

1968

## Mary Ireta Crofts v. Josiah Hoyt Crofts : Brief of Respondent

Utah Supreme Court

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In the  
Supreme Court of the State of Utah

MARY IRETA CROFTS,  
*Plaintiff and Appellant,*

— vs. —

JOSIAH HOYT CROFTS,  
*Defendant and Respondent.*

Case  
No. 411

BRIEF OF RESPONSE

Appeal From a Declaratory Judgment  
District Court of Garfield County, Utah  
HONORABLE FERDINAND ERICKSON, *State Judge*

KEN CHAMBERLAIN  
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Richfield, Utah  
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FILE

JUN 3 - 1913

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Clerk, Supreme Court

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In the  
**Supreme Court of the State of Utah**

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MARY IRETA CROFTS,  
*Plaintiff and Appellant,*

— vs. —

JOSIAH HOYT CROFTS,  
*Defendant and Respondent.*

} Case  
No. 11165

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**BRIEF OF RESPONDENT**

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NATURE OF THE CASE

The Plaintiff-Appellant sought an accounting and a Declaratory Judgment concerning her rights under the property settlement provisions of the Decree entered in a divorce case in Garfield County.

From Findings of Fact settling the account of Defendant-Respondent under his obligations to the Plaintiff and from a Declaratory Judgment interpreting other provisions of the Decree, the Plaintiff took this appeal.

To follow Appellant's form, we refer to the parties as Appellant and Respondent.

## DISPOSITION IN THE LOWER COURT

The Trial Court, hearing oral evidence from both parties and receiving a verified accounting from the Respondent, resolved the balance remaining under a deferred obligation based upon stipulation of the parties and entered its Declaratory Judgment on those other provisions of the Decree which the Plaintiff sought to have interpreted.

## NATURE OF RELIEF SOUGHT ON APPEAL

The Respondent seeks to have the Trial Court affirmed; however contending that he should have been granted credit for an additional \$500.00 under his accounting and the evidence.

## STATEMENT OF FACTS

It is important at the outset to observe that the Respondent was not nor has he ever been delinquent in any payments of alimony or support money (R. 42-44, 279); in fact, he had overpaid alimony and received credit for those excesses against a \$10,000.00 obligation (hereinafter defined) when the Appellant re-married and the children either returned to live with their father or attained majority (R. 267) thus fixing permanently Respondent's total and overall liability for alimony and support payments (R. 202-205).

Appellant, in the apparent belief Respondent had become responsible to make payments under the \$10,000.00 obligation, restricted as to source and rate of payment

by terms of the Decree to sale of business assets (R. 4), filed this rather singular action which may be premature but to which Respondent did not object on that ground.

The underlying stipulation (R. 3 and 4) contained Respondent's agreement to pay alimony and support money (not disputed in this proceeding) and a provision that the plaintiff should be awarded the sum of \$7,500.00 to be paid by the Respondent to the Appellant out of

“profits arising from business interests held by the Defendant [Respondent] and shall be immediately due and payable out of the sale of business assets of the Defendant to third parties. Said amount shall be payable at the rate of 50% of the gross sales proceeds until said \$7,500.00 has been paid in full” (R. 4).

This stipulation was later amended first by interlineation (R. 4) and later by re-statement (R. 29-31), each party giving and taking something, to increase the \$7,500.00 to \$10,000.00 and significantly to add a limiting proviso to the rate of its payment which, when the stipulation was amended, restated, and re-executed, said:

“4. As a permanent, complete and final settlement of the rights of the Plaintiff in the property of the Defendant, 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 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. *In addition the Defendant has the option to prepay any part of the amount provided.*" (Italicized material represents that added by the amendments at R. 4 and 30.)

The stipulation further provided that the Appellant could have the exclusive possession, use and occupancy of the home in Panguitch which she never exercised (R. 165, lines 2-12 and R. 211) and in the event the home property was sold, then "the equities realized from the sale of said property shall be equally divided between the Plaintiff and Defendant" (R-31).

At the time of hearing the Court, being appropriately solicitous that the Appellant understood the terms of the stipulation and the proposed Decree, read the provision just quoted and the following colloquy ensued: (R. 13)

THE COURT: And in the event there are no profits and he retains the ownership of the property, then, of course, there would be no income with which to distribute this ten thousand dollar debt; isn't that correct?

MR. OLSEN: That would be correct.

THE COURT: Do you understand that Mrs. Crofts?

MRS. CROFTS: Yes, in case he never sold his property, then he would never pay me, is that what you mean?

THE COURT: Yes, in case there is no profit or in case he doesn't sell out, will you get this ten thousand dollars?

MRS. CROFTS: I don't know.

THE COURT: That was my concern.

MR. OLSEN: Under this provision, if there were no profits in the business and there was no sale of the assets, there wouldn't be any way of maturing and requiring payment of the ten thousand dollars, is that the way you understand it, Mrs. Crofts?

MRS. CROFTS: Well, yes, only he said that if his wages were raised again, you know —

\* \* \*

(R. 16)

MR. OLSEN: For the record, Mrs. Crofts, do you think you understand the provisions concerning the ten thousand dollar lump sum settlement?

MRS. CROFTS: I think so.

THE COURT: And so far as you are concerned, is the property settlement which is outlined in that agreement satisfactory to you under these circumstances?

MRS. CROFTS: Yes.

Appellant's Point IV says the Trial Court erred in not ordering Respondent to furnish to her information by which she can determine when, if any, sales of business assets took place. This is precisely what the Court below ordered (R. 315, Appendix Page i).

We are ready to furnish Appellant any records or data which are relevant and appropriate under that order and no issue with respect thereto is before this Court.

Respondent has heretofore furnished abstracts of tax returns for all years material to these proceedings

(R. 90) and stipulated at the time of trial that since Appellant petitioned for an accounting Respondent had made some sales of business assets (R. 157).

Most importantly, and pursuant to that representation Respondent on December 5, 1967, tendered to Appellant the full amount adjudged by the Court to remain due under the \$10,000.00 award but Appellant rejected the tender (Appendix Page i). Respondent still remains willing and able to pay the amount the Trial Court fixed.

Immediately before and for some time after the divorce, the Appellant was in Arizona racing a string of horses (R. 165, 211) and later married a track veterinarian (R. 310). Consequently, Appellant never lived in the home of the parties as the Decree contemplated but neither has the home been sold; nevertheless, Appellant wanted the Court to determine what her interest in the "equities" of the home would be in the event it were sold.

Appellant wanted a \$500.00 advance which Respondent granted, stating that he wanted this applied on the property settlement to which Appellant agreed (R. 211, 212); however, the Court disallowed this in Respondent's accounting as being too remote in time (R. 315). While disagreeing with the Court's ruling, Respondent nevertheless tendered the \$500.00 with the other funds (Appendix Page i).

To avoid repetition the remaining facts Respondent deems material will be stated in the argument.

## POINT I

THE LOWER COURT PROPERLY HELD:  
[A] THAT THE \$10,000.00 SUM AWARD-  
ED APPELLANT BY THE DECREE WAS  
PAYABLE AT SUCH TIME AS THERE  
WERE ACTUALLY DISTRIBUTED TO AND  
RECEIVED BY THE RESPONDENT PRO-  
CEEDS FROM THE SALE OF BUSINESS  
ASSETS; [B] THAT NO INTEREST AC-  
CRUED UNTIL AN EVENT OCCURRED  
MAKING RESPONDENT LIABLE TO PAY  
AN AMOUNT OR AN INSTALLMENT.

Neither by their original stipulation nor by the interlineated amendments could the parties have made it plainer that the fund for payment of this \$10,000.00 obligation was specific and the obligation to pay therefrom restricted.

Both stipulations (R. 4, 30) as well as the Decree (R. 30) confirmed Respondent's obligation to pay from a restricted source: profits from business transactions and sales of business assets. "Salaries" are excluded by necessary implication which Appellant does not dispute.

Profits and proceeds from sales are clearly distinguishable; however, the *rate of payment* was regulated by the proviso:

"Said amount shall be payable at the rate of 50% of the *gross sales proceeds*." (Emphasis added.)

Respondent was a member of a saw-milling concern (R. 12) which could have had profits but no distributions

and conversely distributions without profits. A partnership often can show an economic gain but have no liquid funds with which to pay a "dividend" or withdrawal.

Correspondingly, the Respondent could conceivably receive actual distribution of proceeds from sales of business assets where there would be no "profit" but only a return of capital or sometimes a capital loss. Withdrawals from the partnership may be classified as distribution of "profits" even though called "salaries."

The parties' agreement provided, therefore, that if the Respondent had profits he would be obligated to pay conditioned on actual receipt of *gross sales proceeds* (regardless of gain or loss on the sales).

On the receipt of gross sales proceeds, he became obligated to pay 50% thereof (whether a profit or not) up to the extent of "profits" from all sources, whether from sales or from operations in the usual course of business.

There is nothing ambiguous about the provision of the Decree and stipulation.

Both the source and rate of payment of the \$10,000.00 are confined to a fund specified thusly:

"Said amount shall be payable at the rate of 50% of the gross sales proceeds until said \$10,000.00 has been paid in full" (R. 39).

Parties may contract to confine the payment of an obligation to a special fund and such method of pay-

ment is exclusive. *West v. Anderson*, 171 Okla. 165, 42 P2d. 653.

In fact, the obligor is not even liable where the obligation is payable from a restricted fund which never comes into existence. *Stern v. Franks, et al.*, 96 P2d 802, 35 Cal. App.2d 676. *Gardner v. Trigg*, 59 Ariz. 397, 129 P2d 666.

Such claim is not made here except to demonstrate that Respondent has had no liability to pay anything on the \$10,000.00 because he had received no proceeds from sales of business assets as appears from Respondent's verified accounting (R. 90, 91) which is not disputed. Notwithstanding he had no unqualified liability to pay, Respondent had in fact prepaid in excess of \$5,000.00 on the account because Appellant requested funds of him (R. 222 et seq.).

Respondent received proceeds from sales in the year 1967 and tendered Appellant the full remaining balance. (Appendix p. i.)

#### [B] INTEREST ON THE \$10,000.00

*Cole v. Cole*, 101 Utah 355, 122 P2d 201, holds that judgments providing for periodic installments under a decree do not bear interest until they are unqualifiedly payable.

Reference by counsel to interest on a judgment for one-half of the value of community property is inappli-

cable because that payment was due when the decree was entered. Payment was neither deferred nor conditional.

Here the payment is both deferred *and* conditional. It may never have become due.

The award interpreted in *Scott v. Scott* (1967), 19 U2d 267, 430 P2d 580 *was* a specific sum in deferred installments (\$1,000.00 per month for 121 months).

The Court said at Page 583 of 430 P2d:

The right to such accrued installment payments vested in the plaintiff on the due date of each installment, and the plaintiff is entitled to interest thereon at the legal rate until payment is made.

*Arnold v. Arnold*, 140 NW2d 874, is in accord with our position: “specific periods payments” bear interest from the time they become due and owing, not before.

The Decree says:

Said amount shall be payable at the rate of 50% of the gross sales proceeds until said \$10,000.00 has been paid in full.

It does not say “until said \$10,000 *together with interest* has been paid in full.”

Appellant’s only claim to interest lies in her assertion that the \$10,000.00 obligation attains the dignity of a judgment.

This thesis is wholly dissipated when considered in light of an annotation in 33 ALR2d 1456 where the au-

thor, in a compendium of the cases, summarizes the rule and rationale thereof as follows:

The theory behind this rule [that divorce-decreed installments bear interest from the date they become due] appears to be that such installments are in the nature of *separate judgments which bear interest as they become due*. (Emphasis added.)

Utah's decision of *Boyle v. Baggs*, 10 U2d 203, 350 P2d 622, is entirely consonant with this view of "separate judgments" to the extent they impose the incident of a lien *when due and unpaid*.

Vol. 47 CJS, P. 35, Interest, Section 21c, expresses the rule that:

The right to interest on judgments being purely statutory, interest may be allowed on only such judgments as come within the provisions of the statute.

*Roberts v. Roberts*, 69 Wash. 2d, 420 P2d 864 holds that each installment of alimony, when unpaid, becomes a separate judgment and bears interest from the due date.

The Utah cases of *McKay v. McKay*, 13 U2d 187, 370 P2d 358 and *Larson v. Larson*, 9 U2d 160, 340 P2d 421, hold that interest accrues only after delinquency in an installment. These cases affect alimony; however, the principle of separate judgments applies to lump sum or property settlement awards: *Heustis v. Heustis* (Ky.) 381 SW2d 533, holds that an unliquidated claim bears no interest until liquidated by reduction to judgment.

*Martin v. Martin* (Okla.) 350 P.2d 270 holds that where a judgment awarded the wife a lump sum of money payable in a specified period the wife was *not* entitled to interest from rendition of judgment where payment was made within the time fixed. Similar holdings are found in *Viser v. Viser*, 243 La. 706, 146 So2d 409; *Pope v. Pope*, 2 Ill.2d 152, 117 NE2d 65.

## POINT II

### THE TRIAL COURT PROPERLY RULED THAT "EQUITIES" IN THE HOME PROPERTY MEANT THE SALE PRICE LESS ENCUMBRANCES.

It is entirely conceivable that the home property would never be sold. This possibility is contemplated by stipulation and the Decree (R. 4, 5, 31, 40). It is here that Appellant entirely misconceived the issue. The two provisions in the Decree, although they may on superficial inspection appear inconsistent on their face, apply to two different fact situations, i.e., a situation where the Appellant may (although she has not to the present time) desire to occupy the home, in which event the Defendant is responsible for the monthly mortgage payments;<sup>1</sup> and secondly, a situation where the parties mutually agree upon a sale in which event the equities will be divided.

Those equities are to be determined by deducting the encumbrances and dividing the remainder. *Crowder v. State Dept. of Social Security*, 259 P2d 387.

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<sup>1</sup> Which he has done and continues to do.

*Pierson v. Ball*, 189 So. 679, 138 Fla. 104, holds that:

In common parlance the word equity has reference to the value of the property in excess of encumbrances against it which amount to a lien.

*Des Moines Joint Stock Land Bank v. Allen*, 261 NW 912, 220 Iowa 448 holds:

The term "equity" means the remaining interest belonging to one who has pledged or mortgaged his property, or the surplus or value which may remain after the property has been disposed of for the satisfaction of liens. And "equity" is defined as the amount of value of the property above the total liens or charges.

Whatever disposition is made of the home will determine the parties' "equities." If it is not sold the problem will be moot but Respondent must continue to make the mortgage payments according to the terms of the mortgage at the monthly rate specified.

If the home is sold, the amount of liens will then have to be determined and the remaining "equity," arrived at by deducting these encumbrances from the sale price, is to be divided.

### POINT III

#### THE TRIAL COURT WAS CORRECT IN SETTLING THE ACCOUNTING BETWEEN THE PARTIES.

The matter of interest, raised by Appellant in both her Points I and III, has been treated in this brief under Point I.

Appellant complains that Respondent should not have been given credit for payments he made to her out of the final payment upon a home the parties had occupied while temporarily residing in Salt Lake City or for sale of a pasture in Panguitch.

The record does not disclose in any place where the property was held in "joint tenancy." Under an argumentative cross-examination conducted by counsel against the Defendant, the Attorney for the Plaintiff "advised" Mr. Crofts that the property likely was in joint tenancy as that was customarily the way it was handled if an attorney prepared the documents and Mr. Crofts obligingly agreed that that must have been how it was if counsel told him so (R. 258, 259). The difficulty is that there is no proof anywhere that there was *title* to the property at all.

The facts are that Mr. Crofts was a Utah State Commissioner of Agriculture and rather than renting a home in Salt Lake during his temporary absence from Southern Utah where his business was located he contracted to purchase a home in Salt Lake City which was their residence during his tour of service for the State. His wife's name may have been on the contract but nothing except negative evidence it "must have been" was before the Court.

The pasture in Panguitch probably was in joint tenancy being for Appellant's race horses.

Evidence of an interest of Appellant in these properties is a responsibility which the Plaintiff has the burden of proving if any is asserted.

The Respondent did not produce any evidence of title but relied on an agreement between the parties found by the Court as a matter of fact to have been consummated, that if Appellant received one-half of the net proceeds from those sales they would be credited on the \$10,000.00 obligation (R. 253, 257, Exhibit 6, R. 310).

Two checks were exchanged; one for the Salt Lake real estate contract and one for the Panguitch pasture (R. 254).

The Court found as a fact that the agreement was as Mr. Crofts testified. The entitlement of the parties being in doubt respecting (1) title to the property, contract, proceeds, or other interests therein and (2) the question of whether or when the \$10,000.00 obligation would be payable, the parties could effectively contract to apply the amounts Appellant received on the property settlement agreement.

The fact that Appellant's name was on a contract document does not automatically give her a vested interest in the proceeds of the sale (*Tangren v. Ingalls*, 12 U2d 388, 367 P2d 179.)

The Court found (R. 318) that the parties reached an accord and satisfaction on the question whether the Decree intended the \$10,000.00 to include all interests in

any property of a community or marriage-acquired character and that they resolved any dispute by paying Mrs. Crofts one-half the proceeds and mutually agreeing to credit those amounts to the obligation.

#### POINT IV.

RESPONDENT WILL FURNISH TO APPELLANT RECORDS APPROPRIATE TO VERIFY WHAT IS ALREADY SHOWN IN THE RECORD.

Since the Trial Court has already ordered what Appellant seeks by this point we see no necessity to argue it.

#### CONCLUSION

We respectfully submit that the Trial Court should be affirmed.

Respectfully submitted,

OLSEN AND CHAMBERLAIN

*Attorneys for Defendant  
and Respondent.*

## APPENDIX

## MATTSSON &amp; JACKSON

Carvel Mattsson          Norman H. Jackson

## ATTORNEYS AT LAW

151 North Main Street, Richfield, Utah 84701

Telephone 896-5441      Area Code 801

December 14, 1967

Mr. Ken Chamberlain  
Olsen & Chamberlain  
Attorneys at Law  
76 South Main Street  
Richfield, Utah

Dear Ken:                      Re: *Crofts v. Crofts*

I am sending a copy of this letter to Mr. J. H. Crofts at 250 South 3rd West, Panguitch, Utah.

Mrs. Ireta R. Anderson sent to us recently the check which is enclosed herewith and which bears No. 387, is dated December 5, 1967, is made payable to the Order of Ireta R. Anderson, and her attorneys Carvel Mattsson and Edward Richards, is in the sum of \$4,563.84 and is drawn by J. H. Crofts on the Bank of Iron County, Parowan, Utah.

On the back of the check you or Mr. Crofts typed the following: "Full satisfaction of Jdgmt of Sixth District Court."

The said sum will not be accepted in satisfaction of the Judgment, for which reason the check is being returned to you herewith. If Mr. Crofts desires to pay the said sum of \$4,563.84 to apply on whatever amount is finally determined to be due and to stop the running of interest on that amount, the payment will be accepted and credited but not otherwise.

## APPENDIX — (Continued)

In the near future you will receive a Notice of Appeal in this matter. There are a number of items we want the Utah Supreme Court to rule on.

In the last Decision of Judge Erickson, there was an Order that you furnish us with information and data relative to sales of business assets and receipt of business profits. We have not received such data, the nature of which is spelled out in the Demand and Request for production of documents served on you under date of May 27, 1967. It will be appreciated if you will furnish these items to us without delay.

Yours very truly,

MATTSSON & JACKSON

By /s/ CARVEL MATTSSON

CM : lo  
Enclosure