

1989

Harrison v. Harrison : Brief of Respondent

Utah Court of Appeals

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BRIEF

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890616-CA

IN THE UTAH COURT OF APPEALS

SHERRY DIANE BARTON HARRISON,)
Plaintiff-Respondent,) Case No. 890616-CA
vs.) Classification Priority 7
FRANK MERRILL HARRISON,)
Defendant-Appellant.)

BRIEF OF RESPONDENT

On appeal from the Fifth Judicial District Court
of Iron County, State of Utah; Honorable J. Phillip
Eves, District Judge and Honorable Marlynn B. Lema,
Domestic Relations Commissioner.

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IN THE UTAH COURT OF APPEALS

SHERRY DIANE BARTON HARRISON,)
)
 Plaintiff-Respondent,)
) Case No. 890616-CA
vs.)
)
FRANK MERRILL HARRISON,)
)
 Defendant-Appellant.)

JURISDICTION OF THE COURT OF APPEALS

The Court of Appeals has jurisdiction pursuant to Section 78-2a-3(2)(h), Utah Code Annotated (1953, as amended).

NATURE OF PROCEEDINGS BELOW

The Defendant has appealed an Order by the Fifth District Court, Iron County, State of Utah which denied the Defendant's objection to the Findings of Fact and Conclusions of Law and Decree of Divorce entered by the Domestic Relations Commissioner, the Honorable Marlynn B. Lema ("Commissioner"). The Defendant is also attempting to challenge the final Findings of Fact and Conclusions of Law and Decree of Divorce.

ISSUES PRESENTED ON APPEAL

1. Was there sufficient evidence before the court to support the award of custody to the Plaintiff?
2. Did the Fifth District Court properly deny Defendant's objections to the Findings of Fact and Conclusions of Law and Decree of Divorce entered by the Commissioner?

DETERMINATIVE STATUTES OR RULES

The determinative statutes and rules are those which deal specifically with the office and function of the Commissioner in divorce cases. Section 30-3-4.2(7) gives the commissioner the following authority:

[C]onduct evidentiary hearings in contested divorce or spouse abuse matters and make recommendations to the district court for entry of an order.

The effect of this recommendation by the Commissioner is set forth in Section 30-3-4.4(2)(b):

The commissioner's recommendation has the effect of an order of the court until it is modified by the court.

The other applicable statutes deal with the process of objecting to an order entered by a commissioner. Section 30-3-4.4(3) sets forth the procedure for filing objections:

- (a) Any party objecting to the recommended order shall file a written objection to the recommendations and serve copies of the objections to the commissioner's office and opposing counsel.
- (b) **Objections shall be filed within ten days of the date the recommendation was made in open court or if taken under advisement, ten days after the date of the subsequent written recommendation made by the commissioner as provided by the Utah Rules of Civil Procedure. . . . [emphasis added]**

If no party objects within the required time limit, the result is the entry of a final order. Section 30-3-4.4(5) states:

- (5) If no objection or request for review is made within ten days, the party is considered to have consented to entry of an order in conformance with the

commissioner's recommendation.

Rule 6-401(2)(E) of the Judicial Rules of Administration establishes the procedure for judicial review of the

Commissioner's decisions:

(E) The Commissioner's recommendation shall constitute the order of the court without hearing unless objections to the recommendation are filed **within ten days** of the date the recommended order was **made in open court** or, if taken under advisement **the date of the subsequent written recommendation made by the commissioner**. . . . [emphasis added]

Rule 6-401 gives a commissioner's orders the same force and effect as in Section 30-3-4.4.

Finally, with regard to the Defendant's challenge of the Commissioner's factual findings, the applicable rule is Rule 11

(e)(2) of the Rules of the Utah Court of Appeals:

Transcript required of all evidence regarding challenged finding or conclusion. If the appellant intends to urge on appeal that a finding or conclusion is unsupported by or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion.

A copy of the statutes and rules are in the addendum.

STATEMENT OF THE CASE

The Defendant appeals an order by the Fifth District Court denying the defendant's objections to Findings of Fact and Conclusions of Law and Decree of Divorce entered by the Domestic Relations Commissioner. The proceedings and ultimate disposition of the case at the trial court level occurred as follows:

1. The divorce action was filed on May 9, 1988. (R-1).
2. On July 19, 1989, a hearing was held before the

Domestic Relations Commissioner for the Fifth District Court, the Honorable Marlynn B. Lema.(R-78).

3. The recommendations were not made in open court, but by a subsequent written recommendation dated July, 21, 1989 and filed on July 26, 1989. (R-86 through 90).

4. The Commissioner had awarded the care, custody and control of the minor child to the Plaintiff on the basis that the father's work schedule would require the minor child to be left alone for long periods of time during nighttime hours. (R-88).

5. Over 30 days elapsed from the date that the written recommendations were made by the Commissioner. At that time, the Commissioner entered a final Findings of Fact and Conclusions of Law and Decree of Divorce on September 8, 1989. (R. 106-120).

6. On September 14, 1989, over a month and a half after the original written recommendations by the Commissioner, the Defendant filed objections to Findings of Fact and Conclusions of Law and Decree of Divorce and Request for De Novo Hearing.(R-126)

7. The trial court denied the Defendant's objections to the Findings of Fact and Conclusions of Law and Decree of Divorce and Request for De Novo Hearing since the objection was made over a month and a half after the Commissioner's written recommendation. (R-136).

STATEMENT OF FACTS

The Defendant has failed to provide any transcripts of the earlier hearings for this appeal as required by Rule 11(e)(2) of the Rules of the Utah Court of Appeals. Despite the lack of transcripts, the record is clear that the key factor in granting

child custody to the Plaintiff at the trial court level was the Defendant's inability to provide care and supervision of the child at night due to an erratic work schedule.(R-88).

The only other crucial fact in this appeal is that by not timely objecting to the Commissioner's recommendation, the Defendant consented to a judgment in accordance with that recommendation. (R-136).

SUMMARY OF ARGUMENT

The Defendant cannot make a claim of insufficient evidence for the award of custody without making a record for appeal. Also, the Defendant is appealing the validity of the District Court's denial of the Defendant's objection, not the written recommendation by the Commissioner. This is not the proper forum for hearing an appeal of the Commissioner's written recommendation.

The objections of the Defendant were properly denied pursuant to Rule 6-401 of the Code of Judicial Administration and Section 30-3-4.4 of the Utah Code Annotated.

ARGUMENT

POINT 1

DEPENDANT MAY NOT CHALLENGE FACTUAL FINDINGS OF THE DOMESTIC RELATIONS COMMISSIONER WITHOUT PROVIDING RECORD FOR APPEAL.

The specific rule of the Court of Appeals dealing with challenges to the sufficiency of evidence at a trial court level is Rule 11(e)(2):

(2) Transcript required of all evidence

regarding challenged finding or conclusion.
If the appellant intends to urge on appeal that a finding or conclusion is unsupported by or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion.

The rule is very clear that if an appellant intends to challenge a finding or conclusion, a transcript of the evidence must be provided for the appellate court. The Defendant has not provided a transcript in this appeal.

In fact, the Defendant, in his Brief, specifically states that he is bound by the Findings of Fact made by the Commissioner:

The writer of the Brief fully understands that the Court may be bound by the Findings of Fact made by the Domestic Relations Commissioner when there is no transcript of the proceedings provided.

Brief of Appellant, page 8. The Defendant tries to alleviate this problem by claiming impecuniosity. However, no such exception exists for Rule 11(e)(2).

The Supreme Court was faced with a similar problem in Sawyers vs. Sawyers, 558 P. 2d 607, 608 (Utah 1976). A copy is included in the addendum. The appellant appealed a District Court Order modifying a Decree of Divorce, but provided only the original papers of the Court with no other transcript or evidence. The Court specifically stated that:

Defendant's contentions and points on this appeal involve factual matters which this Court cannot resolve or undertake to determine without a transcript of the testimony.

Appellate review of factual matters can be meaningful, orderly, and intelligent only in juxtaposition to a record by which lower court's rulings and decisions on disputes can be measured.

In this case, without a transcript, available, and therefore no measurement of the District Court's actions can be made as urged upon us by the Defendant.

Id. at 608-609. Without a transcript the Defendant cannot challenge factual determinations on appeal.

Another fatal flaw in the Defendant's appeal is presented by the attempt to include the Commissioner's Findings of Fact and Conclusions of Law and Decree of Divorce as part of this appeal. A written recommendation of the Commissioner, dated July 21, 1989 was never objected to by the Defendant. Under section 30-3-4.4(5) of the Utah Code Annotated, the failure to object to the Commissioner's recommendation operates as consent to the entry of an Order conforming to that recommendation. The Defendant finds himself in the awkward position of appealing an Order to which he has consented. With the Defendant consenting to the factual findings, there is only one remaining issue on this appeal: Whether the denial of the Defendant's objection by the Court was appropriate.

POINT II

THE DISTRICT COURT PROPERLY DENIED THE DEFENDANT'S OBJECTIONS TO THE COMMISSIONER'S WRITTEN RECOMMENDATIONS.

The Defendant objected to the Commissioner's Findings of Fact and Conclusions of Law and Decree of Divorce. The Defendant, however, did not object to the written recommendation of the Commissioner. The written recommendation was signed on July 21, 1989 and no objection was filed until September 14,

1989. The District Court properly held that under section 30-3-4.4(3) and Rule 6-401(2)(E) when objection is made over ten days after the Commissioner's written recommendation, the parties are deemed to have consented to the Commissioner's recommendation. A party cannot object to findings that have his consent. The District Court merely followed the statutory guidelines relating to the operation of the office of the Commissioner.

An important part of domestic relations, particularly child custody suits, is to provide stability and continuity to the children of the divorce. This purpose is served by having a commissioner and permitting the commissioner's recommendations to become permanent after only a short period of time. This provides the stability and finality necessary in domestic relations cases.

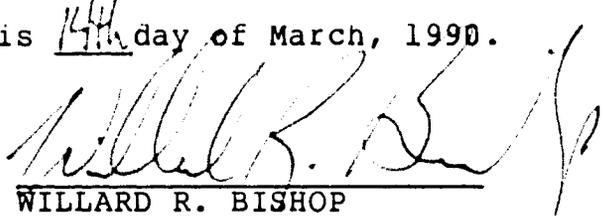
The Defense seems to base its entire argument on the fact that a Domestic Commissioner executed and entered the Decree of Divorce. The Defendant ignores the language of Rule 6-401(2)(B) of the Code of Judicial Administration which gives the Commissioner authority to sign orders consistent with the statutory sections. A Commissioner has authority under section 30-3-4.4 to make recommendations which have the effect of an Order until modified by the District Court. Section 30-3-4.4(5) also gives the Commissioner's recommendations the finality of an Order if they are not objected to within ten days. After the expiration of the ten days, the recommendations act as a court order. When the Commissioner finalized her recommendations in

the form of a Decree of Divorce, she was in keeping with the statutory authority of a commissioner under section 30-3-4.4.

Conclusion

The Defendant has failed to file a transcript, but yet desires to challenge the validity of the Commissioner's factual findings. This is in violation of Rule 11(e)(2) of the Court of Appeals. The Defendant is attempting to appeal an order to which he has consented by failing to respond to the Commissioner's written recommendation. The District Court properly recognized that the statutory time period had expired and denied the objections to the Commissioner's written recommendations. The decision of the trial court and the Commissioner should be affirmed. The appeal is without merit.

RESPECTFULLY SUBMITTED this 14th day of March, 1990.


WILLARD R. BISHOP

CERTIFICATE OF MAILING

jes 4/3
I hereby certify that I mailed ^{*four (4) 4/3*} a full, true and correct copy of the above document to James L. Shumate, P.O. Box 623, Cedar City, UT 84721, by first-class mail, postage prepaid.



30-3-4.2. Authority of commissioner.

In matters of divorce, annulment, separate maintenance, child custody, or spouse abuse the court commissioner may:

- (1) upon notice require the personal appearance of parties and their counsel;
- (2) require the filing of financial disclosure statements and proposed settlement forms by the parties;
- (3) obtain child custody evaluations from the Division of Family Services under Section 62A-4-106 or the private sector;
- (4) make recommendations to the court regarding any issue in domestic relations and spouse abuse cases at any stage of proceedings;
- (5) keep records, compile statistics, and make reports as the courts may direct;
- (6) require counsel for the parties to file with the initial or responsive pleadings a certificate based upon the facts available at that time if there is:
 - (a) an issue of child custody anticipated;
 - (b) a significant financial or property issue to be adjudicated; or
 - (c) legal action pending or previously adjudicated, in a district court or a juvenile court of any state regarding the minor children in the current case;
- (7) conduct evidentiary hearings in contested divorce or spouse abuse matters and make recommendations to the district court for entry of an order;
- (8) adjudicate default divorces;
- (9) enter a default judgment against any party who fails to comply with the commissioner's requirements of attendance or production of documents;
- (10) impose sanctions against any person who acts in contempt of the commissioner under Section 78-32-10;
- (11) issue temporary or ex parte orders; and
- (12) adjudicate contested divorces only upon appointment as judge pro tempore in accordance with the rules of the Supreme Court.

History: C. 1953, 30-3-4.2, enacted by L. 1985, ch. 151, § 3; 1989, ch. 104, § 3.

Amendment Notes. — The 1989 amendment, effective April 24, 1989, inserted "In matters of divorce, annulment, separate maintenance, child custody, or spouse abuse" at the

beginning of the section; inserted "under Section 62A-4-106" and deleted "under Subsection 55-15b-6(11)" from the end in Subsection (3); added Subsections (7) to (12); and made minor stylistic changes.

Under the general supervision of the presiding judge and within the policies established by the Judicial Council, the court commissioner has the following duties prior to any matters of divorce, annulment, separate maintenance, child custody, or spouse abuse coming before the district court:

- (1) review all pleadings in each case;
- (2) certify those cases directly to the court that do not appear to require further intervention by the commissioner;
- (3) conduct hearings with parties and their counsel present, except those previously certified to the court, for the purpose of submitting recommendations to the court;
- (4) provide any other information or assistance to the parties as appropriate;
- (5) coordinate information with the juvenile court regarding previous or pending proceedings involving children of the parties; and
- (6) refer appropriate cases to mediation programs if available.

History: C. 1953, 30-3-4.3, enacted by L. 1985, ch. 151, § 4; 1989, ch. 104, § 4.

Amendment Notes. — The 1989 amendment, effective April 24, 1989, substituted "Judicial Council" for "judges of the district" and

deleted "and authority" following "duties" in the introductory language; deleted former Subsection (7) which read "adjudicate default divorces"; and made minor stylistic changes.

30-3-4.4. Jurisdiction of commissioner — Effect of commissioner's recommendation — Objections — Referral of cases to court.

(1) All domestic relations matters, including orders to show cause, pretrial conferences, petitions for modification of a divorce decree, scheduling conferences, and all other applications for relief except ex parte motions, shall be referred to the court commissioner before any hearing may be scheduled before the district court judge unless otherwise ordered.

(2) (a) The court commissioner shall, after hearing any motion or other application for relief, recommend entry of an order and shall make a written recommendation as to each matter heard.

(b) The commissioner's recommendation has the effect of an order of the court until it is modified by the court.

(3) (a) Any party objecting to the recommended order shall file a written objection to the recommendations and serve copies of the objections to the commissioner's office and opposing counsel.

(b) Objections shall be filed within ten days of the date the recommendation was made in open court or if taken under advisement, ten days after the date of the subsequent written recommendation made by the commissioner as provided by the Utah Rules of Civil Procedure.

(c) Objections shall be to specific recommendations and shall set forth reasons for the objections.

(4) The commissioner shall then refer the matter to a district judge for review of matters specifically objected to by the parties or certified by the commissioner.

(5) If no objection or request for review is made within ten days, the party is considered to have consented to entry of an order in conformance with the commissioner's recommendation.

the court pursuant to the payment schedule established by the Department, the Department shall file a progress/violation report with the court. The report shall contain any explanation concerning the defendant's failure to pay and a recommendation as to whether the defendant's probation should be modified, continued, terminated or revoked or whether the defendant should be placed on bench probation for the limited purpose of enforcing the payment of fines or restitution.

(3) If the court orders the defendant placed on bench probation for the purpose of enforcing the payment of fines and restitution, the court shall notify the defendant of such order.

(4) If the court allows for statutory termination of probation, the Department of Corrections shall, when ordered by the Court, collect restitution on behalf of the victim.

(Amended effective January 15, 1990.)

Amendment Notes. — The 1989 amendment deleted "all" before "fines" and added the language beginning "during" in Subdivision (1); in Subdivision (2), substituted "by the court pursuant to the payment schedule established by the Department" for "for a period of 16 months," substituted "progress/violation report" for "incident report," substituted "modified, continued, terminated or revoked" for "terminated, extended or revoked," and added

the clause beginning "or whether" at the end; deleted former Subdivisions (3) and (4), relating to second terms of probation; added present Subdivision (3) and redesignated former Subdivision (5) as (4); deleted the last sentence, regarding collection of outstanding fines or restitution by the Office of Recovery Services; and made minor stylistic changes.

ARTICLE 4.

DOMESTIC RELATIONS.

Rule 6-401. Domestic relations commissioners.

Intent:

To identify the types of cases and matters which commissioners are authorized to hear, to identify the types of relief which commissioners may recommend and to identify the types of final orders which may be issued by commissioners.

To establish a procedure for judicial review of commissioners' decisions.

Applicability:

This rule shall govern all domestic relations court commissioners serving in the District Courts.

Statement of the Rule:

(1) **Types of cases and matters.** All domestic relations matters filed in the District Court in counties where domestic relations commissioners are appointed and serving, including orders to show cause, pretrial conferences, petitions to modify divorce decrees, scheduling conferences, and all other applications for relief, shall be referred to the commissioner upon filing with the

(A) THE COMMISSIONER SHALL HAVE THE AUTHORITY TO SIGN ORDERS set forth in Utah Code Ann. Sections 30-3-4.2, 30-3-4.3 and 30-3-4.4.

(B) The commissioner shall have the authority to sign orders consistent with paragraph (1) above.

(C) The commissioner shall have the authority to sign orders directing state agencies or private professionals to conduct evaluations and home studies.

(D) The commissioner may enter a default judgment or impose sanctions against a party failing to conform with the commissioner's requirement of attendance or production of documents.

(E) The commissioner may adjudicate default and uncontested divorces.

(F) The commissioner may issue temporary and ex parte orders.

(G) The commissioner may impose sanctions against any person who acts in contempt of the commissioner under Utah Code Ann. Section 78-32-10.

(H) The commissioner may conduct settlement conferences with the parties and their counsel for the purpose of facilitating settlement of any or all issues in a domestic relations case. Issues which cannot be agreed upon by the parties at the settlement conference shall be referred to the district court for trial.

(I) The commissioner may conduct pretrial conferences with the parties and their counsel on all domestic relations matters unless otherwise ordered by the court. The commissioner shall make recommendations on all issues under consideration at the pretrial and submit those recommendations to the district court.

(3) **Objections.** The commissioner's recommendations have the effect of an order of the court until modified by the court. Objections to the commissioner's recommendations, temporary orders or pretrial orders shall be filed with the clerk of the court and copies served on the commissioner's office and opposing counsel. Objections shall be filed within ten days of the date the recommendation or order was made in open court or if taken under advisement, ten days after the date of the subsequent written recommendation or order made by the commissioner. Objections shall be to specific recommendations or provisions in an order and shall set forth reasons for each objection.

(4) **Judicial review.**

(A) **Temporary orders and recommendations.** When a matter is brought before the court by objection to the commissioner's recommendation or temporary order or by certification by the commissioner, the court shall review the matter in accordance with Rule 4-501 of this Code.

(B) **Pretrial orders.** When a matter is brought before the court by objection to the commissioner's pretrial order, the court shall set the matter for trial on those issues specifically objected to by the parties.

(5) **Prohibitions.**

(A) Commissioners shall not make final adjudications of domestic relations matters other than default or uncontested divorces.

(B) Commissioners shall not serve as pro tempore judges in any matter, except as provided by Rule of the Supreme Court.

(Amended effective January 15, 1990.)

above, except that the original request for a transcript shall be filed with the clerk of the court from which the appeal is taken, who will arrange for the appointment of a reporter to prepare a transcript. The reporter who is appointed will be subject to all of the obligations imposed on reporters by these rules.

(2) **Transcript required of all evidence regarding challenged finding or conclusion.** If the appellant intends to urge on appeal that a finding or conclusion is unsupported by or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion.

(3) **Statement of issues; cross-designation by respondent.** Unless the entire transcript is to be included, the appellant shall, within 10 days after filing the notice of appeal, file a statement of the issues the appellant intends to present on the appeal and serve on the respondent a copy of the request or certificate and of the statement. If the respondent deems a transcript of other parts of the proceedings to be necessary, the respondent shall, within 10 days after the service of the request or certificate and the statement of the appellant, file and serve on the appellant a designation of additional parts to be included. Unless within 10 days after service of such designation the appellant has requested such parts and has so notified the respondent, the respondent may within the following 10 days either request the parts or move in the court from which the appeal is taken for an order requiring the appellant to do so.

(4) **Payment of reporter.** At the time of the request or at the time of the appointment of a reporter pursuant to (1) above, a party shall make satisfactory arrangements with the reporter for payment of the cost of the transcript.

(f) **Agreed statement as record on appeal.** In lieu of the record on appeal as defined in Paragraph (a) of this rule, the parties may prepare and sign a statement of the case showing how the issues presented by the appeal arose and were decided in the court from which the appeal is taken and setting forth only as many of the facts averred and proved or sought to be proved as are essential to a decision of the issues presented. If the statement conforms to the truth, it, together with such additions as the court may consider necessary to present fully the issues raised by the appeal, shall be approved by the court from which the appeal is taken and transmitted by the clerk of that court to the clerk of the Court of Appeals as the record on appeal within the time prescribed by Rule 12(b)(2). The index shall be transmitted to the Court of Appeals by the clerk of the court from which the appeal is taken upon approval of the statement by that court.

(g) **Statement of evidence or proceedings when no report was made or when transcript is unavailable.** If no report of the evidence or proceedings at a hearing or trial was made or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement shall be served on the respondent, who may serve objections or propose amendments thereto within 10 days after service. Thereupon, the statement and objections or proposed amendments shall be submitted to the court from which the appeal is taken for settlement and approval and, as settled and approved, shall be included by the clerk of that court in the record on appeal.

there was nothing before court after only seven days had elapsed since service of summons and the purported order requiring defendant to remove bridge after holding of a hearing was a nullity. Rules of Civil Procedure, rule 6(d).

Robert L. Gardner, Cedar City, for defendant and appellant.

David L. Mower, Panguitch, for plaintiff and respondent.

ELLETT, Justice:

This is an appeal from an order of the court commanding the defendant to remove a bridge from across plaintiff's ditch traversing defendant's land. The following sequence of events gave the defendant his grounds for appeal:

The sheriff had a Complaint, Summons, and Order to Show Cause in his possession on April 29, 1976. He went to defendant's place and served the Summons, together with a copy of the Complaint, upon defendant's aged mother who lived in one of two trailer homes on defendant's land. The Order to Show Cause (why the bridge should not be removed) was not served. The return date for the order was May 6, 1976, just seven days after the Summons was served.

Defendant contacted an attorney on May 4, 1976, who called the attorney for the plaintiff and the two thought they had worked out a compromise. They agreed to meet May 6th and have an order signed by the judge settling the matter.

May 6th was the regular court day in that rural county. The plaintiff rejected defendant's proposed settlement and the judge called the matter for disposition. Defendant's counsel pointed out to the court that since the order was never served, the court lacked jurisdiction to proceed. How-

only appeared thinking to settle the matter on terms heretofore agreed to. The court ordered him to remain in the courtroom and participate or not as he thought best, and stated that the matter would be heard. It was heard ex parte and the court ordered the bridge to be removed.

The Summons purportedly served upon the defendant gave him twenty days in which to answer the allegations of the Complaint; and when the hearing was had, only seven of those days had elapsed. The order, itself, had not been served on the defendant at that time. There was nothing before the court and the purported order was a nullity.¹

The order made is set aside, and the case is remanded for such further proceedings as may be proper. Costs are awarded to the appellant.

HENRIOD, C. J., and MAUGHAN, CROCKETT and WILKINS, JJ., concur.



Ann J. SAWYERS, Plaintiff
and Respondent,

v.

Don M. SAWYERS, Defendant
and Appellant.

No. 14461.

Supreme Court of Utah.

Dec. 13, 1976.

Ex-husband appealed from a judgment and order of the Third District Court, Salt Lake County, Don V. Tibbs, J., which modi-

specified for the hearing" unless otherwise ordered by the court. No such time was otherwise ordered by the court.

1. Rule 6(d), U.R.C.P., provides that an order such as the one before the court "shall be served not later than 5 days before the time

nied the terms of a divorce decree. The Supreme Court, Wilkins, J., held that in the absence of a transcript of testimony, the Supreme Court could not resolve factual matters presented by the ex-husband's contentions and that it was therefore presumed that the trial court's findings were supported by competent and substantial evidence.

Affirmed.

Divorce ⇐ 184(4)

Where ex-husband's contentions, on appeal from modification of divorce decree, involved factual matters which Supreme Court could not resolve without transcript of testimony and where no copy of transcript was included in appellate record and no abstract of testimony was presented, applicable presumption that findings of trial court were supported by admissible, competent and substantial evidence required affirmance. Rules of Civil Procedure, rule 75(a)(1).

Don M. Sawyers pro se.

Bruce E. Humberstone, Salt Lake City,
Udell R. Jensen, Nephi, for plaintiff and respondent.

WILKINS, Justice:

This is an appeal by defendant from a judgment and order of the District Court in and for Salt Lake County, dated January 8, 1976, upon petitions by each of the parties to modify the terms of a decree of divorce dated November 27, 1976.

Plaintiff was represented by counsel and defendant appeared before this court pro se, though he was represented by counsel in the district court. In his brief, defendant disagrees with many of said court's findings of fact, conclusions of law, and modified decree. He seeks to have the lower court's decision entitled "Judgment and Order Upon Petitions for Modification of Decree of Divorce Of Both Parties" reversed in several particulars.

The clerk of the district court transmitted to this court pursuant to the designation "all of the original papers . . . on file herein . . .". Nothing else has been received by this court in this matter except the briefs filed by the parties. No certificate was filed with the clerk of the district court as required by Rule 75(a)(1), Utah Rules of Civil Procedure, that a transcript of evidence had been ordered or that defendant did not intend to rely on said transcript. And no copy of the transcript by the reporter in the district court was included in this record on appeal, nor is an abstract of testimony presented for this court's consideration.

Basically, the defendant's brief consists of a statement of facts and a commentary on the nineteen paragraphs of the district court's judgment and order, which commentary substantially consists of disagreement with said court's rulings and an attempt to have this court consider facts which defendant claims existed subsequent to the date of the lower court's judgment.

Plaintiff in her brief disputes the matters raised by defendant which are at variance with the findings of fact, conclusions of law, and judgment and order of the district court.

The defendant in oral argument before this court stated that he was primarily appealing the award of judgment to plaintiff of (1) \$750.00 for attorney's fees (agreeing though to an amount of \$300.00) and (2) \$578.00 for delinquent alimony and child support.

Defendant's contentions and points on this appeal involve factual matters which this court cannot resolve or undertake to determine without a transcript of the testimony.¹

Appellate review of factual matters can be meaningful, orderly, and intelligent only in juxtaposition to a record by which lower courts' rulings and decisions on disputes can be measured. In this case without a transcript no such record was available, and therefore no measurement of the district

1. *Mitchell v. Mitchell*, 527 P.2d 1359 (Utah 1974)

court's actions can be made as urged upon us by defendant.

And, as under elementary principles of appellate review we ". . . presume the findings of the court to have been supported by admissible competent, substantial evidence . . .",² we affirm. Costs to plaintiff.

HENRIOD, C. J., and ELLETT, CROCKETT and MAUGHAN, JJ., concur.



Steven D. WALTON et al., Plaintiffs
and Appellants,

v.

STATE of Utah, By and Through its
ROAD COMMISSION, Defendant,
Third-Party Plaintiff and Respondent,

v.

SUMMIT COUNTY and Summit Park,
Inc., Third-Party Defendants and
Respondents.

No. 14532.

Supreme Court of Utah.

Dec. 27, 1976.

Landowners brought action against State to recover for damages resulting from alleged elimination of access to the lot as result of state grading project and for damages suffered as a result of construction by county of an allegedly noisy and unsightly equipment and maintenance shed. The Third District Court, Salt Lake County, James S. Sawaya, J., denied relief and landowners appealed. The Supreme Court, Henriod, C. J., held that action could not be maintained against the State to require re-

at law and thus governed by the Governmental Immunity Act and the limitation provisions thereof.

Affirmed.

Ellett, J., concurred in the result.

Maughan, J., dissented and filed an opinion.

1. States ⇐ 193

Landowners could not maintain action against State to require State to remove certain equipment and maintenance sheds, which were allegedly noisy and unsightly, where the sheds had been built by the county.

2. Eminent Domain ⇐ 112

Fact that maintenance sheds built by county might have been noisy and unsightly did not provide basis for recovery by neighboring landowners.

3. Eminent Domain ⇐ 106

State was not required to pay for alleged loss of access to lot caused by grading project where access to the lot was not impossible.

4. States ⇐ 174

Action brought by landowners against State as result of grading project which allegedly resulted in elimination of access to the lot was one at law and thus subject to the time limitations of the Governmental Immunity Act, despite contention that the Act applies only to actions at law and that the action in question was in equity U.C. A.1953, 63-30-1 et seq.

5. States ⇐ 174

Decision of landowners to live outside the State and not to check on their property within the State did not toll the limitation provisions of the Governmental Immunity Act U.C.A. 1973, 63-30-10.