1990

Bruno D'Aston v. Dorothy D'Aston : Petition for Rehearing

Utah Court of Appeals

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IN THE COURT OF APPEALS

OF THE STATE OF UTAH

BRUNO D'ASTON,	:	
Plaintiff-Appellee,	:	
	:	
vs.	:	Case No. 89-0050CA
DOROTHY D'ASTON, et al.,	:	
Defendant-Appellant.	:	

PETITION FOR REHEARING

APPEAL FROM THE DECREE OF DIVORCE OF THE
FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY,
THE HON. BOYD L. PARK, PRESIDING.

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ATTORNEYS FOR DEFENDANT-APPELLANT

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PETITION FOR REHEARING

PETITION AND CERTIFICATION OF GOOD FAITH

Plaintiff-respondent Bruno D'Aston hereby petitions this Court, pursuant to Rule 35 of the Utah Rules of Appellate Procedure, for a rehearing of this matter. The points of law and fact which petitioner claims the Court has overlooked or misapprehended are set forth in detail in the following argument. Counsel for petitioner hereby certifies, by his signature below, that this petition is presented in good faith and not for delay.

ISSUES PRESENTED

1. Does the Court's opinion improperly restrict the discretion of the trial court on remand by holding that the 1973 agreement is binding as a matter of law, even though there exists evidence which would support the trial court in finding

that unique and compelling circumstances exist to justify varying from the agreement, or that the agreement was rescinded by the conduct of the parties?

2. Is the "unique and compelling circumstances" test adopted by this Court in conflict with prior decisions of this Court and of the Utah Supreme Court?

STATEMENT OF THE CASE

A. Nature of the Case. This is an action for divorce. The complaint also named the parties' two adult children as defendants and sought an order compelling the defendant wife and the children to return to the plaintiff husband certain personal property alleged to have been stolen from the husband.

B. Prior and Related Proceedings. The Court's opinion was filed June 14, 1990, and is reported at 136 Utah Adv. Rep. 47. A copy appears in Appendix A.

A description of the proceedings below prior to the filing of the Notice of Appeal is set forth in the initial briefs of the parties. Subsequent to the filing of the Notice of Appeal, plaintiff ("Husband") proceeded on his claims against defendant Eric Aston. An Order and Decree substantially in favor of plaintiff was entered on March 9, 1990. Eric Aston subsequently filed a Notice of Appeal (Case No. 900223-CA), and plaintiff filed a Notice of Cross Appeal (Case No. 900281-CA). The appeal and cross appeal were consolidated under Case No.

900223-CA by Order entered June 1, 1990. A copy of the Findings of Fact and Conclusions of Law appears in Appendix B, and the Order and Decree appealed from appears in Appendix C.

During the pendency of the instant appeal, the trial court found defendant ("Wife") to be in contempt of court by reason of her failure to comply with certain provisions of the Decree of Divorce. By opinion entered April 9, 1990, this Court held that this appeal would be dismissed unless Mrs. D'Aston submitted herself to the process of the trial court within thirty days of the issuance of the opinion. D'Aston v. D'Aston, 790 P.2d 590 (Utah Ct. App. 1990). (A copy of the opinion appears in Appendix D.) On May 4, 1990, Wife represented to this Court that she had submitted herself to the process of the trial court. She remained, however, in contempt of the trial court's order. On May 22, 1990, the trial court entered an Order (a copy of which is attached as Appendix E). The trial court gave Wife until June 22, 1990, to purge herself of the contempt by depositing with the court the money which she had previously and incorrectly represented to the court was in a safety deposit box. Defendant remained in contempt of court at the time this Court's opinion was issued on June 14, 1990.

C. Statement of Facts. Most of the facts relevant to this action are set forth in the initial briefs of the parties and in the Court's opinion. Such additional facts as are

necessary to a consideration of this petition are set forth below in connection with the argument.

SUMMARY OF ARGUMENT

The 1973 agreement which was the subject of this Court's opinion essentially conveyed the parties' real property to Wife and the personal property to Husband. Husband's personal property consisted largely of coin collections. The evidence showed and the trial court found that the parties continued to conduct their affairs after the execution of the 1973 agreement as though it did not exist. Husband presented evidence that his son, apparently acting under the direction and with the cooperation of Wife, stole most of Husband's personal property on April 30, 1986. The trial court did not make any finding as to whether the theft occurred but did hold that if the items which were the subject of the theft appeared in the possession of either party, that party would be held in contempt. Certain of the stolen items were subsequently found in Eric Aston's possession. Because Wife made herself unavailable for process, Husband has not yet been able to bring further proceedings against Wife based on this additional evidence.

This Court's opinion, however, appears to hold that Wife is entitled to all the property granted her under the 1973 agreement as a matter of law, notwithstanding that there is evidence which would support a trial court finding that the

agreement was rescinded by the conduct of the parties, and that Wife participated in stealing all the property conveyed to Husband under the agreement. This Court holds that a post-nuptial agreement is absolutely binding on the trial court unless "unique and compelling circumstances" exist. The "unique and compelling circumstances" test is unsupported by citation. Prior decisions of this Court and of the Utah Supreme Court have held that similar agreements entered into during the course of the marriage but in contemplation of divorce, are not binding on the trial court. Such agreements are considered to be a recommendation only to the court, to be adhered to if it is "fair and reasonable."

There is no logical or legal justification for giving only advisory effect to an agreement entered into by the parties when they are aware of all of their current assets and circumstances, but giving conclusive effect to an agreement entered into at a previous time, even though circumstances may have changed.

This Court should vacate its prior opinion and hold that a post-nuptial agreement in this case is binding between the parties in determining the status of property as separate as of the time of the divorce. The trial court should be given the discretion to apply traditional rules concerning the division of separate property in a divorce action.

Because the trial court held that the 1973 agreement was not intended to be enforced between the parties, the trial court did not have occasion to reach the issues of whether the agreement had been rescinded by the conduct of the parties, or whether the circumstances justified varying from the agreement. The facts on these issues are in dispute, and it is error for this Court to hold otherwise as a matter of law.

Finally, appellant-wife remains in contempt of the trial court has failed to fully satisfy this Court's directive in its prior opinion. The appeal should be dismissed because appellant failed to comply with this Court's prior opinion.

ARGUMENT

POINT I

THE HOLDING OF THIS COURT IMPROPERLY RESTRICTS THE DISCRETION OF THE TRIAL COURT ON REMAND.

A. Unique And Compelling Circumstances Exist To Justify Varying From The 1973 Agreement.

Bruno D'Aston ("Husband") testified at trial that on April 30, 1986, after he had returned from a coin show in the State of Washington, Dorothy ("Wife") invited him to share coffee with her. While Wife was thus occupying him, their son, Eric Aston, broke into Husband's vehicle and removed hundreds of thousands of dollars worth of coins and other valuable assets. Eric then returned and stated to his father, in the presence

of his mother, that he, Eric, had removed the coins because "we" could no longer trust Bruno D'Aston. (Tr. 60.) The items stolen included nearly all of the assets conveyed to Husband under the 1973 agreement.

Wife and Eric disputed Husband's testimony. The trial court determined that it was not necessary to make a finding as to what occurred, because the trial court held that the 1973 agreement was not enforceable in any event. This Court disagreed and held the 1973 agreement to be enforceable. This Court held that post-nuptial agreements are enforceable unless "unique and compelling circumstances" exist to justify varying from the agreement. Husband establishes below in Point II that the "unique and compelling circumstances" test is not proper. Even if the test is applied, however, unique and compelling circumstances exist in this case.

This Court does not define what would constitute "unique and compelling circumstances," but states in a footnote that "[t]he trial court made no findings to delineate what it found as compelling circumstances to justify such an action and we find none." 136 Utah Adv. Rep. at 50, n. 6. The trial court did not delineate what it found as compelling circumstances, however, because it had found the 1973 agreement to be un-enforceable in any event.

This Court and the Utah Supreme Court have had several occasions to consider what constitutes sufficient grounds to

divide separate property. A review of the cases demonstrates that the same test should be applied in this case, and that the evidence in this case was sufficient to justify varying from the post-nuptial agreement.

In Noble v. Noble, 761 P.2d 1369 (Utah 1988), for example, the Court held that the trial court properly awarded a portion of the husband's separate property to the wife where the wife had no income or assets and where her present financial needs were the result of the husband's tortious conduct. This Court asserts that Noble is distinguishable because it did not involve a prenuptial or postnuptial agreement. The critical issue, however, is that the standard applied in Noble is the same as this Court has previously held applies where a property settlement agreement has been made. The Court in Noble held:

> [T]here is no per se ban on awarding one spouse a portion of the premarital assets of another. In fact, our cases have consistently held that under appropriate circumstances, achieving a fair, just, and equitable result may require that the trial court exercise its discretion to award one spouse the premarital property of the other.

761 P.2d at 1373 (citations omitted).

This language is remarkably similar to that used in Coleman v. Coleman, 743 P.2d 782 (Utah Ct. App. 1987), a case which did involve a postnuptial agreement (although executed in contemplation of divorce):

> [I]t is well recognized that a parties' stipulation as to property rights in a

> divorce action, although advisory and usually followed unless the court finds it to be unfair or unreasonable, is not necessarily binding on the trial court. It is only a recommendation to be adhered to if the court believes it to be fair and reasonable.

743 P.2d at 789 (citations omitted).

Theft must certainly be considered to be a compelling circumstance. Evidence exists which would support a finding that Wife stole the coins from Husband. Although the location of the coins was not known at the time this case was tried, some of the coins have subsequently been discovered in Eric Aston's possession. This corroborates Husband's testimony that Eric and Dorothy D'Aston conspired to steal the coins from Husband.

The Court's holding leaves Husband without an effective remedy. Wife assisted in the theft of all of the assets conveyed to Husband under the 1973 agreement, but this Court nonetheless prohibits the trial court from ordering her to make compensation to Husband from the assets she received under the 1973 agreement.

The trial court should be granted discretion to make whatever orders are necessary and just in this case. Having held that the trial court was in error in its interpretation of the 1973 agreement, this Court should now remand the case to the trial court to make whatever decree is just and ap-

propriate under the circumstances of the case, yet in harmony with this Court's interpretation of the agreement.

B. The 1973 Agreement Was Rescinded By Conduct.

This Court held that post-nuptial agreements are to be interpreted the same as any other contract. As such, as with pre-nuptial agreements, the contract can be rescinded by the conduct of the parties. In re Marriage of Young, 682 P.2d 1233, 1236 (Colo. Ct. App. 1984); see also Berman v. Berman, 749 P.2d 1271, 1273 (Utah Ct. App. 1988).

Because the trial court in this case held that the post-nuptial agreement was never intended to be binding between the parties, the court had no occasion to determine whether the agreement was subsequently rescinded by the conduct of the parties. The court did find, however, that "subsequent to the date of the agreement, the parties continued their married lives together, and bought and sold property as though the agreement did not really exist, except that certain real properties were changed to the name of defendant Dorothy D'Aston." (R. 456.) There is adequate evidence to support this finding, as demonstrated in the parties' initial briefs. Those findings must be upheld:

> We will not set aside a trial court's finding of fact unless it is against the clear weight of the evidence or we otherwise reach a definite and firm conviction that a mistake has been mae. [Citations.] We may regard a finding as clearly erroneous only if the finding is without adequate evidentiary support or is induced

> by an erroneous view of the law. [Citations.]

Smith v. Linmar Energy Corp., 790 P.2d 1222, 1224 (Utah Ct. App. 1990) (J. Billings).

The testimony in this case is sufficient to support the findings. To the extent that Husband's evidence was weaker than Wife's, it was because Wife had denied Husband access to his records. (R. 754, 757.) This Court should grant the trial court discretion on remand to further inquire into that issue and make detailed findings as to whether the agreement was rescinded by the conduct of the parties.

POINT II

THE "UNIQUE AND COMPELLING CIRCUMSTANCES" TEST IS NOT SUPPORTED BY AND CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND THE UTAH SUPREME COURT.

A. The 1973 Agreement Determines Only The Status Of The Property, And Not Its Ultimate Disposition By The Divorce Court.

Husband does not, for the purposes of this Petition for Rehearing, contest this Court's holding that the parties intended the 1973 agreement to be binding, and that the agreement was unambiguous. Husband respectfully submits, however, that this Court has misinterpreted the agreement. The critical portion of the agreement states as follows:

> 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 [sic] or liens of the other, direct or indirect, and however derived.

Defendant's Exhibit 37 (emphasis added).

This Court held that the emphasized portion clearly indicated an intent that the agreement be binding and conclusive on any divorce court. 136 Utah Adv. Rep. at 49. The agreement does not, however, state that it is binding on any "court decision." It is only intended to be binding on those court decisions which give "presumptive effect to the status of marriage." In other words, the agreement prohibits the court from presuming, solely by reason of the marriage, that the property was community or marital property. The agreement only determines the status of the property as separate.

This argument is supported by Parkhurst v. Gibson, 573 A.2d 454 (N.H. 1990). The prenuptial agreement at issue in that case stated, among other things, that "[i]t is mutually declared that it is the intention of the parties to this agreement that by virtue of their prospective marriage neither one shall have nor acquire any right, title or claim in and to the real or personal estate of the other party . . . ." 573 A.2d at 456. The agreement did not however, specifically use

the words "divorce," "alimony," or "property settlement," but appeared to be directed at determining the status of the parties' property for inheritance purposes. The subject agreement in this case similarly does not specifically refer to divorce or to a property settlement in divorce, and should be read as only determining the status of the property as separate.

Husband does not contest, for the purposes of this Petition for Rehearing, that the 1973 agreement conclusively establishes the status of the property as separate. In Utah, the general rule is that "in appropriate circumstances, equity will require that each party retain the separate property brought to the marriage." Burke v. Burke, 733 P.2d 133, 135 (Utah 1987). By designating the property as separate, therefore, the 1973 agreement created a presumption that the property would remain the property of Wife. The trial court must treat the property as separate property. As with any separate property, however, the court can order one party to convey portions of his or her separate property to the other in order to achieve equity under the circumstances of the case. Id. Although the agreement mandates that the property be dealt with by a divorce court as separate property, nothing in the agreement can be read as prohibiting the divorce court from otherwise treating the property the same as any other separate property.

B. No Logical Or Legal Basis Exists To Give Greater Effect To A Post-Nuptial Agreement Than To A Property Settlement Agreement.

In Coleman v. Coleman, 743 P.2d 782 (Utah Ct. App. 1987), the court considered the effect to be given to a property settlement agreement executed in contemplation of a divorce. The court held as follows:

> [I]t is well recognized that a parties' stipulation as to property rights in a divorce action, although advisory and usually followed unless the court finds it to be unfair or unreasonable, is not necessarily binding on the trial court. It is only a recommendation to be adhered to if the court believes it to be fair and reasonable.

743 P.2d at 789 (citing Pearson v. Pearson, 561 P.2d 1080, 1082 (Utah 1987); Klein v. Klein, 544 P.2d 472, 476 (Utah 1975)).

It is not clear from the court's opinion in Coleman whether the property settlement agreement was executed prior to the commencement of the divorce action or during the pendency of the divorce proceedings. The distinction does not appear critical for the purposes of that decision.

In the instant action, in contrast, the court holds that if a property settlement agreement is executed at some unspecified earlier time, at a time when the parties are not immediately contemplating divorce but at a time when divorce is certainly foreseeable, the agreement becomes not merely advisory if "fair and reasonable," but conclusively binding

unless "unique and compelling" circumstances exist. This Court does not cite to any prior case law establishing such a distinction, and Husband is not aware of any.

Husband respectfully submits that no logical basis exists for giving greater effect to a postnuptial agreement (whether executed one year or twenty years before the divorce) than to a property settlement agreement. Logic would dictate that the pre-divorce (postnuptial) agreement be given less weight, not greater. A property settlement agreement is entered into with the contemplation that it will be enforced within a short period of time after execution. The parties are presumably aware of all the facts and circumstances which will be in existence at the time the agreement is enforced. The postnuptial agreement in this case, in contrast, was executed nearly fifteen years before enforcement was sought. There has been a vast and material change in circumstances subsequent to the execution of the agreement. Husband respectfully submits that there is no legal or logical reason for giving greater effect to the contract which was executed with less knowledge.[1]

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[1]Alternatively, this Court should adopt the standards for enforcement of a prenuptial (or postnuptial) agreement as set forth in Brooks v. Brooks, 733 P.2d 1044 (Alaska 1987). The court held that the following three criteria are generally considered in determining whether to enforce such an agreement:

> 1. Was the agreement obtained through fraud, duress or mistake, or misrepresentation or nondisclosure of material fact?

It is important to emphasize that Husband does not dispute, for purposes of this Point, that the 1973 agreement mandates that the trial court treat the designated properties as separate property. Once the property is properly labeled as either separate or marital, however, the trial court should be granted a latitude of discretion in dividing the property equal or greater to that applicable when dealing with a property settlement agreement.

Once it is determined that the property is separate, the following guidelines apply in determining whether it should be divided:

> Premarital property, gifts, and inheritances may be viewed as separate property, and in appropriate circumstances, equity will require that each party retain the separate property brought to the marriage. However, the rule is not invariable. In fashioning an equitable property division, trial courts need consider all of the pertinent circumstances. The factors generally to be considered are the amount and kind of property to be divided; whether the property was acquired before or during the marriage; the source of the property; the health of the parties; the

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2. Was the agreement unconscionable when executed?

3. Have the facts and circumstances changed since the agreement was executed, so as to make its enforcement unfair and unreasonable?

Brooks, 733 P.2d at 1049 (citing Scherer v. Scherer, 249 Ga. 635, 292 S.E.2d 662, 666 (1982)). The "unfair and unreasonable" test in the third factor is identical to that applied by Utah courts with respect to property settlement agreements. Coleman, 743 P.2d at 789.

> parties' standard of living, respective financial conditions, needs, and earning capacity; the duration of the marriage; the children of the marriage; the parties' ages at time of marriage and of divorce; what the parties gave up by the marriage; and the necessary relationship the property division has with the amount of alimony and child support to be awarded. Of particular concern in a case such as this is whether one spouse has made any contribution toward the growth of the separate assets of the other spouse and whether the assets were accumulated or enhanced by the joint efforts of the parties.

Burke v. Burke, 733 P.2d 133, 135 (Utah 1987) (footnotes omitted). The trial court did not have any reason to make findings on these issues, because it had already determined that the 1973 agreement was not enforceable and that all the property was marital property. The trial court should be permitted on remand to exercise its discretion in accordance with the principles set forth above.

POINT III

WIFE SHOULD BE GRANTED NO RELIEF WHERE SHE REMAINED IN CONTEMPT OF THE TRIAL COURT.

In its prior decision in this case, this Court held that Wife was required to "submit herself to the jurisdiction of the trial court and satisfy that court's concerns before she may exercise that right [to appeal]. 790 P.2d at 594. Wife failed to comply with this requirement. Although she did appear at a hearing, she remained in contempt of the trial court. This Court's second opinion should be vacated until and unless Wife

purges the contempt. Wife may and should be punished for her contempt even though the underlying order may be incorrect. See In re Contempt of Reeves, 112 Idaho 574, 733 P.2d 795 (Ct. App. 1987).

Wife failed to "satisfy" the trial court's concerns within the time frame previously set by this Court. The appeal should be dismissed.

CONCLUSION

Husband does not contest, for purposes of this Petition, this Court's holding that the 1973 agreement was intended to be binding by the parties. The agreement by its terms, however, only identifies the property as separate. Prior decisions of this Court and of the Utah Supreme Court provide that the trial court may, in the exercise of its discretion, require a party to make a conveyance of separate property when necessary to achieve equity.

Even under the "unique and compelling circumstances" test adopted by this Court, the evidence would support a finding that such circumstances existed.

The Court's opinion should be modified and the holding limited to determining that the 1973 agreement was intended to be binding between the parties. This Court should hold that the agreement determined the status of the property to be separate and should remand the case to the trial court to deal

with the property as separate property in accordance with prior decisions of this Court and the Utah Supreme Court.

Finally, the appeal should be dismissed because Wife did not bring herself into compliance with the trial court's order prior to the issuance of this Court's second opinion.

DATED this 12th day of July, 1990.

S. REX LEWIS and
LESLIE W. SLAUGH, for:
HOWARD, LEWIS & PETERSEN
Attorneys for Respondent

MAILING CERTIFICATE

I hereby certify that four true and correct copies of the foregoing were mailed to the following, postage prepaid, this 12th day of July, 1990.

Brian C. Harrison, for:
HARRIS, CARTER & HARRISON
3325 No. University Avenue
Suite 200
Provo, Utah 84604

Attorneys for Appellant

APPENDIX "A"

D'Aston v. D'Aston,

136 Utah Adv. Rep. 47 (Ct. App. June 14, 1990)

agreed upon.

In its findings of fact, the trial court determined that the initial two leases negotiated by Galaxy Advertising authorized the placement of the signs on specific sites which were the same locations occupied by the signs at the time the present parties executed the existing lease, and that the parties intended the lease to continue Reagan's right to maintain the signs only in their existing locations. Although the evidence is controverted, "we assume that the trial judge believed those aspects of the evidence and the inferences reasonably drawn from them that support his decision." *Redevelopment Agency*, 785 P.2d at 1122 (quoting *Brixen & Christopher, Architects v. Elton*, 777 P.2d 1037, 1042 (Utah Ct. App. 1989)). Under our standard of review, we will not set aside a trial court's findings unless they are against the clear weight of the evidence or we otherwise reach a definite and firm conviction that a mistake has been made, *Smith v. Linmar Energy Corp.*, 132 Utah Adv. Rep. 52, 53 (Ct. App. 1990), and we give deference to the trial court's findings and its opportunity to judge the credibility of the witnesses. Utah R. Civ. P. 52(a).

Having examined the record, we conclude that the trial court's findings have adequate evidentiary support and are not clearly erroneous. We, therefore, affirm its judgment.

Regnal W. Garff, Judge

WE CONCUR:
Judith M. Billings, Judge
Gregory K. Orme, Judge

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1. The 1971 leases described the locations as follows: (1) one location across from state road shed on highway, and (2) one location 300 feet south of state road shed on highway.

2. Reid stated that it was his intent to work out an agreement whereby they

> could keep the signs next to the highway and if he built or developed – well, we realized that if he came up with another use for the property that was more economically profitable for him, that at that point in time it might come about that we might have to remove the signs. But until that happened, or if he only developed part of it, or whatever, that we would like to have the ability to stay on the property until he had totally utilized the property .... My understanding is that if part of it were developed and a piece was left undeveloped, that you could relocate the sign.

Cite as
136 Utah Adv. Rep. 47

IN THE UTAH COURT OF APPEALS

Bruno D'ASTON,
Plaintiff and Appellee,
v.
Dorothy D'ASTON, et al.,
Defendant and Appellant.

No. 890050-CA
FILED: June 14, 1990

Fourth District, Utah County
Honorable Boyd L. Park

ATTORNEYS:

Brian C. Harrison, Provo, for Appellant

S. Rex Lewis and Leslie W. Slaugh, Provo, for Appellee

Before Judges Billings, Garff, and Orme.

OPINION

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*, 132 Utah Adv. Rep. 25 (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 conveyed 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

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]

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]

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).

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 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*, 131 Utah Adv. Rep. 28, 30 (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 should receive alimony.[7]

Judith M. Billings, Judge

WE CONCUR:

Regnal W. Garff, Judge

Gregory K. Orme, Judge

---

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 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").

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.

7. We need not consider the issue of whether the ersed the trial court's property distribution on other grounds.

Cite as
136 Utah Adv. Rep. 50

IN THE UTAH COURT OF APPEALS

STATE of Utah,
Plaintiff and Appellee,
v.
Vaughn HUMPHREY,
Defendant and Appellant.

State of Utah,
Plaintiff and Appellee,
v.
Harry Jamar Gordon,
Defendant and Appellant.

No. 890424-CA

No. 890130-CA
FILED: June 14, 1990

Third District, Salt Lake County
Honorables James S. Sawaya and Frank G. Noel

ATTORNEYS:

Elizabeth Bowman and Elizabeth Holbrook, Salt Lake City, for Appellant Vaughn Humphrey

James C. Bradshaw and Elizabeth Holbrook, Salt Lake City, for Appellant Harry Jamar Gordon

R. Paul Van Dam and Sandra Sjogren, Salt Lake City, for Appellee State of Utah

Before Judges Billings, Garff, and Greenwood.

OPINION

BILLINGS, Judge:

We have consolidated two criminal, interlocutory appeals for decision as they present the identical legal issue. Appellants Vaughn Humphrey ("Humphrey") and Harry Jamar Gordon ("Gordon") appeal from two separate decisions of a district court wherein the trial judge concluded the district court did not have jurisdiction to review defendants' bindover orders from circuit court. We affirm.

Humphrey was charged with sixteen second or third degree felonies. Gordon was charged with manslaughter, a second degree felony. In both cases, the circuit court held preliminary hearings and bound defendants over for trial. Both defendants were ultimately arraigned before the district court.

Subsequently, Humphrey and Gordon each

APPENDIX "B"

Findings of Fact and Conclusions of Law

S. REX LEWIS (1953) and
KEVIN J. SUTTERFIELD (3872), for:
HOWARD, LEWIS & PETERSEN
ATTORNEYS AND COUNSELORS AT LAW
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Our File No. 17,603

Attorneys for Plaintiff

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

BRUNO D'ASTON,	:	
Plaintiff,	:	
vs.	:	**FINDINGS OF FACT AND CONCLUSIONS OF LAW**
DOROTHY D'ASTON,	:	
Defendant.	:	
LISA ASTON and ERIC ASTON,	:	Civil No. CV 86 1124
Co-defendants.	:	Judge Ray M. Harding

Plaintiff's Orders to Show Cause against co-defendant Eric Aston and plaintiff's Motion for an Order directing the delivery of certain personal property to plaintiff came on regularly for hearing before the Hon. Ray M. Harding of the above-entitled Court on January 8, 9 and 22, 1990. The plaintiff was present and represented by his counsel, S. Rex Lewis and Kevin J. Sutterfield, co-defendant Eric Aston was present and represented by his counsel,

Keith W. Meade. The Court, having received evidence and heard testimony of the parties and other witnesses, considered the memoranda of the parties, heard argument of counsel, having issued its Memorandum Decision dated January 31, 1990, being fully advised in the premises, and good cause appearing therefor, now makes and enters the following:

FINDINGS OF FACT

1. The Court herein entered a Decree of Divorce on or about December 15, 1988, whereby it awarded various personal property to the plaintiff, including various items which plaintiff alleges were removed from his car and his motor home on or prior to April 30, 1986.

2. The divorce decree also awarded to plaintiff a one-half interest in various personal property located at the marital home of 1171 No. Oakmont, Provo, Utah ("marital home").

3. The Decree of Divorce awarded the marital home to defendant Dorothy D'Aston.

4. The Decree of Divorce also awarded to the plaintiff other personal items, including cameras, lenses, carrying cases, and other optical equipment.

5. Prior to the separation of plaintiff and defendant Dorothy D'Aston, plaintiff was involved for numerous years in the buying, selling, and collecting of coins, rare coins, and other similar items.

6. On many of plaintiff's rare coins, he stamped the rim above the head with the letter "A."

7. Shortly after the plaintiff's personal property disappeared in April, 1986, plaintiff was able to make a detailed list for the police department from his memory of many

of the missing items. Some of those items, while not exceptionally rare, would not be expected to appear in an average coin shop.

8. On March 15, 1989, Eric Aston made and executed a Bill of Sale to Lloyd Ross Engle and Jan Chapman Engle to various items of personal property located in the marital home. Eric Aston assisted in the sale of the real property and accepted a quit claim deed from defendant Dorothy D'Aston aka Dorothy Aston on March 14, 1989. On the same date, Eric Aston executed a warranty deed to the Engles for the sale of the marital home. At the closing of the sale of the property on March 14, 1989, Eric Aston received two trust account checks from Provo Land Title Company, one for the sum of $58,144.44, and one for the sum of $58,144.48, for a total cash receipt of $116,288.92.

9. On April 14, 1989, this Court issued its Writ of Execution and Assistance. Pursuant to that Writ, John Sindt, a constable of Salt Lake County, took various items into his possession on April 29, 1989, from co-defendant Eric Aston.

10. The various property identified as Exhibit 7 at the hearing hereof obtained by Constable Sindt, was previously located at co-defendant Eric Aston's business known as The Gold Connection at approximately 21st South 700 East, Salt Lake City, Utah.

11. Many coins identical to plaintiff's missing coins, even those which were unusual, unexplainably appeared in Eric Aston's coin shop. Several of the coins reported missing by plaintiff were stamped with an "A." Identical coins bearing an "A" were found among the coins in co-defendant Eric Aston's inventory.

12. Though given an opportunity, co-defendant Eric Aston has not adequately explained why he had so many coins identical to plaintiff's missing coins.

13. Within the past several months, co-defendant Eric Aston has made significant purchases, including inventory for his coin shop, several automobiles, and two separate condominiums. Co-defendant Eric Aston has not plausibly explained the manner and source of the funds sufficient to purchase the inventory for his coin shop, the automobiles, and property he has recently acquired.

14. The Court finds and reasonably infers that much of the capital for co-defendant Eric Aston's recent purchases came from the sale of plaintiff's coins, many of which are still missing.

15. The Court also finds and reasonably infers that co-defendant Eric Aston had several coins in his possession identical to plaintiff's missing coins because those coins were actually taken by co-defendant Eric Aston.

16. The parties have stipulated that co-defendant Eric Aston claims no interest in the cameras, lenses, cases, and optical equipment found in co-defendant Eric Aston's store, and that the Court can enter an order awarding the same to plaintiff, which items were received by plaintiff at the time of the hearing herein.

17. The parties have also stipulated that plaintiff makes no claim to various dimes, pennies, nickels, quarters, one-half dollars, dollars, and panda bullion which can be awarded to co-defendant Eric Aston and were received by him at the time of the hearing herein.

18. Plaintiff has met his burden of proving ownership to many of the items entered as evidence herein. Plaintiff is the owner of all coins which bear an "A" stamp, including all of the coins now held by the Court which bear an "A" stamp. A list of the "A" stamped coins held by the Court is as follows:

1892 P	Morgan Silver Dollar
1890	Carson City Silver Dollar
1879	Metric Proof U. S. Dollar
1871 S	U. S. $20 Gold Coin - Liberty
1914 S	U. S. $20 Gold Coin - St. Gaudins
	1 set Diving Goose Canadian Dollar
1881 O	Morgan Silver Dollar
1890 CC	Morgan Silver Dollar
1922 D	Peace Dollar
1923 S	Peace Dollar
1924 S	Peace Dollar
1934 D	Peace Dollar
1896 S	U. S. $20 Gold Coin - Liberty
1904 S	U. S. $20 Gold Coin - Liberty

19. Plaintiff is also the owner of the items held by the Court which match those items listed on plaintiff's first list of stolen property which was given to the police. These items on plaintiff's first list of stolen property are as follows:

Complete set of coins of The Golden West (36 coins in set plus 2 Calif. coins).

U. S. Gold Dollars

1	1849 - AU
2	1853 - AU

$2 1/2 U. S. Gold

1	1905 - UNC
1	1915 - AU
1	1911 - D

$10 U. S. Gold

1	1910 - D - UNC
1	1915 - UNC

$20 U. S. Gold

1	1871 - AU
1	1897 - BU

1 1914 - S - BU
1 1925 - BU
1 18.5 gram Alaska gold nugget

2,013 oz. silver bullion (1-oz. rounds; 5-oz. bars; 10-oz. bars; 100-oz. bars)

187 Libertads (1982, 1983, 1984, 1985)

Canada Dollars

13 1958 - BU
20 1962 - BU
45 1963 - BU
120 1964 - BU
137 1965 - Type 1, BU, Type 2 BU, Type 3 BU, Type 4 BU and Type 5 BU
60 1966 - LB - BU
1 1967 - D.G. 45° - BU
120 1967 - BU
6 1967 - Canada proof sets with $20 Gold
470 1984 - proof dollars and case

U. S. Proof & Gem Silver Dollars

1 1879 - Metric proof

5 coins of 13 coin Gem set MS - 65 - CC - dollars consisting of 1-1879; 1-1882; 1-1883; 1-1884; and 1-1890.

84 Common dates BU - dollars
60 Common dates CIRC - dollars

Miscellaneous Gold

6 1-oz. - K - Krugeran.
1 1-oz. - M - Mapleleaf.
3 Mex - 2 Peso
3 Mex - 2 1/2 Peso
2 Mex - 1947 - 50 Peso - BU

Stamps - one book.

20. Plaintiff's later inventories do not appear to have the same reliability as the original list of stolen property.

21. Plaintiff is the owner and should receive any items held by the Court which match the list of consignment items as awarded to plaintiff in the divorce decree, as listed on Exhibit 24 thereof and which are a part of Exhibit 7 and also described in Exhibit 57. The bullion which was a part of Exhibit 7 is also a part of the bullion described in Exhibit 57 at the trial and all of these items are to be returned to plaintiff.

22. Co-defendant Eric Aston is the owner of the items not included in the above listing and any furniture which is now in his possession at his store.

23. Plaintiff has incurred costs of court and is entitled to be awarded them from the co-defendant Eric Aston.

The Court having made and entered its Findings of Fact, now makes and enters the following:

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties to and subject matter of this action.

2. The Court should approve the stipulations of the parties made at the hearing regarding ownership of cameras, lenses, cases, and optical equipment to plaintiff and various coins to the co-defendant Eric Aston.

3. Plaintiff should be awarded all coins which bear an "A" stamp, including all of the coins now held by the Court which bear an "A" stamp, and all items held by the Court which match those items listed on plaintiff's first list of stolen property which was given to the police.

4. Plaintiff should also receive any items held by the Court which match the list of consignment items as awarded to plaintiff in the divorce decree, as listed on Exhibit 24 thereof and which are a part of Exhibit 7 and also described in Exhibit 57.

5. Plaintiff should be awarded all of the bullion which was a part of Exhibit 7 herein, and which was described in Exhibit 57 herein.

6. All of the above-described items should be ordered returned to the plaintiff.

7. Co-defendant Eric Aston should be awarded any items not included in the above listing and any furniture which is now in his possession at the store.

8. Plaintiff should be awarded costs of court.

9. Co-defendant Eric Aston should not be held in contempt for his actions in assisting in the sale of the marital home and executing the bill of sale on the various personal property contained therein.

DATED this 9 day of ~~February~~ March, 1990.

BY THE COURT

RAY M. HARDING
DISTRICT COURT JUDGE

APPROVED AS TO FORM:

KEITH W. MEADE, ESQ.
Attorney for Co-defendant Eric Aston

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was faxed to the following, this 8 day of February, 1990.

Keith W. Meade, Esq.
525 East 100 South
Fifth Floor
P.O. Box 11008
Salt Lake City, Utah 84147-0008

Emily Laskoll
SECRETARY

APPENDIX "C"

Order and Decree

S. REX LEWIS (1953), for:
HOWARD, LEWIS & PETERSEN
ATTORNEYS AND COUNSELORS AT LAW
120 East 300 North Street
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Our File No. 17,603

Attorneys for Plaintiff

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

BRUNO D'ASTON,	:	
Plaintiff,	:	**ORDER AND DECREE**
vs.	:	
DOROTHY D'ASTON,	:	
Defendant.	:	
LISA ASTON and ERIC ASTON,	:	Civil No. CV 86 1124
Co-defendants.	:	Judge Ray M. Harding

Plaintiff's Orders to Show Cause against co-defendant Eric Aston and plaintiff's Motion for an Order directing the delivery of certain personal property to plaintiff came on regularly for hearing before the Hon. Ray M. Harding of the above-entitled Court on January 8, 9 and 22, 1990. The plaintiff was present and represented by his counsel, S. Rex Lewis and Kevin J. Sutterfield, co-defendant Eric Aston was present and represented by his counsel,

Keith W. Meade. The Court, having received evidence and heard testimony of the parties and other witnesses, considered the memoranda of the parties, heard argument of counsel, having issued its Memorandum Decision dated January 31, 1990, being fully advised in the premises, good cause appearing therefor, and having previously entered its Findings of Fact and Conclusions of Law, now makes and enters the following:

ORDER AND DECREE

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. The stipulations of the parties made at the hearing herein regarding ownership of cameras, lenses, cases, and optical equipment to plaintiff and various coins to co-defendant Eric Aston is hereby approved with each party awarded ownership of those items.

2. Plaintiff is the owner of all of the coins which bear an "A" stamp, including all of the coins now held by the Court which bear an "A" stamp, and is the owner of the items held by the Court which match those items listed on plaintiff's first list of stolen property which was given to the police, more particularly described as follows:

"A" Stamped Coins:

1892 P	Morgan Silver Dollar
1890	Carson City Silver Dollar
1879	Metric Proof U. S. Dollar
1871 S	U. S. $20 Gold Coin - Liberty
1914 S	U. S. $20 Gold Coin - St. Gaudins
	1 set Diving Goose Canadian Dollar
1881 O	Morgan Silver Dollar
1890 CC	Morgan Silver Dollar
1922 D	Peace Dollar
1923 S	Peace Dollar
1924 S	Peace Dollar
1934 D	Peace Dollar
1896 S	U. S. $20 Gold Coin - Liberty
1904 S	U. S. $20 Gold Coin - Liberty

Plaintiff's First List of Stolen Property:

Complete set of coins of The Golden West (36 coins in set plus 2 Calif. coins).

U. S. Gold Dollars

1	1849 - AU
2	1853 - AU

$2 1/2 U. S. Gold

1	1905 - UNC
1	1915 - AU
1	1911 - D

$10 U. S. Gold

1	1910 - D - UNC
1	1915 - UNC

$20 U. S. Gold

1	1871 - AU
1	1897 - BU
1	1914 - S - BU
1	1925 - BU
1	18.5 gram Alaska gold nugget

2,013 oz. silver bullion (1-oz. rounds; 5-oz. bars; 10-oz. bars; 100-oz. bars)

187 Libertads (1982, 1983, 1984, 1985)

Canada Dollars

13	1958 - BU
20	1962 - BU
45	1963 - BU
120	1964 - BU
137	1965 - Type 1 BU, Type 2 BU, Type 3 BU, Type 4 BU and Type 5 BU.
60	1966 - LB - BU
1	1967 - D.G. 45° - BU
120	1967 - BU

6 1967 - Canada proof sets with $20 Gold
470 1984 - proof dollars and case

U. S. Proof & Gem Silver Dollars

1 1879 - Metric proof

5 coins of 13 coin Gem set MS - 65 - CC - dollars consisting of 1-1879; 1-1882; 1-1883; 1-1884; and 1-1890.

84 Common dates BU - dollars
60 Common dates CIRC - dollars

Miscellaneous Gold

6 1-oz. - K - Krugeran.
1 1-oz. - M - Mapleleaf.
3 Mex - 2 Peso
3 Mex - 2 1/2 Peso
2 Mex - 1947 - 50 Peso - BU

Stamps - one book.

3. Plaintiff should receive delivery and possession of all items held by the Court which match the list of consignment items awarded to plaintiff in the divorce decree, as listed on Exhibit 24 thereof, and which are a part of Exhibit 7 herein and also described in Exhibit 57 herein. These consignment items are included in the items described in paragraph 2 above.

4. Plaintiff is the owner of all the bullion which was part of Exhibit 7 herein as described in Exhibit 57 herein.

5. Plaintiff is hereby awarded court costs in the amount of $3039.70.

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that co-defendant Eric Aston is awarded the items retained by the Court not included in the above listing and any furniture which is now in his possession at his store.

DATED this 9 day of ~~February~~ March, 1990.

BY THE COURT

RAY M. HARDING
DISTRICT COURT JUDGE

APPROVED AS TO FORM:

KEITH W. MEADE, ESQ.
Attorney for Co-defendant Eric Aston

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to the following, postage prepaid, this 15 day of February, 1990.

Keith Meade
525 East 100 South
5th Floor
Salt Lake City, UT 84147

Emily Caskell
SECRETARY

APPENDIX "D"

D'Aston v. D'Aston,

790 P.2d 590 (Utah Ct. App. 1990)

[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 re-*flects 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 con-*tempt 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 243, 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 ..."

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-

APPENDIX "E"

Order

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 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