

1978

## Rochelle Ritchie Wilson v. Robert Gaines Wilson : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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ROCHELLE RITCHIE WILSON, )

Plaintiff- )

Respondent, )

vs. )

ROBERT GAINES WILSON, )

Case No. 15277

Defendant- )

Appellant. )

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RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

A. Nature of the Case.

This is an appeal from that portion of the Decree of Divorce entered in the court below that ordered the distribution of the marital estate property and the payment of alimony to Plaintiff-Respondent. Defendant-Appellant, a doctor of medicine, claims on appeal that the trial court was in error in not awarding him a bigger piece of the marital estate pie and in requiring him to pay alimony to Mrs. Wilson, the Plaintiff, in the sum of \$900.00 a month.

B. Course of Proceedings.

Because of the complexity and size of the marital estate here in question, this case required the better part of three days of trial, almost all of which was devoted to

the presentation of evidence and testimony regarding the nature, extent and distribution of the marital estate. On February 4, 1977, midway through the trial, the court entered its Partial Decree of Divorce (R. 76) wherein Mrs. Wilson, Respondent, was granted a divorce against Appellant on the grounds that Dr. Wilson had announced to her on occasion that he did not love her, that he had fallen in love with another woman (his best friend's wife) whom he wanted to marry, and, although Respondent pleaded for an opportunity to attempt to salvage the marriage, Appellant would not be dissuaded from pursuing his announced course of action (Green TR. 70, 11. 12-30; 71, 11. 1-11).

After taking additional testimony and evidence with respect to the nature, extent and proposed distribution of the marital estate, the court entered its final Decree of Divorce as to Property Distribution on May 6, 1977 (R. 129), wherein property was distributed and alimony awarded as hereinafter described.

C. Relief Sought on Appeal.

The judgment of the trial court should be affirmed and Respondent should be awarded a reasonable attorney's fee incurred in defending this appeal.

D. Statement of Facts.

The parties to this action met and married at the outset of Dr. Wilson's medical career on August 27, 1969. Although both had children from a previous marriage, no issue was born to this union. When Respondent married Dr. Wilson, she was 33 years of age (Red TR. 43); at the time the final decree was entered, she was 41.

Notwithstanding Appellant's description of money and property contributed by each at the outset of their marriage (Brief of Appellant, 3), Respondent's net worth contribution exceeded that of Dr. Wilson; in fact his contribution was of a negative nature.

Although Appellant is careful to enumerate in his brief the value of his assets at the outset of this marriage, he conveniently omits to mention the extent of his concurrent debts and obligations as well. Dr. Wilson testified that he contributed the following assets to this marriage: an automobile valued at approximately \$3,500.00 (Green TR. 28), a down payment on a house in the sum of \$10,000.00 (Green TR. 28, 11. 10-18) (note that following the trial Appellant submitted a statement indicating that \$15,000.00 had been paid rather than \$10,000.00) and office equipment valued at \$2,000.00 (Green TR. 48). No mention

is made, however, that he owed the estate of his father \$20,000.00 for an obligation incurred prior to this marriage, and, in fact, after the filing of the complaint and during the pendency of this action he withdrew money from the joint account of these parties and liquidated that obligation (Green TR. 58, 11. 11-30; 59, 11. 1-17; Red TR. 42, 11. 7-12). On another occasion during the pendency of this action as well, Appellant paid \$5,000.00 to an education trust set up for the benefit of his sons from his prior marriage, which payment constituted a contribution to a continuing obligation which he brought with him to this marriage (Green TR. 65, 11. 5-26).

Furthermore, Appellant brought to this marriage an obligation to pay \$500.00 per month in child support for the maintenance of his two sons. He was obligated to purchase and maintain life and health insurance for their benefit, in addition to having to provide funds for all education that either son might desire or need beyond high school, including graduate and professional schools.

Although Respondent came to this marriage with no great storehouse of riches, she at least entered it debt-free. Whereas Appellant entered the marriage with an obligation to pay child support, Respondent entered the marriage with the right to receive child support. Whereas Appellant entered the marriage with debts and obligations in

excess of the value of his assets, Respondent entered the marriage with no debts and obligations and assets of practical use and value including a washer, a dryer, a sewing machine, silver and other household items such as pots, pans and dishes.

During the course of this marriage, Dr. Wilson pursued his medical career while Mrs. Wilson attended to her household chores at home. Over the years of this marriage, his practice developed and generated income growth of a rapid and substantial nature. His income for the year of 1969 was \$24,129.95 (Red TR. 11. 6-10; P. Ex. #1); presently his salary is, exclusive of income from other business interests and investments, in excess of \$100,000.00 annually (Brief of Appellant, 17).

At the time of their marriage, these people understood and assumed certain obligations with respect to the children of each from their prior marriages. Dr. Wilson, for example understood that inasmuch as Respondent had custody of her two children, they would reside with her. He assumed the obligation of contributing to their support as well as that of Respondent. Mrs. Wilson, on the other hand, understood that, although Appellant's former wife had custody of his two children, they, as well as other family members, would stay with them from time to time. In addition to attending to her normal wifely chores and obligations of cooking, cleaning,

shopping, etc., she accommodated Appellant's family members on many occasions. His sons stayed with them for one month in the summertime of each year, during which time she not only assisted in taking care of them, but accompanied them, with their father, on camping trips and other vacation excursions (Green TR. 17, 11. 2-9). During five of the approximate seven years of their marriage, Dr. Wilson's father stayed with them for one month at a stretch. His mother and brother were also accustomed to staying with them. In each instance, Respondent assisted in making their stay comfortable and pleasant (Green TR. 17, 11. 14-21).

In his statement of facts (Brief of Appellant, 4), Appellant paints a picture of a husband who tirelessly slaved away at work while his wife loafed in the fruits of his labors. He states: "During the course of their marriage, Defendant worked unceasingly. Through his diligent efforts, he was able to accumulate the property which forms part of the subject matter of this appeal." Ibid. On the other hand, he describes Respondent as one who "never worked during the marriage despite the fact that Defendant had encouraged her to do so on numerous occasions. \*\*\* Plaintiff contributed absolutely nothing of a monetary nature to the accrual of the estate of Plaintiff and Defendant." Id. 3,4.

This description of the circumstances of this marriage as well as the expectations that each party had for the other is unfair and inaccurate insofar as it implies that Respondent idled away her time and failed to meet an existent need to assist in generating income for their support. The record is clear that the financial position of these parties from the outset of their marriage was such as to never reasonably require a second income in order to financially stay afloat. Appellant's own testimony as quoted from his Brief (Brief of Appellant, 4) is indicative of the fact that any recommendation or conversation he may have had with Mrs. Wilson with respect to her finding employment was for the sole purpose of providing her a diversion from her household chores. He stated, for example, "She did not have enough to occupy her time." Ibid. Additional income would certainly have only added to his tax burden.

Absent the need to provide additional income, which potentially on the part of Plaintiff would have been miniscule in comparison with the income generated by Dr. Wilson, Respondent elected to attend to her household chores and apply her time in endeavors other than pursuing a gainful avocation. To have retrained herself in her field of training as an x-ray technician, as Appellant allegedly recommended, would have required her to completely dedicate herself to total retraining inasmuch as some 20 years had passed since she was involved in



that rapidly changing area of expertise. (Red TR. 48 ll. 26-29). The heavy commitment required by such an undertaking on the part of Plaintiff was simply greater than the need and interest at the time.

With respect to the property distribution and award of alimony made by the trial court, it should be noted that the decision was not rendered until after the trial judge took the matter under advisement for careful consideration following three days of trial, the greatest portion of which was dedicated to the facts relating to the extent, nature and distribution of the marital estate and those issues regarding alimony. The third and final day of trial was February 11, 1977. The court made its minute entry with respect to property distribution and alimony on April 19, 1977 (R. 125), and the appropriate Decree of Divorce as to Property Distribution was signed and entered on May 6, 1977, wherein the court awarded alimony to the Respondent in the monthly sum of \$900.00, which is less than 11 per cent of Defendant's monthly income, and ordered that the marital estate be distributed as herein-after set forth. Respondent was awarded property valued at \$90,744.00, whereas Appellant was awarded property valued at \$206,801.65 or \$232,801.65, depending upon whether one includes the \$26,000.00 withdrawn by the doctor for his own

personal needs from the parties' joint account during the pendency of the action. Appellant is of the opinion that payment of said \$26,000.00 with \$20,000.00 to Defendant's brother and the \$6,000.00 to the educational trust was made pursuant to his legitimate debts and obligations and that, consequently, it should not be considered as a part of the marital estate but should be offset against the value of his assets he brought into this marriage.

The valuation of the property distribution which follows differs from that described in Appellant's Brief (Brief of Appellant, 6-9). The discrepancy is a function of several omissions and errors made by Defendant in calculating the value of property awarded to each party. Although, for example, Appellant announces that he used and accepted Respondent's valuations in preparing his statement, in several instances this is simply not the case. In each instance wherein there is a discrepancy of this nature, appropriate references are made in this brief to the trial record to verify the same. Furthermore, Appellant counted one item twice (the stoneware) in his schedule of property awarded to Respondent and omitted to mention two items of property awarded to himself valuing in excess of \$16,500.00 (gold and silver coin collection and 1976 Toyota Land Cruiser). With that explanation, consider the specifics of the property distribution ordered by the trial court in this matter.

PROPERTY AWARDED TO PLAINTIFF

<u>Item</u>	<u>Value</u>	<u>Comments</u>
A. Condominium (Plaintiff's residence)	\$78,000.00	Red TR. 36, 11. 11-18; P. Ex. #15
B. Unimproved lots in North Carolina	12,000.00	
C. Plaintiff's automobile	6,200.00	
D. Diamond ring	4,200.00	Green TR. 18, 11. 1-6
E. Furniture in condominium with the exception of those items specifically awarded to Defendant	6,544.00 <sup>1</sup>	Red TR. 71, 11. 23-23; P. Ex. #13
F. Stoneware	included in "E" above	Appellant counted this item twice Brief of Appellant, 6, 7
G. Men's chest and corner table	included in "E" above	
H. Cash	2,000.00	
I. Personal items (including jewelry)	no value	
	<hr/>	
	\$90,744.00	

<sup>1</sup>Calculated as follows:

- A. Total value of personal property in  
condominium as per Plaintiff (P. Ex. #13) \$ 3,316.00
- B. Less household goods awarded Appellant  
and included in computation of A  
flatware - \$62.00; goblets - \$50.00;  
plates - \$15.00; fishtrap tables - \$20.00;  
stool - \$15.00; chairs - \$300.00; etagere -  
\$330.00; lamp - \$20.00; bookcase - \$1,000.00 (1,772.00)

PROPERTY AWARDED TO DEFENDANT

<u>Item</u>	<u>Value</u>	<u>Comments</u>
A. Interest in profit-sharing trust	\$100,000.00	This value was computed by Appellant's own attorney retained to manage said trust. Red TR. 29, 11. 25-28.
B. Partnership interest	30,000.00	Computed by Appellant's own accountant
C. Interest in professional corporation	15,636.73	Although this includes Appellant's Mercedes-Benz automobile, it does not include his 1976 Toyota Land Cruiser
D. Cattle	6,200.00	
E. Rocks and equipment	10,635.00	
F. Ranch	10,000.00	
G. Cottonwood Club membership	1,500.00	Base replacement cost. Red TR. 76, 11. 16-18; Appellant claims that its cash value if sold is \$1,000.00 because of the \$400.00 transfer fee -- inasmuch as Appellant does not intend to sell it, however, its value to him is what he would have to pay to replace it, e.g. \$1,500 - \$2,000.
H. Gold and silver coins	10,000.00	R. 83; P. Ex. #15; Appellant omitted to include this in his computation (Brief of Appellant 7-8.)
I. Mountain lot	No value	

J.	House trailer	700.00	
K.	Sheep horns	No value	
L.	Fish trap tables	150.00	Appellant's own estimate. D. Ex. #32
M.	Bronze goblets, plates and flatware	300.00	Appellant's own estimate
M.	Money in bank	2,531.91	At time this action was filed, the amount was \$28,531.92 -- during the pendency of this action Appellant withdrew \$26,000.00 -- \$20,000.00 of which went to Appellant's brother; remainder of \$6,000.00 was placed in trust for his children by former marriage.
O.	Appellant's automobile (1976 Toyota Land Cruiser)	6,500.00	Green TR. 62, 11. 27-29; Appellant omitted to include this item in his computation (Brief of Appellant, 7-8)
P.	Suede chairs	800.00	D. Ex. #32
Q.	Etagere	450.00	D. Ex. #32
R.	Bookcases	2,000.00	D. Ex. #32
S.	Filing drawer, desk, naugahyde stool and lamp	---	Included in corporate assets of \$15,636.73. R. 83
T.	1976 tax refund less \$2,000.00 to Respondent	9,399.00	
U.	Personal items	No value	

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\$206,801.65

No statement of facts in an appeal of this nature would be complete without mention of the parties' respective prospects for the future. Appellant will continue to enjoy the benefits, income and comforts generated by the practice which was built during the course of this marriage. His annual income which is now in excess of \$100,000.00 increased over the last seven years some 400 per cent, and there is no reason to believe that its potential for the future is not equally promising. He was also awarded other income-producing assets which have the potential of substantially supplementing his professional salary. Not only does he have the security of substantial income at present, but the court provided him with the means for complete security at the time of his retirement or in the event of disability by awarding him his interest in a professional pension currently valued at \$100,000.00 which was created and contributed to during the course of this marriage.

Dr. Wilson continues to pursue the same career and do the same work which he did prior to his separation and divorce from Mrs. Wilson. He is a highly trained individual who can continue his present lifestyle without any significant adjustment. Indeed, this divorce seems to have suited his needs very well, inasmuch as he has promptly married the woman for whom he was willing to sacrifice his marriage with Respondent.

Respondent's prospects, on the other hand, present a completely different set of circumstances. Whereas this divorce has hardly given Dr. Wilson cause to miss a step in his present lifestyle, Respondent must now carve out an entirely new way of life. Unlike Dr. Wilson, she is not presently trained for immediate employment in any field; in fact, 20 years have passed since she last found involvement in her field of training, which by nature is subject to rapid and dynamic advances and changes. Whereas Appellant was awarded assets of an income-producing nature, no such asset was awarded to Respondent, leaving her to her own ingenuity to get along in life henceforth. Whereas Dr. Wilson has security for retirement and/or disability, no such security was built in to Mrs. Wilson's award of property. In short, she not only has lost the happiness and security of her marriage and husband to their closest friend's wife, but now faces a total adjustment to life in order to adequately support herself and her children.

ARGUMENT

Point I

ALTHOUGH THE SUPREME COURT MAY REVIEW THE EVIDENCE AND SUBSTITUTE ITS JUDGMENT TO CORRECT ANY MANIFEST INEQUITIES RESULTING FROM THE DECISION BELOW, THE TRIAL JUDGE IN A DOMESTIC MATTER HAS CONSIDERABLE LATITUDE OF DISCRETION IN ADJUSTING THE FINANCIAL AND PROPERTY INTERESTS OF THE PARTIES BEFORE THE COURT. HIS ACTIONS ARE PRESUMED TO BE CORRECT AND VALID AND MAY NOT BE UPSET OR MODIFIED ON APPEAL UNLESS THE RECORD CLEARLY DISCLOSES THAT THE TRIAL COURT'S DECREE WAS SO PLAINLY ARBITRARY AS TO SHOW A CLEAR ABUSE OF DISCRETION WHICH WORKS A MANIFEST INJUSTICE OR INEQUITY.

While it is true that in a divorce action, or in any other equitable action for that matter, the Supreme Court may review the evidence, make findings and substitute its judgment for that entered below, such action of superseding the considered decision of the trial judge, who is in the best position to arrive at a just and equitable result, is rather drastic in nature and should not be lightly undertaken. In divorce actions, as well as in any other kind of appeal, the decision of the lower court is endowed with a presumption of validity and correctness, and the Appellant shoulders the heavy burden of overcoming that presumption.

The wide breadth of discretion, which it is the trial judge's prerogative and responsibility to exercise, is absolutely necessary in a divorce action for two reasons.



First, there is no fixed formula that can be applied in any two cases which will produce a just and equitable result in both instances. The number of facts, and their respective degrees of importance, that come into play differ substantially from case to case. Each case must turn on its own facts.

It follows that the second reason for indulging the trial court with its considerable latitude of discretion is that no one is in a better position than the trial judge to evaluate the credibility of evidence and testimony, to weigh the variables involved in each case, and to arrive at a decision that will approximate fairness and justice as closely as can be accomplished in these kinds of cases.

Lawlor v. Lawlor, 121 Ut. 201, 240 P.2d 271 (1952).

Because there is no fixed formula or anything more definite than general guidelines, and because the trial judge is in the best position to fairly allocate financial and property interests in a divorce action, his judgment should not be upset or modified for the reason that those sitting on the Supreme Court may have decided to cut up the pie in different proportions. Otherwise, the trial judge would, in fact, have little or no discretion in such matters. This court stated not so many years ago:

Even though our constitutional provisions, Section 9 of Article VIII, states that in equity cases this court may review the facts, we nevertheless take into account the advantaged position of the trial judge. Accordingly, we recognize that it is his prerogative to judge the credibility of the witnesses, and in case of conflict, we assume that the trial court believed the evidence which supports the findings. We review the whole evidence in the light most favorable to them; and we will not disturb them merely because this court might have viewed the matter differently but only if the evidence clearly preponderates against the findings.

For similar reasons, the trial court is allowed a comparatively wide latitude of discretion in determining what order should be made in such matters; and we will not upset his judgment and substitute our own unless it clearly appears that the trial court abused its discretion or misapplied the law. [Citations omitted.] Stone v. Stone, 19 Ut.2d 378, 431 P.2d 802 (1967) (Emphasis added).

The following are a few examples of innumerable cases supporting the principles just stated: Naylor v. Naylor, 563 P.2d 184 (Ut. 1977) (in matters of divorce the trial judge has considerable latitude of discretion in the disposition of property. His judgment should not be disturbed unless it works a manifest injustice or inequity as to indicate a clear abuse of discretion); Hansen v. Hansen, 537 P.2d 491 (Ut. 1975) (trial court has considerable latitude -- burden on appellant to show misunderstanding or misapplication of law resulting in substantial or prejudicial error or that the evidence must

clearly preponderate against the findings or that serious inequity has resulted as to manifest clear abuse of discretion); Mitchell v. Mitchell, 527 P.2d 1359 (Ut. 1974) (the trial judge has considerable latitude of discretion); Whitehead v. Whitehead, 16 Ut.2d 179, 397 P.2d 987 (1965) (trial judge must be allowed wide latitude of discretion in matters relating to alimony -- his decision should not be changed unless evidence shows manifest inequity and injustice).

This standard of review on appeal in a divorce action has found expression in many different forms. This court has stated in numerous decisions that it

. . . will not substitute its judgment in a divorce proceeding relative to alimony and division of property for that of the trial court unless the record clearly discloses that the trial court's decree in such matters is plainly arbitrary. Allen v. Allen, 109 Ut. 99, 165 P.2d 872 (1946) (Emphasis added.); see also Woolley v. Woolley, 113 Ut. 391, 195 P.2d 743 (1948).

On other occasions, the court has stated that it will not upset or modify the decision of the trial court in a divorce action unless the appellant proves that the evidence clearly preponderates against the findings and decree, that there was a misunderstanding or misapplication of law resulting in substantial prejudicial error, or that serious inequity has resulted as to manifest a clear abuse of discretion. Carter v. Carter, 563 P.2d 177 (1977); Harding v. Harding, 26 Ut.2d 277, 488 P.2d 308 (1971).

The most commonly used term in characterizing this standard of review is "plain" or "clear abuse of discretion". "Abuse of discretion" has been defined by the Court of Appeals of the District of Columbia as meaning "action which is arbitrary, fanciful or clearly unreasonable." U.S. v. McWilliams, 163 F.2d 695, 697. In a domestic matter involving the issue of child support, the Court of Appeals of Arizona made reference to another case in which the Supreme Court of Arizona stated that "for an abuse of discretion to exist, the record must be devoid of competent evidence to support the decision." Platt v. Platt, 17 Ariz. App. 458, 498 P.2d 532 (1972). And, finally, the Michigan Supreme Court has stated that "abuse of discretion" for purposes of appellate review requires that the result be so palpably and grossly violative of fact and logic that it evidences not exercise of will, but perversity of will; not exercise of judgment, but defiance thereof; not exercise of reason, but rather passion and bias. Wendel v. Swanberg, 384 Mich. 468, 185 N.W.2d 348, 351.

By no flight of the imagination can it be reasonably said that the actions of the trial court in this case were arbitrary, fanciful or clearly unreasonable. On the basis of this record, one could not seriously contend that the decision of the trial court is so palpably and grossly violative of fact and logic that it evidences a perversity of will, defiance of judgment and bias, nor can it be shown that the record is devoid of competent evidence in support of the court's decision.

It should also be mentioned again in this regard that difference in judicial opinion is not tantamount to "abuse of judicial discretion". Hamilton v. U.S., 31 A.2d 887, 889.

Appellant asserts that this court "often substitutes its judgment for that of the trial court in alimony and property distribution matters" (Brief of Appellant, 11). He follows with a "partial listing" of authorities in support of that proposition (Ibid.), makes passing reference to "circumstances" of those cases which warranted a modification of the trial court's judgement, and concludes "in the present case, those same circumstances exist and the trial court's decree should be modified" (Id. 12). To assert that the circumstances of fact presented by this appeal are the "same" as those existing in cases referred to by Appellant is an unhelpful and somewhat inaccurate generalization. The combination of facts existing in each case of this nature is unique and sufficiently dissimilar from others as to defy the utility of any generalizations or fixed formulas. By way of illustration brief reference is here made to cases cited by Appellant in his Brief on Pages 11 and 12 in support of his proposition just stated.

Appellant first cites Dubois v. Dubois, 29 Ut.2d 75, 504 P.2d 1380 (1973) and reports that this court disallowed alimony awarded by the trial court. While that is true, Appellant

fails to mention that the basis of this court's holding was that the wife was awarded approximately 60 per cent of the marital estate valuing \$588,581.00 (almost double that of the estate presently before the court) along with attorney's fees in the sum of \$10,000.00. Among the property awarded to the wife were assets of an income-producing nature which the court concluded would provide her with sufficient income ". . .to maintain her in the manner to which she is accustomed without periodic payments from the Defendant." In the present case, however, Respondent was awarded no assets of an income-producing nature, and even with the decree as it now stands Respondent will not be able to maintain herself "in the manner to which she is accustomed." It should be noted in this regard that the three lots in North Carolina which were part of the court's award to her are unimproved, non-income-producing properties.

In the next case, Martinett v. Martinett, 8 Ut.2d 202, 331 P.2d 821 (1958), Appellant accurately reports that this court modified the property distribution made thereon. Here, again, however, the facts are substantially dissimilar to those now before the court. The marital estate then in question was comparatively small and consisted of a farm, two houses and some personal property. Virtually all of the estate was awarded to the wife except the husband was given a one-half interest

in the smaller of the two homes. Furthermore, unlike the wife who was healthy and working, and 15 years his junior, he was of poor health, unable to work and 67 years old. He testified "My heart, wind, and legs are gone. I am waiting to die." This court properly concluded that under the circumstances he should have been awarded one of the two homes in which he could reside.

In Dehm v. Dehm, 545 P.2d 525 (Ut. 1976), this court reviewed the trial court's denial to decrease alimony because of change in circumstances. Although this court did take action to reduce the alimony award from \$300.00 a month to \$1.00, the stated reasons for so holding were that the wife had made no claim that alimony was necessary for her support, and that at that particular time, eight years after the divorce, she had received both B.A. and M.A. degrees and was working. It should also be mentioned parenthetically that the original award of alimony which stood for many years in the sum of \$300.00 a month was 23 per cent of her husband's income at the time of the divorce (\$1,300.00 a month). In the present case, Respondent is in definite need of the alimony support as ordered which constitutes less than 11 per cent of Appellant's current salary.

In Hampton v. Hampton, 80 Ut. 570, 47 P.2d 419 (1935), appellant filed a petition for the reduction of alimony paid to his former wife. The trial court ordered a reduction in alimony and the appellant appealed on the grounds that it had not been reduced enough. This court took action to further reduce the alimony from \$54.00 per month to \$45.00. It is interesting to note, however, that at the time of the original divorce, the appellant therein earned \$2,100.00 annually, and the court ordered him to pay \$60.00 a month alimony to his former wife, which amounted to over 34 per cent of his monthly income. The appellant paid alimony as ordered for some five years at which time his annual salary had decreased to \$1,500.00, and yet, even with this court's reduction, alimony of \$45.00 a month still constituted 36 per cent of his income. Appellant in the case presently before the court dwells on the amount of alimony awarded to Respondent but fails to place that in the proper context of relating it to his income (less than 11 per cent).

Although this court made a modification in the alimony in Wilson v. Wilson, 5 Ut.2d 79, 296 P.2d 977 (1956), recognition was given to the fact that the wife was awarded substantially all of the property possessed by the parties to the marriage, including two homes, stock and bank accounts.



This court stated that although alimony in the sum of \$50.00 per month was insufficient for Respondent's support, the assets awarded to her, if well managed, would produce supplemental income. Again, in the present case, Respondent was not awarded assets of an income-producing nature.

Appellant does not assign any specific error, misunderstanding or misapplication of the law to the trial judge except to say that he thinks the court simply made the wrong decision in not awarding to him a bigger slice of the pie. In light of the fact that the dissolution of this marriage was borne of his desire to leave Respondent for another woman, Justice Crockett's comments in Wilson, supra, seem to fit the circumstances of this case as well:

From the decree awarding the plaintiff the divorce, the defendant appeals. He does not attack the part of the decree granting the divorce; on the contrary, it seems to suit his designs very well. He asked plaintiff to secure a divorce for the reason that he was involved with a certain Mrs. M. and wanted to marry her. Notwithstanding the fact that the divorce was indispensable to his plans, he seems to have desired, not unnaturally, to be released from the bonds of matrimony at the least possible economic disadvantage to himself.

The court requested counsel for both parties in this matter to submit supporting memoranda of law on two different occasions (Defendant's Memorandum R. 81-92; Memorandum of

Law submitted by Defendant R. 93-98; Plaintiff's Reply Memorandum R. 99-109; Plaintiff's Memorandum R 110-122). The court no doubt perused the four briefs submitted. In short, the trial judge did everything that could have possibly been done to put himself in the best position to make an informed and objective decision in a very difficult kind of case in which, by its nature, no one really wins. It is virtually inevitable in a case of this nature that one and probably both of the parties will be dissatisfied.

Appellant is asking this court to re-examine the tangible evidence that makes up the record and supersede the decree of the trial judge who observed the witnesses, weighed the conflicting evidence and entered a decree which in his judgment and discretion was as fair and equitable as can be made under the circumstances of this case. This court should not succumb to the temptation of re-doing what has already been carefully done without finding that the trial judge's actions were plainly arbitrary, fanciful or clearly unreasonable; and that conclusion simply cannot be reasonably derived from this case.

Point II

THE TRIAL COURT'S ADJUSTMENT OF THE FINANCIAL AND PROPERTY INTERESTS OF THE PARTIES WAS FAIR AND EQUITABLE.

A. APPELLANT'S STATEMENT OF FACTS WITH RESPECT TO THE EXTENT, VALUE AND DISTRIBUTION OF THE MARITAL ESTATE IS PARTIALLY IN ERROR AND, CONSEQUENTLY, CREATES THE ILLUSION THAT APPELLANT WAS AWARDED LESS AND RESPONDENT MORE THAN WHAT THE TRIAL COURT ACTUALLY AWARDED IN ITS DECREE.

Appellant's description and evaluation of the proportionate interest in the marital estate awarded to each party by the lower court is incorrect on eight separate counts. This inaccuracy tends to create the appearance that Appellant was awarded less, and the Respondent more, than what the trial court actually ordered.

First, although the marital estate included three automobiles, Appellant's Statement of Facts accounts for only two (Brief of Appellant 6-8). The two vehicles recognized by Appellant are the automobile awarded to Respondent and the Mercedes-Benz which went to Appellant as part of his interest in the professional corporation (Brief of Appellant, 7, fn. 25). A 1976 Toyota Land Cruiser was awarded to Appellant; however, in addition to the Mercedes-Benz (R. 125, 130). That vehicle was valued by Appellant to be worth approximately \$6,500.00 (Green TR. 62 ll. 17-29).

Second, Appellant was awarded the "gold and silver coin collection" valued by him to be worth \$10,000.00 (R. 93)

as reflected by the court's minute entry order (R. 125). Appellant omits to include this asset in his schedule of assets entitled "Property Awarded Defendant" on pp. 7 and 8 of his Brief. In all fairness, this oversight is understandable, inasmuch as it was inadvertently omitted from the Decree of Divorce as to Property Distribution (R. 129), although the court specifically intended that Appellant receive it as reflected in the previously referenced minute entry order. Notwithstanding this oversight, inasmuch as Appellant does in fact have control and possession of said asset, and inasmuch as the court intended that he receive it, it should be included in that portion of the marital estate awarded to him.

Third, in his description of "Property Awarded Plaintiff" on pp. 6 and 7 of his Brief, Appellant inadvertently double counted the item "stoneware" valued at \$400.00, inasmuch as it was entered separately as "Item E" and was also included as "Item F" as well.

Fourth, as more fully explained hereinafter, Respondent contends that Appellant is attempting to unfairly minimize the value of his interest in the pension trust awarded to him and valued at \$100,000.00, by subtracting therefrom one-half that amount which allegedly would have

to be paid in income taxes if he were to, hypothetically, cash out his interest today (Brief of Appellant, 9, fn. 38, 17).

Fifth, Appellant contends that Respondent "...has not brought any significant property into the marriage whereas the Defendant brought into the marriage assets of a value exceeding \$20,000.00" (Brief of Appellant, 14). Appellant assumes a rather incongruous posture by contending that he contributed assets in excess of \$20,000.00 at the outset of their marriage without accounting for the concurrent offsetting debts and obligations which he brought to the marriage as well. As previously mentioned, during the pendency of this action, Appellant drained the marital estate of some \$26,000.00 for the purpose of liquidating completely one debt of \$20,000.00 and partially contributing to a continuing obligation in the sum of \$6,000.00. When Appellant's pre-marital assets are offset by his pre-marital debts and obligations, it is evident that he entered this marriage with a negative net worth, whereas Respondent contributed assets of value and was at least debt-free. At the very least, if those obligations are not offset against the value of Appellant's pre-marital assets, they should be included in his share of the marital estate as awarded by the trial court.

Sixth, on p. 5 of his Brief, Appellant itemizes the bills paid and support provided Respondent from the time of separation to the time of trial. Appellant then proceeds to

(Brief of Appellant, 9). This maneuver is highly improper. Such expenditures for support and payment of bills legitimately incurred during the course of marriage should not be included in the marital estate, especially in light of the fact that Appellant failed to provide equal treatment by adding to the value of his property award monies expended in his own behalf and for his own support during the pendency of this action as well. The effect of this maneuver, as well as others herein described, is to unfairly inflate and exaggerate the value of what Respondent was awarded by the trial court.

Seventh, Appellant states "Plaintiff contributed absolutely nothing of a monetary nature to the accrual of the estate of Plaintiff and Defendant" (Brief of Appellant, 4). While it is true that over the years Respondent's monetary contribution to the marital estate in comparison to that made by Appellant is insignificant; to conclude, however, that the bread and butter provider of a marriage should be awarded the bulk of the estate simply because he works out of the home for gain while his wife works inside the home for free gives no value to the faithful and valuable, albeit non-monetary contribution made by a wife and homemaker and is grossly unfair. Such a narrow-minded view has undoubtedly played a role in giving birth to the current movement among women to leave the home and find recognition elsewhere.

Respondent was not gainfully employed during the course of the marriage primarily because their financial circumstances did not require it and, whatever conversation these parties may have had with respect to her becoming engaged in a gainful avocation was only born of the concern to provide her with some diversion from her wifely chores and variety in life. She should not now be punished for electing to pursue the life of a housewife and for doing the very things she undertook to do when she took the marriage vows to be a wife.

In Woolley v. Woolley, supra, the Utah Supreme Court gave clear recognition of a woman's contribution to a marriage in her capacity as a homemaker by awarding her an interest in the potential future income of her husband.

If the money invested in the mining ventures has been earned by the efforts of defendant in his profession, the efforts of the wife and mother in taking care of the home and children have assisted defendant in his accumulation. Accordingly, she should not be denied her share of any increase in value that may result in the future.

Similarly, the Colorado Court of Appeals has held that a wife engaged only in domestic activities is, nevertheless, entitled to a division of the marital property in a divorce proceeding.

The efforts of the respective parties in accumulating wealth is one of many factors that are relevant in the division of the marital partners' property [Citation] and sizable property awards to a wife have been approved without mention of whether the wife directly added to the accumulation of wealth. [Citations.] It is well established that a wife's housekeeping labors are a factor to be considered in dividing property. . . . These services are necessary to the maintenance of a civilized lifestyle. . . . Reiger v. Christensen, 529 P.2d 1362 (C.A.Colo. 1974).

In Marzique v. Marzique, 356 F.2d 801 (D.C. Cir., 1966), the Circuit Court of the District of Columbia stated:

Where jointly held property is involved, and the evidence shows that the husband contributed the bulk, if not all, of the funds for the purchase thereof, the wife's interest is deemed to be conditioned on her faithful performance of the marriage vows. [Dictum.]

Eighth, it is the prerogative of the trial judge to judge the credibility of witnesses and evidence, and, in the case of conflict, the Supreme Court must assume that the trial court believed the evidence which best supports its findings; consequently, this court should view the evidence in the light most favorable to the trial court's findings. Stucki v. Stucki, 562 P.2d 240 (Ut. 1977); Carter v. Carter, supra; Stone v. Stone, supra. As indicated at the



appropriate places in this brief, values assigned to certain assets in the marital estate differ as between these parties. Respondent submits that the values used by Appellant are not exclusively those which best support the court's findings, while those used in this brief are most in keeping with the rule of review just stated.

In each case of this nature, consideration must be given to numerous factors. In no case do all factors favor one party at the complete exclusion of the other. Nor does the degree of importance or emphasis required by each factor remain constant from one case to another. Of the myriad of factors that could potentially come into play in allocating the financial and property interests of the parties to a divorce action, Respondent submits that those enumerated immediately

Fault: It has long been recognized by this court that although no firm rule can be uniformly applied in all divorce cases, a court may, and invariably does, consider the relative loyalty or disloyalty of the parties to their marriage vows and their relative guilt or innocence in causing the break-up of the marriage in formulating the divorce decree and property distribution. Searle v. Searle, 522 P.2d 697 (1974); Dubois v. Dubois, supra; Wilson v. Wilson, supra; MacDonald v. MacDonald, 120 Ut. 573, 236 P.2d 1066 (1951); Pinion v. Pinion, 92 Ut. 255, 67 P.2d 265 (1936). Admittedly this is not the

only factor that should be given consideration in this case, and Respondent does not seek to have Appellant unfairly penalized; but, by the same token, she should not have to suffer or be punished for Appellant's actions in breaking up the marriage. The record clearly reflects that Appellant would not consider reconciliation and simply wanted out of their marriage in order to marry another woman. And yet, Appellant now asks this court to substantially reduce his obligation of partial support to Respondent and give him a further portion of the estate awarded to her by overruling the order of the trial judge who gave judicious consideration to all factors here involved.

Current and Potential Income: It is also well-established that the court should consider, in addition to the relative guilt or innocence of the parties, their present and potential incomes. Wilson v. Wilson, supra. Appellant is fortunate to have a lucrative and promising career which has developed over the course of this marriage. Over that period of time, Appellant's income has multiplied 400 per cent and has every indication of continuing to increase in the future.

Social Position and Standard of Living: Another relevant factor is the social position and standard of living enjoyed by the parties during the course of their marriage, Wilson v. Wilson, supra. In the MacDonald case, supra, this court stated:

. . .that where there are sufficient assets and income to do so, she (the wife against whom the divorce was granted on ground of habitual intoxication) is entitled to be provided for according to her station in life and as demanded by her condition of health and lack of ability to work. . . . (Emphasis added.)

The station in life and (high) standard of living to which the partner became accustomed during their marriage is evident from the record. Their affluence provided them financial freedom and security for both the present and the future. But, even as the order of the trial court now stands, it cannot be fairly said that Respondent will be as fortunate as Appellant in maintaining the same standard of living and comforts heretofore enjoyed by them.

Money or Property Each Brought into the Marriage:

MacDonald v. MacDonald, supra; Brief of Appellant, 13. Notwithstanding Appellant's self-serving assertion that whereas he contributed property valuing in excess of \$20,000.00, Respondent contributed nothing, the truth of the matter is that his debts exceeded his assets at the time and he entered the marriage with a negative net worth as heretofore explained.

The Contribution of Each in the Accumulation of the Marital Estate: Ibid. The assets of this marital estate were accumulated almost exclusively during the course of this

marriage. Its wealth was developed as a direct result of the joint efforts of both parties, i.e., Respondent attending to the normal chores and duties which fall to the housewife and Appellant in pursuing his career.

As previously stated, Respondent simply elected to give full time and attention to fully supporting Appellant by attending to her wifely chores and duties instead of pursuing a gainful avocation which he supposedly encouraged her to do in order to provide her with some diversification of interests and activities.

Any Extraordinary Sacrifice, Devotion or Care Which May Have Been Given to the Spouse or Others, Such as Mother, Father, Etc.: Ibid. As previously mentioned, during the course of their marriage, Respondent assisted in caring for Appellant's two sons for a period of one month each year of their marriage. During five years Dr. Wilson's father stayed with them for approximately one month on each occasion; his brother and mother were also accustomed to staying with them. In each instance, Respondent assisted in making them feel welcome and comfortable. In addition to this, the parties enjoyed an extensive social life during the marriage.

Finally, it should be mentioned that with respect to the property division, Appellant received even more than what he recommended as a fair and equitable distribution.

In his Memorandum of Law (R. 93), he recommended that the marital estate be divided on a two-thirds/one-third basis as between himself and Respondent respectively. As referenced in the Statement of Facts herein, Appellant received, in fact, in excess of two-thirds of the marital estate.

B. PLAINTIFF'S AWARD OF \$2,000 CASH WAS BASED ON EVIDENCE NOT AVAILABLE AT THE TIME OF TRIAL WHICH WAS PROMPTLY AND PROPERLY SUBMITTED TO THE COURT UPON ITS DISCOVERY AND PRIOR TO THE COURT'S MAKING ITS FINAL ORDER.

This issue arises out of 1976 Federal and state income tax refunds amounting to \$11,399.00. The relevant income tax returns (R. 121, 122) were not available to Respondent at the time of trial, but upon their preparation by Appellant were promptly submitted to the trial court by Respondent in conjunction with Plaintiff's Memorandum (R. 110). Copies of the same were provided Appellant, giving him ample opportunity to enter ex-parte objection to this post-trial evidence. No such objection was made by Appellant. He again assumes an inconsistent and unfair position by objecting to the \$2,000.00 award made to Mrs. Wilson in this regard without referring to the fact that he received the balance of the refund amount of \$9,399.00. Appellant casts himself in the role of a hypocrite in another respect inasmuch as he also submitted post-trial evidence to the court which he now asks this court to consider on appeal. After the trial, Appellant submitted to the court, in conjunc-

tion with his Defendant's Memorandum (R.81-92), evidence which purported to show (1) that he in fact paid approximately \$15,000.00 down on a home instead of \$10,000.00 (R.91), and (2) that the resale value of his membership interest in the Cottonwood Club had a net resale value of approximately \$1,000.00 exclusive of a \$400.00 transfer fee as opposed to a different value given at trial. By submitting this evidence, Appellant requested the court to extend to him the very consideration which he now asserts was error for the court to extend to Respondent. Appellant, in fact, has used the values suggested by this post-trial evidence in his Statement of Facts on appeal.

C. APPELLANT'S PENSION-TRUST FUND WAS  
PROPERLY VALUED, AND IN ANY EVENT HIS ASSIGN-  
MENT OF ERROR IN THIS REGARD IS IMPROPERLY  
RAISED ON APPEAL.

Appellant's argument that his interest in the trust fund should be valued at \$50,000.00 rather than \$100,000.00 because he allegedly would have to pay \$50,000.00 in income taxes if he were to terminate the trust today, is devoid of merit, and is without any foundation in the evidence. Appellant did not offer any evidence at trial either as to the potential income tax consequences of cashing out of the trust or as to his intention of terminating the trust. Its value was established by Appellant's own attorney retained for the purpose of managing

it (Red TR. 29, ll. 13-24; 31, ll. 11-14). Appellant offered no evidence to contradict that which established the value of \$100,000.00.

Appellant is asking this court to take into consideration a hypothetical situation (i.e., the consequences of his terminating the trust at the present time). Appellant has not offered any evidence to show that he intends to cash out of this trust nor has he offered any legal authority in support of his argument in this regard. It is improper for him to now request this court to take into consideration the possible consequences of an action that he obviously has no intention of taking. The facts are that the trust was established to provide for retirement or disability and for that purpose its value to Appellant is \$100,000.00.

### Point III

RESPONDENT'S AWARD OF ALIMONY IS NOT ABSOLUTELY PERMANENT AND, IN COMPARISON TO DEFENDANT'S INCOME AND EARNING POTENTIAL, IT IS EXTREMELY MODEST.

With respect to the award of alimony, Appellant claims that the trial court ordered him to pay too much for too long. As to the first half of this contention, he refers to the amount of alimony awarded in the abstract without placing it in the proper context in relation to his earnings from his medical

practice, nor does he fairly take into consideration the standard of living enjoyed by each of these parties during the course of their marriage. Although Appellant's ability to maintain that same standard of living is virtually unimpaired, Respondent faces considerably greater difficulties in this regard.

Appellant refers to the fact that during the course of this litigation Respondent submitted a list of her monthly expenses on two different occasions. The first itemization showed monthly expenses in the sum of \$598.00 (Red TR. 68; D. Ex. #29). The second itemization of monthly expenses was submitted at the time of trial and showed a total of \$842.00 (P. Ex. #16). Appellant, of course, notes the discrepancy and suggests to this court that the more modest figure is what Respondent, in fact, requires for her support. He fails to account for Respondent's testimony at trial, however, wherein she explained that the discrepancy arose simply because she miscalculated and underestimated her monthly expenses on the first occasion, thus the need for the second itemization submitted at trial. Respondent testified, for example, as follows:

Q. Now, you made an estimate earlier, did you not, about \$600.00 at the time we had a preliminary hearing?

A. Yes, sir. But that was much underestimated. It cost more than I thought.  
(Red TR. 68, 11. 5-8.)



Had Respondent accurately assessed her monthly expenses on the first occasion, that particular itemization would have been used at trial and there would have been no need to prepare and submit a second one.

Those factors and considerations previously mentioned with respect to the distribution of property are relevant to the award of alimony as well; thus, there is no need to re-travel that territory here. It should be mentioned, however, that this Respondent has found no case either in Appellant's Brief or from research that supports Appellant's contention that the needs of the spouse and the duration of the marriage are the two factors of "paramount importance" (Brief of Appellant, 19) with respect to the award of alimony. In reality the two factors of "paramount importance" that the trial court should, and in this case did, take into consideration with respect to determining the amount and duration of alimony are (1) the necessities of the wife, and (2) the financial ability of the husband.

Broadly speaking, the principal factors or circumstances which govern the amount to be allowed as permanent alimony are the necessities of the wife and the financial ability of the husband to meet them. Other factors have been mentioned, most of which are merely aspects of these two general tests. Thus, it has been said that the court should consider the financial condition of the parties, the capacity

of the husband to earn, the capacity of the wife to earn, the age, health and general physical condition of the parties, their social standing, and their conduct or misconduct, especially with reference to the question of fault in causing the termination of the marriage. 24 Am.Jur.2d Divorce §631, p. 750 (Emphasis added).

In the case of Hampton v. Hampton, supra, this court stated, "The amount of alimony is measured by the wife's needs and requirements, considering her station in life, and upon the husband's ability to pay." (Emphasis added.)

It is important to place Respondent's "necessities" in the context of the standard of living and kind of lifestyle to which these parties became accustomed during the course of their marriage. In the abstract, "necessity" is a very amorphous concept which provides little assistance unless these other factors are taken into consideration. One individual's bare necessity is another's luxury; and in this case as well as any other alimony should be awarded in an amount sufficient to enable Respondent to maintain her social standing or station in life.

The amount of alimony awarded should be so apportioned as to secure to the wife the same social standing, comforts and luxuries of life as she would probably have enjoyed had it not been for the enforced separation, but care should be taken that it does not amount to an appropriation of the entire estate of the husband. Id., §635, pp. 755, 756.

Probably the most important element that enters into the determination of the amount

condition of the parties, including the income or earning power of the husband and that of the wife. The court must take into account the resources of the wife, including the property awarded to her in the divorce proceeding. Aside from the wife's separate means or estate, the size and productiveness of that of the husband are important factors in determining the amount of the allowance, although they are not to be considered without reference to whether or not the wife was of assistance to him in accumulating the property. Id., §631, pp. 751, 752 (Emphasis added.)

Next to the property or resources of which he is already possessed, consideration should be given to the husband's earning capacity, future prospects and probable acquisition of wealth from any source whatever. Id., §632, p. 753 (Emphasis added.)

The second half of Appellant's argument on appeal with respect to the issue of alimony goes to its indefinite duration. It should be noted in this regard that inasmuch as all matters of this nature are made subject to the continuing jurisdiction of the court, they are not cast in concrete, but, rather, are subject to modification upon showing the proper change in circumstances. The trial court obviously took this fact into consideration in making its award of alimony as reflected in the following statement made by the trial judge in response to an objection entered against Dr. Wilson who was to testify as to what he thought an x-ray technician might earn:

THE COURT: Objection sustained. What do you claim for it?

MR. SUMMERHAYS: I claim she can qualify without any difficulty to become an x-ray technician, that she can earn \$750.00 a month without any difficulty.

THE COURT: Well, as soon as she starts earning \$750.00 a month, then I suppose we would have a change of circumstances. As of now, under her testimony, and I don't suppose it is contradicted, it has been 20 years since she was an x-ray technician. She would have to take a complete re-training. I think I can take her testimony in that regard in making a decision, but what an x-ray technician makes today seems to be immaterial and the objection is sustained. (Green TR. 31, 11. 23-30; 32, 11. 1-6.)

Inasmuch as it is not possible to foresee or anticipate all of the developments and changes that the future holds for these parties, the alimony award made by the trial court has greater potential of dealing fairly and equitably with them than would an award imposing an arbitrary date of termination, which would blindly cut off support without consideration to the relevant needs and circumstances. Under the decree as it now stands, Appellant can petition the court to terminate alimony when the circumstances so warrant; it is obvious, however, that the trial court was of the opinion that Respondent should be awarded alimony in the sum ordered under her present circumstances.

Appellant, understandably places emphasis on the duration of the marriage of these parties, and while it is recognized that it did not last half a century, it should be noted that its termination is a direct result of the attitudes and conduct of Appellant in desiring to scrap this marriage for another. Furthermore, Respondent submits that consideration should not only be given to the duration of the marriage (which incidentally was far longer than any of those involved in Appellant's cited cases in this regard), but consideration should also be given to the time of life that this marriage consumed. At the time of its beginning Respondent was at a station in life when the prospects for remarriage were substantially greater at age 33 than they are now at age 42. It takes little reflection to realize that the prospect of finding a long and lasting relationship with another is far greater for a man in middle age than it is for a woman, and, unlike Appellant, Respondent had no prospect waiting in the wings during the pendency of this action.

RESPONDENT'S REQUEST FOR RELIEF ON APPEAL

THE JUDGMENT OF THE TRIAL COURT SHOULD BE AFFIRMED AND RESPONDENT SHOULD BE AWARDED A REASONABLE ATTORNEY'S FEE INCURRED IN DEFENDING THIS APPEAL.

The judgment of the trial court should be affirmed, and Respondent submits that there is nothing in the record below to indicate that the trial judge abused his discretion in entering the Decree of Divorce in any respect, and that by virtue of this appeal, she has been put to the unnecessary expense of having to engage the further services of legal counsel. Consequently, she respectfully requests this court to award her a reasonable attorney's fee for defending this appeal. Ehninger v. Ehninger, 569 P.2d 1104 (Ut. 1977); Kiger v. Kiger, 29 Ut.2d 167, 506 P.2d 441 (1973).

CONCLUSION

This court has stated:

We believe the great weight of authority supports the rule that a decree of the trial court in divorce proceedings, relative to alimony and division of property, will not be modified except when the trial court has abused its discretion. Otherwise, the appellate court by its own actions would alter the purpose for which it was created. An appellate court cannot remain a court of appeals and invite review of every case decided by

a lower tribunal where its judgment fails to satisfy one or both parties to the litigation. Woolley v. Woolley, supra.

And, it might be added, in a divorce action, more than any other kind of litigation, the probabilities are great that one, and often both, parties will be dissatisfied. No one really wins, and an unpleasant task is simply accomplished as best as can be done under the circumstances. It is, nevertheless, difficult, if not impossible to divide the marital estate in such a manner as to award each party just what each thinks he desires or wants, and thus, the need for according the trial judge a wide latitude of discretion in these matters.

As one considers the facts of this case, one cannot reasonably conclude that the Appellant has been treated unfairly and that the trial court has clearly abused its discretion. Whereas Appellant entered this marriage with a negative net worth, Respondent came to it debt-free and contributed assets of practical use and value. Whereas Appellant retains his annual income in excess of \$100,000.00, exclusive of alimony and income from other sources, Respondent has monthly alimony in the sum of \$900.00 which is less than 11 per cent of Appellant's income.

Whereas Appellant was awarded in excess of two-thirds of the marital estate, which was accumulated during the course of the marriage, Respondent was awarded less than one-third.

Whereas Appellant was awarded properties of an income-producing nature, Respondent has no assets which could potentially provide a supplemental income.

Whereas Appellant is a highly trained and skilled individual, Respondent is not presently trained or skilled for any particular employment and 20 years have elapsed since she was involved in her area of expertise. Whereas during the course of this marriage Appellant's earning capacity increased 400 per cent, Respondent's earning ability substantially suffered as she attended to her husband's needs so as to enable him to develop his practice and increase his earning potential.

Whereas Appellant retains the certainty of a promising medical career, Respondent faces a doubtful future. Whereas Appellant retains not only the present security but security for the future in the form of the pension trust fund which was created and contributed to during the course of this marriage, Respondent faces an uncertain future without any such security. Whereas Appellant has the certainty of new companionship, Respondent faces an uncertain future in this regard as well.

Whereas Appellant will no doubt be able to maintain the same standard of living to which both parties became accustomed during the course of this marriage, the prospects



for the Respondent in this regard are not so promising, and, in fact, Appellant now asks this court to further adjust her position downward.

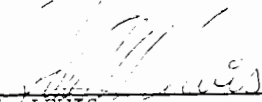
While Respondent is grateful for the consideration extended to her children by Appellant, she also notes the care and devotion which she extended to his family as well, in addition to fulfilling her responsibilities of a housewife.

The Appellant simply has not sustained his burden on appeal by showing that the trial court's actions were arbitrary, fanciful or clearly unreasonable, or that its findings are devoid of competent evidence or violative of fact and logic.

Wherefore, Respondent respectfully prays this court to affirm the decree entered below and award her a reasonable attorney's fee incurred in defending this appeal.

Respectfully submitted,

JENSEN & LEWIS, P.C.

  
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KAY M. LEWIS  
Attorneys for Respondent

Delivered two copies of the foregoing Brief to L. L. Summerhays, Attorney for Appellant, this 21st day of February, 1978.