

1992

McDonald v. McDonald : Unknown

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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No. 920313

IN THE STATE OF UTAH COURT OF APPEALS

TAMERA A. McDONALD

plaintiff/appellee

Priority No. 15

vs.

ROBERT M. McDONALD

defendant/appellant

920313-11

ON APPEAL FROM THE THIRD DISTRICT COURT
OF SALT LAKE COUNTY, STATE OF UTAH

THE HONORABLE FRANK G. NOEL, PRESIDING

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vs.

BRIEF OF PLAINTIFF/APPELLEE

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LIST OF PARTIES

- I. Tamera A. McDonald, plaintiff.
- II. Robert M. McDonald, defendant.
- III. Edwin F. Guyon, Esq., plaintiff's trial counsel
and appellate counsel as to the issue of
attorney fees.

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STATEMENT OF JURISDICTION

This is an appeal from a memorandum decision entered on May 11, 1992 and an order thereon entered on July 15, 1992 amending the December 12, 1991 decree of divorce to award attorney fees directly to plaintiff's counsel.

Jurisdiction to hear the instant appeal lies in the Utah Court of Appeals pursuant to the provisions of section 78-2a-3(2)(h). Utah Code Annotated, which provides the following:

The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over: . . . appeals from district court involving domestic relations cases, including but not limited to divorce, annulment, property division, child custody, support, visitation, adoption, and paternity.

STATEMENT OF THE ISSUES

I. Whether the trial court erred in awarding attorney fees directly to trial counsel and, if so, whether such error is harmless.

II. Whether the trial court violated defendant's right to procedural due process in entering its memorandum decision of May 11, 1992.

III. Whether the trial court erred in granting plaintiff's January 28, 1992 Rule 60 motion.

IV. Whether the entry by the trial court of its May 11, 1992 memorandum decision was an abuse of discretion.

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES,
RULES, AND REGULATIONS

1. The constitution of the state of Utah, article I, section 7, provides that:

No person shall be deprived of life, liberty or property, without due process of law.

2. Utah Code Annotated, Section 30-3-3, as amended 1953, provides the following:

The court may order either party to pay to the clerk a sum of money for the separate support and maintenance of the adverse party and the children, and to enable such party to prosecute or defend the action.

3. Utah Code Annotated, Section 78-51-41, as amended 1989, provides the following:

The compensation of an attorney and counselor for services is governed by agreement, express or implied, which is not restrained by law. From the commencement of an action, or the service of an answer containing a counterclaim or at the time that the attorney and client enter into a written or oral employment agreement, the attorney who is so employed has a lien upon the client's cause of action or counterclaim, which attaches to any settlement, verdict, report, decision, or judgment in the client's favor and to the proceeds thereof in whosoever hands they may come, and cannot be affected by any settlement between the parties before or after judgment. Any written employment agreement shall contain a statement that the attorney has a lien upon the client's cause of action or counterclaim.

4. Rule 17(a), Utah Rules of Civil Procedure, provides that:

Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's name without joining the party for whose benefit the action is brought; and when a statute so provides, an action for the use or benefit of another shall be brought in the name of the state of Utah. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after

objection for ratification of commencement of the action by, or joinder or substitution of the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

5. Rule 54(c)(1), Utah Rules of Civil Procedure, provides that:

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

6. Rule 59(e), Utah Rules of Civil Procedure, provides that:

A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

7. Rule 61, Utah Rules of Civil Procedure, provides that:

No error in either the admission or the exclusion of evidence, and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

8. Rule 4-501(1)(d), Code of Judicial Administration provides that:

Upon the expiration of the five-day period to file a reply memorandum, either party may notify the Clerk to submit the matter to the court for decision. The notification shall be in the form of a separate

written pleading and captioned "Notice to Submit for Decision". The notification shall contain a certificate of mailing to all parties. If neither party files a notice, the motion will not be submitted for decision.

9. Rule 4-501(3)(a), Code of Judicial Administration provides that:

A decision on a motion shall be rendered without a hearing unless ordered by the Court, or requested by the parties as provided in paragraphs (3)(b) or (4) below. [emphasis added]

STATEMENT OF THE CASE

This is an appeal from a divorce action. Subsequent to protracted district court proceedings, the court rendered its decree resolving custody, visitation and property distribution which included an award of attorney fees. Defendant's counsel, contrary to direct instructions from the court, refused to forward proposed findings of fact, conclusions of law and judgment to trial counsel for approval as to form. The court, unaware of this refusal, entered the final decree in the form presented by defendant. Upon being made aware of the entry of the decree, plaintiff moved the court for relief as it related to attorney fees for trial counsel. On May 11, 1992 the court entered its order granting attorney fees to plaintiff's counsel. Defendant appeals.

STATEMENT OF FACTS

1. On March 28, 1991, trial in the instant action terminated with the court ruling, inter alia, that defendant pay attorney fees in the amount of \$7,500.00.

2. Subsequently, and on a continuing basis, differences arising over the form of the findings, decree and other matters continued by motion, response, and occasional order and amended decree.

3. On October 9, 1991 the court rendered its memorandum decision (exhibit A) containing its ruling on plaintiff's August 16, 1991 objections to defendant's proposed findings of fact, conclusions of law and judgment (filed August 20, 1991) and specifically directing that:

Counsel for defendant is to prepare new Findings of Fact, Conclusions of Law and a Decree consistent with this decision, submit them to opposing Counsel for approval as to form and then to the court for signature. [emphasis added]

4. On October 21, 1991 defendant's counsel was informed that:

Inasmuch as I have not heard from you regarding the preparation of new findings of fact, conclusions of law and judgment as directed by Judge Noel in his memorandum decision of October 9, 1991, I wish to notify you that, unless payment in full of the amounts awarded as attorney fees are made prior to November 1, 1991, I will cause execution to issue to obtain such funds from your client. (R. 1022)

5. On October 25, 1991 defendant's counsel, notwithstanding the court's order that any findings of fact and conclusions of law and judgement be submitted to plaintiff's counsel responded by stating:

I have been dealing with Mr. Watts on this matter since he entered an appearance in this case. He related to me that you have refused to file a withdrawal. If you feel I should be dealing with you on the case, please advise and let me see something from one of you signed by Tamera McDonald stating which of you represents her. (R. 1023)

6. On October 26, 1991, and in response to the foregoing, defendant's counsel was informed as follows:

I read with great surprise your letter of October 25, 1991. Please be advised that I am counsel of record and, unless and until you are advised otherwise by me, will remain so.

I believe the rules specify that, in the event a party is represented by more than one attorney, you are obligated to provide notice of your activities to both.

To the extent that you have communicated with other counsel without notifying me, please forward to me any and all documents involved in such communication and inform me (in writing) of the time, date and content of any oral communications with Mr. Watts to which I was not a party. (R. 1024)

7. On October 30, 1991, notwithstanding the failure of defendant to submit same to plaintiff's trial counsel for approval as ordered by the court, the initial decree of divorce was entered, paragraph 14 thereof providing:

Plaintiff is awarded judgment against Defendant in the sum of Seven Thousand Five Hundred Dollars (\$7,500.00) as attorney's fees. (R. 920)

8. On December 12, 1991 an amended decree of divorce was entered, paragraph 14 thereof providing:

Plaintiff is awarded judgment against Defendant in the sum of Seven Thousand Five Hundred Dollars (\$7,500.00) as attorney's fees. (R. 989)

9. On January 28, 1992, plaintiff filed her Rule 60 motion for stay of entry of order and to set aside judgment re attorney fees. (R. 1016/1024).

10. On February 5, 1992, defendant filed his response to plaintiff's above referenced Rule 60 motion, stating therein that:

The Decree that has carried the language upon which the Court has ruled was reviewed by Mr. Guyon over

a considerable period of time; it was a decree to which he made numerous objections, but at no time did he make objections to the language with which he now disagrees. [emphasis added] (R. 1026)

11. On April 6, 1992 plaintiff, and in compliance with the requirements of Rule 4-501(d) notified the court that the referenced Rule 60 motion was submitted to the court for its decision. (Exhibit B)

12. On May 11, 1992 the trial court entered its memorandum decision stating in relevant part that:

The Court has reviewed the entire history regarding this "Attorney's Fees" matter and now enters an Order disposing of these motions and resolving the issue of plaintiff's attorneys fees.

The Court previously entered a minute entry dated the 16th day of January, 1992 indicating that Mr. Guyon should look to plaintiff for payment of his attorneys fees. That opinion was based on the precise wording of the decree of divorce which stated:

"Plaintiff is awarded judgment against defendant in the sum of \$7,500.00 (Seven Thousand Five Hundred Dollars) as attorneys fees."

The Court is of the opinion that the precise wording of the Decree required that result.

Mr. Guyon has now filed a Motion to Set Aside that judgment relating to attorneys fees relying on Rule 60 Utah Rules of Civil Procedure.

After reviewing the entire matter, including portions of the court transcript cited by the parties, and the court's notes together with the Courts recollection of this matter, the Court is of the opinion that Mr. Guyon's motion is well taken. It was and is the Court's intent that Mr. Guyon be given a judgment for attorneys fees for services rendered up to the time of the court's order awarding attorneys fees. The technical language that finally emerged in this matter (although the specific issue here presented was not addressed earlier) granted the judgment in favor of plaintiff rather than to Mr. Guyon. (R. 1068/1069)

13. On July 15, 1992 the court, based upon the May 11, 1992 memorandum decision entered its amendment to judgment stating:

[I]t is hereby ordered that said December 12, 1991 decree be and hereby is amended to provide, in lieu of payment of attorney fees directly to plaintiff, as follows:

Defendant shall pay directly to Edwin F. Guyon as counsel for plaintiff, as attorney fees, the sum of \$7,500.00. (R. 1207/1208)

SUMMARY OF ARGUMENTS

1. The trial court did not err in awarding attorney fees directly to trial counsel. If such award was error, such error is harmless.

2. The trial court did not violate defendant's right to procedural due process in entering its memorandum decision of May 11, 1992.

3. The trial court did not err in granting plaintiff's January 28, 1992 Rule 60 motion.

4. The entry by the trial court of its May 11, 1992 memorandum decision was not an abuse of discretion.

ISSUE I -- ERROR, IF ANY IN ENTERING ORDER
AWARDING FEES DIRECTLY TO ATTORNEY, WAS HARMLESS

STANDARD OF REVIEW

1. An appellate court reviewing cases in equity has the duty and prerogative, where warranted, but only upon a full review of fact and law, to substitute its judgment for the judgment of the trial court --- with the caveat that the trial court's action should not be disturbed except to prevent manifest injustice.

Penrose v. Penrose, 656 P.2d 1017 (Utah 1982); Jackson v. Jackson, 617 P.2d 338 (Utah 1980); Mitchell v. Mitchell, 527 P.2d 1359 (Utah 1974).

2. The burden is upon the appellant to prove that the evidence clearly preponderates against the findings as made; or there was a misunderstanding or misapplication of the law resulting in substantial and prejudicial error; or a serious inequity has resulted as to manifest a clear abuse of discretion. Mitchell v. Mitchell, 527 P.2d 1359, 1360 (Utah 1974); Harding v. Harding, 488 P.2d 308 (Utah 1971); Searle v. Searle, 522 P.2d 697 (Utah 1974).

PARTIES IN INTEREST

3. The purpose of Rule 17, Utah Rules of Civil Procedure, and the reason the defendant has the right to have a cause of action prosecuted by the real party in interest is so that the judgment will preclude any action on the same demand by another and permit the defendant to assert all defenses or counterclaims available against the real owner of the cause. Shaw v. Jeppson, 239 P.2d 745, 748 (Utah 1952)

4. The provisions of Rule 54(c)(1) are consistent with the general principle that a trial court may not render judgment in favor of a nonparty. Courts can generally make a legally binding adjudication only between the parties actually joined in the action. Hiltsley v. Ryder, 738 P.2d 1024 (Utah 1987).

ATTORNEY FEES

5. Early in Utah family law jurisprudence the Utah Supreme Court took the position that a decree in favor of a party's

attorney was void for lack of jurisdiction. Openshaw v. Openshaw, 12 P.2d 364, 365 (Utah 1932); Rolando v. District Court, 271 P. 225 (Utah); Brown v. Brown, 8 P.2d 452 (Ariz) and concluded that the decree should be amended so as to make it run in favor of the party to the case. Openshaw, supra.

6. When issues arising over payment of fees to the Openshaw attorney gave rise to additional litigation, the Utah Supreme Court rejected Openshaw's argument that an improper remedy, i.e. an action in conversion, was sought and declared such a claim without merit, relying on Section 104-1-2 Utah Code Annotated, 1943 which provides:

There is in this state but one form of civil action for the enforcement or protection of private rights and the redress or prevention of private wrongs.

and held that:

Under this section this court has held that a pleader is not required to follow any particular form or special theory in stating the facts, and if the facts stated entitled plaintiff to any relief under the substantive law, then he has stated what is termed "a good cause of action", and the court must enter judgment in his favor so far as any attack upon the sufficiency of the pleading is concerned. Williams v. Nelson, 145 P. 39, 41 (Utah); Hanson v. Openshaw, 155 P.2d 410, 411-12 (Utah 1945).

7. Subsequently the Utah Supreme Court has taken the position that:

In the absence of a statute, let it be conceded that an attorney in a divorce action has no lien either on the cause of action or on the judgment or on the proceeds thereof in favor of his client, but in this state we have an attorney's lien statute. It, R.S. Utah 1933, 6-0-40, provides: "The compensation of an attorney and counselor for his services is governed by agreement, express or implied, which is not restrained by law. From the commencement of an action, or the service of an

answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action or counterclaim, which attached to a verdict, report, decision or judgment in his client's favor and to the proceeds thereof in whosoever hands they may come, and cannot be affected by any settlement between the parties before or after judgment. Hampton v. Hampton, 32 P.2d 703, 706 (Utah 1945).

and further, that:

Under such a statute, we think the weight of authority (citations omitted), at least on principle, is to the effect that the lien attaches in all cases, including divorce actions. Id.

8. It has been held, in Rasband v. Rasband, 752 P.2d 1331, 1336 (Utah App 1988) that:

A trial court has the power to award attorney fees in divorce proceedings, pursuant to Utah Cod Ann. section 30-3-3 (1984). Kerr v. Kerr, 610 P.2d 1380, 1384 (Utah 1980). The decision to make such an award and the amount thereof rest primarily in the sound discretion of the trial court. Id. However, the award must be based on evidence of both financial need and reasonableness. Beals v. Beals, 682 P.2d 862, 864 (Utah 1984).

9. In Albrechtsen v. Albrechtsen, 414 P.2d 970, 971 (Utah 1966), an action in which a non-party attorney appealed an order quashing a writ of garnishment, the Supreme Court, stating that the proper procedure would be for the attorney to intervene for the purpose of determining the amount and extent of his lien and then have it enforced, concluded that, under the circumstances, the attorney had no standing and dismissed the appeal.

HARMLESS ERROR/UTAH

10. Rule 61 places upon appellant the burden of showing not only that an error occurred, but that it was substantial and prejudicial in that the appellant was deprived in some manner of a full and fair consideration of the disputed issue by the finder of

fact. Ashton v. Ashton, 733 P.2d 147 (Utah 1987); Onyeabor v. Pro Roofing, Inc., 787 P.2d 525 (Utah Civ App 1990).

11. When parties have been afforded an opportunity to present their claims to a court or jury in a fair trial and a verdict and judgment is entered, all presumptions are in favor of the validity of the verdict and judgment. Joseph v. W.H. Groves Latter-Day Saints Hospital, 348 P.2d 935 (Utah 1966).

12. Where the parties have been afforded a trial, a presumption arises that the judgment should not be disturbed unless the one attacking it meets the requirement of showing that the error is substantial and prejudicial, in the sense that there is reasonable likelihood that the result would have been different in absence of such error. Hall v. Blackman, 417 P.2d 664 (1966).

13. Since the appellant has the burden of demonstrating that any error has affected his substantial rights, every reasonable presumption in favor of the validity of a general verdict must be taken as true on appeal. Leigh Furniture & Carpet Company v. Isom, 657 P.2d 293 (Utah 1982).

14. A party who takes a position that leads a court into error, or who by conduct approves the error committed by the court, cannot later take advantage of the error in procedure. Helman v. Paterson, 241 P.2d 910 (Utah 1952).

15. An appellate court will not reverse a judgment for mere error, unless the error involved is substantial and prejudicial. Kesler v. Rogers, 542 P.2d 354 (Utah 1975).

16. An error is harmful only if the likelihood of a

different outcome is high enough to undermine confidence in the verdict. Crookston v. Fire Insurance Exchange, 817 P.2d 789 (Utah 1991).

HARMLESS ERROR/OTHER JURISDICTIONS

17. In actions in other jurisdictions in which questions similar to those of the instant action, an approach has been followed that declares the matter to be generally harmless:

The husband's argument that it was error for the court to order the payment of fees directly to the wife's attorney is well-founded. The case of Louthian and Merritt, P.A. v. Davis, 272 S.C. 330, 251 S.E.2d. 757 (1979), disapproves of this method of awarding attorney's fees. In Louthian and Merritt, P.A., *supra*, our Supreme Court stated that because a claim for attorney's fees incidental to a divorce action is purely personal, they are to be awarded to the litigant and not to the attorney. The trial court erred, then, in awarding attorney's fees directly to the wife's attorney; however, the error in their award is not reversible because no prejudice to the husband has been shown. [citations omitted] The award of attorney's fees, therefore, is affirmed. Reid v. Reid, 312 S.E.2d 724, 730 (S.C.App 1984)

18. The above decision is based in substantial part upon an earlier South Carolina case in which the court stated:

In his final exception, the husband contends that the lower court erred in directing that the attorneys' fees be paid directly to the attorneys. Code Section 20-112 provides that the court may allow the wife suit money. Counsel for the husband argues that an order granting payment directly to the attorneys is void. The wife's attorneys acknowledge ". . . that the preferred practice is to order attorneys' fees paid to the party, . . ." Traditionally in this State, in divorce actions fees have been ordered paid directly to counsel. Normally, there is no reason to contest such payment and this Court is not aware of any evils growing out of the practice.

In the original order, the trial judge provided for "a reasonable attorneys' fee to be paid to her attorneys for defending the action." This apparently

caused no concern on the first appeal, nor at the hearing on remand.

The principle is well settled that error is not reversible unless prejudice to the complaining party may have resulted therefrom.

Assuming error in directing that the fees be paid directly to the attorneys, no prejudice to the husband has been shown. The wife testified in the court below in behalf of the motion of her attorneys, whereby they sought payment and ". . . an order setting a reasonable attorneys' fee for the undersigned attorneys . . ." Neither the husband nor the wife is in a position to complain, and a reversal on this ground is not required. [emphasis added] Darden v. Witham, 209 S.E.2d 42, 47 (S.C. 1974).

19. The Supreme Court of Oklahoma, in Owens v. Owens, 264 P.2d 341 (Okla 1953), an action in which the appellant contends that an attorney fee allowance is void on account of the manner in which it was stated in the judgment reasoned as follows:

It is therefore ordered, adjudged and decreed by the court that the plaintiff, O.O. Owens, pay to said attorneys on or before March 1, 1945, the said sum of \$2,000.00 and that plaintiff also pay the costs of this action.

[the attorneys issued an execution on the above judgment, in response to which plaintiff filed a motion to quash]

Upon application and hearing the court granted a nunc pro tunc order correcting the judgment so that as to the attorneys fees item it should read as a judgment "against the plaintiff O.O. Owens and in favor of the defendant Ester Webb Owens, for the use and benefit of defendant's attorneys H.L. Smith and Guy S. Manatt.

Plaintiff contends that the judgment for attorneys fees as stated in the original judgment, or as stated in the nunc pro tunc order is void as being a judgment in favor of persons not parties to the action, and contends that any order directing payment to the attorneys is void. [emphasis added]

[the court distinguished on the law a case involving California judgment]

This court has never held that an attorney's fee allowance in a divorce case was void if ordered to be paid direct to the attorney. We have always taken a view contrary to California, because we have held that the attorneys for the wife in a divorce have a personal interest in the allowance of attorneys fees to the extent that the attorneys may in their own name enforce the payment of the same to themselves and for their own private benefit, though the wife does not participate in such proceedings with the attorneys, and though the wife might in fact be antagonistic to such enforcement by the attorneys. [citations omitted]

This court has, over many years, recognized the validity of allowances of attorneys fees in divorce cases when the language used by the Judge and written in the Journal entry named the attorneys in various ways, and in some cases where it referred to them, but did not name them. [citations omitted] Owens, supra., at 341-342.

20. Subsequent to an extensive analysis of prior cases in which the Oklahoma Supreme Court rehearsed the history of its position and made the following determination:

In view of this well defined and well established policy in Oklahoma it is of but scant importance whether we uphold the order made in the subsequent proceedings, or uphold the original trial order when this fee allowance was first ordered and made. Either way the plaintiff, husband, should pay the award made.

If there was any error in the verbiage of the first order it was an irregularity only. It could have been corrected in drafting and approving the Journal entry if either party had thought it of sufficient importance.

The fact remains that the original trial judge intended to make, and did make an attorneys fee allowance against the husband. Every one understood it and no one questioned the fairness of the amount or the authority of the court to make such an allowance against the husband. There was acquiescence in the order and compliance with it to the extent of paying \$200 thereof, and the balance should be paid as ordered by the court.

The plaintiff contends the order was void on account of the use of the names of the attorneys in the manner they were used in the Journal entry. but to

sustain that contention we must depart from the policy employed in many former cases and over a long period of years. It is not pointed out that any harm or evil has resulted from the application of this policy in any one of the many former cases, nor that harm or injury will result from its application in this case.

Our policy authorizes attorneys in their own names to enforce attorneys fee awards in proper cases, as above cited, on the theory that they have individual or vested interests therein. Then of course it is logical to uphold orders which refer to them or name them as we have done in several above cited cases.

We conclude the plaintiff was not entitled to have the execution quashed. The court properly denied his motion to quash. Id., at 346.

21. In the event the court committed error, said error was harmless, there being no prejudice alleged or shown.

ISSUE II -- THE TRIAL COURT DID NOT VIOLATE
DEFENDANT'S RIGHTS TO PROCEDURAL DUE PROCESS
IN ENTERING ITS MAY 11, 1992 ORDER

1. In the state of Utah, "Timely and adequate notice and an opportunity to be heard in a meaningful way are the very heart of procedural fairness." Nelson v. Jacobsen, 669 P.2d 1207, 1211 (Utah 1983).

2. While Utah law recognizes both procedural and substantive due process standards, Wells v. Children's Aid Society of Utah, 681 P.2d 199, 204 (Utah 1984) the only claim by defendant herein relates to procedural due process, the general test for which is "fairness" in providing for notice and opportunity to be heard. Id., at 204.

3. The much cited case of Mullane v. Central Hanover Bank & Trust, 399 U.S. 306, 314 (1950), adopted by the Utah Supreme

Court, sets out the classic requirements of adequate notice:

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance. [citations omitted] Id., at 1212.

and further states:

Many cases have held that where notice is ambiguous or inadequate to inform a party of the nature of the proceedings against him or not given sufficiently in advance of the proceeding to permit preparation, a party is deprived of due process. Id.

4. In an action involving the termination of parental rights, the Utah Supreme Court determined that:

Implicit in the due process clause of our state Constitution is that persons be afforded a hearing to determine their rights under the law. Gribble v. Gribble, 583 P.2d 64, 67 (Utah 1978).

5. The record is clear that defendant received a copy of plaintiff's rule 60 motion filed January 28, 1992 (R. 1016/1024); filed his response in the form of a motion to dismiss (R. 1025/1027); received a notice to submit for decision (Ex. A); and received a copy of the court's memorandum decision (R. 1068/1070)

6. The procedures followed by the court comply, in all aspects, with the applicable procedural rules. Rule 4-501(3)(a) permits the court to enter its decision without a hearing unless requested by one of the parties. Defendant failed to request a hearing on this motion and waived his right to complain on appeal

that the absence of a hearing violates his right to due process.

ISSUE III -- THE TRIAL COURT DID NOT COMMIT
ERROR IN GRANTING PLAINTIFF'S JANUARY
28, 1992 RULE 60 MOTION

1. Rule 60, Utah Rules of Civil Procedure permits the court to grant relief for any one of the six specific and one general reasons stated if filed within a reasonable time (3 months after entry for specific reasons 1 through 4). The period from October 10, 1991 to January 30, 1992 is three months. The motion was filed January 28, 1992, less than three months subsequent to the entry of the initial judgment, let alone the subsequent amended judgments.

2. Rule 59 applies, if at all, only in allegations relating to "newly discovered evidence", a claim not at issue in the instant action. The motion was filed as a rule 60 motion; the court treated plaintiff's motion as a rule 60 motion; and the motion itself requests relief contemplated under rule 60.

3. When parties have been afforded an opportunity to present their claims to a court or jury in a fair trial and a verdict and judgment is entered, all presumptions are in favor of the validity of the verdict and judgment. Joseph v. W.H. Groves Latter-Day Saints Hospital, 348 P.2d 935 (Utah 1966).

4. Where the parties have been afforded a trial, a presumption arises that the judgment should not be disturbed unless the one attacking it meets the requirement of showing that the error is substantial and prejudicial, in the sense that there is

reasonable likelihood that the result would have been different in absence of such error. Hall v. Blackman, 417 P.2d 664 (1966).

5. Since the appellant has the burden of demonstrating that any error has affected his substantial rights, every reasonable presumption in favor of the validity of a general verdict must be taken as true on appeal. Leigh Furniture & Carpet Company v. Isom, 657 P.2d 293 (Utah 1982).

ISSUE IV -- THE TRIAL COURT DID NOT ABUSE ITS
DISCRETION IN GRANTING PLAINTIFF'S
JANUARY 28, 1992 RULE 60 MOTION

1. The court's October 9, 1991 memorandum decision clearly directs the defendant to forward proposed findings and judgment to plaintiff's trial counsel -- a requirement not met by defendant. The October 21/26, 1992 correspondence demonstrates that defendant's position was not inadvertent. It is further relevant that defendant's February 5, 1992 response to plaintiff's motion purports that the decree was in fact reviewed by plaintiff's counsel.

2. A party who takes a position that leads a court into error, or who by conduct approves the error committed by the court, cannot later take advantage of the error in procedure. Helman v. Paterson, 241 P.2d 910 (Utah 1952).

3. Plaintiff adopts the reasoning in the foregoing sections in further support against a holding that the court abused its discretion in the instant action.

CONCLUSION

Plaintiff, in retaining as trial counsel, Edwin F. Guyon, and entering into an agreement for his employment created --- by virtue of section 78-51-41, U.C.A. and cases thereunder --- an unrestrained lien for attorney fees on his behalf.

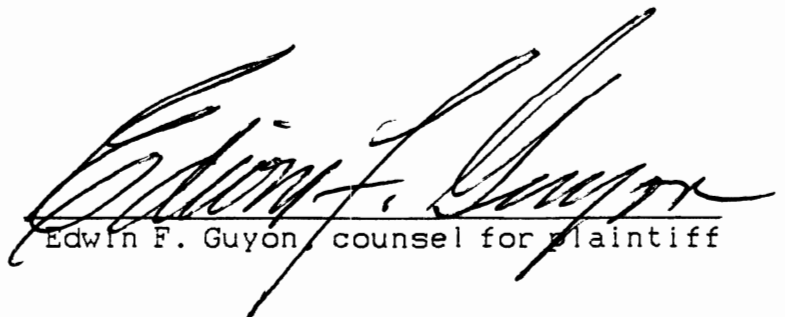
At the conclusion of trial an award of \$7,500.00 for attorney fees was rendered against defendant. No challenges as to the amount and extent of said lien have been made.

While it may be that plaintiff's trial counsel has no standing to appeal the attorney fee issue, Albrechtsen does not deny standing for purposes of appeal in the instant action to a named party.

Defendant, himself an experienced trial attorney and present throughout all the proceedings at trial, represented on the record that he was willing to work with plaintiff's counsel on the matter of payment of fees, but has not. To now allege that the trial court erred and/or abused its discretion as it relates to due process and the memorandum decision of May 11, 1992 is inappropriate.

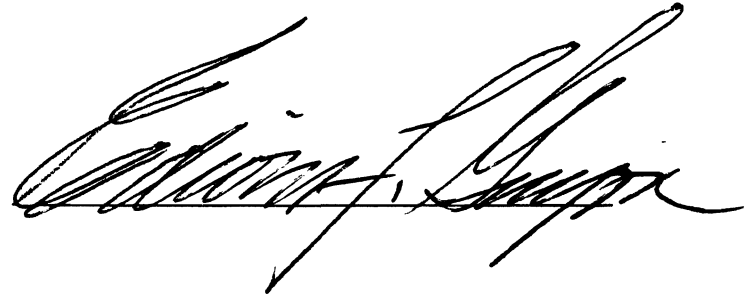
Dated the 4th day of November, 1992.

By:


Edwin F. Guyon, counsel for plaintiff

MAILING CERTIFICATE

I certify that on the 5TH day of NOVEMBER, 1992 I mailed a copies of the foregoing brief of plaintiff/appellee to Suzanne Benson, Esq., 455 East 500 South, #200, Salt Lake City, Utah, 84111 and James Watts, Esq., 124 South 600 East, #100, Salt Lake City, Utah, 84102.

A handwritten signature in black ink, appearing to read "William J. Cupp". The signature is written in a cursive style with a large, sweeping initial "W" and a long, horizontal stroke extending to the right.

Edwin F. Guyon - 1284
counsel for plaintiff
205 Newhouse Building
Salt Lake City, Utah 84111
801/355-8811

THIRD DISTRICT COURT, SALT LAKE COUNTY, UTAH

TAMERA A. McDONALD

plaintiff

NOTICE TO SUBMIT
FOR DECISION

vs.

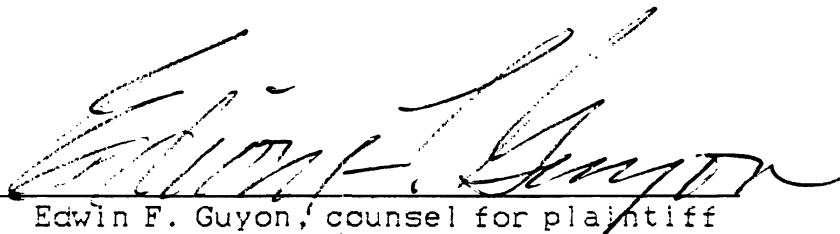
ROBERT M. McDONALD

case no. 894901477 - DA
Judge Frank G. Noel

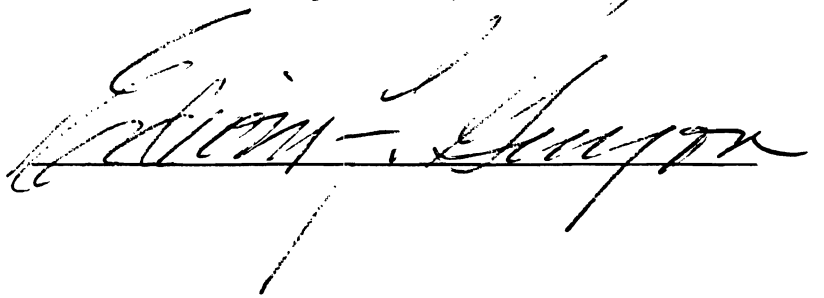
defendant

Notice is hereby given that defendant's motion to
dismiss, etc., served upon plaintiff February 4, 1992, is hereby
submitted for decision by the court.

Dated the 17th day of APRIL, 1992.

By: 
Edwin F. Guyon, counsel for plaintiff

I certify that on the above date a copy of the foregoing
notice was mailed, first class, postage prepaid to Glen M. Richman,
Esq., 60 South 600 East, #100, Salt Lake City, Utah, 84102.



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

TAMERA A. McDONALD,	:	MEMORANDUM DECISION
Plaintiff,	:	Civil No. 894901447 DA
vs.	:	JUDGE FRANK G. NOEL
ROBERT M. McDONALD,	:	
Defendant.	:	

Now before the Court are plaintiff's Objections to Defendant's Proposed Findings of Fact, Conclusions of Law and Judgment. The Court has reviewed the objections together with the memos filed in support of and in response thereto and now rules as follows:

The Court will make it's ruling by reference to the paragraph numbers contained in the document filed by plaintiff entitled "Objections to Proposed Findings and Judgment".

OBJECTIONS TO FINDINGS:

1. Plaintiff's objection is sustained.
2. Plaintiff's objection is overruled.
3. Plaintiff's objection is sustained.
4. Plaintiff's objection is sustained. The Court has previously entered findings and conclusions regarding

jurisdiction and grounds for the divorce.

5. Plaintiff's objection is overruled. The finding, that plaintiff argues should be included, has in substance been incorporated below in paragraph 17 (g) of defendant's proposed Findings of Fact and Conclusions of Law.

OBJECTIONS TO MIXED FINDINGS/CONCLUSIONS:

1. As a general statement under this section the Court agrees that there should not be a separate section entitled "Mixed Findings/Conclusions". The matters contained in that section should fall under the section entitled "Findings". The Court will refer specifically to paragraphs 14 through 17 of defendant's proposed Mixed Findings of Fact and Conclusions of Law as it appears that plaintiff is objecting to all of said paragraphs.

Paragraphs 14, 15 and 16 of the Mixed Findings of Fact and Conclusions of Law should be deleted.

Paragraph 17 (i) should be deleted as being redundant.

Paragraph 17 (m) should be deleted as being a comment on the evidence and not a finding of fact.

CONCLUSIONS OF LAW:

Plaintiff's objection to paragraph 9;2;4 is sustained.

Plaintiff's objection to paragraph 9;3;1 is sustained.

Plaintiff's objection to paragraph 12;8;9 to 11 is overruled.

Plaintiff's objection to paragraph 14; 19; 1 et. seq. is sustained.

OBJECTIONS TO DECREE:

1. Plaintiff's objection is sustained.

2. Said paragraph shall remain as written but with the following addition:

"... or as the parties may agree."

3. The Court sustains plaintiff's objections.

4. The Court overrules plaintiff's objection.

5. Plaintiff's objection is overruled.

6. The Court sustains plaintiff's objection.

Counsel for defendant is to prepare new Findings of Fact, Conclusions of Law and a Decree consistent with this decision, submit them to opposing Counsel for approval as to form and then to the Court for signature.

DATED this 9th day of October, 1991.

A handwritten signature in black ink, appearing to read 'Frank G. Noel', written over a horizontal line.

FRANK G. NOEL
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, postage prepaid, to the following, this _____ day of October, 1991:

James I. Watts
Attorney for Plaintiff
124 South 600 East, Suite 100
Salt Lake City, Utah 84102

Edwin F. Guyon
Attorney for Plaintiff
433 South 400 East
Salt Lake City, Utah 84111

Glen M. Richman
RICHMAN & RICHMAN
Attorney for Defendant
60 South 600 East, Suite 100
Salt Lake City, Utah 84102
