant

DELIVERY CERTIFICATE

I hereby certify that four true and correct copies of the foregoing Brief of Appellant was hand delivered to Mr. John Spencer Snow, Attorney at Law, 261 East 300 South, Suite 350, Salt Lake City, Utah 84111, on this ____ day of February, 1989.

ADDENDUM

All statutes were cited verbatim in the Brief, and the following pertinent documents are attached:

- 1) Decree (file document 000011 and 000012).
- 2) Petition for Order to Show Cause (file document 000014 and 000015).
- 3) Order to Show Cause (file document 000016).
- 4) Minute Entry (file document 000023).
- 5) findings of Fact and Conclusions of Law(file document 000135)

Attorney for Plaintiff
731 East South Temple
Salt Lake City, Utah 84102
Telephone: 322-3551
9-28-73-29

JAN 10 1973

W. Sterling Adams, Clerk 3rd Dist. Court

By Ed. Sedmons
Deputy Clerk

IN THE DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

WANDA MARIE SACKETT BAGSHAW,)
Plaintiff,) DECREE OF DIVORCE
-vs-)
JOSEPH ARTHUR BAGSHAW,) Civil No. D-6775
Defendant.)

OK 123 No. 3917
1-11-73 9:47 A.M.

The above entitled cause having come on regularly for hearing, Plaintiff being present in person and represented by counsel, Spencer L. Haycock, and the Defendant not appearing nor being represented by counsel but it appearing to the Court that the Defendant has heretofore filed his waiver and appearance wherein he waived time in which to answer or otherwise plead and consented that the matter may be heard at any time without further notice to him; and the default of the Defendant having been entered and the Court having heard the sworn testimony of the Plaintiff and being fully advised in the premises and the Court having filed its Findings of Fact and Conclusions of Law, now, therefore, upon motion of Spencer L. Haycock, attorney for Plaintiff, it is

ORDERED, ADJUDGED AND DECREED:

1. Plaintiff is awarded a Decree of Divorce dissolving the bonds of matrimony now and heretofore existing between the parties; provided, however, that said Decree shall not become final until the expiration of three months from the date of its entry herein. Provided further that said Decree shall not become final if during said period proceedings for review are pending or the Court otherwise orders.

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2. That Plaintiff is awarded the custody, care and control of the two minor children, Joseph LaVar and David LeRoy, subject to reasonable rights of visitation by Defendant.

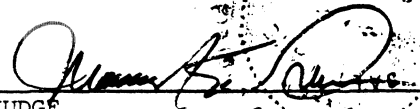
3. That Plaintiff is awarded the sum of \$100.00 per month per child as support and maintenance of the said minor children, and further, that Defendant is ordered to pay to Plaintiff the sum of \$200.00 per month as alimony; that Defendant also pay one-half the medical and dental expenses of said minor children, or in lieu of one-half the medical expenses, that he provide an adequate policy of health insurance for said children.

4. That Plaintiff is awarded the household goods and furnishings, and the 1962 Ford automobile; that the Defendant is awarded the 1962 Jeep automobile, the 1972 Chevrolet pickup truck and camper, and his personal items.

5. That Defendant is ordered to assume and pay the debts and obligations incurred during the course of the marriage including the balance owing on the attorney fee herein in the sum of \$200.00 and hold Plaintiff harmless therefrom.

DATED this JAN 10 1973 day of January, 1973.

BY THE COURT:


JUDGE

ATTEST
W. STERLING EVANS
CLERK

BY 
County Clerk

000012

ROBERT VAN SCIVER
Attorney for Defendant
321 South Sixth East
Salt Lake City, Utah 84102
322-5678

May 1, 1979
W. C. [Signature]
by [Signature]
Clerk of Court

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

WANDA MARIE SACKETT BAGSHAW,	:	
	:	
Plaintiff,	:	PETITION FOR
	:	ORDER TO SHOW CAUSE
vs.	:	
	:	
JOSEPH ARTHUR BAGSHAW,	:	
	:	
Defendant.	:	Civil No. <u>D-6775</u>
	:	

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

Joseph Arthur Bagshaw, the defendant above named
petitions the Court as follows:

1. That he is the defendant in the above entitled
matter. That he is unable to read, and it was represented
to the defendant by the plaintiff that if he executed certain
documents, there would be no alimony.

2. That the Decree of Divorce entered herein
provides for alimony and based upon such misrepresentations,
the defendant acquiesced in the securing of a Decree of
Divorce. Therefore, the same should be modified eliminating
that provision relating to alimony.

3. Further, that there has been the taking by
the plaintiff of an income tax return, a portion of which
should be paid to the defendant.

WHEREFORE, Defendant prays for the issuance of
an Order to Show Cause, requiring the plaintiff to appear

and show cause, if any she has, why the following Order should not be entered:

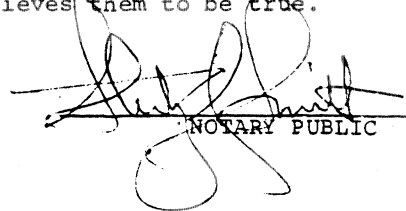
A. Modifying the Decree of Divorce to reflect that the plaintiff is awarded no alimony.

B. Ordering plaintiff to return a portion of the income tax return to the defendant.

DATED this 17 day of May, 1973.


JOSEPH ARTHUR BAGSHAW

On this 17 day of May, 1973, personally appeared before me Joseph Arthur Bagshaw, who duly acknowledged to me that he signed the foregoing voluntarily; that the contents thereof are true and correct to the best of his knowledge, except as to matters stated on information and belief, and as to such matters, he believes them to be true.


NOTARY PUBLIC

My Commission Expires:

My Commission Expires Aug. 30, 1975

1150
A-11-4-40

9:30 ~~area~~
Salt Lake City, Utah
ROBERT VAN SCIVER
Attorney for Defendant
321 South Sixth East
Salt Lake City, Utah 84102
322-5678

FILED IN CLERK'S OFFICE
Salt Lake County Utah
JUN 26 1973
W. Sterling Evans, Clerk and Dist. Clerk
By [Signature]
Deputy Clerk

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

WANDA MARIE SACKETT BAGSHAW,	:	
	:	
Plaintiff,	:	ORDER TO SHOW CAUSE
	:	
vs.	:	
	:	
JOSEPH ARTHUR BAGSHAW,	:	
	:	
Defendant.	:	Civil No. <u>D-6775</u>
	:	

The above entitled matter came on for hearing upon the verified Petition of the defendant herein. Upon motion of Robert Van Sciver, Attorney for Defendant, and good cause appearing therefor,

IT IS HEREBY ORDERED that the plaintiff, Wanda Marie Sackett Bagshaw be and appear before the above entitled Court on the 5th day of July, 1973, at the hour of 10:15 A. M. in courtroom number 1, 240 East Fourth South, Salt Lake City, Utah, to then and there show cause, if any she has, why the following Order should not be entered:

- A. Modifying the Decree of Divorce to reflect that the plaintiff is awarded no alimony.
- B. Ordering plaintiff to return a portion of the income tax return to the defendant.

DATED this 6th day of June, 1973.

BY THE COURT:

W. STERLING EVANS
CLERK
By [Signature]
Deputy Clerk

[Signature]
DISTRICT JUDGE

THIRD JUDICIAL DISTRICT
COUNTY OF SALT LAKE — STATE OF UTAH

Wanda BASHAW
Plaintiff

MINUTE ORDER

Case # D 6275

Joseph BASHAW
Defendant

Type of hearing: Div. _____ Annul. _____ OSC _____ Other _____

Present: Plff. _____ Deft. _____

P. Atty. S. HAYCOCK

D. Atty. GIL HATHAY

Sworn & Examined: Plff. _____ Deft. _____

Others _____

Summons _____ Stipulation _____

Waiver _____ Publication _____

Default: Plff. _____ Deft. _____

Date: NOV 28 1973

Judge: GAIL TAYLOR

Clerk: W. R. Hansen

Reporter: _____

Bailiff: _____

ORDERS:

Counseling ordered _____

Custody study ordered _____

Custody awarded to _____

Visitation rights _____ Reasonable, or: _____

Support \$ _____ X _____ = \$ _____ per month

Alimony \$ _____ Per month/year

Payments to be made thru the clerks office _____ Payments to be made by the _____ of

each month, or 1/2 by the _____ and 1/2 by the _____ of each month

Atty fees to the _____ in the amount of \$ _____ or Deferred _____

Home to Pltf _____ Deft _____ Use of _____

Furnishings to Pltf _____ Deft _____ Use of _____

Auto to Pltf _____ Deft _____

_____ to pay debts incurred prior to _____

_____ to pay court costs of \$ _____ within _____ days

Divorce granted to _____ as _____

Based on stipulation of counsel or on motion of

Respectively counsel, the court orders:

OSC to continue pending
written stipulation & ORDER

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF SALT LAKE COUNTY, UTAH
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH AUG 12 1988

WANDA MARIE SACKETT BAGSHAW,

Plaintiff,

vs.

JOSEPH ARTHUR BAGSHAW,

Defendant.

MINUTE ENTRY

CIVIL NO. D-6775

H DIXON HINDLEY, CLERK 3rd DIST COURT
BY [Signature] DEPUTY CLERK

This Court is not persuaded that the parties arrived at an enforceable stipulation to modify the Decree of Divorce to eliminate alimony. Brown v. Brown, 744 P.2d 333 (Utah App. 1987).

Counsel for the plaintiff is to prepare the Findings of Fact, Conclusions of Law, and Judgment.


Dated this 14 day of August, 1988.

[Signature]
J. DENNIS FREDERICK
DISTRICT COURT JUDGE

ATTEST
H DIXON HINDLEY
Clerk
By [Signature] Deputy Clerk

000082

JOHN SPENCER SNOW, No. 3026
SNOW, HALLIDAY & BAKER
Attorneys for Plaintiff
261 East 300 South, Suite 350
Salt Lake City, Utah 84111
Telephone: (801) 364-4940

SEP 20 1988
H. Dixon Hickey, Clerk 3rd Dist. Court
By  Deputy Clerk

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

WANDA MARIE SACKETT BAGSHAW,	:	
Plaintiff,	:	FINDINGS OF FACT AND
	:	CONCLUSIONS OF LAW
vs.	:	
JOSEPH ARTHUR BAGSHAW,	:	Civil No. D-6775
Defendant.	:	

The order to show cause of the plaintiff came on regularly for hearing before the domestic relations commissioner on Tuesday, the 29th day of March, 1988, at the hour of 2:00 p.m. The plaintiff was present in person and represented by her respective attorney, John Spencer Snow, and the defendant was presented in person and represented by his respective attorney, Randall Gaither. The domestic relations commissioner made her recommendations that the plaintiff be awarded judgment against the defendant for alimony arrearage in the sum of \$19,400.00 to and including March 31, 1988. The domestic relations commissioner further found that the decree of divorce had not been modified and there was no evidence of a stipulation to terminate alimony and that the defendant had failed in his burden

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of proof. The domestic relations commissioner further found that there was no evidence of unlawful cohabitation and that the State of Utah had no interest in any portion of the alimony judgment in favor of the plaintiff. The domestic relations commissioner further found that the plaintiff had the right to rely upon the said decree of divorce without modification. The domestic relations commissioner made no specific recommendation as to the payment of attorney fees and costs. The said defendant filed an objection to the recommendation of the domestic relations commissioner and sought an evidentiary hearing by pleading entered on the 6th day of April, 1988. The said defendant further filed a motion to enter stipulation, order and judgment dated the 6th day of April, 1988. The objection to the recommendations of the domestic relations commissioner and the motion to enter stipulation, order and judgment and the said defendant came on for hearing before the above entitled court on the 21st day of July, 1988, at the hour of 9:00 a.m. The plaintiff was present in person and represented by her respective attorney, John Spencer Snow, and the defendant was present in person and represented by his respective attorney, Randall Gaither. Witnesses for both plaintiff and defendant were sworn and testified, including the parties themselves. Certain exhibits were introduced into evidence. The above entitled court heard the evidence and reviewed the exhibits introduced into evidence and made specific findings that there was no unlawful

cohabitation of the plaintiff to terminate alimony. The court took under advisement the motion to enter stipulation, order and judgment of the said defendant. The above entitled court directed the defendant through his attorney to submit a memorandum of law and that the court would then make its ruling based upon all of the pleadings, testimony and exhibits introduced into evidence. The defendant submitted proposed findings and memorandum of law with a copy of the transcript of the hearing of July 21, 1988, dated the 1st day of August, 1988. The above entitled court, having taken the matter under advisement and having reviewed all of the pleadings on file, submitted its minute entry dated the 4th day of August, 1988. The above entitled court, being fully advised in the premises, and good cause appearing therein, now makes the following:

FINDINGS OF FACT

1. The plaintiff did not commit any acts of unlawful cohabitation subsequent to the entry of the decree of divorce in this action.
2. This court finds that there was neither a stipulation between the parties as evidenced by a signed writing nor an agreement of the parties stated in court before a judge on the record as required by Brown v. Brown, 744 P.2d 333 (Utah, App. 1987).
3. There was no termination of alimony by reason of the actions of the plaintiff.

4. The parties did not arrive at an enforceable stipulation on or about the 28th day of November, 1973.

5. The alimony provision in the decree of divorce was in full force and effect from and after its entry by the court to and including the present time.

6. The parties did not enter into any enforceable stipulation to modify the decree of divorce to terminate alimony by the defendant to the plaintiff.

7. The alimony remains in full force and effect and has not been terminated by the defendant by prior order of this court.

From the foregoing findings of fact, the court now enters the following:

CONCLUSIONS OF LAW

1. Plaintiff is entitled to judgment against the defendant in the sum of \$19,400.00 to and including March 31, 1988.

2. The motion to enter a stipulation, order and judgment of the said defendant is hereby denied.

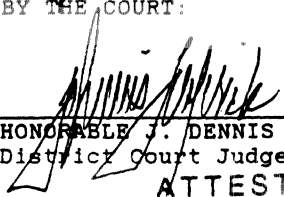
3. The plaintiff did not unlawfully cohabit subsequent to the entry of the decree of divorce.

4. There is not enforceable stipulation entered into by and between the parties subsequent to the entry of the decree of divorce to terminate the obligation of the defendant to pay alimony to the plaintiff.

5. Each party is ordered to pay for his or her own
respective attorney fees and for costs of court incurred in this
action.

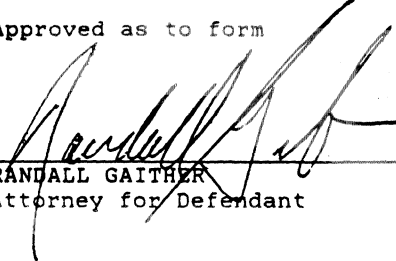
DATED this 20th day of SEP, 1988.

BY THE COURT:



HONORABLE J. DENNIS FREDERICK
District Court Judge

ATTEST
H. DIXON HINDLEY
Clerk

Approved as to form


RANDALL GAITHER
Attorney for Defendant

By


Deputy Clerk