1977

Donna B. Wright v. Orval Wright : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT

OF THE STATE OF UTAH

DONNA B. WRIGHT,	)	
Plaintiff and Appellant,	)	Case No. 15163
vs.	)	
ORVAL WRIGHT,	)	BRIEF OF APPELLANT
Defendant and Respondent.	)	

STATEMENT OF THE KIND OF CASE

This is an action pursuant to Utah Code Ann. §30-3-5 to modify a Divorce Decree, divesting the former wife of title to the matrimonial residence and vesting it in both parties; requiring the sale of said home and the equal division of the equity to the parties hereto; and also requiring the former wife to pay an indebtedness secured by the home but incurred for the benefit of the former husband's separate property.

DISPOSITION IN THE LOWER COURT

The modification was granted, and motions to re-open and amend were denied.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the order requiring her to make payments on her home and reversal of the judgment declaring respondent to own an interest in her home.

STATEMENT OF THE FACTS

Original Action

This case was commenced on July 29, 1965, by the filing of a Complaint and Waiver in the Fifth Judicial District, with appellant Donna B. Wright as plaintiff. Ellis J. Pickett, her husband's attorney, was listed as her counsel. The Complaint sought a divorce and the effectuation by the court of a Property Settlement Agreement. R.1. Though the Property Settlement Agreement had been executed by the parties contemporaneously with the Complaint, on July 28, 1965, it was not filed until September 2, 1965. R.4. The agreement provided that the parties' home "would be set aside for Mrs. Wright our children." A mortgage on the house, incurred prior to the divorce to finance a mountain cabin was to be paid by Mr. Wright "until the mortgage indebtedness has been paid in full" (emphasis added). This indebtedness amounted to $7,729.64 when the divorce was granted. Mr. Wright kept the mountain cabin in question and after the divorce sold the same retaining the proceeds of this sale.

Mrs. Wright was also given an automobile, and promised $200 per month child support. She also received four lots in a local undeveloped subdivision, with Mr. Wright to pay the mortgage on those lots. Mr. Wright rece

all the remaining lots in the subdivision (approximately 20), all contract receivables on lots previously sold and

> All of the property in Sections 10, 11 and 12 in Township 39 South, Range 11 West, SLB&M, as described in that mortgage dated June 25, 1963, and recorded in Book S-44 of Mortgages on pages 107 to 109 inclusive, File No. 119243 of the Records of Washington County, Utah.

which was approximately 1,100 acres. The Property Settlement Agreement did not provide for disposition of the mountain cabin referred to above, another small house, a Jeep, a truck, two boats, diamonds, guns, cameras, and other personalty which Mr. Wright retained.

Also, the property settlement did not note, and the court was unaware that the parties had exchanged numerous deeds to property two days before executing the Complaint, Waiver, and Agreement. (There may also have been other concealed assets, but Appellant's discovery on this issue was denied by the lower court. See Argument Denial of Discovery, at 26, infra.

The matter was heard October 8, 1965 (R.6.) by Judge C. Nelson Day, and the divorce was granted. Findings of Fact and Conclusions of Law and an Interlocutory Decree of Divorce were entered October 27, 1965. R.8. The property settlement was adopted by the Court and the decree stated that Mrs. Wright was "awarded the home in

Hurricane...for herself and minor children," while Mr. Wright was ordered to pay the mortgage debt in full.

Order to Show Cause

Attempting to find a way to satisfy his obligations, Mr. Wright filed an Affidavit in the divorce action on February 22, 1971, claiming that the home should be awarded to himself on the ground that the minor children ha reached their majority, that Mrs. Wright had remarried, and that the house was not then used by Mrs. Wright. R.13. An Order to Show Cause was issued the 11th day of May, 1971, b Judge J. Harlan Burns. R.15.

Mrs. Wright responded through her attorneys Douglas Pike and John W. Palmer, moving to dismiss the Orde to Show Cause and filing an opposing affidavit. R.16, 17, 20. She also moved to enforce arrearages in support payme R.22.

A hearing was set for October 12, 1971, (R.31), but vacated to allow Mrs. Wright discovery on the relative values of property each party owned. See R.32, 34, 35 and 36. In the order vacating the hearing date, the judge, without hearing any evidence of changed circumstances, ordered Mrs. Wright to make the monthly payments of $110.0 on the unrelated mortgage financing Mr. Wright's mountain cabin until a hearing on the merits o[illegible]red. From the

decree until that date, Mr. Wright had paid $3,778.47 on the mortgage debt. There remained to be paid the sum of $3,951.17.

Mrs. Wright's discovery as to property values was allowed, but its scope was severely limited. The judge felt that Mr. Wright's income from 1965 to 1970, and property values and relative ownership in 1965 were immaterial, struck several of the interrogatories, allowing only those pertaining to Mr. Wright's present property ownership and income. T (October 8, 1971) 8:3-23; R.36.

Both parties submitted memoranda on the relevant law. Mrs. Wright alleged that the property settlment part of the Decree was not modifiable. R.18. Mr. Wright recognized this contention but claimed "that the District Court does retain jurisdiction over a ... property settlement agreement..." and therefore could modify a property settlement. R.28.

Interim Failure to Proceed

In May, 1973, after over a year's delay since the completion of discovery, with no further prosecution by Mr. Wright, Mrs. Wright filed a Demand for Non-Jury Trial Setting through her new attorney, Robert L. Gardner. R.49, 51. Mr. Wright had no desire to proceed because Mrs. Wright was making the monthly payments on his debt. The date set for the hearing was vacated at the insistance

of Mr. Wright's counsel. R.54, 55. The second date set was also vacated at his request. R.56, 58. Finally on October 1, 1973, the matter was heard by Judge A. John Ruggeri.[1]

Hearing of Order to Show Cause

Mr. Gardner's statement of the record recites th the allegations in support of Mr. Wright's claim to the house were very limited.

> There was nothing supporting his position except a very limited statement that the Plaintiff did not live in the home, the minor children were of legal age, and the Plaintiff was renting the home. There was no contention by the Defendant that he claimed an interest in the home from the time of the divorce or that he needed the house or for financial reasons that he needed money. Affidavit of Attorney, p.2.

The evidence presented was likewise very limited.

> The Defendant took the stand and in substance testified that he lived in Hurricane, Utah, had remarried, and had children by his present wife; that the Plaintiff had moved to Las Vegas, Nevada, and remarried; that the two children of these parties were now of age and not living with the Plaintiff, and that in view of the foregoing, the court should award him an interest in the home or that the home be sold and the proceeds divided. Affidavit of Attorney, p.3.

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[1] The transcript of this hearing is unavailable. See Affidavit of Counsel, Appendix to this brief. Appellants prepared a statement of the proceedings and served it on opposing counsel pursuant to Rule 75(m), U.R.C.P. Respondent having made no objection, the District Court made no settlement and approval. The statement of Mr. Gardner appears in the record. See Affidavit of Former Attorney of Record, filed November 1977, in the Supreme Court.

Mr. Garner regarded the evidence presented as totally insufficient to support modification of the property settlement, and did not believe recovery would be possible.

> Based upon what appeared to be a total lack of any competent evidence that would justify the redistribution of the title to the home and based upon the property settlement agreement that was part of the file, I did not see anything that the Plaintiff was required to respond to and therefore Plaintiff did not testify concerning the divorce, the property settlement, nor her present circumstances.

The judge, however, adopted Mr. Wright's contention that property settlements were modifiable.

> To the great surprise of both myself and my client, the Judge ordered the home appraised, sold, and after payment of an existing mortgage, the proceeds divided equally between the parties. Affidavit of Attorney, p.3.

Mr. Gardner discussed the matter with his client immediately after the October 1, 1973 hearing, and discovered (1) that Mr. Pickett who had originally represented Mrs. Wright was actually Mr. Wright's attorney, (2) that deeds had been prepared and exchanged as part of the property settlement, (3) that a large amount of property was not dealt with in the settlement agreement, (4) that her understanding was that the deeds meant she could not have the house taken away, and (5) that the mortgage debt was not related to the house but to property of Mr. Wright. See Affidavit of Attorney, page 3.

It was at this time that Mr. Gardner learned that on July 29, 1965, the day the divorce decree was filed Mr. Wright had delivered to Mrs. Wright a Quit Claim Deed to the home and real property at issue in this lawsuit. R.66. This deed was recorded July 29, 1965. On its face the deed conveys the property to "Donna B. Wright, wife of Grantor, as her sole and separate proper R.64. This Quit Claim Deed was given in exchange for various deeds from Mrs. Wright to Mr. Wright conveying the remainder of the parties' realty to Mr. Wright. The deeds were executed, delivered and recorded by Mr. Wright prior to the date of the filing of the Complaint for div R.63.

Motion to Re-Open

The day following the hearing Mr. Gardner made motion to re-open pursuant to Rule 59(a), U.R.C.P., alle the newly discovered deed as new evidence to convince th court that modification of a vested record interest was improper. See R.84. On October 15, 1973, he filed an affidavit of Mrs. Wright setting forth the execution of deeds and her understanding that "it was the intention o both the Plaintiff and Defendant at the time of the divo that the complete and absolute title to the home was giv to the Plaintiff..." R.63. Attached was a copy of the d

to the home, and a letter from Attorney Pickett referring to the exchange of deeds. R.64 and 65. Attorney Gardner also filed a written motion to re-open on the ground of newly discovered evidence. The motion was heard on October 17, 1973. R.66, 68. The transcript of this hearing is also unavailable[2], but a minute entry indicates the judge remained convinced that property settlements were modifiable and the motion to re-open was denied. R.68, 77, 78.

Findings of Fact and Conclusions of Law and a Judgment were then entered. Judge Ruggeri specifically found that the title and disposition of the home were still before the Court. R.69. Further, it was found that Mr. Wright no longer had a duty of support, and that the use of the home by Mrs. Wright and the children had ended. The Court noted the inequity of the previous Order requiring Mrs. Wright to make the mortgage payments, but felt it was powerless to change that Order. R.70. The Court ordered the home sold and the proceeds divided between the parties. R.70.

Motion for a New Trial

Mr. Gardner promptly moved for a new trial on the ground that there was insufficient evidence of change in circumstance to warrant a divestiture of title to real property. R.72. The court, several months later in May, 1974, filed a memorandum decision setting out grounds for and denying the motion to re-open. The court's action was specifically with-

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[2] See Affidavit attached hereto in Appendix, page vi

out prejudice to other procedures to establish the deed. R.

Motion to Re-Open Granted and Denied

In January, 1975, Judge Ruggeri reversed himself and granted the motion to re-open, and agreed to receive into evidence testimony and documents touching upon the ownership and disposition of the property. R.85. Mr. Gardner promptly filed a Petition to Modify the Order modifying the Decree. R.86. The Petition recited the evidence of deeds, discovered after the hearing, and noted the disparity of the property division in favor of the husband. Mr. Wright's counsel responded with an Objection to Petition to Modify (R.80.), and the Court sustained the objection, again without prejudice. R.107, again reversing itself.

Motion to Amend Order

Within a week of the hearing sustaining the objection to the Petition to Modify, Mr. Gardner filed a Motion for Leave to File a Petition to Amend pursuant to Rule 60(b), U.R.C.P. R.92. An accompanying memorandum explained the legal basis for the petition. R.94, 99.

No action was taken by the court. In late 1976, Attorney Gardner withdrew as counsel for Mrs. Wright, and early in 1977 counsel for Mr. Wright filed a Notice to Appoint Successor Attorney. R.110.

Present counsel for Mrs. Wright entered his appearance, (R.113) and Judge Burns referred the case to

Judge Ballif. Judge Ballif set a hearing for April 4 to consider vacating the Order sustaining the objection to the Petition to Modify, and notified counsel that they should be prepared to proceed to trial on April 5. R.111.

Judge Ballif heard the parties on April 4, 1977, and entered an order the following day "making the Order of the Court dated July 30, 1975...final..." R. 115. He expressly noted his reluctance to affect the decision of another district judge. A Notice of Appeal was timely filed and this appeal was perfected. R.116 et.seq.

In the course of these proceedings, after the Judgment of Judge Ruggeri executed October 19, 1973 ordering the mortgage satisfied out of the proceeds from the sale of the home (R.73), the last $951.17 of the mortgage indebtedness was completely paid off by Mrs. Wright.

It should be noted that the Motion for New Trial dated October 23, 1973, (R.72) and the Motion for Leave to File a Petition to Amend pursuant to Rule 60(b) (R.92) have never been disposed of, according to the record. The most recent judge to hear this case below ordered that no other pleadings be filed except a notice of appeal, and rather than be found in contempt, appellant has filed this appeal rather than seek resolution of those motions.

ARGUMENT

POINT I. THE DECREE MODIFICATIONS WERE CONTRARY TO LAW

The lower court made two modifications of the divorce decree. First, it ordered Mrs. Wright to make the mortgage payments, covering the house, and second, it ordered the house sold, with proceeds to be divided evenly between the parties. Prior to these orders, Mr. Wright ha made all the mortgage payments and the title to the house was vested solely in Mrs. Wright's name, as her separate property. R.64.

Apparently, the court based its actions on Utah Code Ann. 30-3-5, feeling that the statute authorized its acts.

> When a decree of divorce is made, the court may make such orders in relation to the children property and parties, and the maintenance of the parties and children, as may be equitable. The court shall have continuing jurisdiction to make such subsequent changes or new orders with respect to the support and maintenance of the parties, the custody of the children and the support and maintenance, or the distribution of the property as shall be reasonable and necessary. Visitation rights of parents, grandparents and other relatives shall take into consideration the welfare of the child. (emphasis added).

This statute, in different forms but with simila substance, has been in effect since March 6, 1852, when th Territorial Legislature enacted Utah's first divorce statutes. See Whitmore v. Hardin, 3 Utah 121, 131, 1 P. 4 (1881) and C.L. 1888 §2606, column note. That enactment provided for modification of divorce decrees:

> [W]hen it shall appear to the court at a future time that it would be for the interest of the parties concerned that a change should be effected in regard to the former disposal of children or distribution of property, the court shall have power to make such change as will be conductive to the best interests of all parties concerned. Whitmore, Id. at 131.

A related statute provided for modification of decrees respecting children, property and maintenance "in those respects when circumstances render them expedient." Id at 132. Similar statutes have been in effect since the territorial provision. See C.L. 1876 §1155; C.L. 1888 §2606; R.S. 1898 §1212; C.L. 1909 §1212; C.L. 1917 §3000; R.S. 1933 §40-3-5; Utah Code Ann (1943) §40-3-5.

While the present statute clearly allows modification of periodic support and maintenance provisions, the award of real property and the appurtenant house to Mrs. Wright was not such a provision, and therefore was not modifiable. Also, Mr. Wright's obligation to pay the mortgage was modified without hearing any evidence of changed circumstances, which is contrary to case law developed under the statute. Both modifications were, therefore, contrary to law.

A. The Ownership of the House, Given in Property Settlement, was not Modifiable

It has been unanimously held by all state courts that have considered the question that property settlements in divorce decrees are not modifiable. See Tuttle v. Tuttle, 38 Cal. 2d 419, 240 P.2d 587 (1952); Kuckenberg v. Kuckenberg, 252 Or. 647, 452 P.2d

305 (1969); Moore v. Moore, 33 Wyo. 239, 237 P.235 (1925). This contrasts sharply with the companion rule that provision for alimony can be modified. 24 Am. Jur. 2d Divorce and Separation §941 (1966).

The reasons for the distinction are sound. As stated by a leading commentator:

> None of the policy reasons favoring modification apply to a division of property. It should be final when made...Clark, Domestic Relations § 14.9 (1968).

In many of Utah's sister states, statutes make property settlements unmodifiable except upon grounds allowing modification of any other civil judgment. See Appendix, Laws of the Western States on Modification of Divorce Decrees. Arizona, Colorado, Montana, Nevada, and Washington are among this group.

In spite of the clear rule, however, respondent successfully argued below that property settlements may be modifiable under the Utah statute. He cited Doe v. Doe 48 Utah 200, 158 P.781 (1916) for the proposition that the District Court retains jurisdiction to modify the decree of divorce with respect to the distribution of property. R.27. The court's statement in that case, however, was merely prospective - that its order could be modified in the future. The decree in Doe was expressly worded to

place the home in trust, thus giving third parties notice of the other spouse's interest, and clearly reflecting an award of mere use of the house, not absolute title.

Though Doe was clearly distinguishable from this situation in which absolute title has been given to the wife, (R.64) the lower court adopted Mr. Wright's claim of modifiability specifically finding that the title and disposition of the home were still before the court. R.69. The issue of modifiability of property settlements is central to this appeal. As Mr. Wright's counsel has stated

> [I]f, in fact, that property settlement is unmodifiable...I would suppose that the Supreme Court should decide that and tell us if we are wrong. T (April 4, 1977) 20:19-23.

Appellant notes that an encyclopedic authority cites Utah as the only jurisdiction allowing property settlement modifications due to the broad language of our statute. 27B C.J.S. Divorce §300(4)a note 62.50 (1959). However, the case cited in support of that statement deals only with an interest in mountain cabins given to the wife in lieu of alimony as a source of income. She did not hold title to the property. See Dixon v. Dixon, 121 Utah 259, 240 P 2d 1211 (1952). Attorneys for appellant have been unable to find any Utah case applying the statute to modify a property settlement.[3]

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[3] Cases applying 30-3-5 or its predecessors to modify decrees, include: Whitmore v. Hardin, 3 Utah 121, 1 P.465 (1881) recognized the use of the statute to terminate a wife's use of the matrimonial household upon remarriage.

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Buzzo v. Buzzo, 45 Utah 625, 148 P.362 (1915), applied the statute to allow alimony modification where the decree was based upon the agreement of the parties.

Cody v. Cody, 47 Utah 456, 154 P.952 (1916) held the statu allowed modification to grant alimony where none had been granted in the original decree.

Sandall v. Sandall, 57 Utah 1050, 193 P.1093 (1920) found petition sufficient to support a modification of alimony.

Myers v. Myers, 62 Utah 90, 218 P.123 (1923) determined a motion to modify alimony could not affect past due installments.

Chaffee v. Chaffee, 63 Utah 283, 225 P.81 (1928) reversed decision in favor of a petition seeking reduction of suppo payments and reduction of the amount of installment paymen of lump sum alimony.

Rockwood v. Rockwood, 65 Utah 261, 236 P.457 (1925) dealt with a petition to reduce alimony and child support.

Carson v. Carson, 87 Utah 1 , 47 P.2d 894 (1935) held tha a material and permanent change of circumstances was neces to reduce alimony payments.

Hamilton v. Hamilton, 89 Utah 554, 58 P.2d 11 (1936) held that a modification of alimony could not be had in the absence of changed condition.

Larsen v. Daynes, 102 Utah 312, 133 P.2d 785 (1943) decide the statute allowed the court to delay disposition of property in settlement to allow the parties to negotiate.

Anderson v. Anderson, 110 Utah 300, 172 P.2d 132 (1946) considered an application to modify custody and alimony.

Dixon v. Dixon, 121 Utah 259, 240 P.2d 1211 (1952) adjust the management of certain property, the income of which w given in lieu of alimony.

Harrison v. Harrison, 22 Utah 2d 180, 450 P.2d 456 (1969) allowed modification of a decree for clarification.

Ridge v. Ridge, 542 P.2d 191 (Utah 1975) considered the pr priety of a scheduled reduction of periodic alimony.

Some Utah opinions have approached the question, however, or similar questions. In Lyon v. Lyon, 115 Utah 446, 206 P.2d 148 (1949) Justice Wolfe, in considering whether a portion of a decree was dischargeable in bankruptcy as providing for property settlement, or not dischargeable as providing for alimony, treated dischargeability and modifiability as separate questions, and specifically noted that the court expressed no opinion on the modifiability of property settlements. 206 P.2d at 152. Two more recent cases Carter v. Carter, 19 Utah 2d 183, 429 P.2d 35 (1967) and Iverson v. Iverson, 526 P.2d 1126 (Utah 1974) have applied modification powers to affect the award of "use and occupancy" of a house, both cases explicitly noting that the titles to the homes remained in joint tenancy. 429 P.2d at 36 and 526 P.2d at 1127.

Some Utah opinions have expressly assumed that property settlements are not modifiable. In Callister v. Callister, 1 Utah 2d 34, 261 P.2d 444 (1953) the

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[3] Dehin v. Dehin, 545 P.2d 525 (Utah 1976) applied the modification powers to alimony and support provision.

Strong v. Strong, 548 P.2d 626 (Utah 1976) considered modification of alimony and support payments.

Cummings v. Cummings, 562 P.2d 229 (1977) dealt with reduction of support and alimony.

appellant alleged that the payments modified by the lower court were not alimony, but part of a property settlement and thus not modifiable. The court treated the objection substantial, apparently recognizing the nonmodifiability rule.

In Scott v. Scott, 19 Utah 2d 267, 430 P.2d 580 (1967) this court applied Nevada law but referred to rela Utah authority in Lyon and Callister, supra, for the proposition that a property settlement is not subject to modification.

There is, therefore, no dispositive case indicating the Utah position on modifiability of property settlements. No cases allow modifiability, and no cases express reject it. However, the above cases indicate an implicit recognition of the non-modifiability rule, the rule in every other jurisdiction which has ruled upon the same.

Persuasive policy considerations compel adherence to the rule of non-modifiability of property settlements. Where a judgment, on its face, gives no indication that the property awarded is subject to further control of the court no such control should be allowed. Unless the award is of "use and occupancy" or unless a trust is clearly imposed, there should be no allowance of subsequent judicial tampering with title.

The judgment should be entitled to full faith

and credit in accordance with its terms. The parties should be able to freely deal with property which they receive. Third parties should be able to rely on the face of the decree when dealing with parties to a divorce and their property. Particularly in real property, marketability and freedom of alienation is important. As a case in the domestic relations area has stated,

> [I]t is also the policy of the law, insofar as consistent with principles of justice and equity, to keep land titles clear and to encourage alienability of property rather than the contrary. Boyle v. Boggs, 10 Utah 2d 203, 208, 350 P.2d 622 (1960).

The problems resultant from allowing modification of lump sum property awards in lieu of alimony would seriously burden the security of divorced persons and those who deal with them. If property in their hands were always subject to the continuing jurisdiction of the courts with the possibility of divestment always present complete inability to alienate property, or even use it as security, would result.

Allowing modification would place a cloud on the title of all property ever held by a divorced person. In order to convey clear title to property a divorced person would be required to obtain the signature of the former spouse. Conveyances of such property already made would be questioned.

The consequences of the rule followed by the

lower court, that property settlements are freely modifiable, would be unjust as to the divorced parties and severely disruptive of third parties' rights. To affirm ruling of the trial court is to burden our courts with th duty to endlessly reajudicate rights which should be fixe at the time of divorce, and to cast a cloud over all titl ever held by parties to divorce.

B. Ordering Mrs. Wright to Pay the Mortgage Debt Was Clearly Contrary to Law

At the hearing on the motion for continuance to allow discovery, Judge Burns inquired, "Who's making the payments on the house at this time?" Finding Mr. Wright making the payments, the Court stated.

> [T]his matter will be continued for thirty days during which the plaintiff [Mrs. Wright] will make payments on the home. T (October 8, 1971) 7:10-11.

The discovery was not completed within thirty days, howeve as Mr. Wright took three months to answer the interrogatories. But Mrs. Wright continued to make the payments o the house because the Order (drafted by counsel for Mr. Wright) did not incorporate the thirty day limit but stated she was to make payments on the mortgage "pending final determination" of the matter. R.36.

After having complied with Mrs. Wright's request for discovery, Mr. Wright took no further steps

to prosecute the case. Having been relieved of support and mortgage obligations, he had no desire to proceed. Finally, Mrs. Wright set the matter for trial. Judge Ruggeri heard the matter and failed to relieve Mrs. Wright of the obligation to pay the mortgage. He found an agreement on the part of Mrs. Wright to make the mortgage payments based upon the prior order of the court granting a continuance. R.70. We would call the Court's attention to the order granting continuance. R.36. There is nothing in this order that even implies an agreement on the part of Mrs. Wright.

Furthermore, reviewing the transcript wherein Judge Burns relieved Mr. Wright of his duty to pay his mortgage debt it is clear that the decision was reached without one scintilla of evidence being taken. T (October 8, 1971) 1-10. Note the decision of Judge Ruggeri was also reached without his taking any evidence on this issue. He instead relied upon his predecessor Judge Burns, who likewise did not hear any evidence from witnesses, only the arguments of counsel.

While the Utah statute (§30-3-5) gives broad modification powers, the statute clearly requires a change of circumstance be shown to support a modification. The Utah Court has construed this statute as requiring a substantial change in the material circumstances of the parties. Ridge v. Ridge, 542 P.2d 189, 191 (Utah 1975).

Where there is no material and permanent change of condition, the decree may not be modified. Hamilton v. Hamilton, 89 Utah 554, 58 P.2d 11 (1936), Carson v. Carson 87 Utah 1, 47 P.2d 894 (1935), and cases cited therein.

This Court has further said that notwithstanding the equitable powers of the district courts in divorce matters, and the broad discretion they possess, they may not "act arbitrarily, or on supposition or conjecture as to facts upon which to justify its order." Iverson v. Iverson, 526 P.2d 1126, 1127 (Utah 1974). If, in the absence of evidence of changed condition the court is powerless to modify a decree then certainly in the absence of any evidence a modification is invalid.

The order requiring Mrs. Wright to make payments on the mortgage, under which she paid $3,951.17 must be reversed, since it was not based upon any evidence of changed circumstances, but upon Judge Ruggeri's assumption that the parties had agreed to it and that it was a condition of Judge Burn's Order granting Mrs. Wright a continuance to conduct discovery. There is simply no reference at all in the record before the Court that Judge Burns required Mrs. Wright's payments of the mortgage as a condition to his granting the continuance or that both counsels for the parties agreed to this modification. Respondent may

argue otherwise, but the record shows only that Mrs. Wright requested a continuance, not that granting the same was conditioned upon payment of the mortgage payments.

Finally if this Court finds that the District Court made the modification a condition to granting a continuance to conduct discovery, then this Court must still reverse that Order based upon the rule of the Iverson case set forth above that the court was without power to modify absent evidence of changed condition.

POINT II THE EVIDENCE DID NOT JUSTIFY MODIFICATION OF THE PROPERTY SETTLEMENT

Even if this Court accepts Mr. Wright's contention, adopted by the lower court, that the statute in question (Utah Code Ann. §30-3-5) allows modification of vested property rights, it is clear that the facts alleged and present did not justify modification.

There is, of course, no case law on the factual showing necessary to modify property settlements because such modifications are universally prohibited. However, the factual showings required to modify alimony may be useful by analogy. Such factual considerations include the same factors considered by the court in the setting of alimony such as the parties' respective age, health, work experience, and the duration of the marriage. These factors might be relevant at modification of a property settlement as well.

However, the additional factors considered in modification of alimony are not so persuasive. These include changes in the financial circumstances of the parties such as permanent changes in the husband's earning assets, or obligations, the husband's retirement, a change in the wife's earnings or assets, increases in cost of living, changes in childrens needs, misconduct or remarria See, generally, 24 Am. Jur. 2d Divorce and Separation §§6 694 (1966) and Clark Domestic Relations §14.9 (1968). Thes factors all relate to income and support resources and needs. Because property settlements are not for income a support, however, these factors are of limited value.

Property settlements serve to equitably divide t marital property and therefore factors relative to a chang in relative possession and accumulation of assets should have been considered in order to justify a reapportionment of the property settlement. The same factors relevant to the division of property in the beginning should have been fully reconsidered if there was to be a modification. However, discovery on these matters was denied by the cou There was no way for Mrs. Wright to counter Mr. Wright's evidence of non-use with evidence of their relative financ conditions and the lack of change therein because she was denied access to all such evidence. The court felt it was immaterial. But it clearly was material, and failure to consider such evidence requires a reversal of the modification as factually unsubstantiated.

The factors which were considered were clearly insufficient. The court's findings state that the basis for modification of the decree was that "the use of the house by the Plaintiff for the benefit of herself and the union children has now been extinguished." R.69. Further, the court found the house was no longer needed by them. R.70. The court then concluded that there had been a substantial change of circumstances. Id.

The court's decision, on one hand appears to treat the question as if Mrs. Wright had been awarded the mere use and occupancy of the house, though the face of the decree indicates much more than an award of mere use, On the other hand the court recognized that title was in Mrs. Wright. R.69. In the judge's view, since Mrs. Wright's use of the house had ceased, title should be taken from her and re-apportioned between her and her former husband. Appellant requests that the Court review the Divorce Decree. R.11. It clearly shows that the only party denominated as having an interest in the home is Mrs. Wright.

Furthermore, the assertion that the Decree awards Mrs. Wright a mere use and occupancy of the house is absolutely rebutted by the Quit Claim Deed from Orval Wright to Donna B. Wright, "wife of grantor, as her sole and separate property," conveying the property in question to appellant. R.64. This deed on its face indicates that it was recorded

the same day that the divorce action between Mr. and Mrs Wright was filed. Mr. Wright gave this deed to Mrs. Wri in consideration for Mrs. Wright conveying to Mr. Wright of the remaining real property of the parties (with the exception of four undeveloped lots). These deeds were a given before the divorce action was filed. R.62. Respo although aware of this evidence, would have the Court ig it to achieve a grossly unjust result.

The lower court was made aware of the foregoing evidence the day following the modification hearing. Th court had the power under Rule 60(b) U.R.C.P. to allow th introduction of these deeds into evidence. On its face, Appellant contends that these documents would have manda a contrary result to that reached by the lower court, but the lower court chose to ignore this evidence.

Even under the lower court's view that property settlements are modifiable, the court failed to consider relevant evidence in two aspects. One, evidence of relative financial condition of the parties at the time of divorce and at the time of the modification hearing. Two evidence that demonstrated that Mr. Wright had conveyed fee simple title to the property in question to Mrs. Wrig The modification is therefore without any evidentiary sup

POINT III THE DENIAL OF DISCOVERY CAUSED A SUBSTANTIAL INJUSTICE

In preparation for the modification hearing Mrs.

Wright sought discovery of Mr. Wright's financial situation for the years 1965 through 1971. Mr. Wright objected to the proffered interrogatories on the ground that they were immaterial.

> We object to the interrogatories, they are immaterial. T (October 8, 1971) 7:5-6.

And the court accepted the objection as to all of the interrogatories relating to past property ownership, value and income. T (October 8, 1971) 8:3-23; R.36, 38.

The ruling striking the interrogatories was erroneous on two grounds. First, the trial court considered the materiality of the interrogatories to the issues of the case, when the proper test is materiality to the subject matter of the litigation and probability of leading to discoverable matter. Second, the matters labeled immaterial were clearly material.

Rule 26(b)(1), U.R.C.P., specifies the scope of discovery.

> (1) Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The obvious purpose of the Rule is to allow a party access to information which can help him present his case. The Rule does not contemplate restriction of discovery to admissible evidence, but permits each party to familiarize itself with information which is of secondary importance and discover facts which will enable further investigation.

Ellis v. Gilbert, 19 Utah 2d 189, 429 P.2d 39 (1967) considered the purpose of the discovery rules and concluded that anything relevant to the subject matter of the lawsuit is discoverable. The court declared that anything which would aid in a just, easy, and early determination of the dispute was discoverable.

The very brief interrogatories submitted by appellant related to the description and value of land owned by Mr. Wright in 1965 and 1971, the structure of Mr. Wright's investment corporation and its ownership of land past and present, Mr. Wright's income for the years 1962-1970, and his interests in other businesses. The interrogatories are reproduced in the footnote.[4]

The trial court felt that the interrogatories should be stricken if not material to the issues. His

---

[4] 1. State the legal description and approximate fair market value of the land you owned on October 26, 1965.
2. State the legal description and approximate fair market value of the land you own now.
3. As to Island in the Sky, Inc., state:
(a) The names and addresses of the officers
(b) The names and addresses of the directors
(c) The names and addresses of the owners
(d) The number of shares owned by each stockholder;

application of the materiality of issues test in evaluating the second interrogatory appears in the record:

> THE COURT: Do you have an objection to Interrogatory Number Two.
> MR. PARK: Yes, your Honor, same objection. It is immaterial how much he owns now, also on the same basis.
> THE COURT: If he contends and alleges a change of circumstances and he is worth several million dollars, wouldn't it be material as to change of circumstances and whether or not it would be equity for him to pay off the home? T (October 8, 1971) 8:7-15.

Though the materiality of present financial condition was apparent and recognized by the court, the court did not recognize the equal materiality of past financial condition. But how could change, or lack of it, be shown without proof of the original as well as the present conditions? The Court failed to properly apply its own "materiality to the issues" test. And further,

---

[4]

(e) The legal description and approximate fair market value of the land owned by the corporation on October 26, 1965;
(f) The legal description of the land owned by the corporation presently;
(g) Attach copies of the corporate income tax return for the years 1964 through 1970.

4. Attach copies of your income tax returns for the years 1962 through 1970.
5. List your interest in all other partnerships, joint ventures, corporations, or business ventures that you owned on October 26, 1965.

that test was not the proper one to have been applied by the court.

As stated on the face of the Rule "[I]t is not ground for objection that the information sought will be inadmissible at trial..." Rule 26(b)(1), U.R.C.P. Rather the test is relevance to subject matter, specifically including

> existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. Id!

Here, the items on which discovery was sought were essential to rebuttal of Mr. Wright's claim that circumstances had changed. The denial of access to this evidence prohibited her investigation at the outset, and was prejudicial error.

Denial of discovery, while generally a matter in the sound discretion of the trial court, will be reversed where there is an abuse of discretion or where substantial prejudice results. Burns v. Thiokol Chemical Corp., 483 F.2d 300 (5th Cir. 1973) stated that a trial judge's discovery rulings are not sacrosanct and will be reversed if it fails to adhere to the liberal spirit of the rules. Noting that "open disclosure of all potentially relevant information is the keynote of the Federal Discovery Rules" the order of the lower court sustaining objections to certain interrogatories was found to be substantial error, and the

judgment after trial was reversed. Id.

Other courts, in considering claims for reversal based on denial of discovery have made their consideration apparent. In a diversity personal injury case arising out of an automobile accident, the plaintiff's refusal to respond to questions at a deposition about conviction of felonies, lesser offenses, or driving under the influence, the trial judge held that he need not answer. But the appellant court reversed the case and remanded for a new trial, stating that the error could not be called harmless. Mellon v. Cooper-Jarrett, Inc., 424 F2d 499 (6th Cir. 1970).

In Edgar v. Finley, 312 F.2d 533 (8th Cir. 1963) the court made it clear that denial of access to information to which there is a right of access was an abuse of discretion, and where prejudicial would result in a reversal. Other cases reversing judgment where pre-trial discovery had been improperly barred include McDougall v. Dunn, 468 F.2d 468 (4th Cir. 1972); Goldman v. Checker Taxi Co., 325 F.2d 853 (7th Cir. 1963); Roebling v. Anderson, 257 F.2d 615 (D.C. Cir. 1958) See also Rickett v. Mayer, 473 S.W. 2d 446 (Ark 1971).

Clearly, the denial of discovery below was contrary to the law and therefore an abuse of discretion. Appellant was effectively denied her right to prepare her defense. Reversal of the modification is required, with

instructions that proper discovery is to be allowed before a re-hearing.

POINT IV DENIAL OF THE POSTJUDGMENT MOTIONS WAS AN ABUSE OF DISCRETION

Subsequent to the modification hearing Mrs. Wright's counsel made several motions, including

(1) a Motion to Re-open, pursuant to Rule 59(a) U.R.C.P. based upon the discovery of the deed as discovered evidence (R.66);

(2) a Motion for a New Trial, pursuant to Rule 59(a)(6) on the ground that there was inadequate evidence to show change in circumstances sufficient to property vested for eight years away from appellant and such a judgment was contrary to law (R.72);

(3) a Petition to Modify the Order pursuant Utah Code Ann. 30-3-5, reciting the concealment of prop unrelated nature of the mortgage; and property settleme nature of the home (R.86); and

(4) a Motion to Amend the Order apparently prepared to satisfy the judge's conception of procedura propriety (R.92).

The history of these past judgment motions re the judge's ambivalence. Whenever he denied a motion, denied it "without prejudice to other remedies..." (R.7 84, 107) with the instruction to submit proper pleading

to bring the matter before the Court. R.68. Once he reversed himself, ordering a re-opening after denying it. R.84, 85. Then he denied re-opening again. R.107. These facts indicate the judge was concerned with the procedural format of Mrs. Wright's motions, but that he desired to allow her to present her evidence and establish her claims. See R.84. Finally, the matter came before Judge Ballif who was understandably reluctant to affect actions taken by the previous judges.

Judge Ruggeri's ambivalence sprang from his acceptance of Mr. Wright's claim that the property disposition or a property settlement was modifiable under Utah law. Though Mrs. Wright protested that property settlements were not modifiable (R.18), Mr. Wright claimed they were modifiable (R.27) and the court specifically held that "the title and disposition of said house property [was] still before the Court." R.69. Because the court viewed property settlements as modifiable the newly discovered evidence was irrelevant in his view. But since the court clearly establishes that the house was part of a property settlement, and therefore not a modifiable part of the decree, denial of the motion to reopen, amend, and have a new trial was clearly an abuse of judicial discretion.

The motion to reopen on the ground of newly discovered evidence and the motion for a new trial on the

grounds of insufficient evidence and a judgment contrary t clearly should have been granted. The petitions to modif and amend, pursuant to the statute should have been grante as well. In Harrison v. Harrison, 22 Utah 2d 180, 450 P.2 456 (1969) this Court affirmed a decree modification based upon fraud and concealment of assets by the husband. The petitions here alleged such facts, and therefore should ha been heard rather than dismissed.

In denying all these motions the lower court essentially held the proffers insufficient as a matter of law, and refused to hear evidence. Appellant contends that the lower court misconceived the law and that it was therefore an abuse of discretion to deny the petitions and motions.

POINT V THIS CASE SHOULD BE REMANDED TO HEAR THE UNRESOLVED MOTIONS

Among the motions made by Mrs. Wright to facilitate reconsideration of the modification order are a Motion for New Trial pursuant to Rule 59(a)(6), and a Motion for Leave to File a Petition to Amend Court Order. R.72 and 92. These motions have never been resolved by th lower court.

Motion for Leave to File Petition

The order appealed from in this case was entered April 5, 1977. It made a prior order dated July 30, 1975, and entered August 5, 1975, final. R.115. That order denied a Petition to Reopen made in February, 1975. R.86.

Immediately after the denial of that February petition, in July, Mrs. Wright filed Motion for Leave to File a Petition to Amend (R.92), which has never been acted upon by the Court.

Motion for New Trial

A very early motion for a new trial has also not been acted upon. That motion was made pursuant to Rule 59(a)(6), which allows a new trial on the ground of insufficiency of the evidence to support the verdict, or on the ground that the judgment is against law. No order, minute entry, or note regarding this motion has ever been entered.

Appellant did not pursue the resolution of these motions in the lower court because the Court ordered that "no other pleadings [be] filed...except a Notice of Appeal." R.115. Appellant feels that lower court resolution of these motions, with proper instructions from this Court as to the law of modifiability of decrees, is an action this Court could consider as an alternative to reversing the modification.

CONCLUSION

Throughout the protracted term of this litigation respondent has steadfastly argued to the lower court "that the District Court retains jurisdiction of the parties to

modify the decree of divorce with respect to the distribution of property." R.27. Counsel for respondent assert that the Utah Supreme Court had taken this position and furthermore, that the Supreme Court has decided that a property settlement incorporated into a decree is modifia upon a showing of change of circumstances. R.28. Clearly respondent's theory of Utah law, that property settlement are modifiable, was adopted by the trier of fact.

The trier of fact specifically found "that the title and disposition of said home is still before the court." Finding of Fact, R.69. The judge further found "that the use of the home by the Plaintiff for the benefi of herself and the minor children has now been extinguish Finding of Fact, R.69. The court further found a change circumstances. Finding of Fact, R.70. Counsel for the respondent admits that this is the theory upon which the trier of fact modified the divorce decree, in effect vest a one-half (1/2) interest in the home in question in Mr. Wright. At a post-judgment hearing before Judge Ballif, respondent's counsel asserted:

> [I]f, in fact, that property settlement is unmo ifiable, or the conveyance prior to the divorce by deed can't be changed by a trial judge, I would suppose that t Supreme Court should decide and tell us if we are wrong.
>
> THE COURT: Is that your theory in that case, t it was something that could by changed, depending upon a change in circumstances, such as is done with alimony, Mr Park?
>
> MR PARK: That's correct, your Honor. T (April 1977) 20:19-28.

The trier of fact should have been appraised

that the Utah Supreme Court had never expressly decided the issue of the modifiability of a property settlement agreement where absolute title to the property had passed to one of the parties. Furthermore, the lower court failed to see the distinction between the award of "use and occupancy" and the award of title. In the court's view all property settlements were modifiable and hence "the title and disposition of said house is still before the Court". R.69. Because the court viewed the property settlement as modifiable the additional evidence that Mr. Wright had conveyed the property in question to Mrs. Wright as her sole and separate property (R.64) was immaterial.

Judge Ballif perceived this distinction and commented:

> In any event, I would like to hear from you and hear your view in what way you were able, from either testimony or just the manner in which you showed an interest on the part of Mr. Wright in this property.
>
> As I read the stipulation for the entry of divorce, the only party who was denominated as having any interest in the home was Donna B. Wright, and there was also a phrase "and the children". I do not see anything anywhere or any deed which retained any interest in Orval Wright. T (April 4, 1977) 4:13-21.

The only sensible interpretation of Utah Code Ann. 30-3-5 as it applies to the distribution of property

is that it only affects or makes modifiable awards of "use and occupancy". For this Court to rule otherwise creates severe clouds on the marketability and alienabili of real property of divorced persons. The Supreme Court of the states of California, Oregon and Wyoming, realizing the difficulties that would be caused by a contrary rule, have decided that property settlements in divorce decrees are not modifiable. Similarly, by way of legislation the states of Arizona, Colorado, Montana, Nevada and Washington have reached the same result. Appellant urges the Court to adopt the rule of non-modifiability of property settlement agreements as was implied by prior Utah Supreme Court decisions in the cases of Scott, Lyon and Callister, supra. The rule of every other jurisdiction that has decided this issue should be adopted.

Furthermore, should this Court be inclined to find that the Property Settlement Agreement involved herein is of the type that is modifiable, the lower court failed to articulate a test to measure the circumstances under which modification would be justified. The trial court apparently felt that the proper test was one of "change or circumstances". R.70. This was based solely upon the fact that the children of the marriage had reached the age of maturity and the appellant no longer needed the home.

This was essentially the extent of respondent's testimony at the modification hearing. See Affidavit of Attorney, p. 3. Since property settlements serve to equitably divide marital property the same factors relevant to the division of property in the beginning should have been fully reconsidered if there was to have been a modification. Because of the lower court's failure to articulate a test to determine when property settlements will be modifiable and to hear evidence in relation thereto, the finding that sufficient cause exists for a modification in this case should be reversed.

It should be noted that Mrs. Wright was denied discovery of the parties' relative financial conditions and the amount of change therein due to a pre-trial ruling of the lower court that all such evidence was immaterial. If the Supreme Court holds that property settlements are modifiable and that one of the relevant considerations in determining if a modification should be granted is whether or not there have been changes in the relative financial conditions of the parties, then the Supreme Court should reverse the lower court to allow the discovery of this evidence and give appellant the opportunity to present the fruits of her discovery at another modification hearing.

The appellant filed interrogatories approximately four months after the filing of respondent's Order to Show Cause in this matter. The thrust of the interrogatories

was to determine Mr. Wright's financial condition in the year of the divorce (1965) through the present (1971). The lower court sustained Mr. Wright's objection to all of the interrogatories relating to past property, ownership, value and income on the grounds of immateriality. In doing so, the court substantially impaired appellant's ability to discover evidence essential to rebut Mr. Wright's claim of changed circumstances. Beyond a doubt, the lower court committed reversible error.

The questions asked were clearly material. Without proof of the original as well as the present condition how could change or lack of it, be shown. By a ruling of immateriality the court made it impossible for appellant to ever rebut a change of circumstances. Furthermore, as a matter of law, the court applied an erroneous test to determine materiality. The record is clear that the trial court considered materiality of the interrogatories as it related to the issues of the case instead of relevancy to the subject matter of the lawsuit. Applying this test to the interrogatories before the court they were clearly proper and should have been answered. Assuming for the sake of argument that this Court rules against the appellant on each issue as set forth in this Conclusion, this Court should still reverse the modification granted herein on the grounds that the denial of discovery caused a substantial injustice to the appellant, with instructions that proper

discovery is to be allowed before a re-hearing.

After reviewing the record T (October 8, 1971) of the hearing at which Mr. Wright's obligation to pay the monthly mortgage payments on the home in question (incurred to finance property kept by Mr. Wright) was changed to an obligation of Mrs. Wright, one can only conclude that the result reached by the trier of fact was legally impermissible. The transcript of this hearing is devoid of any reference to the testimony of any witnesses. No evidence was taken by the court.

The modification of the Divorce Decree switching the obligation to pay monthly mortgage payments required a showing of a substantial change in material circumstances of the parties. As indicated in the body of this brief, the Supreme Court of Utah has already ruled that in the absence of evidence of change of conditions the Court is powerless to modify the decree. Since no evidence was taken by the trier of fact before reaching his decision to modify the Decree, the modification is invalid.

Two other grounds for substantiating this modification by the trial court may be proffered. One, that the parties or their counsel agreed to it. Again, if the record of this hearing is reviewed no statement will be found that even implies an agreement to switch the obligation to make monthly mortgage payments. Two, that the trial court

made it a condition of granting Mrs. Wright a continuance conduct discovery. If such were a condition there is nothing in the record of this hearing to indicate that counsel for Mrs. Wright was aware that it was a condition more importantly that he consented to the imposition of t condition. If the lower court sua sponte made modificati a condition to granting a continuance to conduct discover then that court has acted arbitrarily and again violated t rules set down by the Utah Supreme Court that a trier of fact is without power to modify absent evidence of change condition.

The denial by the lower court of all of the postjudgment motions made by appellant, under the circumstance, was an abuse of judicial discretion. Immediately after making his decision the trier of fact was made aware of the deed whereby Mr. Wright conveyed the property in question to Mrs. Wright as her sole and separate property. He had a copy of this deed before him. Clearly this deed coupled with the motions filed by appellant's counsel set forth substantial grounds which if proven mandated reversal of the court's modifications. One ground alleged was that if title to the home had not been conveyed to Mrs. Wright, then extrinsic fraud had been committed upon the parties and the court.

From the record, it is clear that the court did not know how to respond to these motions. In one

instance the court denied the motion, reversed itself granting the motion and allowing the introduction of evidence; and finally overruling itself denying its own order to re-open. In each instance where a motion was denied it was denied without prejudice and appellant was encouraged to file further motions. Furthermore, since there are two motions unresolved at the trial court level, appellant has the right to the resolution of these motions as well as the other motions which the appellant filed. Appellant feels that lower court resolution of these motions with proper instructions from this Court as to the law of modifiability of decrees is an alternative to reversing the decision of the lower court.

Finally, to allow the decision made by the lower court in favor of modification to stand creates a gross inequity. All of the pleadings in the divorce matter, including the Property Settlement Agreement and the deeds used to convey the parties' property were drafted by Mr. Wright's attorney upon terms dictated by Mr. Wright. The agreement for property settlement commences:

> Wishing to respect my wife's desire for a separation, wishing to do everything possible to alleviate her tension, to contribute in every way to her peace of mind and happiness, I agree as follows to the distribution of our property rights; (R.4.).

The agreement then enumerates what Mr. Wright agrees to give

to his wife and is executed by him. An acceptance of Mr. Wright's offer of settlement was then executed by Mrs. Wright. Prior to the execution of the Property Sett ment Agreement, on instruction from Mr. Wright, Mr. Wrig counsel had prepared deeds to the real property to be retained by Mr. Wright which Mrs. Wright was urged to execute. These deeds were delivered to Mr. Wright contemporaneously with the execution of the Property Settle Agreement by Mr. Wright. The following day Mr. Wright conveyed the property in question to Mrs. Wright as her s and separate property.

It is self apparent that the Property Settlemen Agreement and deeds were given in consideration of each party receiving respective interests in real and personal property. More than five years later Mr. Wright comes to the Court and asks for a larger piece of the matrimoni pie. To allow a redistribution of vested property intere under these circumstances is an extremely inequitable result. Appellant would request that the Court consider equities of the parties in reaching its decision.

For the reasons set forth in this Conclusion, Appellant would request reversal of the order requiring a to make monthly mortgage payments on her home, and since mortgage on the same has been paid in full for an order this Court requiring respondent to reimburse appellant fo

the payments made by appellant upon a showing by appellant of the amount paid; and reversal of the judgment declaring respondent to own an interest in her home. Alternatively, appellant requests that the two modifications made by the lower court herein be reversed and the matter be remanded to the trial court with instructions as to the applicable law. Furthermore, appellant requests an award of costs.

Respectfully submitted this 2nd day of March, 1978.

Frank A. Allen

FRANK A. ALLEN
Attorney for Plaintiff/Appellant

MAILING CERTIFICATE

I do hereby certify that on this 3rd day of March, 1978, I did mail two copies of the above and foregoing BRIEF OF APPELLANT to Mr. Michael W. Park, attorney for respondent, 110 North Main Street, Cedar City, Utah, 84720, postage prepaid.

Christena Shaw

SECRETARY

APPENDIX

LAWS OF THE WESTERN STATES ON MODIFICATION OF DIVORCE DECREES

Arizona

Ariz. Rev Stat §25-327(A)

Except as otherwise provided ... the provisions of any decree respecting maintenance or support may be modified only as to installments accruing subsequent to the motion for modification and only upon a showing of changed circumstances which are substantial and continuing. The provisions as to property disposition may not be revoked or modified, unless the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state.

California

Cal. Civ. Code §4801(a)(7)

Any order for support of the other party may be modified or revoked as the court may deem necessary, except as to any amount that may have accrued prior to the date of the filing of the notice of motion or order to show cause to modify or revoke.

Cal. Civ. Code §4811(a) and (b)

(a) The provisions of any agreement between the parties for child support shall be deemed to be separate and severable from all other provisions of such agreement relating to property and support of the wife or husband. All orders for child support shall be law-imposed and shall be made under the power of the court to make such orders. All such orders for child support, even when there has been an agreement between the parties on the subject of child support, may be modified or revoked at any time at the discretion of the court, except as to any amount that may have accrued prior to the date of filing of the notice of motion or order to show cause to modify or revoke.

(b) The provisions of any agreement for the support of either party shall be deemed to be separate and severable from the provisions of the agreement relating to property. All orders for the support of either party based

on such agreement shall be deemed law-imposed and shall be deemed made under the power of the court to make such orders. The provisions of any agreement or order for the support of either party shall be subject to subsequent modification or revocation by court order, except as to any amount that may have accrued prior to the date of filing of the notice of motion or order to show cause to modify or revoke, and except to the extent that any written agreement, or, if there is no written agreement, any oral agreement entered into in open court between the parties, specifically provides to the contrary.

Colorado

Colo. Rev. Stat. §14-10-122(1)

Except as otherwise provided ... the provisions of any decree respecting maintenance or support may be modified only as to installments accruing subsequent to the motion for modification and only upon a showing of changed circumstances so substantial and continuing as to make the terms unconscionable. The provisions as to property disposition may not be revoked or modified unless the court finds the existence of conditions that justify the reopening of a judgment.

Idaho

Idaho Code §32-706

Where a divorce is granted for an offense of the husband, including a divorce granted upon the husband's complaint, based upon separation without cohabitation for five (5) years, the court may compel him to provide for the maintenance of the children of the marriage, and to make such suitable allowance to the wife for her support as the court may deem just, having regard to the circumstances of the parties respectively; and the court may, from time to time, modify its orders in these respects.

Montana

Montana Rev. Codes Ann §48-330(1)

Except as otherwise provided in subsection (6) of section 48-320, the provisions of any decree respecting maintenance or support may be modified by a court only as to installments accruing subsequent to the motion for modification and either:

(a) upon a showing of changed circumstances so substantial and continuing as to make the terms unconscionable; or

(b) upon written consent of the parties. The provisions as to property disposition may not be revoked or modified by a court, except:

(i) upon written consent of the parties, or

(ii) if the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state.

Nevada

Nevada Rev. Stat. §125.150(5)

If the court adjudicates the property rights of the parties, or an agreement by the parties settling their property rights has been approved by the court, whether or not the court has retained jurisdiction to modify the same, such adjudication of property rights, and such agreements settling property rights, may nevertheless at any time thereafter be modified by the court upon written stipulation duly signed and acknowledged by the parties to such action, and in accordance with the terms thereof.

New Mexico

N.M. Stat. Ann. §22-7-6(c)

The court may modify and change any order in respect to the guardianship, care, custody, maintenance or education of the children, whenever circumstances render such change proper. The district court shall have exclusive jurisdiction of all matters pertaining to the guardianship, care, custody, maintenance and education of the children, and with reference to the property decreed or funds created for their maintenance and education, so long as they, or any of them remain minors. If any of the property decreed or funds created for the maintenance and education of the children shall remain on hand and be undisposed of at the time the minor children reach the age of majority, the same may be disposed of by the court as it may deem just and proper.

Oregon

Or. Rev. Stat. 107.135 (1) and (2)

(1) The court has the power at any time after a decree of annulment or dissolution of marriage or of separation is granted, upon the motion of either party and after service of notice on the other party in the manner provided by law for service of a summons, to:

(a) Set aside, alter or modify so much of the decree as may provide for the appointment and duties of trustees, for the custody, support and welfare of the minor children, or for the support of a party; and

(b) Make an order, after service of notice to the other party, providing for the future custody, support and welfare of minor children residing in the state, who, at the time the decree was given, were not residents of the state, or were unknown to the court or were erroneously omitted from the decree.

(2) The decree is a final judgment as to any installment or payment of money which has accrued up to the time either party makes a motion to set aside, alter or modify the decree, and the court does not have the power to set aside, alter or modify such decree, or any portion thereof, which provides for any payment of money, either for minor children or the support of a party, which has accrued prior to the filing of such motion.

Washington

Wash. Rev. Code. Ann. §26.08.110

Such decree as to alimony and the care, custody, support and education of children may be modified, altered and revised by the court from time to time as circumstances may require. Such decree, however, as to the dissolution of the marital relation and to the custody, management and division of property shall be final and conclusive upon both parties subject only to the right to appeal as in civil cases, and provided that the trial court shall at all times including the pendency of any appeal, have the power to grant any and all restraining orders that may be necessary to protect the parties and secure justice.

Wyoming

Wyo. Stat. §20-66.

After a decree for alimony or other allowance for the wife and children, or either or them, and also after a decree for the appointment of trustees to receive and hold any property for the use of the wife or children, the court may, from time to time, on the petition of either of the parties, revise and alter such decree respecting the amount of such alimony or allowance, or the payment thereof and respecting the appropriation and payment of the principal

AFFIDAVIT

STATE OF UTAH)
: ss.
COUNTY OF WASHINGTON)

FRANK A. ALLEN, being duly sworn, deposes and says:

1. That affiant is an attorney licensed to practice law within the State of Utah and is counsel for the Appellant herein.

2. That affiant filed the Notice of Appeal herein and within a reasonable time thereafter contacted Byron Ray Christiansen to obtain a transcript of the original divorce proceeding heard in the Fifth Judicial District Court, Washington County, State of Utah, on October 8, 1965; Ned Greenig to obtain a transcript of the Order to Show Cause hearing held in said court, October 1, 1973; John Greenig to obtain a transcript of the October 17, 1973 hearing on the Motion to Re-open and to obtain a transcript of the July 23, 1975 hearing on the Motion to Re-open held in the same Court.

3. That on August 1, 1975 affiant was advised by Byron Ray Christiansen that he was unable to locate his stenographic notes of the original divorce hearing on October 8, 1975 and therefore would not be able to produce a transcript of said hearing. A copy of said letter is attached hereto as Schedule A and incorporated herein by reference.

4. That affiant made numerous attempts to obtain the aforesaid transcripts from Mr. Ned Greenig and Mr. John Greenig and was finally advised that said reporters had lost their stenographic notes and would be unable to produce transcripts of said hearings.

5. That Mr. Ned Greenig and Mr. John Greenig advised affiant that they would produce an Affidavit to the effect that said notes could not be located but to date said reporters have failed to provide affiant with an Affidavit.

6. That the failure of the aforesaid reporters to provide transcripts has considerably delayed the filing of Appellant's brief herein.

DATED this 2nd day of March, 1978.

Frank A. Allen
FRANK A. ALLEN

SUBSCRIBED and SWORN to before me this 2nd day of March, 1978.

NOTARY PUBLIC
Residing at St. George, Utah

My commission expires:

JANET L. GLONE
NOTARY PUBLIC
STATE OF UTAH

SCHEDULE "A"

August 1, 1977

Frank A. Allen
Attorney at Law
148 East Tabernacle
St. George, Utah 84770

Dear Mr. Allen:

Re: Donna B. Wright vs.
Orval Wright
Civil No. 3456

Pursuant to your designation of record on appeal in the above-captioned matter you designated a copy of transcript of the original divorce hearing on October 8, 1965.

I have searched the Washington County Archives where my stenographic notes are stored, and I am unable to locate designated stenograph notes and therefore will be unable to produce a transcript of said October 8, 1965 hearing.

I was able to locate my stenographic notes of October 8, 1971 and November 16, 1973, and transcripts of these dates have been filed with the Washington County Clerk.

I am very sorry for this inconvenience and if you have any suggestions please so contact me.

Very truly yours,

Byron Ray Christiansen, Jr.
Certified Shorthand Reporter

cc: Washington County Clerk

Michael W. Park, Esq.

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