2005

Sweet v. Sweet : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JAMES SWEET, Petitioner/Appellee, vs. MELANIE SWEET, Respondent/Appellant.	Appeal No. 20050034

BRIEF OF THE APPELLANT

ON APPEAL FROM THE THIRD DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH,

THE HONORABLE ANTHONY B. QUINN, DISTRICT COURT JUDGE PRESIDING.

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I. Juridictional Statement

1. The Court of Appeals has jurisdiction in this matter pursuant to Utah Code Ann. §78-2a-3(2)(h), as this is an appeal from the district court involving domestic relations. Appellant appeals the trial court's Second Revised Findings of Fact and Conclusions of Law and Second Revised Decree of Divorce.

II. Statement of the Issues

1. Did the trial court err in denying Respondent's Motion to Set Aside Divorce Decree pursuant to Rule 60(b) of the Utah Rules of Civil Procedure by holding that marital contracts are to be held to the same standard as common contracts?

    a. *STANDARD OF REVIEW*: Abuse of Discretion: The trial court is afforded broad discretion in ruling on a motion for relief from judgment under Utah R. Civ. P. 60(b), and its determination will not be disturbed absent an abuse of discretion. *See, e.g., Katz v. Pierce,* 732 P.2d 92 (Utah 1986); *Russell v. Martell,* 681 P.2d 1193, 1194 (Utah 1984).

b. *DETERMINATIVE STATUTES, RULES OR CASES*: "Contracts between spouses or potential spouses are not necessarily judged on the same terms as contracts executed by persons operating at 'arm's length.'" *Reese v. Reese*, 984 P.2d 987, 994 (Utah 1999). Duress, fraud, and coercion are commonly held sufficient to vacate a settlement in a divorce decree. *See St. Pierre v. Edmonds*, 645 P.2d 615, 619 (Utah 1982).

Public interest requires that no spouse be defrauded by the other in obtaining a decree of divorce, and when properly pleaded, it is not important whether the decree is entered after litigation or if it is based on consent. *Bayles v. Bayles*, 981 P.2d 403, 407 (Utah App. 1999). *See also Birch v. Birch*, 771 P.2d 1114 (Utah App. 1989).

2. Assuming, arguendo, that martial contracts and common contracts are held to the same standards for invalidation, did the trial court abuse its discretion in finding that the evidence put forward by the Appellant/Respondent failed to do so?

a. *STANDARD OF REVIEW*: De Novo: Conclusions of law in civil cases are reviewed for correctness. As used by Utah's appellate courts, "correctness" means that no particular deference is given to the trial court's ruling on questions of law. *See S.S. v. State*, 972 P.2d 439, 440-41 (Utah 1998); *Orton v. Carter*, 970 P.2d 1254, 1256 (Utah 1998).

b. *DETERMINATIVE STATUTES, RULES OR CASES:* When a legal rule is to be applied to a given set of facts, or, in other words, when the trial court must determine "whether a given set of facts comes within the reach of a given rule of law," the trial court is given a de facto grant of discretion. The standard of review approximates a "de novo" review by the appellate courts. *State v. Pena*, 869 P.2d 932, 936-38 (Utah 1994).

III. Determinative Rules

1. Rule 60 of the Utah Rules of Civil Procedure is attached as Exhibit A.
2. "A finding of fraud must be based on the existence of all its essential elements, i.e., the making of a false representation concerning a presently existing material fact which the representor either knew to be false or made recklessly without sufficient knowledge, or the omission of a material fact when there is a duty to disclose, for the purpose of inducing action on the part of the other party, with actual, justifiable reliance resulting in damage to that party." Taylor v. Gasor Inc., 607 P.2d 293, 294 (Utah 1980)
3. The Restatement (Second) of Contracts, §§ 175 and 176 defining Duress are attached as Exhibit B.
4. The Utah Supreme Court has "explicitly adopt[ed] the legal standards of duress set forth in sections 175 and 176 of the Restatement (Second) of Contracts." Andreni v. Hurtgren 860 P.2d 916, 921 (Utah 1993).

IV. Statement of the Case

This is an appeal from a final judgment of the Third Judicial District Court, Salt Lake County, State of Utah, the Honorable Anthony B. Quinn presiding.

The parties were divorced on June 7, 2004. The decree was entered into by a stipulation agreement. On July 12, 2004 the Appellant ("Melanie") filed a motion seeking to set aside the divorce decree under Rule 60(b) of the Utah Rules of Civil Procedure.

A hearing on the motion took place on November 10, 2004. At this hearing Judge Quinn denied the motion. The final order was entered on December 6, 2004 and Melanie filed a Notice of Appeal on January 3, 2005.

V. Statement of the Facts

1. Parties were married on May 7, 1993 and had three children as issue of their marriage.
2. The parties separated in April 2004 when Appellee ordered Appellant to move out of their marital home Tr. at 15.
3. During the course of their marriage, Appellant felt that Appellee exherted extreme control. Tr. at 15. This behavior was also observed by numerous close and professional contacts. *See* Wells Aff ¶ 3-7; Dr. Langer Aff; Williams Aff ¶ 3, 12; Bills Aff ¶ 1-3.

4. Appellee was observed to be relentlessly critical of most things the Appellant did. This criticism was applied to everything from Appellant's carrying out of household functions to cooking to caring for the children. See Respondent Aff. ¶3; Bills Aff. ¶ 1 – 2, 9.
5. This created an environment where the Appellant felt that "nothing was ever good enough" for the Appellee. Resp't Aff. ¶ 3.
6. This controlling attitude came to a head during the period preceding the divorce. The Appellee forced Appellant to leave the marital house (Resp't Aff ¶ 8) and started calling her at work to such an extent that the Appellant was reprimanded by her employer. Tr. at 15.
7. While Appellant was out of the marital home, Appellee would show up at Appellant's residence and go through her closets and drawers. He also checked calls on her cell phone and placed calls to numbers found in her cell phone. Verified Memorandum in Support of Respondent's Motion to Set Aside the Decree of Divorce pg. 3.
8. This created the emotional framework evident during the divorce proceedings. The Appellant felt that she had no choice but to agree to the Appellee's demands and was not aware that other options were available to her. Tr. at 14: 7-10, 20-15:1.

9. The Appellee dictated the terms of the stipulation to the Appellant and then forced her to fax the statement to the Appellee's attorney, Mr. Tycksen. Tr. at 15: 13-22.

10. Appellee told Appellant that she had no other choice but to sign the stipulation document or else she would go to jail and would never see her children again. Verified Memorandum in Support of Respondent's Motion to Set Aside the Decree of Divorce pg. 2.

11. These threats were based on the Appellant's previous felony plea and prison correspondence. Appellant found these threats credible and caused substantial fear and apprehension through the ongoing manipulation and control of her husband.

12. Based upon these threats and coercions the Appellant's will was overcome and as a result she submitted and later signed the stipulation documents. *Id.*

13. The Appellee hired Mr. Tycksen to represent him during the divorce proceedings. Appellee told the Appellant that she could not retain independent counsel as they could not afford two attorneys. Resp't Aff. ¶ 8.

14. The Appellee required the Appellant to pay half of the attorney's fees. Resp't Aff. ¶ 8. This lead Appellant to believe that both parties' interests were represented by Mr. Tycksen and that he would ensure the fairness of the process. Tr 13:11-18, 14:11-16,.

15. Mr. Tycksen has stated that he offered legal advice to both of the parties during their meetings together. Tr. at 21:15-16.

16. During these meetings, while the Appellant believed that she was being represented by Mr. Tycksen, Mr. Tycksen made several representations of questionable validity to the Appellant. He told her that the stipulation was a "really good deal." Tr. at 12:19-22. He also told her that while arrangements for child support were required by law, the Appellee would not enforce them, and even if he chose to later enforce the provision he could only "go back one month." Tr. 12:23-13:10.

17. It wasn't until the last meeting, either immediately before or after the signing of the stipulation, that Mr. Tycksen informed the Appellant that he only represented the Appellee and that she could get her own attorney to review the stipulation. Tr. 13:23-14:4.

18. By this point, Appellant was confused by the issues of representation and felt rushed into a decision. She stated that "it happened so fast and went so quickly that I didn't know what to do. I didn't have the money to find my own attorney" having paid for half of Mr. Tycksen's charges already. Tr. at 14:5-10.

19. There is no language in the stipulation or the decree that clarifies that appellant understands that Mr. Tycksen only represents the Appellee or that she understood or had been informed of her right to seek counsel.

20. The parties were divorced pursuant to the written stipulation on June 7, 2004. Pursuant to the decree, the Appellee was awarded the marital home, on which Appellant was awarded an equitable lien of $20,000. Appellee was also awarded the neighboring lot free and clear of any claim. Both properties were gifted to the Appellant as part of her inheritance. Appellee had contributed approximately $20,000 of his pre-marital assets to the cost of building the marital home.

21. Appellant also gave over custody of her children and agreed to a visitation schedule that was she felt was highly disadvantageous. She agreed to the terms based on the threats, coercions and representations discussed above.

22. On July 12, 2004 Appellant, having realized the unfair nature of the proceedings and stipulation, moved the lower court to set aside the decree pursuant to Rule 60(b) of the Utah Rules of Civil Procedure.

23. During the hearing, the Honorable Anthony Quinn stated, "[U]ltimately, the terms of this divorce appear on the face of it to be one-sided." Tr. at 3:9-12. However, he denied the Appellant's 60(b) motion.

24. Appellant now appeals the lower court's ruling.

VI. Summary of the Argument

I. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SET ASIDE THE DECREE PURSUANT TO RULE 60(B) OF THE UTAH RULES OF CIVIL PROCEDURE BY DECLARING THAT MARRIAGE

CONTRACTS MUST MEET THE SAME STANDARDS FOR INVALIDATION AS "COMMON" CONTRACTS.

Rule 60(b) of the Utah Rules of Civil Procedure allows the court to relieve a party from a final judgment or proceeding for the following reasons applicable to this case:

> (1) Mistake, inadvertence, surprise or excusable neglect;
> (3) Fraud, misrepresentation or other misconduct of adverse party or;
> (6) Any other reason justifying relief from the operation of judgment.

The lower court, in denying Melanie's motion to set aside the decree, concluded that Melanie "must, at a minimum, produce evidence that would constitute a defense to a common contract." (Minute entry conclusions, ¶ 1). This conclusion, however, is directly contrary to Utah common law.

The Utah Supreme Court has held that "contracts between spouses or potential spouses are not necessarily judged on the same terms as contracts executed by persons operating at 'arm's length.'" Reese v. Reese, 984 P.2d 987 (Utah 1999). Reese held, in the context of prenuptial agreements, "the mutual trust between the parties raises an expectation that each party will act in the other's best interest. The closeness of this relationship, however, also renders it particularly susceptible to abuse." Id. While mutual trust is a lesser issue in a divorce proceeding, the closeness of the relationship and intimate history makes marital agreements prone to abuse. This suggests that

when evaluating duress, fraud or the fairness of contracts in a marriage a lesser standard is to be employed than that used in "common contracts."

II. ASSUMING, ARGUENDO, THAT A MARRIAGE CONTRACT IS HELD TO THE SAME STANDARD AS A COMMON CONTRACT, THE TRIAL COURT ERRED IN FINDING THAT THE EVIDENCE PUT FORWARD BY THE APPELLANT FAILED TO MEET THE STANDARDS FOR INVALIDATION.

While "[e]quity is not available to reinstate rights and privileges voluntarily contracted away simply because one has come to regret the bargain made," Land v. Land, 605 P.2d 1248, 1251 (Utah 1980), the present case is not simply one of regret. The stipulation created and signed was the product of fraud and duress and is so one sided and unfair that the court should exercise their considerable discretion to set aside the stipulation.

Fraud

Appellee denied Melanie access to legal counsel to advise her of the equity of her divorce settlement. This amounts to fraud, as declared by the Utah Supreme Court in St. Pierre v. Edmonds, 645 P.2d 615, 619 (Utah 1982). Appellee told Melanie that it was enough to have one attorney between them. He also told Melanie that they could only afford one attorney and that each of them should pay half of the expenses, which she did. Therefore, when dealing with Mr. Tycksen, the counsel retained by the Appellee, Melanie believed that her interests were being looked after by Mr. Tycksen, a conclusion supported by (1) her payment of half of his bill, (2) assertions made by Mr. Tycksen about the fairness of the deal and (3) the fact that Mr.

Tycksen did not inform Melanie of his true representative relationship until immediately before or after signing the divorce stipulation.

Duress

Melanie had endured Appellee's controlling and manipulative nature through almost 11 years of marriage. He improperly threatened her that if she failed to follow his instructions with the creation and signing of the divorce agreement that she would end up in jail and never see her children again. This had a dramatic impact on Melanie's ability to negotiate and agree to a fair divorce settlement.

Equity

The courts have the power to set aside divorce decrees, even ones reached by stipulation, if they find that the arrangements are unfair. The trial judge observed the one sidedness of the arrangement. It now behooves this court to exercise thier discretion to set aside this blatantly one sided and unfair decree and allow what "justice and equity require for the interest and welfare of the parties involved." Mathie v. Mathie, 363 P.2d 779, 782-83 (Utah 1961).

VII. Argument

I. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SET ASIDE THE DECREE PURSUANT TO RULE 60(B) OF THE UTAH RULES OF CIVIL PROCEDURE BY DECLARING THAT MARRIAGE CONTRACTS MUST MEET THE SAME STANDARDS FOR INVALIDATION AS "ARM'S-LENGTH" CONTRACTS

A. Rule

The Utah Supreme Court has held that "contracts between spouses or potential spouses are not necessarily judged on the same terms as contracts executed by persons operating at 'arm's length.'" Reese v. Reese, 984 P.2d 987 (Utah 1999). In the context of prenuptial agreements, for instance, "the mutual trust between the parties raises an expectation that each party will act in the other's best interest. The closeness of this relationship, however, also renders it particularly susceptible to abuse." Id. While "mutual trust" is not as prevalent in a divorce proceeding as it may be in a prenuptial arrangement, the closeness of the relationship, history and spousal knowledge continue to make this type of agreement dangerously "susceptible to abuse."

While the exact standards to be used when judging marital contracts is not clear[1], it is apparent that the Utah Supreme Court had intended it to be a lesser standard than the "arm's length" transaction standards relied upon by opposing counsel.

B. Application

In analyzing the arguments in the following sections, they must be looked at in the framework of the above rule. That is, Marriage Contracts are not arm's length transactions and this should be taken into heavy consideration as applied to the arguments laid out below.

In this case, the Appellee had years of experience controlling Melanie's behaviors. As her husband, the Appellee was able to exert a level of authority and

control that is not present in an arm's length transaction. Melanie has testified about this control, as have others who have witnessed the manipulations first hand. In addition, Melanie did not have the luxury that is available with most arm's length transactions. She could not just walk away if she found the terms unfavorable. The Appellee had threatened that Melanie would lose her children and be sent to jail if she did not do as he told her. This obviously creates a scenario that would not be present if one were simply buying a car or entering into other "Common contracts." This is a contract, by its very nature, that is "particularly susceptible to abuse."

II. ASSUMING, ARGUENDO, THAT A MARRIAGE CONTRACT IS HELD TO THE SAME STANDARD AS AN ARMS-LENGTH CONTRACT, THE TRIAL COURT ERRED IN FINDING THAT THE EVIDENCE PUT FORWARD BY THE APPELLANT FAILED TO MEET THE STANDARDS FOR INVALIDATION.

A. Rule: Standards for Contract Invalidation

1. Fraud

III. Courts have long found fraud to be an allowable reason for contract invalidation. Fraud is characterized as a false representation or an omitted representation (with a duty to disclose) made for the purpose of inducing action which is reasonable relied upon and results in damage. Taylor v. Gasor Inc., 607 P.2d 293, 294 (Utah 1980). Beyond this classic definition, which is applicable to this case on several levels, fraud takes on an additional meaning in divorce cases.

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[1] The court having declined to rule on the subject in In Re Beesley, 883 P.2d 1343, Fn 6 (Utah 1994).

> "An intentional act by a party in a divorce action which prevents the opposing party from making a full defense 'amounts to fraud upon the opposing party, as well as upon justice, justifying court in setting aside the decree so obtained.'" St. Pierre v. Edmonds, 645 P.2d 615, 619 (Utah 1982) (Citations omitted.).

It also takes on an additional character when it relates to dual representation of clients in a divorce case. The Utah State Bar has issued the formal opinion that an attorney may not concurrently represent both parties in a divorce under any circumstances. Opinion No. 116, June 25, 1992. "The risk of the appearance of impropriety is great in divorce cases where the inherent adversity of the parties is so obvious.... [D]ual representation can foster actual impropriety by facilitating a fraud on the court, either with or without the attorney's collusion. The potential for fraud enlarges when one spouse dominates in the marriage." Id.

When discussing arguments that have been advanced in favor of dual representation, the Bar points out that, while someone should be allowed to waive their right to separate representation, this assumes that both parties are equally informed as to advantages and disadvantages of dual representation. However, "[t]hat assumption is not valid when one party dominates to the extent of controlling the other party's power to decide.... Such dominance is often the case in dissolving marriages and may not be apparent to the attorney who only sees both parties when they are together." Id.

1. Duress

When dealing with traditional arm's length contracts, Utah has "explicitly adopt[ed] the legal standards of duress set forth in sections 175 and 176 of the Restatement (Second) of Conracts." Andreini v. Hurtgren 860 P.2d 916, 921 (Utah 1993). The Restatement (Second) of Contracts allows for two types of duress that may invalidate a contract: duress by physical compulsion and duress by improper threat. The sections on duress by improper threat, sections 175 and 176, read, in applicable part, as follows:

> §175: When Duress By Threat Makes A Contract Voidable
> (1) If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.
> §176: When A Threat is Improper
> (1) A threat is improper if
> a. What is threatened is a crime or a tort, or the threat itself would be a crime or a tort if it resulted in obtaining property,
> b. What is threatened is criminal prosecution,
> c. What is threatened is the use of civil process and the threat is made in bad faith, or
> d. The threat is a breach of the duty of good faith and fair dealing under a contract with the recipient
> (2) A threat is improper if the resulting exchange is not on fair terms, and
> a. The threatened act would harm the recipient and would not significantly benefit the party making the threat,
> b. The effectiveness of the threat in inducing the manifestation of assent is significantly increased by prior unfair dealing by the party making the threat, or
> c. What is threatened is otherwise a use of power for illegitimate ends.

The Utah Supreme Court has held that "Duress and fraud are commonly held sufficient to vacate a property settlement in a divorce decree." St. Pierre at 619. This is true because "Public interest requires that no spouse be defrauded or coerced by the

other in obtaining a decree of divorce." Id. "Generally speaking, the courts will, as in the case of fraud ... exercise their power and set aside a judgment obtained by duress." Id.

This is vitally true in marital contract negotiations. There is such a risk for abuse and heavy-handed dealing that courts have to ensure that the dealings are fair and the outcomes equitable. "[T]he general principal derived from our case law is that spouses or prospective spouses may make binding contracts with each other and arrange their affairs as they see fit, *insofar as the negotiations are conducted in good faith ... and do not unreasonably constrain the court's equitable and statutory duties.*" Reese, 994-995, Emphasis added. In Reese, the court had found that, while there was evidence that Thomas had exerted some pressure by repeatedly requesting that Sheila sign the contract, this did not constitute a clear lack of good faith, honesty, and candor. However, in the present case, there was a demonstrated history of Appellee controlling and manipulating Melanie.

2. Public Policy

The courts have wide discretionary power in ensuring that divorce agreements are fair and that public policy is not violated by an overly dominant or unfair decree. Public interest requires that no spouse be defrauded by the other in obtaining a decree of divorce and, when properly pleaded, it is not important whether the decree is entered after litigation or based on consent. Bayles v. Bayles, 981 P.2d 403, 407 (Utah

App. 1999). *See also* Birch v. Birch, 771 P.2d 1114 (Utah App. 1989). Equity has often been used by the Utah Supreme Court to allow for the invalidation of one-sided decrees, including the following cases:

> It is the established rule that a stipulation pertaining to matters of divorce, custody and property rights therein, though advisory upon the court and would usually be followed unless the court thought it unfair or unreasonable, is not necessarily binding on the court anyway. It is only a recommendation to be adhered to if the court believes it to be fair and reasonable. Klein v. Klein, 544 P.2d 472, 476 (Utah 1975).
>
> We also have been unwilling to deprive trial courts of their equitable powers to modify agreements made by spouses in contemplation of divorce. '[A]greements between spouses to fix their property rights ... are generally not held to be so absolute as to prevent a court under its equity powers in divorce actions from doing that which justice and equity require for the interest and welfare of the parties involved. Id., citing Mathie v. Mathie, 363 P.2d 779, 782-83 (Utah 1961).

Therefore, the trial court should only look at a stipulation as a recommendation. If a trial court finds it to be one-sided, the trial court should not adhere to it, but should rather set it aside in the interests of equity.

B. Application

1. Fraud

Appellee prevented Melanie from obtaining counsel to assist her during the divorce proceedings. He represented that they could not afford a second attorney and that she would not need independent representation. This assertion was made to

prevent Melanie from obtaining counsel that would ensure equitable proceedings. This assertion was reasonably believed and relied upon by Melanie to her detriment. Having personal representation is usually an integral part of making a full defense. As noted above, the intentional act of preventing a party from making a full defense amounts to fraud in itself.

Melanie was further a victim of the Appellee's fraudulent behavior as a result of representations he made to her that caused her to take detrimental actions. Appellee told Melanie that the courts would deny her all custody and visitation rights to her children as a result of her time in prison. He told her that the only way that she could secure even limited visitation was to agree to the terms he was establishing. These statements, which amount to duress as examined below, also amount to fraud in that they were false material statements which Melanie relied upon to her detriment. Her being denied access to legal counsel which could have corrected the representation makes her reliance reasonable.

Melanie was also misled by representations that were <u>not</u> made in a timely fashion, but should have been. By paying half of the attorney's fees and by representation made by Appellee and his attorney, Melanie believed that that an attorney was unnecessary as her interests would be protected by the counsel retained by the Appellee. This representation was not corrected by Appellee or Appellee's counsel until their last meeting together. Melanie testified that she believed Mr. Tycksen, Appellee's counsel, was equally advising both parties. Melanie reasonably

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COPY

IN THE UTAH COURT OF APPEALS

JAMES SWEET, Petitioner / Appellee, vs. **MELANIE SWEET,** Respondent / Appellant.	**NOTICE OF ERRATA** Appeal No. 20050034 CA

COMES NOW the Appellant, by and through counsel, David Paul White and makes the following correction.

Page 21, paragraph 2, line 4 presently reads: "as a result of her time in prison."

As Melanie did not serve any prison time, the text should read as follows: "as a result of her conviction."

Attached to this notice is a new copy of page 21 with the corrections made.

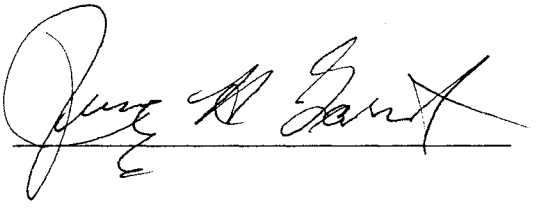
Dated this 29 day of August, 2005

David Paul White

MAILING CERTIFICATE

I hereby certify that on the 29th day of August 2005, I mailed two (2) true and correct copies of the foregoing **NOTICE OF ERRATA,** postage prepaid, to the following:

Steven C. Tycksen
Attorney for Petitioner / Appellee
5300 South 360 West, Suite 360
Murray, Utah 84123



prevent Melanie from obtaining counsel that would ensure equitable proceedings. This assertion was reasonably believed and relied upon by Melanie to her detriment. Having personal representation is usually an integral part of making a full defense. As noted above, the intentional act of preventing a party from making a full defense amounts to fraud in itself.

Melanie was further a victim of the Appellee's fraudulent behavior as a result of representations he made to her that caused her to take detrimental actions. Appellee told Melanie that the courts would deny her all custody and visitation rights to her children as a result of her conviction. He told her that the only way that she could secure even limited visitation was to agree to the terms he was establishing. These statements, which amount to duress as examined below, also amount to fraud in that they were false material statements which Melanie relied upon to her detriment. Her being denied access to legal counsel which could have corrected the representation makes her reliance reasonable.

Melanie was also misled by representations that were <u>not</u> made in a timely fashion, but should have been. By paying half of the attorney's fees and by representation made by Appellee and his attorney, Melanie believed that that an attorney was unnecessary as her interests would be protected by the counsel retained by the Appellee. This representation was not corrected by Appellee or Appellee's counsel until their last meeting together. Melanie testified that she believed Mr. Tycksen, Appellee's counsel, was equally advising both parties. Melanie reasonably

believed that Appellee's counsel was protecting both parties' interests while preparing the stipulation and the resulting findings of fact, conclusions of law, and decree of divorce.

Melanie's belief and reliance was reasonable because (1) she paid for half of the expenses, (2) Mr. Tycksen advised both parties and made representations about the agreement and, (3) Melanie was not notified, in writing or during meetings with Appellee and Mr. Tycksen, that she was not being represented until immediately before or after the signing of the stipulation. Each of these points is explored below.

(1) Appellee hired an attorney and informed Melanie that there was no money for an additional attorney and that she was to pay one-half of the attorney's fees, or $700, which she did. After the numerous years under the control of Appellee and being dominated by his wishes, Melanie was once again dominated by Appellee. She followed his instructions, not knowing any better. She also believed that this would ensure that Mr. Tycksen would be protecting her interests as well as Appellee's.

(2) This belief was furthered by the representations Mr. Tycksen made to her during the process. He referred to the fairness of the property distribution and of the visitation arrangements. Mr. Tycksen also, by his own admission, advised both parties about the child support provisions necessary to make their arrangements valid. Appellee falsely represented to Melanie that he would not enforce the child support provision. Mr. Tycksen then told Melanie that even if the Appellee later decided to enforce the provision, he could only go back one month. Leaving aside the legal

incorrectness of this representation for a moment, it supports the claim that Mr. Tycksen was holding himself out as representing Melanie's interests. This furthered Melanie's belief that she was being adequately represented.

Addressing the legal incorrectness of this representation, Mr. Tycksen is operating from a superior position of knowledge regarding the law. His representation about the Appellee's ability to only go after back child support for one month was clearly incorrect. Melanie relied upon this incorrect representation in agreeing to sign the document. She relied upon his representation because she was under the impression that Mr. Tycksen would not give her blatantly incorrect information.

(3) Finally, this belief was reasonable because nothing was ever given or told to her that would dissuade her from that belief until the last meeting. Nothing in the stipulation, the findings, or the decree stated anything about Mr. Tycksen only representing Appellee, or about Melanie being informed of her right to seek separate counsel. This is standard language. In fact, Melanie was not informed until the signing of the stipulation that she was not represented by Mr. Tycksen at all and that she could have another attorney look at the stipulation. At that point, sitting next to her controlling and domineering husband, struggling to cope with and understand this last minute revelation, she could not be expected to reasonably appreciate or assert her rights. This would be equivalent to the police interrogating a suspect to the very

point of confession and then, just before or after signing the confession, informing them of their Miranda rights.

Mr. Tycksen was, in effect, acting as a dual representative of the parties during the divorce proceedings, especially in the mind of Melanie. She entered into the stipulation after being told repeatedly by Appellee that she had no choice, and after Mr. Tycksen had informed her that she was getting a "good deal." Melanie thought that she could trust Mr. Tycksen to be fair and look out for her interests as well.

The present case is a prime example of the kind of situation the Bar expressed concern about. Appellee was clearly the dominant party in the marriage. Appellee dictated many aspects of Melanie's life, everything from who her friends were to how household chores were completed. Throughout their marriage, Appellee controlled the relationship and insisted on having everything his way. This relationship finally manifested itself by creating the circumstances that allowed the Appellee to convince Melanie that she could not and should not contact a lawyer on her own, which alone amounts to fraud.

2. Duress

As was stated in Appellee's affidavit and that of his attorney, the terms of the divorce were arrived at prior to approaching Appellee's attorney to draft the papers. This was done under the Appellee's influence. After so many years of being dominated by Appellee, this compilation of terms was not the result of a fair discussion. Rather, it was the result of coercion, threats and unfair practices. Among

other things, Appellee told Melanie that the stipulation was her only choice; otherwise she would go to jail and would never see her children again. She was not allowed to hire an attorney on her own to offer a correct perspective to counter his threats, so she believed that carrying out his wishes was the only way to avoid incarceration and a permanent separation from her kids. He added credibility by demonstrating his level of control over her and his commitment to dominating her life. During their separation, the Appellee would show up at Melanie's residence and go through her closets and drawers. He also checked calls on her cell phone and placed calls to numbers found in her cell phone.

Melanie has stated that she signed the stipulation as a direct result of these threats and controlling actions. She was also acting under the fear of these threats when she typed the stipulation and faxed it to Mr. Tycksen's office. Nothing is as important to Melanie as her children and she believed that she would never see them again if she took a course of action contrary to Appellee's desires.

Fearing for the loss of her children and her freedom from an improper threat she deemed credible and avoidable only by conforming to Appellee's wishes, the circumstances of this stipulation's creation and signing fall squarely within the state adopted definition of duress discussed on page 18. Under fear of criminal prosecution and abuse of civil process Melanie signed this document.

3. Public Policy

Public interest requires that no spouse be defrauded by the other in obtaining a decree of divorce. Public interest also requires that divorce decrees be fair, especially to avoid abuse by a dominant spouse. In this case, the Appellee received an unfair distribution of property in the decree. As part of the decree, Melanie conveyed to Appellee land that was given to her by her father. It was an early distribution of her inheritance and was intended to pass to Melanie specifically. This inherited property was not part of the marital estate. Generally, courts should "award property acquired by one spouse by gift and inheritance during the marriage ... to that spouse ... unless (1) the other spouse has by his or her efforts or expense contributed to the enhancement, maintenance, or protection of that property, thereby acquiring an equitable interest in it, or (2) the property has been consumed or its identity lost through commingling or exchanges or where the acquiring spouse has made a gift of an interest therein to the other spouse." Mortensen v. Mortensen, 760 P.2d 304, 308 (Utah 1988).

The land that was subject to the real property division in the instant case was inherited by Melanie. The gift was of 1.92 acres of undeveloped land, worth an estimated $70,000. Appellee did contribute approximately $20,000 of his funds to build a house on a portion of the property, which became the marital home. Appellee did acquire some amount of equitable interest in the land, however, he convinced Melanie that she had little claim in the property due to his investment, and that he was entitled to the retain possession of marital home and the property on which it stood.

According to the property distribution Melanie was induced to agree to, Melanie received a mere $20,000 equity lien on the home. Melanie also conveyed the remaining acreage to the Appellee free of any claim of interest. Appellee had not invested any personal assets to this parcel and would have no claim outside of this decree.

While the property loss as a result of this decree is substantial, Melanie is most concerned about the consequences of this decree on her relationship with her children. This decree cost Melanie all claims to custody and is heavily weighted against her in visitation rights. Under the flag of equity Melanie challenges the fairness of the visitation schedule and requirements that the Appellee has placed on Melanie in the carrying out of that visitation schedule. The divorce decree requires that Melanie spend a significant portion of her time with the children at the Appellee's home rather than her own. Also, in the event that the Appellee needed someone to care for the children during his visitation time, Melanie was not offered the option to watch them, rather being replaced by the Appellee's mother in those circumstances.

These children are the most important thing in Melanie's life. She would have never signed away her custody had it not been for the unfair and misleading dealings as discussed above. The blanket granting away of rights and access to her children demonstrate the one-sidedness of the dealings and the importance of a public policy that protects against such abuse. Because of the combination of fraud and threats, this divorce has been a one sided playing field since the beginning. When people are

unable to adequately protect their rights, for whatever reason, but especially when dealing with parties in advantageous positions, the courts have an interest to see that people are treated fairly and with dignity.

Courts have wide discretion to set aside divorce decrees, even ones arrived at by genuine stipulation, if the court finds that the decree is unfair. Divorce and custody stipulations are only "recommendation[s] to be adhered to *if the court believes it to be fair and reasonable.*" Klein at 476, emphasis added. In this case, the trial court judge stated on record that it's an inequitable decree: "[U]ltimately, the terms of this divorce appear on the face of it to be one-sided." (transcript p. 3). Having made the determination that it was one sided, the trial judge erred in holding that he then had to look for contract reasons to invalidate the decree. Based on the one-sidedness of the stipulation, the trial judge could have, and it is Melanie's assertion that he should have, used his equitable powers to set it aside without further justification.

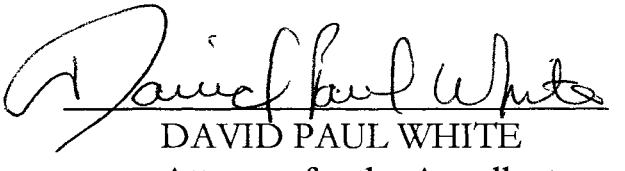
VIII. Conclusion and Prayer

This case is before the court as a challenge to the court's denial of a motion to set aside a divorce decree under rule 60(b) of the Utah Rules of Civil Procedure. The trial court held that marriage contracts could only be set aside if they met the standards required to set aside "arm's length" contracts. The court then found that those standards were not met. It is established case law that marriage contracts are not "arm's length" contracts, but are more prone toward abuse from a controlling spouse, so the standards must be different than those of a typical contract.

However, assuming arguendo that the standards for marriage contracts and "common" contracts are the same, the trial court erred in finding that these standards had not been met. This is a case where duress and fraud culminated to deny Melanie an equitable division of property and, more importantly, parental custody and visitations. Fraud and duress were used to force Melanie to sign a decree that she never would have signed absent those improper forces and misrepresentations. Public policy demands that divorce decrees be equitable and the courts are only to adhere to recommendations, including stipulations, if the courts find that they are equitable. These factors, taken collectively and individually, create a scenario that demands invalidation of the decree. Melanie is only asking for a chance to reexamine the decree with the benefit of real counsel instead of being dominated and controlled by her husband and the representations of his attorney.

Melanie prays this court to overturn the ruling of the trial court and asks that the divorce decree be set aside so that a new one may be fairly created.

DATED THIS 24th day of August 2005.



DAVID PAUL WHITE
Attorney for the Appellant

Addendum

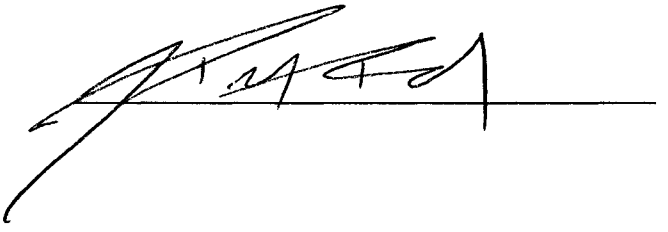
Exhibit 1: 60(b) of the Utah Rules of Civil Procedure

Exhibit 2: Restatement of Contracts (Second) §§175-176

MAILING CERTIFICATE

I hereby certify that on the 25th day of August 2005, I mailed two (2) true and correct copies of the foregoing **BRIEF OF APPELLANT,** postage prepaid, to the following:

Steven C. Tycksen (#3300)
ZOLL & TYCKSEN, L.C.
5300 South 360 West, Suite 360
Murray, Utah 84123



Tab 1

Exhibit A

Utah Rules of Civil Procedure: Rule 60. Relief from judgment or order.

(b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), or (3),not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Tab 2

Exhibit B

Restatement (Second) of Contracts

§ 175 When Duress by Threat Makes a Contract Voidable

(1) If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.

(2) If a party's manifestation of assent is induced by one who is not a party to the transaction, the contract is voidable by the victim unless the other party to the transaction in good faith and without reason to know of the duress either gives value or relies materially on the transaction.

§ 176 When a Threat Is Improper

(1) A threat is improper if

(a) what is threatened is a crime or a tort, or the threat itself would be a crime or a tort if it resulted in obtaining property,

(b) what is threatened is a criminal prosecution,

(c) what is threatened is the use of civil process and the threat is made in bad faith, or

(d) the threat is a breach of the duty of good faith and fair dealing under a contract with the recipient.

(2) A threat is improper if the resulting exchange is not on fair terms, and

(a) the threatened act would harm the recipient and would not significantly benefit the party making the threat,

(b) the effectiveness of the threat in inducing the manifestation of assent is significantly increased by prior unfair dealing by the party making the threat, or

(c) what is threatened is otherwise a use of power for illegitimate ends.