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Alberta Fanney Gaskill v. Don R. Gaskill : Brief of Appellee

Utah Court of Appeals

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

ALBERTA FANNEY GASKILL a/k/a LEE OR LEA GASKILL,

Plaintiff/Appellee,

v.

DON R. GASKILL,

Defendant/Appellant.

: Case No. 920632-CA
: Priority No. 16

BRIEF OF APPELLEE

Appeal from a judgment in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable James S. Sawaya, Judge, presiding.

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Plaintiff/Appellee,	:	
v.	:	Case No. 920632-CA
DON R. GASKILL,	:	Priority No. 16
Defendant/Appellant.	:	

JURISDICTIONAL STATEMENT

Jurisdiction is conferred on this Court pursuant to Utah Code Ann. § 78-2a-3(2)(h).

STATUTES, RULES, AND CONSTITUTIONAL PROVISIONS

Utah Code Ann. § 15-1-1(2) provides:

> (2) Unless the parties to a lawful contract specify a different rate of interest, the legal rate of interest for the loan or forbearance of any money, goods, or chose in action shall be 10% per annum.

Utah Code Ann. § 30-4a-1 (enacted 1983) provides:

> 30-4a-1. Authority of court.
> A court having jurisdiction may, upon its finding of good cause and giving of such notice as may be ordered, enter an order nunc pro tunc in a matter relating to marriage, divorce, legal separation or annulment of marriage.

Utah Code Ann. § 78-12-22 provides:

78-12-22. Within eight years.

Within eight years:

An action upon a judgment or decree of any court of the United States or of any state or territory within the United States.

An action to enforce any liability due or to become due, for failure to provide support or maintenance for dependent children.

Rule 4(g)(4) of the Utah rules of Civil procedure, as it existed in 1976 provided[1]:

(g) **Manner of proof.** Within 5 days after service of process, proof thereof shall be made as follows:

. . .

(4) By the written admission or waiver of service by the person to be served, duly acknowledged, or otherwise proved.

Rule 59(e) of the Utah Rules of Civil Procedure provides[2]:

(e) **Motion to alter or amend a judgment.** A motion to alter or amend the judgment shall be served no later than 10 days after entry of the judgment.

Rule 60(b) of the Utah Rules of Civil procedure provides[3]:

(b) **Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud; etc.** On motion and upon such terms as are just, the court may in the

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[1]This rule is embodied in substantially similar form in current Rule 4(h)(5).

[2]This rule has been in effect in its current form since this suit was initiated in 1976.

[3]This rule has been in effect in its current form since this suit was initiated in 1976.

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 any 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.

Rule 4(a) of the Utah Rules of Appellate Procedure provides in pertinent part:

> (a) **Appeal from final judgment and order.** In a case in which an appeal is permitted as a matter of right from the trial court to the appellate court, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 days after the date of entry of judgment or order appealed from.

STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW

1. Whether the court abused its discretion by denying amendment of the original decree nunc pro tunc?

Standard of Review. "A trial court's decision concerning modification of a divorce decree will not be disturbed absent an abuse of discretion." Crouse v. Crouse, 817 P.2d 836, 838 (Utah App. 1991) (citing Hagan v. Hagan, 810 P.2d 478, 481 (Utah App. 1991)). Utah Code Ann. § 30-4a-1 provides that the trial court "may, upon its finding of good cause . . . enter an order nunc pro tunc" in domestic matters. This statute leaves the decision within the sound discretion of the trial court. Although nominally titled a petition to modify a decree nunc pro tunc, R. 34, in effect Mr. Gaskill is again seeking relief from a judgment similar to the relief available under Rule 60(b). "The trial court is afforded broad discretion in ruling on a motion for relief from judgment under Utah R. Civ. P. 60(b), and its determination will not be disturbed absent an abuse of discretion." Birch v. Birch, 771 P.2d 1114, 1117 (Utah App. 1989). Accord, Katz v. Pierce, 732 P.2d 92, 93 (Utah 1986); Russell v. Martell, 681 P.2d 1193, 1194 (Utah 1984).

2. Whether the trial court erred as a matter of law in concluding that Mrs. Gaskill had not waived and was not estopped from asserting her right to alimony?

Standard of review. These matters were submitted on affidavits by stipulation of the parties, R. 87, and a summary judgment standard is therefore applicable.

> Summary Judgment is appropriate only when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. The facts and inferences to be drawn therefrom are viewed in

> the light most favorable to the losing party and are affirmed only where it appears that there is no genuine dispute as to any material issues of fact, or where, even according to the facts as contended by the losing party, the moving party is entitled to judgment as a matter of law. However, it is [the losing party]'s burden to show that there are specific material facts which preclude a grant of summary judgment. Since summary judgment is granted as a matter of law rather than fact, the trial court's legal conclusions are reviewed for correctness.

Hunt v. ESI Eng'g, Inc., 808 P.2d 1137, 1139 (Utah App. 1991) (cites omitted).

3. Whether the trial court erred in calculating the amount of the judgment?

Standard of review. The amount of the judgment constitutes a finding of fact, and will be reversed only if shown to be clearly erroneous. See, e.g., Hinckley v. Hinckley, 815 P.2d 1352, 1353 (Utah App. 1991).

> On appeal, it is the burden of the party seeking to overturn the trial court's decision to "marshall the evidence in support of the findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be 'against the clear weight of the evidence,' thus making them 'clearly erroneous.'"

Hagan v. Hagan, 810 P.2d 478, 481 (Utah App.1991) (quoting In re Estate of Bartell, 776 P.2d 885, 886 (Utah 1989) (quoting State v. Walker, 743 P.2d 191, 193 (Utah 1987))). "If the appellant fails to marshal the evidence, the appellate court assumes that the record supports the findings of the trial court and proceeds to a review of the accuracy of the lower court's conclusions of law and the application of that law in the case." Crouse v. Crouse, 817

P.2d 836, 838 (Utah App. 1991). Accord, Ashton v. Ashton, 733 P.2d 147, 150 (Utah 1987).

4. Whether Mrs. Gaskill is entitled to attorneys' fees incurred in defending this appeal?

Standard of review.

> "'Ordinarily, when fees in a divorce have been awarded below to a party who then prevails on appeal, fees will also be awarded to that party on appeal.'"

Crouse v. Crouse, 817 P.2d 836, 840 (Utah App. 1991) (quoting Bell v. Bell, 810 P.2d 489, 494 (Utah App. 1991)(quoting Burt v. Burt, 799 P.2d 1166, 1171 (Utah App. 1990))).

STATEMENT OF THE CASE AND NATURE OF THE PROCEEDINGS

Lea Gaskill ("Lea") filed for divorce in September, 1976. Don Gaskill ("Don") signed a motion for waiver of the interlocutory period, and a consent and waiver, both of which were prepared by Lea's counsel. The consent and waiver provided that Don "acknowledges the receipt of a copy of the Complaint herein, waives service of Summons upon him, waives time and consents that his default may be entered and that the Court may proceed to hear and determine said cause at any time and without notice to said defendant." Don had handwritten "Omit #8 on Complaint" on the consent and waiver. Paragraph 8 of the complaint is concerned with alimony. Judge Sawaya entered Don's default, decreed the parties divorce, and ordered that Don pay Lea $450.00 per month alimony.

In September 1978, Lea obtained on order to show cause. Mr. Gaskill responded by challenging the original judgment and

attempting to obtain its modification to eliminate alimony. Both sides failed to prosecute, and the judge dismissed both matters without prejudice. The judgment remained in full force, and is to date fully valid.

In August, 1991, Lea domesticated the judgment in the state of Washington and attempted to recover delinquent alimony there. Don reopened the Utah action, again seeking modification of the original judgment nunc pro tunc. Lea moved for entry of judgment. Commissioner Evans, by stipulation of the parties, heard argument and entered his recommendations on matters of law based on submitted affidavits. Don filed an objection, and Judge Sawaya affirmed this objection and entered judgment for Lea Gaskill. This appeal ensued.

STATEMENT OF FACTS

Lea Gaskill ("Lea") filed for divorce from Don Gaskill ("Don") on September 8, 1976 by means of a verified complaint. R. 2-4. Also on September 1, Lea and Don signed a "Motion for Waiver of the Interlocutory Period." R. 5. On September 8, Don signed a Consent and Waiver in which he "acknowledges the receipt of a copy of the Complaint herein, waives service of Summons upon him, waives time and consents that his default may be entered and that the Court may proceed to hear and determine said cause at any time and without notice to said defendant." In Don's handwriting is written "Omit #8 on Complaint". R. 6. The "Motion for Waiver of the

Interlocutory Period" and "Consent and Waiver" were filed in the court by Lea on September 15, 1976. R. 5, 6.

Paragraph 8 of the complaint states in its entirety:

> 8. That the defendant pay the plaintiff $700.00 per month alimony for a period of 30 months, after which time the defendant has agreed to pay the plaintiff $450.00 per month for the remainder of her life, providing, however, that should the plaintiff re-marry all alimony payments shall cease forthwith.

R. 3.

Don Gaskill made no further appearance prior to entry of judgment. The court entered findings of fact and conclusions of law noting the waiver signed by Mr. Gaskill, entering his default and awarding Lea Gaskill judgment for alimony in the amount of $450.00 per month until death or remarriage. R. 8-10. The court signed a judgment and decree on December 30, 1976, which was duly entered on December 31, 1976. R. 11.

Lea filed on affidavit in support of an order to show cause on April 12, 1978, R. 13, and obtained an order to show cause signed by Judge Leary on September 8, 1978, ordering Don Gaskill's appearance. R. 14. Mr. Gaskill filed an "Affidavit in Support of Motion to Amend Decree of Divorce" on October 23, 1978, premised on Rule 60(b)(7). R. 18-20. This affidavit claims, inter alia, that Mr. Gaskill was unaware that a judgment for alimony had been entered until he was served with the show cause order, R. 19 at ¶9, which was served on him on September 15, 1978, R. 16.

Hearing was held on November 21, 1978, and respective counsel for both plaintiff and defendant were requested to file memoranda. R. 24. On July 2, 1979, after neither party had

submitted a memorandum, the court on its own motion dismissed the matter without prejudice. R. 25.

No further activity occurred until Lea domesticated the judgment in Washington and sought delinquent alimony in Superior Court of Washington County, State of Washington, on August 19, 1991. See R. 79, ¶12.

On December 10, 1991, Mr. Gaskill filed a "Verified Petition to Modify Decree" in the Third District Court in Utah. R. 34-37. Lea subsequently filed a motion for entry of judgment for delinquent alimony. R. 47-52.

By stipulation of the parties, Commissioner Evans reviewed affidavits and heard argument on legal issues. The Commissioner ruled in favor of Lea, R. 87-93. Don Gaskill objected. R. 94-5. Judge Sawaya affirmed, R. 110, and entered judgment for $81,239.36. R. 114. Counsel for Don Gaskill made no effort to correct the amount of the judgment in the trial court by objecting to the proposed form of judgment, or by motion under rules 59(a) or 60, but instead appealed immediately.

Lea Gaskill was awarded her attorney's fees by minute entry dated November 12, 1992, see Addendum A, and an Order Awarding Attorney's Fees dated December 2, 1992, see Addendum B. Mr. Gaskill has not appealed from this ruling.

SUMMARY OF THE ARGUMENT

The court's ruling is proper and should be affirmed. Mr. Gaskill submitted himself to the jurisdiction of the court by

signing the consent and waiver on September 8, 1976. Regardless of the merits of Mr. Gaskill's claims with respect to the validity of the judgment, Mr. Gaskill failed to prosecute his challenge to the validity of the judgment when he became aware in 1978 that the judgment existed. As a result, the judgment has stood with full force and effect.

The court did not abuse its discretion by denying Mr. Gaskill's motion for modification of the alimony order nunc pro tunc. The original judgment and decree of divorce is in all regards proper, and Mr. Gaskill failed to challenge the judgment in a proper, timely fashion.

Mrs. Gaskill has not waived her rights to alimony, and is not estopped from asserting such rights. Mr. Gaskill cannot point to any written agreement, any parol agreement, or any action on the part of Lea that would preclude her recovery. Except as limited by the eight year statute of limitations, Mrs. Gaskill is entitled to full recovery of the alimony owing by Mr. Gaskill.

Mr. Gaskill failed to make a record below, and has failed to marshal the evidence in support of the court's ruling as to the amount. Absent proper marshaling, this Court should assume that the record supports the trial court's ruling.

Mrs. Gaskill was awarded her attorney's fees below, and is entitled to attorney's fees on appeal.

ARGUMENT

POINT I. THE ORIGINAL 1976 JUDGMENT AND DECREE OF DIVORCE IS PROPER AND VALID IN ALL RESPECTS; THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DECLINING TO MODIFY IT NUNC PRO TUNC.

A. MR. GASKILL SIGNED A VALID WAIVER, SUBMITTING HIMSELF TO THE JURISDICTION OF THE COURT.

Similar to current Rule 4(h)(5), Rule 4(g)(4) (as it existed in 1976) provided:

> (g) **Manner of proof.** Within 5 days after service of process, proof thereof shall be made as follows:
> . . .
> (4) By the written admission or waiver of service by the person to be served, duly acknowledged, or otherwise proved.

In the instant case, Mr. Gaskill executed a fully valid and effective waiver. It stated that he:

> acknowledges the receipt of a copy of the Complaint herein, waives service of Summons upon him, waives time and consents that his default may be entered and that the Court may proceed to hear and determine said cause at any time and without notice to said defendant.

R. 6.

The waiver signed by Mr. Gaskill comports with all the requirements of Rule 4(g)(4). In Locke v. Peterson, 285 P.2d 1111, 1112 (Utah 1955), the Utah Supreme Court held that a waiver signed in the presence of plaintiff's attorney would comport with the rule where the attorney represented to the court that it in fact was the defendant's signature on the waiver. In this case, Mr. Gaskill's signature was properly acknowledged by a notary public. Nothing

more is required. The waiver signed by Mr. Gaskill gave the court in personam jurisdiction over Mr. Gaskill.

Even without the waiver signed by Mr. Gaskill, his signature on the "Motion For Waiver of the Interlocutory Period" constitutes a general appearance subjecting Mr. Gaskill to the court's jurisdiction. "[I]f a party asks the court for affirmative relief, that party is subject to the court's jurisdiction." Nunley v. Nunley, 757 P.2d 473, 475 (Utah App. 1988) (citing Downey State Bank v. Major-Blakeney Corp., 545 P.2d 507, 510 (Utah 1976).

The court had valid in personam jurisdiction to enter an award of alimony under either the Consent and Waiver, or by reason of Mr. Gaskill's request for affirmative relief in waiving the interlocutory period. Mr. Gaskill's remarriage has forced him to argue that he submitted to conditional jurisdiction rather than challenge jurisdiction in its entirety, since he obviously could not remarry if his prior divorce decree was void for lack of jurisdiction. However, Mr. Gaskill cites no authority for the proposition that an appearance can be anything other than special (to challenge jurisdiction) or general (and hence unconditional). The "conditional appearance doctrine" that Mr. Gaskill would have this Court adopt does not appear to exist anywhere, much less in Utah.

B. MR. GASKILL WAS PROPERLY DEFAULTED AFTER HE FAILED TO ANSWER.

Mr. Gaskill failed to file an answer or otherwise present defenses. Seventy days after Mr. Gaskill signed the waiver of

service of summons, a hearing was held on the merits. R.7 The trial court duly noted the default of Mr. Gaskill, see Rule 55, U.R.C.P., and entered judgment accordingly.

Mr. Gaskill now asserts that he did not consent to entry of a judgment for alimony. However, Lea does not rely on the language in the waiver to support entry of judgment. Mr. Gaskill's interlineated terms may be sufficient to prevent entry of a default judgment which includes alimony based solely on the waiver. But after Mr. Gaskill waived service, and after his default, the court was justified in entering judgment in accordance with the terms of the complaint irrespective of what, if anything, the waiver said with respect to entry of a default judgment. See Rule 55(b). Regardless of whether or not Mr. Gaskill intended to consent to a judgment for alimony, his waiver establishes jurisdiction, and his failure to answer or present defenses operates as a matter of law to allow the court to enter a default judgment for the relief sought in the complaint.

If this Court grants Mr. Gaskill the relief it now seeks, it will effectively eliminate the availability of acceptance of service in conformity with Rule 4(h)(5). Parties would hereafter waive service, but object to entry of any adverse judgment by interlineating "Omit prayer for relief" on the waiver. Thereafter, if judgment is rendered for plaintiff, defendant has only to assert that there was no personal jurisdiction against him to effectively eliminate the judgment. To guard against this, parties would be required to utilize actual service. Mr. Gaskill's claims thus

conflict with the Utah Rules of Civil Procedure, which allow waiver of service. See, e.g., Soltanieh v. King, 826 P.2d 1076, 1078 (Utah App. 1992) (defendant residing in Iran submitted himself to court's jurisdiction in divorce proceeding by signing waiver and consent). Mr. Gaskill's contentions are not and should not be the law in Utah. Mr. Gaskill was properly defaulted.

C. MR. GASKILL FAILED TO PROSECUTE HIS CHALLENGE TO THE VALIDITY OF THE JUDGMENT IN A TIMELY MANNER.

Default judgments are admittedly harsh; however, parties are required to accept the consequences of their own actions. Nobody forced Mr. Gaskill to sign the waiver of service. Had he refused, Mrs. Gaskill would have served him in the traditional manner, and Mr. Gaskill would be precluded from making the challenges to the original judgment and decree that he currently presents on this appeal. He cannot have it both ways. His signed and sworn statement states that he consented to the court's jurisdiction. He cannot now assert that such consent was conditional upon an ambiguous, hand-written interlineation to an otherwise clear document.

Mr. Gaskill had his opportunity to contest the judgment in 1978, but declined to carry the action through to its conclusion. The court only wanted the matter briefed before it ruled on the merits. Mr. Gaskill did not follow through.

Mr. Gaskill had his opportunities to address this issue and waived them. He could have filed an answer in 1976 and

litigated this matter to its conclusion, but he chose not to do so. He could have litigated this issue in 1978, but he failed to submit the memorandum requested by the court, and the matter was dismissed without prejudice. He could have challenged this dismissal, but again chose not to do so. Mr. Gaskill has placed himself in the situation where he finds himself. He must live with the results of his own actions.

Rule 60 provides that a motion for relief from a judgment may be made within a "reasonable time." In Workman v. Nagle Constr. Co., 802 P.2d 749 (Utah App. 1990), the defendant did not receive notice of the judgment until over a year after it was entered. Within a month after learning of the judgment, defendant moved under Rule 60(b) to set the judgment aside. The Court of Appeals held that the motion was timely. In so doing, it stated:

> If a party has had notice of the judgment but has nevertheless remained idle in attacking it in the court of rendition or in appealing it, that lack of diligence is a strong reason not to disturb the judgment.

Id. at 751.[4]

Workman demonstrates that courts are receptive to reviewing the propriety of default judgments where the judgment debtor is not notified of the judgment, but only if the debtor takes prompt action after becoming apprised of the existence of the judgment, and prosecutes the matter diligently. Mr. Gaskill was sufficiently

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[4]In contrast to the present case, the Workman court relied in part on plaintiff's failure to give notice of entry of judgment under Rule 58A(d) (as amended 1985). Lea Gaskill in this case had no corresponding obligation under the Utah Rules of Civil Procedure in effect in 1976.

prompt in challenging the propriety of the judgment soon after he learned of its existence, but he failed to prosecute the matter to a final determination. His attempt to have the issue addressed now, over a dozen years later, is untimely and must fail.

In Heath v. Heath, 541 P.2d 1040 (Utah 1975), a husband moved to vacate a default divorce decree three and one-half years after it was entered. The Supreme Court noted his failure to file any answer for over two months, at which time default judgment was entered. "He then slept on his alleged rights for 3½ years, when belatedly he attempted to rectify his failure to plead and protraction, by filing a motion to vacate the decree on the strength of several false assumptions . . ." Id. at 1041. The Supreme Court declined to grant him any relief. The final paragraph of the opinion is prophetic for Mr. Gaskill:

> We believe and hold that the lower court did not err, but that under the Rules, the authorities and the circumstances extant here, the defendant did by urging too little too late.

Id.

Mr. Gaskill can fare no better. In this case, Mr. Gaskill learned of the judgment at the latest in September of 1978. He filed a motion, but failed to follow through. He now seeks the same relief sought over 14 years ago, four times as long as the period found in Heath to be excessive. Under Rule 60(b), he is untimely. He is obviously also untimely under Rule 59(b) and under Rule 4(a) of the Rules of Appellate procedure.

D. THE TRIAL COURT PROPERLY FOUND THAT THERE WAS NO "GOOD CAUSE" UNDER § 30-4a-1 FOR ENTRY OF AN ORDER OF NO ALIMONY NUNC PRO TUNC.

Having failed to take timely action under the rules, Mr. Gaskill is forced to make his last ditch effort under Utah Code Ann. § 30-4a-1.

Mr. Gaskill does not address the issue as to retroactive application of § 30-4a-1, enacted in 1983, to modify a decree entered in 1976. Utah Code Ann. § 68-3-3 provides "[n]o part of these revised statutes is retroactive, unless expressly so declared." Although the general statutory non-retroactivity rule has been held not to apply if a statute is merely procedural, see State Dep't of Social Services v. Higgs, 656 P.2d 998, 1000 (Utah 1982), "[e]very amendment not expressly characterized as a clarification carries the rebuttable presumption that it is intended to change existing legal rights and liabilities." State v. Amador, 804 P.2d 1233, 1234 (Utah App. 1990). Mr. Gaskill has not even attempted to rebut this presumption.

Even if § 30-4a-1 is applicable, Mr. Gaskill is not entitled to relief. Controlling precedent shows that Mr. Gaskill did not present evidence sufficient to support a showing of good cause, and that he seeks to use Utah Code Ann. § 30-4a-1 for an improper purpose. Bagshaw v. Bagshaw, 788 P.2d 1057 (Utah App. 1990) is determinative:

> While section 30-4a-1 has a broad remedial scope, it does not abrogate all the common law trappings of nunc pro tunc law. At common law, nunc pro tunc allowed a court to correct its earlier error or supply its omission so the record accurately reflected that

which in fact had taken place. Preece v. Preece, 682 P.2d 298, 299 (Utah 1984); Horne[v. Horne], 737 P.2d [244] at 246 [(Utah App. 1987)]. Cases in which courts traditionally have applied the nunc pro tunc doctrine fall into two categories:

> (1) those in which one of the parties died after the submission of the case to the lower court for its decision, but before the actual rendition of judgment; and (2) those in which a judgment has in fact been rendered by the lower court, but the clerk has failed to perform the ministerial function of entry.

6A J. Moore, Moore's Federal Practice ¶ 58.08 (1989).

The second category is based upon the principle that "where the delay in rendering judgment or decree arises from the act of the court, that is, where the delay has been for its convenience, or has been caused by the multiplicity or press of business or the intricacy of the questions involved, or of any other cause not attributable to the laches of the parties, but within the control of the court; the judgment or the decree may be entered retrospectively...." Mitchell v. Overman, 103 U.S. 62, 64-65, 26 L.Ed. 369 (1881) (emphasis added); see also 6A J. Moore, Moore's Federal Practice ¶ 58.08 (1989).

These general principles of the common law of nunc pro tunc are relevant, if not controlling, in a determination of good cause under section 30-4a-1. In this case, the court did not make the clerical error, but taking the facts in the light most favorable to the Husband, Husband did. It is undisputed that the court never received the written stipulation mentioned in the minute entry. Thus, this alone could support a finding of lack of 'good cause' under section 30-4a-1.

Furthermore, a nunc pro tunc order must, even under the more liberal requirements of section 30-4a-1, still be entered for the purpose of making the record reflect what actually was meant to happen at a prior time.

Bagshaw v. Bagshaw, 788 P.2d 1057, 1060-61 (Utah App. 1990) (emphasis added).

Mr. Gaskill does not seek to use § 30-4a-1 to make the record reflect what actually occurred in 1976. To the contrary, he

seeks to change the order that in fact was properly entered in 1976. Mr. Gaskill seeks to circumvent the time requirements of Rules 59 and 60, and/or the procedural requirements of Utah Code Ann. § 30-3-5. "Installments of support payments ordered in a divorce decree become vested in the recipient when they become due." Coleman v. Coleman, 664 P.2d 1155, 1157 (Utah 1983) (citing Bates v. Bates, 560 P.2d 706 (Utah 1977); Larsen v. Larsen, 561 P.2d 1077 (Utah 1977)). Mr. Gaskill should have litigated this matter in 1978, before the alimony installments Mrs. Gaskill now seeks to collect vested in her.

In the present case, the court did not make any clerical errors. The trial judge read the Waiver and Consent, read the complaint, and noted Mr. Gaskill's default. He further noted that Mrs. Gaskill sought initial alimony of $700.00 per month for 30 months, then $450.00 per month thereafter. The court, acting in the interests of justice, determined that $450.00 per month would be adequate, and entered its judgment to that effect.

Any mistakes made were made by Mr. Gaskill. He failed to fully apprise the court that he did not consent to entry of a judgment for alimony. The interlineated statement on the Waiver and Consent is ambiguous at best. It is not the trial court's or Mrs. Gaskill's responsibility to "attempt to advise defendant to seek legal counsel before or after he signed the consent and waiver," Appellants brief at 30, nor is it "incumbent upon the trial court to require that an opportunity to be heard be given Mr. Gaskill," Appellants brief at 32.

It was Mr. Gaskill's responsibility to make his position clear to the judge, either through counsel, in person, or otherwise. His hand-written interlineation "Omit #8 on Complaint" obviously failed. Furthermore, the Utah Constitution adequately "require[d] that an opportunity to be heard be given Mr. Gaskill." Article I Section 11 provides:

> **Sec. 11. [Courts open -- Redress of Injuries.]** All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

Mr. Gaskill had full opportunity to appear, but declined to do so in 1976, or to litigate to judgment in 1978. He waited too long.

The trial court's finding that there was no "good cause" under § 30-4a-1 is not clearly erroneous; the trial court's failure to modify the 1976 divorce decree nunc pro tunc is not an abuse of discretion.

POINT II. LEA GASKILL HAS NOT WAIVED HER RIGHT TO COLLECT ALIMONY, AND IS NOT ESTOPPED FROM COLLECTING ALIMONY.

A. WAIVER.

This Court has set out a three part test for application of the doctrine of waiver:

> In order for waiver to occur, "there must be an existing right, benefit or advantage, a knowledge of its existence, and an intention to relinquish it." "The party's actions or conduct must evince unequivocally an intent to waive, or must be inconsistent with any other intent." "Whether a right has been waived is generally

> a question of fact and therefore we accord considerable deference to the finder of fact's determination."

Hinckley v. Hinckley, 815 P.2d 1352, 1354 (Utah App. 1991) (quoting Mont Trucking v. Entrada Indus., 802 P.2d 779, 781 (Utah App. 1990).

In this case, the trial court properly found that there was no waiver. There was an existing right, specifically, the alimony provision in the 1976 decree. Lea Gaskill was clearly aware of that right. However, to assert that she ever had an intention to abandon that right is purely fanciful, if not farcical.

No action of Mrs. Gaskill is even asserted -- Mr. Gaskill relies entirely on inactions that occurred during a period when she had a purported duty to act. Mr. Gaskill is attempting to treat the 1978 dismissal without prejudice as though it finally and conclusively determined Mrs. Gaskill's rights. If the 1978 dismissal had been with prejudice, then Lea would have had an obligation to seek relief, identical to the obligation Mr. Gaskill had when the court entered judgment, or, giving him the benefit of the doubt, when he learned of the judgment in 1978, or her rights would be conclusively determined.

When Mr. Gaskill learned of the judgment, he had a limited opportunity to attempt to "correct" what he perceived to be an unjust judgment. When the court dismissed his motion for relief without prejudice, it meant precisely that. But the clock continued to tick away. Mrs. Gaskill's judgment was only limited

by Utah Code Ann. § 78-12-22, the eight year statute of limitations. Mr. Gaskill's motion for relief was limited by the timeliness requirements of Rule 60, and the "good cause" requirements of nunc pro tunc jurisprudence.

Time ran out on both parties. Mrs. Gaskill is limited by the statute of limitations to collecting alimony arrearages for only for the eight years preceding her application. Mr. Gaskill is limited by the finality of the divorce decree entered in 1976.

Mrs. Gaskill's actions have not evinced an unequivocal intent to waive, and are not inconsistent with bringing suit at any later date. Her inaction merely reflects that she and/or her attorney "dropped the ball" at that time, and did not seek to pursue the matter further at that time. Since that time, however, Mrs. Gaskill has unequivocally evinced her intent to pursue these matters at this time. No waiver has occurred.

The case of Hinckley v. Hinckley 815 P.2d 1352 (Utah 1991), relied on by Mr. Gaskill, is distinguishable on its facts. Mr. Hinckley was entitled to reduce alimony payments by one half of Mrs. Hinckley's earnings if she became employed. After Mr. Hinckley became aware that his ex-wife was working, he nevertheless continued to pay alimony in full without requesting the reduction to which he was entitled. These overpayments are affirmative acts, not undertaken by mistake, which are inconsistent with his right to later claim entitlement to these reductions. Mrs. Gaskill did not have to ask for alimony; her entitlement vested each month by

operation of law. Lea Gaskill did not waive her right to collect alimony.

B. ESTOPPEL.

In order to prevail on his theory of estoppel, Mr. Gaskill must prove that Mrs. Gaskill, by her representations or actions, led him to believe he need not pay alimony, and that in reliance on said representations he changed his position to his detriment. Ross v. Ross, 592 P.2d 600, 602-3 (Utah 1979).

The leading case on estoppel to collect alimony is Bagshaw v. Bagshaw, 788 P.2d 1057 (Utah App. 1990). The facts are surprisingly similar to those in the instant case. Mrs. Bagshaw filed a complaint for divorce, seeking $100 per month alimony and $200 per month child support.[5] Mr. Bagshaw,

> unrepresented by counsel, agreed that a default divorce could be entered against him on Wife's complaint. Husband now claims he cannot read and he signed the divorce papers based on Wife's alleged representation that she wanted only child support and some furniture.[6]
>
> A divorce decree was entered on January 10, 1973, which included the amounts of child support and alimony requested in the complaint. After the divorce, Husband learned of the alimony provision and filed an Order to Show Cause seeking modification of the decree to terminate the alimony award.

Id. at 1058.

On the day of hearing in Bagshaw, Husband alleged that the parties' attorneys reached an agreement to terminate alimony.

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[5]The instant case does not involve child support.

[6]Mr. Gaskill is literate, and does not allege that Mrs. Gaskill represented she would not seek alimony.

Wife denied any such agreement was reached. The record did reflect that "a stipulation was reached between the parties and the matter was continued pending a written stipulation and order. However, no stipulation was ever entered into the record." Id. at 1059.

Wife did not seek to enforce the alimony order for over 14 years. Child support payments were collected by the Office of Recovery Services. When Wife attempted to enforce the alimony order, Husband moved to enforce the previous alleged stipulation by entering an order nunc pro tunc terminating alimony, or in the alternative, to find that Wife was estopped from collecting it.

The trial court found that no stipulation was reached and Wife was not estopped from collecting arrearages. This Court affirmed:

> In order to prevail on his theory of estoppel, plaintiff [Husband] must prove that defendant [Wife], by her representations or actions led plaintiff to believe he need not pay alimony or child support, and that plaintiff, in reliance on said representations, changed his position to his detriment. In such a case, enforcement of the decree creates a hardship and injustice to plaintiff, and defendant would be estopped to deny her own misrepresentations, and estopped from claiming unpaid support.

[Ross v. Ross, 592 P.2d 600] at 602-03 [(Utah 1979)] (footnote omitted).

> The trial court heard evidence and found that Wife did not engage in unlawful cohabitation after the entry of the divorce decree nor did her actions otherwise constitute a basis for the termination of alimony. The trial court's findings support a conclusion that Wife should not be estopped from collecting alimony arrearages and we therefore find no error.

Bagshaw, 788 P.2d at 1061. On nearly identical facts, the trial court below found similarly in the present case. Unlike Bagshaw, Mr. Gaskill is not illiterate, there is no allegation that an agreement was reached fifteen years ago, and Mrs. Gaskill has not collected any support, whereas Mrs. Bagshaw collected child support without ever mentioning that she should receive support as well. The facts in Bagshaw are therefore more sympathetic to the husband, yet even in that case no relief was available.

The case of Adams v. Adams, 593 P.2d 147 (Utah 1979), directly addresses the issue of whether an alimony judgment creditor's silence and failure to enforce the judgment for a period of time may work as an estoppel:

> Mere silence on the part of plaintiff is not sufficient to raise an estoppel, and we find nothing in the record to support the Court's finding that she had a duty to speak. . . . The record does not show that [Wife] misled [Husband] in any way, nor that [Husband] changed his position to his detriment in reliance on any representations or actions on the part of [Wife]. [Husband] cannot rely on his mistaken belief that his obligation to pay alimony terminated because he had custody of the minor children. Installments of support money vest as they become due. The Court has no power to modify the decree as to these vested rights, unless it finds that each element of equitable estoppel applies. None of these elements are present in this case.

Adams, 593 P.2d at 148 (footnotes omitted).

Mrs. Gaskill's silence, for whatever period of time, cannot work as an estoppel.

Burrow v. Vrontikis, 788 P.2d 1046 (Utah App. 1990) is cited by Mr. Gaskill for the proposition that failure to request support for seven years works as an estoppel. This case is not on point. In Vrontikis, Ms. Burrow conceived a child while dating Mr.

Vrontikis. About five months before birth, Mr. Vrontikis indicated an unwillingness to make any commitment to her or the child, but offered to pay for an abortion. No further contact was had until seven years later, when Ms. Burrow brought a paternity action.

The court found that Ms. Burrow was estopped by representations relayed to Vrontikis, and barred by laches from seeking child support after seven years. In this case, Mrs. Gaskill did not wait until 12 years after the divorce to seek alimony. Instead, she was diligent and made certain that the original decree, at the time of its entry, awarded her alimony. Had Ms. Burrow obtained a judgment for child support shortly after the birth of the child, the entire complexion of the case would have been different. On its facts,[7] Vrontikis is inapplicable.

The trial court correctly held that Mrs. Gaskill was not estopped from collecting alimony.

C. MR. GASKILL MISAPPREHENDS THE MEANING OF THE JUDGE'S ORDER.

Point II of Mr. Gaskill's brief (pp. 23-27) address whether Mr. Gaskill was estopped from raising the defenses of waiver and estoppel. The court never ruled that Mr. Gaskill was estopped from asserting these defenses. Rather, the court ruled

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[7]Beyond the obvious difference that Vrontikis was a paternity action seeking child support, whereas this is a divorce action involving alimony.

that under the undisputed facts in this case these defenses are not meritorious. The Commissioner stated[8]:

> Under the present circumstances, it would be inequitable to find that either party is estopped from asserting their respective positions or that they have waived the same.

R. 91. Neither party was estopped. Neither party waived any of their rights. Under the present circumstances (i.e. under undisputed facts of this case), there was no waiver and neither party is estopped. Mr. Gaskill's position, addressed on the merits, was ruled to be untimely. Mrs. Gaskill's position, as limited by the eight year statute of limitations, was found to be meritorious. The court's judgment is correct and should be affirmed.

POINT III. DUE TO MR. GASKILL'S FAILURE TO BRING TO THE TRIAL COURT'S ATTENTION THE INCORRECT AMOUNT OF THE JUDGMENT, AND HIS FAILURE TO MARSHAL THE EVIDENCE IN SUPPORT OF THE JUDGMENT, THIS COURT MAY SUMMARILY AFFIRM THE AMOUNT OF THE JUDGMENT.

Mr. Gaskill now argues on appeal that the amount of the judgment is incorrect. Mr. Gaskill does not explain why this matter was not brought to the attention of the trial court by means of an objection to the proposed form of order under Rule 4-504(2), Code of Judicial Administration, or an appropriate motion under Rule 59 or 60, so it could be addressed by the court below.

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[8]Judge Sawaya adopted Commissioner Evans' findings and conclusions as his own. R. 114.

Mr. Gaskill has failed to make a sufficient record below or to marshal the evidence in support of this amount, and the judgment may be affirmed by this court on that basis.

> On appeal, it is the burden of the party seeking to overturn the trial court's decision to "marshal the evidence in support of the findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be 'against the clear weight of the evidence,' thus making them 'clearly erroneous.'"

Hagan v. Hagan, 810 P.2d 478, 481 (Utah App.1991) (quoting In re Estate of Bartell, 776 P.2d 885, 886 (Utah 1989) (quoting State v. Walker, 743 P.2d 191, 193 (Utah 1987)); accord, Crouse v. Crouse, 817 P.2d 836, 838 (Utah App. 1991); Riche v. Riche, 784 P.2d 465, 468 (Utah App. 1989); Foxley v. Foxley, 801 P.2d 155 (Utah App. 1990); Deeben v. Deeben, 772 P.2d 972 (Utah App. 1989).

"If the appellant fails to marshal the evidence, the appellate court assumes that the record supports the findings of the trial court and proceeds to a review of the accuracy of the lower court's conclusions of law and the application of that law in the case." Crouse v. Crouse, 817 P.2d 836, 838 (Utah App. 1991). Because Mr. Gaskill has failed to make any record below, failed to bring this matter to the trial court's attention, and failed to marshal the evidence in support of the fact finding as to amount, this Court may summarily affirm.

Because counsel for Mrs. Gaskill mistakenly supplied the trial court with the incorrect figure included in the judgment, counsel feels it is only appropriate that the correct amount be set forth here. Although this information, like the information

contained in appellant's brief, is not part of the record and thus not properly before this Court, it is nevertheless helpful to this Court in addressing the equities of this situation and whether review is appropriate under a plain error analysis.

The trial court granted judgment for the eight year period preceding Mrs. Gaskill's action for judgment, plus judgment for the six month period during which the action was pending. Monthly payments of $450.00 are due from January 1, 1984 through June 1, 1992 (a total of 102 payments), together with simple interest on such amounts from the date they became due through June 30, 1992, see Utah Code Ann. § 15-1-1(2). The formula for calculating this amount is as follows:

$$pn\left(1+\frac{n+1}{2}i\right)$$

where p = monthly payment amount,

n = number of payments owing, and

i = monthly interest (.10/12, or .83333%)

For n = 96, as calculated by Mr. Gaskill, the result is $60,660. This would be the amount due and owing as of January 1, 1992. The trial court, however, granted judgment for all amounts through June 30, 1992 (the 96 payments referenced by Mr. Gaskill plus the 6 additional payments that accrued during the pendency of the action). See R. 114. With n = 102, proper calculation yields a result of $65,598.75. This is the correct amount of the judgment as of June 30, 1992, the date chosen by the trial court.

This amount has accrued post-judgment interest from June 30, 1992 through March 31, 1993 at 12% per annum, see Utah Code Ann. § 15-1-4, or 9% for nine months, in the amount of $5,903.89. Additionally, Mr. Gaskill also now owes for July 1992 through March 31, 1993 in the principal amount of $4,050.00, together with interest (n = 9) in the amount of $168.75. The total owing as of March 31, 1993 on the judgment, post-judgment interest, and post-judgment accrued alimony and interest is therefore $75,721.39.

POINT IV. LEA GASKILL IS ENTITLED TO HER ATTORNEY'S FEES ON APPEAL.

This Court has repeatedly stated:

> "'Ordinarily, when fees in a divorce have been awarded below to a party who then prevails on appeal, fees will also be awarded to that party on appeal.'"

Crouse v. Crouse, 817 P.2d 836, 840 (Utah App. 1991) (quoting Bell v. Bell, 810 P.2d 489, 494 (Utah App. 1991)(quoting Burt v. Burt, 799 P.2d 1166, 1171 (Utah App. 1990)).

After obtaining judgment, Mrs. Gaskill moved for an order awarding her attorney fees. By minute entry dated November 12, 1992 the court awarded Mrs. Gaskill fees in the sum of $1,280 and costs in the amount of $106.76. A true and correct copy of this minute entry is contained in Addendum A. The court subsequently entered an Order Awarding Attorney's Fees on December 2, 1992. A true and correct copy is contained in Addendum B.

Mrs. Gaskill should be granted her attorney's fees on appeal.[9] This matter should be remanded to the District Court for determination of the proper amount.

CONCLUSION

The court had proper jurisdiction when it entered the judgment and decree of divorce in 1976. Mr. Gaskill was properly defaulted, and judgment was entered in conformity with the complaint, except as modified to reduce alimony for the first 30 months.

Mr. Gaskill, after he learned of the alimony provision in the divorce decree, failed to prosecute his asserted defenses to the original decree to a final judgment. Mr. Gaskill's current motion to amend the original decree nunc pro tunc is untimely and without good cause.

Mrs. Gaskill had no obligation to have the dismissal without prejudice of both parties' claims in 1978 set aside, or to sue on her rights at any given time in the future. Her choice to wait 12½ years was her choice, not a waiver, and does not estop her from collecting alimony arrearages now (except to the extent that the statute of limitations limits recovery).

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[9]Because Mrs. Gaskill has an independent basis for asserting her right to fees, she declines to brief possible entitlement to fees for filing a frivolous appeal under Utah R. App. P. 33. Given the similarity of the instant facts to those in Bagshaw v. Bagshaw, 788 P.2d 1057 (Utah App. 1990), and counsel's failure to state that he seeks to overturn that decision, this appeal is teetering dangerously close to the edge of frivolity.

Mr. Gaskill has failed to make a record below concerning the amount of the judgment, and has failed to marshal evidence supporting the figure in the judgment. This Court may affirm on that basis.

Finally, Mrs. Gaskill is entitled to her fees on appeal.

The judgment below should be affirmed, and Mrs. Gaskill should be granted her attorney's fees on appeal.

SUBMITTED this first day of March, 1993.

GUSTIN & CHRISTIAN

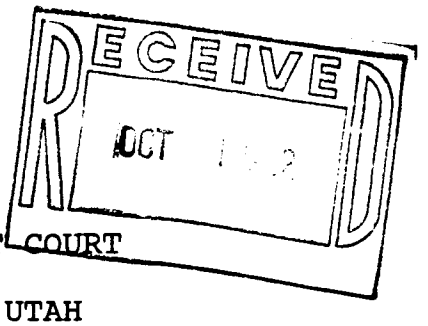
HELEN E. CHRISTIAN
ROBERT K. HEINEMAN
Attorneys for Defendant/Appellant

CERTIFICATE OF DELIVERY

I hereby certify that I caused two copies of BRIEF OF APPELLEE to be mailed to Brent D. Young, IVIE & YOUNG, 48 North University Avenue, P.O. Box 672, Provo, Utah 84603, this 18th day of March, 1993.

Helen E. Christian
Robert K. Heineman

ADDENDUM A
Minute Entry dated 11/12/92



IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

	:	MINUTE ENTRY
GASKILL, ALBERTA FANNEY	:	
PLAINTIFF	:	CASE NUMBER 764923691 DA
	:	DATE 09/29/92
VS	:	HONORABLE JAMES S. SAWAYA
	:	COURT REPORTER
GASKILL, DON R	:	COURT CLERK STH
DEFENDANT	:	

TYPE OF HEARING:
PRESENT:

P. ATTY.
D. ATTY.

PLAINTIFF'S REQUEST FOR RULING ON THE ISSUE OF ATTORNEY'S FEES HAVING BEEN SUBMITTED TO THE COURT PURSUANT TO RULE 4-501. COMES NOW THE COURT AND STATES AS FOLLOWS: I FIND NO RESERVATION OF THE ISSUE OF ATTORNEY FEES, NO ANY AFFIDAVITS.

CC: HELEN E. CHRISTIAN
BRENT D. YOUNG

ADDENDUM B

Order Awarding Attorney's Fees dated December 2, 1992

HELEN E. CHRISTIAN (2247)
GUSTIN & CHRISTIAN
Attorneys for Plaintiff
Suite 722 Boston Building
9 Exchange Place
Salt Lake City, Utah 84111
Telephone: (801) 531-7444

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

----------ooOoo---------- 2179333
12-4-92 8:19 AM

ALBERTA FANNIE GASKILL a/k/a LEE or LEA GASKILL,	:	ORDER AWARDING ATTORNEY'S FEES
Plaintiff,	:	
v.	:	Civil No. 764923691
DON R. GASKILL,	:	Judge James S. Sawaya
Defendant.	:	

----------ooOoo----------

This matter having come before the Court on Plaintiff's request for attorney's fees reserved pursuant to an earlier Order of the Court, Plaintiff, ALBERTA FANNIE GASKILL, represented by her counsel of record, Helen E. Christian, and Defendant, DON R. GASKILL, represented by his counsel of record, Brent D. Young, and the Court having reviewed the Affidavits submitted by Plaintiff and her counsel, and having reviewed the file and being otherwise fully advised in the premises, and having made and entered its Minute Entry of November 12, 1992, the Court now hereby makes and enters the following Order:

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

Plaintiff is awarded and Defendant is ordered to pay to Plaintiff attorney's fees in the amount of $1,280.00, and costs in the amount of $106.76, a total sum of $1,386.76.

DATED this 2 day of ~~November~~ Dec, 1992.

BY THE COURT:

JAMES S. SAWAYA
District Court Judge

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed a true and correct copy of the foregoing ORDER AWARDING ATTORNEY'S FEES, by placing same in the United States mail, postage prepaid, on this 17th day of November, 1992, addressed to:

Brent D. Young
IVIE AND YOUNG
Attorney for Defendant
48 North University Avenue
P.O. Box 672
Provo, UT 84603

Kay J. Slahtasky

gaskill.ord