

1993

Helen S. Broadbent v. Ross Broadbent : Brief of Appellee

Utah Court of Appeals

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UTAH COURT

BRIEF

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DOCKET NO.

930455

IN THE UTAH COURT OF APPEALS

HELEN S. BROADBENT,

Plaintiff and Appellee,

v.

ROSS BROADBENT,

Defendant and Appellant,

No. 9 ~~30455~~

Argument Priority

Priority No. 15

930455-CA

BRIEF OF THE APPELLEE

APPEAL FROM ORDERS AND JUDGMENTS OF THE THIRD
JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY,
STATE OF UTAH,
THE HONORABLE TIMOTHY R. HANSON

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JUN 22 1994

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IN THE UTAH COURT OF APPEALS

HELEN S. BROADBENT,

Plaintiff and Appellee,

v.

ROSS BROADBENT,

Defendant and Appellant,)

No. 900425-CA

Argument Priority

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JURISDICTIONAL STATEMENT

The Utah Court of Appeals has jurisdiction to hear this appeal pursuant to the Utah Constitution Article VIII, Section 3, and Utah Code Annotated, Section 78-2a-3(2)(i).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Appellee takes specific exception to Appellant's form of issues presented for review on this appeal as follows:

Issue no. 3. The trial court did not determine as a matter of law that Appellant was not entitled to a credit against his obligations under the Decree of Divorce for the benefits actually received by Appellee pursuant to the Settlement Agreement entered into between the parties, and Appellant has produced no such finding or order to that effect.

Issue no. 4. The trial court in fact directed Appellant to submit evidence in the form of affidavits and granted Appellant an evidentiary hearing on all payments, in any form, made by Appellant to Appellee toward his obligations under the Divorce Decree and Appellant has produced no such finding or order to the contrary.

Issue no. 7. The issue of procedure to seek award of attorney's fees was not preserved for appeal because it was not objected to in Appellant's Objection to the Order.

DETERMINATIVE STATUTES AND RULES

The determinative statutes and rules of the State of Utah read verbatim as follows:

Utah Rule of Appellate Procedure 3.

Rule 3. Appeal as of right: how taken.

(a) **Filing appeal from final orders and judgments.** An appeal may be taken from a district, juvenile, or circuit court to the appellate court with jurisdiction over the appeal from all final orders and judgments, except as otherwise provided by law, by filing a notice of appeal with the clerk of the trial court within the time allowed by Rule 4. . . .

Utah Rule of Appellate Procedure 4.

Rule 4. Appeal as of right: when taken.

(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 the judgment or order appealed from. . . .

(b) **Motions post judgment or order.** If a timely motion under the Utah Rules of Civil Procedure is filed in the trial court by any party (1) for judgment under Rule 50(b); (2) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) under Rule 59 to alter or amend the judgment; (4) under Rule 59 for a new trial, the time for appeal all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. . . .

Utah Code Ann. Section 30-3-10.6.

Payment under child support order -- Judgment.

(1) Each payment or installment of child or spousal support under any child support order, as defined by Subsection 62A-11-401(3), is, on and after the date it is due:

(a) a judgment with the same attributes and effect of any judgment of a district court, except as provided in Subsection (2).

STATEMENT OF THE CASE

a. Nature of the Case.

This case deals with (i) Appellee's collection actions against Appellant for amounts due and owing under the Decree of Divorce dated May 7, 1986, and the arrearage amounts reduced to judgment thereafter; (ii) the validity of the so-called Settlement Agreement which Appellant asserts superseded and nullified the Decree of Divorce; and (iii) whether or not the fact finder, in this case Judge Timothy R. Hanson, committed clear error in his findings of fact.

b. Course of Proceedings.

1. Appellee does not dispute Appellant's paragraph 1.
2. Appellee does not dispute Appellant's paragraph 2.
3. Appellee disputes Appellant's paragraph 3 to the extent it seeks to interpret the Settlement Agreement.
4. Appellee disputes Appellant's paragraph 4 in that it makes a bold statement of fact about Appellant having "transferred eighty vending machines" that is not only untrue, but is not supported by the portion of the record to which Appellant directs the Court's attention, "R. 148-152," or by any other portion of the record. Paragraph 4 further asserts that Appellant was precluded from presenting evidence of his performance under the Settlement Agreement, but such is also untrue. To support this assertion Appellant cites to "R. 1178-79," which, in fact, is the Trial Court's directive that the parties brief the Trial Court on the legal issues involved in the validity and enforceability of the Settlement Agreement, and to include "affidavits" to present evidence to the Court and to create a factual record on which to determine the existence or lack of payment, consideration, and any other factual issue to be raised in connection with the Settlement Agreement. R. 1177-80. In response to the Trial Court's directive Appellant submitted his Defendant's Memorandum of Points and Authorities dated December 11, 1992, containing 10 pages of argument and 44 pages of evidence. R. 94-152 Although not properly

admitted in affidavit form, such evidence included information concerning Appellant's alleged vending machine business and alleged compensation to Appellee thereunder. R. 146-152.

Appellant desired to preempt and supersede the Decree of Divorce by the mere existence of the Settlement Agreement. R. 49-50. The Trial Court correctly found that the Settlement Agreement was invalid for that purpose, but allowed Appellant to present any and all evidence of payment, in any form, in his legal brief of December 11, 1992, and at the evidentiary hearings ordered on November 23, 1992. R. 1177-80. Appellant additionally presented much testimony concerning payment of his obligations at the hearings, which testimony was unsupported by documentary evidence and found to be unpersuasive by the Trial Court, but failed to present any evidence of payment by any form of "in kind" transfers of personal property, including vending machines.

5. Appellee does not dispute Appellant's paragraph 5.

6. Appellee does not dispute Appellant's paragraph 6.

7. Appellee does not dispute Appellant's paragraph 7, but refers the Court to paragraph 4, *supra*, wherein Appellee cites the Trial Court's directive that both parties create an evidentiary record through affidavits and other evidence for the purpose of determining whether or not the Settlement Agreement was lawful or against public policy, and whether or not any consideration was received from Appellant pursuant to the Settlement Agreement. Other than the evidence he attached to the Memorandum dated December 11, 1992, Appellant failed to present any such evidence or create any such record.

8. Appellee disputes Appellant's paragraph 8 in that it states that "no such judgment existed." The subject writ was based on the Judgment in the form of the Decree of Divorce, pursuant to Section 30-3-10.6 Utah Code Annotated, which provides in pertinent part, "Each payment or installment of child or spousal support under any child support order, as defined by Subsection 62A-11-401(3), is, on and after the date it is due: (a) a judgment with the same attributes and effect of any judgment of a district court" R. 158.

9. Appellee disputes Appellant's paragraph 9 based on the following: (a) at the November 23, 1992 hearing, the Trial Court ordered that the parties brief the Court on the issues involved in the Settlement Agreement and the payment and nonpayment of amounts due under the Divorce Decree and submit affidavits and other evidence of the factual issues involved (*see* paragraphs 4 and 7, *supra*, and R. 86); and (b) Appellant did brief the Trial Court and attached 44 pages of evidence to such brief (*see* paragraphs 4 and 7, *supra*, and R. 94-152). Appellant's brief and evidence were totally inadequate to overcome his burden under the law, as clarified by Appellee's Brief (R. 87-93) and Reply Brief (R. 159-178), which briefs included evidentiary affidavits, including requests and evidence of attorney's fees and costs.

10. Appellee does not dispute Appellant's paragraph 10.

11. Appellee does not dispute Appellant's paragraph 11.

12. Appellee does not dispute Appellant's paragraph 12, but adds that at none of the hearings requested by Appellant and held through January 1992, including the hearing of January 25, 1992, did Appellant present any further evidence supporting his claims that he had made "in kind" transfers of personal property to Appellee. R. 317-332.

13. Appellee disputes Appellant's paragraph 13 in that it states that the Trial Court "refused to hear evidence as to the benefit received by Ms. Broadbent under the terms of the Settlement Agreement. R. 1187-1188." The only reference to the Settlement Agreement in the record at pages 1187-1188 is the Trial Court's statement, "I just said we wouldn't re-visit the issue as to whether the parties had an enforceable stipulation. I've already decided that." This was in reference to the validity of the Settlement Agreement as to its ability to preempt and supersede the Decree of Divorce by its mere existence as had been ruled on in the Trial Court's Order of January 14, 1992. This was no prohibition on whether or not evidence of payments made to Appellee by Appellant pursuant to the Settlement Agreement actually occurred.

In fact, that was the very purpose for the evidentiary hearing in which the Trial Court was then engaged--to determine the full extent of payments of any kind that Appellant had made to Appellee, in any form. Appellant was free to present evidence of such payments, if any he possessed. Appellee was prepared to present evidence of issues related to payments made in the form of "vending machines" pursuant to the Settlement Agreement, as evidenced by the exhibit list. R. 311. Plaintiff's Exhibits nos. 1, 2, 4, and 7 were all prepared to rebut Appellant's anticipated claims of payments made in the form of vending machines, but were never offered into evidence because Appellant abandoned that defense and offered no evidence of payments made with vending machines.

Additionally, the Trial Court ordered the parties to provide closing arguments in writing, ordering Appellee to address issues of amounts to which she was entitled and ordering Appellant to "address any credits he believe[s] he is entitled to." R. 352.

14. Appellee does not dispute Appellant's paragraph 14.

15. Appellee does not dispute Appellant's paragraph 15, but notes to the Court Appellant's lack of objection to the grant of attorney's fees, which Appellant now seeks to raise in this appeal.

16. Appellee does not dispute Appellant's paragraph 16, but notes to the Court Appellant's lack of objection to the grant of attorney's fees, which Appellant now seeks to raise in this appeal. R. 1423-1424.

17. Appellee does not dispute Appellant's paragraph 17.

18. Appellee does not dispute Appellant's paragraph 18.

19. Appellee does not dispute the existence of Appellant's Notice of Appeal nor the purported contents thereof as alleged in paragraph 19, but disputes the effect as asserted by Appellant. The January 1993 Order was not "modified" by the June 1993 Order and Judgment.

STATEMENT OF THE FACTS

Appellee believes that in addition to those facts enumerated by Appellant, the following facts are important to the Court's understanding of the issues:

1. The Trial Court found that "during the course of the marriage, the [Appellant] has treated the [Appellee] cruelly, causing her great distress and upset" R. 17.

2. The amounts that the Trial Court awarded Appellee from the Appellant in the Decree of Divorce for alimony, child support, and other maintenance of the parties' minor child, were never paid by Appellant absent the present litigation, and Appellee was forced to shoulder the entire financial and emotional burden of providing for and raising the child:

[D]efendant's response has been unpersuasive, and appears to be calculated merely to frustrate the attempted collection of any amounts that have long been due and owing to the plaintiff from the defendant.

The defendant has done little, if anything, to comply with the Court's orders in the original Decree of Divorce. He has made insignificant contributions to the financial needs or other welfare of the child, and has basically left the total responsibility for those obligations to the plaintiff. The defendant's efforts to further frustrate the plaintiff's attempted collection of at least some of the amounts that she is rightfully entitled appear to the Court to border upon bad faith, and while the Court does not make such a specific finding, it does award attorney's fees on the basis that the expenses and fees have been incurred as a result of the demands of the defendant, and that the defendant has failed to prevail. The plaintiff is not in a position to pay the attorney's fees that she has incurred as a result of the defendant's challenge to Garnishments and other matters, as contained herein, and further considering the conduct of the defendant throughout these long proceedings since the divorce Decree was originally entered, and his lack of any meaningful cooperation, the additional attorney's fees are not only warranted, but in this Court's view mandated. [R. 507-08]

3. The Settlement Agreement was intended by Appellant to supplant and supersede the Decree of Divorce: "In exchange for a full release from all past, present or future obligations relating to child support or alimony, Ross Broadbent hereby agrees [to] provide Helen Schumann with vending machines under the following terms." R. 49.

4. Appellee signed the Settlement Agreement in the scant hope of receiving *some* financial input from Appellant for the support of the parties' child. R. 88; 239-247. Appellee received no benefit under the Settlement Agreement. R. 232-33.

5. The Settlement Agreement proposed as consideration to give Appellee only that which she had already been awarded in the Decree of Divorce, and therefore, constituted no new consideration. R. 233.

6. Appellant's acts and protracted litigation have been retaliatory and vindictive, including his Petition to Modify Custody of the parties' minor child, when he lost on these financial issues below. R. 418-28. The Index to this file is 8 pages long due thereto.

SUMMARY OF ARGUMENT

The January 14, 1993 Order is not properly before this Court on appeal because no Notice of Appeal was timely filed and appeal was not preserved by any subsequent motions filed by Appellant in the Trial Court.

The so-called Settlement Agreement was raised below as a bar to Appellee's collecting any amounts due under the Decree of Divorce and was advanced by Appellant as a document that superseded and supplanted the Decree of Divorce. In fact, the Settlement Agreement was invalid *ab initio* in that it was against public policy and constituted no new consideration. Appellant was not barred from putting on evidence of payments made toward his obligations pursuant to the Decree of Divorce, but chose to exclude certain spurious claims that he had made in kind payments under the Settlement Agreement. A two day evidentiary hearing was conducted below in addition to the Trial Court's directive that the parties submit affidavits and

other factual evidence of any payments made by Appellant, but Appellant failed to put on any such evidence of in kind payments.

The Trial Court did not commit clear error in assessing the facts from the totality of the evidence presented. The Trial Court's determination of amounts owed, credits given, and interest due were based on the evidence, or lack of contrary evidence, provided by the parties.

The Trial Court properly awarded Appellee her costs, including reasonable attorney's fees, and Appellee is entitled to her costs of defending against this appeal, including reasonable attorney's fees.

ARGUMENT

ISSUE I

APPEAL OF THE JANUARY 14, 1993 ORDER WAS NOT FILED WITHIN THE TIME PERIOD PROVIDED BY THE UTAH RULES OF APPELLATE PROCEDURE.

The Notice of Appeal declares that Appellant appeals the "Final Order and Judgment" of January 14, 1993. Appellant failed to properly appeal such Order (no Judgment existed) pursuant to the requirements of the Utah Rules of Appellate Procedure, or to properly preserve the right to appeal the January 14, 1993 Order pursuant to the Utah Rules of Civil Procedure. Therefore, the right to appeal that Order has lapsed and is nonexistent, and this appeal to that extent must be dismissed.

Rule 4(a), U.R.A.P., provides 30 days in which an appeal of right may be taken from a judgment or order of a trial court. Rule 5 provides 20 days in which to appeal from an interlocutory order. In the present case, the pertinent Order of the trial court was entered on January 14, 1993, and the Notice of Appeal was filed no sooner than July 8, 1993. This, of itself, precludes the Court of Appeals from considering the January 14, 1993 Order. However, Appellee anticipates two possible arguments for preserving the appeal by Appellant, and addresses those below.

a. The January 25, 1993 motions fail to extend the appeal time.

Appellant filed motions with the trial court within two weeks of the January 14, 1993 Order, requesting the court to revisit its Order in various ways. Rule 4(b), U.R.A.P., provides as follows:

(b) **Motions post judgment or order.** If a timely motion under the Utah Rules of Civil Procedure is filed in the trial court by any party (1) for judgment under Rule 50(b); (2) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) under Rule 59 to alter or amend the judgment; (4) under Rule 59 for a new trial, the time for appeal all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. . . .

Appellant's motions of January 25, 1993, failed to request reconsideration under Rules 50 or 52, U.R.C.P., eliminating an extension under parts (1) or (2) of Rule 4(b), U.R.A.P. The only possible basis for extension of time under Rule 4(b) is Appellant's invocation of Rule 59(a)(1) and (7), and Rule 59(e), U.R.C.P. in his January 25, 1993 motions. These portions of Rule 59 fail to apply, however, because (1) they apply only to a "new trial," and (2) Rule 59(b) requires that such "motion for a new trial shall be served not later than 10 days after the entry of the judgment." Because no trial was had on which the January 14, 1993 Order was based, and because the January 25, 1993 motions were signed and filed more than 10 days following the entry of the judgment and served 3 days after that, Appellant is estopped from invoking the extension provisions of Rule 4(b), U.R.A.P. Because of these same defects, the Trial Court disregarded the motions.

Furthermore, the January 25, 1993 motions failed to request that the Trial Court amend or rehear any portion of the January 14, 1993 Order regarding the invalidation of the Settlement Agreement. *See* requests (a) through (f), pp. 1 and 2. Although the Trial Court failed to rule on the January 25, 1993 motions due to their late filing and improper bases, the Trial Court did allow an evidentiary hearing on the issue of the amount of arrearages and offsets, deciding all of the issues raised in requests (a) through (f) of the January 25, 1993 motions. Therefore, the issue of the invalidation of the Settlement Agreement was not preserved for appeal by the filing

of the January 25, 1993 motions, even had the motions been filed within the 10 days allowed under the Rule.

b. The June 28, 1993 Orders and Judgment fail to extend the time to appeal the January 14, 1993 Order.

The Notice of Appeal asserts that the January 14, 1993 Order was "modified by two additional judgments and orders entered on the 28th day of June, 1993," and further asserts that the "appeal is taken from the entirety of the judgments and orders." From this language Appellee infers that Appellant intends to bootstrap the January 14, 1993 Order into an appeal by merging the January 14, 1993 Order with the Orders and Judgment of June 28, 1993.

As demonstrated in the history provided above, the portion of the January 14, 1993 Order at issue is the invalidation of the Settlement Agreement, which was a question of law. As also outlined above, this question of law on the validity of the Settlement Agreement was not appealed and was never again revisited by the trial court and not at issue in the June 28, 1993 Orders and Judgment. In fact, the June 28, 1993 Orders and Judgment merely settled factual questions by determining the amount of arrearages and offsets between the parties. No question of law was addressed in the June 28, 1993 Orders and Judgment.

Therefore, the Court may determine herein whether or not the Trial Court erred in its factual findings in the June 28, 1993 Orders and Judgment. The Court may not revisit the issues of law decided by the Trial Court in the January 14, 1993 Order, because they were not appealed in a timely manner.

Issue II is included below in the event the Court disagrees with Appellee's position in Point I. Otherwise, the Trial Court's January 14, 1993 Order invalidating the Settlement Agreement should not even be addressed on this appeal.

ISSUE II

THE SETTLEMENT AGREEMENT IS INVALID AND UNENFORCEABLE AS BEING AGAINST PUBLIC POLICY AND AS LACKING ANY NEW CONSIDERATION.

a. The Settlement Agreement is against Public Policy.

It is well established law in this state that contracts like the Settlement Agreement are illegal and invalid, and against public policy. The Utah Supreme Court summed up the Utah cases in *Hills v. Hills*, 638 P.2d 516, 517 (Utah 1981), stating, "The right to support from the parents belongs to the minor children and is not subject to being bartered away, extinguished, estopped or in any way defeated by the agreement or conduct of the parents. *Gulley v. Gulley*, Utah, 570 P.2d 127 (1977); *Baggs v. Anderson*, Utah, 528 P.2d 141 (1974); *French v. Johnson*, 16 Utah 2nd 360, 401 P.2d 315 (1965)."

Appellee had paid nothing toward his child support, alimony, or other obligations under the Decree of Divorce through the date of offering Appellee the Settlement Agreement, and paid nothing thereafter until these collection proceedings were initiated. The Settlement Agreement was offered to Appellee by Appellant for a singular purpose: "In exchange for a full release from all past, present or future obligations relating to child support or alimony" R. 49. This represents precisely the kind of contract that *Hills* disallows. The controlling language of *Hills* was taken from the Supreme Court's decision in *Baggs*. Therein, as here, the delinquent father induced the custodial mother into entering into a settlement agreement, excusing him from the obligation of child support if he were to perform certain duties under the settlement agreement. The *Baggs* Court likewise held that such a contract is against public policy, and is, invalid from its inception.

Therefore, on these grounds alone, the Trial Court was correct in its decision invalidating the Settlement Agreement as being violative of public policy and the holdings in *Baggs* and *Hills*. The Trial Court's decision negated Appellant's argument that the Trial Court was barred by the mere existence of the Settlement Agreement from considering any factual issue of whether

or not any consideration passed from Appellant to Appellee under the Decree of Divorce. That was the sole ruling of the Trial Court with respect to the Settlement Agreement.

b. The Settlement Agreement provided no New Consideration.

The Settlement Agreement purported to give Appellee only that to which she was already entitled under the Decree of Divorce, only in a different form--vending machines, with some arbitrary value, to be fixed by Appellant. In *Baggs*, the Supreme Court declared its second reason for finding that the settlement agreement between the father and mother was invalid *ab initio*:

[W]e further observe that there are other obstacles to the invocation of [an estoppel] doctrine here. A serious one is that we cannot see wherein the defendant gave any consideration for the claimed agreement that he would not have to pay any future support money. That is, he neither gave anything of value, nor suffered any legal detriment for that promise. Under the decree he was already obligated to make payments of \$200 per month. Such an agreement to do that which one is already required to do does not constitute consideration for a new promise. [At 143].

This Settlement Agreement is precisely like that in *Baggs*, only more egregious. Because the Settlement Agreement purports to give Appellee only that which the Trial Court had already awarded her, it fails to offer any new consideration, thereby invalidating the Settlement Agreement.

Again, on these grounds the Trial Court was correct in its decision invalidating the Settlement Agreement as being violative of public policy and the holdings in *Baggs* and *Hills*.

ISSUE III

APPELLANT WAS NOT DENIED AN OPPORTUNITY TO PRESENT EVIDENCE OF PAYMENT OF HIS OBLIGATIONS.

The Trial Court observed the tactics of Appellant for years as he disputed any obligation to help in the financial requirements of raising his son. It recognized that the Settlement

Agreement was just one more ruse to escape his obligations under the Decree of Divorce. Nevertheless, in determining whether or not the Settlement Agreement was legally valid, the Trial Court specifically ordered the parties to brief the Trial Court on the legal issues involved, and to provide factual evidence on which to determine the existence or lack of payment thereunder, consideration, and any other factual issue to be raised in connection with the Settlement Agreement, as a basis for its decision on the validity, enforceability, and payments made pursuant to, the Settlement Agreement. R. 1177-80.

In response to the Trial Court's directive Appellant submitted his Defendant's Memorandum of Points and Authorities dated December 11, 1992, containing 10 pages of argument and 44 pages of evidence. R. 94-152 Although not properly admitted in affidavit form, such evidence included information concerning Appellant's alleged vending machine business and alleged compensation to Appellee thereunder. R. 146-152.

Based on the evidence (and lack thereof) submitted by the parties and legal briefs of counsel, the Trial Court correctly found that the Settlement Agreement was invalid for the purpose of estopping Appellee from presenting evidence of amounts owed under the Decree of Divorce.

The Trial Court ordered evidentiary hearings allowing Appellant the opportunity to present any and all evidence of payment, in any form. Appellant presented much testimony concerning payment of his obligations at the hearings, which testimony was unsupported by documentary evidence and found to be unpersuasive by the fact finder, the Trial Court. At such hearings Appellant failed to present any evidence of payment by any form of "in kind" transfers of personal property, including vending machines. Appellant was not estopped or barred from presenting evidence of any such in kind payments. He was merely estopped from relitigating the validity of the Settlement Agreement, as it related to acting as a bar to hearing evidence of amounts owed under the Divorce Decree. Appellant decided not to present any such evidence

when he saw on the Exhibit List that Appellee was prepared to expose his "payment in the form of vending machines" defense as a hoax.

It was Appellant who decided not to present evidence of in kind payments--first by way of affidavit during the legal briefings ordered by the Trial Court, and second by way of testimony and evidence presented at the evidentiary hearings.

It is only retrospectively that Appellant decided to continue his pattern of legal harassment of Appellee by claiming that he had not received a fair hearing, which has been his drone from the very beginning of these proceedings. In fact, Appellant just wants several bites at the same apple. Appellant had his opportunity to present his evidence, if any he possessed, and chose not to present the same, for reasons known only to him and his counsel. He cannot now, after having made such a decision, claim that he was denied the opportunity.

ISSUE IV

THE TRIAL COURT'S FINDINGS OF FACT WERE NOT CLEARLY ERRONEOUS.

The remaining issues addressed by Appellant are factual issues which were decided by the Trial Court based on the evidence presented, including the demeanor of the witnesses. The demeanor of the witnesses was especially important in this case because of Appellant's clear lack of interest in anything but his own welfare, financial and otherwise, as was amply demonstrated by him on the witness stand.

a. The Trial Court did not commit clear error in adding interest and costs of collection to the 1987 judgment.

Again, this issue was not timely appealed, and was not addressed in any rehearing or new trial motion late-filed and invoked to bootstrap the January 14, 1993 Order into the July 1993 Notice of Appeal.

Appellant first disagrees with the Trial Court's acceptance of Appellee's calculations of amounts owed under the 1987 Judgment. When presenting evidence at the hearing of November 23, 1992, and in the subsequent legal briefs ordered by the Trial Court, Appellant failed to present any contrary evidence of what the correct amount of the 1987 Judgment was. R. 160. Appellant merely denied that he owed Appellee any amount, or ever would owe her any amount, based on the existence of the Settlement Agreement. Appellant now seeks a trial *de novo* and attempts to present new evidence of what he believes the calculations should be. Appellant is not entitled to a trial *de novo* before the Court of Appeals, and is limited to the evidence he presented to the Trial Court on this matter, which was no evidence. R. 233.

b. The Trial Court did not commit clear error in awarding Appellee her costs and attorney's fees in the collection of child support.

Again, this issue was not timely appealed, and was not addressed in any rehearing or new trial motion late-filed and invoked to bootstrap the January 14, 1993 Order into the July 1993 Notice of Appeal.

As Appellant has acceded, a trial court has the power to award attorney fees in domestic proceedings. Appellant's Brief at 31. Such an award under Utah Code Annotated Section 30-3-3 is not limited to actions prior to the signing of the Decree of Divorce, and Appellant's statement to the contrary is without merit. Furthermore, the Trial Court was free to exercise its discretion under Utah Code Annotated Section 78-27-56 in awarding attorney's fees in this case. *Utah Dept. of Social Services v. Adams*, 806 P.2d 1193 (Utah App. 1991). The Trial Court was faced with a father who refused to pay his child support, and whose financial abilities, when compared with those of the custodial mother, enabled him to outspend her in her collection efforts. Appellant's efforts to avoid collection by his repeated challenges to the Writs of Garnishment and demands for hearings, his inducing Appellee into entering into the Settlement Agreement after having refused to pay his child support and alimony obligations for

years, and other legal maneuvers, all convinced the Trial Court that attorney's fees were proper in this case. This was a matter well within the Trial Court's discretion. *Adams*, at 1197.

As articulated in *Adams*, Appellant's burden is to "marshall all the *supporting* evidence and demonstrate its [legal] insufficiency" to support the Trial Court's finding that attorney's fees were warranted. *Id.* Appellant has failed to prove that the Trial Court abused its discretion and cannot do so, because the facts demonstrate that Appellant's litigation activities were orchestrated for the purpose of circumventing the Decree of Divorce and due process, not to facilitate them, as he claims herein.

c. The Trial Court did not commit clear error in awarding Appellee twelve percent interest.

Appellant argues that the Trial Court should have awarded "contract" prejudgment interest for amounts due under the Decree of Divorce. Appellant ignores the law as argued before the Trial Court and decided thereby. R. 1420-23. Utah Code Ann. Section 30-3-10.6. provides in pertinent part: "(1) Each payment or installment of child or spousal support under any child support order, as defined by Subsection 62A-11-401(3), is, on and after the date it is due: (a) a judgment with the same attributes and effect of any judgment of a district court, except as provided in Subsection (2)."

The amounts sought in the June 1993 Order and Judgment were all "child or spousal support under a[] child support order," the Decree of Divorce, and interest was calculated from the date each such amount became due, at the statutory rate of twelve percent. Any argument to the contrary is made in bad faith. Granted, interest on the June 1993 Judgment would be calculated at a lower rate thereafter--but interest is calculated at the rate in effect on the date a Judgment was entered, not the date on which a Judgment is paid.

d. The Trial Court did not commit clear error in awarding Appellee various amounts for reimbursement of costs paid by her.

Appellant engages in whining over amounts awarded by the Trial Court and again seeks trial *de novo* in the Utah Court of Appeals on issues properly decided by the Trial Court. Under the Decree of Divorce Appellee was entitled to reimbursements for the minor child's medical and dental care costs, lessons and summer school expenses, and reimbursement for medical and life insurance coverages. A great deal of testimony was provided to the Trial Court, as well as documentation, all taken together, demonstrating the amounts owed Appellee by Appellant. Appellant makes blanket statements herein that the Trial Court made its decisions based on "flimsy evidence." Appellant's Brief, at 31. Appellant goes to the length of attempting to cite to matters not in the record to convince this Court that the Trial Court was in error. *Id.*, at 27.

Appellee should not be forced to relitigate the hearings held before the Trial Court in this Brief. The Trial Court properly found that "books, flags, school pictures, flash cards, overdue book fees, magazine subscriptions, crafts and clothing" were indeed, expenses related to lessons and summer school. It based its decision on the evidence presented and the demeanor of the witnesses. These are items that one would normally associate with lessons and summer school, and Appellant has no basis for asserting otherwise. Appellant has demonstrated only his unwillingness to provide such items for his child, but has completely failed to demonstrate that the Trial Court committed clear error in so denominating such items, which is his burden. If anything, this Court should gain a feel for the Appellant's tactics in avoiding his responsibilities to his child by the tenor of these arguments.

e. The Trial Court did not commit clear error in awarding Appellee additional attorney's fees.

In the January 14, 1993 Order, recognizing Appellee's need for financial resources in attempting to collect child support, the Trial Court awarded Appellee ongoing costs of collection,

including a reasonable attorney's fee. R. 234. Contrary to Appellant's representation to this Court, in the Memorandum Decision of April 28, 1993, the Trial Court addressed the issue:

[D]efendant's response has been unpersuasive, and appears to be calculated merely to frustrate the attempted collection of any amounts that have long been due and owing to the plaintiff from the defendant.

The defendant has done little, if anything, to comply with the Court's orders in the original Decree of Divorce. He has made insignificant contributions to the financial needs or other welfare of the child, and has basically left the total responsibility for those obligations to the plaintiff. The defendant's efforts to further frustrate the plaintiff's attempted collection of at least some of the amounts that she is rightfully entitled appear to the Court to border upon bad faith, and while the Court does not make such a specific finding, it does award attorney's fees on the basis that the expenses and fees have been incurred as a result of the demands of the defendant, and that the defendant has failed to prevail. *The plaintiff is not in a position to pay the attorney's fees that she has incurred as a result of the defendant's challenge to Garnishments and other matters, as contained herein, and further considering the conduct of the defendant throughout these long proceedings since the divorce Decree was originally entered, and his lack of any meaningful cooperation, the additional attorney's fees are not only warranted, but in this Court's view mandated.* [R. 507-08, emphasis supplied]

Appellant raises the issue of when evidence of attorney's fees was presented to the Trial Court. This is an issue not preserved for appeal, never having been raised in the objections to the Findings of Fact, Conclusions of Law, and Order of June 1993.¹ It is, in fact, an attempt

¹Appellant's Objections were limited to the following:

[1] c. Paragraph 12 of plaintiff's proposed Findings should be amended to include the language found at page 7, paragraph 1 of the Memorandum Decision as follows: "The plaintiff seeks an award of attorney's fees and costs in an additional amount of \$4,145.00 for additional fees and costs related to the defendant's objections to the amounts contained in the Writs of Garnishment and demands for evidentiary hearings to recalculate and offer evidence relating to the amount claimed by the plaintiff." [R. 544-45].

. . .

[3] b. Paragraph 28 of the proposed Order should be amended to reflect the statutory language found at Rule 4-505 of the Utah Code of Judicial Administration if the court deems that such award is equitable. [R. 546].

by new counsel who was not present in any of the hearings or other proceedings before the Trial Court, to retrospectively attempt to attack the Trial Court's grant of attorney's fees to Appellee.

The proceedings below were ongoing, and at no point until June of 1993 was there any indication that the continuing challenges to Appellee's collection attempts would cease. The Trial Court had awarded ongoing attorney's fees,² and the same were never finally calculable until entry of the June 1993 Order and Judgment. Affidavits of attorney fees are found throughout the record together with testimony concerning Appellee's needs in regard to the award of attorney fees. In Appellee's affidavit dated January 21, 1993, Appellee testifies: "I have incurred substantial costs and attorneys fees in my efforts to collect the above detailed amounts, and my attorney will submit an Affidavit of Attorney Fees following the hearing on this matter." R. 243; *see also* R. 174.

Appellee did not just seek attorney's fees for the actual evidentiary hearings, which were continued for months, but for all phases of the proceedings. The Trial Court's grant of ongoing attorney's fees allowed Appellee to request attorney's fees at any time such amounts had reached a sufficient level that Appellee felt she should request that the Trial Court reduce them to judgment. Appellant's actions in these proceedings gave Appellee and the Trial Court every indication that there would be continuing litigation for many months to come--which indications have been borne out, through the date of this briefing, and into the future when Appellant's Petition to Modify Custody is tried. Therefore, evidence of need was offered before and during the hearings, but the issue of the amounts and reasonableness was reserved until those amounts could be fully calculated. The evidentiary hearings were held to decide the single issue of amounts owed pursuant to the Decree of Divorce and what payments or credits should be allowed to Appellant. Any other issue was strictly prohibited. Therefore, Appellee properly

²Paragraph 3 of the January 1993 Order provides: "Plaintiff may augment the amounts of such outstanding Judgments by her costs of collection, including a reasonable attorney's fee" R. 234. The term "outstanding Judgments" refers to all of the amounts that were sought and awarded below.

defendant, having heard the sworn testimony of the plaintiff, and good cause appearing therefore, and having heretofore made and entered its Findings of Fact and Conclusions of Law;

NOW, THEREFORE;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. That the bonds of matrimony now and heretofore existing between the parties are dissolved, and a Decree of Divorce is granted to the plaintiff, to become final upon the date of entry hereof.

2. That the plaintiff is awarded the care, custody and control of the minor child of the parties, subject to defendant's rights of visitation which shall include regular visits of once during the week, which shall generally be Wednesday after school until bedtime, and weekends at least two times per month from Friday after school until Sunday evening. That in the event that either parent moves more than 50 miles from Salt Lake City, the visitation right shall be rearranged to provide equivalent visiting time. That additionally, the holidays with the minor child shall be alternated between the parties from year to year, and the minor child shall spend at least two weeks of the summer vacation with the defendant. That visitation on principal holidays, birthdays, and vacation shall be arranged between the parties and alternated with the other party in the following year.

3. That the defendant is ordered to pay to the plaintiff child support in the sum of \$100.00 in March, 1986, \$200.00 in

April, 1986, \$300.00 in May, 1986, and \$400.00 in June, 1986, and \$400.00 each month thereafter. That in addition, the defendant is ordered to provide standard health insurance for the benefit of Christian. That the defendant is ordered to acquire and pay for a life insurance policy upon his own life for the benefit of Christian Broadbent, in the amount of \$75,000.00 beginning in July, 1986. That the defendant's child support obligation shall continue until Christian reaches the age of 18 years or has graduated from high school, whichever comes last.

4. That the defendant is ordered to pay two-thirds ($2/3$) of the dental and medical care provided to Christian, which is not covered by the health insurance. That such services shall be agreed upon prior to treatment, except in the case of emergency.

5. That the defendant is ordered to pay one-half ($1/2$) of the costs for lessons and for summer school.

6. That the defendant is ordered to pay to the plaintiff the sum of \$300.00 per month, beginning July 30, 1986. That the defendant's obligation for this payment shall continue for a period of three years, or until the plaintiff remarries or cohabits with an unrelated member of the opposite sex as defined by Section 30-3-5, Utah Code Annotated (1953 as amended).

7. That each of the parties is awarded the personal property now in his or her possession, and to include household furniture and other furnishings according to the addendum attached to the parties' Stipulation, with the plaintiff to retain the

porcelain horses and the woman with child, and the defendant the Chinese Quon Yin figure. That the plaintiff is ordered to deliver said items to the defendant, upon approval of the Decree of Divorce.

8. That the defendant is ordered to transfer 322,000 shares from the family trust, so that after the divorce, the plaintiff will own a total of 360,000 shares of International Connections.

9. That in the event any stock in International Connections currently pledged to Arthur Hackin diverts to the defendant, it shall be divided equally between the parties. That in the event plaintiff receives any payments based upon an increase on the value of American Methyl stock ~~which~~, such payments shall be the sole property of plaintiff.

10. That both plaintiff and defendant shall each retain such other investments, stocks and business interests as they may own or acquire.

11. That each party is ordered to assume and pay his or her own separate debts and hold the other party harmless therefrom.

12. That each party is ordered to assume and pay his or her own attorney's fees and costs incurred herein.

13. That the plaintiff is awarded the use of her maiden name, Helen Schumann.

DATED this 7 day of May, 1986.

BY THE COURT:

Scott Daniels
District Judge

Approved as to form:

Ellen Maycock

ATTEST
H. DIXON HURLEY
CLERK
By Karen Bush
CLERK

MAY 12 1987

THOMAS N. ARNETT, JR. (0128)
Attorney for Plaintiff
528 Newhouse Building
10 Exchange Place
Salt Lake City, Utah 84111
Telephone: (801) 363-5650

H. Dixon Hindley, Clerk 3rd Dist. Court
H. Dixon Hindley
Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

-----ooo0ooo-----
HELEN S. BROADBENT,

Plaintiff,

vs.

ROSS BROADBENT,

Defendant.

:

:

:

:

:

Bk 213 NO. 1141
5-13-87-8:19 am
JUDGMENT

Civil No. D81-173

Judge Timothy R. Hanson

-----ooo0ooo-----
Plaintiff's Order to Show Cause came on regularly for hearing before the Honorable Sandra Peuler, Commissioner of the above-entitled Court, on Tuesday, the 3rd day of March, 1987, at the hour of 2:00 p.m., plaintiff appearing in person and through her attorney Thomas N. Arnett, Jr., and the defendant appearing in person and through his attorney Ellen Maycock of the firm of Kruse, Landa & Maycock, and the Court having heard the arguments and proffers of proof of counsel, having considered the contents of the Court's file, having made its recommendation in open Court, neither party having objected thereto within ten days, and good cause appearing therefore;

NOW, THEREFORE;

IT IS HEREBY ORDERED AND ADJUDGED as follows:

JUDGMENT

1. That the plaintiff be and is hereby awarded judgment against the defendant in the sum of \$5,300.00, representing child support and alimony arrearages through February 28, 1987.

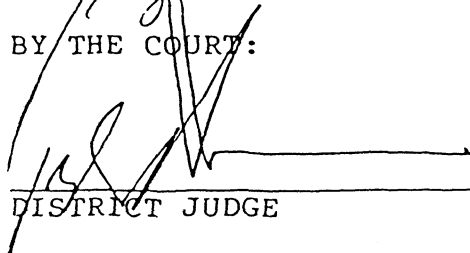
2. That the plaintiff be and is hereby awarded judgment against the defendant in the sum of \$1,503.00, representing medical and dental bills incurred for the minor child of the parties, which have been paid by the plaintiff due to the defendant's failure to obtain health insurance as ordered in the Decree of Divorce.

3. That the plaintiff be and is hereby awarded judgment against the defendant in a sum of \$393.50, representing one-half of the costs of lessons and summer school for the benefit of the minor child of the parties.

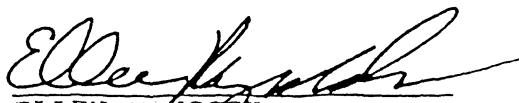
4. That the defendant be and is hereby ordered to use his best efforts to obtain appropriate employment so that he can comply with the financial requirements of the Decree of Divorce.

DATED this 12 day of May, 1987.

BY THE COURT:

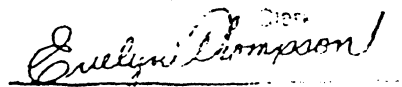

DISTRICT JUDGE

Approved as to form:


ELLEN MAYCOCK
Attorney for Defendant

ATTEST

H. DYON HINDLEY

By 
Evelyn Thompson

County of Salt Lake - State of Utah

FILE NO. D-81-173

E: (✓ PARTIES PRESENT)

EN S. BROADBENT,

COUNSEL: (✓ COUNSEL PRESENT)

: James L. Thompson

Plaintiff,

: Attorney for Plaintiff

'S.

: M. Joy Douglas

IS BROADBENT,

: Attorney for Defendant

Defendant.

:

CLERK

HON. TIMOTHY R. HANSON

JUDGE

REPORTER

DATE: DECEMBER 30, 1992

BAILIFF

Before the Court is the defendant's Objection to Writs of Garnishment issued at the request of the plaintiff. On November 23, 1992, the parties appeared before the Court with their counsel of record, and argued their respective positions in relation to the objections to the garnishments filed by the defendant. Following argument, the Court requested legal memoranda from counsel relating to the issues raised during the course of oral argument. The matter was to be brought to the Court's attention, and was therefore diaried on December 17, 1992. The Court has reviewed the materials submitted by the parties, and is satisfied that the defendant's objections to the Writs of Garnishment are without merit. To the extent that the defendant asserts that the stipulation entered into between the parties prohibits the issuance of the Writs of Garnishment based upon judgments earlier obtained, the Court finds that the Settlement Agreement is invalid and without any legitimate consideration. The Settlement agreement did not result in a court order, and this Court has not authorized the substitution of vending machines for child support, even if the parties otherwise legitimately agree. The Writs of Garnishment are

00183

TITLE: (✓ PARTIES PRESENT)
HELEN S. BROADBENT,

COUNSEL: (✓ COUNSEL PRESENT)

Plaintiff,

VS.

ROSS BROADBENT,

Defendant.

CLERK

REPORTER

BAILIFF

HON. TIMOTHY R. HANSON

JUDGE

DATE: _____

based upon a duly entered Judgment, which is enforceable through post-Judgment collection proceedings, such as a Writ of Garnishment.

Defendant's claims that the amounts sought through the Writs of Garnishment are excessive is unsupported. There is nothing in the materials submitted by the defendant that would suggest that the calculations on the part of the plaintiff as set forth in the Writs of Garnishment is inappropriate, other than the unsupported statement that the defendant thinks he is entitled to additional credits.

Based upon the foregoing, the Court overrules the defendant's Objections to the Writs of Garnishment, and orders that the plaintiff may proceed to obtain the funds being held by the parties garnished to satisfy the outstanding Judgments heretofore awarded in favor of the plaintiff and against the defendant.

Counsel for the plaintiff is to prepare an appropriate Order in conformity with this Minute Entry decision, and submit the same to the

--Continued--

County of Salt Lake - State of Utah

FILE NO. D-81-173

TLE: (✓ PARTIES PRESENT)

COUNSEL: (✓ COUNSEL PRESENT)

LEN S. BROADBENT,

:

Plaintiff,

:

vs.

:

SS BROADBENT,

:

Defendant.

:

CLERK

HON. TIMOTHY R. HANSON

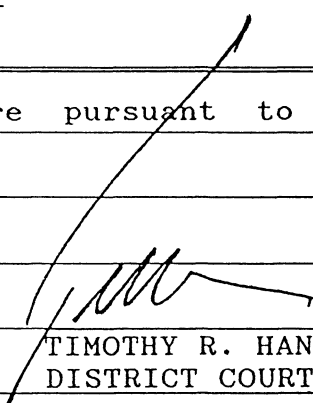
JUDGE

REPORTER

DATE: _____

BAILIFF

Court for review and signature pursuant to the Code of Judicial
Administration.


TIMOTHY R. HANSON
DISTRICT COURT JUDGE

Copies to:

James L. Thompson, Esq.

M. Joy Douglas, Esq.

00185

PAGE 3 OF 3

JAN 11 1993

SALT LAKE COUNTY

James L. Thompson (#5807)
Attorney for Plaintiff
410 East Center Street
Bountiful, Utah 84010
Telephone (801) 292-0560

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

HELEN S. BROADBENT,)	
)	ORDER
Plaintiff,)	
)	
vs.)	
)	
ROSS BROADBENT,)	Civil No. D81-173
)	
Defendant,)	Judge Timothy R. Hanson
)	

Before the Court is the Defendant's Objection to Writs of Garnishment issued by the Clerk on October 29, 1992, based upon the Court's Judgment dated May 12, 1987. Such Writs were issued in the amount of \$13,316.82, representing principal and interest in the statutory amount on the aforementioned Judgment. Defendant objected to such Writs and requested a hearing challenging the same. On November 23, 1992, the parties appeared before the Court, Plaintiff represented by James L. Thompson, and Defendant represented by M. Joy Douglas, and argued their respective positions in relation to the objections to the garnishments filed by Defendant. Following argument, the Court requested legal Memoranda from counsel relating to the

issues raised during the course of oral argument. The matter was to be brought to the Court's attention, and was therefore diaried on December 17, 1992. The Court, having heard the arguments of counsel and having considered the Memoranda submitted by the same, makes its Findings of Fact and Conclusions of Law, and Orders as follows:

FINDINGS OF FACT

1. On May 7, 1986, this Court granted a Decree of Divorce to the parties, awarding custody of the minor child of the marriage, Christian Broadbent, to Helen Broadbent (Schumann), the Plaintiff herein.

2. In the Decree of Divorce this Court ordered Defendant to pay Plaintiff, among other things, Child Support and Alimony, and other amounts for the care and maintenance of their son.

3. Defendant failed and refused to pay such sums as ordered by this Court, and on May 12, 1987, the Court entered its Judgment against Defendant and in favor of Plaintiff in the principal amount of \$7,196.50.

4. The parties entered into a "Child Support and Alimony Settlement Agreement," dated March 16, 1988, the consideration for which was identified: "In exchange for a full release from all past, present or future obligations relating to child support or alimony, Ross Broadbent hereby agrees [to] provide Helen Schumann with vending machines under the following terms."

5. The Settlement Agreement did not result in a Court Order and the Court has not authorized the substitution of vending machines for child support, even if the parties otherwise legitimately agree, and Plaintiff received no benefit under the Settlement Agreement.

6. Plaintiff's calculations set out in the Writs of Garnishment of the amounts due under the Judgment dated May 12, 1987, are accurate and appropriate, which amount is \$13,316.82 in principal and interest due and owing as of October 12, 1992. Plaintiff has necessarily incurred costs and attorney fees in the amount of \$2,201.20 (through and including the filing of Plaintiff's Reply Brief) resulting from this proceeding to collect the amounts due under the Court's Judgment. Further interest on the Judgment amount from October 12, 1992 through December 12, 1992, amounts to \$253.65, plus an additional \$5.19 each day thereafter until paid.

CONCLUSIONS OF LAW

1. To the extent that the Defendant asserts that the stipulation entered into between the parties in the Settlement Agreement prohibits the issuance of the Writs of Garnishment based upon Judgments earlier obtained, the Settlement Agreement is invalid and without any legitimate consideration.

2. The Writs of Garnishment are based upon a duly entered Judgment, which is enforceable through post-judgment collection proceedings, such as a Writ of Garnishment.

3. Defendant's claims that the amounts sought through the Writs of Garnishment are excessive is unsupported. There is no admissible evidence in the materials submitted by Defendant suggesting that Plaintiff's calculations as set forth in the Writs of Garnishment are inappropriate. Such calculations are, therefore, accurate.

ORDER

Based on the foregoing and good reason appearing therefore it is hereby ORDERED, ADJUDGED, AND DECREED as follows:

1. The Court overrules the Defendant's Objections to the Writs of Garnishment finding them to be without merit.

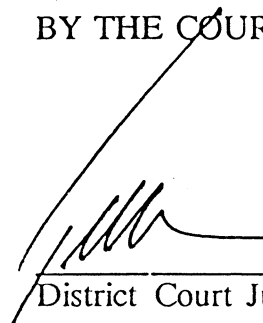
2. Plaintiff may proceed to obtain the funds being held by the parties garnished, to satisfy the outstanding Judgments heretofore awarded in favor of the Plaintiff and against the Defendant.

3. Plaintiff may augment the amounts of such outstanding Judgments by her costs of collection, including a reasonable attorney's fee, making the total amount of the Judgment of May 12, 1992, \$15,865.09, including interest through December 31, 1992, plus an additional \$5.19 each day thereafter until paid.

4. Counsel for Plaintiff is to prepare an appropriate Order in conformity with the Court's Minute Entry Decision, and submit the same to the Court for review and signature pursuant to the Code of Judicial Administration.

DATED this 14 day of January, 1993.

BY THE COURT:



District Court Judge

Lauren C. Calkins
attest

CERTIFICATE OF MAILING


I certify that I caused the foregoing to be served upon Defendant by mailing a true copy of the same, first class United States mail, to the following on this 31st day of December, 1992:

M. Joy Douglas, Esq.
CORPORON & WILLIAMS, P.C.
310 South Main Street, Suite 1400
Salt Lake City, Utah 84101



James L. Thompson

APR 28 1993


SALT LAKE COUNTY
Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

HELEN S. BROADBENT,	:	MEMORANDUM DECISION
Plaintiff,	:	CASE NO. D-81-173
vs.	:	
ROSS BROADBENT,	:	
Defendant.	:	

The above-referenced matter is before the Court for decision relating generally to amounts claimed by the plaintiff as unpaid and presently due under the terms of an original divorce Decree entered by this Court on May 7, 1986. Since the entry of the original Decree, this Court on May 12, 1987 signed a Judgment awarding plaintiff certain sums as arrearages and made certain orders requiring the defendant to comply with the financial requirements of the Decree. To the extent there is a dispute between the parties as to whether or not there have been payments on the May 12, 1987 Judgment, the Court finds that there has been none and the amount due under the May 12, 1987 Judgment is, including interest at the rate of 12% per annum through March 10, 1993, \$13,965.84. All remaining claims allegedly accrued since the May 12, 1987 Judgment.

The Court in relation to that Judgment has awarded attorney's fees in an amount of \$2,201.20 as was contained in the Order of

January 14, 1993. To the extent that there is any question regarding the status of the May 12, 1987 Judgment and any credits claimed due against that Judgment, the Court finds that there are none and finds in favor of the plaintiff and against the defendant on those issues.

It also appears to the Court that there continues to be a continuing objection to the Writs of Execution, suggesting that the Writs of Execution are improper, inasmuch as there is an alleged agreement, at least asserted by the defendant, to resolve outstanding arrearages and that the amounts claimed under the Writs of Execution are excessive.

As to the question of whether or not the Writs were proper, the Court determines to the extent that it has not already done so, that the Writs of Execution are proper. This Court declined to accept, enforce or otherwise consider the so-called settlement agreement between the plaintiff and the defendant, and has heretofore ruled on those issues, and the Court has not been advised of any legitimate reason why its ruling should be modified.

As to the amounts that are due the plaintiff from the defendant from and since the May 12, 1987 Judgment, excluding interest on the May 12, 1987 Judgment and the previously awarded amount of attorney's fees, this Court determines as follows.

Alimony is owed the plaintiff from the defendant in the principal amount of \$8,035.00. Added to that is interest on the amount of alimony from the date that it was due on a periodic basis, and at the statutory interest rate. The Court finds in favor of the plaintiff, and finds the plaintiff's testimony and evidence relating to unpaid alimony persuasive, and the defendant's testimony unpersuasive.

On the amount of child support that is due and payable, the Court finds that child support due the plaintiff by the defendant as of November 1992 is \$25,065.00. Added to that is interest at the statutory rate from the due date of each interest payment. On the issue of unpaid child support, the Court finds the plaintiff's testimony and evidence persuasive on the amounts due, and the defendant's evidentiary offerings unpersuasive.

The plaintiff seeks unpaid expenses that were ordered to be paid by the defendant to the plaintiff as a result of the Decree of Divorce, and incidental expenses that she has incurred as a result of her checking and savings accounts being garnished by defendant's creditors for sums that the defendant was to pay as a result of the Decree.

On the issue of unpaid expenses, the Court finds that there is presently due and owing \$8,697.51 as asserted by the plaintiff.

The plaintiff is entitled to Judgment in those amounts for unpaid expenses and consequential expenses as a result of the defendant's failure to comply with the Court's original Decree of Divorce. The plaintiff's evidence is persuasive on those issues, whereas the Court finds the defendant's evidence lacking and unpersuasive. Plaintiff is entitled to statutory interest on the amounts due for unpaid expenses as of the date that the expense was incurred.

The Decree of Divorce specifically provided that the defendant will provide standard health care insurance for the benefit of the minor child, Christian. The plaintiff asserts that the defendant has not provided the standard health care insurance, and that she was required to do so to insure that the child, Christian, who suffers from some substantial physical problems, did not become uninsurable. There is evidence that the defendant from time to time may have provided some insurance but that evidence fails in its evidentiary value due to the vague nature of the testimony offered by the defendant regarding the times that insurance was available and the manner in which it was provided, if at all.

The evidence supports and the Court finds that the plaintiff, to insure the continued insurability of the minor child, has provided at her own expense insurance coverage and that the amount

of funds that she has paid to insure the health insurance remained in effect is the principal sum of \$6,900.00. The Court finds that she is entitled to that amount from the defendant in that she has paid the defendant's obligation to insure that the child's insurance coverage is continuing. The plaintiff is entitled to interest at the statutory rate from and after the dates that the health insurance premiums were paid by the plaintiff.

The plaintiff further asserts that the defendant has failed to comply with that portion of the Decree that required him to acquire and pay for a life insurance policy on his own life for the benefit of the minor child in an amount of not less than \$75,000.00, commencing in July of 1986. Certain policies have been in effect on the life of the defendant in accordance with the Decree of Divorce, but those policies have been paid for, purchased and maintained by the plaintiff. Defendant's claims that there were other policies naming a trust as beneficiary are unpersuasive. No trust has been offered in evidence, and even if the trust provides as the defendant suggests, there is no guarantee that the funds would be available to the minor child as required by the original Decree of Divorce.

The evidence shows and the Court finds that the plaintiff has paid a total of \$9,246.00 through November of 1992 for life

insurance premiums on the defendant's life. The Court finds the plaintiff's evidence persuasive on this issue, and the defendant's evidence unpersuasive. In addition to the principal amount of \$9,246.00 through November 1992, the plaintiff is entitled to interest at the statutory rate from the date that the expense was incurred.

Further on that subject, the defendant is advised that the Court expects that he will no later than forty-five (45) days from the date of this Memorandum Decision obtain and pay for appropriate life insurance, and supply to the plaintiff and her attorney proof of said insurance, all as to comply with the original Decree of Divorce. Failure to do so without adequate explanation will require this Court to consider issues of contempt and the potential sanctions therefor, including incarceration, should there be evidence that the defendant continues to ignore the Court orders regarding his responsibility towards the plaintiff and the minor child.

The plaintiff also seeks attorney's fees. The Court has determined that the amount of attorney's fees of \$2,201.20 is appropriate for the collection of the May 12, 1987 Judgment. Those attorney's fees may be reduced to a Judgment and interest will accrue in accordance with the statutory rate thereon.

The plaintiff seeks an award of attorney's fees and costs in an additional amount of \$4,145.00 for additional fees and costs related to the defendant's objections to the amounts contained in the Writs of Garnishment and demands for evidentiary hearings to recalculate and offer evidence relating to the amount claimed by the plaintiff.

The Court is satisfied that the original attorney's fees and costs sought by the plaintiff are appropriate, and awards additional attorney's fees and costs in accordance with Exhibit "C" (the Affidavit of plaintiff's counsel), as attached to the plaintiff's closing statement brief. The plaintiff has substantially prevailed on all issues, the defendant's response has been unpersuasive, and appears to be calculated merely to frustrate the attempted collection of any amounts that have long been due and owing to the plaintiff from the defendant.

The defendant has done little, if anything, to comply with the Court's orders in the original Decree of Divorce. He has made insignificant contributions to the financial needs or other welfare of the child, and has basically left the total responsibility for those obligations to the plaintiff. The defendant's efforts to further frustrate the plaintiff's attempted collection of at least some of the amounts that she is rightfully entitled appear to the

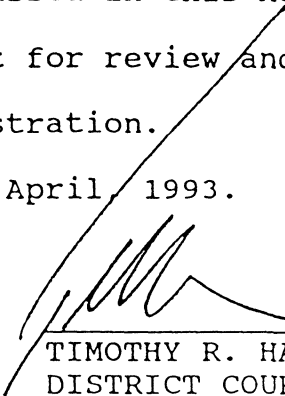
Court to border upon bad faith, and while the Court does not make such a specific finding, it does award attorney's fees on the basis that the expenses and fees have been incurred as a result of the demands of the defendant, and that the defendant has failed to prevail. The plaintiff is not in a position to pay the attorney's fees that she has incurred as a result of the defendant's challenge to Garnishments and other matters, as contained herein, and further considering the conduct of the defendant throughout these long proceedings since the divorce Decree was originally entered, and his lack of any meaningful cooperation, the additional attorney's fees are not only warranted, but in this Court's view mandated.

The Court is holding a check issued as a result of a Garnishment in the sum of \$15,052.67 made payable to Helen Broadbent. That check will be made available to the plaintiff's counsel upon the signing of an appropriate Order in conformity with this Memorandum Decision. The proceeds realized from the aforementioned check shall be noted in the Court's file with an appropriate pleading representing a partial satisfaction of the outstanding Judgments. The aforementioned funds are to be applied to the oldest obligations first.

Counsel for the plaintiff is requested to prepare an appropriate set of Findings of Fact, Conclusions of Law, and Orders

relating to the issues discussed in this Memorandum Decision, and submit the same to the Court for review and signature pursuant to the Code of Judicial Administration.

Dated this 28 day of April, 1993.



TIMOTHY R. HANSON
DISTRICT COURT JUDGE

FILED DISTRICT COURT
Third Judicial District

James L. Thompson (#5807)
Attorney for Plaintiff
410 East Center Street
Bountiful, Utah 84010
Telephone (801) 292-0560

JUN 28 1993

By  SALT LAKE COUNTY,
Deputy Clerk

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

HELEN S. BROADBENT,)	
)	
Plaintiff,)	FINDINGS OF FACT, CONCLUSIONS OF
)	LAW, AND ORDER OF THE COURT
vs.)	
)	
ROSS BROADBENT,)	Civil No. D81-173
)	
Defendant,)	Judge Timothy R. Hanson
)	

Before the Court is the Defendant's Objection to Writs of Garnishment obtained by the Plaintiff pursuant to amounts claimed by the Plaintiff as unpaid and presently due under the terms of an original divorce Decree entered by this Court on May 7, 1986. Defendant objected to such Writs and requested a hearing challenging the validity of the same and the amounts claimed due thereunder. On February 8 and March 8, 1993, the parties appeared at an evidentiary hearing before the Court, Plaintiff represented by James L. Thompson, and Defendant represented by M. Joy Jelte, and argued their respective positions in relation to the objections to the garnishments filed by Defendant. Following such hearing and argument, the Court requested final

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arguments in writing from counsel relating to the issues raised during the course of the hearing. The Court, having heard the testimony of the witnesses, examined the evidence presented by the parties, and heard arguments of counsel and having considered the final arguments submitted by the same, makes its Findings of Fact and Conclusions of Law, and Orders as follows:

FINDINGS OF FACT

1. On May 7, 1986, this Court granted a Decree of Divorce to the parties, awarding custody of the minor child of the marriage, Christian Broadbent, to Helen (Broadbent) Schumann, the Plaintiff herein.

2. In the Decree of Divorce this Court ordered Defendant to pay Plaintiff, among other things, Child Support and Alimony, and other amounts for the care and maintenance of their son; namely, that Defendant maintain health insurance on the child and maintain a policy of life insurance on himself for the benefit of the child, and that Defendant pay portions of medical and other expenses incurred for the benefit of the child.

3. Defendant failed and refused to pay such sums as ordered by this Court, and on May 12, 1987, the Court entered its Judgment against Defendant and in favor of Plaintiff in the principal amount of \$7,196.50, and further ordered the Defendant to comply with the financial requirements of the Decree.

4. There has been no payment made by Defendant to Plaintiff toward the Judgment of May 12, 1987, and no credit is due, and the amount due and owing under such Judgment as of March 10, 1993, including interest thereon at the rate of 12% per annum, is \$13,965.84. Plaintiff is entitled to her costs and attorney's fees in the amount of \$2,201.20 for costs of collection of such amount as was granted in the Court's Order of January 14, 1993, and such amounts are specifically found to be reasonable and appropriate. The Court specifically finds in favor of Plaintiff and against Defendant on all issues relating to the May 12, 1987 Judgment, including the award of attorney's fees, plus interest thereon at the statutory rate.

5. Any claims of satisfaction or payment of any amount due herein pursuant to an alleged Settlement Agreement between the parties are invalid as has been previously ruled by this Court, and all writs issued herein have been obtained properly, and not in excessive amounts.

6. All remaining claims accrued since the entry of the May 12, 1987 Judgment in the following amounts, and the Court finds as follows.

7. Alimony is owed Plaintiff from Defendant in the principal amount of \$8,035.00, plus interest thereon at 12% per annum from the date such alimony became due. The Court finds in favor of the Plaintiff, and finds Plaintiff's testimony and evidence relating to unpaid alimony persuasive, and the Defendant's testimony unpersuasive.

8. Child Support is owed Plaintiff from Defendant in the principal amount of \$25,065.00 through November 1992, plus interest thereon at 12% per annum from the date such Child Support became due. The Court finds in favor of the Plaintiff, and find's Plaintiff's testimony and evidence relating to unpaid Child Support persuasive, and the Defendant's testimony and evidentiary offerings unpersuasive.

9. Unpaid Expenses are owed Plaintiff from Defendant in the principal amount of \$8,697.51 through November 1992, including incidental expenses that Plaintiff incurred as a result of her checking and savings accounts being garnished by Defendant's creditors for sums that Defendant was to pay as a result of the Decree, plus interest thereon at 12% per annum from the date such Unpaid Expense became due. The Court finds in favor of the Plaintiff, and find's Plaintiff's testimony and evidence relating to Unpaid Expenses persuasive, and the Defendant's testimony and evidentiary offerings unpersuasive. Such Unpaid Expenses result from Defendant's failure to comply with the Court's original Decree of Divorce.

10. The Plaintiff, to ensure the continued medical insurability of Christian, the minor child, has provided at her own expense medical insurance coverage in the amount of \$6,900.00, and is entitled to such amount from Defendant in that she had paid the Defendant's obligation to insure that the child's insurance coverage is continuing, plus interest thereon at 12% per annum from the date each such premium payment became due.

11. Defendant was ordered in the Decree of Divorce to obtain and pay for a policy of Life Insurance of not less than \$75,000.00 on his own life for the benefit of Christian Broadbent, and Plaintiff has purchased and maintained such policies of Life Insurance on the life of Defendant. Defendant has failed to prove that he provided such policies of Life Insurance and Plaintiff is owed from Defendant \$9,246.00 through November 1992, plus interest thereon at 12% per annum from the date each such Life Insurance premium became due. The Court finds in favor of the Plaintiff, and finds Plaintiff's testimony and evidence relating to Life Insurance persuasive, and the Defendant's testimony and evidentiary offerings unpersuasive.

12. Plaintiff has substantially prevailed on all issues herein and is entitled to her additional reasonable costs and attorney's fees in connection with these further proceedings in the amount of \$4,145.00, plus interest thereon at the statutory rate from the date of entry hereof.

13. The Court finds that Defendant's response to Plaintiff's Writs of Garnishment has been unpersuasive and appears to be calculated merely to frustrate Plaintiff's attempts to collect the amounts that have been long due and owing her from the Defendant. Defendant's efforts to further frustrate Plaintiff's attempted collection of at least some of the amounts to which she is rightfully entitled appear to the Court to border upon bad faith.

14. The Court finds that Defendant has done little, if anything, to comply with the Court's orders in the original Decree of Divorce.

15. The Court finds that Defendant has made insignificant contributions to the financial needs or other welfare of the minor child, Christian Broadbent, and has essentially left the total responsibility for those obligations to Plaintiff.

16. The Court finds that Plaintiff's costs and attorney's fees have been incurred as a result of Defendant's challenges and demands made herein, that Defendant has failed to prevail, and that Plaintiff is not in a position to pay for her costs and attorney's fees. The Court further finds that considering the conduct of the Defendant throughout these long proceedings and since the Divorce Decree was originally entered, and Defendant's lack of meaningful cooperation, the additional attorney's fees are not only warranted, but in the Court's view, are mandated.

17. The Court is holding a check issued as a result of a Garnishment in the sum of \$15,052.67 made payable to Helen Broadbent, to which Plaintiff is entitled upon the signing of this Order, the amount of the proceeds of which will be noted in the Court's files with an appropriate pleading representing a partial satisfaction of the outstanding Judgments.

18. Neither Plaintiff nor her attorney acted inappropriately in intercepting such check from Freedom Mortgage Corp. and forwarding the same to the Court, and Defendant's Motion for Order to Show Cause is without merit.

CONCLUSIONS OF LAW

19. The Writs of Garnishment are based upon duly entered Judgments, which are enforceable through post-judgment collection proceedings, such as a Writ of Garnishment.

20. Defendant's claims that the amounts sought through the Writs of Garnishment are excessive are unsupported. There is no evidence suggesting that Plaintiff's calculations as set forth in the Writs of Garnishment are inappropriate.

21. Defendant's Motion for Order to Show Cause is without merit, and should be dismissed.

22. Plaintiff is entitled to the following principal amounts calculated through November 1992, and interest amounts thereon calculated through March 10, 1993:

Judgment of May 12, 1987	\$7,196.50	principal
	<u>6,769.34</u>	interest
	13,965.84	Subtotal
Unpaid Alimony	\$8,035.00	
Unpaid Child Support	25,065.00	
Unpaid Expenses	8,697.51	
Health Insurance Reimbursement	6,900.00	
Life Insurance Reimbursement	9,246.00	
Interest on Unpaid Amounts	29,261.89	
Attorney's Fees and Costs	<u>6,342.81</u>	
	93,548.21	Subtotal
	\$107,514.05	TOTAL

Plaintiff is further entitled to interest on the total amount of \$107,514.05 at the statutory rate, \$35.34 per diem from March 10, 1993, until paid. All funds collected pursuant to such amounts shall be applied to the oldest obligations first.

ORDER

Based on the foregoing and good reason appearing therefore it is hereby ORDERED, ADJUDGED, AND DECREED as follows:

23. The Court overrules the Defendant's Objections to the Writs of Garnishment finding them to be without merit.

24. Judgment shall be entered in favor of Plaintiff and against Defendant in the following principal amounts calculated through November 1992, and interest amounts thereon calculated through March 10, 1993:

Judgment of May 12, 1987	\$7,196.50	principal
	<u>6,769.34</u>	interest
	13,965.84	Subtotal
Unpaid Alimony	\$8,035.00	
Unpaid Child Support	25,065.00	
Unpaid Expenses	8,697.51	
Health Insurance Reimbursement	6,900.00	
Life Insurance Reimbursement	9,246.00	
Interest on Unpaid Amounts	29,261.89	
Attorney's Fees and Costs	<u>6,342.81</u>	
	93,548.21	Subtotal
	\$107,514.05	TOTAL

25. Judgment shall be entered in favor of Plaintiff and against Defendant for interest on the total amount of \$107,514.05 at the statutory rate, \$35.34 per diem from March 10, 1993, until paid.

26. All funds collected pursuant to such amounts shall be applied to the oldest obligations first.

27. Plaintiff may proceed to obtain the funds being held by the parties garnished, to satisfy the outstanding Judgments heretofore awarded in favor of the Plaintiff and against the Defendant.

28. Plaintiff may augment the amounts of such outstanding Judgments by her costs of collection, including a reasonable attorney's fee.

29. Defendant shall obtain and pay for appropriate Life Insurance as ordered in the Decree of Divorce within 45 days of the date of the Memorandum Decision (April 28, 1993), and supply to Plaintiff and her attorney proof of said insurance. If Defendant fails to do so without adequate explanation, the Court shall consider issues of contempt and the potential sanctions therefore, including incarceration.

30. Such issues of contempt and sanctions, including incarceration, shall be considered should there be any evidence that Defendant continues to ignore the Court's Orders regarding his responsibility towards the Plaintiff and the minor child.

31. Counsel for Plaintiff is to prepare Findings of Fact, Conclusions of Law, and an appropriate Order in conformity with the Court's Memorandum Decision, and submit the same to the Court for review and signature pursuant to the Code of Judicial Administration.

32. Defendant's Motion for Order to Show Cause is denied.

DATED this 28 ^{June} day of ~~May~~, 1993.

BY THE COURT:

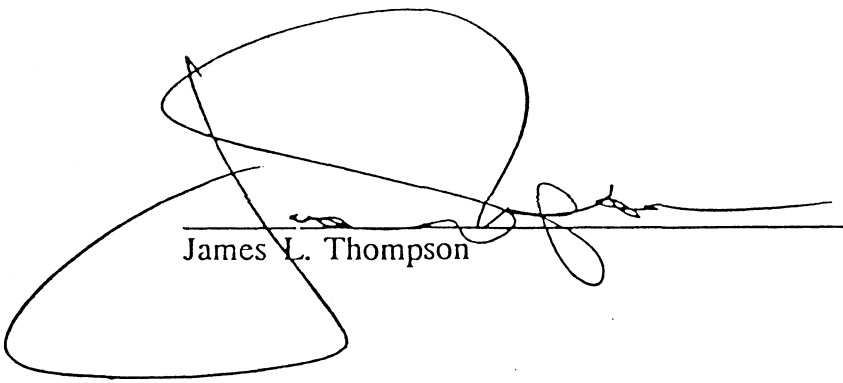

District Court Judge

Evelyn Thompson
Attest

CERTIFICATE OF MAILING

I certify that I caused the foregoing to be served upon Defendant by mailing a true copy of the same, first class United States mail, to the following on this 30th day of April, 1993: *ALSO SENT A COPY OF THE JUDGEMENT*

M. Joy Jelte, Esq.
CORPORON & WILLIAMS, P.C.
310 South Main Street, Suite 1400
Salt Lake City, Utah 84101


James L. Thompson