

1994

# Wilma R. Bugger v. Charles B. Bugger : Reply Brief

Utah Court of Appeals

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DOCKET NO. 940394

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IN THE UTAH COURT OF APPEALS

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WILMA R. BUGGER,	:	
	:	
Plaintiff/Appellee,	:	
	:	Case NO. 940394-CA
vs.	:	
	:	Priority Classification 15
CHARLES B. BUGGER,	:	
	:	
Defendant/Appellant :	:	

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REPLY BRIEF OF APPELLANT  
CHARLES B. BUGGER

---

Appeal from the Third Judicial District Court  
Salt Lake County, State of Utah  
Honorable Tyrone Medley, District Judge, presiding

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MAY 18 1995

COURT OF APPEALS

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Defendant/Appellant	:	

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REPLY BRIEF OF APPELLANT, CHARLES B. BUGGER

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ARGUMENT

**I. APPELLANT MAINTAINS THAT THE TRIAL COURT'S FINDING OF FACT ACCURATELY REFLECTS THE EVIDENCE PRESENTED AS TO THE 1983 FILING OF A DECREE OF ANNULMENT.**

The Appellant (hereinafter "Charles") challenges the accuracy and veracity of the use of the Affidavit of Kenn M. Hanson in Respondent's brief. The nature of an "affidavit" is such that it merely creates a rebuttable presumption,<sup>1</sup> and the averments of an affidavit should be true and stated positively, containing evidentiary facts, not an opinion or legal conclusion.<sup>2</sup> However, averments of fact based upon information and belief lack evidentiary value because they are considered mere hearsay; thus barred by the rules of evidence governing

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<sup>1</sup> Layton City v. Bennett, 741 P.2d 965 ((Utah. App. 1987), cert. denied 765 P.2d 1277.

<sup>2</sup> 2A C.J.S. AFFIDAVITS §47.

hearsay.<sup>3</sup> In addition, when used as evidence, an affidavit is commonly regarded as weak evidence that should be received with caution and not conclusive of the facts stated therein.<sup>4</sup>

In this case, Respondent's brief makes conclusive statements that Kenn Hanson, the 1983 counsel of record, "prepared the Findings of Fact and Conclusions of Law and the Decree of Annulment and submitted them to the Court for entry, [and that] Mr. Hanson prepared an affidavit stating that he prepared the findings and the decree and submitted them to the court for filing and entry." (Appellee's Brief at 4). However, these conclusory statements are in direct opposition to the Trial Court's findings, as well as the affiant's statements.

First, Mr. Hanson's Affidavit did not state that the documents he prepared were in fact submitted. Rather, Mr. Hanson merely states that it was, and still is, his practice to timely prepare, then submit all Orders of the Court and follow up on any matter submitted, and that to the best of his knowledge he followed that practice (Hanson Aff. para. 8 - 11). Secondly, the record attests to the fact that Mr. Hanson could not recall specifically calling the Court to follow up on the documents he prepared (R. at 3, line 25). This suggests that Mr. Hanson did not submit the documents he prepared for entry, nor follow up on the matter submitted.

Finally, the record is clear that the Court ruled "based on

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<sup>3</sup> 2A C.J.S. AFFIDAVITS §49; 32A C.J.S. EVIDENCE §194.

<sup>4</sup> Audit Services v. Kraus Const., Inc., 615 P.2d 183 (Mont. 1980); see also, 32A C.J.S. EVIDENCE § 1032.

the evidence that has been presented at this point, the Court is going to find that a Decree of Annulment, Findings of Fact, Conclusions of Law to support a Decree of Annulment were never entered in this particular case." (R. at 11, line 9). Simply put, Respondent's statements are not based on actual fact, thus conclusory, and in direct opposition to the trial court's findings.

**II. AS OPPOSED TO THE ASSERTIONS MADE IN RESPONDENT'S BRIEF, THE DELAY IN RENDERING THE FINAL DECREE WAS NOT DUE TO THE COURT'S NEGLIGENCE, BUT RATHER MR. HANSON'S FAILURE TO SUBMIT AND FOLLOW THROUGH WITH HIS COURT APPOINTED DUTIES.**

Under Utah law, nunc pro tunc Orders are appropriate only when it is established that the delay was due to circumstances beyond the control of the parties to the action.<sup>5</sup> In the present case, the Respondent was unable to provide a showing of any act of negligence by the Court. Additionally, Respondent was unable to provide direct evidence that Mr. Hanson did in fact submit or follow through with the Orders he prepared. Thus, the delay in the entering of the final decree was not due to any negligent act by the Court, but rather Mr. Hanson's failure to follow through with his Court appointed obligations. Therefore, the Decree of Annulment entered Nunc Pro Tunc in this case should be set aside due to plain error.

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<sup>5</sup> Bagshaw v. Bagshaw, 788 P.2d 1057, (Utah App. 1990) (nunc pro tunc allows a court to correct its earlier error or supply its omission when a decision has been rendered and the decision has not been properly recorded through no fault of the parties).

**III. THE TRIAL COURT'S FINDING OF "GOOD CAUSE" IS NOT SUPPORTED BY ENOUGH LEGAL OR FACTUAL SUPPORT TO WARRANT THE USE OF ITS NUNC PRO TUNC POWER.**

On appeal, courts applying nunc pro tunc power have been upheld where the court itself has failed to properly record the decision due to any "cause not attributable to the laches of the parties, but within the control of the court."<sup>6</sup> The statutory provision granting this power is as follows:

**A court having jurisdiction may, upon its finding of good cause and giving of such notice as may be ordered, enter an order nunc pro tunc in a matter relating to marriage, divorce, legal separation or annulment of marriage.**

Utah Code Ann. § 30-41-a (1983). Since "good cause" hinges upon the particular facts of a case, it is determined on a case by case basis. In this case, the Trial Court tacitly implied that the delay in rendering the final decree was not due to Court error when it ruled that no Findings of Fact, Conclusions of Law, or Decree of Annulment had ever been entered in this particular case. Thus, whether viewed as a factual matter or an issue of law, no "good cause" exists for a nunc pro tunc ruling. As such, the nunc pro tunc ruling should be set aside.

If assumed, arguendo, that "good cause" is supportable in this case, the 1994 documentation is not consistent with the record of the 1983 ruling as ordered by the Trial Court. A nunc pro tunc order enters a now for then record of an order previously made and is used to make the record speak the truth,

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<sup>6</sup> Mitchell v. Overman, 103 U.S. 62, 26 L.Ed. 369 (1881) as quoted in Bagshaw, 788 P.2d at 1060-61.

not to correct the court's failure to speak.<sup>7</sup> However, as previously presented, the 1994 Decree and supporting documentation are significantly inconsistent with the 1983 ruling but are in complete harmony with the documentation alleged to have been prepared in 1983 by Mr. Hanson. Thus, the 1994 documentation is not supportable under the nunc pro tunc criteria and, as a matter of law, the ruling should be set aside.

In light of all the surrounding relevant evidence presented to the court, the Trial Court's finding of a nunc pro tunc order and the resulting documentation are clearly erroneous. Therefore, this Court should set aside the nunc pro tunc ruling as a matter of law because that ruling is not supported by any evidence of court error, nor a showing of "good cause".<sup>8</sup>

**IV. LACK OF NOTICE IN THE FILING OF AN ENTRY OF JUDGMENT CONSISTENT WITH A TRIAL COURT'S FINAL RULING IN WHICH BOTH PARTIES WERE PRESENT AND AFFORDED AN OPPORTUNITY TO BE HEARD HAS BEEN HELD BY THIS COURT TO BE HARMLESS ERROR.**

Although, generally speaking, there are notice requirements for the filing of documents based on a Trial Court's final ruling, the lack of such notice in circumstances found in the present case is not a due process violation but rather harmless error. This submission is premised on the fact that 1) the 1983

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<sup>7</sup> Preece v. Preece, 682 P.2d 298 (Utah 1984).

<sup>8</sup> Brief of Appellant, Point I(A),(B),(C), pg. 11-15 provides a complete discussion of how the law defines "good cause" and applies that meaning in a nunc pro tunc order relating to annulment of marriage.

Trial Court's ruling was based on the evidence presented by the parties who were present and given an opportunity to be heard;<sup>9</sup> and 2) since due process was afforded at trial, the filing of documents entirely consistent with the Trial Court's findings preclude a due process violation based on lack of notice for such filings. Rather, this Court has held that such lack of notice is merely harmless error.<sup>10</sup> Therefore, unless Respondent can show that Judge Condor's 1983 findings of fact were clearly erroneous, or that Charles's entry of judgment based on the transcript of Judge Condor's ruling has substantial and prejudicial error, this Court should find Charles' failure to provide notice as harmless error.

#### CONCLUSION

Charles challenges the veracity of the use of Kenn M. Hanson's Affidavit in the Respondent's brief. Charles maintains that the Trial Court's finding of fact accurately reflects the evidence presented as to the filing, or lack thereof, of a Decree of Annulment, Finding of Fact and Conclusions of Law in 1983. Under Utah law, nunc pro tunc Orders are only appropriate when the delay is due to a court's actions and through no fault of the parties. In opposition to the assertions made in Respondent's brief, the evidence suggests that the delay in rendering of the

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<sup>9</sup> Nelson v. Jacobsen, 669 P.2d 1207 (Utah 1983).

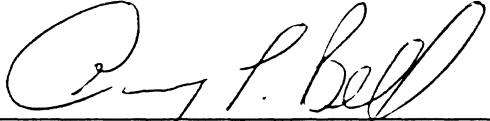
<sup>10</sup> Workman v. Nagle, 802 P.2d 749 (Utah App. 1990) (held: prevailing party's failure to notify opponents of entry of judgment does not make the judgment ineffective, but is rather harmless error).

final decree was due to Mr. Hanson's failure to submit and follow through with his court appointed duties, rather than any negligence on the part of the Court. The Trial Court ordered Respondent to submit a Decree of Annulment and its supporting documents to be consistent with Judge Condor's 1983 ruling. However, Respondent's 1994 documentation was not consistent with the nunc pro tunc criteria, but rather with the original documentation drafted by Mr. Hanson. Therefore, the Trial court's nunc pro tunc ruling, as well as the Respondent's 1994 Decree entered Nunc Pro Tunc should be set aside due to plain error.

In addition, Charles asks this Court to find the lack of notice for filing a Finding of Fact based on Judge Condor's ruling and signed by Judge Medley, as harmless error. Unless Respondent can show harm, or substantial and prejudicial error in Judge Condor's ruling or the Finding of Fact based on that ruling, no due process claim may be supported since the Respondent was already on notice as the content of that ruling.

Based on the foregoing arguments, Charles respectfully asks this Court to set aside the Trial Court's nunc pro tunc ruling, as well as Respondent's 1994 Decree of Annulment entered Nunc Pro Tunc and rule that the lack of notice was harmless error.

**RESPECTFULLY SUBMITTED** this 18th day of May, 1995.

  
BY: Gary L. Bell  
Attorney for Appellant  
Charles B. Bugger

CERTIFICATE OF DELIVERY

I hereby certify that two true and correct copies of the foregoing REPLY BRIEF FOR APPELLANT CHARLES B. BUGGER were hand-delivered or mailed, by first class mail, postage prepaid, on this 18th day of May, 1995, to the following:

W. Kevin Jackson  
Attorney for Respondent  
311 South State Street, Suite 380  
Salt Lake City, Utah 84111-2379

A handwritten signature in black ink, appearing to read "C. Bell". The signature is written in a cursive, flowing style with a large initial "C" and a long, sweeping underline.