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Utah Court of Appeals

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Joseph Harlan Burns; Attorney for Defendant/Appellee.

Carolyn Nichols; Haley & Stolebarger; Attorney for Plaintiff/Appellant.

Recommended Citation

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IN THE COURT OF APPEALS
STATE OF UTAH

GARY K. SHELTON,	:	
	:	
Plaintiff and Appellant,	:	C.A. No. 92-0583-CA
	:	
vs.	:	
	:	
JERILYN A. SHELTON	:	Priority 16
	:	
Defendant and Appellee.	:	

BRIEF OF APPELLANT

On Appeal From the Judgment of the
Fifth Judicial District Court
in and for Washington County, State of Utah
Honorable James L. Shumate

Carolyn Nichols (0965)
HALEY & STOLEBARGER
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175 South Main Street
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Attorney for Plaintiff/Appellant

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IN THE COURT OF APPEALS

STATE OF UTAH

GARY K. SHELTON,	:	
	:	
Plaintiff and Appellant,	:	C.A. No. 92-0583-CA
	:	
vs.	:	
	:	
JERILYN A. SHELTON	:	Priority 16
	:	
Defendant and Appellee.	:	

BRIEF OF APPELLANT

STATEMENT OF JURISDICTION

This is an appeal from a final judgment of the District Court for the Fifth Judicial District Court of Washington County. This appeal seeks review of a Final Order of Property Division, Alimony, and Attorney's Fees, entered on or about August 28, 1992, adopting the Commissioner's Memorandum and Recommended Decision, filed on or about March 4, 1992, whereby Defendant/Appellee received a retroactive modification and award of temporary alimony.

This Court granted Appellant's motion for a stay of execution on the judgment pending appeal. The Court has jurisdiction in this case pursuant to Utah Code § 78-2a-3(2)(i) (1993).

ISSUE PRESENTED ON APPEAL

Did the trial court err in holding as a matter of law that the Defendant was entitled to a retroactive modification and award of temporary alimony?

STANDARD OF REVIEW

The issue on appeal presents a question of law to be reviewed by the Court for correctness, giving no deference to the trial court's conclusions and/or view of the law. Greenwood v. City of North Salt Lake, 817 P.2d 816, 818 (Utah 1991); Ron Case Roofing & Asphalt Paving, Inc. v. Blomquist, 773 P.2d 1382, 1385 (Utah 1989); Brinkerhoff v. Schwendiman, 790 P.2d 587, 589 (Utah App. 1990).

DETERMINATIVE STATUTES

I. Utah Code Ann. § 30-3-10.6(1) & (2) (1992)

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

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

(b) entitled, as a judgment, to full faith and credit in this or any other jurisdiction; and

(c) not subject to retroactive modification by this or any other jurisdiction, except as provided in Subsection (2).

(2) A child or spousal support payment under a child support order may be modified with respect to any period during which a petition for modification is pending, but only from the date notice of that petition was given to the obligee, if the obligor is the petitioner, or to the obligor, if the obligee is the petitioner.

STATEMENT OF THE CASE

. NATURE OF THE CASE.

This case arises out of the divorce proceedings of the parties. During a hearing held in June of 1991, before the District Court Commissioner, Appellant was ordered to pay one-half of the mortgage payment on the marital residence, in the amount of \$54.50 per month, and temporary alimony of \$0.00, to Appellee.

Subsequent thereto, on or about February 25-26, 1992, the parties again appeared before the District Court Commissioner. The Commissioner issued a Memorandum and Recommended Decision, adopted by the District Court, and pursuant to which the District Court entered a final order retroactively awarding temporary alimony. This is an appeal from the District Court's order of retroactive alimony.

II. COURSE OF THE PROCEEDINGS

Gary Shelton filed for divorce on May 30, 1991. There was a hearing on June 18, 1991, before the District Court Commissioner, for purposes of setting temporary alimony. After the hearing, and based upon the financial condition of the parties, the Commissioner recommended that Mr. Shelton pay one-half the monthly mortgage payment on the marital residence (\$454.40), and temporary spousal support in the amount of \$ 0.00.

In or about February 25-26, 1992, the parties again appeared before the District Court Commissioner for a hearing on Defendant's Order to Show Cause in re Contempt, Defendant's Motion for Temporary Alimony and Defendant's Motion for Order to Compel Discovery. On or about March 4, 1992, the District Court Commissioner issued a Memorandum and Recommended Decision. A copy of the Commissioner's Memorandum and Recommended Decision is attached hereto as Addendum A.

The Commissioner's Decision provided, inter alia, that Defendant is entitled to temporary alimony retroactive to June, 1991. The District Court, in a Memorandum Decision issued on July

31, 1992, adopted the Commissioner's Decision regarding Ms. Shelton's entitlement to the retroactive award of alimony.

On or about August 20, 1992, the District Court entered a "Final Order of Property Division, Alimony, and Attorney's Fees." A copy of the trial court's Final Order is attached hereto as Addendum B. Pursuant to the paragraph 9 of the above-mentioned Final Order, a Judgment was granted to Defendant against the Plaintiff in the amount of thirteen thousand dollars (\$13,000), with interest accruing at a rate of twelve percent (12%) per annum.

An Order Granting Defendant's Motion for Judgment and to Allow Execution on Judgment was entered on or about May 5, 1993. A copy of the Order allowing execution of the judgment is attached hereto as Addendum C. This Court stayed execution on that judgment pending appeal.

Plaintiff Gary Shelton filed his Notice of Appeal on August 24, 1992.

STATEMENT OF FACTS

1. On or about March 4, 1992, the District Court Commissioner issued a Memorandum and Recommended Decision on Defendant's Order to Show Cause in re Contempt, Defendant's Motion for Temporary Alimony and Defendant's Motion for Order to Compel Discovery. Addendum A.

2. The Commissioner's Decision provided, inter alia, that Defendant is entitled to temporary alimony retroactive to June, 1991. Addendum A, pp. 3-4, ¶ 1.

3. On or about August 28, 1992, the Fifth District Court, entered a "Final Order of Property Division, Alimony, and Attorney's Fees." Addendum B.

4. In paragraph 9 of the above-mentioned Final Order, the court adopted the recommendation of the Commissioner regarding Defendant's entitlement to a retroactive alimony award. Addendum B, ¶ 9.

5. Pursuant to the paragraph 9 of the above-mentioned Final Order, a Judgment was granted to Defendant against the Plaintiff in the amount of thirteen thousand dollars (\$13,000), with interest accruing at a rate of twelve percent (12%) per annum. Addendum B, ¶ 9.

6. On or about May 5, 1993, the District Court entered an order allowing execution of the above-referenced judgment. Addendum C.

SUMMARY OF ARGUMENT

Under Utah law, it is improper for a District Court to retroactively modify a spousal support order. Spousal support obligations become unalterable debts as they accrue. Thus, each payment "vests" when due. As an unalterable debt, the obligation is subject only to prospective modification.

In the instant case, Appellant's spousal support obligation was modified retroactively. Such a retroactive modification is contrary to Utah law. Therefore, that aspect of the District Court's "Final Order of Property Division, Alimony, and Attorney's

Fees," which seeks to retroactively modify Appellant's spousal support obligation, should be vacated.

ARGUMENT

I. RETROACTIVE MODIFICATION OF A SPOUSAL SUPPORT ORDER IS CONTRARY TO UTAH LAW.

Under current Utah law, family support obligations become unalterable debts as they accrue. Bernard v. Attebury, 629 P.2d 892, 894 (Utah 1981). As such, a trial court may only impose support obligations prospectively. Id. (emphasis added). In the instant case, the District Court erred in imposing a support obligation retroactively.

Appellant was obligated under a temporary court order to provide support to Appellee equivalent to one-half the mortgage payment for the marital residence. No other support and/or alimony was ordered. This temporary support order, providing for payment of one-half the mortgage, became an unalterable debt as it accrued. As such, it could not be subject to retroactive modification.

In Whitehead v. Whitehead, 836 P.2d 814 (Utah App. 1992), this Court held that it was an abuse of discretion for the district court to excuse overdue family support payments. Id. at 816. This Court stated that:

Child and spousal support payments become unalterable debts as they accrue, and courts may not retroactively reduce or excuse past-due support obligations.

Id. Implicit in this statement is the recognition that spousal support and child support payments are to be treated analogously for purposes of retroactive modification.¹

As Whitehead makes clear, a retroactive increase in child support payments is contrary to Utah law. U.C.A. 30-3-10.6(1); Whitehead at 816; (citing to Karren v. Department of Social Services, 716 P.2d 810, 813 (Utah 1986)); see also Larsen v. Larsen, 561 P.2d 1077, 1079 (Utah 1977)). Therefore, a retroactive increase in spousal support payments is likewise inappropriate.

The Utah Supreme Court, in Larsen v. Larsen, 561 P.2d 1077 (Utah 1977) further stated:

In this jurisdiction alimony and support payments become unalterable debts as they accrue; therefore, a periodic installment cannot be changed or modified after the installments have become due.

Id. at 1079 (footnote omitted). In Larsen, Defendant was ordered to pay \$1.00 per year alimony and \$1.00 per year child support. The State Department of Social Services sought a judgment for support provided by it to Defendant's three children. Id. at 1078. The District Court dismissed the motion for retroactive support on the grounds that the prior order could not be retroactively modified, irregardless of the change in circumstances since entry of the prior order. Id. The Utah Supreme Court affirmed the dismissal.

¹ See further In re Marriage of Sanborn, 777 P.2d 4, 6 (Wash.App. 1989), where the Court applied "equitable principles," normally applicable in child support cases, to a spousal support case "[b]ecause of the many similarities between child support and maintenance."

Here, the District Court Commissioner temporarily awarded Appellee no "actual" alimony, but Appellant was ordered to pay one-half the mortgage on the martial residence. Thus, the extent of Appellant's support obligation was the amount of one-half the mortgage payment, \$454.50. Each payment became an unalterable debt as it accrued, thereby vesting in Appellee. see e.g. Coleman v. Coleman, 664 P.2d 1155 (Utah 1983) ("Installments of support payments ordered in a divorce decree become vested in the recipient when they become due."). As unalterable debts, vested in Appellee, they could not be retroactively modified.²

It is irrelevant that, in the instant case, it was a temporary support obligation which was retroactively modified, and not a permanent support obligation. Temporary support obligations are to be treated the same as a permanent support order or final decree. Whitehead at 816. In Whitehead, Mr. Whitehead sought to have this Court treat temporary support orders different from permanent support orders by allowing the former to be retroactively modified, thereby upholding the district court's order excusing him of overdue support payments. Id. This Court, looking to U.C.A. § 30-3-10.6(1), refused to treat the two types of orders differently,

² Other jurisdictions are in accord with Utah. see e.g. Hildahl v. Hildahl, 601 P.2d 58, 60 (Nev. 1979) (alimony or child support payments, once accrued, cannot thereafter be modified); Matter of Marriage of Olsen, 600 P.2d 690, 693 (Wash.App. 1979) ("It is well settled that a court may not modify maintenance and support payments retroactively. [citation omitted] At most, the court can only modify maintenance and support as of the date of filing of the modification petition.")

finding that, like a permanent support order or final decree, a temporary support order cannot be retroactively modified. Id.

The District Court's Final Order of August 28, 1992, providing for the retroactive application of temporary alimony is contrary to Utah law, as it seeks to modify an unalterable debt. As set forth above, Appellant's support payments, in the form of one-half the mortgage on the marital residence, became unalterable debts as they accrued. It is improper for the District Court to modify this obligation by awarding temporary alimony, retroactive to the date of the initial temporary support hearing.³ As such, this aspect of the District Court's order should be vacated.

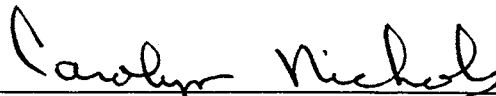
CONCLUSION

In ordering a retroactive modification of Appellant's spousal support obligation, the District Court acted contrary to Utah law. As such, this Court should vacate paragraph 9 of the District Court's order, providing for judgment against Appellant for the amount of the retroactive alimony, along with granting such other relief as this Court may determine to be appropriate under law and equity.

³ As stated by the Washington Court of Appeals, "[a]t most, the court can only modify maintenance and support as of the date of filing of the modification petition." Matter of Marriage of Olsen, at 693. Thus, the District Court could only order retroactive modification of Appellant's support obligation from the date Appellee filed her Motion for Temporary Alimony, not the date of the original hearing of June, 1991.

Dated this 25 day of October, 1993.

HALEY & STOLEBARGER

A handwritten signature in cursive script that reads "Carolyn Nichols". The signature is written in black ink and is positioned above a horizontal line.

CAROLYN NICHOLS

Attorney for Appellant

MAILING CERTIFICATE

I hereby certify that two true and correct copies of the foregoing BRIEF OF APPELLANT were mailed to the following by depositing the same in the U.S. Mail, postage prepaid:

Joseph Harlan Burns
P.O. Box 6330
Cedar City, Utah 84720

DATED this 26 day of October, 1993.

Carolyn Nichol

ADDENDUM

LAW OFFICES OF
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175 SOUTH MAIN STREET
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FRANK E. MOSS**

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**ALSO ADMITTED IN WASHINGTON, D.C.
***ALSO ADMITTED IN COLORADO

FILED
Utah Court of Appeals

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DEC 10 1993


Mary T. Noonan
Clerk of the Court

December 9, 1993

Mary T. Noonan
Clerk of the Court
Utah Court of Appeals
230 South 500 East #400
Salt Lake City, Utah 84111

Re: Shelton v. Shelton, Case No. 92-0583-CA
Errata Statement

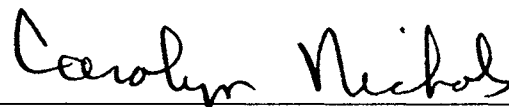
Dear Ms. Noonan:

Upon recent review of our opening brief, we noted an oversight on our part. In preparing the brief for filing we neglected to print the proper file in our computer system which contained the Statement of the Case, Course of Proceedings and Statement of Facts, with the relevant citations to the Record below. Those sections, as they currently appear in our opening brief, do not contain these citations.

Attached please find an Errata which contains the correct copy of those sections for insertion into our opening brief. Nothing of substance has been changed, except for the addition of the citations to the Record below.

We thank you in advance for your consideration, and hope our oversight will cause as little inconvenience as possible.

HALEY & STOLEBARGER:



Carolyn Nichols
Attorney for Appellant/
Gary K. Shelton

cc: Joseph Harlan Burns
Attorney for Appellee/
Jerilyn A. Shelton

IN THE COURT OF APPEALS

STATE OF UTAH

GARY K. SHELTON,	:	
	:	
Plaintiff and Appellant,	:	C.A. No. 92-0583-CA
	:	
vs.	:	
	:	
JERILYN A. SHELTON	:	Priority 16
	:	
Defendant and Appellee.	:	

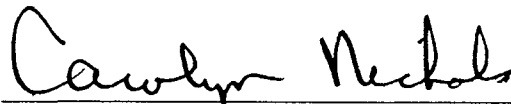
ERRATA STATEMENT TO APPELLANT'S BRIEF

APPELLANT GARY K. SHELTON, by and through his counsel of record, Carolyn Nichols, of Haley & Stolebarger, hereby submits this Errata Statement to his opening brief.

Attached are a replacement for pages 2 thru 5 of Appellant's opening brief.

DATED this 9th day of December, 1993.

HALEY & STOLEBARGER:



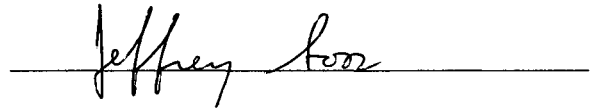
Carolyn Nichols
Attorney for Appellant

MAILING CERTIFICATE

I hereby certify that two true and correct copies of the foregoing Errata Statement to Appellant's Brief were mailed to the following by depositing the same in the U.S. Mail, postage prepaid:

Joseph Harlan Burns
P.O. Box 6330
Cedar City, Utah 84720

DATED this 9th day of December, 1993



STANDARD OF REVIEW

The issue on appeal presents a question of law to be reviewed by the Court for correctness, giving no deference to the trial court's conclusions and/or view of the law. Greenwood v. City of North Salt Lake, 817 P.2d 816, 818 (Utah 1991); Ron Case Roofing & Asphalt Paving, Inc. v. Blomquist, 773 P.2d 1382, 1385 (Utah 1989); Brinkerhoff v. Schwendiman, 790 P.2d 587, 589 (Utah App. 1990).

DETERMINATIVE STATUTES

I. Utah Code Ann. § 30-3-10.6(1) & (2) (1992)

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

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

(b) entitled, as a judgment, to full faith and credit in this or any other jurisdiction; and

(c) not subject to retroactive modification by this or any other jurisdiction, except as provided in Subsection (2).

(2) A child or spousal support payment under a child support order may be modified with respect to any period during which a petition for modification is pending, but only from the date notice of that petition was given to the obligee, if the obligor is the petitioner, or to the obligor, if the obligee is the petitioner.

STATEMENT OF THE CASE

I. NATURE OF THE CASE.

This case arises out of the divorce proceedings of the parties. R. 1-6. During a hearing held in June of 1991, before the District Court Commissioner, Appellant was ordered to pay one-half of the mortgage payment on the marital residence, in the

amount of \$454.50 per month, and temporary alimony of \$0.00, to Appellee. R. 84, ¶ 7.

Subsequent thereto, on or about February 25-26, 1992, the parties again appeared before the District Court Commissioner. R. 234. The Commissioner issued a Memorandum and Recommended Decision, (R. 234-238), adopted by the District Court, and pursuant to which the District Court entered a final order retroactively awarding temporary alimony. R. 628, ¶ 9. This is an appeal from the District Court's order of retroactive alimony.

II. COURSE OF THE PROCEEDINGS

Gary Shelton filed for divorce on May 30, 1991. R. 1-6. There was a hearing on June 18, 1991, before the District Court Commissioner, for purposes of setting temporary alimony. R. 82. After the hearing, and based upon the financial condition of the parties, the Commissioner recommended that Mr. Shelton pay one-half the monthly mortgage payment on the marital residence (\$454.40), and temporary spousal support in the amount of \$ 0.00. R. 84, ¶ 7.

In or about February 25-26, 1992, the parties again appeared before the District Court Commissioner for a hearing on Defendant's Order to Show Cause in re Contempt, Defendant's Motion for Temporary Alimony and Defendant's Motion for Order to Compel Discovery. R. 234. On or about March 4, 1992, the District Court Commissioner issued a Memorandum and Recommended Decision. R. 234-238. A copy of the Commissioner's Memorandum and Recommended Decision is attached hereto as Addendum A.

The Commissioner's Decision provided, inter alia, that

Defendant is entitled to temporary alimony retroactive to June, 1991. R. 236-37. The District Court, in a Memorandum Decision issued on July 31, 1992, adopted the Commissioner's Decision regarding Ms. Shelton's entitlement to the retroactive award of alimony. R. 572-73, ¶ 10

On or about August 20, 1992, the District Court entered a "Final Order of Property Division, Alimony, and Attorney's Fees." R. 616-29. A copy of the trial court's Final Order is attached hereto as Addendum B. Pursuant to the paragraph 9 of the above-mentioned Final Order, a Judgment was granted to Defendant against the Plaintiff in the amount of thirteen thousand dollars (\$13,000), with interest accruing at a rate of twelve percent (12%) per annum. R. 652.

An Order Granting Defendant's Motion for Judgment and to Allow Execution on Judgment was entered on or about May 5, 1993. R. 730-31. A copy of the Order allowing execution of the judgment is attached hereto as Addendum C. This Court stayed execution on that judgment pending appeal.

Plaintiff Gary Shelton filed his Notice of Appeal on August 24, 1992.

STATEMENT OF FACTS

1. On or about March 4, 1992, the District Court Commissioner issued a Memorandum and Recommended Decision on Defendant's Order to Show Cause in re Contempt, Defendant's Motion for Temporary Alimony and Defendant's Motion for Order to Compel Discovery. R. 234-238, Addendum A.

2. The Commissioner's Decision provided, inter alia, that Defendant is entitled to temporary alimony retroactive to June, 1991. R. 236-37, Addendum A, pp. 3-4, ¶ 1.

3. On or about August 28, 1992, the Fifth District Court, entered a "Final Order of Property Division, Alimony, and Attorney's Fees." R. 616-29, Addendum B.

4. In paragraph 9 of the above-mentioned Final Order, the court adopted the recommendation of the Commissioner regarding Defendant's entitlement to a retroactive alimony award. R. 628, Addendum B, ¶ 9.

5. Pursuant to the paragraph 9 of the above-mentioned Final Order, a Judgment was granted to Defendant against the Plaintiff in the amount of thirteen thousand dollars (\$13,000), with interest accruing at a rate of twelve percent (12%) per annum. R. 652, Addendum B, ¶ 9.

6. On or about May 5, 1993, the District Court entered an order allowing execution of the above-referenced judgment. R. 730-31, Addendum C.

SUMMARY OF ARGUMENT

Under Utah law, it is improper for a District Court to retroactively modify a spousal support order. Spousal support obligations become unalterable debts as they accrue. Thus, each payment "vests" when due. As an unalterable debt, the obligation is subject only to prospective modification.

In the instant case, Appellant's spousal support obligation was modified retroactively. Such a retroactive modification is

Tab A

MAR 06 1992

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
IN AND FOR WASHINGTON COUNTY, STATE OF UTAH

GARY K. SHELTON,)	
)	
Plaintiff,)	COMMISSIONER'S
)	MEMORANDUM AND
vs.)	RECOMMENDED DECISION
)	
JERILYN A. SHELTON,)	
)	
Defendant.)	Civil No. 914500159

This matter came on for hearing on the 25th and 26th days of February, 1992 on Defendant's Order to Show Cause in re Contempt, Defendant's Motion for Temporary Alimony and Defendant's Motion For Order to Compel Discovery. Plaintiff was personally present in Court and represented by counsel, G. Michael Westfall, Esq., and Defendant was personally present in Court and represented by counsel, Michael R. Shaw, Esq. The Court, having heard testimony and having received evidence, being fully advised in the premises and having taken under advisement the issue of temporary alimony Hereby enters its Memorandum and Recommended Decision:

FINDINGS OF FACT

1. Defendant's need for temporary alimony was obvious at the hearing held in June of 1991. She had been in retirement during the marriage having had premarital employment in the State of California where she was licensed to sell real estate. She was unemployed and had no income:

2. Plaintiff pleaded poverty and inability to pay alimony, alleging that litigation in California, involving his corporation which traditionally paid him \$4,000.00 per month, had substantially reduced his income. The Court ordered Defendant to pay one-half of the mortgage payment and to advise the Court of income received by him over the \$1,600.00 per month he receives in retirement benefits. Defendant did not tell the Court that he had received \$1,000.00 per month from the corporation for each month following the parties' separation including the month of June. In July, 1991, he learned that \$3,000.00 was available from the corporation for salary (2/3 to Plaintiff and 1/3 to the minority stockholder). Plaintiff directed the accountant to pay \$1,000.00 to Defendant, \$1,000.00 to the other stockholder and \$1,000.00 to Plaintiff's mother who had performed certain services for the corporation for over 20 years but had been paid on only one other occasion for a short period of time in 1983.

Plaintiff's mother testified she did not recall being paid in 1983 when she shared a joint checking account with Plaintiff. From July, 1991, until February, 1992, Plaintiff received \$1,000.00 per month and Plaintiff's mother received \$1,000.00 per month. This income was not reported to the Court nor was the availability of the funds. Plaintiff in written communication tried to withdraw additional funds from the corporation disguised as loans and bonuses. Plaintiff borrowed \$12,000.00 for equipment for a farming operation he is developing in Canada plus additional funds for airplane repair and \$1,400.00 from his mother, none of which was reported. This deception was dealt with in an on-bench ruling of contempt.

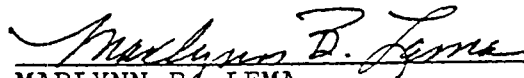
3. Defendant used up all of her personal liquid assets to meet ongoing obligations including a \$10,000.00 savings account previously allocated for the use of her children. Defendant also prepared for and passed the necessary requirements to obtain a Utah Real Estate License. At time of hearing defendant had earned one commission of \$2,650.00.

Based on the foregoing Findings of Fact the Court concludes as follows:

1. That Defendant is entitled to temporary alimony retroactive to June, 1991, in the amount of \$1,000.00. This

amount coupled with the previous order obliging Plaintiff to pay \$454.50 per month as one-half the mortgage on the marital residence will leave each party with a relatively equal amount, i.e., \$1,600.00 retirement benefits to Plaintiff less \$454.50 mortgage payment and \$1,454.50 to Defendant less that same amount.

DATED this 4th day of March, 1992.


MARLYNN B. LEMA
DISTRICT COURT COMMISSIONER

MAILING CERTIFICATE

I hereby certify that on this 10th day of
March, 1992, I mailed a true and
correct copy of the above and foregoing, first-class postage
pre-paid, or hand delivered, to the following:

G. Michael Westfall, Esq.
One South Main Street
St. George, UT 84770

Michael R. Shaw, Esq.
249 East Tabernacle
Suite #200
St. George, UT 84770

Carolyn Smitherman

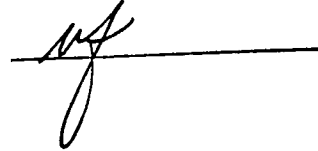
Tab B

FILED
FIFTH DISTRICT COURT

'92 AUG 28 PM 2 03

WASHINGTON COUNTY

BY



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IN THE FIFTH JUDICIAL DISTRICT COURT, IN AND FOR
WASHINGTON COUNTY, STATE OF UTAH

GARY K. SHELTON,)	
)	
Plaintiff,)	FINAL ORDER OF PROPERTY DIVISION,
)	ALIMONY, AND ATTORNEY'S FEES
)	
vs.)	
)	
JERILYN A. SHELTON,)	Case No. 924500159
)	
Defendant.)	Judge James L. Shumate

The above-entitled matter came before the Court for trial, beginning on April 6, 1992. Both parties appeared in person. Plaintiff was represented by G. Michael Westfall, of the firm of Gallian and Westfall. Defendant was represented by Michael R. Shaw, of the firm of Jones, Waldo, Holbrook and McDonough. The parties each testified and offered other witnesses and exhibits. At the request of the Court, each party submitted a proposed inventory and distribution of assets on 3-1/2 inch computer disk to aid the Court in the preparation of its Decision. Upon the stipulation of the parties, the Court granted a Decree of Divorce early on in the proceedings, reserving for later ruling all issues of property division and valuation, debt allocation, alimony, and attorney's fees. Counsel for both parties were ordered to submit final argument in the form of written memoranda. The final such pleading was filed with the Court on June 4, 1992. The Court had taken under advisement all issues presented at trial, together with all outstanding objections to

strike those objections. The rulings made by the Commissioner and objected to by Plaintiff are: 1) Commissioner's Memorandum and Recommended Decision, filed March 6, 1992; 2) the Order of Contempt, filed April 6, 1992; and 3) the Order on Defendant's Motion to Compel Discovery, filed April 6, 1992.

The Court has reviewed the testimony, exhibits, transcripts of proceedings before the Commissioner, and the memoranda and other pleadings submitted by the parties. The Court has entered its Findings of Fact and Conclusions of Law by Memorandum Decision dated July 31, 1992, and based thereon hereby ORDERS as follows:

1. The following items of personal property associated with the Williston Lake property and farming operation in Canada, and found by the Court to be part of the marital property, are hereby awarded to Plaintiff with the associated values as fixed by the Court:

<u>Description of Item</u>		
1.	D-8 caterpillar	\$8500
2.	Case 4x4 tractor	\$8900
3.	Root rake	\$1000
4.	Packer	\$ 650
5.	3 bottom plow	\$ 950
6.	Breaking plow	\$1350
7.	Seeder	\$ 500
8.	Cutter	\$ 900
9.	1941 antique army truck	\$5000
10.	Skid shed/supplies	\$ 300
11.	Drill seeder	\$ 200

13.	Small caterpillar	\$1200
14.	Root picker	\$ 500
15.	3 chain saws	\$ 400
16.	Misc. tools	\$2000
17.	Blue house 2 bedroom (gift)	\$1000
18.	Small table	\$ 50
19.	Kitchen stove in guest cabin	\$ 50
20.	Kitchen appliances, pots, pans in guest cabin	200
21.	Linens in guest cabin	\$ 500
22.	2 rockers in guest cabin	\$ 70
23.	Large oval rugs (gift)	\$ 1
24.	Wood stove in guest cabin	\$ 200
25.	Paperback books in guest cabin	\$ 1
26.	VCR in guest cabin	\$ 150
27.	Small generator in guest cabin	\$ 100
28.	Large generator in guest cabin	\$ 300
29.	3 down comforters in guest cabin	\$ 200
30.	Small antique dresser	\$ 150
31.	Antique trunk	\$ 50
32.	Sleeping bags in guest cabin	\$ 250
33.	Cook stove wood/propane in log home	\$ 800
34.	Light kitchen Hoosier in log home	\$ 300
35.	Large brown sofa in log home	\$ 50
36.	Old office furniture implements in log home	\$ 100
37.	Utility table in log home	\$ 50
38.	Treadle sewing machine in log home (refinished)	\$ 150
39.	Several silk flowers in log home	\$ 20

40.	2 wall lanterns (gift)	\$ 75
41.	1 large crock	\$ 45
42.	Linens in log home	\$ 250
43.	Dresser/sink built into log home	value in realty
44.	Corning dishes	\$ 75
45.	China in log home	\$ 100
46.	Wood chopping cart in log home	\$ 50
47.	Antique piano chair	\$ 100
48.	2 attorney bookcases in log home	\$ 250
49.	Propane refrigerator in log home	\$ 350
50.	Antique icebox in log home (refinished)	\$ 150
51.	Antique scale in log home	\$ 85
52.	Misc. antique bottles	\$ 50
53.	Antique towel rack, antique mirror (refinished)	no value fixed
54.	Dressing mirror	\$ 30
55.	Handmade bedspread/curtains in log home	\$ 100
56.	2 bear pictures in log home	no value fixed
57.	2 chaise lounges	\$ 50
58.	Lawnmower	\$ 50
59.	Barbecue grill	\$ 75
60.	Misc. lawn chairs	no value fixed
61.	Antique barrels	\$ 60
62.	Smoker gift	no value fixed
63.	Brother typewriter	\$ 50
64.	Antique parlor stove in log home	\$ 100
65.	Pressure washer	\$ 200
66.	Tools located in Canada	\$1000
	Tools located in Canada in Canada	\$ 300

68.	Orange canoe located in garage in Canada	\$ 50
69.	19' Arenacraft boat located in Canada	\$3500
70.	New motor located in garage in Canada	\$1300
71.	Antique buckboard	\$ 150
72.	All fishing gear located in Canada	\$ 250
73	Color fish finder	\$ 200
74.	Antique icebox located in garage in Canada	\$ 100
75.	Antique secretary located in garage in Canada	\$ 50
76.	Power saw, radial arm located in Canada	\$ 400
77.	Misc. supplies--chimney, pipe, flooring, oak, etc.	\$ 500
78.	Antique 1 lung motor located in garage in Canada	\$ 50
79.	Misc. hoses, pulleys, cable,	\$ 400
80.	3 ice chests	\$ 20
81.	Wheelbarrow	\$ 20
82.	Antique brass bed	\$ 100
83.	Antique soda fountain chairs	\$ 80
84.	Trailer	\$ 200
85.	2 fly-tying sets	\$ 50
86.	Antique farm implements	\$ 100
87.	Radio phone	\$ 350
88.	CB	\$ 5
89.	Radar Detector	\$ 150
90.	3 end tables	\$ 100
91.	Wall unit	\$ 150
SUBTOTAL		\$49,207

2. The following items of personal property are hereby awarded to Defendant as her sole and separate property from those items found by

the Court as marital property with the associated value as fixed by the Court:

1. Antique child crib (refinished)	\$ 75
2. Misc. crafts/leather/patterns; misc. cookbooks and pictures (gift)	no value fixed
3. Tole painting/wreaths/farm-animals	no value fixed
4. Large bird cage	\$ 50
5. Canning jars/supplies	\$ 350
6. Glass cabinet	\$ 650
7. Handmade log box	\$ 100
8. Pressure canner	\$ 100
9. 1 30-30 semi-automatic rifle (gift)	\$ 200
10. Afghan given to Ms. Dawson	\$ 50
11. Large canner pot	\$ 50
12. Silver canoe	\$ 200
13. Antique crib (unfinished)	\$ 100
14. Electric jigsaw	\$ 20
15. Antique barley twist table	\$ 300
16. 3 antique pressback chairs, refinished	\$ 300
17. Dark bookshelf w/ glass shelves	\$ 100
18. King-size bed	\$ 200
19. Headboard for king-size bed	no value fixed
20. Headboard (handmade)	\$ 40
21. Bedspread/curtains (hand-quilted)	\$ 50
22. 2 recliners	\$ 100
23. 4 bookcases	no value fixed
24. Fireplace insert	\$ 300
25. TV, stereo, tape, disc, VCR	\$1500

26.	Tole painting paint, brushes, sewing machine	no value fixed
27.	G.E. refrigerator	\$ 500
28.	Dehydronator	\$ 5
29.	Powder guns (2)	no value fixed
30.	Two violins	no value fixed
31.	Garnet ring	\$ 50
32.	Wedding ring	\$ 300
33.	Large ice chest	no value fixed
34.	Air brush	\$ 130
35.	Small park bench	no value fixed
36.	Schwinn tandem bike	\$ 300
37.	Saw, hammer, drill, level, wood clamps, wrenches (both socket, crescent, pipe and box-end, if any) screwdriver set	no value fixed
38.	Raleigh 10-speed bike	\$ 15
39.	Ski equipment purchased for Defendant	no value fixed
40.	Garage vac	no value fixed
41.	Ladder	no value fixed
SUBTOTALS		\$6135

3. The following items are hereby awarded to Plaintiff, the Court having found that they are separate and premarital property owned by Plaintiff before the marriage of the parties:

1.	Cessna 210 airplane	\$48500
2.	Taylorcraft airplane (rebuilt)	\$9500
3.	1959 Jaguar (refurbishing)	\$4500
4.	1965 Jaguar XKE	\$5000
5.	Fairchild PT 19 airplane	\$15000
6.	Sofa in Utah	no value fixed

7.	Loveseat in Utah	no value fixed
8.	Antique survey equipment	no value fixed
9.	Two (2) guitars	no value fixed
10.	Oil painting	no value fixed
11.	Remington copies 5 Western pictures, 2 Indian picture, 2 cowboy picture	\$ 100
12.	Books in Utah on Plaintiff's profession or hobbies or owned by Plaintiff before the marriage	\$ 100
13.	Car engine hoist	\$ 200
14.	Propane heaters	\$ 15
15.	Drill press	\$ 150
16.	Metal bender/shear	\$ 100
17.	Old car steam cleaner	\$ 100
18.	Tools in toolboxes and located in Utah garage excepting those tools awarded to Defendant as set forth hereinafter	\$1000
19.	All paint associated with car or aircraft restoration	\$ 500
20.	Car/airplane parts	\$ 100
21.	Raleigh 10-speed bike	\$ 15
22.	Ski equipment purchased for Plaintiff	no value fixed
23.	Small camelback trunk	\$ 75
24.	Rectangular antique table, 6 chairs	\$1500
25.	Telescope	\$ 200
	SUBTOTAL	\$86655

As additional separate and premarital property, Plaintiff is awarded all of his interest in SVS Corporation free and clear of any claim of Defendant. While the Court is aware, and has so found, that Plaintiff's interest in the corporation produces substantial income for Plaintiff this Court has not been persuaded as to any fixed value for

Plaintiff's interest in the Corporation, and has specifically not found any fixed value.

4. The following items of personal property are hereby awarded to Defendant, the Court having found that they are the separate and pre-marital property of Defendant:

1. Ethan Allen 72" round table/6 chairs	\$ 300
2. Ethan Allen hutch	\$ 200
3. 2 black love seats	\$ 350
4. Ethan Allen drop leaf end table	\$ 150
5. Armoire mirror doors	\$ 450
6. Dark Hoosier	\$ 500
7. Books, cookbooks, other books relating to Defendant's interests and hobbies	no value fixed
8. Small TV from Bayliner Boat	no value fixed
9. Large canner pot	no value fixed
10. Victoria juicer/food processor	"
11. All tole painting in Canada	"
12. Alabaster green egg	"
13. Chicken pot pads	"
14. Small black bear	"
15. Small bear on coffee table	"
16. Small red stapler (Defendant's mother's)	"
17. 14" cast iron fry pan	"
18. Thumb print pan	"
19. 10" fry pan, 14" pan	"
20. Brass potholder	"
21. Bayliner 27' boat	\$13000
22. 1984 Buick	\$1000

23.	1981 Jaguar	\$4000
24.	Antique secretary (Defendant's mother's)	no value fixed
25.	Kitchen Aid mixer	\$ 200
26.	Sewing machine	\$ 200
27.	Personal clothes	no value fixed
28.	Animals handmade by Defendant	"
29.	Crafts/leather	\$ 200
30.	2 rust love seats	\$ 600
31.	Coffee table, leaded glass	\$ 500
32.	Armoire (refinished)	\$ 600
33.	Antique wingback chair (reupholstered)	\$ 350
34.	Antique reproduction chair (reupholstered)	\$ 200
35.	Barley twist drop leaf table and chair	\$ 300
36.	Antique lamp and two sconces	\$ 200
37.	Grandfather clock	\$ 599
38.	Old antique clock	\$ 100
39.	Marble backgammon set	no value fixed
40.	Silver/china/crystal	\$2000
41.	Antique tea set (Defendant's family heirloom)	no value fixed
42.	Old goblets	no value fixed
43.	Old Deacon chair/refinished	\$ 200
43.	Patio table, chairs	\$ 900
44.	Kitchen items	\$ 200
45.	Headboard for king-size bed	no value fixed
46.	Lamp	\$ 100
47.	King-size bed located in Utah master bedroom	no value fixed
48.	Triple dresser	no value fixed

50. Jewelry chest	no value fixed
51. 2 nightstands	no value fixed
52. Fireplace insert	\$ 350
53. Old antiques collected by Defendant	no value fixed
54. Lamp, pictures, coffee maker in Utah	"
55. Cookbooks	"
56. Pots and pans	"
57. 5 oil paintings (painted by Defendant's mother)	"
58. Picture grandfather	"
59. Commercial sewing machine	"
60. Antique desk chair	\$ 100
61. Antique school clock	no value fixed
62. Antique banjo	no value fixed
63. Antique bucksaw	no value fixed
64. Jewelry - heart diamond, round diamond, diamond bracelet, charms, chain	\$1000
65. Chain and chain bracelet	\$ 70
66. Park bench	no value fixed
67. Three cast iron chairs	"
68. Brown desk chair	"
69. All yard tools in Utah	"
70. Black velvet picture	"
71. Antique shoe repair (Defendant's family heirloom)	"
72. Sad irons (Defendant's family heirloom)	"
73. 2 brown flowered wingback chairs	\$ 100
74. Antique dresser in Canada master bedroom	\$ 500
75. Green bedroom wingback chair	\$ 100
76. Large armoire	\$ 350

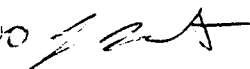
77. Large antique trunk (refinished)	\$ 150
78. Old antique cans	no value fixed
79. Round drop-leaf end table	\$ 100
80. Pink antique jar	\$ 100
81. Brass pot holder	\$ 120
SUBTOTAL	\$30539

5. Defendant is hereby awarded the home in Bloomington, St. George, Utah, subject to the encumbrance thereon, which she shall henceforth be required to discharge. Plaintiff is awarded no interest in the Bloomington, St. George, Utah, home, but Defendant is ordered to indemnify and hold Plaintiff harmless from the debt on this property.

6. Plaintiff is hereby awarded all of the real property in Canada, free and clear of any claim by Defendant. Defendant shall have the right to enter onto the Canadian property for the purpose of reclaiming those items of personal property located in Canada and described above.

7. Defendant is awarded, and Plaintiff is ordered to pay, alimony in the amount of \$1,400.00 per month for a period of twenty-four (24) months beginning September 1, 1992, and ending August 31, 1994. Plaintiff is ordered to pay all alimony payments to the Clerk of the Court so that the payment is received by the Clerk's Office no later than 5:00 P.M. on the first day of each month beginning September 1, 1992. In months when the first day of the month falls on a Saturday, a Sunday, or a legal holiday of the State of Utah, the payment shall be made so that it is received in the Clerk's Office no later than 5:00 P.M. of the last working day before the first day of the month falling on a weekend day or holiday.

8. If any alimony payment is not received by the Clerk's office when due, a Judgment shall issue, forthwith, for the amount due upon the affidavit of Defendant. Such a Judgment shall provide that it may be satisfied either from the income represented by Plaintiff's stock or other ownership interest in SVS Corporation or by execution against Plaintiff's stock or ownership interest in SVS Corporation or by other post-judgment remedies. Any such Judgment shall also include this Court's findings with respect to jurisdiction over the parties, the mobility of the majority of the assets, and Plaintiff's attempts to secrete assets.

9. Defendant is awarded a Judgment against Plaintiff in the amount of \$13,000.00, with interest thereon at the rate of 12% per annum, which represents this Court's adoption of the recommendation made by the Court's Commissioner for an award of temporary alimony. However, no execution shall issue upon such Judgment so long as Plaintiff makes monthly payments to the Clerk of the Court in the same fashion as set forth in paragraph 8 immediately above in the amount of at least \$500.00 per month. Any such payments shall be credited first against the accrued interest and then against the principal amount due. Interest shall accrue from and after July 31, 1992. ^{on this} \$13,000.00 

10. All items of property not specifically described in this Order are awarded to the party awarded the realty where the property is located. If either party interferes with the other's acquisition of any of the personal property awarded by this Order, the party damaged may apply to the Court, under the provisions of Rule 4-501 of the Utah Code of Judicial Administration, and upon Motion supported by Affidavit and Memorandum of Points and Authorities, citing to the Memorandum Decision or this Order, for a Judgment for the dollar value of the personal

property as established herein. Any such Judgment against Defendant will reduce the temporary and rehabilitative awards of alimony by the amount of the Judgment. Any such Judgment against Plaintiff may be collected as set forth in paragraph 8 immediately above.

11. All values in this Order are in U.S. dollars only.

12. Defendant, based upon her lesser earning capacity, is awarded her attorney's fees and costs in the amount of \$18,500.00. The Court acknowledges that this award is less than the reasonable attorney's fees of Mr. Shaw as previously found, but the equities of this case demand a reduction to this level.

13. Plaintiff is ordered to pay the debts to Judy Jordan of \$12,000.00 and for the Cessna repair of \$8,000.00.

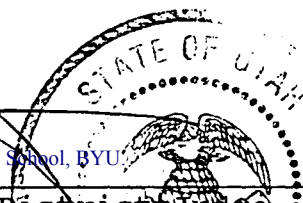
14. All rulings of the Court's Commissioner and the Objections thereto are hereby merged into this Order and thereby resolved.

15. Each party is ordered to pay his or her own debts and obligations incurred by such party and not otherwise allocated herein.

16. Each party is ordered to sign such consents and conveyances as may be appropriate to carry out the provisions of this Order.

17. Due to the length of this Order, the same may be supplemented by such separate Orders dealing with specific obligations or assets as may be reasonably requested by motion of either party under UCJA Rule 4-501 to facilitate such ends as recordation as to real property ownership or similar effectuation of the terms hereof.

DATED this 28th day of August, 1992.



MAILING CERTIFICATE

I hereby certify that I mailed a true and correct unsigned copy of the above and foregoing Final Order of Property Division, Alimony, and Attorney's Fees by first class mail, postage prepaid, this 20th day of August, 1992, to the following:

Gary K. Shelton
Box 119
Hudson Hope, B.C.
V0C1V0

Michael R. Shelton

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WASHINGTON COUNTY

BY *KLH*

JOSEPH HARLAN BURNS, ESQ. #0507
ATTORNEY AT LAW
Attorney for Defendant
965 South North Main, Suite #4
P.O. Box 6330
Cedar City, UT 84721-6330
(801)-586-8922

**IN THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR
WASHINGTON COUNTY, STATE OF UTAH**

GARY K. SHELTON,
Plaintiff,

vs.

JERILYN A. SHELTON,
Defendant.

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**ORDER ALLOWING
EXECUTION ON
JUDGMENT**

Civil No. 91-4500159

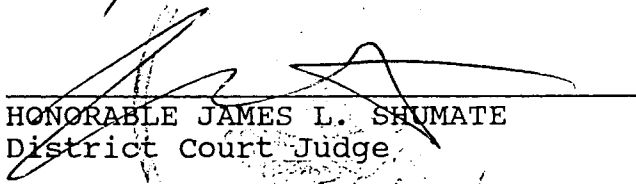
Judge James L. Shumate

The defendant's Motion to Allow Execution on the Judgment of the Court on the 28th day of August, 1992, entitled Final Order of " Property Division, Alimony, and Attorney Fees" came on for hearing before the Court on the 17th day of March, 1993, the Honorable James L. Shumate, District Judge presiding, and the plaintiff not having appeared in person but having been represented by counsel, Carolyn Nichols, HALEY & STOLEBARGER, and the defendant having appeared in person and as represented by Joseph Harlan Burns, counsel, and it appearing from the file and the defendant's affidavit that the plaintiff, Gary K. Shelton, has not performed as required, to wit: " maintain monthly payments of at least \$500.00 " (paragraph #9 of Final Order) to

reduce an arrearage of \$13,000.00" and it appearing that the defendant, Jerilyn A. Shelton, is entitled by the terms of said Court Order to proceed with Execution or other appropriate collection procedure under the law, and good cause appearing therefore,

IT IS HEREBY ORDERED that the defendant, Jerilyn A. Shelton should be, and hereby is, authorized to proceed with attachment, garnishment, execution or other appropriate means of collection under the Utah Rules of Civil Procedure, Rule 69 Execution and proceedings supplemental thereto; Rule 64C Attachment; Rule 64D Garnishment or other appropriate collection procedure under the law of the State of Utah to pay and retire the extant Judgment in the sum and amount of \$13,000.00 DOLLARS together with interest at the legal rate.

DATED this 6 day of May, 1993.


HONORABLE JAMES L. SHUMATE
District Court Judge

APPROVED:

JOSEPH HARLAN BURNS
Attorney for Defendant

CAROLYN NICHOLS
Attorney for Plaintiff

MAILING CERTIFICATE

I hereby certify that a full, true and correct copy of the Order Allowing Execution on Judgment was placed in the United States mail at Cedar City, Utah, with first-class postage thereon fully prepaid on the ___ day of _____, 1993, addressed as follows:

Carolyn Nichols
HALEY & STOLEBARGER
175 South Main, Suite 1000
Salt Lake City, UT 84111

Secretary