1968

Mary Ireta Crofts v. Josiah Hoyt Crofts : Appellant's Brief

Utah Supreme Court

IN THE SUPREME COURT
of the
STATE OF UTAH

MARY IRETA CROFTS,
Plaintiff and Appellant,

vs.

JOSIAH HOYT CROFTS,
Defendant and Respondnt.

No. 11165

APPELLANT'S BRIEF

Appeal from the Declaratory Judgment of the Sixth Judicial District Court for Garfield County, Utah
Honorable Ferdinand Erickson, Judge.

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NATURE OF THE CASE

This is an action for divorce, in which Appellant seeks a review and reversal by the Utah Supreme Court of a Declaratory Judgment entered herein by the Sixth District Court for Garfield County, Utah, on a Petition filed by Appellant for an interpretation of the Decree of Divorce entered herein and for an Accounting by the Respondent.

DISPOSITION BY THE SIXTH DISTRICT COURT FOR GARFIELD COUNTY, UTAH

The lower Court entered a Declaratory Judgment by which it determined (a) that Respondent owed Plaintiff $4,563.84; (b) that the $10,000.00 awarded Appellant by the Decree of Divorce was in lieu of all other interests of Appellant in any property including the rights of the parties in a home in Salt Lake City which had been sold and a tract of land in Panguitch, Utah; (c) that said $10,000.00 amount was payable in installments at such

time as there were actually distributed to and received by Respondent profits from the sale of business assets and that interest did not accrue prior to actual receipt by Respondent of such amounts and that the said $10,000.00 awarded was not a judgment bearing interest; and (d) that the Decree of Divorce insofar as it pertained to the equities of the parties in the home property at Panguitch was to be construed to call for a division and distribution equally between the parties only after all costs of sale and all outstanding indebtednesses against the residence had been fully satisfied.

NATURE OF RELIEF SOUGHT ON APPEAL

The Appellant seeks to have the Utah Supreme Court reverse the Declaratory Judgment of the lower Court in connection with the disallowance by the lower Court of interest on the $10,000.00 amount awarded to Appellant, the determination of the lower Court with respect to the balance due thereon to the Appellant, including the allowance by the said Court of credits thereon to which the Respondent was not entitled, the holding of the lower Court with respect to "equities" in the Panguitch home property of the parties, and the failure and refusal of the lower Court to require Respondent to account to Appellant and to supply her with data covering sale of business assets and receipts of profits from business interests.

STATEMENT OF FACTS

Appellant brought an action in October, 1962, in the Sixth Judicial District Court for Garfield County, Utah,

seeking a divorce from Respondent, a division of properties, child custody, support money and alimony, and attorney's fees (R. 1-2). The parties signed a General Appearance of Defendant, Waiver and Agreement dated October ....., 1962 (R. 3, 4, 5) and after the case was heard by the Court on October 16, 1962, (R. 6 to 28, both inclusive), there was filed on Nov. 5, 1962, a General Appearance of Defendant, Waiver and Amended Agreement (R. 29, 30, 31) dated October 16, 1962. Findings of Fact and Conclusions of Law (R. 35, 36, 37) and a Decree of Divorce (R. 38, 39, 40) were filed November 5, 1962, bearing date of October 16, 1962. The said Decree of Divorce is set forth verbatim as an Appendix at the end of the instant Brief.

By its Decree of Divorce, the lower Court, after dissolving the bonds of matrimony and awarding child custody to Appellant, continued as follows (R. 38, 39):

> "IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Defendant shall assume, pay, and discharge all of the outstanding family obligations of the parties hereto, including the outstanding note and mortgage upon the home property owned by the parties."

The home property referred to was and is a certain home at Panguitch, Utah, owned by the parties as joint tenants, on which one and only one mortgage debt existed at the time of said Decree, this being in favor of Federated Security Life Insurance Company (R. 16, 96, 294).

Following provisions relative to alimony and support money, the Court decreed as follows (R. 39):

> "IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiff is awarded as a permanent, complete and final settlement of her rights in the property of the Defendant the total sum of $10,000.00, which sum shall be paid by the Defendant to the Plaintiff out of profits arising from business interests held by the Defendant and which profits are actually distributed and received by the Defendant and shall be immediately due and payable out of the sale of business assets of the Defendant to third parties and actual receipt by the Defendant of said sale proceeds. Said amount shall be payable at the rate of 50 per cent of the gross sales proceeds until said $10,000.00 has been paid in full. Further, the Defendant shall have the option of prepaying any part of the amount provided herein."

Then followed provisions in the Decree of Divorce relative to an automobile, furniture and furnishings, and the possession, use and occupancy of the Panguitch home, described as containing 4.2 acres, more or less, (R. 39, 40) and then followed this provision (R. 40):

> ". . . In the event the home is sold to a third party, the equities realized from the sale of said property are to be equally divided between the Plaintiff and the Defendant. The home property shall be continued in joint ownership between the Plaintiff and Defendant until said ownership is terminated by a sale to a third party as is herein provided."

Appellant's Petition for Interpretation of Decree of Divorce and to Have Defendant Render an Accounting (R. 42, 43, 44, 45) sought an interpretation by the Court of the Decree of Divorce and that it determine (a) that

in view of the fact that Respondent was ordered to pay all outstanding family obligations, including the outstanding note and mortgage upon the home property, that said mortgage debt should not be deductible from gross sale proceeds of the Panguitch home in making a division of such proceeds between the parties; (b) that Plaintiff was entitled to eight (8) per cent interest on the $10,000.00 awarded to her by the Decree of Divorce from the date of the entry thereof until said sum was paid; and (c) that Respondent be ordered to show cause why he should not account to Appellant for profits arising from business interests held by Respondent and distributed to him or subject to distribution upon his request and for the sale of any business interests of Respondent, including the sale price, the proceeds received, and any proceeds not received but payable to him. An Order to Show Cause and Setting Time for Hearing (R. 46, 47, 48) was issued and served pursuant to said Petition.

Various proceedings were then conducted and hearings held, the record and transcripts of which appear in the Record on Appeal (R. 49 to 311, both inclusive) and there was then entered an AMENDED DECISION (R. 312, 313, 314, 315) dated Nov. 29, 1967. The original Decision was not filed and of course is not a part of the Record on Appeal. The Court then entered its Findings of Fact and Conclusions of Law (R. 316, 317, 318, 319, 320) and its Declaratory Judgment (R. 321, 322, 323) from which Judgment the instant appeal was taken by Appellant.

ARGUMENT

POINT I

THE LOWER COURT ERRED IN HOLDING THAT THE $10,000.00 SUM AWARDED APPELLANT BY THE DECREE OF DIVORCE WAS PAYABLE IN INSTALLMENTS AT SUCH TIME AS THERE WERE ACTUALLY DISTRIBUTED TO AND RECEIVED BY THE RESPONDENT PROFITS FROM THE SALE OF BUSINESS ASSETS, THAT INTEREST THEREON DID NOT ACCRUE PRIOR TO ACTUAL RECEIPT BY RESPONDENT OF ANY OF SUCH AMOUNTS, AND THAT SAID $10,000.00 AWARD WAS NOT A JUDGMENT.

By its Declaratory Judgment, the Court stated that the $10,000.00 award was payable solely out of "profits from the sale of business assets" received by the Respondent (R. 322). This obviously and flagrantly in conflict with the Decree of Divorce the provisions of which are quoted in the Statement of Facts above on this point and a copy of which is attached hereto as an Appendix. Certainly, it is true that under the guise of interpreting a Decree, the Court is not permitted to completely revise and alter the same, but this is exactly what the lower Court has done on both this and other points and provisions.

In connection with the question as to whether or not the $10,000.00 award was a judgment, bearing interest from its date at 8% per annum we submit that this amount as set forth in the Decree of Divorce was and is a sum certain and is a judgment bearing interest from its date under the Laws of Utah. The language of the Decree is significant:

> "IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiff is awarded as a permanent and final settlement of her rights in the property of the Defendant, the total sum of $10,000.00. . . ." (R. 39).

At this point, could there be any doubt that this was and is a judgment bearing interest? Additional language followed, but it merely did two things: (1) it specified out of what funds or sources the judgment was to be paid, namely, from all "profits arising from business interests held by the Defendant" and 50% of gross sales proceeds "out of the sale of business assets of the Defendant; and (2) it gave the Defendant the "option of prepaying any part of the amount provided herein." (R. 39). These provisions did not restrict, modify or lessen the effect of the award as a sum certain, which would bear interest at 8% under Utah Statutes.

Rule 54 of the *Utah Rules of Civil Procedure* provides as follows:

> "*Definition*: *Form*. 'Judgment' as used in these Rules includes a decree and any order from which an appeal lies. A judgment need not contain a recital of pleadings the report of a master, or the record of prior proceedings."

In the case of *Robinson v. Salt Lake City*, 37 Utah 520, 109, 817, a judgment is defined as follows:

> "The statute does not require a judgment to be in any particular form. Ordinarily a judgment is sufficient if by the use of proper language it is stated what the prevailing party shall receive and what the losing party is required to do, pay

> or discharge, and in that way adjudicates and disposes of the matters in controversy."

Section 15-1-4, *Utah Code Annotated* 1953, provides as follows:

> "*Interest on judgments.* . . . Any judgment rendered on a lawful contract shall conform thereto and shall bear the interest agreed upon by the parties, which shall be specified in the judgment; other judgments shall bear interest at the rate of eight per cent per annum."

In *Arnold v. Arnold*, 140 NW2d 874, at page 877 (5) the Iowa Court held:

> "We are satisfied fixed awards of money for child support, alimony and property settlement draw interest at five per cent per annum from date of judgment, or in case of specific periodic payments, from date each such payment becomes due and owing . . (authorities) . . Furthermore, this rule applies even though the judgment itself fails to make reference to the matter of interest. Page 878(9) "IV: Having determined a judgment or decree in a divorce action awarding money in a sum or sums certain or capable of ascertainment from the judgment or decree, draw interest until paid. We proceed next to a consideration of the effect an appeal may have upon right to such interest."

The Decree in the instant case provides a sum certain and then merely continues to provide for payment out of certain sources. It does not make the judgment payable in installments and in fixed periodic dates as was done with respect to the alimony and support money

awarded. It is somewhat similar to a demonstrative legacy which Words and Phrases, Volume 12, page 68, defines as follows:

> "A 'demonstrative legacy' is one given with reference to a particular fund only for purposes of pointing out a convenient method of payment and wherein legatee will not be disappointed though the fund totally fails. Probate Code Sec. 161. In re Cline's Estate, 155 P.2d 390, 393, 67 Cal. App. 2d 800."

One of the most important and significant provisions of the Decree of Divorce with respect to this question is found in the provision that the defendant shall have *the option of prepaying any part of the amount provided herein* (R. 39). What possible reason could there be for this provision in favor of the Respondent other than to enable him to halt the running of interest on the $10,000.00 awarded Appellant? If that provision has any purpose behind it, and it must be assumed that it was not included for the purpose of being meaningless, then it was to enable Respondent to avoid further interest by "prepaying" so that he could use any funds available (and not merely those from business profits or from 50% of gross sales proceeds).

The lower Court failed utterly to distinguish between a property settlement award and an award of alimony or support money payable in periodic installments. Certainly, the alimony and support money amounts did not draw interest at least until they matured. The cases holding that interest does not apply on awards in divorce

cases are limited insofar as we can determine, to situations involving periodic installments due as alimony or support money. But that is entirely different from a property settlement award and/or an award of alimony in gross and the courts have so held. The $10,000.00 amount is not even alimony in gross, which clearly would bear interest. It is more than that — it is a settlement and award of Plaintiff's interest in her husband's property settlement and is not alimony.

We are fully cognizant that the Utah Supreme Court has held in *Cole vs. Cole* (1942) 101 Utah 355, 122 P2d 201, that periodic alimony and support money installments do not bear interest until due. This part of the ruling in said case is limited to such items payable in installments and is so construed in being cited in 33 ALR2d 1457. It is significant and interesting to note that in the *Cole* case, the Court goes on to discuss a property settlement award and uses this language:

> "On May 19, 1936, the decree granting Marguerite D. Cole the sum of $1,037.50, being one-half of the value of the community property was entered. The first payment in the amount of $250, was not made until January 19, 1938. Subsequent payments were made as heretofore set forth. The amount having been fixed by decree of the court, interest should be allowed from the date of the decree to the date the checks were delivered. . . ."

In the Decree in the *Cole* case, nothing was said about interest. A judgment automatically bears interest under the Utah Code. See 30 *Am. Jur* (*Interest*) Sec. 24, p. 22, which states that under such a statute, interest

will be applied or implied although the judgment itself is silent on the point.

Another Utah case of importance in our situation is *Beesley v. Badger*, 66 Utah 194, 240 P. 458, in which the Court considered the Utah Statutes relative to whether or not a divorce decree providing for installment payments of alimony constituted a lien against the property of the person required to pay. After quoting the Statute applicable to judgment liens, the Court held:

> "When a divorce is granted and the husband ordered to pay alimony or to support minor children or both, and the decree itself does not declare or impress a lien to secure such payments, then, by force of the statute relating to judgments in general, such decree or judgment from the filing and docketing thereof becomes and has all the force and effect of a lien to the same extent as an ordinary judgment for money, when the decree for alimony is in a gross sum, though payable partly or wholly in future installments, and when not in a gross sum but, as here, in installments for an indefinite period, the decree is a lien securing payment of all due and unpaid installments, but not of installments to become due in the future. By the weight of authority, and as we think the better reason, although there are cases to the contrary, a decree for alimony in a gross sum as well as to past due and unpaid installments stands upon the same footing as ordinary money judgments. . . ."
>
> . . ."A judgment or decree awarding alimony in a gross sum though payable in future installments, is nevertheless definite and certain as to the sum

> of money to be paid. So is a decree as to past-due and unpaid installments . . ."

If the Judgment in the *Beesley* case constituted a lien, then certainly a property settlement judgment fixing a certain sum as being due Appellant, regardless of sources out of which it is to be paid and particularly where the judgment debtor has a right of prepayment, is a judgment constituting a lien and bearing interest under the Utah Code. From the standpoint of justice, it should be held to be such a judgment, particularly where, as in our instant case, the Defendant retained all of the business property. The award to Appellant represented her share in that profit-producing business property, which was kept as an integrated mass for Respondent's benefit. From this, he would receive all benefits and profits, and Appellant's only benefit from it was the accrual of interest on the judgment due her.

POINT II

THE LOWER COURT ERRED IN ADJUDICATING THAT THE DECREE OF DIVORCE BE DETERMINED TO MEAN THAT THE EQUITIES IN THE HOME AT PANGUITCH, UTAH, WERE TO BE DIVIDED AND DISTRIBUTED EQUALLY BETWEEN THE PARTIES ONLY AFTER ALL COSTS OF SALE AND ALL OUTSTANDING INDEBTEDNESS AGAINST SAID HOME WERE FULLY SATISFIED.

It is impossible for Appellant to determine the meaning of the lower Court's Declaratory Judgment on the question of equities in the Panguitch home. We quote from said Judgment (R. 322, 323):

> "D. IT IS FURTHER ADJUDICATED that the Decree of November 5, 1962, is interpreted and

> determined to mean that the equities in the home are to be divided and distributed equally between the parties only after all costs and expenses of sale and all outstanding indebtedness against the residence have been fully satisfied."

Supposedly, the Declaratory Judgment was an interpretation of the Decree of Divorce, but we feel that the Declaratory Judgment itself needs to be interpreted. In the first place, it uses the word "indebtednesses" which would refer to more than one debt, but the Decree (R. 38, 39) refers to only one note and mortgage and uses this language:

> "IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Defendant shall assume, pay and discharge all of the outstanding family obligations of the parties hereto, including the outstanding note and mortgage upon the home property owned by the parties."

By its Declaratory Judgment, the lower Court has, once again, completely changed the provisions of the Decree. Th words "outstanding note and mortgage" have been changed to "indebtednesses" and, if we understand the Court correctly, the Appellant is to be made to stand half of not only the "outstanding note and mortgage upon the home property" but also half of "all outstanding indebtednesses against the residence" even though the Respondent was ordered to assume, pay and discharge all of the debts, including the "outstanding note and mortgage upon the home property owned by the parties."

The record shows that there was only one mortgage debt on the home property when the Decree was signed

and entered, that being due Federal Security Insurance Company. (R. 16, 96, 294) and the Court itself at page 96 of the Record on Appeal referred to "the existing debt" thereon. However, Respondent has now sought to introduce a new, separate and distinct "encumbrance" against the home in the form of a promissory note signed by the parties to J. E. Crofts & Sons (R. 85, 86) and which was not secured by a mortgage. Indeed, Respondent through his counsel stipulated (R. 294) that when the divorce was granted there was only one mortgage against the home property filed of record and that this was to Federated Security. He then contended, however, that there was a note signed by the parties to J. E. Crofts and Sons, which was for materials and labor that went into the home. Certainly, it would torture the Decree beyond recognition to hold, as apparently the lower Court has now done, that this was a mortgage on the home property, particularly in view of the fact that the Decree referred to only one mortgage, being the one to Federated Security Insurance Company, and the Respondent was ordered to pay all family debts, including that note and mortgage. One of the debts he was thus and thereby ordered to pay was the note to J. E. Crofts and Sons, but now he seeks to have the Appellant pay half of the same, and by using the word in the plural sense (indebtednesses) it appears that the lower Court, either intentionally or inadvertently, has gone along with his contentions.

The Declaratory Judgment is uncertain, incomplete and indefinite in that it does not spell out exactly what

is being referred to in this connection. Nor does it state when or in what manner "equities" are to be determined. These questions present themselves:

(1) In view of the order that Respondent pay all debts, including the mortgage on the family home at Panguitch, are "equities" to be determined by deducting from the gross sale price when the property is sold the costs of sale? If so, then after making such deduction, the net proceeds would be divided equally since the property is held by the parties as joint tenants.

(2) When the home is sold, are "equities" to be determined by deducting at that time the costs of sale and all of the balance *then* remaining due Federated Security Insurance Company on its mortgage loan? We assume that Respondent has kept up the payments to Federated and that the present balance is substantially less than the amount due in October and November, 1962. On the assumption that he continues to make the payments to Federated, the mortgage debt will be still less when the property is sold.

We cannot believe that Respondent seriously contends that the obligation to J. E. Crofts and Sons should be deducted in arriving at "equities." Actually, this debt, one of those assumed by Respondent and which he agreed to pay and discharge, matured April 30, 1966 (Exhibit "C" following R. 91) and we assume it has been paid pursuant to the Decree of Divorce, but whether or not it has been paid, it is clearly a debt Respondent was ordered to pay as one of "all of the outstanding family obligations" and certainly was not a mortgage debt against the home but was merely an unsecured note of the parties.

We cite *Pierson v. Ball*, 189 So. 679, 138 Fla. 104, and *Des Moines Joint Stock Land Bank v. Allen*, 161 NW 912, 220 Iowa 448, in connection with this point.

The Declaratory Judgment is defective in not determining WHEN or how "equities" are to be determined. We feel that point must be cleared up. There are three possibilities, namely, (1) only costs of sale are to be deducted in determining "equities" in the home; (2) "equities" are to be determined by deducting from gross sale proceeds the costs of sale and the amount due Federated *when* the Decree was entered; or (3) "equities" are to be determined by deducting from gross sale proceeds from the home property the costs of sale and the balance remaining due Federated Security Insurance Company *at the time of sale*. We submit that the first possibility is the correct one since Respondent was ordered to pay the mortgage debt. If the home had been sold the day after the Decree was entered, it was Respondent's duty to pay the mortgage debt in full. To hold otherwise would mean that Appellant would be paying one-half of a debt Respondent was ordered to pay. The Court's direction that he pay "all" of the debts, including this one, would thereby become meaningless.

Even if the "equities' 'are determined at the time of sale by deducting costs of sale and the balance remaining due *at that time* to Federated it will mean that Appellant is being required thereby to pay one-half of the said remaining debt and that the language of the Decree is being ignored because Respondent is not being required to pay

all of the family obligations, including this one. The word "equities" must be interpreted in the light of all provisions in the Decree. It is fundamental that the Court must give effect to each and every provision in the Decree, in the light of and with relationship to each other. If this is done, then the lower Court's interpretation, we submit, is obviously incorrect.

POINT III

THE LOWER COURT ERRED IN DETERMINING THAT THE AMOUNT OWED BY RESPONDENT TO APPELLANT AS OF THE DATE OF ITS DECLARATORY JUDGMENT WAS $4,563.84, AND IN ALLOWING RESPONDENT CREDIT FOR $1,271.14 AND $350.00 RECEIVED FROM THE SALES OF APPELLANT'S INTEREST IN A SALT LAKE CITY HOME AND A PANGUITCH PASTURE OWNED AND HELD BY THE PARTIES AS JOINT TENANTS.

At the time the Decree of Divorce was dated and entred (Oct. 16 and Nov. 5, 1962, respectively) the parties were the owners as joint tenants of certain pasture property in Panguitch, Utah, adjoining their Panguitch home property, and were entitled to funds from the sale by them of a Salt Lake City home held and owned by them as joint tenants (R. 81, 178, 179, 258, 259, 302). Respondent as joint tnans (R. 81, 178, 258, 259, 302). Respondent claimed credit on the $10,000.00 awarded to Appellant for the sum of $1,271.14 representing Appellant's one-half of the final payment on the sale of the Salt Lake City home and also for the sum of $350.00 representing one-half of the sale price of the Panguitch pasture, which one-half was her own property. The lower Court allowed these as proper credits on the amounts due under the

Decree of Divorce in determining the net balance remaining due by Respondent to Appellant on the $10,000.00, which balance was determined without charging Respondent with any interest whatsoever on the $10,000.00 amount on either the theory that it was a judgment bearing interest from its date at 8% or that at the very minimum interest was due on and as installments matured and become payable thereon by virtue of the realization by Respondent of profits from business interests held by him or of gross sales proceeds from the sale of business assets.

In other words, the Appellant has been charged and the Respondent has been credited with properties and amounts actually owned by the Appellant when the Divorce was granted. The Decree of Divorce does not justify or permit under any possible logical construction any such result. There would have been just as much logic and reason to charge Appellant and to Credit Respondent with any other item of property such as an automobile, jewelry, or any other asset owned by Appellant at the time of the Divorce whether or not or whenever the same was sold by her and converted into cash. The Decree of Divorce does not mention at any point nor does the entire Record on Appeal which is the complete record, refer in any way to Panguitch pasture, the ownership or disposition thereof, or the balance due from the sale of the Salt Lake City home owned by the parties as joint tenants. The Panguitch property adjoined the Panguitch home property held by the parties as joint tenants and which was ordered continued in such joint

ownership until sold. The Salt Lake City home held in joint tenancy until sale had been sold and the proceeds were payable to both of the parties. The Decree did not take away from the Appellant any property in her name or already owned by her, and this would include the Panguitch pasture and the balance on the Salt Lake City home, but the lower Court, by its Declaratory Judgment has now seen fit to change the Decree of Divorce and to take away from the Appellant part of her property by charging Respondent with receipts from the sale of her own property. Certainly this was not contemplated by the Decree and was not even mentioned. The Court's Declaratory Judgment by its effect and by the allowance or these credits, introduces entirely new items into the action, and, worse still, takes from the Appellant and gives to the Respondent part of the Appellant's property, all without any consideration whatsoever.

There was some evidence relative to these particular items at one of the hearings on the Petition for Interpretation of the Decree, since Respondent had claimed them in the unverified, incomplete and erroneous accounting he had filed with the Court (R. 87, 88, and 89), these particular items being listed as the second April 10, 1963 item in the amount of $1,271.16 and as the third April 10, 1963 item of $350.00. Such evidence was completely inconclusive in that Appellant stated that she received both payments and gave her cooperation in the sale of the Panguitch pasture with the understanding and on the condition that they did not apply on the $10,000.00 award (R. 178, 179, 302, 303) and the Respondent testi-

fied to the contrary (R. 252-260, incl.). We feel that certainly the Appellant's testimony is entitled to much more credence, because it seems only logical that she would not be allowing or agreeing to a credit on the $10,000.00 from the sale of her own properties. She had an undivided one-half interest as a joint tenant in these properties and in the proceeds therefrom and these interests were just as much property rights vested in her as were items of property separately held or owned by her, whatever they might have been, at the time of the Divorce .

Furthermore, it is an elementary principle of law which requires no citations of authority, that even if she had agreed to any such application and credit, which we vigorously dispute and deny, no consideration for any such agreement, credit or application was paid by Respondent or received by Appellant, without which any such agreement would fail and be void.

The entire matter, furthermore, is removed from any peradventure of doubt by the express wording of the Decree of Divorce itself which states (R. 39) that the "Plaintiff shall be awarded the total sum of $10,000.00, which shall be paid by the Defendant to the Plaintiff out of *profits arising from business interests held by the Defendant*" . . . *and* . . . *out of the sale of business assets of the Defendant to third parties*. . . ." The award of $10,00000 (plus interest) was payable, therefor, out of Defendant's profits from his property and out of the sale of his business assets. To make this amount or any

part of it payable out of Appellant's property is a travesty which should not be countenanced by any Court. Furthermore the Decree stated that the settlement was of *"the rights of the Plaintiff in the property of the Defendant"* (R. 39) and it was not a settlement of Plaintiff's rights in her own property nor did it award the Respondent any rights in the property of the Appellant.

POINT IV

THE LOWER COURT ERRED IN NOT REQUIRING RESPONDENT TO ACCOUNT TO APPELLANT AND TO SUPPLY HER WITH DATA COVERING THE SALE OF BUSINESS ASSETS, DATES AND AMOUNTS INVOLVED, DATES OF RECEIPT BY RESPONDENT, AND SIMILAR DATA WITH RESPECT TO PROFITS RECEIVED BY THE RESPONDENT.

By the terms of the Decree of Divorce quoted above, it was specifically provided that the $10,000.00 was payable out of profits received by Defendant-Respondent from business interests held by him (all of said profits) and was immediately due out "of the sale of business assets of the Defendant to third parties and actual receipt by the Defendant of said sale proceedings" with the further provision that payments out of gross sales proceeds were to be at the rate of 50% thereof (R. 39). Even if it were held that this $10,000.00 award was not a judgment bearing interest which we respectfully contend would be erroneous there is no possible doubt but what interest would start accruing when and as Respondent received profits from business interests or "gross sales proceeds" from sale of business assets to third parties. It follows, therefore, that Appellant is

entitled to know the exact dates, amounts and other data with respect to such profits and sales. Appellant sought at the first hearing on her Petition to have the Court order that Respondent be required to submit a balance sheet showing assets when the Decree was entered, in order that there would be a beginning point and she could then determine whether or not profits had been realized from such business interests or sales thereof had been made. The lower Court refused this request, which was repeated a number of times (R. 68, 69, 70, 71, 72, 73, 74, 75). Subsequent efforts were also made, but to no avail. By its Amended Decision, the lower Court recognized (R. 315) that at the very least the Appellant was entitled to interest from the respective dates payments became due to her by virtue of the receipt by Respondent of business profits or gross sales proceeds, and specifically directed as follows:

> "The Defendant is therefore required to supply Plaintiff such enabling data."

In its Findings of Fact and Conclusions of Law (R. 316, 317, 318, 319) the lower Court almost completely reversed its field by stating (R. 318) that the $10,000.00 amount was payable "out of profits arising from the sale to third parties of business interests held by the Defendant" but then again reversed itself by saying that 50% of the gross sales proceeds of business assets which were actually distributed to and received by the Defendant were to be paid to the Plaintiff immediately but not earlier;" and completely ignored the effect of the realization of business profits requiring payments to apply on

the $10,000.00 award. In its Conclusions of Law (R. 319) the lower Court affirmatively found that no interest was due on the $4,563.84 prior to the actual receipt by Defendant of those amounts." This did not define what or which amounts were being referred to, nor is there any finding as to when any such amounts were realized and started to bear interest.

At the very worst and most unfavorable interpretation of the Decree insofar as Respondent is concerned with respect to said $10,000.00 amount, payments thereon matured and interest started to accrue thereon whenever and in whatever sums Respondent received either profits from business interests held by him (which would include interest, dividends, profits from the operation of his own business assets, distributions to him by partnerships or corporations of profits, etc.) and whenever he realized gross sales proceeds from selling business assets, 50% of which gross sales proceds would be payable to Appellant.

By its Declaratory Judgment, the lower Court ignored completely the duty to pay out of business profits and changed without any possible justification the provision relative to payment out of 50% of "gross sales proceeds" by saying that the payments were due only out of "'profits from the sale of business assets." There is a great deal of difference between "profits from the sale of business assets" and "gross sales proceeds." By applying the latter, it doesn't matter whether there is a profit or loss on the sale. By applying the former, sale

price would be ignored and a determination would be made of "profits" or "gain." Indeed, Respondent has endeavored in his Accounting (R. 90) to twist "gross receipts" from sales into one-half of long-term capital gain.

At no time has Appellant had the benefit of an accounting by Respondent of profits from business interests or of gross sales proceeds from business assets. The lower Court recognized her right to such an Accounting, but then entered a Declaratory Judgment and made oral Orders which completely deprive her of such right.

In order to spell out what Appellant desired and was entitled to under any possible interpretation of the Decree of Divorce, she served on Respondent a Request and Notice (R. 148, 149, 150, 151) setting forth a list of the documents which would disclose profits and gross sales proceeds, specifically listing information and documents desired. The Respondent refused to apply these items and the Court would not make an order requiring him to do so. Appellant's rights to an accounting to disclose information to which she was clearly entitled and her right to documents solely and exclusively within the knowledge and possession of the Respondent have been ignored and circumvented by the Respondent and by the lower Court.

CONCLUSION

Appellant respectfully contends that the so-called Declaratory Judgment of the lower Court be reversed

and altered to provide that the $10,000.00 award in favor of Appellant was a judgment bearing interest at 8% per annum from the date it was entered and determining the correct amount due thereon; that the Court determine that "equities" in the home property at Panguitch be defined to mean gross sales proceeds less expenses of sale and that the net proceeds thus determined be ordered paid equally to the parties on the sale of said home; that the Court disallow Respondent credit on the $10,000.00 award for the sum of $1,271.14 and $350.00 mentioned in Point III; and the Respondent be required, in the event the Court rules that said $10,000.00 award was not a judgment bearing interest at 8 per cent per annum from its date, to account for the dates, amounts and sources of all profits from business interests and gross proceeds from sales of business assets since the decree and that a determination then be made of the correct amount due Appellant after applying each payment first to interest accrued to the date thereof and the balance to principal.

Respectfully submitted,

MATTSSON & JACKSON
151 North Main
Richfield, Utah

GUSTIN & RICHARDS
1610 Walker Bank Building
Salt Lake City, Utah 84111

APPENDIX

IN THE DISTRICT COURT OF GARFIELD COUNTY, STATE OF UTAH

MARY IRETA CROFTS,
Plaintiff.

- vs -

JOSIAH HOYT CROFTS,
Defendant.

DECREE OF DIVORCE
CIVIL NO. 1887

This matter came on for hearing before the Court, the Honorable Ferdinand Erickson, District Judge, presiding without a jury, on the 16th day of October, A.D. 1962 at Richfield, Utah, upon the complaint of the Plaintiff, and upon the General Appearance, Waiver and Agreement of the Defendant on file herein. The Plaintiff appeared in person and by her Counsel Tex R. Olsen of the Law Firm of Olsen and Chamberlain, and the Defendant did not appear in person or by counsel and it appearing that the Defendant had been duly served with a copy of the complaint and that he had entered a General Appearance, Waiver and Agreement, wherein he withdrew his answer and elected not to plead to the complaint on file herein, and consented that a default be taken against him and the matter be set down for hearing at any time convenient to the Court and in any county of the State of Utah; the Plaintiff having introduced evidence in sup-

port of the complaint, and the Court being fully advised in the premises, and having heretofore entered its Findings of Fact and Conclusions of Law, now therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Bonds of Matrimony heretofore existing between Plaintiff and Defendant be and the same are hereby dissolved and the marriage relationship between the Plaintiff and the Defendant be and the same is hereby terminated.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiff is awarded the care, custody and control of the minor children of the parties hereto, to-wit: Richard Ray Crofts, a son, age 16, and Tina Marie Crofts, a daughter, age 15. Expressly awarding the Defendant the right to visit said children at all reasonable times and places.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Defendant shall assume, pay, and discharge all of the outstanding family obligations of the parties hereto including the outstanding note and mortgage upon the home property owned by the parties.

IT IS FURTHER ORDERED ADJUDGED AND DECREED that the Defendant shall pay to the Plaintiff as temporary and permanent alimony the sum of $150.00 per month and the further sum of $150.00 per month for the support of the minor children of the parties hereto, which alimony and support payments shall commence on or before the 10th day of November 1962 and

shall continue until the minor children individually reach their ages of majority. In the event a child reaches the age of majority, the support money herein provided shall be reduced $75.00 per month. Also in the event of re-marriage of the Plaintiff herein, the alimony provided shall terminate.

IT IS FURTHER ORDERED ADJUDGED AND DECREED that the Plaintiff is awarded as a permanent, complete and final settlement of her rights in the property of the Defendant, the total sum of $10,000.00, which sum shall be paid by the Defendant to the Plaintiff out of profits arising from business interests held by the Defendant and which profits are actually distributed and received by the Defendant and shall be immediately due and payable out of the sale of business assets of the Defendant to third parties and actual receipt by the Defendant of said sale proceeds. Said amount shall be payable at the rate of 50 per cent of the gross sale proceeds until said $10,000.00 has been paid in full. Further, the Defendant shall have the option of prepaying any part of the amount provided herein.

IT IS FURTHER ORDERED ADJUDGED AND DECREED that the Defendant shall assume and pay all Court costs and attorney's fees incurred in connection with this action.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiff is awarded possession of the 1961 Pontiac sedan automobile, together with the furniture and furnishings owned by the parties hereto

now in the home of the parties in Panguitch, Utah. Further, the Plaintiff is awarded the possession, use, and occupancy of the home and home property owned by the parties located in Panguitch, Garfield County, State of Utah, and specfically described as follows:

> The East 462 feet of the South 6 chains of the Southeast Quarter of the Southwest Quarter of Section 29, Township 34 South, Range 5 West, Salt Lake Meridian, containing 4.2 acres, more or less. The East 5 chains thereof being in Panguitch Town Survey.

Which possession is to be held by the Plaintiff so long as she desires to use said home for personal living. In the event the home is sold to a third party, the equities realized from the sale of said property are to be equally divided between Plaintiff and the Defendant. The home property shall be continued in joint ownership between the Plaintiff and Defendant until said ownership is terminated by a sale to a third party as is herein provided.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Decree of this Court shall become final within three months after the date of its entry upon the records and from the filing hereof with the Clerk of the above entitled Court.

DATED this 16th day of October, A.D. 1962.

s/ FERDINAND ERICKSON
District Judge