

1992

Joy A. Hoagland v. Colin G. Hoagland : Brief of Appellant

Utah Court of Appeals

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BRIEF

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DOCKET NO. 920340

IN THE COURT OF APPEALS OF THE STATE OF UTAH

JOY A. HOAGLAND,	:	
	:	Case No. 920340-CA
Appellant,	:	
vs.	:	
COLIN G. HOAGLAND,	:	Priority No. 16
	:	
Appellee.	:	

BRIEF OF APPELLANT

AN APPEAL FROM A DECREE OF DIVORCE FROM THE SECOND JUDICIAL
DISTRICT COURT OF WEBER COUNTY, STATE OF UTAH
The Honorable Ronald O. Hyde, Presiding

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FILED

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COURT OF APPEALS

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TABLE OF CONTENTS

<u>TITLE</u>	<u>Page</u>
TABLE OF AUTHORITIES.....	ii
JURISDICTIONAL STATEMENT.....	1
STATEMENT OF ISSUES PRESENTED FOR REVIEW.....	1
STATEMENT OF THE CASE.....	2
STATEMENT OF THE FACTS.....	2
SUMMARY OF ARGUMENTS.....	6
ARGUMENT.....	8
I. Whether it was an abuse of discretion for the Trial Court to set the amount of alimony based upon the parties' standard of living prior to separation, rather than on the standard of living considering the parties' respective incomes at time of trial.....	8
II. Whether it was an abuse of discretion for the Trial Court to declare the home, currently titled in the Plaintiff's name, as marital property to be divided, rather than to accept the quit-claim deed given by Defendant to Plaintiff prior to the parties' separation and treat the home as Plaintiff's separate property.....	14
III. Whether it was an abuse of discretion for the trial court to deny Plaintiff an award of attorney's fees where the income of the parties showed her need for such an award, the reasonableness of the fees was undisputed and the Defendant's income showed he had the ability to pay her attorney fees.....	19
IV. Whether or not the Trial Court erred in denying judgment interest on payments to Plaintiff upon a judgment for temporary alimony awarded to her prior to the trial herein.....	21
CONCLUSION.....	23

TABLE OF AUTHORITIES

<u>CASES</u>	<u>Page</u>
<u>Berger v. Berger</u> , 713 P.2d 695 (Utah 1985).....	13
<u>Bell v. Bell</u> , 810 P.2d 489 (Utah App. 1991).....	8,20
<u>Bountiful v. Riley</u> , 784 P.2d 1174 (Utah 1989).....	8
<u>Bushnell v. Bushnell</u> , 649 P.2d 85 (Utah 1982).....	9
<u>Condas v. Condas</u> , 618 P.2d 491 (Utah 1980).....	16
<u>Davis v. Davis</u> , 749 P.2d 647 (Utah 1988).....	8
<u>Fletcher v. Fletcher</u> , 615 P.2d 1218 (Utah 1980).....	13
<u>Gardner v. Gardner</u> , 748 P.2d 1076 (Utah 1988).....	10
<u>Herr v. Salt Lake County</u> , 525 P.2d 728 (Utah 1974).....	21
<u>Hogue v. Hogue</u> , 184 Utah Adv. Rep. 63 (Utah App. 1992).....	17,18,19
<u>Howell v. Howell</u> , 806 P.2d 1209 (Utah App. 1991).....	8,9,10,11,12
<u>Jones v. Jones</u> , 700 P.2d 1072 (Utah 1985).....	9
<u>Masters v. Worsley</u> , 777 P.2d 499 (Utah App. 1989).....	16
<u>Mecham v. City of Glendale</u> , 489 P.2d 65 (Ariz. App. 1971)...	16
<u>Naranjo v. Naranjo</u> , 751 P.2d 1144 (Utah App. 1986).....	8,13,19
<u>Occidental/Nebraska Fed. Sav. v. Mehr</u> , 791 P.2d 217 (Utah App. 1990).....	16
<u>Paffel v. Paffel</u> , 732 P.2d 96 (Utah 1986).....	9
<u>Rasband v. Rasband</u> , 752 P.2d 1331 (Utah Ct.App. 1980).....	19
<u>Regional Sales Agency, Inc. v. Reichert</u> , 784 P.2d 1210 (Utah App. 1989).....	20

TABLE OF AUTHORITIES (continued)

CASES

Page

Roy S. Ludlow Inv. v. Salt Lake County,

551 P.2d 1259 (Utah 1976)..... 16

Savage v. Savage, 658 P.2d 1201 (Utah 1983)..... 12

Smith v. Smith, 793 P.2d 407 (Utah 1990)..... 8

State v. Ziemer, 347 P.2d 1111 (Utah 1960)..... 21

Stroud v. Stroud, 758 P.2d 905 (Utah 1988)..... 7,21,22

Stroud v. Stroud, 738 P.2d 649 (Ut.App. 1987)..... 7,21,22

Total Petroleum, Inc. v. Davis,

822 F.2d 734 (8th Cir. 1987)..... 16

Whitehead v. Whitehead,

193 Utah Adv. Rep. 8 (Utah App. 1992)..... 23

STATUTES

Utah Code Annotated (1953, as amended):

Section 15-1-4..... 21,22

Section 30-3-3..... 19

Section 30-3-10.6..... 22

JURISDICTIONAL STATEMENT

The jurisdiction is proper before this Court under the provisions of §78-2a-3(2)(a), Utah Code Annotated.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

- I. Whether it was an abuse of discretion for the Trial Court to set the amount of alimony based upon the parties' standard of living prior to separation, rather than on the standard of living considering the parties' respective incomes at time of trial.
- II. Whether it was an abuse of discretion for the Trial Court to declare the home, currently titled in the Plaintiff's name, as marital property to be divided, rather than to accept the quit-claim deed given by Defendant to Plaintiff prior to the parties' separation and treat the home as Plaintiff's separate property.
- III. Whether it was an abuse of discretion for the trial court to deny Plaintiff an award of attorney's fees where the income of the parties showed her need for such an award, the reasonableness of the fees was undisputed and the Defendant's income showed he had the ability to pay her attorney fees.
- IV. Whether or not the Trial Court erred in denying judgment interest on payments to Plaintiff upon a judgment for temporary alimony awarded to her prior to the trial herein.

STATEMENT OF THE CASE

Joy Hoagland (hereinafter "Plaintiff") filed an action for divorce against her husband, Colin Hoagland (hereinafter "Defendant") on August 28, 1989. Record, p. 001. This case was tried before the Honorable Ronald O. Hyde, District Court Judge, on the 28th day of October, 1991. Trial Transcript, p. 1. The court took the matter under advisement and issued its Memorandum Decision on the 7th day of November, 1991. R., p. 272. Thereafter, counsel for Defendant prepared the initial Findings of Fact and Conclusions of Law as well as the Decree of Divorce. R. p. 293. The Findings of Fact and Conclusions of Law, and the Decree of Divorce, were entered with the Court on the 4th day of December, 1991. R. pp. 293, 303. Plaintiff filed her Objection to Entry of Findings of Fact on December 12, 1991, R., p. 307, leading to the eventual filing of the Amended Findings of Fact and Conclusions of Law, R. p. 335, and a Second Amended Findings of Fact. R. p. 355.

STATEMENT OF THE FACTS

Plaintiff and Defendant were married in Elko, Nevada on September 5, 1973. Tr. p. 7. When they were first married, they resided in Plaintiff's house in Ogden for approximately two years. Tr. pp. 11-12. In 1975, the Defendant convinced the

Plaintiff to sell her house and use the equity money of the Plaintiff's house to purchase another house. Tr. p. 15. In 1978, Defendant and Plaintiff decided to start a family partnership to run a grocery business. Tr. p. 117. That partnership consisted of the Plaintiff, the Defendant, the Defendant's brother, and the Plaintiff's son. Tr. p. 118. The business was so successful that they added two more stores. Tr. p. 123. During this time, the Plaintiff was working as a bookkeeper and a checker at the stores. Tr. p. 29. At one point, the Defendant did not want the Plaintiff to work at the stores, because Defendant had a girlfriend, "Kay," that worked there. Tr., p. 31. The Plaintiff was told by the Defendant that "he didn't want any part of my [Plaintiff's] home, and he wanted me [Plaintiff] out of the business." Tr. p. 32.

In May 1986, the Defendant wanted to incorporate the business. Tr. pp. 32, 122. The Plaintiff was already out of the store (i.e., she was told not to work there), and the Defendant desired to buy out Defendant's ownership interest in the business. He told the Plaintiff that he would give her a quit-claim deed to the house in exchange for her ownership interest in the business. Tr. p. 32. Both before and after the quit-claim deed was signed and recorded, there had been no creditors

contacting the Plaintiff. Tr. p. 33. At approximately the same time the quit-claim deed was given to her, two corporations were formed with the assets of the partnership. Tr. p. 121. In the Fall of 1986, the corporations filed for bankruptcy. Tr. p. 122. Just prior to the bankruptcy, the Defendant and his brother brought between eight and nine thousand dollars in cash into Plaintiff's home. Tr. pp. 18-20.

In January 1987, the Defendant moved to Las Vegas, Nevada to accept a position with Smith's Management. Tr. p. 8. In April 1987, Defendant invited Plaintiff to fly down to Nevada to see him. Tr. pp. 9-10. During that trip, Defendant told Appellant that he would be in Nevada one more week, and then come back home. Tr. p. 10. He later decided not to come home, but rather that they should get a divorce.

In April 1989, Plaintiff had to get a job as a seasonal employee with the Internal Revenue Service. Tr. p. 44.

The divorce action was filed by the Plaintiff on August 29, 1989. R. p. 1. Defendant was served with a Summons and a Complaint and with an Order to Show Cause for temporary support. R. pp. 5-10. Defendant filed an answer to the complaint and a counterclaim. R. p. 27. A hearing on the Order to Show Cause pertaining to temporary support was held. R. p. 11. The

Defendant did not appear at the Hearing, and did not file any responsive pleadings thereto. Id. Temporary alimony was awarded to Plaintiff in the amount of \$1,500 per month. R. pp. 22-26. At the time of trial, the Defendant owed to the Plaintiff back alimony in the amount of \$27,507.00. R. p. 359. Of this amount, \$21,935.00 had been reduced to judgment in a hearing held five months prior to trial. R. pp. 152-156.

After trial on this matter, the Second District Court awarded to the Plaintiff a Decree of Divorce, R. p. 303, and in the Memorandum Decision and Findings of Fact and Conclusions of Law, held, *inter alia*, that the standard of living the parties enjoyed during the marriage would be determined as of the time of separation instead of as of the time of trial, R. p. 274; that the home was a marital asset rather than an asset solely of the Plaintiff, R. p. 276; that the parties were to pay their own attorney's fees, R. p. 277; and that the back alimony owed to the Plaintiff by the Defendant could be paid in payments without interest, R. pp. 276-277. The Plaintiff then brought this Appeal.

SUMMARY OF ARGUMENTS

- I. WHETHER IT WAS AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO SET THE AMOUNT OF ALIMONY BASED UPON THE PARTIES' STANDARD OF LIVING PRIOR TO SEPARATION, RATHER THAN ON THE STANDARD OF LIVING CONSIDERING THE PARTIES' RESPECTIVE INCOMES AT THE TIME OF TRIAL.

Utah precedents indicate that where a divorce involves parties that were married for a long time and where the husband's income rose dramatically between separation and trial, that the appropriate standard of living is to be determined at the time of trial, basically asking what the standard of living would have been had they remained together. Further, the imperative to determine the value of marital assets at the time of trial is upheld by this analysis.

- II. WHETHER IT WAS AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO DECLARE THE HOME, CURRENTLY TITLED IN THE PLAINTIFF'S NAME, AS MARITAL PROPERTY TO BE DIVIDED, RATHER THAN TO ACCEPT THE QUIT-CLAIM DEED GIVEN BY DEFENDANT TO PLAINTIFF PRIOR TO THE PARTIES' SEPARATION AND TREAT THE HOME AS PLAINTIFF'S SEPARATE PROPERTY.

The doctrine of judicial estoppel requires that where a party (here, the Defendant) has taken a position as to property in court, and has received a benefit from that position, that he cannot then change his position in a later court hearing. Defendant has done just that by saying he transferred the house to the Plaintiff's name to avoid exposure in a Bankruptcy action,

and now wants to receive an interest in the house. Further, when he transferred the house to his wife's name, he received a benefit -- the Plaintiff's interest in the family business. He should not now benefit from what, in hindsight, appears to be a bad deal on his part.

III. WHETHER IT WAS AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO DENY PLAINTIFF AN AWARD OF ATTORNEY'S FEES WHERE THE INCOME OF THE PARTIES SHOWED HER NEED FOR SUCH AN AWARD, THE REASONABLENESS OF THE FEES WAS UNDISPUTED AND THE DEFENDANT'S INCOME SHOWED HE HAD THE ABILITY TO PAY HER ATTORNEY FEES.

The Utah courts have listed the standard under which attorney's fees are awarded, and have made it imperative that the trial court make certain definite findings of fact prior to coming to its award of attorney's fees. The trial court did not make the specific findings, and had the court made those specific findings, it should have then awarded attorney's fees to the Plaintiff.

IV. WHETHER OF NOT THE TRIAL COURT ERRED IN DENYING JUDGMENT INTEREST ON PAYMENTS TO PLAINTIFF UPON A JUDGMENT FOR TEMPORARY ALIMONY AWARDED TO HER PRIOR TO THE TRIAL HEREIN.

The case of Stroud v. Stroud, 738 P.2d 649 (Ut.App. 1987), aff'd 758 P.2d 905 (Utah 1988) is simply one example that interest on a judgment is a right, and not within the discretion of a trial court. When the trial court ordered the Defendant to

pay to the Plaintiff back alimony owed, it abused its discretion when it further ordered that the back alimony, which had been reduced to several final orders, could be paid without interest.

ARGUMENT

- I. WHETHER IT WAS AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO SET THE AMOUNT OF ALIMONY BASED UPON THE PARTIES' STANDARD OF LIVING PRIOR TO SEPARATION, RATHER THAN ON THE STANDARD OF LIVING CONSIDERING THE PARTIES' RESPECTIVE INCOMES AT THE TIME OF TRIAL.

The standard of review accepted by the Utah Supreme Court regarding alimony is:

We will not disturb a trial court's ruling on alimony as long as the court "exercises its discretion within the bounds and under the standards we have set *and has supported its decision with adequate findings and conclusions.*" Naranjo v. Naranjo, 751 P.2d 1144, 1147 (Utah Ct. App. 1988) (quoting Davis v. Davis, 749 P.2d 647, 649 (Utah 1988)). Bell v. Bell, 810 P.2d 489, 491 (Ut.App. 1991, **emphasis added**).

It has been noted by this Court that "[c]onclusions of law, however, are reviewed for correctness and given no special deference on appeal." Howell v. Howell, 806 P.2d 1209, 1211 (Ut.App. 1991). **See also** Bountiful v. Riley, 784 P.2d 1174, 1175 (Utah 1989); Smith v. Smith, 793 P.2d 407, 409 (Utah Ct.App. 1990).

The purpose of alimony is to "enable the receiving spouse to maintain as nearly as possible the standard of living

enjoyed during the marriage and prevent the spouse from becoming a public charge." Paffel v. Paffel, 732 P.2d 96, 100 (Utah 1986) and Jones v. Jones, 700 P.2d 1072, 1075 (Utah 1985). **See also** Bushnell v. Bushnell, 649 P.2d 85, 87 (Utah 1982) (same standard used regarding temporary support).

The case of Howell v. Howell, supra, is a case that contains many parallels to the instant case, and should be regarded closely. In Howell, during the last five years of the marriage, the Plaintiff's income was five thousand, six hundred dollars (\$5,600) per month, and was at that level when the parties separated. However, at the time of trial two years later, Plaintiff's income had raised to ten thousand, one hundred and twenty dollars (\$10,120) per month. This Court found that the large salary increase was due in part to the Plaintiff and Defendant "having persevered during the lean times", id. at 1212; much as it was likely the Defendant's experience owning his own stores that led to his being given the position with Smith's Management in 1987.

This Court in Howell also held, under the fact situation before it, that it was inequitable to fix alimony based simply upon the income at the time of separation. First, this

Court held that looking to the time of trial, rather than another time, given the facts presented,

can properly address what situation would have existed if the parties had not separated earlier. In this case, post separation substantial increase in plaintiff's income was akin to a *deferred income*. In light of the facts of this case, we conclude that the trial court erred in looking at the pre-separation standard of living in setting alimony, but should have instead considered the standard of living "during the marriage" up to the time of trial.

Howell, 806 P.2d at 1212 (emphasis added).

In much the same way, in the instant case, the Defendant was not making much money during the marriage to the Plaintiff -- their own comparable "lean times" -- but after moving out of the family home (but prior to requesting a divorce), Plaintiff began making much better money working for Smith's Management Corp -- a kind of deferred income. His highest salary was in 1990, when he made \$73,302 from Smith's. Tr., p. 129. Income at the time of trial, less because of his arthritis condition necessitating a job change within Smith's, was approximately \$56,000 per year, more than double the average salary earned during the marriage of \$500 per week.

The Howell decision emphasized several sources as precedent in coming to their decision on alimony. One case cited, Gardner v. Gardner, 748 P.2d 1076 (Utah 1988), discussed

how alimony should try to "equalize the parties' respective standards of living enjoyed during the marriage." Id. at 1081. In attempting to equalize the standards of living of the litigants in their case, this Court in Howell compared the incomes of the two parties as awarded at the time of separation, and at the time of trial.

In the instant case, if you subtract the trial court's award of alimony to the Plaintiff, Defendant will still be making \$44,000 per year (not including bonuses), as compared to Plaintiff's \$13,380.00 per year she makes working for the Internal Revenue Service (plus alimony as awarded by the court). It is clear that the wide void between the Defendant's income and the Plaintiff's income is in no way equalized if one takes the standard of living as being at the time of trial.

Other factors that this Court looked at in the Howell decision was the fact that the marriage was long-term; the Plaintiff was "approximately fifty years old, has minimal job skills," and has worked in the house during most of the marriage; that the Plaintiff's likelihood of achieving significant salary levels was slim; and, given these, Plaintiff was only capable of earning \$625.00 per month.

The fact situation in Howell is remarkably close to that of the instant case in each of the above-mentioned factors. At the time of trial, Plaintiff was 56 years of age, Tr. p. 2, and had been married to the Defendant for eighteen years, R. p. 273. The Defendant's earning capacity (currently over \$4,500 per month) far exceeds the Plaintiff's earning capacity (\$1,115 per month). Given her age and marketable skills, it is unlikely the Plaintiff will be capable of earning more than she is now. The parallels are such that Howell should be used for determination of the standard of living, e.g. at the time of trial.

Further, Defendant seems to miss the entire reason for determining alimony from the time of trial rather than from the time of separation: judicial economy. As the Howell court pointed out, fixing alimony at the time of trial "is further justified because any future changes in alimony are limited to instances where a material change in circumstance has occurred." Id. at 1212.

The Utah Supreme Court has determined that, in similar fact situations, the standard of living should be placed at a later time rather than simply "during the marriage." In Savage v. Savage, 658 P.2d 1201 (Utah 1983), the Court stated:

Where a marriage is of long duration and the earning capacity of one spouse greatly exceeds that of the

other, as here, it is appropriate to order alimony and child support at a level that will insure that the supported spouse and children may maintain a standard of living not unduly disproportionate to that which they would have enjoyed *had the marriage continued*.

Savage v. Savage, 658 P.2d at 1205 (emphasis added). **See also** Naranjo v. Naranjo, supra at 1147 (Utah App. 1988).

Again, note the factual similarities: the instant case deals with a marriage of long duration (18 years), and the earning capacity of the Defendant greatly exceeds that of the Plaintiff (over \$4,500 per month vs. \$1,115 per month).

The reason that the precise definition of "standard of living enjoyed by the parties during marriage" is not frequently a problem is that the standard of living at the time of trial is usually comparable to that which existed during the marriage. However, the standard that is coming from the appellate courts leads to a conclusion that long-term marriages in which the earnings of one of the parties greatly increases, while the other party has few or no marketable skills, places the point at which the standard of living is determined at the time of trial.

It should also be noted that determining the standard of living at the time of trial is consistent with the requirement that marital assets be valued at the time of trial. Berger v. Berger, 713 P.2d 695, 697 (Utah 1985). **See also** Fletcher v. Fletcher, 615 P.2d 1218 (Utah 1980).

So not only in the interest of justice, but also in the interest of judicial economy and in response to the requirements that the Utah appellate courts have placed on the determination of alimony in cases with similar facts to the instant case, Plaintiff requests this Court to order alimony to be set according to the standard of living that existed at the time of trial.

II. WHETHER IT WAS AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO DECLARE THE HOME, CURRENTLY TITLED IN THE PLAINTIFF'S NAME, AS MARITAL PROPERTY TO BE DIVIDED, RATHER THAN TO ACCEPT THE QUIT-CLAIM DEED GIVEN BY DEFENDANT TO PLAINTIFF PRIOR TO THE PARTIES' SEPARATION AND TREAT THE HOME AS PLAINTIFF'S SEPARATE PROPERTY.

The facts of this case make the distribution of property, particularly the determination that the Plaintiff's home is a marital asset, clearly erroneous.

When the Plaintiff and Defendant were married in September of 1973, they lived in a house owned by the Plaintiff. Later, the Defendant convinced the Plaintiff to sell her house and invest the equity into the house which Plaintiff still inhabits. In 1978, the Plaintiff and Defendant decided to start a family partnership to start a grocery business. That partnership consisted of the Plaintiff, the Defendant, the Defendant's brother, and the Plaintiff's son. Later, when the Defendant wanted to incorporate the business, he told the

Plaintiff that he would give her a quit-claim deed to the house in exchange for her ownership interest in the business. The quit-claim deed was given to her at approximately the same time the business was incorporated.

The Doctrines of Judicial and Quasi Estoppel bar the defendant from claiming any interest in the house due to the fact that he quitclaimed the house to his wife in exchange for her interest in the business he was running. His stated reason for doing this was so that he could avoid having to list it as an asset during the bankruptcy of the business. He testified that, when the business was still a partnership, Utah Bank and Trust wanted him to give it a lien on the house as collateral on the debt owed by the partnership. Tr. p. 122. It was at that point that he decided that "I could see the bankruptcy coming and that's when I decided to form the corporate [sic] and quitclaim the house to my wife." Tr. p. 122. Creditors did go after his brother's house after he pledged it as collateral for the debts, and his brother lost the house. Tr. p. 123. By thus disclaiming any interest in the property in his bankruptcy action, he was able to save the house from creditors of the business, which received a discharge from indebtedness. To award the defendant an interest in property he previously disclaimed would violate

the doctrines of judicial and quasi estoppel and would thereby allow the defendant to manipulate the legal system in an unconscionable manner. The trial court erred in not recognizing this in its division of marital assets.

Judicial Estoppel or estoppel by record is a doctrine to protect the integrity of the judicial process from conduct such as knowing misrepresentation and fraud upon the court. Masters v. Worsley, 777 P.2d 499 (Utah App. 1989). **See also** Total Petroleum, Inc. v. Davis, 822 F.2d 734, 737 n. 6 (8th Cir. 1987). The Doctrine prevents a party who has obtained relief on the basis of a representation in court maintaining the opposite position in another action. As summarized by the Utah Supreme Court,

It is well settled that a party who has taken a position in prior litigation and has obtained relief on the basis of it cannot maintain the opposite position in another action.

Condas v. Condas, 618 P.2d 491, 496 (Utah 1980). **See also** Occidental/Nebraska Fed. Sav. v. Mehr, 791 P.2d 217, 220 (Utah App. 1990); Roy S. Ludlow Investment Co. v. Salt Lake County, 551 P.2d 1259 (Utah 1976); Mecham v. City of Glendale, 15 Ariz.App. 402, 489 P.2d 65 (Ariz App 1971).

To allow the Defendant to so change his stance that his conduct amounts to defrauding the Bankruptcy court is just the

type of action that judicial estoppel as outlined by the Utah courts is meant to prevent. Under judicial estoppel, the Defendant is estopped from claiming any interest in the house.

Even if this court finds that judicial estoppel is not applicable to the instant case, the case of Hogue v. Hogue, 184 Utah Adv. Rep. 63 (Ut.App. 1992) is helpful in understanding instances when it is appropriate to establish a home as a marital asset, and to further distinguish the instant case as an instance where it would be inappropriate to do so. The facts in Hogue were that Mr. Hogue purchased a piece of property, on which he later built a house. It was not until later that he married Mrs. Hogue and she moved into the house with him. After the marriage, Mr. Hogue quitclaimed the house to Mrs. Hogue, and later declared bankruptcy, claiming no interest in the house. Id., 184 Utah Adv. Rep. 64. The trial judge declared that the house was marital property. While this may on the surface have a few similarities to the instant case (house quitclaimed to wife, etc.), the reasoning used by the trial court leaves no doubt that the factual circumstances in Hogue were far different than those in the instant case.

Specifically, the court found that: (1) Mr. Hogue purchased the ranch exclusively with money from his business after his first divorce and before his second marriage to Mrs. Hogue; (2) Mr. and Mrs. Hogue jointly agreed upon the conveyance of

the ranch to Mrs. Hogue as a means of protecting the property from Mr. Hogue's judgment creditors; (3) Mr. and Mrs. Hogue cohabitated together at the ranch for several months prior to the conveyance of the ranch to Mrs. Hogue; (4) Mr. and Mrs. Hogue jointly contracted for the purchase of acreage adjoining the ranch, as well as purchasing vehicles, trailers, race horses and training and maintenance equipment to be used on the ranch; and (5) Mr. and Mrs. Hogue resided at and jointly maintained the ranch for approximately seven years after the conveyance to Mrs. Hogue.

Id., 184 Utah Adv. Rep. at 65.

Neither the Plaintiff nor the Defendant purchased the house in the instant case prior to the marriage; it was purchased during the marriage. Had Defendant purchased the property and house prior to the marriage (as was the case in Hogue), then his quit claim may not have as much validity. Further, the facts presented at trial do not support the notion that Plaintiff and the Defendant *jointly* agreed to sign the house over to the Plaintiff to protect it from creditors; the record shows that the Plaintiff gave up something of value (her share of the partnership) in exchange for his portion of the house. While Plaintiff and Defendant lived in the house during part of the marriage, it is clear that one reason the Plaintiff stayed in Ogden was that she considered the house her own house, and did not want to leave it -- a not altogether unusual response.

While the trial court did make a finding that the house was transferred in line with Defendant's reasoning, the facts presented weighed against it. Again referring to Hogue, the appellate court may make changes in the trial court's property division determination if, *inter alia*, "the evidence clearly preponderated against the findings." Id., 184 Utah Adv. Rep. at 64, quoting Naranjo v. Naranjo, supra at 1146 (Ut.App. 1988).

It is clear that in this case the finding that the house was deeded only to avoid creditors was clearly erroneous, and should be reversed, or remanded for findings of fact in line with the evidence presented.

III. WHETHER IT WAS AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO DENY PLAINTIFF AN AWARD OF ATTORNEY'S FEES WHERE THE INCOME OF THE PARTIES SHOWED HER NEED FOR SUCH AN AWARD, THE REASONABLENESS OF THE FEES WAS UNDISPUTED AND THE DEFENDANT'S INCOME SHOWED HE HAD THE ABILITY TO PAY HER ATTORNEY FEES.

Section 30-3-3, Utah Code Ann., grants to the trial court the authority to award attorney fees in divorce proceedings. This award must be based upon three factors: (1) evidence of the financial need of the receiving spouse; (2) the ability of the other spouse to pay, and (3) the reasonableness of the requested fees. Rasband v. Rasband, 752 P.2d 1331, 1337 (Ut.App. 1988). In the case before this Court, the second and third points are undisputed by Defendant; the question is factor

number one to determine if attorney fees are justified. In determining that attorney fees should not be awarded to either side, the trial court maintained that with both Plaintiff's seasonal employment and her alimony as awarded, she made sufficient income to be able to pay her own attorney's fees. R. pp. 363-364. However, the trial court did not make a determination as to reasonableness, and did not address the Defendant's ability to pay. The analysis used was not adequate to determine that there is no need on the part of the Plaintiff for an award of attorney's fees. As this Court has held:

To permit meaningful review of the trial court's discretionary ruling, "[w]e have consistently encouraged trial courts to make findings and to explain factors which they considered relevant in arriving at an attorney fee award." Regional Sales Agency, Inc. v. Reichert, 784 P.2d 1210, 1215 (Utah Ct.App. 1989).

* * *

The trial court in this case gave no explanation for its reduction of attorney fees incurred by Wife where their reasonableness was uncontroverted. Again, the court's failure to address Wife's need or Husband's ability to pay her attorney fees leaves us with no adequate explanation for the court's award.

Bell v. Bell, supra at 494 (Ut.App. 1991).

The trial court's decision to make each party bear their own attorney's fees leaves the Plaintiff and this reviewing court with no reasonable explanation as to its actions. Utah law mandates that the decision of the trial court in this matter was

incomplete, and should be reversed or remanded for findings that are in line with the requirements handed down from the Utah appellate courts.

IV. WHETHER OF NOT THE TRIAL COURT ERRED IN DENYING JUDGMENT INTEREST ON PAYMENTS TO PLAINTIFF UPON A JUDGMENT FOR TEMPORARY ALIMONY AWARDED TO HER PRIOR TO THE TRIAL HEREIN.

According to Utah Code Ann., § 15-1-4, unless otherwise specified by contract, "judgments *shall* bear interest at the rate of 12% per annum." (Emphasis added). The meaning of "shall" in a statute is usually presumed to be mandatory. Herr v. Salt Lake County, 525 P.2d 728 (Utah 1974); State v. Ziemer, 10 Utah 2d 45, 347 P.2d 1111 (1960). Utah Courts have determined that this includes alimony judgments. In the case of Stroud v. Stroud, 758 P.2d 905 (Utah 1988), the Supreme Court affirmed this Court's ruling (Stroud v. Stroud, 738 P.2d 649 (Utah App. 1987)) that interest on final orders on alimony and child support was mandatory. The language the court used was unambiguous:

First, the plain, unambiguous language of §15-1-4 [of the Utah Code] prohibits granting the relief defendant seeks. Indeed, in no uncertain terms, the subject statute provides that unless otherwise specified, judgments *shall* bear interest at the rate of twelve percent per annum.

* * *

Second, to allow a reduction as defendant wishes would thwart the intention of the statute by rewarding those who withhold or are delinquent in child support payments. This we also will not do.

Plaintiff is entitled to the statutory rate of interest on the judgment until payment is made in full.

Stroud, 738 P.2d at 906.

In ruling in its Memorandum Decision that the Defendant can pay back alimony owed without interest, the trial court was in clear error.

Section 15-1-4 is not the only statutory language helpful in determining whether judgment interest was improperly withheld by the trial court. According to the trial court, at the time of trial (October 1991), the Defendant owed the Plaintiff \$27,507.00. R. p. 359. Of this amount, \$21,935.00 had been reduced to judgment in a hearing held in May 1991. R. pp. 152-156. According to §30-3-10.6, every time that the Defendant did not pay Plaintiff her temporary alimony as ordered, that amount owed would become a "judgment with the same attributes and effect of any judgment of the district court." Utah Code Ann. § 30-3-10.6. Since the \$27,507.00 spoken of by the trial court was owed to date, it was clearly arrearages; henceforth, it was obviously late. In that case, the Plaintiff, under § 30-3-10.6, had a judgment against the Defendant in the amount of \$27,507.00 when it was due, not just when the court issued the decree of divorce. This Court has recently determined that each of these judgments that occur when the alimony payment is late is a final judgment, and that interest

is due on those arrearages. Whitehead v. Whitehead, 193 Utah Adv. Rep. 8, 10 (Utah App. 1992). Therefore, in the interests of justice, and in compliance with the mandate of Utah statutory law, the entire \$27,507.00 needs to be paid to the Plaintiff at the legal interest rate.


CONCLUSION

Based on the aforementioned reasons, Plaintiff respectfully requests this Court to remand the final divorce decree entered in this case to the trial court for a review of the alimony award, the property distribution, the attorney's fees and costs award and the payment of interest on the accrued back alimony payments.

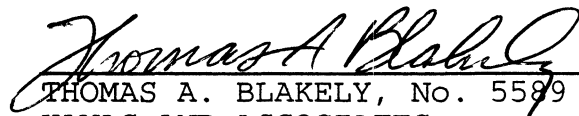
Plaintiff further requests that she be awarded attorney fees and costs on appeal. She has had to bring this appeal to defend her property interests at the resolution of this marriage, and based upon the foregoing, has not brought this action frivolously or without foundation. She is still in need of an

attorney fee award and Defendant has the ability to pay such an award.

RESPECTFULLY SUBMITTED this 4th day of September,
1992.



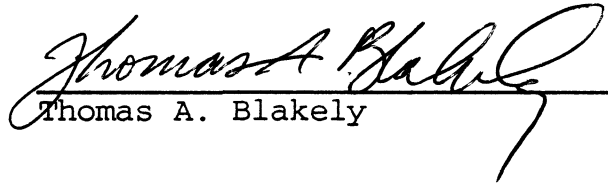
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CERTIFICATE OF MAILING

I hereby certify that four true and correct copies of the foregoing BRIEF OF APPELLANT was mailed, postage prepaid, to Defendant/Appellee Colin Hoagland, by and through his attorney of record, Donn E. Cassity, ROMNEY, NELSON & CASSITY, 115 Social Hall Avenue, Salt Lake City, Utah 84111, this 4th day of September, 1992.



Thomas A. Blakely