

2002

Margaret Nigohosian v. Robert Nigohosian : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MARGARET NIGOHOSIAN

Petitioner and Appellee,

vs.

ROBERT NIGOHOSIAN,

Respondent and Appellant.

**REPLY BRIEF OF
APPELLANT ROBERT
NIGOHOSIAN**

Case No. 2:0020606-CA

Appellant's Reply Brief In Re Appeal from Decree of Divorce entered on June 20,
2002 by the Honorable William B. Bohling of the Third Judicial District Court of Salt
Lake County.

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ARGUMENT

I.

THE NOTICE OF APPEAL WAS *NOT* TARDILY FILED

Mrs. Nigohosian contends that the Notice of Appeal dated and entered on July 19, 2002 (R.1180-1181) was tardy because the decree of divorce was signed on June 18, 2002. This contention is based on a misreading of Rule 4, URAP, which requires a Notice of Appeal to be filed “within thirty days after the date of entry of the judgment or order appealed from.” Rule 4, URAP. Although the divorce decree was apparently signed on June 18, it was not “entered in registry of judgments” until June 20, 2002. (R.1180).¹ The 30th day from June 20, 2002 is July 21, 2002, a Sunday. Whenever the date for filing a document in an appellate court falls on a Sunday, “the period extends until the end of next day that is not a Saturday, Sunday, or a legal holiday.” Rule 22(a), URAP. Filing of the notice on July 19, 2002 was well within the 30 day time limit. The Notice of Appeal was not filed too late.

¹The decree bears a red stamp indicating it was “entered” on June 20. It also bears a stamp indicating the date it was “filed”. That date was June 19. Even assuming the appeal time began to run on the date the decree was “filed” rather than “entered,” 30 days from that date was July 20, 2002 - a Saturday. Under the Rule, the Notice of Appeal would not have been tardy if filed the following Monday. In fact, however, it was filed on Friday, July 19. It was therefore timely even if the running of the time limit was triggered by the date of “filing” rather than the date of “entry.”

II.

THE NOTICE OF APPEAL WAS NOT PREMATURELY FILED.

Mrs. Nigohosian is correct in her assertion that post judgment motions are not ripe for adjudication in an appellate court when not having been formally appealed from a trial court. This appeal was filed by Mr. Nigohosian's trial counsel. Both the Notice of Appeal and the Docketing Statement clearly indicate the intent to appeal from the Decree of Divorce and supporting Findings and Conclusions.

Mr. Nigohosian's trial counsel withdrew while the appeal was pending. When his current appeal counsel stepped in, he mistakenly assumed the appeal had been taken from the trial court's denial of Mr. Nigohosian's Rule 59 and Rule 60 motions. Based on that erroneous assumption, the title page of his appeal brief in chief mistakenly indicates this appeal is taken from the district court's Order Denying Motion For Relief From Judgment entered on December 20, 2002.² Also erroneous is a statement of one of the "Issues Presented" found on page 5 of the appeal brief in chief. (Issue #3). Counsel apologizes for the erroneous statements in his appeal brief based on his mistaken assumption.

²Actually, the motion for relief which that order disposed of had not even been filed until nearly five months after the Notice of Appeal was filed.

The fundamental error this appeal seeks to correct appears in the decree itself and in the findings supporting it. Any subsequent ruling or findings by the district in the context of post decree motions are essentially immaterial to this appeal. However, since concerns over the post decree motions have been raised, this reply brief will address them now.

Mr. Nigohosian's trial counsel filed her Rule 60 motion for relief on the same day and at the same time she filed her Notice of Appeal. (Cf filing stamp on R. 1161 and R. 1180). It is true that a trial court is *generally* divested of jurisdiction over a case while it is under advisement on appeal. White v. State, 795 P.2d 648, 650 (1990). There are exceptions to that general rule. *Id.* at 650, fn. 8. See also Saunders v. Sharp, 818 P.2d 574, 577 (Utah App. 1991). This Court, in fact, has expressly declared that a trial court has jurisdiction to consider a Rule 60(b) motion while an appeal is pending and enter denial if appropriate. If grant of the motion is appropriate, counsel may then request an order of remand from the appellate court for entry of the order granting relief. Baker v. Western Sur. Co., 757 P.2d 878, 880-81 (Utah App. 1988). Under Baker, the district court's consideration of the Rule 60 motion for relief while this appeal was pending was not necessarily inappropriate. Its denial of the motion had no real impact on or relevance

to the then pending appeal.³

Rule 4(b), URAP, provides that a Notice of Appeal filed before the disposition of a Rule 59 Motion to Alter or Amend Judgment “shall have no effect” and that a new Notice of Appeal must be filed within the prescribed time measured from the entry of the order of the trial court disposing of the motion. That rule, however, is not applicable because the Rule 59 motion filed on behalf of Mr. Nigohosian by his prior counsel was not filed until nearly five months *after* the Notice of Appeal was filed in the district court and nearly two months after the related docketing statement was filed in this Court. Arguably, the district court had no jurisdiction to consider the Rule 59 motion while this appeal was pending. See White v. State, *supra*. Significantly, Rule 4(d) does not apply to a Rule 60 motion for relief.

In short, this appeal is proper and does not violate any provision of the Utah Rules of Appellate Procedure.

³ That denial, which came at the conclusion of an October 25, 2002 hearing (long after the docketing statement before this Court had been filed) was never even reduced to a formal, written order, without which an appeal from that ruling could not have been taken.

III.

THE FAILURE OF MR. NIGOHOSIAN'S TRIAL COUNSEL TO OBJECT TO THE FORM OF THE DECREE, FINDINGS AND CONCLUSIONS BEFORE THEY WERE SIGNED DOES NOT PRECLUDE MR. NIGOHOSIAN FROM APPEALING FROM ENTRY OF THOSE DOCUMENTS ON THE GROUNDS THAT THEY DO NOT REFLECT THE PARTIES' STIPULATION.

Mr. Nigohosian's prior counsel explained to the district court why she did not object to the form of the decree, findings and conclusions Mrs. Nigohosian's counsel had submitted to the court:

Ms. O'Hara: I was not aware that Mr. McIntyre submitted them. He sent me a letter, and I understood from our conversation that he was waiting for some documents from me before he submitted them.

(R. 1415 at 5). After acknowledging that the objection period had run, Mr. Nigohosian's counsel told the court: "I didn't know the court had the documents." (R.1415 at 5).

The documents submitted to the court for entry were supposed to have been a reflection of the stipulation the parties had actually reached several months earlier, which was spread on the record on February 1, 2002. (R. 1402, 1-20). If the documents as submitted had truly reflected the parties' stipulation and had been endorsed by Mr. Nigohosian's trial counsel, Mrs. Nigohosian's waiver contention might have merit. Here, however, the documents were not endorsed in the customary way ("approved as to form"

or “approved as to form and substance”). On the contrary, they were submitted to the court not only without endorsement by Mr. Nigohosian’s counsel but, apparently, without counsel’s actual awareness that they were being submitted to the court. Whether the trial court believed or disbelieved prior counsel’s assertion that she was not aware the documents had been submitted to the court for signing and entry, the whole question of notice and knowledge of submission is irrelevant to the fundamental basis for appeal.⁴

The contention that a party’s failure to object to proposed findings precludes a subsequent appeal was made and rejected in Dugan v. Jones, 724 P.2d 955, 956 (Utah 1986). There is simply no legal basis for Mrs. Nigohosian’s contention that Mr. Nigohosian’s failure to object to the decree, findings and conclusions is fatal to his appeal. Both common sense and case authority indicate the contrary.

⁴That basis is that the decree, findings and conclusions contain provisions inconsistent with the terms agreed upon in open court.

IV.

THE DECREE AND SUPPORTING FINDINGS AND CONCLUSIONS ARE INCONSISTENT WITH CRITICAL TERMS OF THE DIVORCE STIPULATION ENTERED ON THE RECORD FEBRUARY 1, 2002.

A. Future Alimony Obligation.

When the parties reached agreement during the final pretrial conference, there was absolutely no indication that the amount of Mr. Nigohosian's monthly alimony obligation would escalate when his sons attained majority. The parties' actual intent was that it would not. At most, the stipulation spread on the record lacks completeness and clarity on the matter. The decree, findings and conclusions submitted by Mrs. Nigohosian's counsel seek to exploit that incompleteness and unclarity.

The parties' agreement as to Mr. Nigohosian's future alimony obligation was spread on the record by Mrs. Nigohosian's counsel during the February 1, 2002 conference as follows:

Mr. McIntyre: We have agreed to a total amount of child support and alimony in the sum of \$1,250 . . .

(R. 1402 -17, lines 10-11). Unfortunately, this constitutes the entire statement of the parties' intent. Significantly, this statement does not indicate Mr. Nigohosian's monthly

alimony obligation would escalate or that his total support obligation would remain at \$1,250 per month after his sons reached adulthood. However, the decree, findings and conclusions Mrs. Nigohosian's counsel drew up and submitted to the court attempt to create that impression. Paragraph 16 of the divorce decree states:

Commencing February 1, 2002, respondent *is* ordered to pay alimony to petitioner which is calculated by finding the difference between \$1,250 per month and the monthly child support obligation, which alimony obligation is presently calculated at \$535 per month, for 25 years commencing on May 1, 1998 and ending on April 30, 2023. (R. 1138).

The corresponding Conclusion of Law No. 17, is verbatim identical to this provision of the decree except that phrase "respondent *is* ordered to pay" reads "respondent *should be* ordered to pay". (R. 1127). The corresponding finding of fact (Finding No. 23), however, attempts to go further in creating the impression that escalation in alimony was intended. It states:

The parties stipulated that the amount of alimony should be calculated by finding the difference between \$1,250 per month and the monthly child support obligation so that the total sum of alimony and child support total [sic] \$1,250 per month. . . .

(R. 1131).

Mr. Nigohosian and his trial counsel understood that his alimony obligation would *not* escalate. That understanding is reflected in the proposed amended findings,

conclusions and decree Mr. Nigohosian's trial counsel submitted to the court. (R. 1230 at ¶21; 1234 at ¶13; 1240 at ¶12). It is also reflected in the statement Mr. Nigohosian's trial counsel made to the district court on October 25, 2002. (R. 1415 at 34-35).

This Court should declare unsuccessful, if not inappropriate, the attempt to create an impression that the parties had agreed to an escalation in alimony. The decree and supporting finding and conclusion are at most ambiguous as to whether the amount of monthly alimony is to escalate when the monthly support child support decreases and ultimately disappears. That ambiguity should be resolved against the drafter.

B. Past Support Arrearages.

At the final pretrial conference held before the district court on February 1, 2002, the parties unequivocally agreed that Mr. Nigohosian's support arrearages as of February 1, 2002 would be voided in consideration for the award to Mrs. Nigohosian of the equity in the marital home and furnishings. This agreement was stated by Mrs. Nigohosian's own counsel as follows:

[I]n exchange for her receiving the equity in the home and the equity in the items that are in the residence, she would waive any claim for alimony or child support arrearages . . . up to the date of today's hearing.

(R. 1415 at 2). This essential term was omitted from the findings, conclusions and decree Mrs. Nigohosian's counsel submitted to the court for entry. After those submissions were signed, the Office of Recovery Services incorrectly (based on the aforementioned critical omission) concluded the arrearages were still owed and extracted payment of those arrearages from Mr. Nigohosian's paychecks.

The errors created by the inaccurate and ambiguous provisions in the decree, findings and conclusions should be corrected by this Court. The divorce documents as interpreted by the Office of Recovery Services do not reflect the parties' actual agreement. It is well within the power and authority of this Court to order the correction of an inaccurate recording of the intent of divorce litigants in their property settlement.

C. Life Insurance Maintenance and Payment of All Outstanding Debts

The stipulation spread on the record and approved by the district court on February 1, 2002 did not include any requirement that Mr. Nigohosian maintain Mrs. Nigohosian as the beneficiary of his life insurance policy nor did it include any agreement that Mr. Nigohosian would be solely liable for all outstanding debts incurred by either of the parties during the marriage. The decree and supporting findings and conclusions submitted by Mrs. Nigohosian's counsel, however, include such provisions. (R. 1139,

¶18 and R. 1140, ¶22). Such inclusions are gratuitous and were not authorized. They do not reflect the agreed stipulation of the parties.

CONCLUSION

The Notice of Appeal was neither tardily nor prematurely filed. The failure of Mr. Nigohosian's trial counsel to object to the form of the decree, findings and conclusions is not fatal to the appeal. The decree and supporting findings and conclusions are inconsistent with critical terms of the divorce stipulation entered on the record and do not reflect the parties' true intent. This Court should correct the error. Mr. Nigohosian hereby renews the specific relief request contained in his brief in chief. Mr. Nigohosian asks this Court to remand the case to the district court with instructions to:

1. Amend the decree and supporting documents to reflect that Mr. Nigohosian's alimony obligation shall remain at \$535 per month unless otherwise ordered by the court following by a petition to modify.
2. Amend the decree and supporting documents to include the parties' agreement that Mr. Nigohosian's alimony and child support arrearages as of February 1, 2002 would be erased and voided in consideration for Mrs. Nigohosian's being awarded the parties' equity in the home and its furnishings;

3. Amend the decree and supporting documents to delete the requirement that Mr. Nigohosian maintain Mrs. Nigohosian as the beneficiary on his life insurance policy and the requirement that he pay all outstanding debts incurred by the parties during the marriage;

In the alternative to numbers 1 and 3, supra, Mr. Nigohosian asks that this Court instruct the district court to hold an evidentiary hearing to determine the parties' true intent as to the issues raised therein and, if it determines the parties did not reach an accord and there was no "meeting of the minds" between them as to those issues, to reach an appropriate decision on them, based on evidence presented to it.

Respectfully submitted this 30 day of January, 2004.

A handwritten signature in black ink, appearing to read "Douglas G. Mortensen", written over a horizontal line.

Douglas G. Mortensen

Matheson, Mortensen, Olsen & Jeppson, P.C.
Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 30 day of January, 2004, I caused two true and correct copies of the foregoing to be delivered to the following via the means indicated:

Jay L. Kessler, #8550
Attorney for Appellee
9117 West 2700 South, #A
Magna, UT 84044

<input checked="" type="checkbox"/>	U.S. Mail
<input type="checkbox"/>	Facsimile
<input type="checkbox"/>	Hand-Delivered
<input type="checkbox"/>	Federal Express


