

1998

Vicki L. Stratton v. David E. Stratton : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

VICKI L. STRATTON,	:	
Appellant,	:	Case No. 981822-CA
vs.	:	Priority 15
DAVID E. STRATTON,	:	
Appellee.	:	

BRIEF OF APPELLEE

On Appeal from the Third Judicial District Court
for Salt Lake County, State of Utah
Honorable Frank G. Noel, District Court Judge Presiding

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STATEMENT OF JURISDICTION

The Court of Appeals has jurisdiction over this matter pursuant to Section 78-2a-3(2)(i), Utah Code Annotated (1953 as amended) as an Appeal from a final order denying Petitioner's Motion to Set Aside Decree of Divorce, Findings of Fact and Conclusions of Law in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Judge Frank G. Noel, presiding.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the trial court correctly refuse to set aside pursuant to Rule 60(b) of the Utah Rules of Civil Procedure, a Decree of Divorce based upon a stipulation?

The standard of review is that the trial court is afforded broad discretion in ruling on a motion for relief from a judgment under Rule 60(b) of the Utah Rules of Civil Procedure and its determination will not be disturbed absent an abuse of discretion. Birch v. Birch, 771 P.2d 1114, 1117 (Utah App. 1989).

2. Did the trial court correctly enforce the stipulation of the parties?

The standard of review is whether the trial court abused its discretion in failing to set aside the parties stipulation. Dove v. Cude, 710 P.2d 170 (Utah 1985).

3. Whether it was an abuse of discretion to refuse to set aside the Decree of Divorce which was based on a stipulation based on a Rule 60(b) Motion, Utah Rules of Civil Procedure, where the Appellant had freely executed the stipulation and thereafter communicated her

repudiation of the Stipulation after the Decree had been submitted to the Court for signature and entry?

The standard of review is whether the trial court abused its discretion. Ostler v. Buhler, 957 P.2d 205, 206 (Utah 1998).

DETERMINATIVE LAW ON APPEAL

Other than the body of common law cited herein, the determinative law on appeal is Rule 60(b) of the Utah Rules of Civil Procedure which is attached hereto in the Addendum.

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

1. The Appellant (hereinafter referred to as "Appellant" or "Vicki") and Appellee (hereinafter referred to as "Appellee" or "David") were husband and wife having been married on the 10th day of June, 1988. R. 1.

2. Vicki filed her Complaint for Divorce in the Third Judicial District Court in and for Salt Lake County, State of Utah, on or about February 6, 1996 through her attorney, Matt Biljanic. R. 1.

3. Vicki filed for an Order to Show Cause seeking temporary orders to govern during the pendency of this action on or about February 23, 1996 which hearing was held before the Honorable Commissioner Lisa A. Jones on or about March 1, 1996. R. 12.

4. David filed his answer in this action on or about March 4, 1996. R. 31- 36.

5. On or about March 11, 1996, Vicki served her first set of discovery upon David.

R. 37.

6. On or about September 9, 1996, Vicki filed a Motion to Compel responses to her discovery. R. 42.

7. On or about October 31, 1996 counsel for Vicki (Matt Biljanic) withdrew from this action. R. 49.

8. On or about November 20, 1996, counsel for Vicki entered his appearance again in this action by submitting a notice of hearing on his motion to compel and an appearance of counsel. R. 51-52.

9. On or about December 13, 1996, David submitted his discovery responses to Vicki's first set of discovery. R. 56.

10. On or about April 30, 1997, Vicki's second counsel in this matter, Daniel Darger, filed his notice of appearance of counsel. R. 60.

11. Vicki's new counsel filed a Motion to Void Antenuptual Agreement and Award Suit Money. R. 61-129.

12. A hearing was set on the Motion to Void Antenuptual Agreement and Award Suit Money on October 23, 1997 before the Honorable Commissioner Lisa Jones. R. 130.

13. At the hearing on the motion, Commissioner Jones determined that factual findings were required and denied the motion stating that the validity of the antenuptual agreement was a

trial issue. R. 140.

14. Vicki filed an objection to the Commissioner's recommendation on her Motion to Void Antenuptual Agreement. R. 141-143.

15. On or about December 4, 1997, Vicki filed a second request for production of documents. R. 143.

16. On or about January 8, 1998, Vicki filed a Subpoena Deuces Tecum to produce documents in the possession of Robert Pusey, the attorney who drafted the antenuptual agreement. R. 150.

16. On or about March 1, 1998, David filed his responses to Vicki's set second of discovery requests. R. 153.

17. On or about April 30, 1998, Vicki executed the Stipulation and Property Settlement Agreement which was received by the Court on May 14, 1998. R. 160-171.

18. On or about May 12, 1998, David filed a Notice to Submit for Decision which was received by the Court on May 14, 1998, together with copies of the Decree of Divorce and Findings of Fact and Conclusions of Law. R. 172.

19. On or about May 18, 1998, Vicki's counsel, Daniel Darger filed a Notice of Withdrawal of Counsel mailing the same to David's counsel on that same date. R. 174-175.

20. On May 19, 1998, the Court entered the Decree of Divorce and the Findings of Fact and Conclusions of Law which had been approved as to form by Daniel Darger. R. 176-182.

21. On or about May 21, 1998, Mr. Richman filed his appearance of counsel as counsel for Vicki. R. 183.

22. On or about June 1, 1998, Vicki filed her Motion Under Rule 60(b)(2)(3)(7)URCP to Set Aside Decree of Divorce, Findings of Fact and Conclusions of Law. R. 186-244.

23. A hearing was set on the Motion on June 26, 1998 before the Honorable Judge Frank G. Noel and then rescheduled to July 10, 1998. R. 247 and 249.

24. On or about June 22, 1998, David filed his Memorandum in Reply to Motion to Set Aside Decree, Findings of Fact ad Conclusionsof Law and To Void Stipulation. R. 251-383.

25. At the hearing on the Motion, the Court did not have in the file David's Memorandum in Reply and so another copy was furnished to the Court. R. 384-515.

26. Oral argument was held before the Honorable Judge Frank G. Noel during which argument Vicki completed her opening argument and shortly after David began his argument, a bomb threat occurred.

27. The Court took the matter under advisement. R. 516.

28. On or about July 17, 1998, the Court entered its Minute Entry denying Vicki's Motion. R. 517-18.

29. On or about July 27, 1998, counsel for David submitted an order to Vicki's counsel to which Vicki's counsel filed an objection. R. 520-22; 523-25.

30. On or about August 4, 1998, Vicki filed the Affidavit of Sherry Epperson. R. 526-

31.

31. On or about August 4, 1998, Vicki filed a Motion for Rehearing. R. 531-37.

32. On or about September 25, 1998, David filed his Memorandum in Reply to Motion for Rehearing. R. 545-60.

33. On or about September 30, 1998, the Court entered its Minute Entry denying Vicki's Motion for Rehearing. R. 561.

34. On or about November 13, 1998, the Court entered its Order on Motion to Set Aside Decree, Findings of Fact and Conclusions of Law and to Void Stipulation. R. 563-565.

35. On or about November 25, 1998, Vicki withdrew her objection to the proposed order. R. 569-70.

36. On or about December 9, 1998, Vicki filed her Notice of Appeal in this action. R. 575.

B. FACTUAL HISTORY

1. Vicki and David were husband and wife having been married on the 10th day of June, 1988. R. 1.

2. Prior to their marriage, the parties entered into an Antenuptual Agreement which was drafted by attorney Robert Pusey. R. 485.

3. Mr. Pusey first drafted an antenuptual agreement which was signed by the parties in the presence of witnesses and notarized and included hand written lists of property which each

party disclosed ownership of to the other party including the approximate value thereof. R. 486; 492-500.

4. After the execution of the initial antenuptual agreement, the parties returned to Mr. Pusey's office requesting changes be made. R. 486-487.

5. Mr. Pusey prepared a second antenuptual agreement, this time typing up the lists of property disclosed. R. 487; 501-507.

6. At the time the parties came into his office to pick up and sign the second antenuptual agreement, Mr. Pusey inquired as to both parties concerning the desired changes, retrieved the parties' copies of the first agreement, throwing them in the trash and ripping up the copy which he had retained in his filing first marking that document "revoked." R. 487-488.

7. The second antenuptual agreement was signed in Mr. Pusey's presence, notarized by him, but due to the short notice and the parties appearing at his office without an appointment there were no witnesses. R. 488.

8. Vicki filed her Complaint for Divorce in the Third Judicial District Court in and for Salt Lake County, State of Utah, on or about February 6, 1996 through her attorney, Matt Biljanic. R. 1.

9. During the course of the litigation, which spanned two years, Vicki had two attorneys prior to her present attorney and sought discovery on two separate occasions. R. 37, 60 and 143.

10. During the course of the litigation, Vicki filed a motion to void the antenuptual agreement which was denied but reserved for the trial in this matter. R. 61-129; 140.

11. On or about April 30, 1998, and after considerable negotiations with counsel, Vicki signed the Stipulation and Property Settlement Agreement. R. 160-171.

12. The Stipulation and Property Settlement Agreement contained a Verification which stated

On this the 30th day of April, 1998, personally appeared before me, Vicki L. Stratton, the Plaintiff in the above encaptioned action, and having been first duly sworn and upon her oath states that she is the Plaintiff in the above encaptioned action, that she is over the age of eighteen years, that she has read the foregoing Stipulation and Property Settlement Agreement, that she agrees to be bound by the terms hereof and that she signed the same of her own free will.

R. 167.

13. The Stipulation and Property Settlement Agreement were filed with the Court on or about May 14, 1998. R. 160.

14. On or about May 14, 1998, Vicki signed and filed with the Court an Affidavit of Jurisdiction and Grounds, which was notarized and approved as to form by her attorney, Daniel Darger, in which Affidavit she stated

7. That the Defendant and I entered into a Stipulation and Property Settlement Agreement which has been filed with the Court. I have reviewed that Document and found that it contained both my signature and the signature of my spouse. I believe that this is a fair and equitable division of the marital estate.

R. 170.

15. On or about May 12, 1998, David filed a Notice to Submit for Decision which was received by the Court on May 14, 1998, together with copies of the Decree of Divorce and Findings of Fact and Conclusions of Law and other related documents. R. 172.

16. On or about May 13, 1998, David's attorney received a telephone call from Mr. Richard Leedy, an attorney purporting to speak for Vicki in this action who stated that Vicki was repudiating the Stipulation and Property Settlement Agreement. R. 385.

17. Following receipt of this telephone call from Mr. Leedy, David's counsel contacted Daniel Darger and asked what was going on. Mr. Darger informed David's counsel that Mr. Leedy was not counsel of record, he had not been terminated as counsel of record, and that he believed the matter was a done deal. R. 385.

18. David's counsel informed Mr. Darger that he believed the matter was resolved and he intended to let the divorce be entered. R. 385.

19. On or about May 18, 1998, Vicki's counsel, Daniel Darger filed a Notice of Withdrawal of Counsel mailing the same to David's counsel on that same date which was received by David's counsel on May 20, 1998. R. 174-175; 385.

20. On May 19, 1998, the Court entered the Decree of Divorce and the Findings of Fact and Conclusions of Law which had been approved as to form by Daniel Darger. R. 176-182.

21. The Court entered the Decree of Divorce and Findings of Fact and Conclusions of Law on May 19, 1998. R. 176-182.

22. Thereafter, Vicki's present counsel filed his appearance, filed his Rule 60(b) Motion, a hearing was held, the matter taken under advisement, and the Court denied the Motion. R. 183, 186-244, 247, 249 and 516.

23. Following the denial of the initial Rule 60(b) motion, Vicki filed her motion for rehearing which the Court denied. R. 531-37; 561.

SUMMARY OF ARGUMENT

The trial court properly denied the Rule 60(b) Motion to Set Aside the Stipulation, Decree of Divore, Findings of Fact and Conclusions of Law. There was no abuse of discretion in so doing. The stipulation was freely entered into and executed by Vicki. Vicki failed to properly put forth arguments under Rule 60(b) of the Utah Rules of Civil Procedure which would provide the Court with any basis to set aside the resulting Decree of Divorce and Findings of Fact. The Court properly bound Vicki to the terms of her agreement which was memorialized in the Stipulation and Property Settlement Agreement and in denying the effect of any alleged repudiation. Because the trial court did not abuse its discretion, this Court should affirm its ruling.

ARGUMENT

I. THE TRIAL COURT CORRECTLY REFUSED TO SET ASIDE, PURSUANT TO RULE 60(b) OF THE UTAH RULES OF CIVIL PROCEDURE, A DERECE OF DIVORCE WHICH WAS BASED UPON A FREELY EXECUTED STIPULATION.

The trial court correctly refused to set aside the Decree of Divorce which was based on a freely executed stipulation signed by the Appellant. The Court correctly denied the Motion to Set

Aside the Decree filed pursuant to Rule 60(b) of the Utah Rules of Civil Procedure. The standard of review is that the trial court is afforded broad discretion in ruling on a motion for relief from a judgment under Rule 60(b) of the Utah Rules of Civil Procedure and its determination will not be disturbed absent an abuse of discretion. Birch v. Birch, 771 P.2d 1114, 1117 (Utah App. 1989).

The trial court properly denied Vicki's Motion to Set Aside the Decree and Findings of Fact and Conclusions of Law. Additionally, the trial court properly refused to permit Vicki to bootstrap her arguments concerning the validity or lack thereof of the parties antenuptual agreement as a basis for setting aside a Decree and Findings which was based not on the antenuptual agreement but rather on a freely executed and enforceable stipulation.

A. THE ANTENUPTUAL AGREEMENT

David believes that the antenuptual agreement was irrelevant to the Motion before the trial court other than the fact that Vicki had ample time to seek an evidentiary hearing to attempt to void that agreement. Further, David agrees that by accepting the terms of the Stipulation and Property Settlement Agreement, Vicki waived her right to assert the antenuptual agreement as a basis for any action by the trial court. Nonetheless, Vicki focused much of her argument for basing the Motion below on the circumstances surrounding its execution and the enforceability of this antenuptual agreement. While David did not believe that such an issue was relevant, Respondent nonetheless addressed Vicki's arguments.

Prior to the parties marriage, the parties caused an antenuptual agreement to be drafted

and the same was executed. R. 483-490. The agreement was drafted by Robert Pusey. R. 483. During the course of the litigation, counsel for Vicki filed a Motion to Void Antenuptual Agreement and Award Suit Money to determine the validity and enforceability of said agreement. R. 61-129. In her Motion and Affidavit, Vicki alleged that she did not have sufficient time to review the agreement and that the value of the assets were not fully disclosed to her. R. 63, 69-70. In response to said motion, David filed an affidavit of Robert Pusey. R. 483-490. After oral argument on the motion, the Commissioner ruled that the validity of the agreement, whether full disclosure occurred, and the scope thereof required factual determinations which would be reserved for trial in this matter. R. 140; 144-45.

Vicki argued that the Court should base the invalidity of the stipulation on the antenuptual agreement. R. 187. Vicki argued that full disclosure was not made prior to the execution of said agreement. R. 187. However, during the course of the divorce proceeding, she had ample time to take depositions (R. 150-51), perform discovery (R. 38; 153) and otherwise uncover all assets which were allegedly not disclosed prior to the execution of the antenuptual agreement. In fact, she did not do so. Vicki rather argued initially without disclosing the source, that she was allegedly in possession of newly discovered evidence, but she failed to properly set forth the reasons why such evidence could not have been discovered using reasonable diligence prior to the execution of the stipulation. (R. 197; 199-200). Such newly discovered evidence, was in fact, not a valid basis under the circumstances for the trial court to set aside the decree.

Vicki argued that her signature on the antenuptual agreement was a forgery and that David caused the forged agreement to be submitted to the Court. R. 200-201. However, at the time of her Motion to determine the validity of said agreement, she did not allege that the agreement was forged. R. 61-126.

Petitioner argued that a conflict of interest existed and that material misrepresentations were made which would invalidate the antenuptual agreement. R. 201. However, no conflict of interest, real or perceived, influenced the preparation or execution of the stipulation. R. 350-358. Further, some of the allegations concerning the alleged conflict of interest are simply not true. Mr. Pusey set forth each and every contact he had with David in his affidavit. R. 350-358. At no time had Mr. Pusey represented Mr. Stratton nor Mr. Stratton's company. R. 350-358. The mere fact that Mr. Stratton paid the bill for the preparation of the antenuptual agreement does not in and of itself create a conflict of interest. See Utah Rules of Professional Conduct, Rule 1.7.¹

David did not mislead Vicki concerning the antenuptual agreement or its terms. As evidenced by Mr. Pusey's affidavit, the agreement was negotiated and in fact modified at the request of Vicki. R. 350-358. While it is true that David informed Vicki that his business partner wanted him to execute such an agreement and that the agreement was prepared in anticipation of

¹"Conflict of interest: general rule" and the comment thereto stating that it is not a conflict of interest stating that a lawyer may be paid from a source other than the client if the client is informed of that fact consents, and accepting such payments do not compromise the attorney's loyalty to his client.

the parties marriage, he did not misuse any trust which the Vicki may have placed in him. Rather, he was attempting to protect his premarital assets and any increase in value thereof in the event that the marriage ended in divorce.

David does not believe that the enforceability or lack thereof of the antenuptual agreement is relevant or material to the issues presented in this Appeal or the motion whichh was filed before the trial court. The Decree and Findings were entered based on the Stipulation and Property settlement agreement. Any underlying assumptions which Vicki may have held concerning the antenuptual agreement did not impact the enforceability of the stipulation and the resulting orders based thereon. The trial court correctly ruled that the stipulation and resulting orders were enforceable and properly refused to set them aside.

B. RULE 60(b)

David believes that the trial court correctly ruled that the Decree and Findings should not be set aside pursuant to Rule 60(b) of the Utah Rules of Civil Procedure. Rule 60(b) of the Utah Rules of Civil Procedure, in the relevant parts, state

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) . . . ; (5) . . . ; (6) . . . ; or (7) 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), (3) or (4) not more than 3 months after the judgment, order or proceeding was entered or taken. A motion under this Subsection (b) does not affect the finality of the judgment or suspend its

operation. This rule does not limit the power of a court to enter 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 relief from a judgment shall be made by motion as prescribed in these rules or by an independent action.

Rule 60(b), Utah Rules of Civil Procedure.

C. Rule 60(b)(2)

The trial court did not abuse its discretion when it denied Vicki's Motion under Rule 60(b)(2). In order for Vicki to have prevailed on the basis of newly discovered evidence, she had to show that the new evidence "by due diligence could not have been discovered in time to move for a new trial" and that such evidence was of sufficient substance that there would be a reasonable likelihood of a different result." Kettner v. Snow, 375 P.2d 28, 30 (Utah 1962). Thus, she had the burden of proving that she has discovered new evidence, that the evidence could not have been discovered by due diligence, that the discovered evidence was of sufficient substance that there is a reasonable likelihood of a different result based on that evidence, and that the motion was timely filed. David conceded that the Motion was timely filed before the trial court. R. 393. However, he believed that Vicki failed to meet all other burdens to prevail based on Rule 60(b)(2). R. 384-397.

First, Vicki failed to meet her burden concerning the discovery of new evidence. Vicki initially alleged in general vague and nebulous statements that subsequent to the execution of the stipulation that she has learned that substantial properties were hidden from her during the marital period and were not considered in entering the stipulation. R. 192-215. Vicki failed to set forth

any evidence which she has allegedly discovered in this matter subsequent to the execution of the stipulation which meets her burden under Rule 60(b)(2). R. 192-215. After the court had entered its ruling denying the motion, Vicki filed the Affidavit of Sherry Epperson and attempted to use this as basis to have another bite at her motion through a request for rehearing. R. 526-530. The Court denied that request. R. 561-62.

Second, this divorce action was ongoing for approximately two years following the filing and prior to its resolution by stipulation. At the time of filing her motion, Vicki was and is represented by her third attorney. R. 49-50; 52-53; 60; 174-75; and 183-84. Vicki's first attorney sought discovery and filed a Motion to Compel to enforce that discovery. R. 38; 42-43. David responded to said discovery, providing full and complete responses thereto. R. 56-57. No additional Motions to Compel based on incomplete answers or failure to respond were filed in this action. Vicki's second attorney additionally performed discovery and sought to take the deposition of Mr. Pusey. R. 150-52; 154-57. Vicki had ample time to seek the depositions of the David's financial institutions, business and any other entity which she felt may have information concerning David's financial condition. Vicki failed to provide the Court with any information concerning how, through due diligence, the alleged newly discovered evidence could not have been revealed prior to her execution of the stipulation in this matter.

Third, Vicki failed to provide the Court with any basis to conclude that she would prevail on all claim based on the newly discovered evidence. The only allegation she makes concerning

this element is that she believes she is likely to prevail on the issues of the antenuptual agreement and alimony if those issues go to trial.

Vicki failed to meet her burden under Rule 60(b)(2). The trial court properly denied her motions and did not abuse its discretion in so doing

Rule 60(b)(3)

Vicki's Motion failed under Rule 60(b)(3) concerning allegations of fraud, misrepresentation or misconduct on the part of David. First, all allegations of fraud must be pled with particularity. In Despain v. Despain, 855 P.2d 254, 256 (Utah App. 1993), the Court set forth the elements of fraud which must be proven by its proponent,

(1) that a representation was made; (2) concerning a presently existing fact; (3) which was false; (4) which the representor either (a) knew to be false, or (b) made recklessly knowing that he had insufficient knowledge upon which to base such a representation; (5) for the purpose of inducing the other party to act upon it; (6) that the other party, acting reasonably and in ignorance of its falsity; (7) did in fact rely upon it; (8) and was thereby induced to act; (9) to his injury and damage.

Despain at 256, footnote 1, citing to Schuman v. Green River Motel, 835 P.2d 992, 994 (Utah App. 1992)(quoting Pace v. Parrish, 122 Utah 141, 247 P.2d 273 (1952). In the present case, Vicki failed to set forth the allegations in her motion. R. 186-215. Further, any allegation of fraud which she may have put forth went not to the circumstances surrounding the execution of the stipulation but rather on the alleged circumstances surrounding the execution of the antenuptual agreement. R. 192-215. Vicki failed to provide the Court with any basis for finding a misrepresentation or misconduct by the David surrounding her execution of the stipulation

which would provide a basis for this Court setting aside the Decree and Findings. The trial court did not abuse its discretion in refusing to set aside the decree and findings.

E. Rule 60(b)(7)

Vicki attempted to appeal to the Court's sense of justice to permit her to be relieved from her bargain and the resulting order. R. 192-215. Justice was served by requiring contracting parties to adhere to the bargains in which they freely enter. There is no other reason to set aside the Decree and Findings in this case.

Vicki executed the stipulation and property settlement agreement on or about April 30, 1998. R. 160-163A. On or about May 13, 1998, counsel for Respondent received a telephone message from Richard Leedy. R. 385. Upon returning the telephone call, Mr. Leedy informed Mr. Falk that Vicki wished to repudiate the stipulation. R. 385. At no time did Mr. Leedy make any representation concerning his authority to speak on behalf of Vicki nor that he had been retained as counsel. R. 385. Upon the termination of the telephone call to Mr. Leedy, Mr. Falk called Mr. Darger, then counsel for Vicki and asked if he had been terminated and what was going on. R. 385. Mr. Darger informed Mr. Falk that he had not been terminated, but that he had been advised that Vicki had gone to see Mr. Leedy. R. 385. Mr. Falk informed Mr. Darger that he believed the matter completed and that he intended to proceed with filing the stipulation and other documents for the Court's execution. R. 385. Mr. Falk further informed Mr. Darger that if the Petitioner wished to file a Motion to Set Aside, he would respond upon receipt otherwise he

intended to complete the action.

On or about May 14, 1998, the stipulation, findings and decree together with a notice to submit for decision were filed with the Court. R. R. 160-182. Subsequent to that filing, Mr. Darger withdrew as counsel on May 18, 1998. R. 174-75. Counsel for David did not initiate any proceedings or take any other action in this matter in violation of Rule 4-506 of the Utah Code of Judicial Administration. All such actions occurred prior to the withdrawal of the Petitioner's then counsel.

There were no other reasons which justified the trial Court setting aside the decree and findings. Vicki freely entered an agreement about which she became unhappy. Vicki was free to not execute the agreement. However, she choose to accept the terms therein. Merely because Vicki is an individual who believes that she should be relieved of the bargains which she knowingly, voluntarily and freely entered did not provide a basis for the trial court to set aside the Decree and Findings.

II. THE TRIAL COURT CORRECTLY ENFORCED THE STIPULATION OF THE PARTIES WHICH WAS FREELY ENTERED INTO BY THE APPELLANT.

The trial court correctly enforced the stipulation of the parties which was freely entered into by the Appellant. The trial court correctly found that there was no basis to set aside the decree of divorce upon the filing of a motion pursuant to Rule 60(b) of the Utah Rules of Civil Procedure. The standard of review is whether the trial court abused its discretion in failing to set

aside the parties stipulation. Dove v. Cude, 710 P.2d 170 (Utah 1985).

Vicki and David entered an enforceable stipulation which was properly enforced by the trial court. To enforce such a stipulation was not an abuse of discretion. After extensive negotiations in this matter, on or about April 30, 1998 counsel for David prepared and submitted to Vicki through her then counsel, Daniel Darger, a Stipulation and Property Settlement Agreement. R. 160-163A. Contrary to the arguments put forth at the trial court, at no time did counsel for David discuss any portion of the Stipulation and Property Settlement Agreement with Vicki. R. 387.

The stipulation and property settlement agreement entered into between the parties to this action was fully enforceable under Utah law. In Brown v. Brown, 744 P.2d 333, 334-35 (Utah App. 1987), the Court of Appeals set forth the elements of when a stipulation is enforceable. In Brown, the Court stated,

A promise or agreement with reference to a pending judicial proceeding, made by a party to the proceeding or his attorney, is binding without consideration. By statute or rule of court such an agreement is generally binding only (a) if it is in writing and signed by the party or attorney, or (b) if it is made or admitted in the presence of the court, or (c) to the extent that justice requires enforcement in view of a material change of position in reliance on the promise or agreement.

Brown at 334 citing to Restatement (2nd) of Contracts, Section 94 (1981); See also Kinsman v. Kinsman, 748 P.2d 210, 212 (Utah App. 1988) and Bagshaw v. Bagshaw, 788 P.2d 1057, 1059 (Utah App. 1990).

In the present case, the stipulation and property settlement agreement was in writing. Further, Vicki signed the stipulation and property settlement agreement assenting to the terms therein. R. 160-163A. Said signature was duly notarized. R. 162-163. In addition thereto, the verification on the Stipulation and Property Settlement Agreement stated,

On this the 30th day of April, 1998, personally appeared before me, Vicki L. Stratton, the Plaintiff in the above encaptioned action, and having been first duly sworn and upon her oath states that she is the Plaintiff in the above encaptioned action, that she is over the age of eighteen years, that she has read the foregoing Stipulation and Property Settlement Agreement, that she agrees to be bound by the terms hereof and that she signed the same of her own free will.

R. 167. In addition to this express agreement to be bound by the terms of the Stipulation and Property Settlement Agreement, Vicki executed an Affidavit of Jurisdiction and Grounds in which she affirmatively expressed the following:

7. That the Defendant and I entered into a Stipulation and Property Settlement Agreement which has been filed with the Court. I have reviewed that Document and found that it contained both my signature and the signature of my spouse. I believe that this is a fair and equitable division of the marital estate. R. 170.

Clearly, the Stipulation and Property Settlement Agreement was in writing and clearly evidenced Vicki's assent to its terms and understanding that it was to become an enforceable order of the Court. Further, she clearly stated in her Affidavit of Jurisdictions and Grounds that she believed the division of marital assets was fair and equitable. R. 170. While it is true that in making an equitable distribution in a divorce proceeding, the Court is to look at all of the assets acquired by

the parties during the course of the marriage, it is also true that a marital asset is any right that has accrued during the marriage to a present or future benefit. Jefferies v. Jefferies, 895 P.2d 835, 837 (Utah App. 1995). However, the parties executed an antenuptual agreement which may or may not have changed the character of certain assets which may have either been acquired or accumulated during the course of the marriage. Nonetheless, the character of some of those assets was never presented to the Court based on the parties mutual agreement to resolve the issues upon stipulation. As such, it was not an abuse of discretion for the trial court to refuse to set aside the stipulation.

The trial court considered the issue of waiver determining that Vicki, by her execution of the stipulation, waived her right to determine the validity of the antenuptual agreement. The Court specifically noted that Vicki had previously filed a Motion to Void the Antenuptual Agreement based on the grounds of nondisclosure of information, ostensibly the same grounds upon which she sought to set aside the decree. R. 564. While Vicki now wishes to highlight the elements of waiver as to each particular item of property had the antenuptual agreement been voided through an evidentiary hearing, the trial court specifically noted that the waiver was of the right to test the validity of that antenuptual agreement. R. 564. It is immaterial whether Vicki waived her right as to a particular item of property which may have been subject to the terms of the antenuptual agreement. What is evident, that Vicki had the right to test the antenuptual agreement through an evidentiary hearing. Vicki was obviously aware of her right to contest the

validity of the antenuptual agreement as she had in fact previously done so. R. 61-67. Finally, Vicki intentionally relinquished that right by executing the stipulation and property settlement agreement. The trial court correctly, implicitly if not explicitly, found that Vicki had waived her rights by executing the stipulation and property settlement agreement. R. 566-68. The trial court did not abuse its discretion.

Vicki's affidavit filed in support of her Motion to Set Aside did not provide any basis for that court to void the stipulation and property settlement agreement. R. 232-38. Vicki's allegation that she had expended substantial sums in attorney fees in the prosecution of the divorce did not provide grounds to void the stipulation. R. 197. In fact, during the course of the pending divorce the parties marital residence was sold and the proceeds therefrom were divided equally between the parties. R. 181. Petitioner's assertion that Respondent had not paid his temporary alimony for the months of November 1997 through April 1998 did not form a basis to void the stipulation. Specifically, the stipulation contained a provision awarding Vicki the unpaid sum of alimony. R. 162.

Vicki's allegations of coercion were without merit. R. 196-97. If Vicki's attorney pushed her into executing an agreement which she did not wish to execute, she could have terminated his services prior to that execution. Any ill advice received by her counsel may justify some independent action, but did not provide grounds to void the stipulation. Further, Vicki's independent financial pressures are not relevant. R. 197. Nearly all parties to divorce actions

undergo substantial financial hardships.

There was no misconduct on the part of David. Petitioner first made vague and nebulous allegations concerning hidden assets and material misrepresentations without providing specificity or substance, and only after the motion had been denied did she attempt to have the matter reheard by providing some specificity but without providing any reasonable basis for why that evidence could not have been discovered with due diligence in the two years the case had been pending. R. 197-98; 561-62; 526-30; and 531-37. In fact, the real basis for Petitioner seeking to void the stipulation is that the Petitioner, subsequent to freely executing the stipulation, became unhappy with the bargain to which she assented. It was not until after the trial court had denied her motion and Vicki sought a rehearing on the matter, did she provide the court with any specificity concerning her allegations through the submission of the affidavit of Sherry Epperson. R. 526-30.

There was no basis for the Court to void the stipulation. The stipulation fully complied with the formalities required for enforcement under Utah law. A party who freely executes a stipulation should not be relieved from the terms thereof merely because she later decides that she is not happy with the terms of her agreement. Based thereon, it was not an abuse of discretion for the trial court to deny the motion to set aside the stipulation.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO SET ASIDE A DECREE OF DIVORCE BASED ON A STIPULATION WHERE THE APPELLANT REPUDIATED THE STIPULATION AFTER ITS EXECUTION AND FILING WITH THE COURT FOR ENTRY OF THE DECREE.

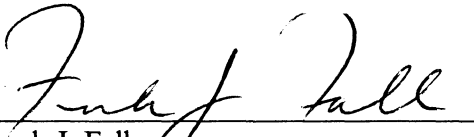
It was not an abuse of discretion for the trial court to refuse to set aside the Decree of Divorce which was based on a stipulation based on a Rule 60(b) Motion, Utah Rules of Civil Procedure, where the Appellant had freely executed the stipulation and thereafter communicated her repudiation of the Stipulation after the Decree had been submitted to the Court for signature and entry. The standard of review is whether the trial court abused its discretion. Ostler v. Buhler, 957 P.2d 205, 206 (Utah 1998).

There is no basis under Utah law for a party to unilaterally "repudiate" an enforceable stipulation. Once executed, the agreement is enforceable if it meets the requirements of the law. Merely because Vicki no longer wished to be bound by her word does not grant a party to a contract the right to unilaterally terminate the same. Furthermore, Vicki has failed to provide the Court with any legal basis for her argument that she had the right to unilaterally repudiate the Stipulation. There is no legal basis for one party to a stipulation and property settlement agreement to attempt to repudiate the terms thereof after the agreement has been duly executed and notarized. The trial court did not abuse its discretion in refusing to grant Vicki's Motion.

CONCLUSION

The trial Court correctly denied the Appellant's Motion to Set Aside the Decree of Divorce. Appellant should be bound by the terms of the agreement which she freely executed. It was not an abuse of discretion for the trial court to enforce the stipulation and the resulting decree of divorce. This court should affirm the decision of the trial court.

Dated and Signed this 5 day of May, 1999.

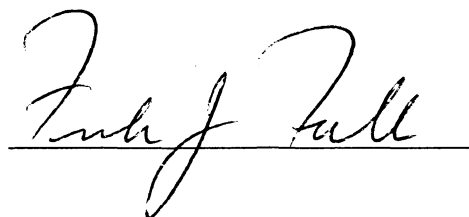


Frank J. Falk
Attorney for Appellee

MAILING CERTIFICATE

I hereby certify that two true and correct copies of the foregoing **Brief of Appellee** was **MAILED**, postage prepaid, on this 5 day of May, 1999 to:

Glen M. Richman
Bart J. Johnsen
RICHMAN & RICHMAN, L.L.C.
60 South 600 East, Suite 100
Salt Lake City, Utah 84102

A handwritten signature in cursive script, appearing to read "Bart J. Johnsen", is written over a horizontal line.

ADDENDUM A

Appellee Adopts the Addendum Submitted by Appellant in this Action.