1986

Ebbert v. Ebbert : Brief of Respondent

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH

EDDIE CLARENCE EBBERT, Plaintiff and Appellant, v. BARBARA ANN EBBERT, Defendant and Respondent.	:	No. 860229-CA Priority #146

RESPONDENT'S BRIEF

Appeal from the Judgment of the Third Judicial District Court
For Salt Lake County
Honorable Philip R. Fishler, Judge

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JURISDICTION

This is an appeal from a divorce decree rendered by the Honorable Phillip R. Fishler of the Third Judicial District Court in and for Salt Lake County. Utah Code Annotated 1953 section 78-2a-3(2)(g) provides that the Court of Appeals has appellate jurisdiction over domestic relations cases.

ISSUES PRESENTED FOR REVIEW

Four issues are presented for review, although plaintiff's Brief separates the issues into nine points. The issues are:

1. Did the Court abuse its discretion in awarding custody of the children to the defendant?

2. Did the Court abuse its discretion in its child support award in light of plaintiff's substantial income?

3. Did the Court abuse its discretion in valuing and dividing the assets of the parties?

4. Is the plaintiff entitled to attorney's fees in bringing this appeal?

DETERMINATIVE PROVISIONS

The interpretation of Utah Rule of Civil Procedure Rule 15, U.C.A. §30-3-5(3) and §78-45-7(2) are relevant to this appeal. The rule and statutes are set forth in Addendum 1.

STATEMENT OF THE CASE

Nature of the Case

This is an appeal of a divorce decree. Plaintiff, Eddie Ebbert, sued defendant, Barbara Ebbert, for divorce on the grounds

of mental cruelty. His complaint alleged that the defendant should have custody of the parties' two daughters with specific visitation rights to the plaintiff, and that the defendant should receive certain marital property.

Long before trial the defendant informed the plaintiff that she intended to move to Colorado. During trial the plaintiff apparently decided he wanted custody of the children and accused the defendant of child abuse. The court upon hearing plaintiff's testimony offered to stop the trial and order a custody evaluation. Plaintiff decided to retract his statements, withdrawing custody as a contested issue. Both parties received a portion of the marital assets and debts; plaintiff was ordered to pay child support and to pay nominal alimony. Each party was ordered to pay his or her own attorney's fees.

Proceedings and Disposition Below

Plaintiff filed a complaint for divorce on June 10, 1985. (Record 2-11). Defendant answered and counterclaimed on July 22, 1985. (Record 12-17). The parties on November 10, 1985 stipulated to a settlement of the action including that custody of their children was to be with the defendant, wife and mother. (Record 315-326). But the parties were thereafter unable to agree upon the form of Findings of Fact, Conclusions of Law and Judgment and Decree of Divorce, and upon motion of the defendant (Record 165-68) the stipulation was set aside (Record 205) and trial was held on March 27, 1986.

At trial both parties appeared, represented by counsel, and offered testimony and exhibits. At the close of trial the court below ruled on the matter. (Record 328-345). He awarded custody of the children to the defendant in accordance with the plaintiff's complaint, the defendant's answer and counterclaim and the prior stipulation of the parties. (Record 329). He ordered defendant to pay child support of $325 per month per child (Record 330); and he awarded alimony of $1.00 per year for two years to defendant (Record 330); he divided the property and debts of the parties (Record 329-332) and at the insistence of the plaintiff, established a specific visitation schedule (Record 332-342). The court entered Findings of Fact and Conclusions of Law and a Judgment and Decree of Divorce on May 15, 1986.

Defendant moved for a new trial on May 27, 1986 on the issues of child support, child custody and property division. (Record 276-77). A hearing was held on plaintiff's motion for new trial on July 1, 1986 and the court denied the motion the same day. (Record 284, 384-364). Thereafter, plaintiff filed a notice of appeal. (Record 289-90).

STATEMENT OF FACTS

The parties were married in June of 1976. (Record 2). They are the parents of two daughters ages seven and five. (Record 2). Plaintiff works as a manufacturer representative and earns approximately $36,500 per year, plus an automobile provided by his employer. (Record 587). Defendant worked periodically as

a bank teller during the marriage and is capable of earning approximately $1,300 per month. (Record 408). During the marriage the defendant's parents gave the parties many gifts in the form of property and cash which greatly improved the financial circumstances of the family. (Record 389, 414, 442, 457, 470).

Both parties pleaded that the children should be in the custody of their mother, the defendant. (Record 3, 14). When the case initially settled plaintiff agreed that the defendant should be the custodial parent. (Record 304). After the plaintiff filed for divorce (June of 1985) he and the defendant discussed the custody and visitation situation in September of 1985 (Record 578) and the defendant told the plaintiff that she was planning to move to Colorado. (Record 578). During the trial plaintiff attempted to amend his pleadings and pray for custody of the children (Record 620). Defendant's counsel objected to that attempt (Record 619) and the trial court denied the motion to amend citing concerns over plaintiff's advance notice of the issue and his failure to move to amend before trial. (Record 621). Later in the trial the plaintiff testified that defendant had physically abused the children (Record 624) and that he should have custody. The trial court then offered to suspend the proceedings and order a custody evaluation. (Record 625). The plaintiff declined the court's offer and instead retracted his statements related to custody issues. (Record 625).

At the close of trial the court awarded permanent custody of both children to the defendant with specific visitation rights as requested by the plaintiff. (Record 329, 332-342, 241-254). The court made a finding that the defendant "is a good mother and a fit and proper person to have . . . custody of [the] children." (Record 256-57). The court ordered plaintiff to pay child support of $325 per month per child and nominal alimony (one dollar per year) for two years. (Record 330, 243, 244). The parties were ordered to pay their own attorneys's fees. (Record 264).

The court found that the parties had total assets of $103,866.00 and liabilities of $10,175.00 resulting in a net worth of $93,691.00. (Record 259). The net worth of the parties included gifts to the parties by the defendant's parents totalling $93,433.00. (Record 259). Plaintiff was awarded the rental house, various household furnishings and his vested savings plan benefits, (244-46) and he was ordered to discharge some of the debts. (Record 246). Similarly, defendant received the marital house, household furnishings and was ordered to discharge a portion of the debts. (Record 246-47).

SUMMARY OF ARGUMENT

1. The court's custody award was proper. Both parties pled that the defendant should have custody of the children. The court received evidence that defendant was a fit and proper

parent. Plaintiff's contentions concerning judicial bias, inadequate findings, visitation, amendment of pleadings at trial are unsupported by the record--the court did not abuse its discretion.

2. The trial court's child support award was proper in light of the totality of circumstances including the plaintiff's and defendant's respective earning capacities.

3. The court did not abuse its discretion in evaluating and dividing the marital estate. The court's property division awarded substantial assets and debts to both parties in equitable proportions.

4. This court should not award plaintiff attorney's fees in bringing this appeal because his income is sufficient to enable him to bear his own expenses for this specious appeal.

PRELIMINARY STATEMENT

The standard of review is an important preliminary consideration for this Court. The Utah Supreme Court has stated:

> Our standard of review in divorce proceedings allows us to disturb the action of the trial court only when the evidence clearly preponderates to the contrary or the trial court has abused its discretion or misapplied principles of law. Subject to those limitations, we are free to review both the facts and the law.

Wiese v. Wiese, 699 P.2d 700, 701 (Utah 1985) [citations omitted].

A more recent case held:

> While we may review both the facts and law in matters of equity, we also accord considerable

> deference to the judgment of the trial court and treat its findings with a presumption of validity.

King v. King, 717 P.2d 715 (Utah 1986).

Applying those standards to the facts of the case mandate affirmance of the decree of the trial court.

ARGUMENT

I.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN AWARDING CUSTODY OF THE CHILDREN TO THE DEFENDANT

The plaintiff in Points I through VI of his brief asserts that child custody was an issue at trial, that the court below erred by refusing to allow plaintiff to amend his pleadings at trial, that the trial judge was biased, and that the court erred by making insufficient findings as to custody. Plaintiff also claims that the trial court's visitation schedule was inequitable. Plaintiff's arguments are redundant, and this Brief will address all of the custody and visitation issues in this one section.

A. Plaintiff did not Raise Custody Issues at Trial

Plaintiff's arguments concerning child custody are disingenuous and unsupported by the record. When the plaintiff filed for divorce he specifically pleaded that the defendant should have custody of both children. His complaint stated:

> Defendant should be awarded the care, custody and control of the parties' minor children subject to the defendant's right to liberal visitation at minimum as follows....

(Record 3). Five months later when the parties appeared at the stipulation hearing the plaintiff agreed that defendant should be custodial parent. (Record 303).

Not until trial did the plaintiff attempt to raise custody issues, but he later changed his mind and retracted his statements related to custody:

> Q. [by Mr. Hanson] Isn't there going to be--will that not create a financial burden on you to attempt to see them every week?
>
> A [by Eddie Ebbert] Not if I can have an abatement clause for the time they're with me and if she will pay the expense to get them over here I'm afraid, if I don't see them every week, for the kids physical health. I've seen bruises on them too many times and welts.
>
> Mr. Cowley: Oh, come on.
>
> Mrs. Ebbert: Oh, Eddie.
>
> The Court: I think if that's what he's saying, now--now you've done it because I'm going to terminate this hearing right now, here and now, and I am going to just stop and we're going to have--I'm going to order a custody evaluation. Now, do you want to retract that statement, sir?
>
> The Witness: Can I speak to him or you or somebody? I--I'm not--I'm honest--
>
> Mr. Hanson: Just listen.
>
> The Court: Are you telling me that you have observed welts and bruises on these children while they're in the custody of Mrs. Ebbert that would lead you to believe that these children are being physically abused?
>
> The Witness: It was--no that's not, what I said and I didn't mean that, that they're being physically abused. How do I explain this, exactly what's going on?

> The Court: I think you better--let's take a five-minute recess and I think you better confer with Mr. Hanson. Because from what you're saying, you've now put me--if what you're saying is true, then I think that I can, on my own motion, make custody an issue because I'm not going to allow you two to stipulate to a custody situation which, in my mind, would put the children at risk. And from what you're saying, I think that's exactly it. So let's take a five-minute recess and you confer with Mr. Hanson. This court will be in recess for five minutes.
>
> [Whereupon, a Brief recess was had; after which, the following proceedings continued:]
>
> The Court: Return again to D85-2144. You may proceed, Mr. Hanson.
>
> Mr. Hanson: Thank you, your Honor.
>
> Q. (By Mr. Hanson) Mr. Ebbert, you and I just had an opportunity in conference to discuss your statement that was made in open court.
>
> A. Yes.
>
> Q. And upon my advice do you now retract that statement?
>
> A. Yes.
>
> Mr. Hanson: No further questions, your Honor.

(Record 624-25).

It is apparent from the record that Mr. Ebbert sought to challenge Mrs. Ebbert's fitness to have custody and that the court was willing to stop the trial, initiate a custody evaluation and give Mr. Ebbert a full hearing on who should have custody of the children. The court said:

> if what you're saying is true, then I think that I can, on my own motion, make custody an

> issue because I'm not going to allow you to stipulate to a custody situation which...would put the children at risk.

(Record at 625).

Following the court's statement, and a recess, the plaintiff, on advice of counsel, withdrew the custody issue by retracting his statement that attempted to place custody in issue. Plaintiff waived trial of the custody issue by pleading that the defendant should have custody.

Plaintiff asserts that custody was in issue because the stipulation between the parties was set aside and the case went to trial. (Brief p. 15-16). The plaintiff ignores the allegation in his complaint that defendant should have custody. He also argues that defendant's denial of paragraph 4 of the Complaint (pleading custody in the defendant) (Record 12) made custody an issue. (Brief p. 11). Defendant's Answer and Counterclaim alleged that custody was proper in the defendant. (Record 14). Plaintiff also entered into a stipulation awarding custody of the children to the defendant. (Record 303). Therefore, the custody issue was resolved by the pleadings and the only issues to be tried were visitation rights, child support, alimony and property division. In a hearing before trial the court interrogated the defendant about her parental fitness. (Record 312). Thus, the court had a solid basis for his custody decision even assuming for the sake of argument that custody was in issue.

The distinction between custody issues and visitation issues is critical, and the plaintiff's Brief fails to recognize the distinction. Visitation rights were clearly in issue and disputed. The trial excerpts, quoted at length in plaintiff's Brief (pp. 13-24), reveal that visitation, rather than custody, was the focus of plaintiff's arguments before the court below. Plaintiff's attorney stated that his questions concerning the move to Colorado and its effect on the children were intended to lay "a record ... regarding foundation concerning visitation...." (Record 569). The record shows that the parties and the court at the insistence of the plaintiff expended much of the trial establishing an extremely specific visitation schedule, a schedule premised on the defendant serving as custodial parent. (Record 332-342, 570-72, 372-84).

Because the plaintiff pleaded that custody should be in the defendant he is bound by the admissions of his pleadings. Numerous cases have held that parties are bound by assertions made in pleadings:

> Normally factual assertions in pleadings and pretrial orders are considered to be judicial admissions conclusively binding on the party who made them.

White v. Anco/Polymers, Inc., 720 F.2d 1391, 1396 (5th Cir. 1983); see also, Thomasset v. Thomasset, 264 P.2d 626, 636 (Cal. App. 1953) (answer in divorce proceeding was an admission of facts asserted therein). By plaintiff's own admission the defendant was the proper custodial parent.

Plaintiff should not be allowed to open the custody issue on appeal when he failed to timely and properly raise the issue before trial. Kessimakis v. Kessimakis, 580 P.2d 1090, 1092 (Utah 1978); Burnham v. Burnham, 716 P.2d 781, 782 (Utah 1986). The plaintiff declined the court's invitation to stop the trial and evaluate the custody issue and plaintiff cannot now be heard to complain on appeal about issues he intentionally omitted.

B. Amendment of Pleadings

Error is also claimed because the court below did not allow the plaintiff to amend his Complaint and plead for custody of the children. (Brief p. 18-20). Plaintiff contends that the trial court failed to follow Utah Rules of Civil Procedure ("U.R.C.P.") Rule 15. Conveniently omitted from plaintiff's Brief are Utah cases on point.

The standard of appellate review regarding U.R.C.P. 15 is whether the court abused its discretion in refusing to allow amendment of pleadings during trial. Westley v. Farmers Insurance Exchange, 663 P.2d 93, 94 (Utah 1983); Stratford v. Morgan, 689 P.2d 360, 365 (Utah 1984). In Stratford, supra, the supreme court upheld the trial court's decision not to allow amendment of pleadings where the plaintiffs had intentionally omitted an issue from prior pleadings and had represented to the court before trial that the issue would not be litigated. 689 P.2d at 365. Similarly in Westley, supra, the supreme court stated:

> Although Rule 15 of the Utah Rules of Civil Procedure tends to favor the granting of leave

> to amend, the matter remains within the sound discretion of the trail court...An amendment would certainly have delayed the trial and the substance of plaintiff's new allegation was known a full year earlier when plaintiff discussed it in his deposition.

663 P.2d at 94.

Here, plaintiff admits that he discussed custody issues, including defendant's planned move to Colorado, long before trial. (Brief p. 13, Record at 578). Defendant's planned move to Colorado is apparently why plaintiff decided he would be the better custodial parent. (Record 621). Yet, the plaintiff waited until trial to move to amend his pleading and pray for custody of the children. (Record 620). The trial court did not abuse its discretion in refusing to grant plaintiff's motion to amend.

C. Judicial Bias Concerning Custody

Plaintiff's submission of an affidavit by Kenn M. Hanson, his attorney at trial, alleging the trial court's bias concerning custody issues is both inaccurate and improper. (Brief, Addendum 1). Plaintiff's counsel states in part:

> 11. That there were times throughout the trial when the Court's gestures were not reflected on the record, but which gestures where (sic) indicative of the Court's attitude and bias.
>
> 12. That in one such demonstration the Court's gestures were so poignant as to coerce the Appelant to withdraw testimony regarding the children's physical health and to bring the trial to a premature end....
>
> 14. That during the course of this discussion the Court gestured in a dramatic, overbearing and intimidating fashion,

> whereupon the Court came right out of the bench, extending his arm and pointing his finger at the Appellant.

(Brief, Addendum 1 p.3.).

Mr. Hanson's allegation that the court below made gestures that were "so poignant as to coerce the Appellant to withdraw testimony" is irresponsible. It implies that the plaintiff was unrepresented by legal counsel at trial, and that plaintiff had no alternative, given the intimidating gestures of the judge, other than retracting his statement concerning the health safety of the children. In fact, the record shows that Mr. Hanson consulted with the plaintiff in private prior to plaintiff's retraction of his statements about child abuse. (Record 625). To accuse the court below of coercing a retraction from the plaintiff of his statement concerning child abuse improperly maligns the integrity of the court and fails to explain why trial counsel did not preserve the issue for appellate review. Absent from the record is an objection by the plaintiff concerning judicial bias or a preservation of the "coercion" issue pursuant to U.R.C.P. 63(b). Thus, plaintiff's arguments regarding bias of the trial judge and plaintiff's "involuntary" retraction of the custody issue are not properly reviewable because plaintiff failed to object, or to move for new trial because of judicial bias. (Record 266-72). Meir v. Christensen, 389 P.2d 734 (Utah 1964) (comments by judge must be objected to in order to be

reviewed on appeal); Brannan v. Slemp, 490 P.2d 979, 982 (Or. 1971) (prejudicial mannerisms by trial court must be objected to to preserve appellate review). Henriksen v. Lyons, 652 P.2d 18, 21 (Wash.App. 1982) (where bias exists request for reversal is a prerequisite to appeal). Defendant's attorney could submit an affidavit controverting Mr. Hanson's statements. However, this Court does not have the jurisdiction or the machinery to receive evidence and determine which affiant is correct. Accordingly, defendant will not burden the record with a meaningless affidavit. A careful review of the entire record absolutely refutes Mr. Hanson's improper allegation of bias.

D. Findings of Fact Respecting Custody

Plaintiff claims that the court's Findings of Fact No. 4 with respect to child custody was inadequate. (Brief p. 7-8). Plaintiff invited the alleged error he now complains about by pleading that defendant should have custody, by waiting until trial to attempt to amend his pleadings and by declining the court's invitation to initiate a complete custody evaluation. Plaintiff retracted his criticisms of defendant's parenting skills (Record 625), and the record as a whole indicates that defendant is a good mother and fit to be the custodial parent. (Record 312). The Utah Supreme Court has held:

> In appropriate cases--where the findings are terse but still suggest the weight accorded to the testimony of the witnesses by the trial court, and outline the basis of the custody

> award--we can find that there was competent evidence to support the judgment so long as it is not 'so flagrantly unjust as to constitute an abuse of discretion.'

Pennington v. Pennington, 711 P.2d 254, 257 (Utah 1985) [citations omitted].

Here, the award was anything but a flagrantly unjust. Rather, it conformed to plaintiff's own allegations. The plaintiff's complaint combined with the presumptive validity of the Court's findings, King v. King, 717 P.2d 715 (Utah 1986) mandates affirmance of the custody award on appeal.

Plaintiff cites two Utah cases, Martinez v. Martinez, 728 P.2d 994 (Utah 1986) and Smith v. Smith, 726 P.2d 423 (Utah 1986) for the proposition that a trial court must make specific findings regarding custody--at least more detailed than rendered by the court below. Plaintiff misconceives the holdings of Martinez and Smith, supra. In both those cases custody was hotly contested at trial (Smith was a custody modification case) and extensive evidence received about the parental fitness of each party. The cases teach that detailed findings are required when custody is disputed at trial. Here, both parties agreed that defendant should have custody of the children, and any concerns plaintiff has with the court's findings on custody are self-inflicted. The Findings of Fact are amply supported by the evidence and are more than adequate to support the Judgment and Decree of Divorce. The court received evidence on the parental fitness of both parties, and relied on the pleadings in making his decision. (Record 312, 523, 623).

E. Visitation Rights

Finally, plaintiff claims that the visitation schedule decreed by the district court was error, and that the defendant has "verbally declined the Appellant visitation rights on fourteen occasions." (Brief p. 33). An affidavit by the plaintiff appears as Addendum 2 of the plaintiff's Brief alleging that the defendant has not complied with the visitation rights defined by the decree.

First, the award of visitation rights is within the trial court's discretion and should be reversed only for abuse of that discretion. Kallas v. Kallas, 614 P.2d 641, 645 (Utah 1980). Here, at the insistence of the plaintiff, the court established a very specific visitation arrangement. (Record 332-342, 372-384, 570-72). Exhibit A to the Judgment and Decree of Divorce (Record 250-54) sets forth plaintiff's visitation schedule and shows that the trial court rendered a judgment that was fair to both parties and their children. Plaintiff has visitation rights including alternating legal holidays, rotating Christmas and Thanksgiving holidays, and for three weeks during the summer. Plaintiff complains about the difficulties with exercising his visitation rights because the children live in Colorado (Brief p. 34), but he fails to explain how the trial court could have more practically and equitably remedied the problem. Given the circumstances, including the ages of the children, the visitation schedule is equitable and should be upheld.

Second, plaintiff's affidavit regarding the enforcement of the terms of the decree is not properly before this Court. The Court of Appeals does not have the means of adequately testing the truth of affidavits by examination and cross-examination of witnesses. Defendant therefore declines to submit an affidavit to this Court responding to plaintiff's affidavit. However, less the Court accept the truth of plaintiff's affidavit, defendant hereby represents that she has never denied the plaintiff child visitation as provided by the decree. To the contrary, plaintiff has failed to take advantage of his alloted visitation rights. Until a district court has made a factual determination concerning plaintiff's allegations, this Court should decline to review plaintiff's affidavit. Plaintiff's remedy is a contempt proceeding before the district court. One Utah case touches upon the subject of enforcement of divorce decrees during appeal and implies that the continuing jurisdiction of district courts pursuant to U.C.A. 30-3-5(3) provides the trial court with enforcement powers even while the proceeding is on appeal. Kallas v. Kallas, 614 P.2d 641, 645 footnote 3 (Utah 1980); see also, Enyart v. Comfort, 591 P.2d 709 (Okla. 1979) (trial court maintains enforcement jurisdiction during divorce appeal). U.R.C.P. 60(a) allows for immediate enforcement of judgments unless a bond is filed, and the district courts are better equipped to enforce their decrees than the appellate courts.

Finally, plaintiff's contentions that the trial court should have ordered defendant to remain in Utah are without merit. (Brief p. 28-32). Plaintiff is capable of traveling to Colorado, and the defendant's right to travel should not be impinged. Shapiro v. Thompson, 394 U.S. 618 (U.S. 1968). Utah authority supports the defendant's right to live where she desires with the children. Earl v. Earl, 406 P.2d 302 (Utah 1965).

II.

THE TRIAL COURT'S CHILD SUPPORT AWARD WAS NOT AN ABUSE OF DISCRETION

Contrary to plaintiff's arguments, (Brief p. 34-41) the $325 per month per child awarded by the trial court was proper. The trial court carefully considered the overall situation in setting the support obligations. The court weighed the plaintiff's earning ability, the defendant's earning ability, and the expenses of both parties. (Record 420, 494, 524, 590). The appellant bears the burden of proving that the trial court abused its discretion in setting the amount of child support, McCarty v. McCarty, 599 P.2d 1248, 1250 (Utah 1979); Mitchell v. Mitchell, 527 P.2d 1359, 1360 (Utah 1974), and plaintiff has failed to meet that burden here.

Plaintiff's arguments fail to disclose any abuse of discretion by the trial court, in fact, the record shows that the court made reasonable provisions for child support. The evidence

at trial showed that the plaintiff is a manufacturer representative with net after tax earnings of $24,000 per year (including the leasehold value of company car furnished to the plaintiff). (Record 330, 422, 586-597). The defendant was found to be capable of earning $700 per month after taxes as a bank teller. (Record 330, 485-490).

Plaintiff cites Utah Code Annotated Section 78-45-7(2) contending that the trial court failed to consider the factors outlined by statute in setting the support amount. (Brief p. 34-35). The record demonstrates that the trial court received evidence on each of the factors listed in U.C.A. 78-45-7(2). Plaintiff's Brief, not the trial court, fails to adequately consider and comprehend U.C.A. Section 78-45-7(2).

Much of the record concerns the financial assets and liabilities of the parties including earnings, gifts, debts and expenses as they related to the family and including the children. The court received abundant testimony concerning the income and assets of the parties. (Record 422, 425, 442, 466, 470-71, 485-89, 589, 597). The plaintiff argues in essence that because the defendant's parents have been generous to their grandchildren, and to the parties themselves, during the marriage that the plaintiff should therefore have his support obligations reduced. (Brief p. 36-38). Plaintiff's interpretation of U.C.A. Section 78-45-7(2) would improperly impute the wealth of the defendant's parents to the defendant in analyzing the relative financial status of the parties.

The financial position of the defendant's parents is not relevant in determining child support and the court below properly limited his evaluation of the circumstanes to the parties themselves. Spector v. Spector, 496 P.2d 864, (Ariz. App. 1972); see also Dickens v. Dickens, 187 P.2d 91, 94-95 (Cal. App. 1947) (court should not consider potential support from other than parents unless a legal obligation exists); Fine v. Fine, 173 P.2d 355, 358 (Cal. App. 1946) (aid from relatives should not reduce father's support obligation). Apparently, Utah courts have not directly addressed that issue, but the Kentucky Court of Appeals rejected a husband's argument that his support award should be lowered because the wife's parents had substantial resources. The court held:

> With respect to the appellant's suggestion that the wife's parents should support the child because they are wealthy we need only say that we are amazed that such a suggestion could seriously be made.

Halcomb v. Halcomb, 337 S.W.2d 32, 33 (Kentucky 1960).

Plaintiff also argues that the trial court "placed the plaintiff in a position where his expenses exceed his income." (Brief p. 37). He complains that the court improperly valued his company provided car, miscalculated his tax status and income level. The evidence refutes the plaintiff's claims of error. Plaintiff's own testimony indicated that he had gross income of $36,490.11 in 1985, (Record 587) and in addition his employer provided him with a car; his projected gross income for 1986 was

approximately $33,592.00 including bonuses (Record 595, 591) plus the company car. (Record 599). Cross-examination showed that plaintiff's estimate of his monthly expenses of $3,191.34 (Record 536) were inflated, misleading and improperly calculated. (Record 593-599). Plaintiff's claim of income "substantially less than $2,000 per month" (Brief p. 37) is absolutely false and the court correctly found his net after tax income to be approximately $24,000 per year. (Record 257). Plaintiff's complaint that the value of his company car is not "income" is a technical distinction without merit. Certainly, a car for plaintiff's personal use is a benefit that enhances his disposable income. The court received substantial evidence related to the value, costs and benefits of the car and its effects on plaintiff's situation. (Record 587-90, 599-601). The court also considered the defendant's earning capacity in setting the child support award. (Record 330). No miscalculation occurred.

The authorities cited by plaintiff (Brief 39-40) are irrelevant to the facts here. Plaintiff cites Woodward v. Woodward, 709 P.2d 393 (Utah 1983) (Brief p. 39) representing that it means that if the custodial parent has no need of child support the court should relieve the noncustodial parent of support duties. Actually, the Woodward court held that because the custodial parent had much higher income than the non-custodial parent, and because one of the emancipated children was living with the non-custodial parent, the custodial parent was not entitled to child support. Woodward has no relevance here.

Plaintiff also cites Graziano v. Graziano, 321 P.2d 931 (Utah 1958) contending that where the custodial parent's family can provide for the children, a small support award is justified. (Brief 40). Graziano is factually distinguishable. There the husband had been drafted into the army, making very low wages, and could not have paid much child support regardless of the wife's situation. The wife in Graziano had a trust fund and personally owned other assets. Thus, the circumstances warranted a low support award. Here, plaintiff makes a substantial salary and is capable of supporting his children in accordance with the decree. Plaintiff fails to explain how ordering a father who makes well over $30,000 per year to pay child support of $325 per month per child is inequitable.

Finally, plaintiff's argument concerning the court's award of alimony of $1.00 per year is frivolous. The court has broad discretion in deciding whether alimony is appropriate, Bushell v. Bushell, 649 P.2d 85, 88 (Utah 1982) and plaintiff does not seriously argue that the court abused its discretion. (Brief p. 41).

III.

THE TRIAL COURT'S VALUATION AND DISTRIBUTION OF MARITAL ASSETS WAS EQUITABLE

The plaintiff's Brief, Point VIII, claims that the trial court awarded the defendant 97 percent of the marital estate and improperly valued the assets. Plaintiff's arithmetic is indecipherable and his argument fallacious.

The Utah Supreme Court has said the following concerning appellate review of property distribution in divorce cases:

> The trial court exercises broad discretion in adjusting the financial needs and property interests of the parties. The Appellant must show that the court's award works such manifest injustice or inequity as to clearly be an abuse of that broad discretion.

King v. King, 717 P.2d 715, 715-716 (Utah 1986). Plaintiff's Brief fails to show any abuse of discretion in the court's allocation of property, and the plaintiff resorts to challenging the competence of the trial court and attacking the veracity of the defendant.

A. Household Furnishings

Plaintiff's Brief pages 41 and 42 claims that the court erred by finding that the defendant's household goods were worth $5,000.00 instead of $10,000.00. A review of defendant's Exhibit "1" shows that the defendant never valued the household goods at $10,000.00. Plaintiff's Brief fails to identify which paragraph of the Findings of Fact erroneously overvalues the household goods. The Findings of Fact (Record 257) paragraphs 7 (c) and (j) are identical to defendant's Exhibit "1" paragraphs 3 and 10. Thus, plaintiff's arguments are without foundation.

Plaintiff contends that the household furnishings were worth approximately $31,000.00 (Brief p. 45; Record 555, Plaintiff's Exhibit 15). The court obviously weighed the assertions of both parties (Record 412, 555-57) but did not accept plaintiff's valuation completely. The trial judge is in the advantaged position of hearing the testimony before he finds facts,

and his findings should not be reversed simply because he did accept plaintiff's valuations. Crofts v. Crofts, 445 P.2d 701, 702 (Utah 1968).

B. Clothing.

Plaintiff's Brief (p. 42) also complains that the court erred by assigning no value to defendant's clothing. Plaintiff fails to note that his clothing was also found to be of no value. (Findings of Fact ¶ 7(1); Record 258). Plaintiff admitted that he owns clothes (Record 344), but does not complain that the court found his clothes to be worthless. Obviously, the court felt that because neither party owned valuable jewelry (Record 504) determining a value for used clothing would be unnecessary. Plaintiff cannot seriously argue that awarding the parties their respective clothing was inequitable. Moreover, plaintiff failed to produce evidence showing that there was a great disparity of value between his clothing and the defendant's. The court's finding was sound.

C. Valuation of the Rental Property.

The parties owned two houses. Their marital residence (7389 South 1710 East, Salt Lake City, Utah) and the "rental property" (7238 South 1710 East, Salt Lake City) which the parties occupied before the purchase of the primary home. (Record 471). The court awarded the rental property to the plaintiff and the marital residence to the defendant, both subject to existing encumbrances. (Record 244, 246). Plaintiff argues that the

trial court undervalued the marital residence, overvalued the rental property and undervalued the liens on the rental property. The record shows conflicting testimony on each of these issues which the court analyzed before rendering its decree.

The value of the residences was not determined by an appraisal. (Record 413, 472, 603). Instead, both parties estimated the market values of the houses, with the defendant's valuation of the marital property being the purchase price. (Record 413). The plaintiff estimated that the residence was worth $150,000.00. (Record 546). Defendant's Exhibit 1 clearly shows that the defendant disputed the plaintiff's guess that the residence was worth $150,000.00. In addition, plaintiff's claim that the court erred by not finding that the house increased in value because of improvements (Brief p. 42-43) is nothing more than unsupported opinion of counsel. Plaintiff cites nothing in the record indicating that improvements made to the residence translated dollar for dollar into enhanced market value. Plaintiff could have obtained a professional appraisal if he had desired to support his valuation. (Record 603). He did not, and the court's finding was not an abuse of discretion.

The plaintiff claims that the court erred by valuing the rental property at $79,000.00 (Brief p. 43; Record 257, Findings of Fact ¶ 7 (b)). Here again both parties were guessing at the property values because no professional appraisal had been conducted. (Record 471, 603). The defendant testified that the parties had placed the rental property for sale with an asking

price of approximately $84,500.00, but that she was unsure of its market value. (Record 472, 743). Plaintiff puts great stock in a purchase offer of $73,500.00 that the parties did not accept. (Brief pp. 43-44; Record 552). An unaccepted purchase offer is certainly not incontrovertible evidence of market value, and given the conflicting statement concerning property valuation the court did not abuse its discretion in valuing the house at $79,000.00.

Another error alleged by the defendant is the court's finding with respect to the encumbrances on the rental property. (Brief p. 44). The plaintiff asserts that the court's Findings of Fact paragraph 7(b) erroneously omitted an encumbrance of $25,000.00 on the rental property owed to Al and Justine Porter, the defendant's parents. (Brief p. 44; Record 554). However, plaintiff admitted at trial that the Porter's $25,000 "encumbrance" had been released. (Record 553). In addition, the decree of divorce provides that the plaintiff is to receive the rental property free of all liens except the existing mortgage (Record 244; Judgment and Decree of Divorce ¶ 6(a)).

The $25,000 "encumbrance" that the plaintiff alluded to (Record 553) arises from the purchase of the marital residence. (See Plaintiff's Exhibit 9-p, marked but apparently not received into the record). The contract required the parties to pay Al and Justine Porter $25,000 when the rental property was sold.

Because that obligation was tied to the purchase of the marital residence, the defendant assumed the $25,000 obligation when she was awarded the marital residence. (Decree ¶ 9; Record 247). Defendant is obligated to take actions to effectuate the court's decree, (Record 249) and because plaintiff is not responsible for the $25,000 obligation to the Porters, the court's valuation was proper. Finally, the defendant promised during the hearing on plaintiff's motion for a new trial that any questions concerning obligations to the Porters would be resolved by a quit-claim deed from the Porters. (Record 362). Thus, plaintiff's arguments are without merit.

The plaintiff also claims error concerning the court's finding that the mortgage debt in the rental property was $44,000 rather than $48,000 alleged by the plaintiff. (Brief p. 44). Defendant's Exhibit 1 was entered into evidence listing the mortgage as $44,000--in direct conflict with plaintiff's testimony. (Record 553). Here again the trial court was able to consider the conflicting evidence and assess the credibility of the parties. See Crofts v. Crofts, supra, 445 P.2d 701, 702 (Utah 1968). Plaintiff admitted that the $48,000 figure he used was the balance at the end of 1985, which is a few months earlier than defendant's financial statement (Plaintiff's Exhibit 1). The trial court's findings carry a presumption of validity Gill v. Gill, 718 P.2d 779, 780 (Utah 1986), and the plaintiff failed to enter evidence that would justify disturbing the court's finding.

D. Employee Savings Plan.

The plaintiff also claims that the court overvalued the savings plan provided through his employer. (Brief p. 44). The court found plaintiff's benefits to be worth $9,466 (Findings of Fact ¶ 7(i); Record 258), but plaintiff claims his benefits were worth only $4,019.20. (Brief p. 44). Defendant's Exhibit 16-D (a summary of savings accounts provided by plaintiff's employer) lists Eddie Ebbert's vested rights as $9,466.31. Plaintiff was incapable of formulating a plausable rebuttal to the values disclosed in Exhibit 16-D. (Record 602). Plaintiff's argument that Exhibit 17-D showed that the plaintiff's vested rights were worth only $4,019.20 is meritless. Exhibit 17-D refers to what the plaintiff's remaining vested rights would be after a withdrawal effective December 31, 1985. The trial court was well within its discretion in assigning a value to plaintiff's savings benefits in light of Exhibit 16-D. In any event, plaintiff cites no evidence in the record that effectively refuted the clear message of the savings plan summary--that plaintiff had $9,466.31 in present vested rights as of September 30, 1985.

E. Lack of Candor.

Plaintiff also attempts to discredit the trial court's findings because the court apparently trusted the defendant's testimony in formulating the decree. Plaintiff's brief states: "The Appellant demonstrated that the Respondent's testimony lacked credibility." (Brief p. 45).

The record shows that throughout the proceedings the defendant was forthright, and that subjects about which she was unsure, she openly admitted. (See for example, Record 473, 422). By contrast, the trial court explicitly stated that the plaintiff's testimony lacked credibility. The Court said:

> Apparently, Mr. Ebbert, you have this overwhelming need to find out what the judge is thinking. Well, I'm going to tell you what the judge is thinking.
>
> ...Now, what that indicates to me is--what it indicates to me and the conclusion to me is inescapable, and the conclusion is, is that you have demonstrated a lack of candor with this court.

(Record 362-63).

Thus, the party with a credibility problem was not the defendant.

F. Division of the Assets

Plaintiff's last assault on the financial aspects of the decree is that it does not evenly divide the assets betewen the parties. (Brief p. 47). No explanation is given supporting plaintiff's assertion that the defendant received 97 percent of the assets. The Findings of Fact totally undermine plaintiff's creative arithmetic. Even assuming the defendant did receive more than 50 percent of the marital assets this does not mean the court abused its discretion in dividing the property.

Marital property does not have to be divided equally. The district court is to look at all the circumstances in making the division. "In the distribution of the marital estate there is no fixed rule or formula." Burham v. Burham, 716 P.2d 781, 782 (Utah 1986). Here, plaintiff received a house with an existing

mortgage as did the defendant. He retained his employment retirement benefits accumulated during marriage, and he was required to pay temporary alimony of one dollar per year for two years despite the fact that his income is well over $30,000.00 per year plus a company car. (Record 587). The parties received from the defendant's parents during the marriage, substantial gifts, valued at over $93,000.00, (Record 414, defendant's exhibit 2) and the court stated that the overwhelming majority of the assets accumulated by the parties were given to them by defendant's parents. (Record 329). The court found that the parties had approximately $103,900.00 in assets and $10,000.00 in liabilities for a net worth of $93,700.00. (Record 259). The plaintiff received approximately $42,500.00 of the net worth -- certainly an equitable proportion of the marital estate. Defendant received approximately $49,650.00 of the net worth, which is also a reasonable amount in light of the facts. Plaintiff is the beneficiary of defendant's parents' generosity. He leaves the marriage owning a house that became the "rental property" only because the defendant's parents essentially purchased the "marital residence" for the parties. (Record 471, 414-15). Considering these circumstances, the court's division was reasonable and equitable.

IV.

THE PLAINTIFF SHOULD NOT BE AWARDED ATTORNEY'S FEES FOR BRINGING THIS APPEAL

Plaintiff's final contention is that he should be awarded his attorney's fees in bringing this appeal. (Brief p.

48). The plaintiff commenced the divorce proceedings and brought this appeal. (Record 2, 289). The trial court held that each party should bear his or her attorney's fees below, and the plaintiff has failed to justify why that reasoning should be changed on appeal.

Plaintiff cites Savage v. Savage, 658 P.2d 1201 (Utah 1983) in support of his argument that defendant should be saddled with plaintiff's costs on appeal because she is "relatively more able to pay" them. (Brief p. 48). In Savage the Supreme Court upheld an award of attorney's fees to a wife who was unemployed where the husband earned $133,370 per year and the wife's only income was $7,000 in stock benefits. The facts here do not approach Savage, and plaintiff's request is without merit.

CONCLUSION

It is respectfully submitted that the trial court did not abuse its discretion in rendering judgment below. To the contrary, the court's decree evidences fairness, reasonableness and practicality. Therefore, the decree should be upheld. Plaintiff's affidavits filed with this Court are improper and should not be considered.

DATED this 11th day of June, 1987.

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CERTIFICATE OF SERVICE

I hereby certify that I am a member of and/or employed by the law firm of WATKISS & CAMPBELL, 310 South Main Street, Suite 1200, Salt Lake City, Utah, and that pursuant to Rule 26 of the Rules of the Utah Court of Appeals four copies of the attached RESPONDENT'S BRIEF were caused to be served upon:

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by depositing a properly addressed envelope containing the same in the U.S. Mails, postage prepaid thereon this 16 day of June, 1987.

ADDENDA

Rule 15. Amended and supplemental pleadings.

(a) **Amendments.** A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) **Amendments to conform to the evidence.** When issues not raised by the pleading are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendments of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court shall grant a continuance, if necessary, to enable the objecting party to meet such evidence.

(c) **Relation back of amendments.** Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

(d) **Supplemental pleadings.** Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

30-3-5. Disposition of property — Maintenance and health care of parties and children — Court to have continuing jurisdiction — Custody and visitation — Termination of alimony — Nonmeritorious petition for modification.

(1) When a decree of divorce is rendered, the court may include in it equitable orders relating to the children, property and parties. The court shall include the following in every decree of divorce:

(a) an order assigning responsibility for the payment of reasonable and necessary medical and dental expenses of the dependent children, and

(b) if coverage is available at a reasonable cost, an order requiring the purchase and maintenance of appropriate health, hospital, and dental care insurance for the dependent children.

(2) The court may include, in an order determining child support, an order assigning financial responsibility for all or a portion of child care expenses incurred on behalf of the dependent children, necessitated by the employment or training of the custodial parent. If the court determines that the circumstances are appropriate and that the dependent children would be adequately cared for, it may include an order allowing the non-custodial parent to provide the day care for the dependent children, necessitated by the employment or training of the custodial parent.

(3) The court has continuing jurisdiction to make subsequent changes or new orders for the support and maintenance of the parties, the custody of the children and their support, maintenance, health, and dental care, or the distribution of the property as is reasonable and necessary.

(4) In determining visitation rights of parents, grandparents, and other relatives, the court shall consider the welfare of the child.

(5) Unless a decree of divorce specifically provides otherwise, any order of the court that a party pay alimony to a former spouse automatically terminates upon the remarriage of that former spouse. However, if the remarriage is annulled and found to be void ab initio, payment of alimony shall resume if the party paying alimony is made a party to the action of annulment and his rights are determined.

(6) Any order of the court that a party pay alimony to a former spouse terminates upon establishment by the party paying alimony that the former spouse is residing with a person of the opposite sex. However, if it is further established by the person receiving alimony that that relationship or association is without any sexual contact, payment of alimony shall resume.

(7) When a petition for modification of child custody or visitation provisions of a court order is made and denied, the court may order the petitioner to pay the reasonable attorney's fees expended by the prevailing party in that action, if the court determines that the petition was without merit and not asserted in good faith.

78-45-7. Determination of amount of support — Assessment formula for temporary support.

(1) Prospective support shall be equal to the amount granted by prior court order unless there has been a material change of circumstance on the part of the obligor or obligee.

(2) When no prior court order exists, or a material change in circumstances has occurred, the court in determining the amount of prospective support, shall consider all relevant factors including but not limited to:

(a) the standard of living and situation of the parties;

(b) the relative wealth and income of the parties;

(c) the ability of the obligor to earn;

(d) the ability of the obligee to earn;

(e) the need of the obligee;

(f) the age of the parties;

(g) the responsibility of the obligor for the support of others.

(3) When no prior court order exists, the court shall determine and assess all arrearages based upon, but not limited to:

(a) the amount of public assistance received by the obligee, if any;

(b) the funds that have been reasonably and necessarily expended in support of spouse and children.

(4) In determining the amount of prospective support on an ex parte or other motion for temporary support, the court shall use a uniform statewide assessment formula, adjusted for regional differences, prior to rendering the support order. The formula shall provide for all relevant factors which can be readily identified and shall allow for reasonable deductions from the obligor's earnings for taxes, work related expenses, and living expenses. The assessment formula shall be established by the Department of Social Services and periodically reviewed by the Judicial Council under Subsection 78-3-21(3).