

1993

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

Utah Court of Appeals

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James L. Thompson; attorney for appellee.

Clark W. Sessions, Dean C. Andreasen; Campbell, Maack and Sessions; attorneys for appellant.

Recommended Citation

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DOCKET NO. 930455

IN THE UTAH COURT OF APPEALS

HELEN S. BROADBENT,
Plaintiff/Appellee,
vs.
ROSS BROADBENT,
Defendant/Appellant.

Court of Appeals
No. 930455-CA

Priority No. 15

BRIEF OF APPELLANT

APPEAL FROM ORDERS AND JUDGMENTS ENTERED BY THE
THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY,
STATE OF UTAH, JUDGE TIMOTHY R. HANSON

CLARK W. SESSIONS (2914)
DEAN C. ANDREASEN (3981)
CAMPBELL MAACK & SESSIONS
One Utah Center, Thirteenth Floor
201 South Main Street
Salt Lake City, Utah 84111-2215
Telephone: (801) 537-5555

Attorneys for Defendant/Appellant

JAMES L. THOMPSON (5807)
2470 South Redwood Road
Salt Lake City, Utah 84119
Telephone: (801) 973-8556

Utah C

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Attorney for Plaintiff/Appellee

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Plaintiff/Appellee,

vs.

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201 South Main Street
Salt Lake City, Utah 84111-2215
Telephone: (801) 537-5555

Attorneys for Defendant/Appellant

JAMES L. THOMPSON (5807)
2470 South Redwood Road
Salt Lake City, Utah 84119
Telephone: (801) 973-8556

Attorney for Plaintiff/Appellee

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	:	
Plaintiff/Appellee,	:	
	:	
vs.	:	Court of Appeals
	:	No. 930455-CA
ROSS BROADBENT,	:	
	:	
Defendant/Appellant.	:	

BRIEF OF APPELLANT

JURISDICTIONAL STATEMENT

The Court of Appeals has jurisdiction of this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(i) (Supp. 1993).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the trial court err in determining as a matter of law that the Settlement Agreement entered into between the parties was not enforceable as it was not supported by "legitimate" consideration? Conclusions of law are reviewed for correctness without any special deference. Western Kane County Special Serv. Dist. No. 1. v. Felan, 744 P.2d 1376 (Utah 1987).

2. Did the trial court err in determining as a matter of law that the Settlement Agreement entered into between the parties was not enforceable as it was not reduced to a final order of the court? Conclusions of law are reviewed for

correctness without any special deference. Western Kane County Special Serv. Dist. No. 1. v. Felan, 744 P.2d 1376 (Utah 1987).

3. Did the trial court err in determining as a matter of law that Defendant was not entitled to a credit against his obligations under the Decree of Divorce for the benefits actually received by Plaintiff pursuant to the Settlement Agreement entered into between the parties? Conclusions of law are reviewed for correctness without any special deference. Western Kane County Special Serv. Dist. No. 1 v. Felan, 744 P.2d 1376 (Utah 1987).

4. Did the trial court deny Defendant due process by not granting Defendant an evidentiary hearing on the benefits received by Plaintiff under the terms of the Settlement Agreement entered into between the parties? Conclusions of law are reviewed for correctness without any special deference. Western Kane County Special Serv. Dist. No. 1 v. Felan, 744 P.2d 1376 (Utah 1987).

5. Did the trial court err in determining the amount of "unpaid expenses," "health insurance premiums," and "life insurance premiums" owed to Plaintiff by Defendant under the terms of the Decree of Divorce? Findings of fact shall not be set aside unless clearly erroneous, due regard being given to the trial court to weigh the credibility of witnesses. Findings of fact are clearly erroneous if they are without adequate evidentiary foundation or if they are induced by an erroneous

view of the law. Western Capital & Sec. Inc. v. Knudsvig, 768 P.2d 989 (Utah Ct. App.), cert. denied, 779 P.2d 688 (Utah 1989).

6. Did the trial court err as a matter of law in awarding Plaintiff prejudgment interest at the rate of twelve percent on child support and alimony arrearage as well as amounts claimed by Plaintiff for reimbursement from the date each such expense was initially paid by Plaintiff? Conclusions of law are reviewed for correctness without any special deference. Western Kane County Special Serv. Dist. No. 1. v. Felan, 744 P.2d 1376 (Utah 1987).

7. Did the trial court err as a matter of law in awarding Plaintiff her attorney's fees and costs in that Plaintiff failed to present any evidence regarding such during trial and failed to preserve her claim prior to the close of her case? Conclusions of law are reviewed for correctness without any special deference. Western Kane County Special Serv. Dist. No. 1. v. Felan, 744 P.2d 1376 (Utah 1987).

8. Did the trial court err in finding that Plaintiff's costs and attorney's fees were reasonable in amount and that Plaintiff is not in a position to pay for her costs and attorney's fees? Findings of fact shall not be set aside unless clearly erroneous, due regard being given to the trial court to weigh the credibility of witnesses. Findings of fact are clearly erroneous if they are without adequate evidentiary foundation or if they are induced by an erroneous view of the law. Western

Capital & Sec. Inc. v. Knudsvig, 768 P.2d 989 (Utah Ct. App.),
cert. denied, 779 P.2d 688 (Utah 1989).

DETERMINATIVE STATUTES AND RULES

Utah Code Ann. § 30-3-5 provides, in relevant part:

- (1) When a decree of divorce is rendered, the court may include in it equitable orders relating to the children, property, debts or obligations, and parties
- (3) The court has continuing jurisdiction to make subsequent changes or new orders for the support and maintenance of the parties, the custody of the children and their support, maintenance, health and dental care, or the distribution of the property and obligations for debts as is reasonable and necessary

STATEMENT OF THE CASE

A. Nature of Case.

This case deals with (i) collection actions taken by Plaintiff Helen Schumann Broadbent ("Ms. Broadbent") for judgment amounts and alleged arrearages in the payment by Defendant Ross Broadbent ("Mr. Broadbent") of alimony, child support and other amounts due under the Decree of Divorce; (ii) whether an agreement entered into by the parties is enforceable and either totally or partially satisfied Mr. Broadbent's past and future obligations for alimony, child support and other amounts due under the Decree of Divorce; (iii) whether the trial court correctly determined the amount of arrearages, including an award of pre-judgment and post-judgment interest; and (iv) whether an

award of attorney's fees and costs to Ms. Broadbent was appropriate in this action.

B. Course of Proceedings and Statement of Facts

1. On May 7, 1986, the Court entered the Decree of Divorce in this case. R. 22-26. A photocopy of the Decree of Divorce is included in the Addendum as Exhibit "A." The Decree of Divorce provided, in relevant part, the following:

a. That Mr. Broadbent pay child support in the amount of \$100.00, \$200.00 and \$300.00 in March, April and May 1986, respectively, and \$400.00 in June 1986 and monthly thereafter. Paragraph 3 of the Decree of Divorce.

b. That Mr. Broadbent provide "standard health insurance" for the benefit of the parties' minor child. Paragraph 3 of the Decree of Divorce.

c. That Mr. Broadbent maintain a life insurance policy on his life for the benefit of the parties' minor child in the face amount of \$75,000.00. Paragraph 3 of the Decree of Divorce.

d. That Mr. Broadbent pay two-thirds of any uninsured dental and medical care expenses for the parties' minor child. Paragraph 4 of the Decree of Divorce.

e. That Mr. Broadbent pay one-half of the "lessons" and "summer school" costs of the parties' minor child. Paragraph 5 of the Decree of Divorce.

f. That Mr. Broadbent pay alimony to Ms. Broadbent in the amount of \$300.00 per month for a period of three years commencing July 30, 1986. Paragraph 6 of the Decree of Divorce.

2. On May 12, 1987, the trial court entered a Judgment against Mr. Broadbent in favor of Ms. Broadbent in the total amount of \$7,196.50 representing arrearages for alimony and child support through February 28, 1987, and medical, dental and other costs incurred for the benefit of the parties' minor child (the "1987 Judgment"). R. 45-46. A photocopy of the 1987 Judgment is included in the Addendum as Exhibit "B."

3. On March 16, 1988, the parties entered into a Child Support and Alimony Settlement Agreement (the "Settlement Agreement"). The Settlement Agreement was filed with the Court on April 18, 1990. R. 49-50. Neither party was represented by counsel during the negotiation or drafting of the Settlement Agreement. A photocopy of the Settlement Agreement is included in the Addendum as Exhibit "C." The Settlement Agreement provided, in relevant part, the following:

a. Mr. Broadbent would establish a vending machine business for Ms. Broadbent consisting of eighty vending machines to be delivered over a sixteen-month period. Ms. Broadbent would assume control, management and ownership of the vending machines as they were delivered to her. Paragraph 1.A. and 1.B of the Settlement Agreement.

b. Mr. Broadbent was to make arrangements on behalf of Ms. Broadbent for her to have direct access to wholesale suppliers for product, vending machine parts and insurance. Paragraph 1.B of the Settlement Agreement.

c. In the event Mr. Broadbent failed to deliver the machines as outlined over the sixteen-month period, the net income from the machines would be "credited directly toward [Mr.] Broadbent's current legal obligation to [Ms. Broadbent and the parties' minor child]. Paragraph 1.C of the Settlement Agreement.

d. Upon Mr. Broadbent's performance under the Settlement Agreement, Mr. Broadbent would receive "a full release from all past, present or future obligations relating to child support or alimony" and "all past obligations or judgments [would] be considered paid in full." Paragraph 1. and 1.C of the Settlement Agreement.

4. Mr. Broadbent transferred eighty vending machines to Ms. Broadbent within approximately the time frame set forth in the Settlement Agreement. R. 148-152. Mr. Broadbent was precluded by the trial court from presenting any evidence with respect to his performance under the Settlement Agreement. R. 1178-79.

5. On September 29, 1992, Ms. Broadbent filed an Application for Writ of Garnishment. The Application related to the "Judgment against Defendant Ross Broadbent herein, dated May

12, 1987, in the principal amount of \$7,196.50, with interest thereon at the statutory rate (12%) in the amount of \$6,120.32 (through October 12, 1992), totaling \$13,316.82 (the remaining amount due on the judgment)." R. 58-59. On October 29, 1992, pursuant to the Application, the trial court issued a Writ of Garnishment. R. 82-85.

6. On November 4, 1992, Mr. Broadbent objected to the issuance of the Writ of Garnishment by filing a Request for Hearing. In the Request for Hearing, Mr. Broadbent claimed that the Writ of Garnishment was issued improperly because the judgment had been satisfied in whole or in part through the Settlement Agreement and Mr. Broadbent's performance thereunder. R. 61-63.

7. On November 23, 1992, the trial court heard Mr. Broadbent's objection to the issuance of the Writ of Garnishment. R. 1168-1183. The trial court requested the parties to file written memoranda as to the enforceability of the Settlement Agreement. R. 1178-1179. The trial court stated:

If I'm satisfied that the contract, after I read the memoranda, is legally enforceable and that it doesn't fail for lack of consideration as a matter of law . . . [then] I'll schedule the matter for an evidentiary hearing and you can put on whatever testimony is appropriate as to whether or not the agreement has been complied with.

R. at 1179.

8. On December 14, 1992, Ms. Broadbent filed an Application for Garnishment (Post-Judgment) claiming that a

judgment in the amount of \$79,020.71 had been entered even though no such judgment existed. R. 157. The Application for Garnishment was not supported by an affidavit or bond. On December 14, 1992, pursuant to the Application, the trial court issued a Writ of Garnishment in the amount of \$79,020.71. R. 186-189. Mr. Broadbent filed a Request for Hearing objecting to the Writ of Garnishment. R. 206-209.

9. On December 30, 1992, and without further evidence or a hearing, the trial court entered its Minute Entry and found that Mr. Broadbent's objection to the issuance of the Writs of Garnishment was without merit on the grounds that the Settlement Agreement was "invalid and without any legitimate consideration" and that 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[d]." R. 183-185.

10. Over Mr. Broadbent's objections (R. 193-202), on January 14, 1993, the trial court entered its Order overruling Mr. Broadbent's objection to the Writs of Garnishment and "augmenting" the 1987 Judgment by Ms. Broadbent's collection costs, attorney's fees and interest resulting in a judgment in the amount of \$15,865.09 through December 31, 1992 (the January 1993 Order). R. 231-235. A photocopy of the January 1993 Order is included in the Addendum as Exhibit "D."

11. On January 25, 1993, Mr. Broadbent filed a Motion to Amend Judgment, Motion for New Trial, Motion for Relief from Judgment, Motion for Stay of Proceedings to Enforce Judgment, Request for Waiver of Supersedeas Bond and Request for Hearing relative to the January 1993 Order. R. 277-281.

12. At a hearing on January 25, 1993, the trial court set an evidentiary hearing for February 8, 1993, for the purpose of determining the amount, if any, owed by Mr. Broadbent to Ms. Broadbent under the Decree of Divorce. R. 317-332.

13. The trial court held evidentiary hearings on February 8, 1993 (R. 1184-1257) and March 8, 1993 (R. 1258-1416) but refused to hear evidence as to the benefit received by Ms. Broadbent under the terms of the Settlement Agreement. R. 1187-1188. The parties were instructed to and filed closing arguments in writing. R. 353-382 and 383-402.

14. On April 28, 1993, the trial court issued its Memorandum Decision. R. 501-510. A photocopy of the Memorandum Decision included in the Addendum as Exhibit "E."

15. On May 5, 1993, Mr. Broadbent filed his Objection to Proposed Findings of Fact, Conclusions of Law and Order and Request for Hearing. R. 543-548.

16. On June 18, 1993, the trial court heard oral argument on Mr. Broadbent's Objection to the proposed Findings/Conclusions and Order. R. 1417-1431 and 651. The trial court overruled Mr. Broadbent's Objection.

17. On June 28, 1993, the trial court entered its Findings of Fact, Conclusions of Law and Order of the Court (the "June 1993 Order"). R. 697-706. A photocopy of the June 1993 Order is included in the Addendum as Exhibit "F."

18. On June 28, 1993, the trial court entered a Judgment against Mr. Broadbent in favor of Ms. Broadbent in the amount of \$102,367.27 (the "June 1993 Judgment"). R. 716-717.

19. On July 9, 1993, Mr. Broadbent filed his Notice of Appeal from the January 1993 Order, as modified by the June 1993 Order and the June 1993 Judgment. R. 770-772.

SUMMARY OF ARGUMENT

The Settlement Agreement was based on "legitimate" consideration. The Settlement Agreement did not have to be reduced to an order of the court to be enforceable. To the extent the Settlement Agreement dealt with amounts due as alimony, it is clearly enforceable. To the extent the Settlement Agreement dealt with amounts due as child support, Mr. Broadbent should receive credit against his child support obligation for the benefit or value derived by Ms. Broadbent thereunder. The trial court denied Mr. Broadbent due process by not granting an evidentiary hearing on the benefit or value derived by Ms. Broadbent under the Settlement Agreement.

The trial court erred in its "augmentation" of the 1987 Judgment by compounding the judgment interest thereon and by awarding attorney's fees and costs as a "cost" of collection.

The trial court erred in numerous respects relative to the entry of the June 1993 Order and June 1993 Judgment. First, the trial court again augmented the 1987 Judgment with interest thereby compounding the interest. Second, the trial court awarded prejudgment interest at the rate of twelve percent rather than ten percent. Third, the trial court awarded judgment to Ms. Broadbent for unpaid expenses, health insurance premiums and life insurance premiums. Such an award was, however, without adequate evidentiary basis or foundation. Finally, Ms. Broadbent introduced absolutely no evidence to support her claim for an award of attorney's fees and costs and, accordingly, failed to meet her burden in proving the elements for an award of such.

ARGUMENT

I.

THE SETTLEMENT AGREEMENT IS AN ENFORCEABLE CONTRACT AS IT RELATES TO ALIMONY AND, AS IT RELATES TO CHILD SUPPORT, TO THE EXTENT OF THE BENEFIT OR VALUE DERIVED BY MS. BROADBENT

The trial court determined that the Settlement Agreement was "invalid" on the grounds that it (i) was without any "legitimate" consideration and (ii) was not reduced to a court order. The trial court erred in both respects as the Settlement Agreement relates to alimony.

A. Alimony

The Utah Supreme Court has acknowledged the right of former spouses to bargain, compromise and settle alimony obligations.

Gulley v. Gulley, 570 P.2d 127, 128 (Utah 1977). An agreement between former spouses with respect to the performance of past or future obligations under a decree of divorce for alimony is binding, in the same manner as any other contract. Id.

The Settlement Agreement itself, therefore, constituted "legitimate" consideration for the compromise, settlement and satisfaction of Mr. Broadbent's alimony obligations under the Decree of Divorce. Mr. Broadbent was, however, precluded from ever presenting any evidence of his performance under the Settlement Agreement. Had the trial court received evidence relative to the Settlement Agreement, it would have determined that Mr. Broadbent did, in fact, perform his obligations thereunder. The Settlement Agreement is based on lawful, adequate and "legitimate" consideration. Ms. Broadbent has, in fact, been compensated twice; once, for the vending machines received and the income derived therefrom and a second time by the judgments that have been entered against Mr. Broadbent and now satisfied.

The trial court also held the Settlement Agreement invalid on the grounds that it was not reduced to a court order. Such is not required, however, under Utah law. An agreement relative to a divorce proceeding must meet certain requirements to be enforceable. The agreement must be in writing, executed by the parties and filed with the court or read into the record. Brown v. Brown, 744 P.2d 333 (Utah Ct. App. 1987). In this case, each

of the three requirements was met and, therefore, the Settlement Agreement is enforceable.

Accordingly, the trial court erred in holding the Settlement Agreement "invalid" with respect to alimony.

B. Child Support

Child support obligations are treated differently than other obligations under Utah law. The child's right to support cannot be bartered away, estopped or defeated by the parties. See Baggs v. Anderson, 528 P.2d 141 (Utah 1974); Hills v. Hills, 638 P.2d 516 (Utah 1981); French v. Johnson, 401 P.2d 315 (Utah 1965). Nonetheless, the Utah Supreme Court has recognized that there may be circumstances where one party is estopped from collecting child support. See Baggs v. Anderson, 528 P.2d 141, 143 (Utah 1974), "[T]here may be some circumstances under which there may arise an estoppel to collect money accrued under a divorce decree. . . ."; French v. Johnson, 401 P.2d 315, 316-317 (Utah 1965) (wife may be estopped from enforcing child support payments).

In Utah Dept. of Social Serv. v. Adams, 806 P.2d 1193, 1995 (Utah Ct. App. 1991), this Court recognized that an "in-kind" payment of child support could effectively provide to the obligee a substantial bonus in the value of child support otherwise required to be paid. In Adams, this Court affirmed the trial court's approval of a written support agreement relieving the obligor ex-husband from physically paying \$200 per month in

court-ordered child support in exchange for the obligee ex-wife and the minor children of the parties living rent free in a home owned by the ex-husband and which home had a fair market rental value of \$350 per month.

The agreement in Adams is analogous to the agreement that Mr. and Ms. Broadbent attempted to effectuate. The Settlement Agreement was prepared without the assistance of counsel. The parties negotiated such in good faith. The parties are not lawyers and obviously did not understand that they could not enter into an agreement which "bartered away" child support. The parties included, however, a provision to the effect that in the event Mr. Broadbent did not fully perform under the Settlement Agreement or something else went awry, Mr. Broadbent would merely receive credit against his obligations under the Decree of Divorce for the benefit actually derived by Ms. Broadbent under the terms of the Settlement Agreement. Paragraph 1.C. of the Settlement Agreement provides:

In the event Ross Broadbent fails to keep the schedule shown above [referring to the delivery of vending machines], the net income from the placed machines (after candy costs, charity payment, management, repairs and travel expenses,) will be credited directly toward Ross Broadbent's current legal obligation to Helen Schumann and Christian Broadbent. Once all 80 machines have been placed in operation, Ross Broadbent will have no further child support or alimony and all past obligations or judgments will be considered paid in full.

Mr. Broadbent now acknowledges that the parties are prohibited on public policy grounds from "bartering away" child support. The

first sentence of paragraph 1.C. of the Settlement Agreement provides protection of the child support obligation. However, the trial court utterly refused to give any application or weight to that particular provision or to give Mr. Broadbent any credit for the benefit transferred to Ms. Broadbent for vending machines and the income derived therefrom. Although prohibited from introducing any evidence, Mr. Broadbent proffered that he did deliver 80 vending machines which Ms. Broadbent accepted, took possession and control of and from which she derived substantial financial benefit. R. 148 and 1176-1177.

In the Settlement Agreement, Mr. Broadbent was not attempting to unilaterally avoid or walk away from his responsibility to support his ex-wife or his minor child. Rather he was attempting to provide a substituted means of payment of those obligations on potentially a prepaid basis, and potentially in a substantially greater amount.

The failure of the trial court to conduct a full evidentiary hearing on the benefit derived by Ms. Broadbent, which amount should be credited against Mr. Broadbent's child support obligation, constitutes a denial of due process under the Utah Constitution, Article I, § 7 and under Amendment XIV of the Constitution of the United States. Christiansen v. Harris, 163 P.2d 314 (Utah 1945).

Accordingly, to the extent the Settlement Agreement does not apply to Mr. Broadbent's child support obligations under the

Decree of Divorce, it should be strictly enforced. Lawful consideration was given by Mr. Broadbent. There was and is no requirement that the Settlement Agreement be memorialized in a court order. To the extent the Settlement Agreement dealt with Mr. Broadbent's child support obligations under the Decree of Divorce, it should be enforced to the extent that Mr. Broadbent receive credit against his child support obligation for the benefit actually derived by Ms. Broadbent for vending machines received and income derived therefrom.

II.

THE TRIAL COURT ERRED IN ITS "AUGMENTATION" OF THE 1987 JUDGMENT

On May 12, 1987, the trial court entered a judgment against Mr. Broadbent in favor of Ms. Broadbent in the total amount of \$7,196.50 relative to arrearage for alimony and child support through February 28, 1987, and medical, dental and other costs incurred for the benefit of the parties' minor child (the "1987 Judgment"). After ruling in its Minute Entry of December 30, 1992, that the Settlement Agreement was "invalid," the trial court, in its January 1993 Order (i) overruled Mr. Broadbent's objection to the Writ of Garnishment that had been issued and (ii) "augment[ed] the amounts of such outstanding Judgments (sic) by [Ms. Broadbent's] costs of collection, including a reasonable attorney's fee, making the total amount of the Judgment of May 12, 1992 (sic-May 12, 1987), \$15,865.09, including interest through December 31, 1992, plus an additional \$5.19 each day

thereafter until paid." R. 234. On January 7, 1993, Mr. Broadbent filed an objection to the proposed form of the January 1993 Order. R. 193-202. The trial court erred in its augmentation of the 1987 Judgment by way of the January 1993 Order in several respects.

First, the trial court augmented the 1987 judgment by accruing interest on it through December 31, 1992. The effect of the trial court's action is the compounding of interest on the 1987 Judgment after December 31, 1992. Utah law does not permit the compounding of interest on a judgment. Estate Landscape and Snow Removal Specialists, Inc. v. Mountain States Telephone and Telegraph Co., 793 P.2d 415 (Utah Ct. App. 1990), rev'd on other grounds, 844 P.2d 322 (Utah 1992). In that case, this Court stated:

This rule against compound interest on judgments is consistent with the general judicial disfavor of interest on interest. It is also of long standing and forms part of the backdrop against which the Legislature has statutorily provided for interest on judgments. We see no compelling reason to alter this longstanding gloss on the judgment interest statute. We therefore decline the invitation to engraft onto the statute judicial discretion to allow compound interest and reverse as to the award of compound interest.

Id. at 420. Accordingly, interest on the 1987 Judgment should be calculated and paid by Mr. Broadbent at the simple judgment interest rate on the principal amount of \$7,196.50 from May 12, 1987 until the date paid.

Second, assuming arguendo that the 1987 Judgment could be augmented by the amount of interest that accrued from May 12, 1987, to December 31, 1992 (the date used in ¶ 3 of the January 1993 Order), the amount was miscalculated by the trial court. The interest amount should be calculated as follows:

1987	\$ 551.27 (\$7,196.50 X .12 X 233/365)
1988	863.58 (\$7,196.50 X .12 X 365/365)
1989	863.58
1990	863.58
1991	863.58
1992	<u>863.58</u>
Total	\$4,869.17

Ms. Broadbent and the trial court apparently calculated the interest from May 12, 1987 to December 31, 1992 as \$6,467.39, computed as follows:

\$15,865.09	Amount of augmented judgment R. 234, ¶ 3 of Order
-7,196.50	Less original principal amount of judgment R. 232, ¶ 3
<u>-2,201.20</u>	Less attorney's fees award R.233, ¶ 6
\$ 6,467.39	

The trial court improperly accrued interest by \$1,598.22 (\$6,467.39 - \$4,869.17).

Third, the trial court also improperly awarded "costs" in the form of attorney's fees and other expenses in the amount of \$2,201.20 in the January 1993 Order. R. 233, ¶ 6. On December 17, 1992, counsel for Ms. Broadbent filed an Affidavit of Attorney's Fees. R. 175-178. The Affidavit was ostensibly filed to support a claim for attorney's fees and costs relative to the

"collection of the subject Judgment." R. 176, ¶ 2. The Affidavit claims \$2,080.50 as a reasonable attorney's fee and \$120.70 for costs. R. 177, ¶ 3-5. The Affidavit does not detail the nature of the claimed costs.

Mr. Broadbent readily admits that the trial court could have awarded Ms. Broadbent her "costs" pursuant to Rule 64D(t) of the Utah Rules of Civil Procedure relative to a collection action. The term "costs" is not defined in the Rules. In reference to the term "costs" under Rule 54, the Utah Supreme Court has stated that "the trial court can exercise reasonable discretion in regard to the allowance of costs" although "it has a duty to guard against any excesses or abuses in the taxing thereof." Frampton v. Wilson, 605 P.2d 770, 773-74 (Utah 1980).

The generally accepted rule is that it [costs] means those fees which are required to be paid to the court and to witnesses, and for which the statutes authorize to be included in the judgment.

Id. at 774.

There was no evidence before the trial court as of January 14, 1993, to enable it to determine whether the \$120.70 was for taxable costs, such as court fees or service fees, or for nontaxable costs, for such expenses as photocopies or exhibits. Accordingly, the \$120.70 claim cannot be taxed as costs until the trial court determines the nature of the claimed costs. Similarly, it is clear under Utah law that attorney's fees can not be awarded absent a contractual or statutory provision.

Dixie State Bank v. Bracken, 764 P.2d 985 (Utah 1988). It was improper for the trial court to award \$2,080.50 for attorney's fees in the form of costs.

Ms. Broadbent may argue that within the context of a divorce action, the trial court has discretion to award her attorney's fees. At the time the trial court entered the January 1993 Order, there was, however, no petition or motion before the trial court for an award of attorney's fees within the context of the divorce action. At that time, Ms. Broadbent was, procedurally, attempting to collect a judgment. This Court has stated that:

A trial court has the power to award attorney fees in divorce proceedings, pursuant to Utah Code Ann. § 30-3-3 (1989). The award must be based on evidence of the financial need of the receiving spouse, the ability of the other spouse to pay, and the reasonableness of the requested fees.

Bell v. Bell, 810 P.2d 489, 493 (Utah Ct. App. 1991). No evidence was before the trial court relative to any of the three factors required to support an award of attorney's fees. Additionally, the trial court made no finding relative to any of the three factors in the January 1993 Order. Accordingly, the award of attorney's fees and costs was improper.

In summary, the trial court improperly augmented the 1987 Judgment in the January 1993 Order by compounding interest and awarding attorney's fees and costs.

III.

THE TRIAL COURT ERRED IN NUMEROUS RESPECTS RELATIVE TO THE ENTRY OF THE JUNE 1993 ORDER AND JUDGMENT

On June 28, 1993, the trial court entered its Findings of Fact, Conclusions of Law, and Order of the Court (the "June 1993 Order"). On June 28, 1993, the trial court also entered a Judgment against Mr. Broadbent in the amount of \$102,367.27 (the "June 1993 Judgment"). The trial court erred in numerous respects relative to the entry of the June 1993 Order and June 1993 Judgment.

A. The 1987 Judgment. In the June 1993 Order, the trial court again addressed the 1987 Judgment and its augmentation in the January 1993 Order. R. 698-9, ¶ 1-4. The errors made by the trial court relative to the January 1993 Order were repeated in the June 1993 Order. Mr. Broadbent's argument with respect thereto are addressed in the previous section of this brief.

B. Alimony. The trial court found that Ms. Broadbent was entitled to a judgment for unpaid alimony in the amount of \$8,035.00, together with prejudgment interest at the rate of twelve percent. R. 699, ¶ 7. Mr. Broadbent does not appeal the amount of the judgment. Neither does he appeal the finding that prejudgment interest is appropriate because under Utah law prejudgment interest is permitted if the judgment amount is fixed as of a particular date and can be determined with mathematical accuracy. Baker v. Dataphase, Inc., 781 F. Supp. 724 (D. Utah

1992). The appropriate prejudgment interest rate is, however, ten percent rather than twelve percent. Utah Code Ann. § 15-1-1(2) provides:

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

Utah Code. Ann. § 15-1-1(2) (1992). Prejudgment interest is awarded at the contract rate of ten percent, not the judgment rate of twelve percent. Breuer-Harrison, Inc. v. Combe, 799 P.2d 716 (Utah Ct. App. 1990); SCM Land Co. v. Watkins & Faber, 732 P.2d 105 (Utah 1986).

C. Child Support. The trial court found that Ms. Broadbent was entitled to a judgment for unpaid child support in the amount of \$25,065.00 through November 1992, together with prejudgment interest at the rate of twelve percent. R. 700, ¶ 8. Again, Mr. Broadbent does not appeal the amount of the judgment or that prejudgment interest is appropriate. Mr. Broadbent does, however, submit that the contract rate of ten percent, not the judgment rate of twelve percent, is the appropriate rate for prejudgment interest.

Mr. Broadbent submits that substantially all of the alimony and child support judgment amounts would have been considered paid had the trial court determined the amount of the benefit derived by Ms. Broadbent from the receipt of vending machines and the income derived therefrom.

D. Unpaid Expenses. The trial court next found that Ms. Broadbent was entitled to a judgment in the amount of \$8,697.51 through November 1992, together with prejudgment interest at the rate of twelve percent for "unpaid expenses." R. 700, ¶ 9. Neither the amount of the judgment nor the award of prejudgment interest is appropriate.

The amount of the judgment is evidenced by Exhibits 3, 5, and packets of checks in Exhibits 27, 28, 30, 31, 32, and allegedly by a number of checks which are in the exhibit packet contained in the record, but which were never received into evidence. Ms. Broadbent testified that these checks constituted the "backup documents" for Exhibits 3 and 5. R. 1194-5.

The judgment amount for unpaid expenses in the amount of \$8,697.51 was calculated by adding the amount of \$5,197.51 shown on Exhibit 3 as "Addl. Expenses" to a claim of Ms. Broadbent for reimbursement of \$3,500 relative to a garnishment of her accounts for a debt of Mr. Broadbent. Exhibit 5 is the detail of the information summarized on Exhibit 3. However, Exhibits 3 and 5 are inconsistent by the amount of \$867.57, calculated as follows:

<u>Year</u>	<u>Exhibit 3</u>	<u>Exhibit 5</u>	
1987	748.83	427.23	
1988	918.63	382.61	
1989	512.18	512.14	
1990	1,030.98	1,030.95	
1991	886.88	887.03	
1992	<u>1,100.01</u>	<u>1,089.98</u>	
	5,197.51	-	4,329.94 = \$867.57

Ms. Broadbent introduced certain checks into evidence to support Exhibit 5. The checks are categorized by type of expenditure, as follows:

<u>Exhibit</u>	<u>Category</u>	<u>Amount</u>
27	Health Club and Seminar	605.00
28	Vitamins	247.57
29	Photos and clothes	475.05
30	School Activity	544.89
31	Skiing and Scouting	654.30
32	Prescriptions	1,352.23
Not received	Miscellaneous	

The last batch of checks was never received as evidence in the case. As such they cannot be considered for any purpose. However, the checks are the only credible evidence upon which the trial court could have relied to determine whether Ms. Broadbent's reimbursement claim was appropriate. Exhibits 3 and 5 are without adequate evidentiary foundation except as supported by checks representing actual payments made by Ms. Broadbent.

As to Exhibit 27, the \$605.00 amount claimed represents payments made to "Body Talk" and "Dynamic Relationship." At trial, Ms. Broadbent presented no evidence as to the purpose of these expenditures but claimed that they constituted "lessons" or "summer school" costs under paragraph 5 of the Decree of Divorce. It is clear, however, that they do not. No reimbursement by Mr. Broadbent is, therefore, required under the Decree of Divorce.

As to Exhibit 28, Mr. Broadbent does not dispute the \$247.57 amount claimed as medical expenses for the benefit of the parties' minor child.

As to Exhibit 29, the checks indicate, and Ms. Broadbent readily admits, that the \$475.05 amount represents claims for reimbursement of clothing and photograph expenses. However, no provision in the Decree of Divorce requires Mr. Broadbent to reimburse Ms. Broadbent for such expenses. The claimed reimbursement should have been denied in total by the trial court.

As to Exhibit 30, attached hereto as Schedule A is listing of each individual check in Exhibit 30 by number, date, payee, purpose and amount. Mr. Broadbent is not liable for reimbursement to Ms. Broadbent for such items as books, flags, school pictures, flash card, overdue book fees, magazine subscriptions, crafts and clothing of the parties' minor child Christian. Mr. Broadbent acknowledges that he is liable for one-half of the items noted on Schedule A with an asterisk in the total amount of \$222.00. The balance of the claimed reimbursement should have been denied by the trial court as not constituting a lesson or summer school expense.

As to Exhibit 31, the checks indicate and Ms. Broadbent again admits that the entire \$654.30 amount claimed is for scouting activities and skiing. Again, no provision in the Decree of Divorce requires Mr. Broadbent to reimburse Ms. Broadbent for such expenditures.

As to Exhibit 32, Mr. Broadbent does not dispute that he is liable for two-thirds of such medical related expenses for Christian.

As to the batch of checks which were not received into evidence, the trial court could not have considered them for any purpose. Even if the trial court were to consider them, Mr. Broadbent is not liable to reimburse Ms. Broadbent for a harmonica, art supplies, a baseball glove and grease pens.

In a hearing subsequent to the issues addressed in this appeal, the trial court considered additional claims for reimbursement by Ms. Broadbent. See Findings of Fact and Conclusions of Law on Plaintiff's Motion for Finding of Contempt and Request for Attorney's Fees and Costs and Order entered February 28, 1994, included in the file in this matter (no record number was indicated by the district court clerk). In paragraphs 19 through 29, the trial court held that it was inappropriate to permit reimbursement for such items as nonprescribed vitamins, art supplies, magazine subscriptions, truck maintenance and repair, pet food and pet expenses, bicycle expenses, photographs, football trips, impact training expenses, books, self-esteem training, etc., all of which Ms. Broadbent attempted to claim as reimbursable items. Either the trial court did not consider the purpose of the claimed expenditures or erred in permitting reimbursement for such expenses which are not subject to reimbursement under the Decree of Divorce.

In summary, Mr. Broadbent acknowledges the following claims for reimbursement. The trial court should have excluded the balance of claims for reimbursement as not being related to medical, lessons or summer school costs or for which no adequate evidentiary foundation was presented.

<u>Exhibit</u>	<u>Total Amount</u>	<u>Mr. Broadbent's Share</u>
27	0.00	0.00
28	247.50	165.05
29	0.00	0.00
30	222.00	111.00
31	0.00	0.00
32	1,352.23	901.49
	TOTAL	\$1,177.54

As to the claim for reimbursement of \$3,500.00 relative to a garnishment, Ms. Broadbent testified that her savings and checking accounts were garnished by Key Bank pursuant to a judgment Key Bank secured against the Broadbents. R. 1210-1211, 1213-1214. While Mr. Broadbent does not dispute that the obligation is his, the amount claimed of \$3,500.00 is without any foundation and is totally based on hearsay evidence. R. 1213-1214. As such, Ms. Broadbent's claim for reimbursement should be rejected and denied.

With respect to the claims for reimbursement discussed above, prejudgment interest is not appropriate because the date on which Ms. Broadbent made a request to Mr. Broadbent for reimbursement is not within the record. The date on which prejudgment interest began to accrue cannot be determined.

Accordingly, prejudgment interest is not appropriate for "unpaid expenses."

E. Health Insurance Reimbursement. The trial court further found that Ms. Broadbent was entitled to a judgment of \$6,900 for reimbursement of health insurance premiums she had paid, together with prejudgment interest at the rate of twelve percent. R. 700, ¶ 10. Neither the amount of the judgment nor the award of prejudgment interest is appropriate.

Ms. Broadbent testified that the claimed reimbursement for health insurance premiums for the benefit of the parties' minor child covered amounts paid through her employment. R. 1197-8, 1204-1206. She testified that she calculated such amount by "going back to my companies, and asking what Christian's share was of that." R. 1206. Again this constitutes hearsay evidence. Ms. Broadbent did not produce or offer into evidence any documentation supporting the claimed premium cost. R. 1206.

Ms. Broadbent claims that the premium cost for Christian's health insurance policy was exactly \$100.00 per month and remained exactly that amount from March 1987 to December 1992, a period of almost six years. Such a claim is ludicrous given the spiraling cost of health insurance during that time period and also given the fact that Ms. Broadbent apparently had more than one employer and/or health insurance carrier, each of which

allegedly charged exactly \$100.00 per month for the insurance coverage.

The trial court erred by relying on such evidence which lacked any credibility whatsoever. Mr. Broadbent acknowledges his obligation to reimburse Ms. Broadbent for health insurance premiums paid if the amount can be substantiated.

F. Life Insurance Reimbursement. The trial court next found that Ms. Broadbent was entitled to a judgment in the amount of \$9,246.00 through November 1992 for life insurance premium reimbursement, together with prejudgment interest at the rate of twelve percent. R. 701, ¶ 11. Neither the amount of the judgment nor the award of prejudgment interest is appropriate.

Ms. Broadbent testified that she claimed reimbursement of the premium cost of life insurance she obtained on Mr. Broadbent's life because he failed to do so. R. 1192, 1198-9. Ms. Broadbent did not present any exhibit at trial as to the amount of the premium. Ms. Broadbent contradicted herself as to the timing of the payment. At one point, Ms. Broadbent testified that she made a quarterly premium payment. R. 1199. At another time, Ms. Broadbent testified that the premium was withheld from her payroll checks. R. 1387.¹

¹ Ms. Broadbent claims that the premium cost of the life insurance policy was exactly \$134.00 per month and remained exactly that amount from March 1987 to December 1992, a period of almost six years. The premium cost over a six year period on a

The trial court erred in awarding a judgment in the amount of \$9,246.00 on such flimsy evidence. Mr. Broadbent acknowledges his obligation to reimburse Ms. Broadbent for life insurance premiums if the amount is accurately established and evidence of payment is provided.

G. Attorney's Fees.

The trial court awarded Ms. Broadbent \$2,201.20 for costs of collection relative to the January 1993 Order and \$4,145.00 relative to the February and March hearings. R. 699, ¶ 4 and R. 701, ¶ 11.

There is no question that a trial court has discretion to award attorney's fees in a divorce action. Utah Code Ann. § 30-3-3 (Supp. 1993); Bell v. Bell, 810 P.2d 489, 493-94 (Utah Ct. App. 1991). Where the award is based on need, the trial court must support the award with adequate findings, detailing the reasonableness of the amount awarded and the need of the receiving party. Finleyson v. Finleyson, 1994 WL 135241 (Utah Ct. App. 1994).

In the Memorandum Decision of April 28, 1993, and in the Findings of Fact contained in the June 1993 Order, the trial court made no finding "detailing the reasonableness of the amount

term policy must have changed in amount. If the policy was a whole life or universal life policy, which typically has a level premium, Mr. Broadbent was charged with the savings feature of the policy as well as the cost of the insurance coverage itself.

awarded and the need of the receiving party." In fact, the trial court would have been unable to do so because Ms. Broadbent presented no evidence on the issue of attorney's fees at the evidentiary hearing. In awarding attorney fees relative to the January 1993 Order as well as the June 1993 Order, the trial court apparently relied on Plaintiff's Closing Statement Brief (R. 353-382) which was the first claim Ms. Broadbent made for an award of attorney's fees. The award is clearly erroneous in that Mr. Broadbent had absolutely no opportunity to cross-examine Ms. Broadbent or her counsel on that issue and the fundamental legal requirements were not even remotely met.

The trial court made only one vague reference in the Memorandum Decision of April 28, 1993, that Ms. Broadbent was "not in a position to pay the attorney's fees that she has incurred." R. 508. Again, there was absolutely no evidence by way of testimony or exhibit that focused on the issue of Ms. Broadbent's income or wealth. It was only an after-the-fact attempt by Ms. Broadbent in Plaintiff's Closing Statement Brief that the issue was first addressed.

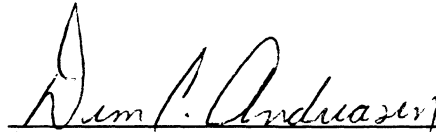
Based on the fact there is no evidentiary basis for a finding of the reasonableness of Ms. Broadbent's attorney's fees or of the need of Ms. Broadbent for assistance in paying those fees, the award of attorney's fees should be denied in total.

CONCLUSION

Based on the foregoing, the January 1993 Order, the June 1993 Order and the June 1993 Judgment should be reversed and remanded to the trial court for further evidentiary hearing.

DATED this 16th day of May 1994.

CAMPBELL MAACK & SESSIONS

A handwritten signature in cursive script, appearing to read "Clark W. Sessions", is written over a horizontal line.

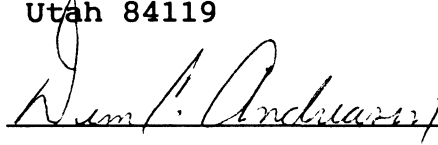
CLARK W. SESSIONS
DEAN C. ANDREASEN

Attorneys for Defendant/Appellant

CERTIFICATE OF SERVICE

On this 6th day of May 1994, I hereby caused to be mailed via first-class mail, postage prepaid, two true and correct copies of the foregoing BRIEF OF APPELLANT to the following:

James L. Thompson, Esq.
2470 South Redwood Road
Salt Lake City, Utah 84119



SCHEDULE A

[SCHOOL ACTIVITY \$544.89]

<u>Check #</u>	<u>Date</u>	<u>Payee</u>	<u>Purpose</u>	<u>Amount</u>
0165	9/15/87	Eagle Aquatics	Swimming	\$22.00
255	1/28/89	Skaggs	Books	16.31
283	2/16/89	Troll Book Club		5.70
545	4/21/88	Granite School Dist.	Mill Hollow	27.50
608	9/7/89	Modern Display	Flags	10.57
621	9/15/89	Life Touch Photography	School Pictures	8.50
646	9/2/89	Olympus Jr. High	3 Magazines	43.87
672	10/12/89	Deseret Bookstore	Books	8.39
750	8/22/89	Olympus Jr. High	Fees	43.00*
789	11/9/89	Hart Bros.	Flash Cards	3.95
915	1/3/90	SL County Library	Overdue Books	12.10
1005	7/25/89	Pic N Save	School Supplies	17.23
1301	8/22/90	Olympus Jr. High	Registration 8th	40.00*
1344	9/18/90	Valley West Office	School	8.17
1350	9/25/90	Olympus Jr. High	Magazines (Sports Ill. Newsweek)	50.88
1356	10/1/90	Olympus Jr. High	2 English Books	16.00
1560	2/11/91	Perrys	School	6.28
1642	3/21/91	Olympus Jr. High	Shirt	6.50
1876	8/10/91	Karen Marchant	Christian's _____	8.00
1914	8/22/91	Olympus Jr. High	Registration	41.00*
1915	8/22/91	Olympus Jr. High		10.50
1953	9/5/91	Olympus Jr. High	Basic _____	5.10
2024	10/7/91	Olympus Jr. High	English	5.00
2175	12/12/91	Olympus Jr. High	Crafts	4.77
2183	12/20/91	Bonnie Nelson	Book Replacement	2.75
2233	1/14/92	County Library		7.40
3007	3/17/92	Crestview Elementary		9.50
4110	8/18/92	Olympus High School	Registration	98.00*
4154	9/9/92	Olympus High School	Spanish Workbooks	6.00

The sum of the amounts marked with an asterisk equals \$222.00, of which Mr. Broadbent would be obligated to reimburse Ms. Broadbent the amount of \$111.00