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Denise R. Gramme v. Andre Gramme : Brief of Defendant-Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

DENISE R. GRAMME,

plaintiff and Respondent,

vs. Case No. 15420

ANDRE GRAMME,

Defendant and Appellant.

BRIEF OF DEFENDANT-APPELLANT

Appeal from the Third Judicial District Court
of Salt Lake County, State of Utah
The Honorable Stewart M. Hanson, Jr., Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

DENISE R. GRAMME,

Plaintiff and Respondent,

vs. Case No. 15420

ANDRE GRAMME,

Defendant and Appellant.

APPELLANT'S BRIEF

STATEMENT OF CASE

Plaintiff, Denise R. Gramme, filed an action in divorce. Defendant, Andre Gramme, answered and counterclaimed.

DISPOSITION IN THE LOWER COURT

The Trial Court found that the Plaintiff was entitled to a divorce against the Defendant and awarded the Defendant a divorce against the Plaintiff on the Counterclaim. The Trial Court awarded the Plaintiff real and personal property having a value in excess of $200,000.00, assessed attorney's fees of $8,000.00, awarded costs, and required the Defendant to pay, as permanent alimony, the sum of $1,400.00 per month.

RELIEF SOUGHT ON APPEAL

The Defendant-Appellant asks the Court to eliminate or reduce the provision for alimony, to modify the property award, and to require that the Plaintiff-Respondent pay, from her substantial estate, her own attorney's fees and costs. The Defendant requests that the home in Carmel, California, be sold and that the proceeds be placed in trust and professionally managed for the Plaintiff.

STATEMENT OF FACTS

While the Court on this appeal may review the law and the facts, the Defendant has divided the Statement of Facts in three parts, the last of which is entirely financial. The first section concerns the testimony of the Plaintiff, Denise R. Gramme, insofar as it is germane to the issues raised by the Defendant on appeal. The facts contained there are not in dispute. In that section, the Defendant has included, for ease of reference, however, the third party testimony of Dean R. Callister, the arson investigator of the Salt Lake City Fire Department. The second section includes the testimony of the Defendant, Andre Gramme.

Testimony, Denise R. Gramme

The Plaintiff had six years of elementary school in Belgium and three years of high school for a total of nine years formal education (R. 173). Her employment

prior to her marriage was with her father, in the potato business, also in Belgium, where she worked sporadically sometimes "all the week" and sometimes not at all. She learned, she said, to buy potatoes and groceries, to bag, carry and deliver potatoes (R. 174).

The parties were married in 1946 and the Plaintiff became immediately pregnant with their only child, Arlette Gramme Rukavina. The Plaintiff was not employed until 1949, when, after emigrating to America, she commenced employment with the Hotel Utah (R. 175), after which she held a number of different jobs. Her last employment was with L. G. Balfour and was for "close to a year" or "maybe more" (R. 176). She was working for Balfour in 1966 (R. 177).

Everything, the Plaintiff testified, was perfect, between she and the Defendant, until he established a relationship with one Sharon Morecraft in the latter part of September 1975 (R. 167-168). The Plaintiff was, prior to that time, "everything" to the Defendant, she said. He was never ashamed of her, took her out all the time, spoiled her and dressed and treated her beautifully (R. 163-164). She had, however, she admitted, been hospitalized between January 15, 1969, and September 4, 1975, twelve times. The records show that the enrollments were frequently for psychological rather than physical reasons (Exhibit 37-D).

The Plaintiff had a mastectomy in 1969, for a malignant tumor and her left breast was removed (R. 220). Her medical problem was equivalent to that of Mrs. Jake Gar Happy Rockefeller and Betty Ford (R. 215). The Plaintiff later requested the removal of her right breast. There was, when it was removed, no hint of malignancy. The Plaintiff has never had chemotherapy, or radiation, or any medication related to the treatment of cancer. No doctor has presently advised her that she suffers from cancer (R. 221), or has in the nine years since 1969 (R. 222). She is under no current course of treatment for the disease. The Plaintiff had a hysterectomy early in her married life and has had a bladder problem.

The Plaintiff, prior to the trial, had had household help for ten or twelve years taking care of one half of a duplex at 692 Cortez Street in Salt Lake City, Utah, where she was home, basically all of the time (R. 214). The duplex on Cortez Street in which the parties lived from 1953 to late 1975, and where the Defendant continues to reside, cost less than $10,000.00 to build and the companion unit rented for $85.00 a month (R. 169). In 1975, the parties purchased an expensive home in Carmel, California.

The Plaintiff, during the period of her married life, had fainting episodes, which sometimes resembled

convulsions. The fainting spells preceded, by a considerable period, the surgery for the removal of the left breast, and there were many such incidents (R. 182-183). Mrs. Gramme did not know how many times she had passed out during the marriage, whether forty-five or fifty, to which she had admitted earlier, or four or five hundred times. She knew, however, that it was "many, many, many times" both before and after her admission for the removal of her left breast on January 15, 1969 (R. 183). Such seizures never occurred while she was operating an appliance. Once, she said, one occurred while she was operating a motor vehicle and twice, she said, they occurred in a public place (R. 184-185). She was never admitted to any hospital for injuries sustained as a result of such circumstances. During the trial, she appeared, on one occasion, to fall around the witness box and to the floor (R. 281).

The Plaintiff testified that there was a fire at her home on July 4, 1972, and another that preceded it (R. 188-189). Yet a third fire involved a 1970 Pontiac owned by the parties and was caused by arson (R. 192). A fourth fire at the Gramme residence involved a boat owned by the Plaintiff's father which was stored in the carport at the Plaintiff's home while the father was in Europe. It burned the boat, damaged a camper, a truck and the carport (See Exhibits 47-D to 50-D) and caused extensive damage (R. 195).

The Plaintiff admitted that a neighbor girl had accused her of setting a fire, claiming to be an eyewitness (R. 197). She indicated that the witnesses name was Karen Knolte (R. 198), and that, later, the Knolte home caught on fire (R. 199). Mrs. Gramme, in connection with the accusation, spoke to the "fire chief" at his office but testified, at first (R. 201-202), that it was not the Fire Department, but the Defendant who required her to see a psychiatrist (R. 201). She denied she was ever asked to take a lie detector test concerning these events, and then hedged (R. 202).

Dean P. Callister, a Lieutenant in the Salt Lake City Fire Department, the fire arson investigator, testified from Fire Department records (R. 483), that he was familiar with the parties and had been called to their home at 692 Cortez Street to investigate fires on six separate occasions between May of 1973, and June of 1974. They had involved, among other things, a garage, a fence, a carport, boat, truck and camper, and a grass fire (R. 482). After a number of visits to examine the aftermath of fires believed to have been caused by arson, without being able, from the evidence, to prove guilt, the Lieutenant was called to speak with "two witnesses" who informed him "they had observed Mrs. Gramme" set a fire (R. 488). After speaking with the County Attorney, who advised him to speak with the

Crammes, he informed them, he said, on June 25, 1974, that they must obtain care for the Plaintiff or that the Department would file criminal charges against her (R. 489). Lieutenant Callister later confirmed that the Plaintiff was, pursuant to his instructions, receiving psychiatric care (R. 490). The fire in June of 1974, was the last one the Fire Department was called to investigate at the Plaintiff's home (R. 488). The Plaintiff, at the time, was admitted to the psychiatric ward at St. Mark's Hospital (R. 272).

On three or four occasions, windows were broken at Cortez Street (R. 202). The home was burglarized and jewelry was stolen. The Defendant's office was ransacked "two" or "three" times, and his papers and documents were thrown around (R. 203). The Police, as distinguished from the Fire Department, came to the parties home at least two or three times (R. 204). All of the events described preceded the relationship of the Defendant with Mrs. Morecraft (R. 206).

The Plaintiff had used drugs, she said, regularly, since 1969. They cost her, over nine years, $60.00 to $70.00 per month, "sometimes more, sometimes less" (R. 207). The drugs included Valium, Fiornal and Diuril (R. 208), water pills, and also, Thorazine and Equamil (R. 291). The Plaintiff overdosed on drugs and when asked how often, responded as follows:

"Well, my husband told me every time I took those pills he took me down to the hospital, and I recall three or four times, maybe six times, I don't know. Maybe three or four or five times, I guess" (R. 209).

Some of the drug overdoses were, in reality, suicide attempts (R. 210), and of the twelve hospital admissions, for every purpose, surgical and psychological, from January of 1969, to September of 1975, all, again, were prior to the relationship of the Defendant with Sharon Morecraft (R. 211, Exhibit 37-D). Prior to the Defendant's friendship with Sharon Morecraft, in late 1975, the Plaintiff admitted that she had never complained that her husband, Andre Gramme, was any part of her problem (R. 213-214). The psychiatrist noted on July 11, 1974, on the occasion of the plaintiff's tenth admission to St. Mark's Hospital, that her social history was "insignificant" (Exhibit 37-D, July 11, 1974 admission, emphasis supplied).

The plaintiff physically assaulted Sharon Morecraft at the airport (R. 231-232), in 1975 or 1976, beating her with a club she had brought from home, which was broken on Mrs. Morecraft's back (R. 232-235). The plaintiff admitted that the Defendant said "...he was scared of me," and that he slept in the bathroom, behind the locked door, "many, many, many times" (R. 236).

The plaintiff was accused of theft (R. 297) in Carmel, California, in early 1977, involving expensive

jewelry stolen from the home of Dr. and Mrs. Hall, who were friends. It was the Plaintiff who notified the Police of a robbery, ostensibly in process. There were, again, broken windows, and the jewelry was found, after a search, in the plaintiff's Carmel home. The Plaintiff pled guilty to a misdemeanor and was placed on probation. She was on probation in California at the time of the trial (R. 297-303).

Testimony, Andre Gramme

The parties were married in July of 1946. Mrs. Gramme was first employed in late 1949 or early 1950 and last worked in 1967 (R. 409), when her income was $1,352.85 (R. 412). She had no income in 1968, none since 1968, and worked sporadically, perhaps half the time, from 1949 to 1967 (R. 414-415).

The Plaintiff left the Defendant, and her infant daughter, early in the marriage (R. 420), for some ten days for another man (R. 421). The Plaintiff, the Defendant said, had a bad temper and was both nervous and loud.

The Plaintiff had, during the period of the marriage, and before 1969, "hundreds" of fainting incidents, which were, said the Defendant, "too numerous to count" (R. 421). The Plaintiff would, the Defendant said, lapse to the floor or fall on a couch. The Defendant never knew the Plaintiff to fall against a piece of furniture, or to hurt herself, and she was never hospitalized by reason of the

incidents. The Defendant had never known such an event to occur when the Plaintiff was operating an appliance, in the bathtub (R. 422), in an automobile, or at any public place. No doctor ever found an explanation for such incidents, or for the variant that more nearly resembled a type of convulsion (R. 423). The incident in the witness box, during the trial, was the first such incident the Defendant ever observed to occur in a public place. After the Fire Department required the Plaintiff to see a psychiatrist, there were, said the Defendant, no more convulsions (R. 424).

The Plaintiff was a regular drug user, and began taking them as early as 1949 or 1950. They included sleeping pills and tranquilizers (R. 425). The use increased in number and variety after 1969 and those for which payment was made by check cost between $60.00 and $80.00 a month, from then until the time of trial. As early as 1970, the Plaintiff overdosed, on one occasion after an argument with her father (R. 426). She did it on several subsequent occasions and was hospitalized. On several occasions her stomach was pumped at St. Mark's Hospital (R. 427).

The Plaintiff, the Defendant testified, confined herself, for a number of years, to the consideration of her health. She stayed at home with the drapes pulled, the doors locked, the blinds drawn, failing to dress during the day and watching the soap operas on TV. She did not assist

in the business (R. 427-428), manage the household accounts (R. 467), keep or maintain the duplex and she was, the Defendant testified, often up at night (R. 428).

The Plaintiff was not pleased with the home at Cortez and wanted to move to a larger home in Holladay (R. 429). She had wanted, she testified, to move from the duplex to a better place and she had discussed such a move with the Defendant over a period of many years (R. 170). There were, at Cortez, a "rash" of broken windows. On one occasion a detective asked the Defendant if the Plaintiff would take a lie detector test. In connection with such events, the Plaintiff suggested that the parties move, asserting that someone didn't like them and that they must have "enemies" (R. 430).

After one of the ransacking incidents at the home, the Defendant observed the Plaintiff remove money from his wallet (R. 431). The Police Department came to the house in connection with the broken windows, and the ransackings, four or five times (R. 432). The Plaintiff refused to take the lie detector test on the basis, she said, of medical advice (R. 432-433).

There were four separate fires in the home, at Cortez (R. 433). All began in the carport. The second occurred on the 4th of July when the Defendant went, over

objection, to a party without the Plaintiff, who then call to inform him that the garage was on fire (R. 434).

The third incident involved the burning of a 1970 Pontiac. The Defendant was awakened by the Plaintiff who preceded him outside and who pulled from the gas tank a rope or a rag that operated as a fuse (R. 435). The Defendant found matches at the scene and was told by the Plaintiff, who admitted they were there, that it was dark and that she had lit the matches to see what was going on. Before the fire, the Plaintiff had asked that the parties purchase another car, a request that the Defendant had refused (R. 437). The Fire Department investigated, and concluded that the fire was caused by arson (R. 437).

In 1973 or 1974, the Plaintiff wanted to travel with her parents to Europe to visit an aunt who was dying (R. 437), and her parents refused to permit her to accompany them. During the trip, the father, Mr. Hasoppe, stored his boat at Cortez Street in the carport. The Defendant, one evening, waked, after an explosion, to find the boat on fire and his wife on the couch in the living room. The fire, which spread, engulfed the carport, a truck and its contents, items of storage, as well as the boat and all were destroyed or damaged, reflecting a total loss of approximately $10,000.00 (R. 739), equivalent to the original cost for the construction of the entire dupl

the Fire Department determined that the fire was caused by arson (R. 440). It was the fourth fire at the duplex on Cortez Street.

There were, in addition to the fires at the home of the parties, other fires in the neighborhood. Two of them involved fences, one a grapestake, between the home of neighbors to the north, the Knolte's, and the home of the parties to these proceedings (R. 441). One of them also involved a clutch of bamboo which the Plaintiff had complained blew dry leaves on the parties' property in the late fall or early winter (R. 441-442). On another occasion the Defendant was awakened by the Fire Department which had extinguished a grass fire. It was at that time, that the setting of the fire, by the Plaintiff, was witnessed by neighbors (R. 442). Later there was at the home of the Knolte's, the parents of one of the witnesses, though they no longer lived at the premises, also a fire (R. 443).

The parties were summoned to the Fire Department (R. 443) and told by the arson investigator that there was enough evidence to press charges against the Plaintiff unless she had psychiatric treatment (R. 444). The Plaintiff was enrolled at the psychiatric ward at St. Mark's Hospital on two separate and subsequent occasions, once after an overdose (R. 445) on the request of Dr. Peterson, and once upon the request of the family physician, Dr. Dalyrymple,

for a total period of approximately two weeks (R. 445-44
A second psychiatrist recommended a third commitment afte
the filing of the criminal charges in California, subseq
to the filing of this lawsuit. The Plaintiff refused to
admitted (R. 446-448).

The Defendant testified that the conduct of the Plaintiff impaired their social relationships (R. 452). On one occasion, he found her in a closed garage, in the trunk of the car, with its motor running (R. 453). She was taken, again, to the emergency room at St. Mark's Hospital. Twice the Defendant found the Plaintiff standing over his bed with a knife in her hand (R. 454), and once he found her wandering around the house, after an argument, with a rifle, cocked, a shell in the chamber, and with the safety off (R. 455). The Defendant also testified that because he was afraid of the Plaintiff, he would lock himself in the bathroom and sleep on the floor. He believed, he said that the Plaintiff was capable of physical violence (R. 45 He observed the Plaintiff hit Mrs. Morecraft with a broomstick, beat her with her hands and throw her luggage at the airport (R. 456). On a morning after the Plaintiff had physically attempted to gain ingress to the Defendant's apartment, the Defendant was advised that a Corvair automobile driven by Mrs. Morecraft, had been damaged by someo who had apparently struck the vehicle with a rock, scratch

the paint, breaking the windshield and the glass on a side door (R. 456).

The relationship of the Defendant with Mrs. Morecraft was not, the Defendant testified, secret or clandestine (R. 458). The Defendant admitted he knew Sharon Morecraft, that he had a relationship with her which began in October of 1975 (R. 102) and that they had been to San Diego (R. 40), to San Carlos, Mexico, Mazatlan, Mexico and Carmel, California (R. 53) together (R. 41). He admitted that Mrs. Morecraft worked for him in his office (R. 42), that he had given her gifts, and had seen her frequently, both prior to and after his separation from the Plaintiff (R. 46) in September of 1976 (R. 47). He stated that the Plaintiff was in California quite a bit of the time, just prior to their separation (R. 49).

The Plaintiff, the Defendant testified, was a poor manager of money; and, at times, during the period of her employment, her clothing purchases were virtually equivalent to her income. Her tastes were expensive (R. 469). After the separation of the parties, the Plaintiff, though the recipient of adequate temporary alimony, failed to pay her bills in timely fashion, including telephone, garbage pickup, soft water, cable TV and water (R. 477).

Financial Affairs

The Defendant, a masonry contractor, testified that all of his earnings from every source had come to rest in his personal assets, as reflected in the Exhibit, 34-D, (R. 105-106) and in the value of his corporation, which he testified was, as of December 31, 1976, $120,000.00, and which, he testified, had diminished in view of his losses during the year 1977 (R. 501). The Defendant failed to answer several questions pertaining to his income, his purchases, and to the accumulations in his estate prior to 197[illegible]. He did so on the basis of the privilege against self incrimination. The questions and the objections are on the record at 85, 86, 89 and 90. The parties accountant, Mr. Bayes, who had, for many years, prepared their joint returns, testified that he knew of no other assets (R. 545), as did, essentially, the Plaintiff. There were several items which the Defendant admitted in final argument (R. 621) might operate to increase the figure on Exhibit 34-D, slightly.[1] The Trial Court found the value of the personal assets to be $439,200.00, and valued the Corporation at $210,800.00 (Findings, R. at 124). That was some $90,000.00 more than

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1. Including $1,700.00 for improvements at 1815 West 500 South, $1,400.00 for the cash value of the policy of insurance with Northwestern, and a Datsun automobile valued at $2,500.00. (See: Final Argument at 620-621.)

it was valued by its accountant (R. 555), or by the Defendant, without considering the losses incurred in the year 1977.

The Defendant, who testified at the trial that the position of the corporation, Andre Gramme Masonry, Inc., was "very precarious," said that he had borrowed $160,000.00, some of which was secured by savings certificates, to secure operating capital, cash flow, for the business (R. 493-495). The Defendant also presented a projection of the project at Little America, showing an estimated loss of $120,000.00 (R. 497), and other projected losses that raised the anticipated shortfall for 1977 to $150,000.00 (R. 501). The Defendant stood behind his tax returns that reflected a loss in 1976 (R. 501).

The valuation placed on the corporation by the Plaintiff's expert was exorbitant (R. 314). The Trial Court did not authenticate the expert's findings and expressly refused to award the Plaintiff a fee for the expert's services.

ARGUMENT

POINT I

THE TRIAL COURT MISUNDERSTOOD AND MISAPPLIED THE LAW

A. The Court Below Did Not Consider the Misconduct of the Plaintiff Wife.

The Trial Court consistently resisted the consideration of the facts relating to the misconduct of the wife, treating the case as one involving merely the adjustment of economic factors. The problem surfaced in chambers off the record, before the trial began.[2] Defendant's counsel requested, first in chambers, during the course of the trial, and then in open Court, that the Court articulate its position on the record (R. 526-528).

Defendant's counsel interrogated the Plaintiff relative to several actual or attempted physical assaults by the Plaintiff on Mrs. Morecraft and members of the Plaintiff's family. The questions were asked on cross-examination, and the first question in the series began at line 3 on page 231. Objections were interposed to a foundational question which began at line 11 on page 240.

"MR. ALLRED	Mrs. Gramme, you were on the outs with your father for a period of some years, were you not, before his death (R. 240)?
MR. MC LACHLAN:	Your Honor, I will object to this line of questioning. I can't see any relevance.
THE COURT:	Objection is sustained.
MR. ALLRED:	Okay. Mrs. Gramme, were you excluded from your father's room at the hospital?

2. Where the Court invited objections to such testimony.

MR. MC LACHLAN: Your Honor- -

THE WITNESS: Never, Sir.

MR. MC LACHLAN: Your Honor- -

MR. ALLRED: I'm laying the groundwork, Your Honor, for the attack that I have just mentioned.

THE COURT: All right. Suppose you show the attack?

MR. ALLRED: Excuse me?

THE COURT: Suppose you show that? What then? What does it prove so far as this case is concerned?

MR. ALLRED: The conduct of the wife, Your Honor, the misconduct of the wife.

THE COURT: Objection is sustained..." (R. 240-241) (Emphasis supplied.)

Then followed a lengthy legal argument. During that argument, the following discussion was had.

MR. ALLRED: "...But I'm not trying to confine myself to misconduct of recent origin (R. 244).

THE COURT: Well I'm going to confine misconduct to recent origin, and in that regard, recommend strongly you read English v English,[3] which was decided by the Utah Supreme Court on June 2nd, 1977.

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3. Where this Court addressed itself to economic considerations. English v. English (Utah, 1977), 565 P.2d 409.

MR. ALLRED: I have read it, Your Honor. I have got a photocopy in my file.

THE COURT: Does that tell you anything about what the issues in this case are?" (R. 244, emphasis supplied)[4]

In that dialogue, the Court has said, indirectly on the record, what it had said, more directly, in chambers. Alimony, the Court reasoned, was to be determined with reference to the economic factors and was, in the instant case, in its entirety, an economic judgment.

That that was the position of the Trial Court is apparent in the dialogue between the Court and Defendant's counsel (R. 240-268). The Court sustained the objection to the question with which the dialogue began, relying, it said, on the "precise language" (R. 268) of Anderson v. Anderson 18 Utah 2d 286, 422 P.2d 192, which it claimed supported the proposition that grounds for

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4. Misconduct was not at issue in the English case, as the Plaintiff-Respondent noted in her brief. "In the instant matter there is nothing that reflects upon the morality of either party..." (Respondent's Brief, page 19) In English this Court cited as central to its deliberations on the issue of alimony, Hendricks v. Hendricks 91 Utah 553, 63 P.2d 277, a 1936 Utah case that preceded Alldredge v. Alldredge 119 Utah 504, 229 P.2d 681, by some fifteen years in time. The English case modified and reduced the alimony awarded by the Trial Court.

divorce having been established, the degree of fault was of no further concern to the Trial Judge.[5]

The Trial Court articulated its position, first, in the context of a quote from the Anderson case, stating that,

> "Thus it affirmatively appears that he (the Trial Judge in the Anderson case) did not penalize the plaintiff in that regard, but considered the various factors bearing upon their financial situation and an equitable solution to the problems presented by the attorneys" (R. 268-269).

and then Judge Hanson put the matter, in perspective, in his own words, as follows:

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5. In the Anderson case, the Trial Court agreed to be bound by a Stipulation. The arrangement was reflected in the brief on appeal as follows:

> "The parties stipulated that the Court would consider the division of the property without in any way considering the question of grounds of divorce or who was responsible, to which the Court stated that it thought this was a wholesome way of handling the matter (R. 54)" (Appellant's Brief, page 5, emphasis supplied).

The Appellant urged on the Anderson appeal that the Trial Court disregarded the Stipulation and considered marital fault and misconduct in making its award. This Court said that the Trial Court in Anderson did not disregard the arrangement of the parties. The Trial Court, in the instant case, took the language of this Court in the Anderson case, out of context, failing to consider the effect of the Stipulation, and erroneously assumed, as a general proposition, that once grounds for divorce were established, the degree of fault was of no further concern.

"WHICH I THINK REFLECTS THE LAW OF THIS STATE AS FURTHER SET FORTH IN THE CASE (English v. English, supra R. at 244) I WAS REFERRING TO EARLIER THIS MORNING" (R. 269, emphasis supplied).

The Court permitted, begrudgingly, testimony concerning the Plaintiff's misconduct during the marriage, but clearly, as the preceding quote indicates, did not consider it on the issue of alimony, and permitted its admission for the limited purpose of cross-examination, or confined it to the issue of grounds.[6]

B. The Position of the Trial Court Did Not Correctly Reflect the Law of the State of Utah.

Courts justify the award of permanent alimony on differing theories. Some take the position that it is in the nature of compensation for the wrong and injury a wife has suffered by reason of her husband's misconduct. Ex parte Spencer 83 Cal. 460, 23 P. 395. See also: 24 Am Jur 2d, "Divorce and Separation," § 601, p. 725. The generally accepted view, however, is that the function of permanent alimony is to provide support for the wife. Strictly speaking, permanent alimony is not based upon the obligation of support, since the dissolution of the

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6. See instances on the record, line 1 page 419 to line 3 page 240, line 15 to line 23 at page 281, line 8 to line 11 at page 451, line 15 to line 17 at page 454.

marriage by the final decree terminates such obligation. Rather, it is a substitute for the right of support.

Where the Court has the power to award permanent alimony, the question whether it should be allowed in the particular case is a matter of sound judicial discretion to be exercised with reference to established principles and upon a view of all the circumstances of the particular case.[7] Stefonick v. Stefonick 118 Mont. 486, 167 P.2d 848, Bishop v. Bishop 194 Okla. 209, 148 P.2d 472, 155 ALR 604, Miles v. Miles 185 Or. 230, 202 P.2d 485. A wife is never entitled to alimony as a matter of course. Vigil v. Vigil 49 Colo. 156, 111 P. 833, Tobin v. Tobin 89 Okla. 12, 213 P. 884. Alimony is usually, but not necessarily, awarded to the wife when she is granted a divorce. Where a divorce is granted to both parties, alimony may be

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7. Assuming the existence of the power to award alimony to a wife for whose misconduct a divorce is granted, the nature of her conduct is a factor which is taken into account in determining whether to make an award. See: Annotation: 34 ALR 2d 345, section 11, citing in support MacDonald v. MacDonald 120 Utah 573, 263 P.2d 1066.

> "The power to award alimony to the guilty wife is addressed to the discretion of the courts and should be exercised with great care, and it should not be exercised in favor of the wife where there are no mitigating circumstances." 24 Am Jur 2d, "Divorce and Separation," section 621 p. 743. See also: Ecker v. Ecker 22 Okla. 873, 98 P. 918.

awarded either, for the basis of liability, subject to some modification in Utah, is the granting of a divorce against the person required to pay it.[8]

Ordinarily, there can be no allowance of permanent alimony where a Decree of divorce is denied. Peyre v. Peyre 79 Cal. 336, 21 P. 838. The nature of the conduct of the wife is a factor which is taken into account in determining whether to make an award of alimony.[9] Annotation: 34 ALR 345, section 11.

The rule at common law, as Justice Wolfe noted in Alldredge v. Alldredge 119 Utah 504, 229 P.2d 681, "denied alimony to the wife at fault."

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8. The Utah Rule is widely believed to be as follows:

> "...in considering the equities upon granting a divorce to the husband, if the court finds that the wife has been guilty of gross or prolonged immoral conduct, an award of alimony to the wife may be denied in most cases." Alldredge v Alldredge 119 Utah 504, 229 P.2d 681.

See 24 Am Jur 2d, "Divorce and Separation," section 621, page 744, footnote. See also: Annotation, 34 ALR 2d 345, Headnote 7 on page 306.

9. And indeed the fact that a wife who is granted a divorce was not free from fault is always an important factor to be taken into consideration in fixing the amount of alimony. See: Annotation 9 ALR 2d 1029, section 3. If the wife is free from blame, the allowance will be greater than if her conduct was conducive to her husband's fault. See: Annotation: 1 ALR 3d 143, section 6.

In Alldredge, the wife permitted juvenile delinquents and older persons of questionable character to come to the home. They drank intoxicating liquors, smoked cigarettes and played cards over the repeated objections of the husband. The Plaintiff and the Defendant had a thirty-seven year marriage and eleven children, ten of whom survived. The Court concluded that the misconduct was of only recent origin and that it constituted cruelty which did not rise to the level of gross misconduct. The misconduct did not, the Court determined, involve moral turpitude.

On those difficult facts, this Court, under its equitable powers, accepted what it called a more modern rule. The Court should consider all the circumstances, it said, and withhold or decree alimony and distribute property in accordance with those circumstances. The Alldredge case is widely cited, is regarded as the applicable Utah Law by national commentators (See footnote #8) and is the lead case in the annotation found at 34 ALR 2d 305.

Under the Alldredge rule, the rule at common law was modified. Under the Alldredge rule, a wife of long standing did not forfeit all right to alimony or all right to a share in the property because of:

1. Recent misconduct.

2. Nor in cases where the husband may have been equally at fault.

3. Nor in cases where there was a doubtful preponderance against the wife.

The clear negative implication of the Alldredge case, however, was that a wife might lose part of her right to property or alimony in each of the three separate situations to which reference is above made.

> "Under this rule, the wife of long standing does not forfeit ALL right to alimony or a share in the property because of..." (Emphasis supplied)

Counsel argues that, at its heart, the Alldredge case, and subsequent Utah cases, still acknowledge the underlying validity of the rule at common law, the rule in a majority of jurisdictions.

> "Perhaps such a forfeiture of alimony may not be out of proportion in the case where a young wife guilty of acts of moral turpitude, has opportunity to start life anew but in a case such as this it would be all out of proportion" (Alldredge v. Alldredge, supra at 685).

The award, extent and duration of alimony is an economic judgment that must consider the needs of the wife and the ability of the husband to pay, and a great number of other circumstances.[10] It is not, however, as the

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10. MacDonald v. MacDonald 120 Utah 573, 263 P.2d 1066.

Trial Court concluded, merely an economic judgment. There are factors beyond the economics of the termination, which relate to the granting of such an award, its amount and duration, and to the right of the wife to claim such a benefit as an incident of the marriage.

C. The Relative Guilt of the Parties is a Factor to be Considered in Awarding Alimony.

It is a serious conceptual mistake to presume that the wife is entitled to alimony, a claim on the husband's future income, whatever her conduct, and however it may have contributed to the destruction of the marriage.

The Utah rule, as it is stated in the annotation at 34 ALR 2d 305, is said to be as follows:

> "Although the statute is broad enough to give the court the power to award permanent alimony to a wife against whom a divorce is granted, it is generally held that in determining whether to exercise the power in a particular case the court should consider the nature of the wife's misconduct." Citing: MacDonald v. MacDonald 120 Utah 573, 236 P.2d 1066. (Emphasis supplied)

And the rule in Alldredge, which the Trial Court chose to disregard, was that,

> "In considering these equities if the Court finds that the wife has been guilty of gross or prolonged immoral conduct an award of alimony may in most cases be denied." (Emphasis supplied)

The standard applied in Utah to determine whether alimony is appropriate, and in what amount, is a flexible standard, which has, as a practical matter, much wisdom.

In Wilson v. Wilson 5 Utah 2d 79, 296 P.2d 977 (1956), this Court stated,

> "We recognize that there is no authority in our law for administering punitive measures in a divorce judgment, and that to do so would be improper. Except that the Court may, and as a practical matter 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."

The Court then, speaking of alimony, cites the principle that was later recited, per curiam, in Anderson v. Anderson 18 Utah 2d 286, 422 P.2d 192, (1967) stating as follows:

> "The Court's responsibility is to endeavor to provide a just and equitable adjustment of their economic resources so that the parties can reconstruct their lives on a happy and useful basis. In doing so it is necessary for the Court to consider in addition to the relative guilt or innocence of the parties, an appraisal of all of the attendant facts and circumstances..." (Emphasis supplied)

See also: Wilson v. Wilson 5 Utah 2d 79, 296 P.2d 977, Pinion v. Pinion 92 Utah 255, 67 P.2d 265, Allen v. Allen 109 Utah 99, 165 P.2d 872, Searle v. Searle (Utah, 1974) 522 P.2d 697.

The Trial Court and Plaintiff's counsel presumed that the length of the marriage made alimony, substantial permanent alimony, automatic, notwithstanding the Plaintiff's conduct, and notwithstanding the immense award of property made to the Plaintiff from the marital estate under the terms and conditions of the generous Decree.

In Christensen v. Christensen 21 Utah 2d 263, 444 P.2d 511 (1968), the Plaintiff and the Defendant had been married for twenty-five years and neither party was free from fault with respect to the marriage. The Trial Judge, for that, within the purview of his powers, awarded the divorce to the Plaintiff husband and provided for a lump sum of alimony, $2,400.00, payable at the husband's option over two years. The wife appealed and urged that "Even if there be fault or frailty on the part of the wife, the Court should keep in mind that if she is placed in too serious an economic disadvantage, she may become dependent upon others or the public which should be avoided." Justice Crockett, speaking for a unanimous Court, responded as follows:

> "Defendant's argument, carried to its conclusion, would mean that whenever a marriage has lasted for any considerable number of years, the wife would always be entitled to permanent alimony. We do not regard that as the law. Nor did we so intend by the statement in the MacDonald case..."

The position of the Appellants in the Christense case was that the Court, on appeal, should concentrate on the economic factors to the exclusion of "fault or frailty." That this Court, which refused to increase the award to the Defendant-Appellant, did not share that conception, is indicated in the following language.

> "As indicated therein, (MacDonald) it (duration of marriage) is one of the factors to be considered with all of the others in making the adjustment which the court deems just and equitable between the parties. This is also true of the relative guilt, or perhaps better stated, the greater responsibility one spouse may appear to have than the other for bringing about the failure of the marriage."

D. The Trial Court Abused Its Discretion.

There is a distinction between the division of assets accumulated during the marriage, which should be distributed on an equitable basis,[11] and the postmarital duty of support and maintenance. Alimony is a perpetual lien on the husband's future income, income acquired in the absence of the wife and without her assistance.

> "The question whether permanent alimony shall be allowed is addressed to the sound discretion of the trial court, and a principal reason why the court has such a discretion is that there are several factors which may justify it in denying alimony altogether,

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11. Where the wife assisted in the accumulation, either directly or indirectly.

> such as the misconduct of the wife, the financial condition of the parties, and contractual agreements between the parties regarding alimony." See: 24 Am Jur 2d, "Divorce and Separation," section 618, page 740 (Emphasis supplied).

The Trial Court permitted no independent evidence from those who knew, relating to marital fault or misconduct. The evidence the Court heard on the issue of misconduct, was received because it was not objected to, because the subject matter was opened on direct by plaintiff's own counsel or because, in the Trial Court's opinion, it related to grounds.

The Trial Court considered economic factors and excluded considerations of marital fault and misconduct. And, it made the assumption that the law of this jurisdiction required such emphasis and such exclusion. In determining then, whether permanent alimony should be allowed, and also, if so, its extent and duration; in exercising, in other words, its discretion in that regard, the Court did not consider the factors required to invoke such a discretion in the first instance.

> "The nature of the misconduct of the wife is for consideration as an aid to judicial discretion in deciding whether the wife should have alimony on divorce, and, if so, the amount thereof."[12]

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12. Alldredge, supra at 685, citing Cronin v. Cronin 245 Ala.309, 16 So. 2d 714.

The Trial Court abused its discretion. It was induced to do so by a misapprehension of the law. This Court will disturb the findings of the Trial Court, and its judgment, where it has abused its discretion or misapplied principles of law. Eastman v. Eastman (Utah, 197[illegible] 558 P.2d 514, Carter v. Carter (Utah, 1977) 563 P.2d 177, Watson v. Watson (Utah, 1977) 561 P.2d 1072.

POINT II

THE TRIAL COURT IMPROPERLY EXCLUDED THE TESTIMONY OF DEFEN-ANT'S WITNESSES.

The Trial Court excluded the testimony of Andre George, Manny Hasoppe and Arlette Rukavina. They were the sister, brother and daughter of the plaintiff, respectively. All were to testify in behalf of the Defendant, Andre Gramme. The Trial Court, which indulged every liberality respecting the financial witnesses, permitted no independent testimony concerning the marital facts.[13] It heard, relative to such matters, from the Plaintiff and the Defendant, exclusively.

The exclusion of testimony basic to the Defendant's case was supported, the Trial Court claimed, by the provisions of Rule 45 of the Rules of Evidence (R. 528, 534).

13. The Court reluctantly permitted testimony from Dean P. Callister, the chief arson investigator for the Salt Lake City Fire Department (R. 482).

the testimony, the Court argued, would be cumulative or corroborative and would necessitate an undue consumption of time. It would create a substantial danger of impairing relationships beyond those that existed between the plaintiff and the Defendant,[14] and the probative value of such testimony was outweighed, it said, by those factors (R. 528, 529).

In a case involving hundreds of thousands of dollars, the Trial Court listened to the partisans and rejected the independent testimony of those who knew the principals best. Mrs. George was the only sister of the plaintiff, and Mr. Hasoppe the only brother. Mrs. Rukavina was the adult daughter and only child of the parties to these proceedings. All were familiar with facts germane to the litigation.[15]

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14. While excluding the evidence professing concern that the testimony of the family members would "create a substantial danger" of impairing relationships beyond those of the Plaintiff and Defendant (R. 528), the Trial Court coerced, in every sense contrary to that concern, a proffer of proof in open Court respecting the anticipated testimony (R. 528-531). Defendant's counsel requested, at the outset of the trial, in chambers, that the testimony of the three witnesses be taken out of the presence of the parties, asserting that practice in the Third District had permitted such an exclusion on a prior occasion.

15. The discussion concerning the testimony of the excluded witnesses is on the record at pages 522 through 535, and the plaintiff's proffer of proof for Mrs. George begins at page 531.

The Plaintiff's case began on Wednesday morning, August 3, 1977, and the Plaintiff rested, (R. 407, 408) sometime in the afternoon on Monday, August 8, 1977, after some three and one-half days of trial.[16] The Defendant's direct case began on Monday afternoon and was concluded in the early afternoon on Tuesday, August 9, taking one day. The Plaintiff called a rebuttal witness on Wednesday, August 9, and August 10, was reserved in its entirety, for argument and Plaintiff's testimony on attorney's fees.

The most cursory analysis of Rule 45 should serve to indicate that its provisions were not properly applied in this instance. The admission of such testimony could not "unfairly or harmfully" surprise the Plaintiff. The intention of the Defendant to call such witnesses was disclosed to the Plaintiff in Defendant's Answers to Plaintiff's Interrogatories filed with the Court roughly five months in advance of the trial (Pleadings, R. 37). No one could claim that the testimony of the excluded witnesses, in a trial to the Court sitting without a jury, created any substantial danger of undue prejudice or of confusing the issues, or of misleading any jury. It can scarcely be argued in a case of such importance, that the

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16. The Defendant concedes that the cross-examination of the Plaintiff, and of the financial witness, Frank E. Stuart, was substantial.

testimony of three witnesses, the longest of which was expected to take "45 minutes to an hour" (R. 531), would result in the undue consumption of time. The fact that the witnesses were related by blood or marriage, or by birth, to the parties, was not an element for consideration under the rule, and constituted no reason for invoking a rule of exclusion under the circumstances of this case.

The Trial Court initiated the challenge to the testimony of Mrs. George, on its own motion (R. 522). Its action in refusing to permit independent testimony relative to marital fault or misconduct was, counsel avers, predicated upon a misconception of the applicable law.[17]

The witnesses were prepared to testify, contrary to expectations, in favor of a relative by marriage and in opposition to a relative by blood.[18] Such testimony has an inherent kind of authenticity. It was legal error for the Trial Court, in exercising its control over the flow of evidence, to deprive the Trial Court, as the finder of the facts, from hearing and considering such testimony. That is particularly true where, as here, the fact finder is to determine where the truth lies as between principals

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17. See legal discussion, this Brief, Point I.

18. With the exception of Arlette Rukavina who was the natural daughter of the Plaintiff and the Defendant.

who are partisan regarding facts that are controverted. Such determinations are difficult at best, as this Court has frequently recognized, "...because judges, being human, cannot penetrate the family drama with complete understanding."[19]

So long as facts testified to by a party are not conclusively established or admitted, they are open to further proof, and it is error to exclude evidence on the ground that it is cumulative. Evans v. Industrial Accident Commission 71 Cal. App 2d 244, 162 P.2d 488, Conlee v. Taylor 153 Tenn. 507, 285 S.W. 35, 48 ALR 940, Traders and General Insurance Company v. Russell (Tex. Civ. App.) 99 S.W. 2d 1079. It is generally held that the erroneous exclusion of evidence affects a substantial right requiring reversal if the evidence in question related to a material point in issue, Seneris v. Haas 45 Cal. 2d 811, 291 P.2d 915, 53 ALR 2d 124, and that it may not be disregarded by an appellate court even though it may approve of the verdict. People v. Alex 260 N.Y. 425, 183 N.E. 906, 85 ALR 939.

The Defendant was entitled to present his witnesses, the admission of whose testimony would have added

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19. Alldredge v. Alldredge 119 Utah 504, 229 P.2d 681, 34 ALR 2d 305.

materially to the weight and clarity of the evidence. The power of the Court to control the introduction of evidence at a civil trial must be exercised cautiously and so as not to impair the rights of the parties. The Court must exercise a sound judicial discretion in the context of the special circumstances of the particular case. The exclusion, in this case, of all independent testimony of marital fault or misconduct, and of other substantive matters known to these primary witnesses, was arbitrary and unreasonably restrictive.

The exclusion of the proferred testimony resulted from a misunderstanding and misapplication of the law. It was an abuse of discretion and constituted, where the Defendant was concerned, a manifest injustice. Those are grounds, under long established principles of our law, for the modification or reversal, on appeal, of the Trial Court's findings. Watson v. Watson (Utah, 1977) 561 P.2d 1072, Harding v. Harding 26 Utah 2d 277, 488 P.2d 308, Martinett v. Martinett 8 Utah 2d 202, 331 P.2d 821.

POINT III

THE DECREE WAS INEQUITABLE AND REQUIRES REVISION

A. The Allocation of the Property and the Award of Alimony in the Proceedings Below Was Out of Proportion to the Wife's Contribution to the Accumulation of the Marital Estate.

The Plaintiff told the Defendant that she was "a very expensive woman" and admitted that she had said that the only thing she knew how to do was spend money (R. 168). During the period when the estate of the parties was essentially accumulated, the Plaintiff was totally unemployed. The maximum rate of pay the Plaintiff ever received from any employment was $2.05 per hour (R. 224). The Plaintiff had household help for ten or twelve years, in fact as early as 1964 or 1965, to assist her in caring for the duplex on Cortez Street (R. 214). From early 1969 till September of 1976, and to January of 1977, when she moved to California, the Plaintiff stayed at home, (R. 215, 216) as previously described. During that period of time there were incidents at Cortez which operated to frustrate the Defendant's business efforts, to occupy his time, diminish his resources, and to impede and frustrate the acquisition of the estate.

The Plaintiff brought essentially nothing to the marriage, neither property nor educational or employment skills (R. 173-175). She was able, physically, to attack Mrs. Morecraft, a much younger woman, at the airport. She has, presently, no serious physical impediments. The Plaintiff had a single child, Mrs. Rukavina, the prospective witness, who was long ago emancipated. The Plaintiff has not managed her own home or handled the household

accounts and has diminished the parties estate, through her spending habits, and by her misconduct.

The allowance of permanent alimony normally presumes that the wife assisted in the accumulation of the property and that she should receive a just proportion of what she has helped to earn, and that alimony should not be awarded where she did not materially assist her husband in the home or out. Wilkins v. Wilkins 84 Neb. 206, 120 N.W. 907. See: Annotation: 34 ALR 2d 337, section 8. This Court in the early case of Blair v. Blair 40 Utah 306, 121 P. 19, determined that the size and productiveness of the estate of the husband, while an important factor in determining the amount of the allowance, must not be considered without reference to whether or not the wife was of assistance to him in accumulating the property.

It was precisely during the years of the Plaintiff's dormancy, that the Defendant changed from an employee working for others, to the owner of his own business, bidding on jobs and substantially increasing his net worth. The Plaintiff has been a hindrance, rather than an aid, in the accumulation of the assets which the Trial Court distributed in allocating the property. The estate was accumulated by the diligence of the Defendant in spite of the Plaintiff's habits, in the face of her instability and despite her lack of industry and thrift.

Divorce proceedings are in equity and this Court, on appeal, can review questions of both law and fact. King v. King 25 Utah 2d 163, 478 P.2d 492. Although the judgment of the Trial Court will not be disturbed lightly, this Court may review the evidence, make its own findings and substitute its judgment for that of the Trial Court when justice requires. Harding v. Harding 26 Utah 2d 277, 488 P.2d 308, Dearden v. Dearden 15 Utah 2d 105, 388 P.2d 230, Martinett v. Martinett 8 Utah 2d 202, 331 P.2d 821, Wilson v. Wilson 5 Utah 2d 79, 296 P.2d 977.

B. The Distribution of the Property as Ordered by the Trial Court Made the Present Award of Substantial Permanent Alimony Unnecessary.

The Trial Court awarded the Plaintiff assets that Plaintiff's own counsel valued at $197,500.00,[20] without including the household furniture and furnishings in Carmel, California, the miscellaneous personal property included in Exhibit 25-P, attorneys fees of $8,000.00 (R. 132) or court costs in the amount of $298.70. The award included a savings certificate in the amount of $25,000.00 at the Silver King State Bank in Park City, Utah, which was fully encumbered, and it required that the Defendant whose liquidity and prospects were described upon the record in

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20. Exhibit 66-P

considerable detail, should "forthwith" make all arrangements required to release the encumbrances against the certificate (R. 131). The Defendant, valued the property awarded to the Plaintiff, in the provisions of the Decree, at very close to $213,800.00, including the attorneys fees and costs.[21]

The parties had acquired the home in Carmel, California, only slightly more than a year prior to their separation. It cost $130,000.00, originally, and was valued at $167,500.00, when the case was tried (R. 600. See also: plaintiff's Exhibit 55-P) and its value, of course, continues to increase. There is no encumbrance against the Carmel property. The home in Carmel was awarded to the Plaintiff and the duplex on Cortez Street was awarded to the Defendant (R. 131). In addition, then, to the award of over $200,000.00 in property to the Plaintiff, the Court granted the Plaintiff, presumably as a substitute for a right of support, alimony in the sum of $1,400.00 per month, which projected over a fifteen year period, less than the life expectancy of the Plaintiff, amounts to an additional $252,000.00. In that regard, the Decree works such an injustice to the Defendant, that equity and conscience demand

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21. Exhibit 34-D.

that it be revised. Christensen v. Christensen 21 Utah 2d 263, 444 P.2d 511.

The question whether permanent alimony should be allowed must consider the underlying necessities of the wife and the financial ability of the husband. The wife's income, and counsel suggests her prospective income, from her separate estate, is always a factor in determining the allowance of alimony and may constitute an absolute bar where it is amply sufficient to maintain her in that position in life to which she has been accustomed. Miles v. Miles 185 Or. 230, 202 P.2d 485.

If one subtracted from, say, $200,000.00, the conservative value of the Court's property award to the Plaintiff, the sum of $36,350.00, the net equity in the parties long term home at 692 Cortez Street in Salt Lake City, Utah, the Plaintiff would retain a cash balance of $163,650.00. That is to say that if the Plaintiff put in another home a value equivalent to the value of the home in which she and the Defendant had, essentially, for the period of the marriage, lived, she could free up, or make liquid, easily, in excess of $150,000.00. That equation does not consider the increased value of the Carmel home, and must be considered conservative.

At 7 1/2%, a normal trust rate of return, such a fund would produce without touching the principal, for the

plaintiff, $11,250.00 annually, or at 8%, $12,000.00, or at 10%, $15,000.00.

In MacDonald v. MacDonald 120 Utah 573, 236 P.2d 1066, the parties had been married for 29 years, about the same time as the parties on this appeal. They had one child, an adult, as do these parties. The problem of the wife in MacDonald was not drugs and emotional instability, as here, but rather intoxicating liquor and emotional instability. Where the drinking had gone to such an excess as to present a considerable family problem, where as Justice Crockett said, there was nothing for the Court to do except to recognize the failure and "pronounce a benediction on the wreck," the Trial Court awarded only nominal alimony and this Court with its extensive scope of review, affirmed.

The Court held that the cash awarded to the wife, though in that case her own, was "properly taken in account in appraising the entire financial situation of the parties and adjusting their property rights." Under those circumstances, this Court said, based as they were upon the conditions which existed at the time of the divorce there was no necessity that the wife be paid substantial alimony immediately. There is no such necessity in the instant case. Although in MacDonald the Court is affirming what a Trial Court had earlier done, in contradiction to the situation

here, the underlying equitable considerations remain the same. MacDonald stands for the proposition that the Trial Court must take into account the resources of the wife, including the property awarded to her in the divorce proceeding, in determining the liability for alimony.

In Dubois v. Dubois 29 Utah 2d 75, 504 P.2d 1387 (1973), the Trial Court took into account the source of the assets which comprised the marital estate and also the fact that the Plaintiff wife was, unlike our case, without fault in the termination of the marriage. "However," this Court said, "it appears that the income from the assets awarded to the Plaintiff is sufficient to maintain her in the manner to which she is accustomed without periodic payments from the Defendant." The Court permitted the alimony to be modified to reduce the payments to the sum of $1.00 per year. In that case, there was a 30 year marriage, two children were over 21 years of age and the Defendant husband had informed his wife that he was in love with another woman.

At 7 1/2%, a normal trust return, the sum of $150,000.00 paid at the rate of $1,400.00 per month would last the Plaintiff, without any additional assistance from the Defendant, for fourteen years and ten months. The sum of $175,000.00 would pay $1,400.00 per month for over twenty years. At a higher rate of interest, the time of payment would, of course, be increased.

C. The Award of Alimony Was Inequitable.

In February, 1977, during the pendency of these proceedings before the Trial Court, the Plaintiff was arrested and incarcerated on the felony charge in Carmel, California, which involved the theft of jewelry from her Carmel neighbors. The Defendant, who was called by the plaintiff, who was in jail, travelled to California with Mrs. Hasoppe, the mother of the Plaintiff, in an effort to assist her (R. 459). On that occasion, after the release of the Plaintiff, the Defendant became suspicious, he testified, of the relationship between his then estranged and separated wife and a deputy sheriff in Monterey County, named Wilbur House, (R. 459) who the Plaintiff admitted she had first met as early as Memorial Day 1975, approximately the same time the Carmel home was purchased (R. 284).

The Defendant travelled a second time to Carmel, California, in April of 1977 (R. 458), while the Plaintiff was in Utah in connection with these proceedings. He entered the Carmel home and found a message on the kitchen telephone to Mr. House, written presumably by a gardener, Mr. Arriola (R. 461). Another message was found on the telephone in a bedroom that had been converted to a TV room, written by Mrs. Gramme, who testified it was for the gardener (R. 289). It is in evidence as Defendant's Exhibit 35-D.

On the occasion of the April visit, the Defendant found mens clothing in the bedroom closet which included four suits, a pair of gray slacks, two sports outfits, a sweater, two woolen golf shirts, some dress shirts, socks, ties and underwear (R. 462). The Defendant estimated the value of the clothing at six to eight hundred dollars (R. 463, 464) and took as evidence, the gray corduroy suit, which was tailored and had been worn, one or two of the golf shirts, the ties, socks and underwear. The other items of clothing were left in the home (R. 463, 464). The Trial Court refused the admission of the items of clothing in evidence (R. 470, 471),[22] although they were described in some detail by the Defendant on the record (R. 463). The Plaintiff admitted there was clothing in the home, but claimed that it was new clothing and that it had never been worn. It was, she said, "I guess, my mistake, because you hang me with it..." (R. 286). Mrs. Gramme admitted, that one suit, four shirts, two ties and some socks were taken (R. 286). The Plaintiff admitted only the items of mens clothing she knew to be in the Defendant's physical possession and conceded that they belonged to Mr. House (R. 288). The Defendant testified there were many other items, including three suits, that were left behind (R. 463). The

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22. And also refused the admission of a letter that made reference to Mr. House (R. 290-293).

plaintiff's explanation of these events is on the record at 286, 287.

Mrs. Gramme, who admitted that her sole source of income was the temporary alimony payment she received from the Defendant (R. 296), admitted that she had spent $125.00 or $126.00 on clothing for Mr. House (R. 287) and the record showed that between March 19 and May 23, 1977, she had written to a store called Bruhns, where the clothes for Mr. House were purchased, ten checks totalling $980.14 (R. 294). She claimed that the greater part of the purchases were for herself.

The plaintiff also admitted that she had given Mr. House, in addition to the clothing, over essentially the same time period, checks in the total amount of $800.00 which, she claimed, were for services the deputy sheriff performed in and around the Carmel home, and for goods furnished for the home (R. 287, 288).

When Mr. Gramme arrived, he found that Mr. House, who was married and whose wife, the Plaintiff testified, had terminal cancer (R. 285), had control of the keys to his boat and possession of his tools which had been removed from the garage of the Carmel home (R. 465, 466). Discussions with Mrs. House, and one with Mr. House at the marina are detailed in the record beginning at page 465. Barely 45 minutes after the conversation at the marina with

Mr. House, the Defendant returned to the Carmel home where he found that the mens clothes not previously taken had been removed, along with the note on the kitchen telephone (R. 466, 467).

After a divorce is granted, it is clear that the affections of the parties may rest and repose where they will. One thing, however, is certain. The Defendant has never had an obligation to support, in any fashion, anyone other than the Plaintiff, or to provide any third party with cash and clothing, tools, a boat and access to a $170,000.00 home.

It is inequitable to require that the Defendant furnish such assistance, especially, where the wife has been provided in the allocation of the marital estate, with resources sufficient for her own support.

POINT IV

THE TRIAL COURT ERRONEOUSLY AWARDED ATTORNEY'S FEES AND COSTS

Section 30-3-3 U.C.A. 1953, permits an award to the wife, or to a husband, of money with which to prosecute, or defend, an action in divorce. The Statute, this Court has said, does not contemplate that the award for expenses of the litigation should be made only in those cases where the adverse party, usually the wife, is destitute or practically so, but rather when, in the sound discretion of the Court, the circumstances of the parties are such

that in fairness to the wife she should be given financial assistance by the husband in her prosecution or defense of the action. See: Weiss v. Weiss 111 Utah 353, 179 P.2d 1005.

The financial circumstances of the parties have an important bearing on issues relative to attorneys fees and suit money, and are critical to the determination of the amount of, or the necessity for, their award.

> "The reason for permitting a wife suit money to defend an action for divorce rests on the ground that the wife normally has no separate estate from which to pay for bringing or defending the action. This is the situation in the case at hand." Alldredge v. Alldredge 119 Utah 504, 229 P.2d 681. (Emphasis supplied)

Not to allow the wife expenses and counsel fees, Justice Wolfe said, would in the majority of cases work an injustice by denying her the power to enforce any marital rights she might have. In the instant case, however, the normal situation does not apply. The wife was not only granted $8,000.00 in attorneys fees, together with costs of approximately $300.00, but was given, at the same time, as her sole and separate estate, real and personal property worth in excess of $200,000.00, and increasing in value.

Under circumstances where the wife did not require, "in fairness," the financial assistance of the

husband to insure the efficient presentation of her side of the controversy, this Court has said,

> "We also believe that the evidence shows that the plaintiff has a sufficient income from property owned by her to justify the court's ruling that defendant should not be required to pay her attorney fees and costs in these proceedings." Callister v. Callister 1 Utah 2d 34, 261 P.2d 944.

There was no necessity for the award of fees and costs under the circumstances of this case, and it is not equitable that the Defendant should be required to pay them from his share of the marital estate.

Beyond, however, the economic considerations raised above, this Court has previously considered the implications of misconduct on attorney's fees and costs.

> "Here (concerning suit money), as in the case of alimony, gross or immoral conduct may cause a denial of attorney fees,..."[23] Alldredge, supra at 687.

CONCLUSION

The Trial Court was obliged to render an equitable adjustment of the economic resources of the parties, and to help them reconstruct their lives on a happy and

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23. "Most jurisdictions" provide that the Court may deny suit money to a wife who is guilty of matrimonial misconduct sufficient to authorize the husband to sue for a divorce or separation. Annotation: 2 ALR 2d 313, section 3. See also: 24 Am Jur 2d, "Divorce and Separation," section 596, p. 720.

useful basis. In doing so, however, it was necessary for the Court to consider relative guilt or innocence.

The Trial Court misread the flexible standard established by this Court, and misapplied the law. It is true that many of the elements to be considered in making an award of alimony are of economic character. It was erroneous to assume, however, that the economic elements were exclusive. The award was an injustice to the Defendant who is both a casualty of the Plaintiff's conduct, which made the continuation of the marriage impossible,[24] and a victim of social engineering.

The Plaintiff, as a condition of the divorce, acquired an estate worth approximately $200,000.00, far in excess of the Plaintiff's contributions, personal or financial, to the accumulation of the estate, and an expectancy of several hundred thousand more. The allocation of the property and the Plaintiff's economic independence made the award of permanent alimony unnecessary. It is inconceivable that the Plaintiff, who spent virtually her entire married life in a duplex that cost less than $10,000.00 initially to build, should now reside in a home that was, at the time of the trial, worth $170,000.00, on which the taxes and insurance are approximately

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24. And his own conduct predictable.

$3,000.00 per year. It is entirely improbable that a person with the Plaintiff's emotional and financial history, can successfully manage such an estate without assistance.[25] In order to avoid economic dependence or the misuse of assets, the wise and efficient management of the Plaintiff's substantial estate, under the circumstances of this case, is an utter necessity. The assets, if liquidated and wisely managed, are adequate and sufficient for the Plaintiff's needs. The home in Carmel should be sold and another acquired. The proceeds should be placed in trust for the benefit of a Plaintiff who is both vulnerable, and psychologically unstable.

This Court should eliminate altogether, or substantially reduce, the alimony award. It should order the sale of the Carmel home and require that the liquidated proceeds be professionally managed for the Plaintiff's benefit, and protection. The Court should diminish the property award to the extent of the savings certificate, $25,000.00, which is encumbered, and require the Plaintiff

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25. See Defendant's Final Argument, at 627 to 629, for a discussion of the considerations involved here.

to pay from her court awarded share of the marital estate, her own attorneys fees and costs.

Respectfully submitted,

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