

1992

Lamar Greene Mitchell v. Marlene Carol Mitchell : Brief of Appellant

Utah Court of Appeals

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920489

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

LAMAR GREENE MITCHELL
Plaintiff and Appellant,

vs.

MARLENE CAROL MITCHELL,
Defendant and Appellee

:
:
: BRIEF OF APPELLANT
:
:
: CASE #920489
: DISTRICT COURT CASE
: #90-4904611DA
: JUDGE HOMER F. WILKINSON
:
: PRIORITY #15
:

This is an appeal from the Third District Court, the
Honorable Homer F. Wilkinson, Judge.

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FILED

Utah Court of Appeals
JAN 28 1993


Mary T. Noonan
Clerk of the Court

IN THE UTAH COURT OF APPEALS
STATE OF UTAH

LAMAR GREENE MITCHELL	:	
Plaintiff and Appellant,	:	
	:	BRIEF OF APPELLANT
vs.	:	
	:	
MARLENE CAROL MITCHELL,	:	CASE #920489
Defendant and Appellee	:	DISTRICT COURT CASE
	:	#90-4904611DA
	:	JUDGE HOMER F. WILKINSON
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BEFORE THE UTAH COURT OF APPEALS

JURISDICTION

The jurisdiction of this court is in accordance with Rule 3 (a) Utah Rules of Appellate Procedure, and is an appeal from a Third District Court order.

STATEMENT OF THE ISSUES

The principal issue is that the Plaintiff contends that the residence of the parties was awarded to the Defendant without adequate findings of fact. The value of the residence appears to be in excess of \$100,000. There were no findings of fact setting forth the value of the residence (R-237). The statute requires equitable division of the property (Section 30-3-5) (1) Utah Code Annotated 1953. The case law supports this statute and broadens it.

DETERMINATIVE STATUTES

Section 30-3-4 (1) Utah Code Annotated requires "the Court or the commissioner in all divorce cases shall make and file findings and decree upon the evidence." (See addendum.)

Section 30-3-5 (1) Utah Code Annotated provides that "When a decree of divorce is rendered the court may include in it equitable orders relating to the children, property, --- and parties." (emphasis added). (See addendum.)

Rule 52(a) Utah Rules of Civil Procedures --- "Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state

separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58 A; ---" (see addendum).

STATEMENT OF THE CASE

(a) Nature of the Case

This case is a divorce action which was filed November 14, 1990.

(b) Course of Proceeding

A decree of divorce was entered March 2, 1992, (R-232) awarding the divorce and awarding personal and real property to each of the parties. The Plaintiff had failed to answer interrogatories, his pleadings were stricken, his default entered and the trial was held in the absence of the Plaintiff. Judgment was filed March 12, 1992 (R-236). Defendant filed a motion for a new trial or motion to vacate thereafter.

(c) Disposition at Trial Court

The Court entered findings of fact, conclusions of law, and judgment on March 12, 1992. The Plaintiff filed a motion for a new trial which was denied.

The basic reason for the motion for a new trial was Rule 60 (b) and (3) and (7). The contention of the Plaintiff set forth in his affidavit (R-237) is substantially to the effect that findings of fact were not entered as a basis for the equitable distribution of all of the real property in accordance with the statutes and law of the state. That is, that no dollar values were ascribed to any of the real property. The motion for a new trial or to vacate judgment was intended leave the decree of

divorce standing, but vacating it as to property distribution.

SUMMARY OF ARGUMENT

The trial court made findings of fact (R-228, paragraph 10) that the personal property had been divided in a manner between the parties they believed to be fair and equitable. The real property was divided between the parties with the home going to the Defendant and two smaller pieces of property in the southern part of the valley going to the Plaintiff. (R-228 par 8 and 9).

The record of the findings of fact and conclusions of law (R-226, R-228) reflects in finding paragraph 8 "---the court further finds that the Defendant should be awarded the home and and the real estate of the parties at 2183 Oneida Street, free and clear of any claims of the Plaintiff, ---" The findings of facts further goes on in paragraph 9 to award the Plaintiff the other two pieces of real estate in Southern Salt Lake County. The record totally fails to determine any value or approximation of value between those two awards as to their equality or to their actual value. The findings of fact on the personal property reflect in paragraph 10 (R-228) that the trial court cited "---that their personal property has already been divided between them in a manner they believe is fair and equitable." There is no such comparison findings as to the real property. There does not appear to be any way, such as in the *Roberts'* case, how the appellate court can review the findings of fact relating to the real property distribution and determine whether or not it is an equitable distribution.

ARGUMENT

Point 1

THE STATUTE REQUIRES THAT THE COURT MAKE AND FILE FINDINGS FACT AND THE DECREE IN THE DIVORCE ACTION.

In Section 30-3-4 (1) Utah Code Annotated --- "The court or the commissioner in all divorce cases shall make and file findings and decree upon the evidence." Rule 52 Utah Rules of Civil Procedure supplements this section stating "(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58 A; ---"

Point 2

THE STATUTE REQUIRES THAT THE COURT INCLUDE CERTAIN ITEMS IN THE DECREE OF DIVORCE AND INDICATES THAT "--- THE COURT MAY INCLUDE IN IT EQUITABLE ORDERS RELATING TO THE CHILDREN, PROPERTY, --- AND PARTIES."

Section 30-3-5 (1) Utah Code Annotated provides as follows.

"When a decree of divorce is rendered the court may include in it equitable orders relating to the children, property, --- and parties." (emphasis added)

Point 3

WHILE THE TRIAL COURT HAS CONSIDERABLE DISCRETION TO ENTER EQUITABLE ORDERS CONCERNING PROPERTY DISTRIBUTION, THE DISTRIBUTION MUST BE BASED UPON ADEQUATE FACTUAL FINDINGS, AND FAILURE TO MAKE FINDINGS ON ALL MATERIAL FACTS IS REVERSIBLE

ERROR UNLESS THE FACTS IN THE RECORD ARE CLEAR, UNCONTROVERTED AND CAPABLE OF SUPPORTING ONLY A FINDING IN FAVOR OF THE JUDGMENT.

In the case of *Haumont v. Haumont* 793 P.2d 421 1990, the court of appeals, speaking through Judge Garff, citing *Munns v. Munns* 790 P.2d 116, recited "---in dividing a marital estate the trial court has considerable discretion to enter equitable orders concerning property distribution. Orders will not be disturbed so long as the trial court exercises its discretion in accordance with the standard set by this state's appellate courts --- except where to do so would work a manifest injustice or inequity." The major purpose of a property division, in conjunction with an alimony award, "---is to achieve a fair, just, and equitable result between the parties." (emphasis added)

"To permit appellate review of the trial court's property distribution, just as in the determination of alimony, the distribution must be based upon adequate factual findings." *Munns*, 790 P.2d at 119. "Failure to make findings on all material facts is reversible error unless the facts in the record are clear, uncontroverted and capable of supporting only a finding in favor of the judgment." *Andersen v. Andersen*, 757 P.2d at 479.

In *Roberts v. Roberts*, 188 Utah Advance Reports 26, #910099-CA, May 28, 1992, the Court, speaking through Judge Jackson, affirmed the principle in *Munns* that considerable discretion of the trial court would not be disturbed on appeal as long as the

trial court exercises that discretion in harmony with the standards set by the appellate courts. The court went further on to hold in citing *Munns*, "to accommodate review, the court's distribution must be based on adequate findings which ---place a dollar value on the distributed assets," (emphasis added) again citing *Munns*. The court in the Roberts' case determined that the findings of fact, the conclusions of law, and the decree based upon them in which many dollar values were recited, and although the division of property was not exactly equal, the court stated: "Taking the value of all the parties' assets and liabilities as a whole, a disparity of this type would not be so disproportionate as to be an abuse of the court's discretion in making an equitable distribution."

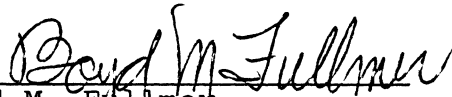
In *Haumont* the court stated "---we find that the trial court committed reversible error because of its failure to make adequate findings to support its distribution [of property]. We therefore reverse and remand for the trial court to make appropriate findings and of property distribution within the parameters set forth in this opinion."

CONCLUSION

Since the findings of facts do not set actual dollar values, or any comparative values concerning that property awarded to the Defendant, or the comparative values of those properties awarded to the Plaintiff, it is clear from the case law cited that the award of the real property, particularly the home on Oneida

Street, should be vacated and that issue remanded to the trial court for further findings of facts which are reasonably subject to appellate review to determine to which parties the property should be awarded in an equitable manner in accordance with the statute and case law. The actual divorce is not to be disturbed.

Respectfully submitted,


Boyd M. Fullmer
Attorney-at-Law

CERTIFICATE OF MAILING

I certify that I mailed a copy the foregoing brief to Mr. David A. McPhie, attorney for the Defendant and Appellee, at 2105 E. Murray-Holladay Road, Salt Lake City, UT 84117, by placing the same addressed to him with postage prepaid in the United States mail on this 28 day of January 1993.



Boyd M. Fuller

ADDENDUM

Section 30-3-4 Utah Code Annotated

Section 30-3-5 Utah Code Annotated

Rule 3 Utah Rules of Appellate Procedure

Rule 52(a) Utah Rules of Civil Procedure

Rule 58(A) Utah Rules of Civil Procedure

Rule 60(B) (3) (7) Utah Rules of Civil Procedure

Findings of Fact

Conclusions of Law

Decree of Trial Court

Decree of Divorce of Trial Court

30-3-4. Pleadings — Findings — Decree — Sealing.

(1) The complaint shall be in writing and signed by the plaintiff or plaintiff's attorney. A decree of divorce may not be granted upon default or otherwise except upon legal evidence taken in the cause. All hearings and trials for divorce shall be held before the court or the court commissioner as provided by Section 78-3-31 and rules of the Judicial Council. The court or the commissioner in all divorce cases shall make and file findings and decree upon the evidence.

(2) The file, except the decree of divorce, may be sealed by the court upon the written request of either party and payment of a \$5 fee. The file is then available to the public only upon an order of the court. The concerned parties, the attorneys of record or attorney filing a notice of appearance in the action, the Office of Recovery Services if a party to the proceedings has applied for or is receiving public assistance, the commissioner, or the court have full access to the entire record. This sealing does not apply to subsequent filings to enforce the decree or amend its terms.

History: R.S. 1898 & C.L. 1907, § 1211; L. 1909, ch. 60, § 1; C.L. 1917, § 2999; R.S. 1933 & C. 1943, 40-3-4; L. 1957, ch. 55, § 1; 1961, ch. 59, § 1; 1969, ch. 72, § 2; 1983, ch. 116, § 1; 1985, ch. 151, § 1; 1989, ch. 104, § 1; 1990, ch. 230, § 1; 1991, ch. 5, § 35.

Amendment Notes. — The 1989 amendment, effective April 24, 1989, inserted the subsection designation (1) at the beginning of the section; substituted "or the court commissioner as provided by this chapter and rules of the Judicial Council" for "except that the family court commissioner, upon designation by the preceding judge to serve as a judge pro tem-

pore, master, or referee, and with the agreement of the parties, may hear an uncontested divorce action"; inserted the subsection designation (2); and made numerous stylistic changes.

The 1990 amendment, effective April 23, 1990, substituted "Section 78-3-3.1" for "this chapter" in the third sentence in Subsection (1) and made two stylistic changes in Subsection (2).

The 1991 amendment, effective February 11, 1991, substituted "Section 78-3-31" for "Section 78-3-3.1" in the third sentence of Subsection (1).

30-3-4.1 to 30-3-4.4. Repealed.

Repeals. — Laws 1990, ch. 230, § 4 repeals these sections, as last amended by L. 1989, ch. 104, §§ 2 to 5, providing for the appointment,

authority, duties, and jurisdiction of court commissioners, effective April 23, 1990.

30-3-5. Disposition of property — Maintenance and health care of parties and children — Division of debts — Court to have continuing jurisdiction — Custody and visitation — Termination of alimony — Nonmeritorious petition for modification.

(1) When a decree of divorce is rendered, the court may include in it equitable orders relating to the children, property, debts or obligations, and parties. The court shall include the following in every decree of divorce:

- (a) an order assigning responsibility for the payment of reasonable and necessary medical and dental expenses of the dependent children;
- (b) if coverage is available at a reasonable cost, an order requiring the purchase and maintenance of appropriate health, hospital, and dental care insurance for the dependent children; and

Repeals. Laws 1990, ch. 230, § 4 repeals these sections, as last amended by L. 1989, ch. 104, §§ 2 to 5, providing for the appointment, missioners, effective April 29, 1991.

30-3-5. Disposition of property — Maintenance and health care of parties and children — Division of debts — Court to have continuing jurisdiction — Custody and visitation — Termination of alimony — Nonmeritorious petition for modification.

(1) When a decree of divorce is rendered, the court may include in it equitable orders relating to the children, property, debts or obligations, and parties. The court shall include the following in every decree of divorce:

(a) an order assigning responsibility for the payment of reasonable and necessary medical and dental expenses of the dependent children;

(b) if coverage is available at a reasonable cost, an order requiring the purchase and maintenance of appropriate health, hospital, and dental care insurance for the dependent children; and

(c) pursuant to Section 15-4-6.5:

(i) an order specifying which party is responsible for the payment of joint debts, obligations, or liabilities of the parties contracted or incurred during marriage;

(ii) an order requiring the parties to notify respective creditors or obligees, regarding the court's division of debts, obligations, or liabilities and regarding the parties' separate, current addresses; and

(iii) provisions for the enforcement of these orders.

(2) The court may include, in an order determining child support, an order assigning financial responsibility for all or a portion of child care expenses incurred on behalf of the dependent children, necessitated by the employment or training of the custodial parent. If the court determines that the circumstances are appropriate and that the dependent children would be adequately cared for, it may include an order allowing the noncustodial parent to provide the day care for the dependent children, necessitated by the employment or training of the custodial parent.

(3) The court has continuing jurisdiction to make subsequent changes or new orders for the support and maintenance of the parties, the custody of the children and their support, maintenance, health, and dental care, or the distribution of the property and obligations for debts as is reasonable and necessary.

(4) In determining visitation rights of parents, grandparents, and other relatives, the court shall consider the welfare of the child.

(5) Unless a decree of divorce specifically provides otherwise, any order of the court that a party pay alimony to a former spouse automatically terminates upon the remarriage of that former spouse. However, if the remarriage is annulled and found to be void ab initio, payment of alimony shall resume if the party paying alimony is made a party to the action of annulment and his rights are determined.

(6) Any order of the court that a party pay alimony to a former spouse terminates upon establishment by the party paying alimony that the former spouse is residing with a person of the opposite sex. However, if it is further established by the person receiving alimony that that relationship or association is without any sexual contact, payment of alimony shall resume.

(7) When a petition for modification of child custody or visitation provisions of a court order is made and denied, the court may order the petitioner to pay the reasonable attorney's fees expended by the prevailing party in that action, if the court determines that the petition was without merit and not asserted in good faith.

History: R.S. 1898 & C.L. 1907, § 1212; L. 1909, ch. 109, § 4; C.L. 1917, § 3000; R.S. 1933 & C. 1943, 40 3-5; L. 1969, ch. 72, § 3; 1975, ch. 81, § 1; 1979, ch. 110, § 1; 1981, ch. 13, § 1; 1985, ch. 72, § 1; 1985, ch. 100, § 1; 1991, ch. 257, § 1.

Amendment Notes. The 1991 amendment, effective April 29, 1991, inserted "debts or obligations" in the introductory paragraph of Subsection (1), added Subsection (1)(c), and inserted "and obligations for debts" near the end of Subsection (3).

Timely filing.

When a motion for summary disposition was clearly meritorious, it would support a suspension of the time limitation contained in Rule 10; Utah R. App. P. Bailey v. Adams, 798 P.2d 1142 (Utah Ct. App. 1990).

TITLE II.

APPEALS FROM JUDGMENTS AND ORDERS OF TRIAL COURTS.

Rule 3. Appeal as of right; how taken.

(a) **Filing appeal from final orders and judgments.** An appeal may be taken from a district, juvenile, or circuit court to the appellate court with jurisdiction over the appeal from all final orders and judgments, except as otherwise provided by law, by filing a notice of appeal with the clerk of the trial court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the appellate court deems appropriate, which may include dismissal of the appeal or other sanctions, short of dismissal, as well as the award of attorney fees.

(b) **Joint or consolidated appeals.** If two or more parties are entitled to appeal from a judgment or order and their interests are such as to make joinder practicable, they may file a joint notice of appeal or may join in an appeal of another party after filing separate timely notices of appeal. Joint appeals may proceed as a single appeal with a single appellant. Individual appeals may be consolidated by order of the appellate court upon its own motion or upon motion of a party, or by stipulation of the parties to the separate appeals.

(c) **Designation of parties.** The party taking the appeal shall be known as the appellant and the adverse party as the appellee. The title of the action or proceeding shall not be changed in consequence of the appeal, except where otherwise directed by the appellate court. In original proceedings in the appellate court, the party making the original application shall be known as the petitioner and any other party as the respondent.

(d) **Content of notice of appeal.** The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment or order, or part thereof, appealed from; shall designate the court from which the appeal is taken; and shall designate the court to which the appeal is taken.

(e) **Service of notice of appeal.** The party taking the appeal shall give notice of the filing of a notice of appeal by serving personally or mailing a copy thereof to counsel of record of each party to the judgment or order, or, if the

party is not represented by counsel, then on the party at the party's last known address.

(f) **Filing and docketing fees in civil appeals.** At the time of filing any notice of separate, joint, or cross appeal in a civil case, the party taking the appeal shall pay to the clerk of the trial court such filing fees as are established by law, and also the fee for docketing the appeal in the appellate court. The clerk of the trial court shall not accept a notice of appeal unless the filing and docketing fees are paid.

(g) **Docketing of appeal.** Upon the filing of the notice of appeal and payment of the required fees, the clerk of the trial court shall immediately transmit one copy of the notice of appeal, showing the date of its filing, together with the docketing fee, to the clerk of the appellate court. Upon receipt of the copy of the notice of appeal and the docketing fee, the clerk of the appellate court shall enter the appeal upon the docket. An appeal shall be docketed under the title given to the action in the trial court, with the appellant identified as such, but if the title does not contain the name of the appellant, such name shall be added to the title.

Advisory Committee Note.—The designation of parties is changed to conform to the designation of parties in the federal appellate courts.

The rule is amended to make clear that the mere designation of an appeal as a "cross appeal" does not eliminate liability for payment of the filing and docketing fees. But for the

order of filing, the cross-appellant would have been the appellant and so should be required to pay the established fees.

Cross-References. Circuit courts, appeals from § 78-4-11.

Justice courts, appeals from § 78-5-120.

Juvenile courts, appeals from § 78-5a-51.

action, to prove permanence of injuries and to warrant instructions to jury thereon, 18, A L R 3d 170.

Propriety and effect, in eminent domain proceeding, of instruction to the jury as to landowner's unwillingness to sell property, 20 A L R 3d 1081.

Verdict-urging instructions in civil case

A L R 3d 101.

Federal Rules of Civil Procedure, construction and effect of provision in Rule 51, and similar state rules, that counsel be given opportunity to make objections to instructions out of hearing of jury, 1 A L R Fed 810.

Key Numbers. Trial 182 to 206.

Rule 52. Findings by the court.

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A; in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following

UTAH RULES OF CIVIL PROCEDURE

RULE 52

ing the close of the evidence or appear in an opinion or memorandum of decision filed by the court. The trial court need not enter findings of fact and conclusions of law in rulings on motions, except as provided in Rule 41(b). The court shall, however, issue a brief written statement of the ground for its decision on all motions granted under Rules 12(b), 50(a) and (b), 56, and 59 when the motion is based on more than one ground.

(b) Amendment. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made either a motion to amend them, a motion for judgment, or a motion for a new trial.

(c) Waiver of findings of fact and conclusions of law. Except in actions for divorce, findings of fact and conclusions of law may be waived by the parties to an issue of fact.

- (1) by default or by failing to appear at the trial;
 - (2) by consent in writing, filed in the cause;
 - (3) by oral consent in open court, entered in the minutes.
- (Amended effective Jan. 1, 1987.)

Compiler's Notes. — This rule is similar to Rule 52, F.R.C.P.

Cross-References. Masters, Rule 53.

NOTES TO DECISIONS

Adoption.
Abandonment of contract.
Advisory verdict.
Breach of contract.
Child custody.
Contempt.
Credibility of witnesses.
Denial of motion.
Divorce, decree, modifications.
Eminent domain.
Juvenile action for.
Material issues.
Harmless error.
Submitted by prevailing party.
Court's discretion.

Overruling or vacation.
Another district judge.
Lack of notice.
Child custody awards.
Criminal cases.
Effect.
Preclusion of summary judgment.
Relation to pleadings.
Failure to object to findings.
How findings entered.
Judicial review.
Standard of review.
Conclusions of law.
Criminal cases.
Criminal trials.
Findings of facts by jury.
Juvenile proceedings.
Purpose of rule.
Stipulations.

Rule 58A. Entry.

(a) **Judgment upon the verdict of a jury.** Unless the court otherwise directs and subject to the provisions of Rule 54(b), judgment upon the verdict of a jury shall be forthwith signed by the clerk and filed. If there is a special verdict or a general verdict accompanied by answers to interrogatories returned by a jury pursuant to Rule 49, the court shall direct the appropriate judgment which shall be forthwith signed by the clerk and filed.

(b) **Judgment in other cases.** Except as provided in Subdivision (a) hereof and Subdivision (b)(1) of Rule 55, all judgments shall be signed by the judge and filed with the clerk.

(c) **When judgment entered; notation in register of actions and judgment docket.** A judgment is complete and shall be deemed entered for all purposes, except the creation of a lien on real property, when the same is signed and filed as herein above provided. The clerk shall immediately make a notation of the judgment in the register of actions and the judgment docket.

(d) **Notice of signing or entry of judgment.** The prevailing party shall promptly give notice of the signing or entry of judgment to all other parties and shall file proof of service of such notice with the clerk of the court. However, the time for filing a notice of appeal is not affected by the notice requirement of this provision.

(e) **Judgment after death of a party.** If a party dies after a verdict or decision upon any issue of fact and before judgment, judgment may nevertheless be rendered thereon.

(f) **Judgment by confession.** Whenever a judgment by confession is authorized by statute, the party seeking the same must file with the clerk of the court in which the judgment is to be entered a statement, verified by the defendant, to the following effect:

(1) If the judgment to be confessed is for money due or to become due, it shall concisely state the claim and that the sum confessed therefor is justly due or to become due;

(2) If the judgment to be confessed is for the purpose of securing the plaintiff against a contingent liability, it must state concisely the claim and that the sum confessed therefor does not exceed the same;

(3) It must authorize the entry of judgment for a specified sum. The clerk shall thereupon endorse upon the statement, and enter in the judgment docket, a judgment of the court for the amount confessed, with costs of entry, if any.

(Amended effective Sept. 4, 1985; Jan. 1, 1987.)

Advisory Committee Note. — Paragraph (d) is intended to remedy the difficulties suggested by *Thompson v. Ford Motor Co.*, 14 Utah 2d 334, 384 P.2d 109 (1963).

Compiler's Notes. — The subject matter of this rule is dealt with in Rules 55 and 78(a), F.R.C.P.

Cross-References. — Judgment against person dying after verdict or decision, not a lien on realty, § 78-22-1. Judgment by confession authorized, § 78-22-3.

NOTES TO DECISIONS

ANALYSIS

Death of party
—During appeal.
Other cases.

—Unsigned minute entry.

When entered.

—Completion.

—Formal judgment.

—Notice to parties.

—Filing.

—Unsigned minute entry.

Cited.

Death of party.

—entered, action was still pending between parties. *Yusky v. Chief Consol. Mining Co.*, 65 Utah 269, 236 P. 452 (1925).

—Notice to parties.

Under this rule, a judgment is complete and is deemed entered for all purposes when it is signed and filed, and not when notice is received by the parties. *In re Budy v. Estate*, 121 Utah 299, 241 P.2d 452 (1952).

Where a losing party moved to set aside the judgment against her within about a month after learning that the judgment had been entered, and her ignorance of the judgment until that time was due in part to a lack of notice.

Juror's voir dire denial or nondisclosure of acquaintance or relationship with attorney in case, or with partner or associate of such attorney, as ground for new trial or mistrial, 64 A.L.R.3d 126.

Amendment, after expiration of time for filing motion for new trial, in civil case, of motion made in due time, 69 A.L.R.3d 845.

Authority of state court to order jury trial in civil case where jury has been waived or not demanded by parties, 9 A.L.R.4th 1041.

Deafness of juror as ground for impeaching verdict, or securing new trial or reversal on appeal, 38 A.L.R.4th 1170.

Jury trial waiver as binding on later state civil trial, 48 A.L.R.4th 747.

Court reporter's death or disability prior to transcribing notes as grounds for reversal or new trial, 57 A.L.R.4th 1049.

Excessiveness or adequacy of compensatory damages for personal injury to or death of seaman in actions under Jones Act, (46 USCS Appx. § 688) or doctrine of unseaworthiness—modern cases, 96 A.L.R. Fed. 541.

Excessiveness or adequacy of awards of damages for personal injury or death in actions under Federal Employers' Liability Act (45 USCS §§ 51 et seq)—modern cases, 97 A.L.R. Fed. 189.

Key Numbers. — New Trial 13 et seq., 110, 116.

Rule 60. Relief from judgment or order.

(a) **Clerical mistakes.** Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) **Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.** 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) when, for any cause, the summons in an action has not been personally served upon the defendant as required by Rule 4(e) and the defendant has failed to appear in said action; (5) the judgment is void; (6) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; 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 Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain 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 any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Compiler's Notes. — This rule is similar to Rule 60, F.R.C.P.

Cross-References. — Fee for filing motion

to set aside judgment, §§ 78-3-16.5, 78-4-24, 78-6-14, Appx G, Code of Judicial Administration.

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McPHIE, CONDIE & PECK
Attorneys for Defendant
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Salt Lake City, Utah 84117
(801) 278-3700

SALT LAKE COUNTY
By [Signature]
Deputy Clerk

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

-----ooOoo-----
LAMAR GREENE MITCHELL, :
 : FINDINGS OF FACT AND
 : CONCLUSIONS OF LAW -
Plaintiff, :
 :
 :
vs. :
 :
 :
MARLENE CAROL MITCHELL, :
 : Civil No. 904904611
 :
Defendant. : Judge Homer F. Wilkinson
 :
 :
-----ooOoo-----

The matter of the above caption divorce came on for hearing on an uncontested basis before the Honorable Judge Homer Wilkinson in his courtroom located at 240 East 400 South, Salt Lake City, Utah, on Tuesday the 25th day of February, 1992 at the hour of 8:50 a.m.

The defendant appeared in person in support of her Counter Claim, and through her attorney of record, David A. McPhie.

The court noted that it had previously entered an Order on the defendant's Motion for Sanctions in which the original Complaint of the plaintiff in this matter was stricken, and his default entered. The court entertained testimony from the defendant supporting residency and grounds as alleged in her Counter Petition.

The court having testimony of the defendant, having considered the file, and good cause

FINDINGS OF FACT

1. Plaintiff and defendant are husband and wife having been married on August 12, 1974 in Salt Lake City, Salt Lake County, State of Utah.

2. Both parties were residents of Salt Lake County for the three month period immediately prior to the filing of the Complaint in this matter.

3. That during the course of the marriage irreconcilable differences arose between the parties which make its continuation impossible.

4. The parties had born to them as issue of this marriage one minor child, namely Tyler LaMar Mitchell, who was born September 15, 1977, who is currently age 14.

5. The court finds that it is reasonable and equitable that the child's natural mother be awarded its care, custody, and control, subject to reasonable rights of visitation for the plaintiff.

6. The court further finds that the plaintiff should be required to pay to the defendant as and for child support the sum of \$122.00 per month in two equal installments, one due on the 5th and one of the 20th of each month. The court further finds that said child support should continue until the parties minor child, Tyler reaches the age of 18 or graduates with his regular high school class, which ever occurs later.

7. The court further finds that the plaintiff should be required to pay to the defendant

8. The court further finds that the defendant should be awarded the home and real estate of the parties located at 2183 Oneida Street, free and clear of any claim of the plaintiff, and that the plaintiff should be ordered to sign a Quit-Claim Deed relinquishing to the defendant all of his right, title, and interest in said home and real estate. Further, that the defendant should deliver said Quit Claim Deed within 10 days of the entry of a Decree of Decree in this matter. Further, that the defendant should be awarded said home and real estate, subject to the indebtedness thereon, if any, and with the requirement that she hold the plaintiff harmless thereon.

9. The court further finds that the plaintiff should be awarded all the parties right, title, and interest in two pieces of real estate, one of which is a 5 acre parcel located in Salt Lake County, known as Lot 7, South Oquirrh Estates, and the other which is a property on approximately 5th North and 8th West, in Salt Lake County. Further, that the defendant should be ordered to execute and deliver to the plaintiff a quit claim deed relinquishing all of her right, title, and interest in said properties to the plaintiff, and the plaintiff should hold the defendant harmless from any liability thereon.

10. The court further finds that the parties have been separated for a lengthy period of time and that their personal property has already been divided between them in a manner they believe is fair and equitable. Specifically, the defendant should be awarded all of her IRA's, Tyler's college fund, her retirement benefits, and business interests free and clear of any claim of the plaintiff. Specifically, the plaintiff should be awarded the 1977 Ford deluxe pickup truck and camper, with the requirement that he pay the debt and obligation thereon. Further, the

plaintiff should be awarded ~~any and clear of any~~ claim of the defendant. Further, that the plaintiff should be awarded any retirement benefits he acquired during the course of the marriage as his sole and separate property. Otherwise, each of the parties should be awarded those items of personal property in their possession as if the date of this Decree as their sole and separate property.

11. The court further finds that the plaintiff should be awarded any and all proceeds which may come from the development of his ideas in progress concerning a curry brush for horses, and involving a powder which may be mixed with paint which keeps horses from chewing said paint.

12. The court further finds that the defendant should be awarded all of her costs of court and attorney's fees not previously reduced to judgement in this matter, in the amount of \$2,260.24.

13. The court further finds that the plaintiff should assume and pay all of the marital debts occurred by the parties prior to the date of their separation as his sole and separate debt with the requirements that he hold the defendant harmless from any liability thereon. This should specifically include but not limited to any and all judgements entered against the plaintiff or either of the parties prior to the date of separation and all state federal or local taxes owing to any taxing authority whatsoever.

14. The court further finds that each of the parties should be required to maintain and provide those policies of health and accident insurance on the parties minor child Tyler which may be available to them through their place of employment and that each of them should pay 1/2 of all medical dental orthodontic and optical expenses incurred on behalf of said child

Based on the above Findings of Facts, the court now makes the following:

CONCLUSIONS OF LAW

1. That the defendant is entitled to a Decree of Divorced based on the terms of the Counter Claim on file herein dissolving the bonds of matrimony heretofore existing between the parties, the same to become final upon the signing and entry thereof.

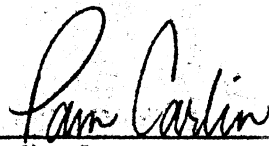
2. That the terms of the Decree of Divorce should be consisted with the terms of the Counter Claim.

DATED this 2 day of March, 1992.


JUDGE HOMER F. WILKENSON

I hereby certify that I mailed a true and correct copy of the foregoing Findings of Fact Conclusions of Law and Decree of Divorce to the following, postage prepaid this 24 day of February, 1992:

LaMar Greene Mitchell
431 West Main Street
Harriman, Utah 84065



Pam Carlin, Secretary

DAVID A. McPHIE (2216)
McPHIE, CONDIE & PECK
Attorneys for Defendant
2105 East Murray-Holladay Road
Salt Lake City, Utah 84117
(801) 278-3700

JUDGEMENT MAR 02 1992

SALT LAKE COUNTY
By DL Deputy Clerk

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

-----ooOoo-----
LAMAR GREENE MITCHELL, :
Plaintiff, : DECREE OF DIVORCE
vs. : 2172448
MARLENE CAROL MITCHELL, : 3-5-92-8:12am
Defendant. : Civil No. 904904611
Judge Homer F. Wilkinson
-----ooOoo-----

The matter of the above caption divorce came on for hearing on an uncontested basis before the Honorable Judge Homer Wilkinson in his courtroom located at 240 East 400 South, Salt Lake City, Utah, on Tuesday the 25th day of February, 1992 at the hour of 8:50 a.m.

The defendant appeared in person in support of her Counter Claim, and through her attorney of record, David A. McPhie.

The court noted that it had previously entered an Order on the defendant's Motion for Sanctions in which the original Complaint of the plaintiff in this matter was stricken, and his default entered. The court entertained testimony from the defendant supporting residency and grounds as alleged in her Counter Petition.

The court having received the testimony of the defendant, having considered the file, and

Conclusions of Law, the court now makes the following:

ORDER, JUDGEMENT, AND DECREE

1. The defendant is awarded a Decree of Divorce from the plaintiff dissolving the bonds of matrimony heretofore existing between the parties, the same to become final upon the signing and entree hereof.

2. The defendant is awarded the care, custody, and control of the parties minor child, Tyler, currently age 14, subject to reasonable rights of visitation for the plaintiff.

3. The plaintiff is ordered to pay to the defendant as and for child support the sum of \$122.00 per month, in two equal installments, one due on the 5th and one of the 20th of each month. The court further orders that said child support be continued until the parties minor child, Tyler reaches the age of 18 or graduates with his regular high school class, which ever occurs later.

4. The plaintiff is ordered to pay to the defendant \$1.00 per year as alimony.

5. The defendant is awarded the home and real estate of the parties located at 2183 Oneida Street, free and clear of any claim of the plaintiff. The plaintiff is ordered to sign a Quit Claim Deed relinquishing to the defendant all of his right title and interest in said home and real estate. Further, the defendant is ordered to execute and deliver to the plaintiff a quit claim deed within 10 days of the entree of a Decree of Decree in this matter. The defendant is awarded

said home and real estate, subject to the lien

6. The plaintiff is awarded all the parties right, title, and interest in two pieces of real estate, one of which is a 5 acre parcel located in Salt Lake County, known as Lot 7, South Oquirrh Estates, and the other which is a property on approximately 5th North and 8th West, in Salt Lake County. Further, the defendant is ordered to execute and deliver to the plaintiff a quit claim deed relinquishing all of her right, title, and interest in said properties to the plaintiff, and the plaintiff should hold the defendant harmless from any liability thereon.

7. The current distribution of personal property is hereby confirmed by the court. Each of the parties is awarded those items of personal property currently in their possession, as their sole and separate property free and clear of any claim of the other, subject to the debt thereon. Specifically, the defendant is awarded all of her IRA's, Tyler's college fund and her retirement benefits, and her business interests free and clear of any claim of the plaintiff. The plaintiff is awarded the 1977 Ford deluxe pickup truck and camper, with the requirement that he pay the debt and obligation thereon. The plaintiff is awarded the 1987 Toyota Camry and the Voltswagon free and clear of any claim of the defendant. Further, that the plaintiff should be awarded any retirement benefits he acquired during the course of the marriage as his sole and separate property.

8. The plaintiff is awarded any and all proceeds which may come from the development of his ideas in progress concerning a curry brush for horses, and involving a powder which may be mixed with paint which keeps horses from chewing said paint.

9. The defendant is awarded of her costs of court and attorney's fees not previously reduced to judgement in this matter, in the amount of \$2,260.24.


10.

parties prior to the date of their separation as his sole and separate debts. with the requirements that he hold the defendant harmless from any liability thereon. Specifically, the plaintiff is ordered to pay any and all judgements against the plaintiff or either of the parties entered prior to the date of their separation, and all state, federal, or local taxes owing to any taxing authority whatsoever, incurred during the marriage.

11. Each of the parties is ordered to maintain and provide those policies of health and accident insurance on the parties minor child, Tyler, which may be available to them through their place of employment, and that each of them should pay 1/2 of all medical, dental, orthodontic, and optical expenses incurred on behalf of said child that insurance will not pay for.

12. The defendant is awarded an Order to Withhold and Deliver as described in the Utah Code Ann. § 62A-11-401, et seq (1953, as amended).

DATED this 2 day of March, 1992.


JUDGE HOMER F. WILKENSON