1990

Bruno D'Aston v. Dorothy D'Aston : Brief in Opposition to Certiorari

Utah Supreme Court

Brian C. Harrison; Harris, Carter & Harrison; attorney for appellant.
S. Rex Lewis, Leslie W. Slaugh; Howard, Lewis & Petersen; attorneys for appellee.

BRIEF

IN THE SUPREME COURT OF THE STATE OF UTAH

Case No. 900452

BRUNO D'ASTON,

Plaintiff-Appellee,

-vs-

DOROTHY D'ASTON, et al.,

Defendant-Appellant.

APPELLANT'S BRIEF IN OPPOSITION

Appeal from the Decree of the 4th Judicial
District Court for Utah County,
Honorable Boyd L. Park, Presiding.

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QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are set forth in Appellee's Petition for Writ of Certiorari.

OPINIONS OF THE UTAH COURT OF APPEALS

Two opinions were issued by the Utah Court of Appeals. The first dealt with the refusal of the appellant to submit to the process of the district court and is cited as D'Aston v. D'Aston, 790 P.2d 590 (Ut. Ct. App. 1990) and contained in appellant's appendix exhibit "A". The second opinion dealt with the merits of the appeal and is cited as D'Aston v. D'Aston, 794 P.2d 500 (Ut. Ct. App. 1990) and contained in appellant's appendix exhibit "B".

GROUNDS FOR JURISDICTION

The date of entry of the decision sought to be reviewed by appellee is June 14, 1990. The date of entry of the Order Denying Appellee's Petition for Rehearing is August 30, 1990. No cross-petition for a writ of certiorari has been filed. The statutory provision which confers jurisdiction on the Utah Supreme Court to review the decision in question is Utah Code Annotated Section 78-2-2(3)(a)(supp. 1990).

CONTROLLING STATUTES

Appellant is not aware of any controlling provisions of constitutions, statutes, ordinances, or regulations.

STATEMENT OF THE CASE

In this case, appellant, Dorothy D'Aston (Dorothy) and appellee, Bruno D'Aston (Bruno) were married in September, 1953, and continued their state of matrimony for over thirty-five (35) years.

In 1973, Bruno proposed a written property settlement agreement to Dorothy which was executed by both parties, notarized, and duly recorded in the State of California.

Under the 1973 agreement, Dorothy received two parcels of real estate and cash in excess of $500,000.00. Bruno received gold, silver, bullion, exotic cars, patents, and foreign real estate in excess of $1,100,000.00.

In addition, the agreement provided that the parties would execute documents to implement the agreement, and that they had each read the agreement, been advised by counsel, and were not under duress, fraud, or undue influence.

On May 2, 1986, Bruno filed this action for divorce and asserted that Dorothy's property should be divided with him, and further asserted, that part of his property had been stolen.

On July 21, 1986, Sidney Troxell, Bruno's California attorney, who had actually prepared the 1973 agreement, sent a letter to coin dealers advising that Bruno's coins, with a value in excess of $1,000,000.00, had been stolen.

On July 31, 1986, Sidney Troxell sent a letter to Dorothy's attorney which stated that the 1973 agreement was in full force and effect.

On August 21, 1986, Bruno assigned his rights under the 1973 agreement to Sidney Troxell.

On August 25, 1986, Sidney Troxell sent a letter to Dorothy asserting his claim to all property awarded to Bruno under the 1973 agreement.

On September 5, 1986, Sidney Troxell filed a lawsuit in California against Dorothy, in his own behalf, and asserted that she had stolen $1,500,000.00 in coins, gold, and silver from Bruno which was his separate property under the 1973 agreement.

At trial, however, Bruno claimed that the 1973 agreement was invalid, that he had no assets, that Dorothy or their son, Eric, had stolen his property, and that he should be awarded one-half of Dorothy's property.

By contrast, Dorothy testified that all property had been transferred in 1973 according to the agreement. She produced detailed original documents and original checks for each asset owned by her after 1973.

Bruno produced virtually no original documents, claiming that they had been stolen, but instead produced handwritten list after list of highly detailed inventories of coins, gold, and silver that he claimed were owned by him over a period of thirty-five (35) years.

Bruno testified that he had engaged in highly profitable buying, selling, and trading of coins, gold, silver and exotic cars during the period of 1974 through 1986, but admitted that he had filed no income tax returns since 1974. He was convicted of a felony in 1973. He did not produce a financial declaration as required by the Rules of Practice in the 4th District Court setting forth his assets, income, and debts.

The District Court ruled that the 1973 property settlement agreement was invalid and that Dorothy's property should be divided with Bruno.

COURSE OF THE PROCEEDINGS AND DISPOSITION

Trial was held on April 18-21, 1988, before the district court, sitting without a jury.

Findings of Fact, Conclusions of Law, and a Decree of Divorce were entered on December 15, 1988 (p. 467-538, Record on Appeal).

Dorothy filed a Motion to Amend or Grant a New Trial which was denied by the district court on January 12, 1989 (p. 562-563, R.).

Dorothy filed her Notice of Appeal on January 23, 1989 (p. 579-580, R.).

During the pendancy of the appeal, the district court found Dorothy in contempt for failing to comply with certain provisions of the Decree of Divorce and for failing to submit to the process of the District Court (see Appendix Exhibit "C").

By its opinion dated April 9, 1989, the court of appeals stayed the appeal and allowed Dorothy 30 days to submit to process of the district court (D'Aston v. D'Aston, 790 P.2d 590 (Utah App. 1990) (D'Aston I) (see Appendix Exhibit "A").

Dorothy complied with the order of the court of appeals and gave notice of her appearance to the court of appeals on May 7, 1990 (see Appendix Exhibit "D").

The court of appeals accepted Dorothy's compliance with its order, addressed the merits of her appeal, and by its decision dated June 14, 1990, reversed and remanded (D'Aston v. D'Aston, 794 P.2d 500 (Utah App. 1990) (D'Aston II) (see Appendix Exhibit "B").

The trial court entered its order regarding contempt on May 22, 1990, and continued the time for considering the matter until October 26, 1990 (see Appendix Exhibit "C").

Upon further consideration of the matter on October 26, 1990, the trial court found that Dorothy did not have the ability to comply with the order of May 22, 1990, ordered her committed to jail for five days with said commitment being suspended upon the payment of a fine in the sum of $250.00 (see Appendix Exhibit "E").

Dorothy paid the fine on November 15, 1990 (see Appendix Exhibit "F").

STATEMENT OF FACTS

1. Plaintiff, Bruno D'Aston, and Defendant, Dorothy D'Aston, were married September 22, 1953, in New York City, New York (page 1402 line 9-12, Record on Appeal).

2. Bruno was 29 years of age and Dorothy was 21 when they were married (p. 1768 line 2, p. 1622 line 15, R.).

3. At the time of the marriage, Dorothy testified that Bruno had $5,000.00 cash and a 1952 Oldsmobile (p. 1402 line18-23, R.).

4. At the time of the marriage, Bruno testified that he had patents, stamps, coins, silver and gold worth $567,700.00 (p. 686 line 21 - p.687 line 14, R. and Exhibit 8).

5. During the marriage, Bruno became a multi-millionaire by his work at Aston Laboratories and by buying, selling and trading coins, silver, gold, and exotic cars (p. 599 line 17 - p. 600 line 8, R.).

6. During the marriage, Bruno applied for and received many patents, which he valued at not less than $100,000.00 (p. 825 line 23 p. 826 line 6, p. 830 line 9-24, R. and Exhibit 35).

7. On March 1, 1973, Bruno presented a property settlement agreement to Dorothy for her consideration, which had been prepared by Sidney Troxell, Bruno's attorney in California (p. 833 line 21 - p. 834 line 10, p. 1413 line 8 - p. 1414 line 14, R. and Exhibit 37).

8. At the time of executing the 1973 property settlement agreement, the parties owned a home in Los Angeles and real estate in the City of Industry, California (p. 838 line 1-3, p. 1414 line 15-19, R. and Exhibit 37).

9. At the time of executing the 1973 property settlement agreement, Bruno owned over $1,000,000.00 in coins (p. 796 line 12 - p. 797 line 3, R.).

10. At the time of executing the 1973 agreement, Bruno owned a valuable collection of cars (p. 797 line 17 - p. 801 line 12, R. and Exhibit 32a-32k).

11. The 1973 agreement was notarized on February 28, 1975 by Connie Young in Los Angeles, California and recorded on March 7, 1975 in Los Angeles County, California (Exhibit 37).

12. On March 12, 1973, twelve (12) days after the property settlement agreement was originally signed by the parties, Bruno deeded the Los Angeles house and the City of Industry property to Dorothy (Exhibits 38 and 39).

13. Bruno also conveyed bank accounts as per the agreement (p. 1414 line 20-21, R.).

14. Dorothy conveyed all of her interest in foreign real estate, coins, cars, patents, silver, and gold to Bruno (p. 1415 line 8 - p. 1416 line 15, R.).

15. After 1973, Dorothy kept careful records containing documents which showed each purchase and sale of real property and checks evidencing her payments (Exhibits 37, 38, 39, 91, 92, 106, 107, 108, 108a, 109, 109a, 110, 111, 112, 113, 114, 115, 129, 129a, 130, 130a, 131, 132, 133, 134, 135, 136, 137, 138, 139, 143, 144, 145, 146, 148, 149, and 149a).

16. After moving to Provo, Utah and purchasing a home, Dorothy kept careful records of each check paid for remodeling and improvements (Exhibits 147 and 147a).

17. By contrast, Bruno claimed to have retired in 1974, that he earned no income from 1974 through 1986, and that he had filed no tax returns (p. 831 line 22 - p. 832 line 15, p. 600 line 9-18, R.).

18. Furthermore, Bruno claimed to have no records because they were stolen. He initially claimed that one four-drawer file cabinet contained all of his records, but later claimed that he had 12 filing cabinets containing his records (p. 1809 line 6 - p.1810 line 20, R.)

19. On April 30, 1986, Dorothy told Bruno to leave, that she could not put up with his lies anymore, and that the marriage was finished (p. 1667 line 7 - p. 1668 line 6, R.).

20. After April 30, 1986, Bruno went to stay with his friend, Ray Coleman, a retired Provo policeman (p. 1181 line 14-23 and p. 1887 line 22-25, R.).

21. On May 2, 1986, Bruno filed a Complaint for Divorce (p. 1-4, R.).

22. On May 20 and 21, 1986, some twenty (20) days after the alleged incident of April 30, 1986, Bruno had Officer Phillips and Officer Scott prepare police incident reports (p. 1230 line 21-23, p. 1568 line 25 - p. 1569 line 1-5, R.).

23. On July 21, 1986, Sidney Troxell, Bruno's California attorney, who had actually prepared the 1973 property settlement agreement, sent a letter to coin dealers advising that Bruno's coins, with a value in excess of $1,000,000.00 had been stolen (p. 1914, R.).

24. On July 31, 1986, Sidney Troxell sent a letter to Dorothy which stated that the 1973 agreement was in full force and effect (Exhibit 41).

25. On August 21, 1986, Bruno assigned his rights under the 1973 agreement to his attorney, Sidney Troxell, and Troxell filed a lawsuit in California against Dorothy (Exhibit 101).

26. At trial, Bruno claimed that the 1973 agreement was invalid (p. 600 line 23 - p. 602 line 11, p. 754 line 2 - p. 755 line 21, R.).

27. Bruno claimed that the agreement was invalid because there were pending lawsuits at the time (p. 962 line 13 - p. 964 line 3, R.).

28. Bruno admitted that his alleged lawsuits were resolved in any event before the agreement was notarized and recorded in 1975 (p. 964 line 1-3, R.).

29. Dorothy had no knowledge of any lawsuits relating to the 1973 agreement until the divorce action was filed and claimed no duress, fraud, or undue influence in the execution of the agreement (p. 1413 line 8 - p. 1414 line 21, p. 1424 line 15 - p. 1425 line 1, R.).

30. Bruno admitted that he did not execute the agreement under duress, fraud, or undue influence (p. 833 line 21 - p. 841 line 22, R.).

31. The parties acknowledged that Dorothy had worked briefly in the 1950's, that she was 56 years old, and that she had no income and no educational degree (p. 687 line 24 - 688 line 8, p. 1412 line 17-18, R.).

32. On August 24, 1988, in camera, the district court stated, among other things, that it did not believe in marital agreements, that Dorothy should take a polygraph, and if she did not, the court would divide her property (p. 435-438, p. 541-547, R.).

33. On November 17, 1988, the district court ruled the 1973 agreement invalid, ordered no alimony, and divided Dorothy's property with Bruno (p. 440-453, R.).

SUMMARY OF ARGUMENTS

Appellant complied with the orders of both the court of appeals and the trial court.

The decision of D'Aston II is in harmony with well established principles of contract law and with prior decisions of the Utah Court of Appeals and the Utah Supreme Court.

Appellant's bare allegation of theft does not constitute a unique and compelling circumstance which would justify distributing the separate property of his spouse.

Appellee's complaint that the court of appeals misinterpreted the agreement is merely an attempt to introduce new theories or re-argue old theories which were rejected at trial and not appealed.

ARGUMENT

I. APPELLANT COMPLIED WITH THE ORDERS OF BOTH THE COURT OF APPEALS AND THE TRIAL COURT.

The function for a Petition for Writ of Certiorari is to present to the court issues which are special and important, and which therefore require review by the supreme court. Rule 46 of the Utah Rules of Appellate Procedure provides in part:

> The following...indicate the character of reasons that will be considered:
>
> > (a) When a panel of the Court of Appeals has rendered a decision in conflict with the decision of another panel of the Court of Appeals on the same issue of law;
> >
> > (b) When a panel of the Court of Appeals has decided a question of state or federal law in a way that is in conflict with a decision of the Supreme Court;
> >
> > (c) When a panel of the Court of Appeals has rendered a decision that has so far departed from the accepted and usual course of judicial proceedings or has so far sanctioned such a departure by a lower court as to call for an exercise of the Supreme Court's power of supervision;
> >
> > (d) When the Court of Appeals has decided an important question of municipal, state, or federal law which has not been, but should be, settled by the Supreme Court.

Appellee (Bruno) argues that the court of appeals failed to require compliance with its own order and therefore Question 2 presented for review is worthy of further consideration.

On the contrary, however, the court of appeals stated:

> We... order the wife to submit herself to the process of the trial court within 30 days or we will dismiss her appeal... Wife gave us notice of her compliance with our order of May 4, 1990, and therefore we address the merits of her appeal in this opinion (D'Aston II).

Furthermore, the trial court further considered the order of contempt, found that Dorothy did not have the ability to comply, and

imposed a fine of $250.00 which she has paid (see Appendix Exhibit "F").

Accordingly, Bruno's request for review of Question 2 is without merit and should be denied. Both the court of appeals and the trial court have been satisfied with respect to this issue.

II. THE DECISION OF D'ASTON II IS IN HARMONY WITH WELL ESTABLISHED PRINCIPLES OF CONTRACT LAW AND WITH PRIOR DECISIONS OF THE COURT OF APPEALS AND THE SUPREME COURT.

Bruno argues that D'Aston II conflicts with prior decisions of the court of appeals and of this court. This is simply not the case.

D'Aston II adopts the following propositions:

> 1. In Utah, prenuptial agreements are enforceable as long as there is no fraud, coercion, or material nondisclosure (Huck v. Huck, 734 P.2d 417, 419 (Utah 1986)) (Berman v. Berman, 749 P.2d 1271, 1273 (Ut. Ct. App. 1988)).

> 2. Other jurisdictions review postnuptial property agreements under the same standards as those applied to prenuptial agreements (In re Estate of Harber, 449 P.2d 7, 16 (1969) (Arizona)); (In re Estate of Lewin, 595 P.2d 1055, 1057 (1979) (Colorado)); (In re Estate of Loughmiller, 692 P.2d 156, 162 (1981) (Kansas)); (In re Estate of Gab, 364 N.W.2d 924, 925-26 (1985) (South Dakota)); and (Button v. Button, 388 N.W.2d 546, 550-51 (1986)(Wisconsin)).

3. In Utah, postnuptial agreements are enforceable absent fraud, coercion, or material nondisclosure (Huck v. Huck, et al. supra p. 12; In re Estate of Harber, et al., supra p. 12).

4. General contract principles apply when interpreting prenuptial and postnuptial agreements (Berman v. Berman supra p. 12). (Matlock v. Matlock, 576 P.2d 629, 633 (1978)) (Roberts v. Roberts, 381 So.2d 1333, 1335 (1980)) (Bosone v. Bosone, 768 P.2d 1022, 1024-25 (1989)).

5. In construing a contract, the Court will first look to the four corners of the agreement to determine the parties intentions (Nielsen v. Nielsen, 780 P.2d 1264, 1267 (Ut. Ct. App. 1989)).

6. Resort to extrinsic evidence of the parties' intent is permissible only if the contract document appears to express the parties' agreement incompletely, or if it is ambiguous in expressing that agreement (Nielsen v. Nielsen, supra p. 13) (Anderson v. Gardner, 647 P.2d 3, 4 (Utah 1982)).

7. The determination of whether a contract is ambiguous is a question of law (Buehner Block Company, 752 P.2d 895) and (Whitehouse v. Whitehouse, 131 Utah Adv. Rep. 28, 30 (Ut. Ct. App. 1990)).

All of the above propositions are well-reasoned rules of law.

Bruno argues that these principles conflict with the case of Coleman v. Coleman, 743 P.2d 782 (1987). However, the facts of Coleman do not apply to this case, nor does the reasoning.

In the instant case, the 1973 agreement was executed, notarized, recorded, deeds exchanged, and property valued at over $1,100,000.00 transferred to Bruno, and real estate and cash valued at over $500,000.00 transferred to Dorothy. Thirteen (13) years passed before Bruno filed for divorce and claimed the agreement was not binding. There is a difference between a long-standing marital contract and a proposed stipulation that is submitted for approval and inclusion in a divorce decree, as set forth in Coleman.

The "compelling circumstances" language found in the case of Foulger v. Foulger, 626 P.2d 412, 414 (Utah 1981), may also be easily distinguished. The Foulger case dealt with the standard to be used when reviewing a petition for modification of a divorce decree, and in particular, modifying provisions of a divorce decree dealing with the disposition of real property. By contrast, D'Aston II deals specifically with the enforceability of a postnuptial agreement. Accordingly, D'Aston II is properly governed by well established principles of contract law and is not in conflict with prior decisions of the court of appeals and this court.

III. APPELLEE'S BARE ALLEGATION OF THEFT DOES NOT CONSTITUTE A UNIQUE AND COMPELLING CIRCUMSTANCE WHICH WOULD JUSTIFY DISTRIBUTING THE SEPARATE PROPERTY OF HIS SPOUSE.

Bruno argues that his allegation of theft against Dorothy constitutes a unique and compelling circumstance which would justify the court in dividing Dorothy's separate property with him. The record shows that these allegations form the main theory of Bruno's case. These allegations were simply not proven at trial. Bruno would like to reopen this theory and do what he failed to do at trial, namely, prove his theory. Bruno did not appeal this issue or any other issue. This assertion was fully considered by both the trial court and the court of appeals, and rejected. The trial court specifically recited both parties' versions of the disputed theft and declined to make any ruling whatsoever on that issue.

Bruno cites the case of Noble v. Noble, 761 P.2d 1369 (Utah 1988) as authority for his argument. Noble may be easily distinguished. Noble involved a trial court finding of tortious conduct by virtue of the husband having shot the wife in the head. After partially recovering, the wife filed for divorce and the court ordered substantial separate property to the wife which had belonged to the husband. The clear distinction in the present case is that no finding was made that Bruno had even proven that a theft occurred, let alone who was supposed to have committed the offense.

Bruno continues to argue his version of the facts without acknowledging that, after presenting four (4) days worth of evidence,

the trial court was not persuaded that Dorothy was involved in any way.

Finally, Bruno argues that some of the disputed coins were later found in the possession of his son, Eric. Any reference to Case No. 900223-CA (Appellee's Appendix Exhibit I) is irrelevant and improper in this court. Dorothy was not a party to the dispute between Bruno and his son, Eric, nor was she represented by counsel in that case.

IV. APPELLEE'S COMPLAINT THAT THE COURT OF APPEALS MISINTERPRETED THE AGREEMENT IS MERELY AN ATTEMPT TO INTRODUCE NEW THEORIES OR RE-ARGUE OLD THEORIES WHICH WERE REJECTED AT TRIAL AND NOT APPEALED.

Appellee argues that the court of appeals misinterpreted the agreement. This complaint does not form the basis of review under Rule 46 of the Utah Rules of Appellate Procedure. Bruno argues again that he should be able to reopen the issue of an alleged theft in order to defeat the clear language of the 1973 agreement and the specific instructions of the court of appeals. This, the court should decline to allow.

Bruno introduces a new theory of his case by suggesting that it would be acceptable to him if the court determined that the properties were separate and then proceeded to divide Dorothy's separate property with him. This is an irrational attempt to acknowledge what cannot be denied (the validity of the 1973 agreement) and yet convey some or all of Dorothy's property to Bruno under a theory of equity.

His argument that the properties should be treated as separate property, but that Dorothy's property should be divided with him, is based upon the false premise that merely alleging a theft, which was not proven in the case, constitutes an equitable reason to disregard the agreement of the parties. This should not be allowed. The court of appeal's ruling is a fair and considered statement of the law.

The record shows that Bruno asserts the invalidity of the 1973 agreement when it suits his purposes, asserts its validity when it suits his purposes, and that now he requests that this Court grant broad latitude to disregard the intent of the agreement and convey some or all of Dorothy's property to him.

There is no evidence in the record to support the existence of unique and compelling circumstances which would justify disregarding an otherwise enforceable agreement.

CONCLUSION

Appellant complied with the orders of both the court of appeals and the trial court.

The decision of D'Aston II is in harmony with well established principles of contract law and with prior decisions of the Utah Court of Appeals and the Utah Supreme Court.

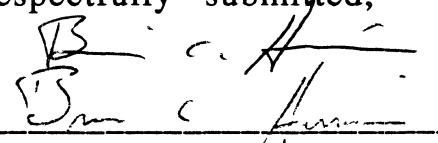
Appellant's bare allegation of theft does not constitute a unique and compelling circumstance which would justify distributing the separate property of his spouse.

Appellee's complaint that the court of appeals misinterpreted the agreement is merely an attempt to introduce new theories or re-argue old theories which were rejected at trial and not appealed.

Appellant respectfully urges this court to deny the Appellee's Petition for Writ of Certiorari.

DATED this 23rd day of November, 1990.

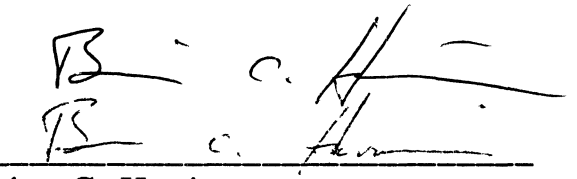
Respectfully submitted,



Brian C. Harrison
Attorney for Defendant-Appellant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I mailed four copies of the foregoing Appellant's Brief in Opposition to S. Rex Lewis and Leslie W. Slaugh, 120 East 300 North, P.O. Box 778, Provo, UT 84603, postage prepaid, this 27th day of November, 1990.



Brian C. Harrison

APPENDIX

EXHIBIT A

[5] Further, in viewing all the facts in the light most favorable to Brinkerhoff, we can find no prejudice. *Harris v. Utah Transit Auth.*, 671 P.2d 217, 222–23 (Utah 1983); *Moore v. Burton Lumber & Hardware Co.*, 631 P.2d 865, 868 (Utah 1981). Brinkerhoff neither below nor on appeal articulates how he was prejudiced by DLS's failure to notify him in the notice of hearing that the hearing was going to be informal. It seems clear that no prejudice would ordinarily occur when an informal hearing is held under the UAPA because the litigant has an absolute right to a trial de novo before the district court. In this trial de novo, Brinkerhoff was able to present his entire case before a new tribunal for an independent decision. Based upon the foregoing, we find the trial court erred in revoking the order of suspension on the basis that the notice of hearing sent by DLS did not state whether the administrative hearing was to be formal or informal as required by Utah Code Ann. § 63–46b–3(2)(a)(v) (1989).

REASONS FOR THE DECISION UNDER SECTION 63–46b–5

Brinkerhoff also alleges that DLS violated Utah Code Ann. § 63–46b–5(1)(i) (1989) by failing to set forth specific reasons for its suspension of his driving privileges. This statute states, in pertinent part, that "[w]ithin a reasonable time after the close of an informal adjudicative proceeding, the presiding officer shall issue a signed order in writing that states the following: ... (ii) the reasons for the decision."

[6] We dispose of this issue on similar grounds. First, Brinkerhoff failed to raise an objection so as to allow DLS to cure any defect, and second, Brinkerhoff does not claim, let alone demonstrate, that he was prejudiced by any alleged error.

The record below shows that Brinkerhoff made no request of DLS to provide him with more specific reasons for the suspension of his license. As stated above, a failure to object to an error and allow a tribunal to correct its error precludes an appellant from asserting the issue on appeal. *Lopez v. Schwendiman*, 720 P.2d 778, 781 (Utah 1986); *Condas v. Condas*, 618 P.2d 491, 495 n. 8 (Utah 1980).

Finally, Brinkerhoff does not allege, and cannot show, prejudice because, under the statutory scheme, he was allowed a trial de novo after which the trial court has the responsibility to enter findings of fact and conclusions of law justifying its decision.

In summary, the trial de novo cured any technical procedural errors occurring at the informal DLS hearing. The purpose of allowing an agency to choose an informal hearing procedure would be defeated if technical, non-prejudicial, procedural errors were sufficient to overturn the agency action. The statutory trial de novo is the proper remedy to cure these non-prejudicial errors.

We find that Brinkerhoff failed to object and preserve his alleged errors. Furthermore, we hold that the trial de novo in the district court provided by the UAPA eliminated any prejudice to defendant. We therefore reverse and remand for entry of an order to reinstate DLS's suspension of Brinkerhoff's driving privileges.

DAVIDSON and BENCH, JJ., concur.

Bruno D'ASTON, Plaintiff and Appellee,

v.

Dorothy D'ASTON, et al., Defendants and Appellants.

No. 890050–CA.

Court of Appeals of Utah.

April 9, 1990.

Divorce action was brought. The Fourth District Court, Utah County, Boyd

an opportunity to order a continuance to remedy any problem with notice.

L. Park, J., entered judgment, and wife appealed. The Court of Appeals, Billings, J., held that: (1) service on wife's attorney of order to show cause why wife should not be held in contempt was sufficient where wife secreted herself to prevent service of order, and (2) wife would be given 30 days to bring herself within process of trial court, and if she failed to do so, her appeal would be dismissed.

Ordered accordingly.

1. Divorce ⇐269(8)

Service on wife's attorney of order to show cause why wife should not be held in contempt in divorce proceedings was sufficient where wife initially had been served with process in case and appeared by counsel in matter but subsequently secreted herself to prevent service of order to show cause.

2. Divorce ⇐278

Wife, who had secreted herself and refused to submit to process of district court in divorce action, would have 30 days to bring herself within process of trial court if she wished to appeal divorce judgment; however, if wife persisted in secreting herself in violation of trial court orders, her appeal would be subject to dismissal.

Brian C. Harrison (argued), Provo, for defendants-appellants.

S. Rex Lewis (argued), Leslie W. Slaugh, Howard, Lewis & Peterson, Provo, for plaintiff-appellee.

Before BILLINGS, GARFF and ORME, JJ.

OPINION

BILLINGS, Judge:

Appellant, Dorothy D'Aston, filed an appeal from a divorce decree entered by the trial court on December 15, 1988. Appellee, Bruno D'Aston ("Mr. D'Aston"), filed a Motion to Dismiss appellant's appeal on the grounds that she was currently in contempt of the trial court's order and had secreted herself, refusing to submit to the process of the district court. He thus argues that appellant should not be allowed to seek a review of the divorce decree on the merits. We agree with Mr. D'Aston and therefore stay this appeal and allow appellant 30 days from the date of the issuance of this opinion to submit to the process of the trial court and to give this court notice of her actions. If appellant complies with this court's order and gives this court written verification of her compliance within the 30-day period, then we will consider her appeal on the merits. However, if appellant fails to submit to the process of the trial court within the 30-day period, the motion to dismiss her appeal will be granted.

FACTS

We only discuss the facts relevant to this order, not the underlying dispute.

At the time of trial, appellant testified that she had $300,000 in cash in a safe deposit box in Far West Bank and $75,000 in cash in a safe at home. In the divorce decree, the trial court ordered appellant to pay Mr. D'Aston $236,800 "from the $300,000.00 in the safe deposit box." To date, appellant has failed to comply with that order.

The trial court issued a writ of execution directing the constable to execute on the safe deposit box at Far West Bank. The constable discovered that no such safe deposit box under appellant's name existed, nor did she have any substantial assets at Far West Bank.

Mr. D'Aston, on January 11, 1989, filed a Motion to Compel Compliance with Decree of the Court. On January 23, 1989, appellant filed a Motion for Stay and Approval of Supersedeas Bond. The trial court ordered a stay and set the amount of the supersedeas bond, which was to be posted within 30 days. Appellant failed to post a supersedeas bond.

Mr. D'Aston, on March 17, 1989, obtained an Order to Show Cause directing appellant to appear and show cause why she should not be held in contempt for her failure to pay Mr. D'Aston the $236,800 ordered in

the decree or to post a supersedeas bond. The process server could not find appellant in order to serve the Order to Show Cause. However, her counsel was served with a copy of the Order to Show Cause.

On March 22, 1989, the trial court held a hearing on Mr. D'Aston's Motion to Compel Compliance. Appellant's counsel was in court that day and the judge requested his appearance at the hearing. Appellant's counsel stated he was making a special appearance as he had not been given proper notice of the hearing.

On April 7, 1989, the court held an order to show cause hearing. Neither appellant nor her counsel was present. In a minute entry, the court noted that the March 22, 1989, hearing had been continued to April 7, 1989, and that appellant's counsel had been informed of this fact at the March 22, 1989, hearing. In addition, the record reflects that appellant's counsel was served with the Order to Show Cause which listed the April 7, 1989, hearing date.

On April 13, 1989, the court entered findings of fact and conclusions of law holding appellant in contempt of court because she was "purposefully hiding herself from the jurisdiction of the Court and from service," and issued an order of commitment and bench warrant. The court amended its order of commitment on May 26, 1989. Appellant again evaded service. Appellant's counsel, however, was served with the findings of fact and conclusions of law and the order of commitment.

Thereafter, appellant's counsel made a Motion to Strike Findings of Fact, Order of Commitment and Bench Warrant. He asserts that he does not know where appellant is and that his current representation is now limited to this appeal. That motion was denied.

NOTICE

In response to Mr. D'Aston's motion to dismiss her appeal, appellant argues that since she has not been served with the Order to Show Cause, the trial court was without authority to hold her in contempt. Appellant thus contends this court may not dismiss her appeal for failure to comply with the trial court's orders.

[1] Utah courts have acknowledged the importance of actual notice in contempt proceedings. *Powers v. Taylor*, 14 Utah 2d 118, 378 P.2d 519, 520 (1963); *see generally Von Hake v. Thomas*, 759 P.2d 1162, 1171–72 (Utah 1988). However, whether a court can issue a civil order of contempt without personal service where a party purposefully hides to prevent service of the order has not been addressed to date in Utah. Nonetheless, we are in accord with other jurisdictions which have held that where a party initially has been served with process in a case, and has appeared by counsel in the matter, service of an order to show cause why the party should not be held in contempt on the party's attorney is sufficient. *See Kottemann v. Kottemann*, 150 Cal. App.2d 483, 310 P.2d 49, 52 (1957); *Brewer v. Brewer*, 206 Ga. 93, 55 S.E.2d 593, 594 (1949); *State ex rel. Brubaker v. Pritchard*, 236 Ind. 222, 138 N.E.2d 233, 236 (1956); *Caplow v. Eighth Judicial Dist. Court*, 72 Nev. 265, 302 P.2d 755, 756 (1956); *Macdermid v. Macdermid*, 116 Vt. 237, 73 A.2d 315, 318 (1950); *see generally* Annotation, *Sufficiency of notice to, or service upon, contemnor's attorney in civil contempt proceedings*, 60 A.L.R.2d 1244 (1958).

In *Kottemann*, which is factually similar to this case, the plaintiff had left his residence and thus could not be served with a motion for contempt. 310 P.2d at 50. The plaintiff's attorneys were served with the motion. *Id.* at 50–51. The attorneys then asserted they did not know the whereabouts of their client and only had authority to represent him in the appeal. *Id.* at 51. The court rejected the attorneys' attempts to limit their authority and concluded that the service of the order to show cause upon the attorneys was proper. *Id.* at 52.[1]

1. Some jurisdictions have gone so far as to hold that no formal adjudication of contempt is necessary in order to dismiss the appeal for failure to comply with a trial court's order. *See Tobin v. Casaus*, 128 Cal.App.2d 588, 275 P.2d 792, 795 (1954) (party could not be found for service of

The trial court found that appellant was secreting herself to avoid service of process in this matter. Appellant's counsel was served with notice of the Motion to Compel Compliance, the Order to Show Cause regarding contempt, and the court's findings of contempt. Appellant's counsel appeared at the March 22, 1989, hearing on the Motion to Compel Compliance and was given notice of the Order to Show Cause hearing. Because appellant has purposefully hidden to avoid service of process and notice of the contempt proceedings and the court's order was given to appellant's attorney, we find the trial court's order of contempt was properly entered.

CONTEMPT

[2] Likewise, Utah's appellate courts have not considered whether they may dismiss a civil appeal when the appellant is in contempt of a trial court order in the same action. However, in the area of criminal appeals, the Utah Supreme Court has dismissed the appeal of a prisoner after he escaped custody. *State v. Tuttle*, 713 P.2d 703, 704 (Utah 1985); *see also Hardy v. Morris*, 636 P.2d 473, 474 (Utah 1981) (court dismissed an escapee's appeal from a dismissal of a writ of habeas corpus). In *Tuttle*, the Utah Supreme Court refined its position in *Hardy*. The court held that an appellant prisoner's escape is not an abandonment of his right to appeal and that the dismissal of his appeal is not an appropriate punishment for his escape. *Tuttle*, 713 P.2d at 704–05. The court stressed the fundamental right to appellate review of a criminal conviction when reinstating the appeal *after* the prisoner was returned to custody. *Id.* at 705.

Appellate courts from other jurisdictions have dismissed the civil appeals of contumacious parties without allowing the parties an opportunity to bring themselves into compliance with the trial court's order. *Rude v. Rude*, 153 Cal.App.2d 2.., 314 P.2d 226, 230 (1957) (failure to pay support and attorney fees); *Kottemann v. Kottemann*, 150 Cal.App.2d 483, 310 P.2d 49, 53 (1957) (failure to pay alimony and attorney fees); *Michael v. Michael*, 253 N.E.2d 261, 263 (Ind.1969) (appellant took child in violation of custody order and fled jurisdiction); *In re Morrell*, 174 Ohio St. 427, 189 N.E.2d 873, 874 (Ohio 1963) (appellant took child in violation of custody order and could not be found); *Huskey v. Huskey*, 284 S.C. 504, 327 S.E.2d 359, 360 (Ct.App.1985) (party left jurisdiction to avoid arrest). Other courts have allowed the party time to comply with the trial court's order before dismissing the appeal. *Stewart v. Stewart*, 91 Ariz. 356, 372 P.2d 697, 700 (1962) (30 days to comply); *Tobin v. Casaus*, 128 Cal.App.2d 588, 275 P.2d 792, 795 (1954) (30 days to comply); *Greenwood v. Greenwood*, 191 Conn. 309, 464 A.2d 771, 774 (1983) (30 days to comply); *Pasin v. Pasin*, 517 So.2d 742, 742 (Fla.Dist.Ct.App.1987) (15 days to comply); *In re Marriage of Marks*, 96 Ill.App.3d 360, 51 Ill.Dec. 626, 629, 420 N.E.2d 1184, 1187 (1981) (30 days to comply); *Henderson v. Henderson*, 329 Mass. 257, 107 N.E.2d 773, 774 (1952) (30 days to comply); *Prevenas v. Prevenas*, 193 Neb. 399, 227 N.W.2d 29, 30 (1975) (20 days to comply); *Hemenway v. Hemenway*, 114 R.I. 718, 339 A.2d 247, 250 (1975) (30 days to comply); *Strange v. Strange*, 464 S.W.2d 216, 219 (Tex.Civ.App.1970) (per curiam) (10 days to comply); *Pike v. Pike*, 24 Wash.2d 735, 167 P.2d 401, 404 (1946) (10 days to comply). These courts justify the dismissal of the appeals on the ground that it violates the principles of justice to allow a party who flaunts the orders of the courts to seek judicial assistance. *See, e.g., Stewart*, 372 P.2d at 700; *Rude*, 314 P.2d at 230; *Greenwood*, 464 A.2d at 773; *Strange*, 464 S.W.2d at 219.

Still another approach is to stay the appeal until the appellant has submitted to the process of the trial court. This approach gives the trial court the flexibility to fashion the terms under which the noncomplying party may purge its contempt rather than necessarily ordering the enforcement of the judgment. In *Closset v. Closset*, 71 Nev. 80, 280 P.2d 290, 291

process); *Pike v. Pike*, 24 Wash.2d 735, 167 P.2d 401, 404 (1946) (party secreted herself and her children to avoid custody order and service of process).

(1955), the appellant had failed to comply with a trial court order in a divorce proceeding and had been found in contempt. The Nevada Supreme Court did not dismiss his appeal for failure to comply with the judgment below, but held that the appeal would be dismissed unless the appellant within 30 days submitted himself to the process of the trial court or posted a supersedeas bond. *Id.* 280 P.2d at 291. The court stated:

> [A]ppellant husband is now a fugitive from process of the trial court. We shall not permit him to avail himself of judicial review *while at the same time* he places himself beyond reach of the process of the trial court in defiance of its attempts to enforce its judgment....
>
> ....
>
> We do but insist that one seeking the aid of the courts of this state should remain throughout the course of such proceeding, amenable to all judicial process of the state which may issue in connection with such proceeding.

Id. at 291 (emphasis added).

The United States Supreme Court considered an appellate court's dismissal of a civil appeal on the basis that the appellant was in contempt of the trial court's order in *National Union of Marine Cooks & Stewards v. Arnold*, 348 U.S. 37, 75 S.Ct. 92, 99 L.Ed. 46 (1954). The Court was asked to decide whether the Washington Supreme Court violated either the equal protection clause or the due process clause of the fourteenth amendment when it dismissed an appeal from a money judgment as a reasonable measure for safeguarding the collectibility of that judgment. The appellant had filed a notice of appeal, but had offered no supersedeas bond and had obtained no stay of the proceedings. *Id.* at 39, 75 S.Ct. at 93–94. The trial court ordered the appellant to deliver certain bonds in its possession to the court's receiver for safekeeping pending disposition of the appeal. *Id.* The appellant refused and was held in contempt. *Id.* As a result, the Washington Supreme Court struck the appeal on the merits, giving the appellant 15 days to purge its contempt by delivering the bonds. *Id.* at 40, 75 S.Ct. at 94. The United States Supreme Court found no constitutional violation, stating that "[w]hile a statutory review is important and must be exercised without discrimination, such a review is not a requirement of due process." *Id.* at 43, 75 S.Ct. at 95. The Court stressed that "[p]etitioner's appeal was not dismissed because of petitioner's failure to satisfy a judgment pending an appeal from it. It was dismissed because of petitioner's failure to comply with the court's order to safeguard petitioner's assets from dissipation pending such appeal." *Id.* at 44, 75 S.Ct. at 96.

We are persuaded that the *Closset* approach is most consistent with the Utah Supreme Court's *Tuttle* decision and the United States Supreme Court's *Arnold* decision. By adopting this approach, we do not deny appellant her right to an appeal under Utah Const. art. VIII, § 5,[2] but rather insist she must submit herself to the jurisdiction of the trial court and satisfy that court's concerns before she may exercise that right. She merely has the obligation to come forward and offer a reasonable alternative to the trial court to safeguard her assets from dissipation pending her appeal.

Appellant was given the opportunity to post a supersedeas bond, but has refused. She has ignored the orders of the trial court and, apart from obtaining a temporary stay which she allowed to lapse for want of a bond, she has provided no reasonable alternative to allow the court to insure that her assets are available to satisfy the judgment pending appeal. By her actions, appellant is frustrating the administration of justice.

Appellant has not claimed that she did not have the ability to comply with the trial court's order. *See Stewart v. Stewart*, 91 Ariz. 356, 372 P.2d 697, 700 (1962). This situation is similar to one faced by a Cali-

2. Utah Const. art VIII, § 5 provides, in pertinent part: "Except for matters filed originally with the supreme court, there shall be in all cases an appeal of right from the court of original jurisdiction to a court with appellate jurisdiction over the cause."

fornia court, where it found it was "dealing with a litigant who not only has previously failed to appear as ordered, but who up to this very time remains a fugitive from justice. Apparently, he is unwilling to respond to a court order with which he disagrees, but seeks to obtain on appeal" a more favorable result. *Tobin v. Casaus*, 128 Cal.App.2d 588, 275 P.2d 792, 795 (1954).

We therefore hold that appellant has 30 days from the date of the issuance of this opinion to bring herself within the process of the trial court. If appellant submits herself to the trial court, she should be allowed an opportunity to offer alternatives to the trial court to protect the judgment. Appellant may persuade the court it should hold the disputed judgment amount in trust until a resolution of this appeal on the merits. However, if appellant persists in secreting herself in violation of the trial court's orders, her appeal will be dismissed at the expiration of the 30–day period.

GARFF and ORME, JJ., concur.

Lewis DUNCAN, individually and as personal representative of the Estate of Patrick Duncan, deceased; Jason E. Duncan, a minor by and through his Guardian ad Litem; Alice Duncan; Noreen Duncan; Michael Duncan; Tim Duncan; Kevin Duncan; Brian Duncan; Michelle Bowers, individually and as personal representative of the Estate of Jefrey and Nicole Bowers, deceased; Judson Bowers; Florence Hanson; Shelly Bowers; Sherry Bowers; Monica Henwood, individually and as personal representative of the Estate of Ramon Henwood, deceased; Phyllis Henwood; and Owen Henwood, Plaintiffs and Appellants,

v.

UNION PACIFIC RAILROAD COMPANY, a corporation; The State of Utah; Paul Kleinman; and Does 1 through 100, inclusive, Defendants and Respondents.

No. 890291–CA.

Court of Appeals of Utah.

April 12, 1990.

Heirs of victims of train-automobile accident brought action against railroad, Department of Transportation and railroad engineer. The Third District Court, Tooele County, Timothy R. Hanson, J., entered summary judgment dismissing wrongful death action. Heirs appealed. The Court of Appeals, J. Robert Bullock, Senior District Judge, held that: (1) heirs failed to establish that either engineer or railroad were negligent, and (2) Department, having given at least some warning or control at railroad crossing, was governmentally immune in deciding whether to improve means of warning or control at crossing because of fiscal effects of decision.

Affirmed.

Jackson, J., filed a concurring opinion.

1. Railroads ⇐348(1)

Evidence failed to support claim of heirs of accident victims that there was negligence in operation of train or entrusting its operation to engineer who was in charge at time of automobile-train collision.

2. Railroads ⇐348(2)

Evidence did not support claim of heirs of accident victims that railroad negligently maintained railroad right-of-way at crossing with street where train-automobile collision occurred; there was nothing to indicate what could have made railroad's right

EXHIBIT B

judgment or order of the circuit court. They, therefore, reason that this is an exception to the general delegation of appellate jurisdiction over circuit court orders to the Utah Court of Appeals.

Again, we do not disagree with the defendants' argument in the abstract, but cannot decipher how the argument helps them. Defendants still point to no statute giving the district court jurisdiction over appeals from the decisions of a magistrate under Rule 7. In fact, Utah Code Ann. § 78–2a–3(2)(e) (1989) vests "interlocutory appeals from any court of record in criminal cases, except those involving a first degree or capital felony" in the Utah Court of Appeals. Certainly the magistrate was acting as a court of record in a criminal case when it held the preliminary hearing.

Finally, both defendants make a number of policy arguments in favor of giving the district courts jurisdiction over objections to bindover orders alleging insufficiency of the evidence. Although some of their contentions have merit,[8] such arguments must be made to the legislature. It is the legislature which is charged with the task of statutorily delegating appellate jurisdiction and we cannot modify its decisions because we believe policy considerations so dictate.

In conclusion, we affirm the orders of the district courts refusing to exercise jurisdiction.

GARFF and GREENWOOD, JJ., concur.

been committed or that the defendant committed it, the magistrate shall dismiss the information and discharge the defendant. The magistrate may enter findings of fact, conclusions of law, and an order of dismissal. The dismissal and discharge do not preclude the state from instituting a subsequent prosecution for the same offense.

Bruno D'ASTON, Plaintiff and Appellee.

v.

Dorothy D'ASTON, et al., Defendants and Appellants.

No. 890050–CA.

Court of Appeals of Utah.

June 14, 1990.

Action was brought for divorce. The Fourth District Court, Utah County, Boyd L. Park, J., entered decree of divorce, and wife appealed, challenging property distribution. The Court of Appeals, 790 P.2d 590, ordered wife to submit herself to process of lower court within 30 days or her appeal would be dismissed. After wife gave notice of compliance with order, merits of appeal were addressed. The Court of Appeals, Billings, J., held that: (1) postnuptial agreement not made in contemplation of divorce was enforceable, absent fraud, coercion, or material nondisclosure, and (2) postnuptial agreement unambiguously provided that it would apply to disposition of spouses' property in event of divorce.

Reversed and remanded.

1. Husband and Wife ⇐30

Prenuptial agreements are enforceable as long as there is no fraud, coercion, or material nondisclosure.

2. Husband and Wife ⇐30

Postnuptial agreement not in contemplation of divorce is enforceable absent fraud, coercion, or material nondisclosure.

3. Husband and Wife ⇐31(2)

Normal rules of contract construction would be applied in resolving disagreement

8. Defendants correctly claim that because the decision to allow an interlocutory appeal is discretionary, defendants might be forced to go through an unnecessary trial if the right to file an interlocutory appeal of the bindover order is denied.

between husband and wife regarding scope and meaning of postnuptial agreement.

4. Husband and Wife ⇐31(2)

Core principle in construing postnuptial agreement was to look to four corners of agreement to determine parties' intentions.

5. Appeal and Error ⇐842(8)

Threshold determination of whether writing is ambiguous, such that court may resort to extrinsic evidence of parties' intent, is question of law, and thus trial court's determination is reviewed under correction-of-error standard, according no particular deference to trial court.

6. Evidence ⇐450(5)

Postnuptial agreement between husband and wife unambiguously provided that it would apply to disposition of parties' property in event of divorce and, therefore, extrinsic evidence regarding spouses' intent in event of divorce should not have been considered, where postnuptial agreement, entered into in community property state, provided that spouses' property would be divided and division would control for all purposes, and unambiguously and specifically referred to rebutting presumption that all property acquired during marriage was community property.

7. Divorce ⇐249.2

Any equitable power of trial court to disregard otherwise enforceable postnuptial property settlement agreement and to distribute separate property of spouses at divorce had to be justified by unique and compelling circumstances.

Brian C. Harrison (argued), Harris, Carter & Harrison, Provo, for defendants and appellants.

S. Rex Lewis (argued), Leslie W. Slaugh, Howard, Lewis & Peterson, Provo, for plaintiff and appellee.

OPINION

Before BILLINGS, GARFF and ORME, JJ.

BILLINGS, Judge:

Appellant, Dorothy D'Aston ("Wife"), appeals from a divorce decree entered by the district court, principally claiming the court erred in failing to distribute the parties' property pursuant to a postnuptial agreement.

On appeal, Bruno D'Aston ("Husband") responded that since Wife was in contempt of the trial court and was avoiding court process, this court should not consider her appeal on the merits. We agreed with Husband and ordered Wife to submit herself to the process of the trial court within 30 days or we would dismiss her appeal. *See D'Aston v. D'Aston*, 790 P.2d 590 (Ct. App.1990). Wife gave us notice of her compliance with our order on May 4, 1990, and therefore we address the merits of her appeal in this opinion.

We agree with Wife's contention that the trial court erred in failing to distribute the parties' property pursuant to their postnuptial agreement and therefore reverse and remand.

Husband and Wife divorced on December 15, 1988, after a 35–year marriage. In 1973, Husband asked Wife to enter into a written property agreement, which had been prepared by his attorney. The agreement was executed by both parties in 1973, then notarized and recorded in the State of California in 1975.

Under the 1973 agreement, Wife received two parcels of real estate and cash. Husband received all real property outside the United States; personal property in his possession, which included $1 million in coins and a collection of antique cars; and all domestic and foreign patents and patent rights. The agreement also provided that all property acquired by either party in his/her own name would be the separate property of that person. Finally, the agreement provided that the parties would execute documents to implement the agreement, and that each had the advice of counsel, had read the agreement, and had not signed the agreement under duress, fraud or undue influence. Shortly after the agreement was signed, the parties con-

veyed the property as provided in the agreement.

On May 2, 1986, Husband filed for divorce. Husband claimed that much of the tangible personal property given to him under the 1973 agreement had been stolen on April 30, 1986, the day Wife had asked him to leave their home. On July 31, 1986, Husband's California attorney, who had drafted the 1973 agreement, sent a letter to Wife's Utah attorney which stated the 1973 agreement was in full force and effect.

Both parties at trial acknowledged they executed the 1973 agreement voluntarily and did not execute it under duress, fraud or undue influence. However, at trial, Husband claimed the 1973 agreement should not control the disposition of the parties' property in this divorce action because the agreement was entered into only to protect the couple's assets from possible creditors in pending litigation, not to distribute property in the event of divorce. Wife at trial claimed she had no knowledge of the alleged pending litigation and assumed the 1973 agreement was to control for all purposes, including the possibility of divorce.

The trial court held the 1973 agreement was not intended to control in the event of divorce, and thus, equitably divided all of the parties' property and awarded no alimony to either party. Wife appeals, claiming that (1) the trial court erred in dividing the parties' separate property in this divorce action contrary to the terms of the 1973 agreement, (2) the trial court erred in denying Wife alimony, and (3) the conduct of the trial judge constituted judicial bias.

VALIDITY OF POSTNUPTIAL AGREEMENTS

[1, 2] In Utah, prenuptial agreements are enforceable as long as there is no fraud, coercion or material nondisclosure.[1] Utah's courts have not yet considered the enforceability of postnuptial agreements not in contemplation of divorce. However, other jurisdictions review postnuptial property agreements under the same standards as those applied to prenuptial agreements.[2]

We agree with the majority of our neighboring jurisdictions and thus hold that a postnuptial agreement is enforceable in Utah absent fraud, coercion, or material nondisclosure.[3]

1. *See Huck v. Huck*, 734 P.2d 417, 419 (Utah 1986) ("it should be noted that in general, prenuptial agreements concerning the disposition of property owned by the parties at the time of their marriage are valid so long as there is no fraud, coercion or material nondisclosure"); *Berman v. Berman*, 749 P.2d 1271, 1273 (Utah Ct.App.1988).

2. *See In re Estate of Harber*, 104 Ariz. 79, 449 P.2d 7, 16 (1969) (en banc) ("[M]arital partners may in Arizona validly divide their property presently and prospectively by a post-nuptial agreement, even without its being incident to a contemplated separation or divorce," provided it is fair and equitable and is free from fraud, coercion or undue influence and that "wife acted with full knowledge of the property involved and her rights therein."); *In re Estate of Lewin*, 42 Colo.App. 129, 595 P.2d 1055, 1057 (1979) ("Nuptial agreements, whether executed before or after the marriage, are enforceable in Colorado [and a] nuptial agreement will be upheld unless the person attacking it proves fraud, concealment, or failure to disclose material information."). *See also In re Estate of Loughmiller*, 229 Kan. 584, 629 P.2d 156, 162 (1981) (postnuptial agreements, fairly and understandingly made, are enforceable); *In re Estate of Gab*, 364 N.W.2d 924, 925–26 (S.D.1985) (postnuptial agreement to protect inheritance rights valid if property fairly disclosed and spouse enters into freely and for good consideration); *Button v. Button*, 131 Wis.2d 84, 388 N.W.2d 546, 550–51 (1986) (postnuptial agreement must meet requirements of fair and reasonable disclosure, entered into voluntarily and freely, and substantive provisions fair to each spouse). *But cf. Ching v. Ching*, 751 P.2d 93, 97 (Haw.Ct.App. 1988) (general rule that property agreements should be enforced absent fraud or unconscionability applies to prenuptial, but not to postnuptial, agreements).

3. This postnuptial agreement was entered into in California. Under California law, married couples may contract to change the separate or community status of their property. Cal. Civil Code § 5103 (1990); *In re Marriage of Dawley*, 17 Cal.3d 342, 551 P.2d 323, 328 n. 6, 131 Cal. Rptr. 3 (1976). Further, married couples may enter into contracts with each other concerning their property rights as though unmarried, subject to rules controlling actions of persons occupying confidential relations with each other. *Haseltine v. Haseltine*, 203 Cal.App.2d 48, 21 Cal.Rptr. 238, 244 (1962); *In re Estate of Marsh*, 151 Cal.App.2d 356, 311 P.2d 596, 599 (1957). California law is in harmony with Utah law on the issue of the enforceability and interpretation

Neither Husband nor Wife assert that the 1973 property agreement was entered into as a result of fraud or coercion nor do they contend that there was material nondisclosure of the parties' assets. Thus, this postnuptial agreement should be enforced pursuant to its terms.

Our conclusion, however, does not resolve this controversy as Husband and Wife disagree as to the meaning and scope of the 1973 postnuptial property agreement. Wife contends the agreement by its unambiguous terms applies in the event of divorce. Husband argues that it was executed merely to protect the parties' property from creditors and was not intended to control a distribution of the parties' property in the event of divorce. Thus, we must determine what the parties intended when they entered into this 1973 agreement.

Utah courts have applied general contract principles when interpreting prenuptial agreements. *See Berman v. Berman*, 749 P.2d 1271, 1273 (Utah Ct.App.1988) (A prenuptial agreement should be treated like any other contract. "In interpreting contracts, the principal concern is to determine what the parties intended by what they said."). This approach is consistent with other jurisdictions' treatment of postnuptial agreements.[4]

[3, 4] Thus, in order to resolve Husband and Wife's disagreement as to the scope and meaning of this postnuptial agreement, we apply normal rules of contract construction. The core principle is that in construing this contract, we first look to the four corners of the agreement to determine the parties' intentions. *See Neilson v. Neilson*, 780 P.2d 1264, 1267 (Utah Ct.App. 1989); *see also Ron Case Roofing & Asphalt Paving Co. v. Blomquist*, 773 P.2d 1382, 1385 (Utah 1989); *LDS Hosp. v. Capitol Life Ins. Co.*, 765 P.2d 857, 858 (Utah 1988); *Buehner Block Co. v. UWC Assocs.*, 752 P.2d 892, 895 (Utah 1988).

[5–7] The relevant provisions of the 1973 agreement denoting its scope and application state, with our emphasis:

> 1. The husband does transfer, bargain, convey and quitclaim to the wife all of his right, title and interest, if any there be, in and to the following:
>
> (a) The real property at 14211 Skyline Drive, Hacienda Heights, California and in and to all buildings, appurtenances and fixtures thereon.
>
> (b) The real property at 230 South Ninth Avenue, City of Industry, California, including all buildings, appurtenances and fixtures thereon, and any and all oil and mineral rights thereto.
>
> (c) Any and all cash in bank accounts located in the State of California.
>
> 2. The wife transfers, bargains, conveys and quitclaims to the husband all of her right, title and interest in and to real property located outside of the United States of America, and in and to all personal property in the possession of the husband, or subject to his control in the United States, Europe or elsewhere in the world, and in and to all patents or patent rights under the laws of the United States, United Kingdom or any commonwealth thereof, Switzerland, Japan or other countries. The provisions of this paragraph apply to all property described herein, whether presently owned

of postnuptial agreements and thus we need not resolve the issue of which state's law should apply.

4. *See Matlock v. Matlock*, 223 Kan. 679, 576 P.2d 629, 633 (1978) ("[C]ontracts, made either before or after marriage, the purpose of which is to fix property rights between a husband and wife, are to be liberally interpreted to carry out the intentions of the makers and to uphold such contracts where they are fairly and understandably made, are just and equitable in their provisions, and are not obtained by fraud or overreaching."); *Roberts v. Roberts*, 381 So.2d 1333, 1335 (Miss.1980) ("The rules applicable to the construction of written contracts in general are to be applied in construing a postnuptial agreement."); *Bosone v. Bosone*, 53 Wash.App. 614, 768 P.2d 1022, 1024–25 (1989) ("a community property agreement is a contract, and effect should be given to the clearly expressed intent of the parties").

or in existence or to be acquired or created in the future.

3. Hereafter, and until this agreement is modified in writing attached hereto, all property, real, personal and mixed, acquired by either party in his or her sole name, from whatever source derived and wherever situated, shall be the sole and separate property of such person, *notwithstanding any law, statute or court decision giving presumptive effect to the status of marriage;* and such property shall be free of all claims, demand or liens of the other, direct or indirect, and however derived.

This postnuptial agreement provides that Husband and Wife's property will be divided and the division will control for all purposes. The agreement was entered into in a community property state and the contractual language unambiguously and specifically refers to rebutting the presumption that all property acquired during the marriage is community property.

The trial court did not expressly conclude that the 1973 property agreement was ambiguous, but nevertheless proceeded to take extrinsic evidence [5] as to the parties' intentions and, based upon this controverted extrinsic evidence, concluded that the parties did not intend the 1973 agreement to apply in the event of divorce.

The threshold determination of whether a writing is ambiguous is a question of law, *Buehner Block Co.*, 752 P.2d at 895; *Faulkner v. Farnsworth*, 665 P.2d 1292, 1293 (Utah 1983); *Whitehouse v. Whitehouse*, 790 P.2d 57, 60–61 (Ct.App.1990), and thus we review a trial court's determination under a correction-of-error standard, according no particular deference to the trial court. *Id.; see also Seashores Inc. v. Hancey*, 738 P.2d 645, 647 (Utah Ct.App. 1987).

We find this postnuptial agreement unambiguously provides that it will apply to a disposition of the parties' property in the event of divorce.[6] Thus, we reverse the trial court's contrary ruling which was based upon extrinsic evidence as to what Husband and Wife intended by their 1973 agreement.

In summary, we reverse the trial court's property distribution and remand for enforcement of the 1973 postnuptial property agreement and then the division of the remaining property, if any, not controlled by it. Because we reverse and remand the property division, we also reverse and remand on the issue of alimony. We believe our decision necessitates the reconsideration of whether either Husband or Wife

5. "Resort to extrinsic evidence of the parties' intent is permissible only if the contract document appears to express the parties' agreement incompletely or if it is ambiguous in expressing that agreement." *Neilson*, 780 P.2d at 1267; *see also Anderson v. Gardner*, 647 P.2d 3, 4 (Utah 1982) (only when an ambiguity exists which cannot be reconciled by an objective and reasonable interpretation of the agreement as a whole should the court resort to evidence beyond the four corners of the agreement).

6. Husband argues on appeal that even if we find the trial court erred when it found the 1973 agreement was not intended to apply in the event of a divorce, the error was harmless because of the broad equitable powers trial courts possess in domestic matters. *See Colman v. Colman*, 743 P.2d 782, 789 (Utah Ct.App.1987). However, even if a trial court has the equitable power to disregard an otherwise enforceable postnuptial property settlement agreement and to distribute the separate property of the spouses, the circumstances must be unique and compelling to justify the application of such an exception. The trial court made no findings to delineate what it found as compelling circumstances to justify such an action and we find none.

In support of his argument, Husband claims that Utah courts have distributed premarital, gift or inheritance property of one spouse to the other spouse. *See Noble v. Noble*, 761 P.2d 1369, 1373 (Utah 1988); *Burke v. Burke*, 733 P.2d 133, 135 (Utah 1987); *Naranjo v. Naranjo*, 751 P.2d 1144, 1147–48 (Utah Ct.App.1988); *Peterson v. Peterson*, 748 P.2d 593, 595–96 (Utah Ct.App. 1988). We find these cases clearly distinguishable as they do not involve an otherwise enforceable prenuptial or postnuptial agreement.

Husband also argues that Utah courts may refuse to apply property settlement agreements in a divorce action. *See Klein v. Klein*, 544 P.2d 472, 476 (Utah 1975); *Colman v. Colman*, 743 P.2d 782, 789 (Utah Ct.App.1987). Again, these cases do not deal with postnuptial property settlement agreements not in contemplation of divorce and are otherwise factually distinguishable.

should receive alimony.[7]

GARFF and ORME, JJ., concur.

JACOBSEN, MORRIN & ROBBINS CONSTRUCTION COMPANY, Plaintiff and Appellee,

v.

ST. JOSEPH HIGH SCHOOL BOARD OF FINANCIAL TRUSTEES, Defendant and Appellant.

No. 890468-CA.

Court of Appeals of Utah.

June 28, 1990.

General contractor brought suit against high school board for balance due on a construction contact. The Second District Court, Weber County, John F. Wahlquist, J., awarded, inter alia, judgment to the contractor and denied the board's counterclaim seeking recovery premised on alleged fact that construction "deadlines" were not met. Board appealed. The Court of Appeals, Bench, J., held that the board's appeal was moot due to the board's paying of judgment and mailing of satisfaction of judgment to contractor, and fact that appeal did not involve claims separate and distinct from those involved in satisfaction of judgment.

Appeal dismissed.

Appeal and Error ⇐781(7)

School board's appeal of judgment entered in favor of general contractor on a construction contract with board was "moot" due to board's payment of judgment and mailing satisfaction of judgment to contractor for execution which did not evidence an intent to appeal, where appeal did not involve a claim separate and distinct from those involved in satisfaction of judgment, and board's counterclaim seeking recovery for alleged breach of contractor's duties under contract was not a separate and distinct controversy.

See publication Words and Phrases for other judicial constructions and definitions.

Edward J. McDonough, Salt Lake City, for defendant and appellant.

Michael Wilkins and Kendall S. Peterson, Tibbals, Howell, Moxley & Wilkins, Salt Lake City, for plaintiff and appellee.

Before BENCH, GARFF, and JACKSON, JJ.

OPINION

BENCH, Judge:

Plaintiff general contractor sued defendant high school board for the balance due on a construction contract. The district court awarded judgment to plaintiff and denied defendant's counterclaim. We dismiss defendant's appeal as moot.

In July 1984, defendant St. Joseph High School Board of Financial Trustees ("high school") executed a written contract with plaintiff Jacobsen, Morrin & Robbins Construction Company ("contractor")[1] for construction work on St. Joseph High School in Ogden, Utah. Two separate projects were encompassed by the contract—the remodeling of a gymnasium and locker rooms, and the addition of a classroom and library.

Using a standard form contract published by the American Institute of Architects, high school agreed to pay contractor the total cost of construction plus a five-percent supervision fee. No firm costs were established in the contract, although "bud-

7. We need not consider the issue of whether the trial court was biased against Wife as we have reversed the trial court's property distribution on other grounds.

1. Now doing business as Jacobsen-Robbins Construction Company.

EXHIBIT C

S. REX LEWIS (1953), for:
HOWARD, LEWIS & PETERSEN
ATTORNEYS AND COUNSELORS AT LAW
120 East 300 North Street
P.O. Box 778
Provo, Utah 84603
Telephone: (801) 373-6345
Facsimile: (801) 377-4991

Attorneys for Plaintiff

k:aston-or.lo
Our File No. 17,603

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

BRUNO D'ASTON,	:	
Plaintiff,	:	**ORDER**
vs.	:	
DOROTHY D'ASTON,	:	Civil No. CV 86 1124
Defendant.	:	Judge Boyd L. Park

The defendant Dorothy D'Aston personally appeared before the Court on the 4th day of May, 1990, in person and was represented by her counsel, Brian C. Harrison. Plaintiff appeared in person and by his counsel, S. Rex Lewis of Howard, Lewis & Petersen. The Court considered its Amended Order of Commitment dated the 26th day of May, 1989, together with its Findings of Fact and Conclusions of Law dated April 13, 1989, and having heard representations made by defendant's counsel, as well as by the defendant, and the defendant having previously been found in contempt of an order of this Court,

IT IS HEREBY ORDERED as follows:

1. Defendant may purge herself of the contempt order of this Court by depositing with the Court the sum of $236,800.00. The defendant is given ~~15~~ 49 days from May 4, 1990 to purge herself of her contempt.

2. In the event the defendant fails to make the aforesaid deposit, the defendant is ordered committed to jail for a period of sixty (60) days.

3. Unless previously modified by an Order of this Court, the Court will review the Commitment Order on June 22, 1990, at the hour of 1:30 p.m. at which time the defendant is ordered to appear in person before the Court. The Court will make its review on that date prior to committing the defendant to jail.

4. The Bench Warrant previously entered herein on the 13th day of April, 1989 is hereby withdrawn.

DATED this 22 day of May, 1990.

BY THE COURT

BOYD L. PARK
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to the following, postage prepaid, this _____ day of May, 1990.

Brian C. Harrison, Esq.
3325 No. University Avenue
Suite 200
Provo, Utah 84604

Emily Haskell
SECRETARY

EXHIBIT D

HARRIS, CARTER & HARRISON
Brian C. Harrison
Attorney for Defendant
3325 North University Avenue, #200
Provo, Utah 84604
Telephone: 375-9801
Utah State Bar #1388

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

BRUNO D'ASTON,	)	
Plaintiff,	)	NOTICE OF APPEARANCE
-vs-	)	
DOROTHY D'ASTON	)	
Defendant.	)	Civil No. CV-86-1124
	)	Judge Boyd L. Park

TO THE UTAH COURT OF APPEALS:

You will hereby take notice that the Defendant, Dorothy D'Aston, appeared before me on the 4th day of May, 1990 for further Court proceedings as required by your opinion in Case

Number 890050-CA filed April 9, 1990.

The Defendant is still in contempt of Court, but has been granted 45 days in which to purge her contempt. Additional proceedings have been scheduled for June 22, 1990 to review this matter.

DATED this 7 day of May, 1990.

BY THE COURT:

Honorable Boyd L. Park

APPROVED AS TO FORM:

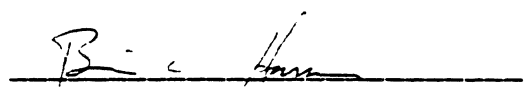
S. Rex Lewis

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I personally mailed a true and correct copy of the foregoing Notice of Compliance on this 7 day of May, ~~1989~~ 1990, by first-class, U.S. Mail, postage prepaid to the following.

S. Rex Lewis
120 East 300 North
Provo, Utah 84601

The Utah Court of Appeals
230 South 500 East, #400
Salt Lake City, Utah 84102



Secretary

EXHIBIT E

HARRIS, CARTER & HARRISON
Brian C. Harrison
Attorney for Defendant
3325 North University Avenue, #200
Provo, Utah 84604
Telephone: 375-9801
Utah State Bar #1388

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

BRUNO ASTON,	)	
	)	
Plaintiff,	)	ORDER
	)	
-vs-	)	
	)	
DOROTHY ASTON, et al,	)	
	)	
Defendant.	)	Civil No. CV-86-1124
	)	
	)	Judge Boyd L. Park

THIS MATTER having come on regularly for hearing on the 26th day of October, 1990, Plaintiff being represented by his attorney, S. Rex Lewis, and the Defendant being present and represented by her attorneys, Brian C. Harrison and Don Mullen, and the Court having considered the evidence submitted and the testimony of the Defendant and argument of counsel, and being fully advised in the premises;

IT IS HEREBY ORDERED:

1. On May 22, 1990, this Court entered an order relative to Defendant's contempt and continued the matter until this date to further consider this matter. The Court finds that Defendant does not have the ability to comply with the order of May 22, 1990, and modifies said order as follows:

a. Defendant is ordered committed to jail for a period of five days with said commitment to be suspended upon the payment of a fine in the sum of $250.00. Defendant may have 90 days to pay said fine.

2. The Court is seriously concerned about the ~~death threat~~ dead fish which was ~~apparently made~~ mailed to Defendant's attorney, and reserves the issue of inquiring into said ~~threat~~ mailing when all parties are before the Court.

DATED this 15 day of November, 1990.

Boyd L. Park
District Court Judge

Approved as to form:

S. Rex Lewis

MAILING CERTIFICATE

I HEREBY CERTIFY that I personally mailed a true and correct copy of the foregoing Order on this 6th day of November, 1990, by first-class, U.S. Mail, postage prepaid to the following:

S. Rex Lewis
120 East 300 North
P.O. Box 778
Provo, Utah 84603

Suzanne Lott
Secretary

EXHIBIT F

No. 3382 Date Nov. 15 1990

Name Dorothy Aston

Address

SOLD BY	CASH	C.O.D.	CHARGE	ON ACCT.	MDSE. RETD.	PAID OUT

QUAN.		DESCRIPTION	AMOUNT	
~~1~~		Fine pymt		
	2	86-1124		
	3	Mo # 252094184	250	00
	4			
	5			
	6			
	7			
	8			
	9			
	10			
	11			
	12			

Customer's Order No.

Rec'd By JM

KEEP THIS SLIP FOR REFERENCE

5L250/01250 REDIFORM