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Neilson v. Neilson : Brief of Respondent

Utah Court of Appeals

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DOCKET NO. 870591 IN THE UTAH COURT OF APPEALS

ALFRED NEILSON,)

Plaintiff and Respondent,)

vs.)

CARLEEN NEILSON,)

Defendant and Appellant.)

Case No. 870591-CA

#146

BRIEF OF RESPONDENT

Appeal from a Judgment of the Third Judicial District Court
in and for Salt Lake County, State of Utah,
Honorable Homer F. Wilkinson, District Judge

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JURISDICTION

This Court has jurisdiction over this matter pursuant to Utah Code Ann. § 78-2a-3(g) (1988) as an appeal from a domestic relations case concerning issues of property division.

ISSUES PRESENTED ON APPEAL

Respondent adopts the Issues Presented on Appeal by the appellant.

STATEMENT OF THE CASE

This appeal originates from a six-day bench trial commencing on June 30, 1987 and continuing from time to time through July 30, 1987 before the Honorable Homer F. Wilkinson. On July 17, 1986, plaintiff Alfred J. Neilson brought this action against defendant Carleen (Collram-Moffitt) Neilson to annul their four-month old marriage and to have a Prenuptial Agreement (Prenuptial Agreement ["Agreement"], dated February 25, 1986) declared void and unenforceable. (R. 2-17.)

At the conclusion of trial, the court, on its own motion, entered a Decree of Divorce in favor of plaintiff on the grounds of mental cruelty and irreconcilable differences between the parties.[1] The court also found that the language of the Agreement was violative of public policy and declared the same null and void. As additional reasons to divide marital property not consistent with the Agreement, the court

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[1]Irreconcilable differences was added as a recognized ground for divorce effective April 2, 1987 by Chapter 106, Section 1, Laws of Utah (1987).

concluded that defendant breached the specific terms of the Agreement by not providing a good faith marital relationship and by failing to contribute to the marriage her income and property, as required by the Agreement. It further noted that even though the court did not exercise its equitable powers, the court found it had the equitable power to review the Agreement and dispose of property as equity would require.

After a complete review of the evidence, the court awarded all of the plaintiff's premarital property to him. The court awarded to defendant (1) the wedding ring, (2) wedding band, (3) Rolex watch; (4) Lladro figurine (all having an approximate aggregate value of $14,000); (5) the defendant's premarital automobile (the obligation for which was paid off by the plaintiff); (6) a Corvette Sting Ray automobile worth approximately $9,000; (7) $12,000 cash or cash equivalence acquired by the defendant during the marriage or separation; and (8) all wedding gifts in defendant's possession. The court also required defendant to pay her own attorneys' fees from the proceeds of the sale of any or all of the above-listed items, expressing that the defendant should not profit from this short-term relationship considering that she neither changed her living status nor provided a normal marital relationship to plaintiff.

The defendant below filed this appeal seeking a reversal of the trial court's determinations and seeking specific enforcement of the Agreement which, in her opinion,

would compel transfer to her of one-half of the plaintiff's stock holdings valued at approximately $800,000, together with an award for attorneys' fees. Defendant also seeks to reverse a finding of contempt for violation of an order of the Domestic Relations Commissioner. However, for reasons expressed below, this issue is moot.

STATEMENT OF FACTS

Plaintiff is a sixty-seven year old retired executive vice president of Neilson Brothers Energy Company. He met defendant Carleen Collram-Moffitt, a thirty-one year old banking executive, in mid-December of 1985 at a social occasion. In January 1986, the parties began dating frequently. On January 18, 1986, defendant called plaintiff in tears asking if she could move into his home since she was being evicted from her apartment and was financially destitute. (See Trial Transcript ["Tr."], pp. 7-8.) Plaintiff offered to advance her the necessary funds to move into an apartment of her own. However, the following day, defendant called and asked if she could move in with him immediately. Plaintiff allowed this, but only on the condition that her stay would be considered temporary since he was concerned that his family would view her living there as being improper. (Tr., pp. 7-8.) On January 21, 1986, defendant moved into p'aintiff's home, in a separate bedroom, bringing with her a large volume of clothing and other personal effects. (Tr., p. 10.)

During the days that followed, the parties' relationship grew to a point where they were in fact discussing marriage arrangements. In the beginning, defendant doted over plaintiff. She exhibited herself as being a warm, loving and affectionate individual primarily concerned for plaintiff's well-being and was very supportive of his conservative religious lifestyle. (Tr., pp. 12-14.) Wedding plans were made for a March 1, 1986 marriage date.

Prior to the marriage, the parties had numerous discussions relating to their expectations of a normal marital relationship (including sexual), their religious values and beliefs, their family values and beliefs, and their philosophies and loyalties toward one another. Plaintiff is a practicing and active member of the LDS Church. Defendant was raised by a family who shared similar religious values, attended church activities with plaintiff prior to the marriage, and plaintiff believed she too would support his religious activities. (Id.) After the marriage, defendant refused to attend church activities with plaintiff.

Prior to the wedding day, the parties had discussions concerning family finances. (Tr., pp. 20-39.) Plaintiff described the source of his dividend income and told defendant that they had to live within this income. (Tr., pp. 20-24.) These financial discussions culminated in the preparation of a prenuptial agreement wherein plaintiff agreed to provide as a demonstration of his love and affection toward defendant 5% of

his stock holdings in Texas Eastern Corp. for each year of their marriage until defendant held 50% of plaintiff's stock holdings in Texas Eastern Corp., then valued in excess of $800,000. Clearly, this stock represented plaintiff's major premarital asset which provides the majority of income necessary for his monthly expenditures. After some amendments were made at the defendant's request, the Agreement was executed on February 25, 1986 at the law office of the attorney representing both parties to the transaction. (See Conclusions of Law, No. 5; Tr., pp. 33-36.)

Plaintiff's generosity to defendant was typified by his paying off in excess of $10,000 worth of defendant's premarital debt, including a $6,000 personal loan upon which she had pledged her car, a debt of $1,015.29 to ZCMI and $2,200 to medical providers for defendant's purported cyst operation. Plaintiff also purchased a wedding ring which cost in excess of $8,500, dresses for defendant's mother and bridesmaids, and a wedding band ordered by defendant without plaintiff's knowledge. It is uncontested in the record that defendant came into this relationship with substantial debt and few personal assets, whereas plaintiff, after a full business career, came into the marriage with a substantial net worth designed to provide for his retirement. (Tr., pp. 25-30.)

One day before the marriage ceremony, defendant disclosed to plaintiff that she had ordered an expensive wedding band ($4,000) in spite of the fact both parties had

earlier agreed they could not afford that additional expense. (Tr., pp. 30-31.) Plaintiff agreed to sell additional stock to cover the $4,000 bill, but only after defendant stated she would not expend any substantial sum of money during the marriage without plaintiff's express knowledge and consent. It was later discovered (June 1986) that the wedding band had cost only $2,000, however, defendant had used the additional $2,000 to purchase a necklace and diamond earings as a wedding present to herself! (Tr., pp. 31-32.)

Plaintiff testified that following the marriage ceremony and commencing with the wedding night, defendant became cold, hostile, unloving, unaffectionate, unfriendly and totally uncommunicative with plaintiff. (Tr., 62-63.) She showed concern only for her financial security, her own privacy and her own material satisfaction. On the wedding night, plaintiff anticipated and expected his new bride to share his bed and bedroom. However, defendant announced to plaintiff her desire to continue to reside in the same separate bedroom that she had occupied during their courtship. (Tr., pp. 56, 63-67.)

The parties' sexual activity during the entire marriage consisted of the "consummation" of the marriage for one-half hour on March 1, 1986, and two subsequent encounters, one within two days of the marriage and one two months later, both lasting approximately one-half hour and all performed more out of duty than love. (Tr., pp. 55-57.) Although plaintiff

requested sexual interrelationships on many occasions, defendant rebuffed his advances claiming she was ill or too tired. Later, defendant began to complain that plaintiff pawed her. She requested that plaintiff not kiss her on the lips or hug or touch her. (Tr., pp. 62-63; 86-87.)

Defendant's behavior was totally inconsistent with her premarital declarations. (See Tr., pp. 12-13.) Before the marriage even took place, defendant announced to her own psychotherapist, Dr. Ruth Bradshaw, that "sex was no problem". Moreover, she announced to plaintiff that she looked forward to and anticipated a normal, frequent and satisfying sexual relationship with him. At no time did defendant ever communicate dissatisfaction with plaintiff's lovemaking ability, nor did she ever discuss any problems with him, with the exception of an apparent snoring problem. Plaintiff had surgery to cure the problem, yet defendant still refused to share his bed or bedroom.

The parties' financial problems and misunderstandings started shortly after their marriage ceremony. Having confronted defendant with the necessity to live within the dividend income they received every three months, defendant suggested that she be added as a joint payor on the checking account and be responsible for maintaining family expenses, citing her educational background (B.S. in finance) and work history (bank officer) to assure plaintiff of her financial

responsibility. (Tr., p. 69.) Plaintiff accommodated this request.

After numerous refusals by defendant to show plaintiff the checking account or an accounting, and having received numerous overdraft notices from the bank, it was disclosed that defendant had spent the money on numerous personal purchases, to-wit, a Rolex watch, a Corvette Sting Ray automobile, clothing, entertainment and travel. (See Tr., p. 71.) She even attempted to buy a $147,000 home in her own name, placing $1,000 as a down payment which was lost to the parties when she failed to secure financing and close the arrangement. (Tr., pp. 78-81.) Within a month after receipt of the quarterly dividend, the parties' bank account was $12,000 overdrawn. To make matters worse, Texas Eastern Corp. had placed shareholders on notice that dividends would be reduced in excess of 100% down to $1.00 per year as opposed to $2.25 per year, thus the plaintiff was forced to sell more shares of stock and to pay more income tax on those recognized sales in order to maintain monthly expenditures and cover the overdrafts. (Tr., pp. 46-48; 71-73.)

Plaintiff testified that defendant had become uncommunicative from the moment of the marriage ceremony. (Tr., p. 62.) She sought her own privacy by frequenting the home of her mother during the evening hours when plaintiff was at home, returning late directly to her bedroom and sleeping in the next morning until plaintiff left for the office. One

Sunday morning, approximately one month after the marriage ceremony, defendant announced to plaintiff that she was going to Mexico City for a few days. (Tr., pp. 66-68.) In fact, defendant stayed for seven days, never asking plaintiff's permission or informing him that she was intending to travel. Apparently, defendant had asked her parents to accompany her (expenses paid ostensibly by plaintiff) approximately two weeks before her intended departure date. Yet at no time did defendant even invite her own husband to join her on this trip. As noted by the court, all communication broke down to the point where plaintiff's only opportunity to communicate was through numerous notes left in the kitchen for defendant to see. (Tr., pp. 83-84.)

Finally, in approximately July 1986, the parties began communicating only through their attorneys when plaintiff had left a note suggesting to defendant that since he had to sell some 500 shares of stock to cover her overdrafts for the unauthorized purchase of a Corvette Sting Ray automobile and the like, that that 500 share sale should be credited against any stock she claims in the future. Rather than respond directly, defendant chose to respond through an attorney. Thereafter, this action was filed seeking annulment of the marriage and declaration that the Agreement was void.

Subsequent to the filing of the Complaint, defendant filed a motion for order to show cause for temporary support and other relief. (R. 45-48.) Commissioner Sandra Peuler,

after hearing, recommended that defendant not receive temporary support, and further agreed, pursuant to stipulation of the parties, that each would be mutually restrained from disposing of or selling any property acquired during the marriage, including shares of stock sitting in the name of the defendant. (R. 75.) This stipulation was confirmed by letter between counsel and restated before Commissioner Peuler in open court. It was later determined that defendant, in approximately December 1986, sold some 372 shares of stock, netting in excess of $10,000, in clear violation of the court's recommendation and the parties' stipulation. (R. 214-15.) Thereafter, the trial court affirmed the recommendation of Commissioner Peuler and found defendant in contempt of court for knowingly violating an agreed-to order and directed defendant to place the remaining 900 shares of stock in the custody of her attorney, together with any unexpended proceeds from the sale of that stock. (R. 217.)[2]

SUMMARY OF ARGUMENT

The trial court determined that the Agreement violated the public policy of this state on the ground that the terms of the agreement encouraged conduct that facilitates the breakup of the marital relationship. The trial court's conclusion was unquestionably correct. The offending provisions offer

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[2]Both plaintiff and defendant agree the court found defendant in contempt, however, the order submitted by plaintiff's attorney has not been signed and the minute entry document does not reflect a "contempt" citation. (R. 217, 252-254.)

defendant an acceleration of her receipt of 50% of plaintiff's stock holdings if he initiates a divorce action. Other jurisdictions, most notably California and Ohio, which have dealt with similar "profiteering" provisions in prenuptial agreements have determined that if the non-divorcing spouse is given a significant economic benefit upon the filing of a divorce proceeding, then such a provision is violative of its state's public policy. See In re Marriage of Noghrey, 215 Cal. Rptr. 153 (Cal.App. 6 Dist. 1985); Gross v. Gross, 464 N.E.2d 500 (Ohio 1984).

Further, the trial court held that defendant's obligations toward plaintiff in this marriage failed from the beginning, and thus, the consideration for the Agreement itself, to-wit, a good faith marital relationship, failed. The court correctly observed that defendant did not modify her premarital status at all, nor was there any element of a normal marital relationship in this marriage. Sexual relations failed, communication failed, financial responsibility failed and sharing had failed. The trial court properly exercised its statutory authority under Utah Code Ann. § 30-3-5 (1987) to look beyond the express terms of the Agreement and at the actual expectations of the parties in arriving at an equitable distribution of the marital property.

Lastly, the trial court determined that defendant must pay her own litigation costs in this proceeding from the property acquired by her during the marriage. On appeal, this

Court must properly defer to the trial court's decision on such matters since defendant has failed to allege sufficient grounds showing a clear abuse of discretion. See Evans v. Evans, 453 P.2d 560 (Utah 1969).

ARGUMENT

I. THE TRIAL COURT CORRECTLY HELD THAT THE PRENUPTIAL AGREEMENT VIOLATED THIS STATE'S PUBLIC POLICY BECAUSE SUCH TERMS PROVIDE A FINANCIAL INCENTIVE TO DIVORCE.

The trial court was correct when it ruled that the Agreement was contrary to the public policy of this state. As will be demonstrated, the court's ruling was entirely consistent with this state's public policy of preserving marital relationships and with other jurisdictions which have dealt with similar "profiteering" provisions in prenuptial agreements.

The only provisions of the Agreement which mention divorce are found in paragraphs 8 and 9 of the Agreement. Paragraph 8 recites that each of the parties had executed new wills which they agreed not to change,

> [P]rovided however, that if either party commences a divorce action, the other party shall then be relieved of the obligation under this paragraph and may then change his or her Will.

The implication of this paragraph is to prohibit the party filing for a divorce from changing his or her will at any time in the future, whatever the party's status or circumstance. At the time this agreement was executed, Utah was considered a "quasi no-fault" state since its law provided that a

demonstration of grounds or fault was still necessary to gain jurisdiction of the court. Extending the rationality of paragraph 8 of the Agreement, in light of Utah's law, produces the following irrational result: the party seeking to adjudicate another's fault is punished for doing so while the faulting party not only profits, but is also relieved of mutual obligation. This irrationality becomes more apparent in paragraph 9 of the Agreement.

After promising to transfer approximatly 5% of his premarital stock holdings to defendant each year until defendant's holdings reached and equaled plaintiff's, i.e., 50%, the parties agreed:

> In the event the parties are subsequently divorced in a divorce action initiated by CARLEEN, it is understood and agreed that the only assets she shall be entitled to receive from the separate property owned by ALFRED are the shares of Texas Eastern Corporation stock which has theretofore been transferred to her. On the other hand, if the parties are divorced in an action initiated by ALFRED, CARLEEN shall be entitled to receive, as the only property to be transferred by the divorce to her from the separate property of ALFRED, sufficient shares of Texas Eastern Corporation stock so that she will own at the time of the divorce the same number of shares of said stock as will then be owned by ALFRED.

(Prenuptial Agreement, ¶ 9.) In other words, if defendant initiates the divorce, she keeps what she got; if plaintiff initiates, defendant's 50% is accelerated and she does not have to await the 5% distribution per year. The term "initiated", as used in the Agreement, may mean something other than one party filing an action against the other. As will be demonstrated, no matter how the term is defined, the court

acted in accordance with the law and without being arbitrary or capricious.

A. "Initiated" Means Filing An Action.

Assuming, arguendo, that the term "initiated", as used in paragraph 9, refers to the filing of a complaint seeking divorce, the trial court accepted plaintiff's argument that defendant certainly would profit by an early termination of the marriage. Thus, the terms of the Agreement itself promote, facilitate or encourage an early break-up of the marriage to defendant's benefit. Accordingly, the trial court found that the language of the Agreement violated public policy and was thus void.

It cannot be seriously argued that the public policy of this state has changed so drastically that it no longer sustains public policy pronouncements regarding the sanctity of marriage and family relationships. From early declarations in Palmer v. Palmer, 72 P. 3 (Utah 1903), through recently enacted legislative purpose and intent statements, as contained in the Family Court Act, Utah's common law and legislative pronouncements have consistently held that marital contracts are not necessarily the same as civil contracts which contemplate commercial relationships, but commence a status created by man and woman for life to which the state becomes an interested party and which cannot be dissolved solely upon the consent and agreement of both parties.

> It is the public policy of the state of Utah to strengthen the family life foundation of our society

> and reduce the social and economic costs to the state resulting from broken homes and to take reasonable measures to preserve marriages, particularly where minor children are involved. . . .

Utah Code Ann. § 30-3-11.1 (1953, as amended).

> The law is well settled that courts will refuse to enforce any contract, as against public policy, which is intended to promote the dissolution of the marriage status. Greenwood on Public Policy, 490-491. When that status is created the rights involved are not merely private, but they are also of public concern. The social system and welfare of the state having their foundation in the family, the state is an interested party, and therefore the marriage relationship cannot be dissolved except through the sovereign power. . . .

Palmer v. Palmer, 72 P. at 7.

Plaintiff is aware that many states, including Utah, have suggested variance from the traditional common law presumption that prenuptial agreements are void and against public policy. Nor does plaintiff argue that such agreement be considered presumptively void. See Huck v. Huck, 734 P.2d 417 (Utah 1986). Many states have adopted a more liberal recognition of individuals' rights to contract future disposition of property in situations where the marriage is terminated not by divorce, but by death or where there has been no showing of coercion or undue influence together with a fair disclosure of facts between the parties. Other states have allowed parties to characterize separate property and marital property within an agreement in order to clarify future potential controversy, and still others have given presumptive validity to prenuptial agreements which only distribute property and do not bind the court's power to order support

between the parties. Some states are willing to recognize present day reality and yet balance well-founded considerations which built our common law public policy by imposing fairness or conscionability reviews upon prenuptial and antenuptial agreements before the court would sanction the parties' private contractual arrangements. Mathie v. Mathie, 363 P.2d 779 (Utah 1961).

Finally, many states such as Ohio and California have retained some of the prohibitions of public policy in support of the sanctity of marriage where the contract language itself promotes, facilitates or encourages dissolution of the marriage or profiteering by one party over the other. This notion is really the other side of the coin, if you will, of the notion that contracts ought to be reviewed to determine if the parties initially entered into them freely without coercion, distress, undue influence and with full disclosure of the facts and circumstances. Here, we have contractual language which insures one party's faithfulness to the marriage, but encourages the other to profit by an attempt to destroy the marriage at an early date. Not only would defendant profit by a dissolution of the marriage, but she profits more the faster it deteriorates.

In In re Marriage of Noghrey, 215 Cal.Rptr. 153, the court concluded that a prenuptial agreement which gave the wife one-half of her husband's assets only upon the occurrence of divorce was against public policy and was unenforceable since

such an agreement "facilitated", "encouraged" or "promoted" divorce or dissolution. Id. at 156. (Quoting, In re the Marriage of Dawley, 551 P.2d 323 (Cal. 1976)). The offending language which the husband signed stated: "I Kambiz Noghrey, agree to settle on Farima Human, the house . . . [i]n Sunnyvale, . . . [a]nd $500,000.00 or one-half of my assets, whichever is greater, in the event of a divorce." Id. at 154. The court determined that not all prenuptial agreements are illegal or void, but in this particular case:

> The agreement before us, however, is not of the type that seeks to define the character of property acquired after marriage nor does it seek to ensure the separate character of property prior to marriage. This agreement is surely different and speaks to a wholly unrelated subject. It constitutes a promise by the husband to give the wife a very substantial amount of money and property, but only upon the occurence of a divorce. No one could reasonably contend this agreement encourages the husband to seek a dissolution. Common sense and fiscal prudence dictate the opposite. Such is not the case for the wife. She, for her part, is encouraged by the very terms of the agreement to seek a dissolution, and with all deliberate speed, lest the husband suffer an untimely demise, nullifying the contract, and the wife's right to the money and property."

Id. at 156.

Similarly, the Supreme Court of Ohio, in Gross v. Gross, 464 N.E.2d 50, upheld the basic validity of antenuptial agreements provided that the terms do not promote or encourage divorce or profiteering by divorce. In addressing the legality of prenuptial agreements, the Ohio Supreme Court described a hypothetical example of the type of provision that it would

consider as being violative of its state's public policy. Such an illustration would be

> [W]here the parties enter into an antenuptial agreement which provides a significant sum either by way of property settlement or alimony at the time of divorce, and after the lapse of an undue short period of time one of the parties abandons the marriage or otherwise disregards the marriage vows. (Emphasis added.)

Id. at 506.

This illustration appears to mirror the facts found in the instant matter by the trial court. When the Agreement was executed, plaintiff owned approximately 25,440 shares of Texas Eastern Corp. stock with a value in excess of $800,000. Unquestionably, paragraph 9 created an enormous financial incentive for defendant to induce plaintiff into filing for a dissolution of the marriage as early as possible since she would receive one-half of his total stock holdings. She did so within "an undue short period of time" by abandoning the marriage and disregarding the marriage vows.

In defendant's brief, she contends that since the trial court used the word "facilitate" to describe its conclusion that the Agreement violated the public policy of this state, instead of using "encourage" or "promote", that this Court should attach some material significance to the trial court's syntax choice. However, defendant's argument constitutes a distinction without a difference, especially where plaintiff successfully argued before the trial judge,

cited cases which use the phrase "encourage, promote and facilitate" divorce. (R. 327.)

The court's use of the word "facilitate" is found in Finding of Fact No. 5:

> The Court further finds that the prenuptial agreement is void and against public policy for the reason that it encourages conduct designed to facilitate the breakup of a marital relationship.

(R. 391-92.) Thus, the court held that the offending agreement encouraged conduct designed to facilitate the breakup of a marital relationship, not simply to facilitate the court's entry of a decree of divorce. If this Court adopts defendant's statement of the law, as set forth in In re the Marriage of Dawley, 551 P.2d 323, the trial court was virtually consistent in setting the agreement aside:

> Under the principles we have explained, [the wife] can succeed in overturning the trial court's order enforcing the agreement only if she can show the terms of the agreement promote or encourage the dissolution of their marriage.

551 P.2d at 330. Such is the finding of this trial court which defendant agrees cannot be reviewed.

Continuing the persuasive precedent from other jurisdictions which have held similar "profiteering" provisions to be contrary to its state's public policy with this state's interest in preserving the marital relationship, this Court should show appropriate deference to the trial court and concur with its determination that the Agreement violates this state's public policy. Plaintiff is well aware that half a glass of water can be viewed as half full to one person and half empty

to another. Similarly, the language of this agreement may promote marriage by imposing a penalty upon one party or promote divorce by allowing the offending party to profit. In this case, and based upon these facts as found and determined by the trial court, the Agreement itself facilitated conduct designed to breakup, not preserve, the marital relationship.

B. If "Initiated" Means Started By One's Acts Or Conduct, Then Consistent With The Understanding Of The Parties, Defendant Initiated This Divorce Action.

Construction of the terms of the Agreement may compel a different result if the term "initiated", as used in paragraph 9 of the Agreement, is defined to mean that due to the fault of one party (thus initiating a cause of action), the other party was forced to file for a complaint in divorce.

The court found that the Agreement did not accurately reflect the parties' intentions concerning divorce, and that there was no question but that the thinking of plaintiff at the time of the execution of the Agreement was not as rational as he would have acted in his personal business dealings. (Finding of Fact, No. 5.; R. 391-92.) The plaintiff testified that paragraphs 8 and 9 of the Agreement were understood by him to mean that if he were at fault in any litigation involving a divorce, then plaintiff would be entitled to an accelerated receipt of one-half of his stock holdings; that if she were at fault, defendant would keep only what she had been previously transferred as of that date. (Tr., pp. 923, 937.)

The trial court concluded that in fact the Agreement was ambiguous and did not reflect the parties' intentions, yet it did not make its ruling based upon that ambiguity since it had already declared the Agreement to violate public policy. Assuming that the court had not set the Agreement aside, it then must be asked if the court distributed property in accordance with the parties' intentions. If so interpreted, plaintiff's filing of a complaint was "initiated" by defendant's acts. Accordingly, paragraph 9 provides that defendant is entitled to keep the remaining 900 shares of stock[3] that had been transferred into her name, having a value of approximately $22.00 per share. Instead of being awarded this stock, which would be reduced in value by taxes imposed upon its sale, she was awarded other property which had similar or greater value: the Corvette Sting Ray automobile ($9,000), wedding ring ($8,500), wedding band and jewelry ($4,000), clothes and jewelry ($2,000), cash ($12,000) and premarital debt reduction ($10,000). Thus, the defendant has not been materially harmed or damaged by the court's disposition of property.

C. <u>As This Record Reflects, Plaintiff's Complaint Requested Declaratory Relief And Annulment Of The Marriage, Not Divorce</u>.

The trial court, on its own motion, modified the prayer of the complaint and awarded plaintiff a divorce upon

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[3]She had previously sold 372 shares.

its own initiative, not at the specific request of the plaintiff. Accordingly, neither party initiated or commenced an action for divorce, and accordingly, paragraphs 8 and 9 of the Agreement are not effectuated by this action.

Certainly, it cannot be seriously argued that defendant has suffered any material injustice during the four and one-half months of marriage since the trial court awarded her approxmately $35,000 worth of cash and hard assets. This amount does not include the additional $10,000 that plaintiff expended to extinguish defendant's premarital debt. Thus, this Court should defer to the trial court's findings in this proceeding as being fair, reasonable and within the parties' expectations. See Boyle v. Boyle, 735 P.2d 669 (Utah App. 1987).

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT RULED THAT THE CONSIDERATION FOR THE PRENUPTIAL AGREEMENT FAILED, AND THUS, EXCUSED PLAINTIFF'S PERFORMANCE UNDER THE AGREEMENT.

The enforceability of any prenuptial contract depends, of course, on its own language and the particular facts and circumstances surrounding it. As in other contract cases, the object is to serve the intent of the parties. Like other contracts, antenuptial agreements must be supported by consideration, though the marriage itself will ordinarily suffice to meet this requirement unless the circumstances dictate otherwise. Matter of Estate of Burgess, 646 P.2d 623 (Okla. App. 1982). The rule is also well established that failure of consideration exists whenever one who has given

performance fails without his fault to receive in some material respect the agreed exchange for that performance. Bently v. Potter, 694 P.2d 617 (Utah 1984). Accordingly, in this case, it was entirely appropriate for the trial court to examine and consider the expectations of the parties when they entered into the prenuptial contract.

At trial, the evidence revealed that plaintiff expected a traditional and normal marital relationship--traditional in the sense that plaintiff wanted all the rights, duties, loyalty, fidelity, service, fellowship, and companionship, etc., that the common law has implied in the legal, factual and practical unity of a husband and wife. See, 41 Am. Jur. Husband and Wife § 5, et seq. Plaintiff also testified that he expected to develop a fulfilling sexual relationship with his new wife. However, at trial, the facts demonstrated that defendant never had the intent to enter into the type of marital relationship which would include regular cohabitation or meaningful sexual relations with plaintiff. There was no friendship, no companionship, no loyalty--in short, no marriage.

In its ruling, the court stated that defendant breached the agreement by her failing to "perform the marriage covenant", i.e., failing to change her living or sexual behavior once the marriage vows were exchanged. Simply put, defendant did not change her circumstances once she was married. She persisted in her habit of living alone in a

separate bedroom just as she had done during their courtship. She also became increasingly uncommunicative and within the first month of marriage traveled out of the home and out of the country without her husband.

Further, defendant's consideration for the agreement failed when she mismanaged the family finances for her own benefit. Despite plaintiff's repeated requests to defendant to live within the fixed income he could provide and to see the checking account, defendant continued to indulge in a personal lifestyle of lavish excesses. Defendant's purchases without the knowledge of plaintiff of a 1978 Corvette Sting Ray automobile, jewelry and the attempted purchase in her own name of a $147,000 home, and numerous purchases of clothing and other personal items all evidence a relationship where defendant took advantage of plaintiff. The effect of defendant's actions, as earlier noted, was financially devastating. (Statement of Facts ["Facts"], p. 8.)

Prior to the marriage, defendant expressed an interest in having sexual relations with plaintiff, however, on the couple's honeymoon night, while plaintiff anticipated and expected his wife to share his bed and bedroom, defendant told plaintiff that she wanted to occupy a separate bedroom as she had done during their courtship. Defendant continued to reside in her own bedroom until she left the house after the filing of the complaint. The parties' sexual activity during the entire marriage consisted of the "consummation" of the marriage on the

wedding night, and two subsequent encounters, one within two days of the marriage and one about two months later. Defendant's total lack of interest in having sexual relations with plaintiff evidences her intent not to have a traditional husband/wife relationship.

In her brief, defendant contends that the trial court had no business interfering in the parties' right to contract, and further, she questioned the propriety of the trial court concluding that a "normal marital relationship" did not exist. In stating such a claim, defendant seeks to have this Court limit the discretion accorded a trial court in divorce matters by limiting its inquiry to the literal language of a prenuptial agreement.

Paragraph 14 of the Agreement provides that it shall only become effective upon the consummation of the proposed marriage between the parties. The effect of the trial court's finding was to rule that no marriage existed. The promises, covenants and marital vows had been disregarded, and thus the underlying consideration, although given in the form of a promise, had failed in reality.

Whatever the court ruled in this regard is of little importance as a separate issue since it voided the Agreement on other grounds. If this Honorable Court does not sustain that holding, then it is evident that the parties must return to the trial court for other determinations consistent with the court's equitable power of distribution.

As the facts amply attest, since defendant did not fulfill a traditional or non-traditional marital role, the trial court was entirely correct in ruling that there was a total failure of consideration in this matter. Moreover, defendant's futile plea that express terms of the Agreement should be made binding upon the trial court, without considering the facts surrounding the intent of the parties and their expectations, would create an empty exercise of judicial waste. This Court must sustain the trial court's exercise of its statutory prerogative.

III. PARTIES CANNOT DEFEAT THE TRIAL COURT'S EQUITABLE POWERS.

The trial court opined that it had the equitable power to review and modify, if necessary, the disposition of property as originally contemplated under the Agreement.[4] The genesis of this "fairness review" is contained in this Court's prior holdings in Mathie v. Mathie, 12 Utah 2d 116, 363 P.2d 779 (1961), and Penrose v. Penrose, 656 P.2d 1017 (Utah 1982), and is mandated by statute. Utah Code Ann. § 30-3-5 declares:

> When a decree of divorce is rendered, the court may include in it equitable orders relating to the children, property and parties.

In Utah, prenuptial agreements and similar contractual relations between husband and wife are given consideration, but are not binding upon the court. In Mathie, supra, the

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[4]Plaintiff contends that this issue is moot so long as this Honorable Court sustains the trial court on the first issue raised, to-wit, validity of the Agreement.

plaintiff and defendant had entered into a reconciliation agreement after which they were later divorced. During the divorce proceeding, the court decided to divide marital property not in accordance with the reconciliation agreement. The court held in addressing the efficacy of that agreement:

> Reverting to the question of the sanctity of the contract, attention is directed to the fact that agreements between spouses to fix their property rights inter se during coverture are generally not held to be so absolute as to prevent the court under its equity powers in divorce actions from doing that which justice and equity require for the interest and welfare of the parties involved. . . .
>
> * * *
>
> From our examination of the authorties it appears that the true import of the well-considered cases dealing with this subject is that such agree- ments will be analyzed upon their own facts and are enforced by the courts only if they are fair and equitable and do not run afoul of any consideration of public policy.
>
> The foregoing discussion is proposed to show the limitations upon such agreements and to emphasize the careful scrutiny they ought to be given before a court of equity should give them effect. . . . But the real question is not so much whether the contract can properly be regarded as valid, as it is what the court, under its acknowledged broad equitable powers in divorce cases, will do in regard to the property and property rights of the parties, a part of which are the rights in such a contract.

363 P.2d at 782-784.

Our courts have, for many years, and to this date continue to allow broad equitable powers to review the disposition of property between parties whether or not their marriage is annuled or terminated by divorce, whether or not their contracts are entered into before or during marriage, and

whether or not they are presumptively valid or had been entered into freely and without undue influence, fraud or duress. In Ranney v. Ranney, 548 P.2d 734 (Kan. 1976), the court stated:

> The general rule in this state is that contracts, made either before or after marriage, [are valid where they] . . . are just and equitable in their provisions and are not obtained by fraud or overreaching. . . .

548 P.2d at 737.

Whether one describes it as a "fairness" review or a "conscionability" review, the underlying notion remains the same and has been recognized by our courts consistently. See Pearson v. Pearson, 561 P.2d 1080 (Utah 1977); Strong v. Strong, 548 P.2d 626 (Utah 1976); Barraclough v. Barraclough, 111 P.2d 792 (Utah 1941); Callister v. Callister, 1 Utah 2d 34, 261 P.2d 944 (Utah 1953); Christensen v. Christensen, 422 P.2d 534 (Utah 1967); Madsen v. Madsen, 276 P.2d 917 (Utah 1954); Klein v. Klein, 544 P.2d 472 (Utah 1975).

Defendant's reliance upon Cunningham v. Cunningham, 690 P.2d 549 (Utah 1984), stating that a trial court's discretionary boundaries do not entitle that court to restructure a contract according to the court's desires, is misplaced. That case is not a divorce case, but concerns itself with a deed of conveyance of parcels of real property. The court specifically states that the trial court in that matter had no equitable powers and could not reform deeds without a finding of mistake or inequitable conduct. In these matters, the district court is empowered to use and exercise its equitable powers, and in doing so, it is not inappropriate

for a court to hold that the defendant's conduct and the resultant profit of some $400,000 for a four-month unsuccessful marriage would be an unconscionable result.

IV. DEFENDANT'S CONDUCT WAS CONTEMPTUOUS.

Defendant next appeals from an oral finding of contempt for willful violation of the Domestic Relations Commissioner's recommendation and mutual restraining order. Pursuant to the Motion for Order to Show Cause Re Contempt filed by plaintiff in this action, and after a hearing held before the trial court in this matter, the court found that the defendant sold some 372 shares of Texas Eastern Corp. stock in violation of her attorney's oral and written stipulation filed before the Domestic Relations Commissioner, upon which the Commissioner recommended a mutual restraining order. Unfortunately, this issue, too, may be moot since a review of the record indicates that the plaintiff's proposed order memorializing the court's finding of contempt was filed unsigned and the court's minute entry does not reflect a finding of contempt. (R. 214, 236, 240-42.)

Both plaintiff and defendant agree that, in fact, the court found defendant in contempt of court, just as they both agree that an oral and written stipulation was presented to the Domestic Relations Commissioner upon which she ordered a mutual restraining order enjoining the parties from disposing, selling or otherwise encumbering marital assets during the pendency of this action. Plaintiff is surprised that defendant and her

counsel raise this issue, having failed to object in any manner to the recommended mutual restraining order, having clearly testified to an awareness of the stipulated order, and being fully aware of Utah Code Ann. § 30-3-4.4(c) (1985), stating that the Commissioner's recommendation becomes and is deemed to be an order of the court if not objected to within ten days.

Defendant admitted at trial that she had authorized her counsel to represent to the Domestic Relations Commissioner and the court that the shares of stock would not be sold during the pendency of this action. (Tr., p. 959.) While the plaintiff cannot argue with defendant's proposition that the Commissioner's recommendations do not have the effect of an order when objections are timely filed, plaintiff also cannot argue with a proposition that a person should be entitled to rely upon an attorney's representations made on behalf of his client, in writing and in open court. To abandon those representations, based solely on the client's future conduct in violation of those representations, would be reprehensible and contemptuous.

V. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN RULING THAT DEFENDANT WOULD BE RESPONSIBLE FOR HER OWN ATTORNEYS' FEES.

Generally, allowance of attorneys' fees and court costs in divorce cases are matters of discretion for the trial court, and although reviewable on appeal, such awards will not be reversed unless there has been a clear abuse of discretion. Evans v. Evans, 453 P.2d 560. Defendant contends the trial

court abused its discretion by making her pay her own litigation costs from the property she received in the divorce. The defendant does not appeal from the court's failure to award her attorneys' fees, nor does the court prohibit her attorney from charging or defendant from paying any amount greater than what the court had ordered her to pay by way of judgment.

The trial court fashioned a remedy consistent with its expressed views that the defendant should not profit any further from this short-term and extremely unsuccessful relationship. The case law cited in defendant's brief does not support the proposition that the court abuses its discretion if it orders a party to pay attorneys' fees out of the property awarded him or her, or if it orders each party to pay his or her own lawyer.

Utah Code Ann. § 30-3-3 (1953, as amended) clearly grants the court wide discretion in fixing and awarding costs to enable either party to prosecute or defend a domestic relations action. In responding to a similar statute, the Colorado Supreme Court, in Morrison v. Peck, 376 P.2d 58 (Colo. 1962), held that a trial court does have the authority to assess attorneys' fees against the wife and in favor of the attorney representing the wife.

Given the defendant's past actions during the course of this trial, it is understandable that the court wished to protect her own attorneys in the payment of their fees. In any

case, the cure to the perceived evil lies amongst the relationship between defendant and her attorneys, not this Court.

CONCLUSION

For the reasons expressed, this Court should affirm the findings of the trial court in holding that the Agreement violated the public policy of this state by facilitating, encouraging and promoting conduct designed to breakup marital relationships. The defendant, by her conduct, clearly demonstrated a desire to profit from this short-term relationship. If, for any reason, this Court cannot uphold the lower court's determinations and decides to reverse, the appropriate remedy is to remand the same for further determinations consistent with the district court's equitable powers.

RESPECTFULLY SUBMITTED this 8th day of August, 1988.

ROGER D. SANDACK,
Attorney for Plaintiff-
Respondent

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CERTIFICATE OF SERVICE

THE UNDERSIGNED hereby certifies that two copies of the BRIEF OF RESPONDENT were placed in the United States mail, postage prepaid, to the following persons on this 8th day of August, 1988:

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