

1987

Michael R. Barker v. Laura Beth McGillivray, State of Utah, Utah Dept. of Social Services, David L. Wilkenson, Ross C. Blackham, SanPete County Attorney, Utah Dept. of Social Services, John Abbott, Roleen Olsen, Office of Recovery Services, Utah Department of Social Services, Utah Legal Services, Inc., Waine Riches, Clella Lawrence, Howard Maetani : Brief of Respondent

Utah Court of Appeals

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David L. Wilkinson; attorney general; Blaine R. Ferguson; Waine Riches, Clella Lawrence, Howard Maetani; Utah Legal Services; Ross C. Blackham; attorneys for respondent.

Michael R. Barker; pro se.

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Brief of Respondent, *Michael R. Barker v. Laura Beth McGillivray, State of Utah, Utah Dept. of Social Services, David L. Wilkenson, Ross C. Blackham, SanPete County Attorney, Utah Dept. of Social Services, John Abbott, Roleen Olsen, Office of Recovery Services, Utah Department of Social Services, Utah Legal Services, Inc., Waine Riches, Clella Lawrence, Howard Maetani*, No. 870158 (Utah Court of Appeals, 1987).
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IN THE UTAH COURT OF APPEALS

MICHAEL R. BARKER	(RESPONSE TO
Defendant, Appellant, Pro Per	(RESPONDANT'S BRIEF
	(
v.	(
	(
Laura Beth McGillivray, and the	(UTAH COURT OF APPEALS
State of Utah, by and through	(NO. 870158-CA
Utah Dept. of Social Services	(
David L. Wilkenson,	(CIVIL NO. 9085
Utah Attorney General	(
Ross C. Blackham,	(
SanPete County Attorney	(
Utah Dept. of Social Services	(
John Abbott, Director	(
Roleen Olsen	(
Office of Recovery Services	(
Utah Department of	(
Social Services	(
Utah Legal Services, Inc.	(
Waine Riches, Attorney	(
Clella Lawrence, Attorney	(
Howard Maetani, Attorney	(
Plaintiff/Respondant	(

Appeal from the Judgment of the Sixth
Judicial District Court for SanPete County
Honorable Don V. Tibbs, Judge

WAINE RICHES, ATTORNEY
CLELLA LAWRENCE, ATTORNEY
HOWARD MAETANI, ATTORNEY
UTAH LEGAL SERVICES, INC.
455 N. UNIVERSITY, SUITE 100
PROVO, UTAH 84601
CO-PLAINTIFFS/RESPONDANTS

MICHAEL R. BARKER
IN HIS PROPER PERSON
BOX 142
WASHINGTON COUNTY
SANTA CLARA, UTAH

DAVID L. WILKENSON,
ATTORNEY GENERAL
C/O BLAINE R. FERGUSON,
ASSISTANT ATTORNEY GENERAL
236 CAPITOL BLDG.
SALT LAKE CITY, UTAH 84114
CO-PLAINTIFF/RESPONDANT

ROSS C. BLACKHAM
SANPETE COUNTY ATTORNEY
SANPETE COUNTY COURTHOUSE
MANTI, UTAH 84642

LIST OF PARTIES

DEFENDANT APPELLANT.....MICHAEL R. BARKER

PLAINTIFF RESPONDANTS.....STATE OF UTAH BY AND THROUGH THE
UTAH DEPARTMENT OF SOCIAL SERVICES,
JOHN ABBOTT; ROLEEN OLSEN; OFFICE
OF RECOVERY SERVICES

PLAINTIFF RESPONDANTS.....UTAH LEGAL SERVICES, INC., WAINE
RICHES, ATTORNEY; CLELLA LAWRENCE,
ATTORNEY; HOWARD MAETANI, ATTORNEY

PLAINTIFF RESPONDANT.....ROSS C. BLACKHAM, SANPETE COUNTY
ATTORNEY

PLAINTIFF RESPONDANT.....STATE OF UTAH
BLAINE R. FERGUSON, ASSISTANT
ATTORNEY GENERAL

PLAINTIFF RESPONDANT.....LAURA BETH MCGILLIVRAY

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IN THE UTAH COURT OF APPEALS

MICHAEL R. BARKER	(RESPONSE TO UTAH LEGAL
Defendant, Appellant, Pro Per	(SERVICES' BRIEF
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Laura Beth McGillivray, and the	(UTAH COURT OF APPEALS
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Utah Department of	(
Social Services	(
Utah Legal Services, Inc.	(
Waine Riches, Attorney	(
Clella Lawrence, Attorney	(
Howard Maetani, Attorney	(
Plaintiff/Respondant	(

Comes now the Appellant, Michael R. Barker, a free, white, natural born person, a citizen of the State of Utah, appearing Specially, under threat, duress, and coercion, and claiming his rights under the Preamble and Bill of Rights to the U.S. Constitution, and his rights under the Utah Constitution to rebutt Respondant's Brief.

NOT SUBJECT TO JURISDICTION

POINT 1. Waine Riches has no argument to show that the Legislative District Court, subject to U.S. Constitution, Article 1 has jurisdiction over a U.S. Constitution, Article 4, Section 2, Citizen, who claims his rights pursuant to Article 3, Section 2, of the U.S. Constitution. My privileges and immunities as a citizen of the State of Utah must be protected by the State. His argument that my argument has no merit is without merit.

I have noticed the lower court and several administrative agencies that I am in fact not subject to legislative tribunals but rather I am entitled to privileges and immunities of a state citizen; the lower judicial district court did take judicial notice of that fact, (See record page 35, lines 3 through 25.); notwithstanding that the lower court did exercise abuse of discretion and abuse of process, or malicious prosecution in that matter; and did so with full knowledge, intent, and malicious intent to violate my common law rights. (See record page 214 line 22 through line 9, and record page 221, lines 1 through 16.)

Furthermore, the State of Utah and concerned administrative agencies have been noticed, noticed to abate, and noticed to bar in the matter of a rescission of the marriage license on the basis of constructive fraud as evidenced on the record in the following documents: Declaration; Notice to Appear and Defend-Rescission of Marriage; Notice to Abate-Rescission of Marriage; Demand to Dismiss for Want of Jurisdiction-Rescission of Marriage; Notice-Rescission of Marriage-Inform me what Law gives State authority to Proceed. No replies were forthcoming citing authority to proceed. The lower court abused its' discretion by refusing to hear the rescission issue when in fact the Utah Supreme Court stated on the record that the proper place to hear that issue was the District Court. (See Utah Supreme Court record and statement of Judge Zimmerman.)

There should be no issue before the court since the Utah Department of Health has determined its' own jurisdiction by failing to respond to the rescission issue based on fraud. Because my children have been held ransom and conspiracy to

breach of contract initiated by Utah Legal Service, Inc., attorneys I am forced to defend due to threat, duress, and coercion.

MEXICAN DECREE CANNOT BE ESTOPPED DUE TO FRAUD & HARM TO ANOTHER
POINT 2. Respondants did not prove that the Mexican Divorce was obtained through the mail. Laura was noticed on the telephone as to the Mexican divorce and agreed to all provisions of it. She refused to give her address but did agree to return to Utah to sign the Mexican divorce decree, which she did, recognizing that it was legal. (See Record page 119, lines 10 through 17.) Laura acted on provisions of the divorce through shared custody of children, (See record page 94 lines 1 through 16, also Exhibit 2 in Appellant's Brief), and by living in a home provided by me and accepting several hundred dollars per month. (See record page 139, lines 5 through line 19.)

Furthermore, Laura did not initiate divorce action. The Utah Department of Social Services did through Utah Legal Services. (See Appellant Brief Exhibit 1) She thought the divorce was legal. (See Record page 119, lines 10 through 17.) The Department is guilty of malicious institution of civil action.

Even if it was proper legal action initiated by Laura, which is not the case, the action is for the sole purpose of financial gain to the harm of another, and a Mexican divorce, even if it was obtained through the mail cannot be estopped. (See Record pages 204 through 206.) Respondants do not even address or defend against this axiom of law and, therefore, their argument is without merit. Hensgen's Estate, 181 P.2d 69. The lower court abused its' discretion by not even considering that fact.

Respondant's state that the Mexican divorce decree was not submitted in evidence. That statement is in error. The document was given to the lower court, Legal Services, Inc., and Utah Department of Social Services, as evidenced by the lower court record file, and Record page 64, lines 15 through 22, Legal Services Brief Addendum, and a letter from the Department as shown in Appellant's Brief as exhibit 42. See also, that Judge doesn't care if it's marked for exhibit since he reads it and it is in the file, Record page 98, lines 21 through 22.

Laura perjured herself on several occasions on the record. (See Record page 117, lines 6 through 11; page 91, lines 12 through 20 along with page 93, lines 4 through 7 along with page 94, lines 6 through 16; page 75, lines 11 through line 3 on page 76 along with p 76 lines 9 through 16; page 76 line 25 through line 10 on page 77; page 64, lines 11 through 14 along with page 66, lines 24, line 1 on page 67, along with Appellant's Brief Exhibit 3. Also, Record page 98, lines 11 through 22.

The new award of divorce to Laura was an abuse of discretion since it is obvious from the previously cited record that Laura does not tell the truth. The judge took her word that she was cornered in the bathroom when in fact it had two doors plus the fact that the physical violence she inflicted on me was in the living room. Respondants even admit that the divorce could be properly awarded to either of the parties. See Record page 87, lines 4 through 8.

She did in fact believe the Mexican divorce to be legal as evidenced on Record page 119, lines 15 & 17, and page 113, lines 23 & 25. All action on the part of both parties pointed to the

divorce being acted upon, ie., Laura's assaults on Appellant, his moving to accept other employment in St. George, Utah, etc.

JOINDER IS PROPER

POINT 3. Appellant has pointed out in his Brief that conspiracy to breach of contract and fraud, along with other stated intentional fraudulent acts, are being perpetrated by the Respondents. The granting out and serving of an injunction preventing defendant from exercising a right under a contract entered on by plaintiff is a breach of the contract by plaintiff and may form a basis for the counterclaim by defendant, and a counterclaim by setting up such fact states a cause of action. Driver v. Gas Co., Ut Rep. 22-143.

New parties may be brought in by defendant by the cross-complaint where it is shown that they are necessary to the determination of the cause. Chalmer v. Trent, Ut Rep. 11-88. (See Appellant's Amended Complaint, 26 Feb. 1987, for the various illegal and fraudulent actions arising out of the Social Services divorce action.)

Several causes of action are properly joined where the subject-matter was for a tort arising out of certain wrongful continuous official acts, and causes of action are properly joined in one action, and the complaint reaches the substantial right without resorting to a needless multiplicity of actions. Wilson v. Sullivan, Ut Rep. 17-341; Irr. Co. v. McIntyre, Ut Rep. 16-398.

Furthermore, Appellant is a Utah State citizen whose sovereign rights have been violated. (See Appellant's Brief for argument on Joinder). Respondants' claim that there is no proper

joinder and no cause of action is without merit.

It is both duty and prerogative of Supreme Court in equity cases, including divorce case, to review facts as well as law. Article 8, Section 9, Utah Constitution. Humphreys v. Humphreys, 520 P.2d 193. The court did abuse its' discretion in ruling otherwise.

SLANDEROUS AND FALSE REMARKS TO BE STRICKEN

POINT 4. Wayne Riches has made a slanderous accusation against me Respondant's point 4 argument by saying that I seek to teach my children by making derogatory remarks about Laura. His line of reasoning and the attendant pornography citations from the Utah Code should be given no more notice than the sound of a pip squeak dribbling into a strong headwind. Riches, for some strange seemingly perverted reason has focused his attention on a remark concerning Laura's sexual character which was never before the children in any way, including verbally. I will not compromise principle and refrain from telling my children, for example, that even though they witnessed numerous berserk actions, vulgar language, and lying by their mother, those actions are wrong; notwithstanding while they abhor those actions they should try to understand the cause and source of those actions, through long suffering while still having love for their mother. Nor will I go to jail for that instruction. I have simply maintained that the court was sufficiently vague and ambiguous, so that I feel it necessary to protect my rights pursuant to Article 1, Section 1, of the Utah Constitution, Humphreys v. Humphreys, 520 P.2d 193.

The lower court did not consider the facts before it. (See Appellant's Answer to Amended Complaint, item 28, 26 Feb. 1987).

Respondants did not deny those facts at any time.

I hereby request that the Appellate Court communicate to Attorney Riches that he cease and desist from cheap, unprofessional, slanderous and untrue allegations against me with a warning that if further tactics are employed that his actions will be brought before the Ethics and Discipline Committee of the State Bar. I move the Court to strike Riches' pleading.

COURT RULES TRANSFER OF PROPERTY WAS FRAUDULENT

POINT 5. The transfer of property to Laura from Mr. Beh did not involve any consideration. His reason for transfer was that he was being threatened and coerced by Legal Service, Inc., legal action. The transfer to Laura was done under threat, duress, and coercion. The lower court abused its discretion by giving legal advise to Legal Service, Inc., attorneys to take legal action against Mr. Beh to clear title on what it termed a fraudulent transfer of title. (Decree of Divorce and Judgment page 7, lines 11 through 14). That property was obtain by me before I met Laura.

REAL PROPERTY AWARD WAS NOT PROPER

POINT 6. The lower court awarded the house being held in trust by Mr. Beh to Laura on the specific basis that the children needed a place to live. See Record page 220, lines 4 through 9. I have been providing that house for the children but Laura moved out of it in an attempt to make me pay more money, as stated in Appellant's Brief. Since the lower court was only concerned about the children having a place to live, then there was no reason for awarding the house to Laura. The house was purchased by me from the proceeds of a home purchased before I even met

Laura. The Court said it understood that. See Record page 116, lines 10 through 17. Notwithstanding the lower court did abuse its' discretion by violating the principle that each party should, in general, receive the real and personal property he or she brough to the marriage. I bought that house from the proceeds of the sale of a house obtained before even meeting Laura. Preston v. Preston, (1982) 646 P 2d 705. Jespersion v. Jespersen, 610 p 2d 326, 328, (1980). Laura had been living in the house per the Mexican divorce mutual agreement, until the Department of Social Services initiated new divorce action. Furthermore, equity is not available to reinstate rights and privileges voluntarily contracted away simply because a party has come to regret the bargain made. The law limits the continuing jurisdiction of the court where a property settlement agreement has been incorporated into the decree. Land v. Land, (1980) 605 P 2d 1248.

The lower court had been noticed that Laura may be a compulsive liar. See Appellant's Answer to Amended Complaint, item 34. (26 Feb. 1987), and proof of same in point 2, paragraph 5, above; notwithstanding, the court did abuse discretion and award the house to her. Subsequent to the award, Laura sold the house and land which was valued at \$25,000.00 (which took into account the depressed housing market), for \$15,000.00 cash. That sale took place 24 August 1987. During a telephone conversation on 22 January 1988, Laura told me that there is only \$1000.00 remaining. My children have indicated the same to me.

I should be compensated for the loss of the house in full, so as to meet the standards set by the Utah Supreme Court in this

Humphreys v. Humphreys, 520 P.2d 193, Preston
v. Preston, P.2d 705, Griffin v. Griffin (1898) 18 U
98, 55 P 84.

To deny my right to relief on improper and incomplete
property adjudication is to allow Laura to fraudulantly obtain
more support in the future because now the children have no
house.

In making property settlement a court should consider: (1)
the amount and kind of property owned by each of the parties; (2)
whether the property was his before coverture or accumulated
jointly. U.C.A., 1953, 30-3-5, as amended.

The house that I had provided is now gone due to abuse of
discretion of Judge Don V. Tibbs and my children have no house.

CUSTODY AWARD IMPROPER

POINT 7. The lower court abused discretion in awarding
custody since the determination as to what was reasonable and
necessary for the best interest of the children was not in accord
with the facts. Nor did the court properly determine who was the
primary caretaker in light of the facts.

Record page 69, line 1 through line 18 on page 77 indicates
that I was the primary caretaker of the children. Currently
Laura is able to spend more time with the children because the
Department of Social Services is giving her money to do so. Laura
is unable to care for the children herself. Even after having
received two years of job training from the Department. She is
off of welfare now because she frauded the court by selling
Appellant's house at a nonprudent and ridiculous low price and
has spent nearly all of the money from the sale, which is

irresponsible to the long term needs of the children. The children now have no house because Laura frauded the court by selling the house which the judge awarded on the specific basis that the children have a place to live. In four months at least \$12,000.00, the entire proceeds from the sale of the house, has been spent. Laura is not a fit person to handle the financial responsibility to meet the needs of the children. Where is the house, I continually provided for my children, that Judge Tibbs took away by advising Attorney Wayne Riches, to initiate legal action against the trustee? Turned over to a financially incompetant person who does not even want to be a mother. (See Appellant's Answer to Respondant's Amended Complaint point 29, which was never denied).

As shown Record page 69 as mentioned in the preceeding paragraph, I am the primary caretaker who has exercised the "highest degree of care" and also "great care" throughout the marriage and divorce. I have provided "maintenance" and support throughout the entire time, ie., providing food, clothing, shelter, and expenses for automobile, medical, utilities, and general household, notwithstanding the fraud which has been perpetrated by Respondant's. Federal Land Bank of St. Louis v. Miller, 184 Ark. 415, 42 S.W. 2d 564, 566., Hughes v. Hughes, La. App., 303 So. 2d 766,769. That support has been for all of my children both natural and adopted. Bonwich v. Bonwich, 699 P2. 760.

Laura may be guilty of the crime of non-support inasmuch as she signed up for "welfare" when in fact she was receiving maintenance and support from me, by moving from the house I

provided for the children and frauding the court by carelessly selling that house. It is obvious that Laura has not exercised even "slight care" for the well being of the children. Therefore the children should be awarded to me. Humphreys v. Humphreys, 520 P.2d 193. (See Point 6 above).

"The right to receive current and future support payments under decree of divorce belongs to the minor children; and that right was not subject to being bartered away, estopped, or in any way defeated by the conduct of the children's mother or third parties." Baggs v. Anderson, 528 P.2d 141.

There is now obvious "substantial" and "material" change of circumstances from that which should have been apparent to the lower court in the beginning for my receiving custody of the children. The trial court's action in the award of custody to Laura, in light of all the facts, is so flagrantly unjust so as to constitute an abuse of discretion.

In the determination of custody the lower court did not consider what is "reasonable and necessary" for "best interests" of my children based upon the facts, and the courts' choice between what was good and better was an abuse of discretion. U.C.A., 1953, 30-3-5(1), 30-3-10. It is common knowledge that Judge Tibbs has a propensity to award divorce settlements in favor of women. The lower court did not allow Appellant to conduct a proper defense of his position in the above matter due to the refusal to permit counsel of choice to aid him even though Appellant was suffering emotional pain.

Laura's claim that she took the children to the dentist and the dentist, and entertain false since

not have a drivers license during the time we were married.

The lower court did not inquire of the children and take into consideration the children's desires regarding custody.

The lower court did not take into consideration the moral character of Laura as stated in Appellant's answer to Respondant's Amended Complaint point 28, dated 26 February 1987, but did refuse to hear the matter in opposition to the stated facts presented to the court. See Record page 199, lines 6 through line 24.

I have never abrogated my right to provide maintenance and support for my children as the primary caretaker. -Utah-, 249 Pac 250.

VISITATION ORDER TO RESTRICTIVE

POINT 8. The visitation order was not proper. I have worked on the weekends for at least two years which, in essence, means that the lower court has ruled that I am not permitted to see my children during the year. Furthermore, to restrict the visitation to two 2 week periods during the summer is not to the best interest of the children or myself. It is in the best interest of the children and it is their right to have a bonding relationship with their father. The restrictive visitation is preventing that bonding relationship for the children to the father and the father to the children, especially in light of the fact that Laura has plans to move out of state at the end of the school year. The visitation schedule should provide an adequate basis for preserving and fostering the child's relationship with the noncustodial parent, over the desire of the custodial parent. Kallas v. Kallas, 614 P.2d 641, 645 (Utah 1980), Cooper v. Cooper,

99 N.J. 42, 491 A.2d 606, 614 (1984). The court [redacted] and visitation to holidays and for the summer months when the children are not in school as per [redacted] written agreement between the parties. The trial court abused its' discretion. Smith, 726 P.2d at 425.

The Respondant's argument that I have not [redacted] any of the responsibilities of primarily taking care [redacted] over long periods of time is, in light of point 7 above, without merit.

CHILD SUPPORT ORDER REVERSED

POINT 9. The child support order was not proper. Furthermore, in a telephone conversation with Laura on 22 January 1988 she admitted to receiving money from her brother. The lower court was not told of that income, and it is [redacted] to the court. The court did not consider that Laura had received two years of schooling from Social Services for job training which increased her [redacted] to earn. She is [redacted] the court did not take into consideration that Laura would avail herself of monthly fuel expenses and [redacted] government benefits which she is now doing.

The court is abusing its' discretion by penalizing me 100 dollars per month in child support increase when the [redacted] child reaches age 18 in six months; at a time [redacted] the [redacted] is not increased. By doing so the court is in essence circumventing the law which maintains [redacted] for [redacted] of [redacted] over 18 years of age. [redacted] Respondant [redacted] the increase is justified because in the future years the expenses may increase. But the fact [redacted] has have

not increased, they have gone down. Judge Tibbs is not sufficiently clairvoyant to determine ahead of time Laura's earning capacity, my earning capacity, circumstances of inheritance which alter the basis of support determination, and a multiplicity of other related factors, etc. The lower court is attempting to require me to be the primary caretaker by continuing to provide maintenance and support while denying me the right to be with my children. The facts of Laura's present earning capacity were not considered by the court when the court abused its discretion by penalizing me pertaining to futurity.

In addition, the Utah Department of Social Services, Office of Recovery Services determined that child support payments were in the amount of \$500.00 per month, which was to be \$310.00 cash and the house I provided. Those payments were accepted for over two years by D.R.S. The lower court is attempting to require that I pay more than what was determined to be within the guidelines of the Utah Department of Social Services, which is clearly an abuse of discretion.

OTHER ARGUMENTS NOT VOID OF MERIT

POINT 10. Other arguments are not void of merit. There has been no indication on the record as to how or why my arguments are void of merit and, therefore, they must stand. Those arguments Respondants have failed to respond to cannot now be argued by Respondants. I move the Appellate Court that Respondants remain mute on those issues which they have failed to respond to.

owner retains title and the fraudulent acts constitute theft. But where the owner's title comes up against the rights of a bona fide purchaser, equity will weigh the conduct of each to determine who will prevail. In the case of automobiles, shares of stock and other property which passes by the assignment of documentary evidence alone, the endorsement and delivery of the certificate to the thief weigh heavily against the owner. By and large, as we have noted, such conduct is considered of sufficient gravity as to estop the owner from asserting his title. It is simply a matter of who has the superior equity.

Cases from other jurisdictions which reach the same result include *White v. White*, 241 Iowa 596, 36 N.W.2d 761, and *Walker v. Walker*, 37 Wash.2d 12, 221 P.2d 100. In each the owner of an automobile fraudulently induced to part with both title and an endorsed certificate of title. In each, the court held the owner to be estopped from asserting his title against a subsequent bona fide purchaser for value. Cf. also, *Kelsoe v. Grouskay*, 70 Ariz. 17 P.2d 915.

Because we are dealing with estoppel to title, and not with title itself, it is of no moment that Mrs. Carr did not comply with S.A. 8-135, as amended, the statute governing the assignment of certificates of title. Noncompliance with the statute may make the transfer void; the fraud of Mrs. Carr certainly made the transfer void. Title would have been no better had there been strict compliance with the statute but we are not dealing here with the validity of "Sutton's" title—we are only concerned with whether the Carrs may assert their concededly good title against Bordwell, the bona fide purchaser. It is irrelevant that Mrs. Carr may not.

There is, then, no irreconcilable inconsistency between the trial court's findings that "Sutton" was a thief, and yet Bord-

[10] Finally, we must determine whether the trial court erred in denying attorney fees under K.S.A.1973 Supp. 40-256. It was found that Farm Bureau's refusal to pay was not "without just cause or excuse." We have said many times that the issue is primarily one of fact to be determined in the first instance by the trial court (*Sloan v. Employers Casualty Ins. Co.*, 214 Kan. 443, 521 P.2d 249; *Ogden v. Continental Casualty Co.*, 208 Kan. 806, 494 P.2d 1169; *Koch, Administratrix v. Prudential Ins. Co.*, 205 Kan. 561, 470 P.2d 756) and must depend on the facts and circumstances of each case (*Forrester v. State Farm Mutual Automobile Ins. Co.*, 213 Kan. 442, 517 P.2d 173; *Wheeler v. Employer's Mutual Casualty Co.*, 211 Kan. 100, 505 P.2d 768; *Sturdy v. Allied Mutual Ins. Co.*, 203 Kan. 783, 457 P.2d 34).

In this case there was never any significant dispute over the facts on which the liability or non-liability of the company would depend. Hence our cases dealing with an insurance company's duty to investigate are not applicable. In cases such as *Forrester* and *Sturdy* we have recognized that the presence of a good faith legal controversy, particularly if it involves a matter of first impression in this jurisdiction, may constitute just cause or excuse for a company's refusal to pay.

[11] In this case we think the "theft" issue was well settled by our cases. The applicability of the exclusions, however, had not been tested; it presented what could reasonably have been regarded by the trial court as a good faith legal controversy. In any event, we are not prepared to say that the trial court abused its discretion or that its finding of just cause or excuse is without support in the record.

The judgment is affirmed.

Approved by the Court.

v.
Dennis R. ANDERSON, Defendant,
Respondent and Cross-Appellant.
No. 13422.

Supreme Court of Utah.
Nov. 6, 1974.

Former wife brought action against former husband seeking to enforce collection of child support payments under a Wyoming divorce decree. The Second District Court of Weber County, Calvin Gould, J., held that former wife was estopped from collecting support money which accrued prior to date of action, and former wife appealed. The Supreme Court, Crockett, J., held that right to receive support payments belonged to minor children and was not subject to being barred away, estopped, or in any way defeated by the conduct of the former wife or third parties.

Remanded with directions.

Ellett, J., concurred and filed a separate opinion in which Tuckett, J., joined.

Henriod, J., filed a dissenting opinion.

1. Divorce ⚡352(3)

Wyoming divorce decree was entitled to full faith and credit.

2. Estoppel ⚡55, 58

An essential requirement for estoppel is that there be some conduct of the obligee which reasonably induces the obligor to rely thereon and make some substantial changes in his position to his detriment.

3. Parent and Child ⚡3.1(1, 13)

Support obligations can fall under two separate categories: (1) the current and ongoing right of a child to receive support money from his parents; and (2) the right of another to receive reimbursement from the parent for support of the child that has already been supplied.

od of time to furnish support, the person furnishing support has the right to claim reimbursement from the parent, the same as any other past debt.

5. Accord and Satisfaction ⚡2(1) Compromise and Settlement ⚡3

A third party's right to reimbursement for support supplied to a child from the failure of the parent to furnish support belongs to whoever furnishes the support and is subject to negotiation, settlement, satisfaction or discharge in the same manner as any other debt.

6. Divorce ⚡308

The right to receive current and future support payments under decree of divorce belongs to the minor children; and that right was not subject to being barred away, estopped, or in any way defeated by the conduct of the children's mother or third parties.

7. Divorce ⚡310

Agreement by father of minor children to make payments of \$200 per month for three months, something father was already obligated to do under terms of divorce decree, did not furnish any consideration for claimed agreement between parents of minor children that father would not have to pay any future support money.

8. Contracts ⚡75(1)

An agreement to do that which one is already required to do does not constitute consideration for a new promise.

9. Estoppel ⚡78(6)

Actions of father of minor children in buying a more expensive car and moving to a more expensive apartment did not constitute substantial change in father's position due to reliance on mother's agreement to release him from support obligations so as to constitute an estoppel barring mother of minor children from bringing action to collect such support payments.

witness by the administrator of the decedent. He apparently believes that if he is called as a witness by the administrator, he then may testify to transactions with the dead man. Our statute, Section 78-24-2, U.C.A.1953, prevents a party to a civil action from testifying to matters equally within the knowledge of the witness and the deceased unless such witness is called to testify thereto by the administrator of the estate of the deceased.

[2] This statute does not mean that a party may not be called to testify to matters not pertaining to transactions with the deceased without opening up the matter so that the survivor may testify to forbidden transactions. It is when the administrator calls the survivor to testify to the transaction that the matter is opened up for further testimony in that regard. The ruling of the trial court was correct in denying defendant the right to testify to transactions with the deceased.

The defendant now claims that the plaintiff cannot recover in this action because Terry, during his lifetime, filed a claim for workmen's compensation insurance pursuant to Section 35-1-58, U.C.A.1953. This statute permits an injured employee to file for compensation and requires an employer who does not carry workmen's compensation insurance to pay the award made within ten days after receiving notice of the same.

[3] The answer to this contention is that it was not raised in the court below, and we will not consider it on appeal. The defendant cannot ignore a proceeding which would undoubtedly have resulted in an award and defend an action at law and then if he loses his case claim that the action does not lie.

The judgment is affirmed. Costs are awarded to the respondent.

CALLISTER, C. J., and HENRIOD, CROCKETT, and TUCKETT, JJ., concur.

**Carol B. HUMPHREYS, Plaintiff
and Appellant,**

v.

**Gary L. HUMPHREYS, Defendant
and Respondent.**

No. 13445.

Supreme Court of Utah.

March 12, 1974.

A wife was granted a divorce, and from both portions of a divorce decree of the Second District Court, Weber County, John F. Wahlquist, J., awarding the husband custody of a son and making an allegedly inequitable disposition of property, the wife appealed. The Supreme Court, Crockett, J., held that in view of some basis in the evidence for a finding that, because of the somewhat erratic and immature conduct of the mother, a comparatively more mature and satisfactory home situation of the father and his children, the best interest and welfare of the little boy would be served by placing him in the father's custody, such placement was not an abuse of discretion. The Court also held that it was equitable and just that the wife be reimbursed for her \$3,400 which was used by her as a down payment to purchase the family home, and that such should be a preferred claim on proceeds realized from sale, with priority just following those claims constituting liens.

Decree modified; as modified, affirmed.

1. Parent and Child ⇨2(11)

In view of basis in evidence for finding that, because of somewhat erratic and immature conduct of mother, and comparatively more mature and satisfactory home situation of father and his children, best interest and welfare of little boy would be served by placing in father's custody, such placement was not abuse of discretion. U.C.A.1953, 30-3-10.

2. Infants ⇨19.3(5)

Matter of custody of minor child is never absolute and permanent thing but is

ject to review and possible change or
modification if changing circumstances
warrant. U.C.A. 1953, 30-3-10,
Divorce C-184(6)

It is both duty and prerogative of the
Court in equity cases, including divorce
case, to review facts as well as law.
ist. art. 8, § 9.

Divorce C-249(6)

It was equitable and just that wife, on
g granted divorce from husband, be
buried for her \$3,400 which was used
er as down payment to purchase fami-
ome, and that such should be preferred
n on proceeds realized from sale, with
rity just following those claims consti-
g liens.

ete N. Vlahos, Ogden, for plaintiff and
lliant.

oger S. Dutson, Ogden, for defendant
respondent.

ROCKETT, Justice:

aintiff Carol E. Humphreys appeals
eking only those portions of a divorce
ee which (1) awarded defendant hus-
l custody of their four-year old (now
1 son, and (2) made what she contends
inequitable disposition of their prop-

ie marriage of the parties in July of
was a second marriage for both. The
tiff had two children, ages eight and
and the defendant three, ages eight,
nd three; (now all are nine years old-
and they have one son Joe Darin, age
five years, issue of this marriage.
marriage lasted eight years. But it
ars to have been in difficulty for a
derable time, perhaps nearly from the
ming. It would serve no useful pur-
to detail the troubles which lead to
egrettable, but what appears to be in-
le, conclusion of divorce, which nei-
party now questions.

re matter of the gravest concern to the
s, the trial court, and this court, is

f. Walton v. Coffman, 110 Utah 1, 169 P.2d 97, and see Baker v. Baker, 25 Utah 2d 337,
1 P.2d 672.

the custody of little Joe Darin. In con-
tending that the trial court abused its dis-
cretion in failing to award her his custody,
plaintiff quotes in her brief and places re-
liance on Sec. 30-3-10, U.C.A. 1953, as it
formerly read:

In any case of separation of husband
and wife having minor children, the
mother shall be entitled to the care, con-
trol, and custody of all such children;
... if it shall be made to appear to
a Court of competent jurisdiction, that
the mother is an immoral, incompetent,
or otherwise improper person, then the
Court may award the custody of the
children to the father or make such other
order as may be just. [Emphasis
added.]

It is significant to observe that that section
was amended by Chapter 72, S.L.U. 1969,
by deleting the provision requiring that the
mother be "an immoral, incompetent or
otherwise improper person . . ." as a
condition precedent to awarding custody to
the father. In the place of the above quot-
ed language, that section now provides:

In any case of separation of husband
and wife having minor children, or
whenever a marriage is declared void or
dissolved the court shall make such order
for the future care and custody of the
minor children as it may deem just and
proper. In determining custody, the
court shall consider the best interests of
the child and the past conduct and dem-
onstrated moral standards of each of the
parties and the natural presumption that
the mother is best suited to care for
young children . . . [Emphasis
added.]

The effect of this change is to minimize
the often ill-advised and abortive attempts
to besmirch the mother in order to obtain
custody of children; and to enlarge the
discretion of the trial court to act in the
best interests of the child.¹ Yet it retains
the guideline concerning the natural pre-
sumption favoring the mother's care for
young children.

BANCROFT-WHITNEY Co.¹
301 Brannen Street
San Francisco, Calif. 94107



Cite as 520 P.2d 193

[1,2] What we have said above about
not unduly burdening this opinion nor be-
smirching the parties with their tribulations
and frailties is applicable on this issue.
However, because it is so unusual to grant
custody of a four-year old child (now
five) to the father, we make this summary
observation: There appears to be an ade-
quate basis in the evidence for the trial
court's conclusion that because of the
somewhat erratic and immature conduct of
the plaintiff; and the comparatively more
mature and satisfactory home situation of
the defendant and his children, there
seems to be a sufficient justification for
the order of custody made as being in the
best interest and welfare of the little boy.
It is also appropriate that the plaintiff is
given such rights of visitation as can prac-
tically be arranged; and concerning which
both parties must exercise a high degree of
forbearance and cooperation for the ben-
efit of each other, and more especially for
their little son. It is also worthy of note
that the matter of custody of a minor child
is never an absolute and permanent thing,
but is subject to review and possible
change or modification if changing circum-
stances should so warrant.

We turn to the problem of the arrange-
ment of the property rights. In view of
the decree as to custody, the court made no
order as to support money; and similarly
awarded no alimony. The plaintiff
complains of inequity in the division of the
personal property: the family automobiles,
boat, trailer and furniture. We are not
sufficiently impressed with that contention
to be much concerned. But with respect to
the family home in Roy, Utah, which is the
principal asset they acquired during the
marriage, we have concluded otherwise.

The home was purchased by the parties
in 1968 under a contract to pay \$16,500.
The plaintiff claims that the down pay-
ment was \$3,400 she received from the sale
of a previously owned home. Defendant
concedes \$3,000 of this. The trial court

found its present value to be about \$25,000.
Against this there is a first mortgage of
about \$11,000; second mortgage \$1,800;
an IRS tax lien \$1,700; and the parties
owe various debts, which need not be de-
tailed here, aggregating between \$5,000 and
\$6,000.

The defendant is a brick mason and con-
tractor. He has a very substantial earning
capacity of \$10,000 to \$20,000 per year.
The plaintiff was previously employed at
the Ogden Defense Depot where she con-
tinued to work for two years after the
marriage. She has a substantially less
earning capacity, but is capable of self-sup-
port. From the evidence it appears that it
should be assumed, as each party contends,
that during the marriage each contributed
his entire efforts and income to the family
enterprise and what property they accumu-
lated.

The decree directs that the home shall be
sold and the proceeds be applied: to the
payment of the mortgages and liens above
set forth; then to any judgments against
the parties: \$400 to the attorneys for
each; then to the payment of debts; and
finally that any amount remaining be di-
vided equally between them.

[3] In their briefs and arguments both
parties remind us of those aspects of the
usual rules of review in divorce proceed-
ings which would favor their respective
contentions. We note our awareness that
it is both the duty and prerogative of this
court in equity cases to review the facts as
well as the law.² But as we have hereto-
fore stated:

... it is firmly established in our
Law, that the trial judge will be in-
dulged considerable latitude of discretion
in adjusting the financial and property
interest of the parties; conversely, how-
ever, if there is such a serious inequity
as to manifest a clear abuse of discre-
tion, this court will make the modifica-
tion necessary to bring about a just
result.³

2. Utah Const. Art. VIII, Sec. 9; see Wiese
v. Wiese, 24 Utah 2d 296, 480 P.2d 504;
Harding v. Harding, 26 Utah 2d 277, 486
P.2d 306.

3. Martinett v. Martinett, 8 Utah 2d 202,
331 P.2d 821.

eta JESPERSON, Plaintiff
and Respondent,

v.

am Leroy JESPERSON, Sr.,
Defendant and Appellant.

No. 16413

Supreme Court of Utah.

March 20, 1980.

and appealed from portion of a divorce by the Fifth District Court, Washington County, Robert F. Owens, Jr., which distributed marital property.

The Supreme Court, Hall, J., held: (1) husband was not entitled to compensation for his efforts in producing property owned by parties; (2) husband did not abuse its discretion in finding that, although mobile home was in joint tenancy, there was no intent by wife to create a one-half interest in husband and no expectation by husband that he had received such an interest; (3) property division ordered by trial court and equitable even though it improperly considered marital misconduct in the property division; and (4) it was unreasonable for trial court to permit withdrawal from marital property of those assets she brought into marriage and award of 77% of assets to wife was not inequitable, particularly when viewed in light of fact that her financial ability alone that produced the production of such assets. Judgment affirmed.

ce = 252.2

In dividing property in marriage dissolution proceeding, marital estate is evaluated to what property exists at time marriage is terminated.

ce = 252.2

In dividing property in marriage dissolution proceeding, husband was not entitled to compensation for his efforts in producing property owned by parties.

3. Husband and Wife = 49% (5)

Fact that home was held in joint tenancy was not conclusive that wife had made a gift to husband of one half of the home.

4. Divorce = 252.1, 286(5)

Trial judge has wide discretion in division of marital property and his findings will not be disturbed unless record shows that there has been an abuse of discretion.

5. Divorce = 252.3(2)

In dividing property in marriage dissolution proceeding, trial court did not abuse its discretion in finding that, although mobile home was held in joint tenancy, there was no intent by wife to create a one-half property interest in husband and no expectation by husband that he had received such an interest.

6. Appeal and Error = 854(2)

Supreme Court is inclined to affirm a trial court's decision whenever it can do so on proper grounds even though trial court may have assigned an incorrect reason for its ruling.

7. Divorce = 254(1)

Trial court's property division in marriage dissolution proceeding was fair and equitable even though it improperly considered marital misconduct in making the property division.

8. Divorce = 252.2

In making a property division in a marriage dissolution proceeding, a court may properly consider such things as the length of the marriage and parties' respective contributions to the marriage.

9. Divorce = 252.3(3)

In dividing property in marriage dissolution proceeding, it was not unreasonable for trial court to permit wife to withdraw from marital property the equivalent of those assets she brought into the marriage and award of 77% of residual assets to wife was not inequitable particularly when viewed in light of fact that it was wife's financial ability alone that permitted the production of such assets.

JESPERSON v. JESPERSON

Cite as: Utah, 610 P.2d 325

Utah 327

John L. Miles of Atkins, Wright & Miles, St. George, for defendant and appellant.

John W. Palmer of Palmer & Anderson, St. George, for plaintiff and respondent.

HALL, Justice:

Defendant appeals from that portion of a decree of divorce which distributed marital property.

The parties were married on March 20, 1973 in Roswell, New Mexico. At the time of the marriage, defendant was 73 years of age, and plaintiff was 68. Defendant entered the marriage with virtually no assets. Plaintiff, at the time of the marriage, owned some furniture, an automobile, and savings in the aggregate amount of \$22,500. Plaintiff also owned a mobile home which she had purchased for \$17,500 (cash) shortly before the marriage.

At various times during the course of their marriage, plaintiff and defendant owned three different mobile homes, including the one purchased by plaintiff prior to the marriage. On each of the homes, defendant allegedly performed various landscaping and repair projects which enhanced the value thereof, such that each of them sold for a profit.¹ Both parties received monthly social security benefits but neither was gainfully employed.²

On September 1, 1978, plaintiff filed an action for divorce. Following a trial on the matter, the court concluded that plaintiff was entitled to a divorce and entered findings which included the following:

The Defendant, William Leroy Jespersen, Sr., has treated the Plaintiff cruelly, causing her great mental distress and anguish. Further, the Defendants acts have destroyed the legitimate objects of

1. Who paid for the materials for such improvements is disputed.

2. At the time of the divorce, defendant's total income was approximately \$241.00 per month in social security benefits. Plaintiff received \$263.90 per month social security and \$50.00 per month as interest from an insurance policy.

3. Beginning on the couple's honeymoon, and continuing through the course of the marriage, defendant apparently engaged in the practice of

matrimony, and further marriage relations between Plaintiff and Defendant are impossible. The Defendant has been guilty of gross and repeated marital misconduct³ which not only constitutes grounds for divorce, but which should be considered in making an equitable division of property.

The court then proceeded to divide the property. Each of the parties was awarded his or her own items of personal property and effects, as well as all savings and checking accounts standing in his or her name.⁴ In addition, plaintiff was awarded the household furniture, fixtures and appliances as well as an automobile.

The only other asset of the marriage was a mobile home located in St. George, Utah. The home was purchased in 1974 for \$19,027 and sold just prior to the divorce for \$27,000. The trial court ordered that plaintiff be awarded the following:

- (1) The sum of \$19,027.00 as a return to Plaintiff of the amount expended by her in the purchase of said property.
- (2) An amount equal to 77% of the net sale remaining from the sales price of \$27,000.00 after deducting the above stated amount of \$19,027.00 and the costs of said sale.

Defendant received the following:

- An amount equal to 23% of the net proceeds received by Plaintiff and Defendant from the sale of their mobile home and lot in the Dixie Downs area, after deducting from said gross sales price the sum of \$19,027.00, as a return to Plaintiff of her purchase price, and the costs of said sale.

vanishing periodically in order to visit other women. By plaintiff's testimony, these absences were often of substantial duration, and sometimes required that plaintiff send money to defendant in order to enable him to return home.

4. Plaintiff claims that her individual savings of \$22,500 were totally depleted during the marriage.

workers were moving a "burned-up" at defendant's shop. Plaintiff advised defendant the accident occurred and that he intended to file a claim with the insurance carrier. When his injury improved, plaintiff filed a claim with the Industrial Commission in December.

On August 29, 1980, the Administrative Law Judge recited the evidence and ruled as follows:

After reviewing all of the evidence, the defendant's witnesses and particularly in the records, the Administrative Law Judge cannot find that an industrial injury occurred and, therefore, finds that plaintiff is not entitled to workmen's compensation benefits.

Plaintiff contends that this constitutes "an arbitrary disregard of the facts," warranting reversal.

The standard of review of an order of the Industrial Commission was recently stated in *U.S. Steel Corp. v. Monfredi*, 2d 888 (1981) as follows:

Court's function in reviewing findings of fact is a strictly legal one in which the question is not whether the Court agrees with the Commission's findings or whether they are supported by the preponderance of evidence, but whether the reviewing court's interpretation of the Commission's findings is "arbitrary or capricious," or "without cause or contrary to the logical conclusion from the evidence without any substantial evidence to support them. Only then may the Commission's findings be disregarded in the original case. In the instant case, the evidence was sufficient to show that the injury was the result of an accident at defendant's shop.

Applying the foregoing standard, we affirm the order of the Commission as there is substantial evidence in the record which supports the findings. Defendant denied causation of the accident and

plaintiff's own witness (a co-worker) was equivocal as to whether an identifiable accident even occurred. There is nothing in the medical records to indicate that the injury was caused by an industrial accident; rather, plaintiff was initially diagnosed as suffering from "spontaneous thrombosis of the right subclavian axillary vein." The hospital admission record which was signed by plaintiff clearly indicated that the condition was not caused by an industrial accident. Not until subsequent hospital admission on May 27, 1980, for an operation to correct the condition is there any mention of it being industrially related. Shortly after plaintiff terminated his employment with defendant, he applied for and received unemployment compensation based on the representation that he was able to work.

[3] Plaintiff also claims as a basis for reversal that the Industrial Commission's affirmation of the order of the Administrative Law Judge violated plaintiff's constitutional right to due process. Specifically, plaintiff contends that he was not given a full and fair opportunity to be heard by the Commission and that it did not enter Findings of Fact and Conclusions of Law as required by U.C.A., 1953, 35-1-85.

On March 11, 1981, plaintiff filed a Motion for Review with the Industrial Commission alleging that the decision of the Administrative Law Judge was contrary to the evidence. On June 4, 1981, the Commission (only two members sitting) ruled, in part, as follows:

The Commission has reviewed the transcript and file in the above entitled matter and Commissioner Hadley is of the opinion that the Administrative Law Judge should be sustained since the Applicant did not mention anything about an accident to the treating physician while that physician was taking his history.

Commissioner Saathoff is of the opinion that the Administrative Law Judge should be reversed because the Applicant did report the injury to his employer. Since there is one vote for sustaining the Administrative Law Judge and one vote to reverse the Administrative Law Judge,

the result is that the Administrative Law Judge is affirmed and the Motion for Review is denied.

[4] The Commission can, and apparently in this case did, adopt the findings of the Administrative Law Judge. Whether a hearing is held and whether further findings are made is a matter of discretion with the Commission. In *U.S. Steel Corp. v. Industrial Commission*, Utah, 607 P.2d 607 (1980), we unanimously held as follows:

Our statutes place the responsibility for decision on the Commission, and not on Administrative Law Judges. Under § 35-1-85, it is the Commission which has the duty to make findings of fact. The Administrative Law Judge's findings and order become final as an order of the Commission under § 35-1-82.52 if the Commission takes no further action in the case. Upon review, the Commission, pursuant to § 35-1-82.54 "shall review the entire record made in said case, and, in its discretion may hold further hearings and receive further evidence and make findings of fact and enter its award thereon." The findings of the Commission are conclusive and final (§ 35-1-85) and the Commission's award may not be set aside unless such findings do not support the award made (§ 35-1-84).

The Commission's order is affirmed. No costs awarded.



George W. PRESTON, Plaintiff
and Appellant,

v.

Lorna A. PRESTON, Defendant
and Respondent.

No. 17597.

Supreme Court of Utah.

April 30, 1982.

Husband appealed from property settlement in contested divorce decree entered

by the First District Court, Cache County, John F. Wahlquist, J. The Supreme Court, Oakes, J., held that: (1) husband should have been given credit for contribution from his separate property for construction of cabin during the marriage; (2) wife was entitled to property she inherited during the marriage as her separate property; and (3) trial court, having found wife in contempt of a prior order, should have adjudicated some consequence or added some finding or conclusion explaining its failure to do so.

Affirmed and remanded for modification.

1. Divorce — 252.2

In divorce action, husband should have been given credit for contribution, made from sale of assets he owned prior to the marriage, to construction of cabin during the marriage, together with proportion of appreciation in value attributable to his contribution.

2. Divorce — 252.3(3)

Even though husband performed legal services and contributed other work regarding property inherited by wife during the marriage, wife's inheritance was not acquired through joint efforts of the parties and thus, in divorce action, wife was entitled to the inheritance as her separate property.

3. Divorce — 253(4)

Having found wife in contempt of order restraining her, pending divorce action, from removing property acquired by the parties during their marriage, trial court should have adjudicated some consequence for the contempt or added some finding or conclusion explaining its failure to do so.

Robert W. Gutke of Harris, Preston & Gutke, Logan, for plaintiff and appellant.

Findley P. Gridley, Ogden, for defendant and respondent.

it held Boyce Equipment not liable for the August 26 freight charges.

Cite as
69 Utah Adv. Rep. 41

IN THE
UTAH COURT OF APPEALS

Eddie Clarence EBBERT,
Plaintiff and Appellant,

v.

Barbara Ann EBBERT,
Defendant and Respondent.

Before Judges Bench, Billings and Hanson
(District Judge).
[Timothy R. Hanson, Judge, Third Judicial
District Court, sitting by special appointment
pursuant to Utah Code Ann.
'78-3-24(1)(j) (1987).]

No. 860229-CA
FILED: November 3, 1987

THIRD DISTRICT
Honorable Philip R. Fishler

ATTORNEYS:

Lowell V. Summerhays, Tamara H. Hauge,
Kenn M. Hanson for Appellant.

James P. Cowley, William H. Christensen for
Respondent.

OPINION

BENCH, Judge:

Plaintiff Eddie Ebbert appeals from several portions of his final decree of divorce. The decree is affirmed except for the portion dealing with visitation.

Plaintiff and defendant Barbara Ebbert were married June 19, 1976. They have two daughters, ages 7 and 5. On June 11, 1985, plaintiff filed for a divorce. In his complaint he asked that custody of the children be awarded to defendant and he be awarded extensive visitation rights. In her answer and counterclaim, defendant also requested custody of the children with reasonable visitation to plaintiff. In September 1985, plaintiff learned of defendant's plan to move with the children to Colorado.

On November 8, 1985, the parties presented to the court a proposed stipulated settlement under which defendant would be awarded custody of the children. The court accepted the stipulated settlement and heard evidence on grounds and jurisdiction. The parties were thereafter unable to agree upon the form and substance of the findings, conclusions, judgment, and decree. Consequently, the trial court set aside the stipulation and set the

matter for trial on March 27, 1986.

At trial, plaintiff attempted to amend his pleadings to include custody as a contested issue. The court denied plaintiff's motion. In its final decree, the court granted both parties a divorce, awarded custody of the two children to defendant, ordered plaintiff to pay \$325.00 per child per month in child support, awarded defendant \$1.00 per year in alimony for two years, established a visitation schedule, and divided marital property and debts. The court filed its findings, conclusions, judgment, and decree on May 16, 1986. Plaintiff's motion for a new trial was thereafter denied.

CUSTODY

On appeal, plaintiff primarily challenges the award of custody of the children to defendant. He argues the court's findings were insufficient to support the custody award.

The Utah Supreme Court, in *Smith v. Smith*, 726 P.2d 423 (Utah 1986), held:

[I]f our review of custody determinations is to be anything more than a superficial exercise of judicial power, the record on review must contain written findings of fact and conclusions of law by the trial judge which specifically set forth the reasons, based on those numerous factors which must be weighed in determining "the best interests of the child," and which support the custody decision.

Id. at 425 (quoting *Hutchison v. Hutchison*, 649 P.2d 38, 42 (Utah 1982)). With regard to custody in the instant case, the trial court merely found "The Defendant is a good mother and a fit and proper person to have the care, custody and control of said two children." In *Martinez v. Martinez*, 728 P.2d 994, 995 (Utah 1986), the Utah Supreme Court held:

A mere finding that the parties are or are not "fit and proper persons to be awarded the care, custody and control" of the child cannot pass muster when the custody award is challenged and an abuse of the trial court's discretion is urged on appeal.

The *Smith* and *Martinez* cases are distinguishable from the instant case. In *Smith* and *Martinez*, custody was hotly contested and, therefore, detailed findings were required for appropriate review on appeal. In the instant case, custody was not at issue. Both by pleading and stipulation, the parties agreed custody should be awarded to defendant. Although the parties were unable to agree on proposed findings, conclusions, judgments, and decrees, each draft thereof would have

defendant. Finally, immencing trial, the court as previously ruled on the grounds, and custody, I at when custody is not an findings required when d are not necessary. See 567 P.2d 1112 (Utah of the trial court to make d issues). To hold other- the trial courts to prepare d findings in every default parties presented to the d stipulation, the court t as to her parental fitness a fit and proper custodian . We find the court's fin- nt to support the custody

hat the issue of custody, leadings, was clearly tried as entitled to amend his y. Utah R. Civ. P. 15(b)

it raised by the ple- ed by express or of the parties, they in all respects as if raised in the plead- ndments of the ple- be necessary to cause rm to the evidence these issues may be tion of any party at after judgment; but end does not affect : trial of these issues. bjected to at the trial that it is not within le by the pleadings, allow the pleadings when the presenta- its of the action will ereby and the obje- s to satisfy the court ion of such evidence : him in maintaining defense upon the ourt shall grant a necessary, to enable party to meet such

testimony heard at trial of the children from the , plaintiff's and defen- with their children, and es and desires, which es- bjected to by defendant, sue of custody. However, ually relevant to the issue to custody. Furthermore, 's claim that he was enti- adings, the Utah Supreme hough Rule 15 ... tends to

favor the granting of leave to amend, the matter remains in the sound discretion of the trial court." *Stratford v. Morgan*, 689 P.2d 360, 365 (Utah 1984). In denying plaintiff's motion to amend his pleadings, the court ruled, "Well, I am not going to allow you to amend the pleadings at this late date. If custody were an issue, you could have had evaluations done, home studies done. We have not done any of that" We find no abuse of the trial court's discretion.

Despite the court's ruling on plaintiff's motion, shortly thereafter the court offered plaintiff an opportunity to make custody an issue. Concerning visitation, plaintiff testified, "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." The court, clearly concerned with plaintiff's allegations of abuse, said,

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 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 [your attorney].

Plaintiff retracted his statement, thereby declining the court's offer to place custody in issue by ordering an evaluation. The award of custody of the two children to defendant is affirmed.

VISITATION

Plaintiff argues the court erred in not granting more liberal and practical visitation rights and in failing to make findings concerning the best interests of the children in light of defendant's planned move to Colorado. In determining visitation rights, the trial court must "give the highest priority to the welfare of the children over the desires of the parent." *Kallas v. Kallas*, 614 P.2d 641, 645 (Utah 1980). The visitation schedule should be realistic and reasonable and provide an adequate basis for preserving and fostering the child's relationship with the noncustodial parent. *Cooper v. Cooper*, 99 N.J. 42, 491 A.2d 606, 614 (1984).

In the instant case, plaintiff and the trial court were both aware of defendant's plans to move after the decree was issued. In his complaint, plaintiff asked for an extensive schedule of visitation rights. The court trimmed plaintiff's request, awarding specific

post-move visitation rights of three weeks each summer and alternate holiday weekends. The findings are silent on the best interests of the children with regard to the visitation schedule. Moreover, the court only makes mention of the intended move without any findings as to whether the move would be in the children's best interests. The trial court abused its discretion in failing to make such findings. See *Smith*, 726 P.2d at 425. We therefore vacate the visitation schedule and remand the matter to the district court with instructions to enter additional findings of fact concerning the best interests of the children as to appropriate visitation rights.

CHILD SUPPORT

Plaintiff next argues the court erred in awarding \$650.00 in monthly child support. He contends the court failed to consider the necessary factors in determining the amount of support:

- 1) the standard of living and situation of the parties;
- 2) the relative wealth and income of the parties;
- 3) the ability of the obligor to earn;
- 4) the ability of the obligee to earn;
- 5) the need of the obligee;
- 6) the age of the parties;
- 7) the responsibility of the obligor for the support of others.

Utah Code Ann. §78-45-7(2) (1987). The court found plaintiff earned approximately \$2,000.00 net per month. Defendant, although unemployed, is capable of earning \$700.00 net per month. The court also heard evidence on the other factors. Plaintiff argues the wealth of defendant's parents, who made large gifts of money to defendant during the marriage, should have been considered by the trial court. Such a consideration would be tantamount to imputing the wealth and income of her parents to defendant, and thereby imposing a duty of child support on the grandparents. Such a result is contrary to the concepts of parental duty and common sense. The court acted well within its discretion in formulating an award of child support and we therefore affirm the award.

MARITAL PROPERTY

Plaintiff also argues the court erred in valuing and distributing the marital property. "Determining and assigning values to marital property is a matter for the trial court, and this Court will not disturb those determinations absent a showing of clear abuse of discretion." *Talley v. Talley*, 739 P.2d 83, 84 (Utah App. 1987). Plaintiff's main argument is the court failed to accept any of his proposed valuations. Such action does not constitute an abuse of discretion. Id. In one instance, defendant valued her household furnishings at \$10,000.00 while plaintiff testified

they were worth \$31,000.00. The court found their value to be \$5,000.00. Even assuming error in that valuation, the division is not disproportionate.

Plaintiff also contends the court erroneously omitted a \$25,000.00 lien, in favor of defendant's parents, on the rental property awarded to him. At trial, plaintiff testified the lien had been extinguished, although he had no supporting documentation. Furthermore, in arguments before the trial court and this Court, it is this Court's understanding that defendant will arrange for the necessary documents to extinguish the lien. Based upon that premise, the division of marital property is affirmed.

BIAS

Plaintiff last argues the trial court was biased and predisposed to award custody to defendant. Plaintiff presented to this Court his counsel's affidavit in support of his argument. Matters not admitted in evidence before the trier of fact will not be considered on appeal to this Court. *Pilcher v. State, Dep't of Social Services*, 663 P.2d 450, 453 (Utah 1983). Furthermore, plaintiff failed to object to the trial court's alleged expressions of bias; he therefore may not claim prejudicial error on appeal. *Meier v. Christensen*, 15 Utah 2d 182, 389 P.2d 734 (1964).

CONCLUSION

Plaintiff's remaining claims are without merit. The judgment and decree of the trial court is affirmed in all respects except the visitation award. That portion of the decree is vacated and the case is remanded for further evidentiary proceedings consistent with this opinion. No costs awarded.

Russell W. Bench, Judge

WE CONCUR:

Judith M. Billings, Judge
Timothy R. Hanson, Judge

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IN THE UTAH COURT OF APPEALS

The STATE of Utah,
Plaintiff and Respondent,
v.
Pedro P. GARCIA,
Defendant and Appellant.

Before Judges Bench, Greenwood and Garff.

No. 860223-CA
FILED: November 4, 1987

THIRD DISTRICT
Honorable David B. Dee