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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.	:	

FILED
MAR 17 1978
Clerk, Supreme Court, Utah

RESPONDENT'S BRIEF

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.	:	

RESPONDENT'S BRIEF

STATEMENT OF KIND OF CASE

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

DISPOSITION IN THE LOWER COURT

The Trial Court awarded the Plaintiff a divorce on her Complaint and also awarded the Defendant a divorce on his Counterclaim. The Trial Court found that the value of the marital estate was $650,000.00 and

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awarded to the Plaintiff real and personal property having a value of $200,000.00, awarded Plaintiff attorney fees of $8,000.00 and costs, and also awarded to the Plaintiff the sum of $1,400.00 per month alim... The Trial Court awarded to the Defendant real and personal property ... a value of $450,000.00, which sum included the value of a corporation which the Trial Court found to have a value of $210,800.00.

RELIEF SOUGHT ON APPEAL

The Plaintiff-Respondent seeks to have this Court affirm, in ... entirety, the Decree of Divorce of the Trial Court and asks this Court ... award to Plaintiff the attorney fees incurred by Plaintiff-Respondent o... Appeal.

STATEMENT OF FACTS

In order to supplement and, in some instances, to correct the Defendant-Appellant's Statement of Facts, Plaintiff-Respondent submits the following:

At the time of the trial in this matter, the Plaintiff was 50 yea... of age (R. 127), and the Defendant was 51 years of age (R. 3). The Pla... was 19 years of age when she married the Defendant in Seraing, Belgium on July 18, 1946 (R. 128). After the marriage, Defendant entered into ... partnership with the Plaintiff's father in the potato wholesale business ...

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The partnership lasted until 1948, when the parties immigrated to the United States. (R. 128). The parties moved to Salt Lake City, Utah, in 1949, whereupon Plaintiff obtained employment with the Hotel Utah in its laundry. (R. 129).

During the period of time from 1949 through 1969, there was no substantial period of time when Plaintiff was unemployed and her earnings were used by the parties for food, utilities and entertainment. (R. 137).

The type of work performed by Plaintiff during her employment included working in a laundry (R. 129), working as a presser (R. 130), working in a cleaning establishment (R. 130, 131), working as a spot welder in the manufacture of missile heads and as a punch press operator (R. 132), and assembling jewelry (R. 134, 135). Between jobs the Plaintiff was never unemployed for more than two or three weeks. (R. 227).

When the Defendant was starting out in the masonry business, the Plaintiff, after work, helped Defendant clean up the job site and prepare for the next day's work. (R. 137, 138, 417). After the Plaintiff terminated her outside employment, she worked for the Defendant and assisted him in his business (R. 138, 139).

According to the records of St. Mark's Hospital (Exhibit 37-D), between 1969 and 1975, the Plaintiff was admitted to St. Mark's Hospital on twelve different occasions:

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1. On January 15, 1969, Plaintiff was admitted to the hospita[illegible] and underwent surgery which consisted of a radical mastectomy for ca[illegible] of the left breast.

2. On January 27, 1971, Plaintiff was admitted to the hospit[illegible] and underwent surgery which consisted of a simple mastectomy of the [illegible] breast for fibrocystic disease and to relieve incapacitating breast pai[illegible]

3. On April 21, 1972, Plaintiff was admitted to the hospital a[illegible] five days of severe vomiting, dizziness and headache and she underwe[illegible] surgery consisting of a Marshall-Marchetti repair for urinary incontin[illegible]

4. On August 21, 1972, Plaintiff was admitted to the hospital [illegible] drug ingestion and urinary incontinence.

5. On January 8, 1973, Plaintiff was admitted to the hospital after she had five convulsive seizures in a four-day period, and she wa[illegible] admitted for the convulsive disorder.

6. On February 11, 1973, Plaintiff was admitted to the hospi[illegible] and underwent surgery for an anterior vaginal repair, a fasial sling a[illegible] removal of a foreign body and ovary.

7. On September 18, 1973, Plaintiff was admitted to the hosp[illegible] for acute influenza.

8. On December 5, 1973, Plaintiff was admitted to the hospi[illegible] for generalized tremors, weakness and an anxiety state.

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9. On February 25, 1974, Plaintiff was admitted to the hospital and underwent surgery for the removal of a fibrous mass from her abdomen and exploratory surgery.

10. On July 11, 1974, Plaintiff was admitted to ths hospital for a severe anxiety reaction.

11. On April 9, 1975, Plaintiff was admitted to the hospital for an anxiety reaction.

12. On September 11, 1975, Plaintiff was admitted to the hospital and underwent a cystoscopy operation as well as exploratory surgery.

The Salt Lake City Fire Department went to the Gramme residence concerning fires in the vicinity of the Gramme residence (R.485), and fires at the residence (R.486), between May, 1973, and June, 1974 (R.488). The Plaintiff testified that she was not responsible for any of the fires (R.200).

Dr. Vern Peterson, a psychiatrist, having served as the President of the Utah Psychiatric Association, testified that Plaintiff was admitted to St. Mark's Hospital on July 11, 1974, for a severe anxiety reaction due to her being obsessed with the loss of femininity and the accusations being made at the time that she had started the fires. (R.573). Dr. Peterson also testified that Plaintiff's intense emotional state in 1974 resulted from her having a hysterectomy operation at an early age, coupled with her later bilateral mastectomies and other surgeries. (R.576).

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The Defendant testified that Mrs. Gramme took tranquilizers after her operation, which tranquilizers were prescribed by her doctor (R. 425). Plaintiff testified that she had taken no drugs prior to her operation in 1969. (R. 207), and that the drugs she used were, in fact, medication. (R. 208). Plaintiff further testified that she had never used sleeping pills except in the hospital. (R. 208).

Dr. Vern Peterson 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), meaning drug abuse, chronic pill taking, and alcohol were insignificant with respect to Mrs. Gramme's illness. (R. 586, 587). Dr. Peterson further testified that Plaintiff had shown no hint of drug abuse or addiction. (R. 577), and that the cost of $60.00 to $80.00 for medication per month was reasonable for an individual such as Plaintiff who required such medication. (R. 587).

Plaintiff has been under the care of Dr. Vern Peterson since 1974 (R. 574). He has had an opportunity to observe Mrs. Gramme's fainting spells, and it was his opinion that the seizures were caused by intense emotional anxiety and were not feigned in any way. (R. 576, 577)

Plaintiff testified that the drug overdoses were precipitated by her cancer (R. 209), and that she had attempted suicide because her body had been mutilated by all of the surgery. (R. 212). The Plaintiff testified the marriage between the parties was fine until she was stricken with cancer. (R. 212).

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Defendant testified that he had known Sharon Morecroft for a number of years, (R.40), and that he had started a relationship with her beginning in October, 1975. (R.102).

The Plaintiff and Defendant separated in September, 1976. (R.45); however, prior to the separation, Defendant had traveled extensively with Sharon Morecroft: In November of 1975, he traveled with her to Mazatlan, Mexico (R.42); in February or March, 1976, he traveled with her to San Diego, California; in May of 1976, he traveled with her to San Carlos, Mexico; in the spring of 1976, he traveled with her to Oroville, California, and to Reno, Nevada (R.46); he traveled with her to Phoenix, Arizona (R.49); and to Carmel, California (R.54).

Defendant admitted having been a frequent guest in Sharon Morecroft's home for dinner (R.45,46), both prior to and after the separation of the parties. (R.46).

Prior to the separation of the parties, the Defendant maintained an apartment in Salt Lake City, Utah, where Sharon Morecroft visited him. (R.50).

The Defendant had employed Sharon Morecroft in his business for approximately one and a half years prior to the trial of this matter. (R.43). The Defendant allowed Sharon Morecroft to use his credit cards (R.51), and a 1977 Pontiac automobile which the company had purchased, as well as a Corvair automobile owned by the company (R.311). Defendant also allowed Sharon Morecroft to use his membership in the Sports Mall (R.56,57

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The Defendant admitted to having purchased jewelry and clothes for Sharon Morecroft, (R. 43, 44, 45) and on one occasion he showed Pl... a gift that he had purchased for Sharon Morecroft (R. 147). Additional... numerous occasions, Defendant refused to stay at home and eat the me... Plaintiff had prepared for him because as he told the Plaintiff, "I'm ta... Sharon out to dinner." (R. 146).

Based upon the privilege against self-incrimination, Defendant refused to answer whether he had had sexual relations with Sharon Morecroft. (R. 52).

Plaintiff stayed at home with the drapes drawn after the Defen... started his relationship with Sharon Morecroft. (R. 171).

Plaintiff testified she had never assaulted a person other than Sharon Morecroft (R. 231), whom she assaulted when the Defendant returned from California with her in his private airplane. (R. 231). The Plaintiff further testified that she attacked Sharon Morecroft in an attem... to save her marriage. (R. 235).

Plaintiff admitted that she had attempted suicide because of the Defendant's relationship with Sharon Morecroft. (R. 212, 213).

Plaintiff pleaded with the Defendant to terminate his relations... with Sharon Morecroft. (R. 147, 233). The Defendant's relationship with Sharon Morecroft severely damaged the Plaintiff emotionally (R. 149), which fact the Defendant also acknowledged. (R. 505).

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The money Plaintiff paid to Mr. House in Carmel, California, was for repair of the roof on the boat and for two water tanks at the home. (R.287). Plaintiff had the water storage tanks installed in the Carmel home because of the water shortage in California at that time. (R.305).

The fire that occurred in the Knolte home was caused by an electrical wire under the rug. (R.200).

Plaintiff left the Defendant for four or five days in 1949 (R.186), on her father's advice (R.187), and lived with another woman (R.187,188), and she denied being involved with another man during that period of time. (R.186). At the time Plaintiff purchased the clothes in Carmel, California, she had no clothes in California and she did not have access to her clothes in Salt Lake City, Utah. (R.307,308). The items of clothing Defendant removed from the home in Carmel, California, were purchased by the Plaintiff as gifts for various people. (R.286).

The Defendant testified that prior to the Plaintiff's operation for breast cancer, the difficulties experienced in the marriage were the Plaintiff's fainting, the untruth, the bickering with the family. (R.505).

Defendant testified that while Plaintiff worked at Hudson Bay Company, her clothing purchases would often exceed her week's earnings, but that was not characteristic of the years when Plaintiff was employed. (R.468). Plaintiff worked for Hudson Bay in 1952 or 1953, for approximately 6 to 8 months (R.130).

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Defendant, under cross examination, admitted that after the h[illegible]

was burglarized, wherein guns and jewelry were taken, that he hired a

private investigator and as a result, a person named Bob West was arr[illegible]

for the burglary and he admitted having burglarized the home. (R. 503[illegible]

Defendant began masonry work as a hod carrier in 1949 and st[illegible]

in business for himself as a masonry contractor in 1961 on a part-time

basis and after a year or two, started in the masonry contracting busin[illegible]

full time. Andre Gramme Masonry, Inc., was incorporated in 1969. [illegible]

Andre Gramme Masonry, Inc., contracts for the masonry wor[illegible]

commercial buildings including schools and hotels and employs between

and 100 employees depending on the number of jobs the company is work[illegible]

on at a particular time. (R. 6, 7). Andre Gramme Masonry, Inc., has

contracted for the masonry work on such buildings as the Language Tr[illegible]

Center, Provo, Utah, which contract was for $1,789,503.00, and the L[illegible]

America Hotel in Salt Lake City, Utah, which contract was for $1,028,[illegible]

(Exhibit 21-P).

In 1977, Defendant was named in Contractor's Magazine as Uta[illegible]

Masonry Contractor of the Year. (R. 514).

During the period of time from 1972 through 1976, Andre Gram[illegible]

Masonry, Inc., had gross receipts as follows:

1972 - $480,908.85 (Exhibit 15-P)

1973 - $523,082.76 (Exhibit 16-P)

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1974 - $705,344.86 (Exhibit 19-P)

1975 - $1,432,904.94 (Exhibit 17-P)

1976 - $1,176,052.43 (Exhibit 18-P)

The Trial Court found that the value of the marital estate was $650,000.00 (Findings, R.124), and awarded to the Plaintiff the home in Carmel, California, which both the Plaintiff and Defendant valued at $167,500.00, the boat in Carmel, California, valued at $5,000.00, and a Savings Certificate in the amount of $25,000.00, and a Datson automobile valued at $2,500.00 by the Plaintiff (Exhibit 66-P), together with various miscellaneous items of personal property which were not included in the value of the $650,000.00 marital estate. (Exhibit 25-P).

Defendant was awarded the balance of the $650,000.00 marital estate, that is, $450,000.00 which sum included the home in Salt Lake City, Utah; four lots in Park City, Utah; one-fifth interest in a leased home in San Carlos, Mexico; one-third interest in a boat in San Carlos, Mexico; a Thunderbird automobile; an airplane valued at $27,000.00; one-fifth interest in real property located at 1815 West 500 South, Salt Lake City, Utah; the $75,000.00 Savings Certificate with Silver King Bank of Park City, Utah; all of his life insurance policies. (Exhibits 66-P and 34-D). Additionally, Defendant was awarded the Corporation which the Court found to have a value of $210,800.00. The Court, therefore, awarded the

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Defendant personal property totaling $239,200.00, together with the Corporation valued at $210,800.00. (Findings, R. 124).

The Defendant valued the corporation at approximately $120,[illegible] as of December 31, 1976, (R. 501); however, the Defendant under cross examination admitted that his opinion as to the value of the Corporation was based upon his accountant's opinion. (R. 519, 520). Mr. Bayes, the accountant for Defendant, valued the Corporation at $121,000.00. (R.[illegible] Mr. Bayes' valuation of the Corporation was strictly on a liquidation basis (R. 563).

Both Mr. Bayes and Mr. Gramme, in arriving at their opinions as to the value of the Corporation, deducted from the net assets of the Corporation a stockholder loan (R. 566), which stockholder loan totaled $29,473.00, and the Defendant considered the $29,473.00 to be a personal asset of his (R. 518) since that sum was, in fact, owed to him personally (R. 565). Mr. Bayes admitted that under his method of valuing the Corporation, if the Corporation had earned income which was unreported, the value of the Corporation would be increased in the amount of the unreported income. (R. 561). Mr. Bayes admitted that he was not an expert with respect to valuing small corporations. (R. 549).

Frank Stewart, President of an economic and management counseling firm (R. 315), who has had much experience with contractors (R. 316), testified that in his opinion the value of Andre Gramme Masonry

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Inc., as of December 31, 1976, was $342,900.00. (R. 333). Mr. Stewart further testified that in analyzing the Defendant's performance in the construction business, Defendant was capable of commanding a salary in the construction business of $50,000.00 per year. (R. 387).

The Defendant's adjusted gross income for the years 1972 through 1976, (a five-year period) was approximately $89,000.00. During those same years, Defendant purchased assets in excess of $300,000.00. The Defendant, based upon his privilege against self-incrimination, refused to answer where he obtained the excess money over his income to purchase those assets (R. 89, 90, also Exhibit 43-P and Exhibits 10-P through 14-P).

Defendant testified that his corporate tax returns reflected a loss for 1976; however, during 1976, Defendant personally purchased two Savings Certificates totaling $100,000.00 at the Silver King State Bank in Park City, Utah, on April 1, 1976. (R. 110). In addition, Defendant purchased three lots in Park City, Utah, in 1976, for $33,000.00 and paid the full purchase price in the same year. (R. 24). Also, in April of 1976, Defendant purchased an interest in a home in San Carlos, Mexico, for $13,000.00, which sum was paid in full at the time (R. 30), and at the time Defendant purchased the interest in the home in San Carlos, Mexico, he also purchased a one-third interest in a boat in San Carlos, Mexico, for $3,000.00, which sum was paid in full in 1976 (R. 31, 32). Defendant also purchased a one-fifth

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interest in a membership to a country club in San Carlos, Mexico in [illegible]
(R. 33). Also, in November of 1976, Defendant purchased a one-fifth
interest in real property located at 1815 West 5th South, Salt Lake City,
Utah, which real property was purchased for $51,000.00, and Defendant's
share was $3,000.00. (R. 35, 36).

During 1976, in addition to Defendant's personal acquisition of
assets, the Corporation purchased a 1977 Pontiac automobile for $7,[illegible]
(R. 54, 55, Exhibit 18-P), and a $17,080.50 computer. (Exhibit 18-P).

Defendant predicted a loss of $150,000.00 for the corporation [illegible]
1977; however, again, in 1977, Defendant purchased a lot in Park City,
Utah, for $26,000.00 and paid for it in full. (R. 24).

During the marriage, the parties traveled extensively to Oregon;
Las Vegas, Nevada; Carmel, California; Wyoming; Europe, and back [illegible]
(R. 149, 150). The Defendant allowed Plaintiff to spend money freely (R.
151), and the parties annually spent $2,000.00 to $3,000.00 at Christmas
and spent considerable money on their grandchildren and their child. (R.
Mrs. Gramme enjoyed entertaining guests during the marriage. (R. 1[illegible]
The parties owned a private airplane (R. 14) and the boats in San Carlos,
Mexico, (R. 16), and Carmel, California (Exhibit 66-P). The parties
employed a gardener to take care of the home in Carmel, California,
which gardening services cost $150.00 per month. (R. 92). The parties
had hired a woman for household work in the home in Salt Lake City,

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Utah, for approximately the last ten or twelve years. (R. 212). The parties were members of several social clubs. (R. 452).

Plaintiff is physically unable to work because of pain in her left arm, lack of mobility in her left arm, and the fact that she has no feeling in her left hand. (R. 222). She tires very easily and has recurring headaches for a period of a week to ten days. (R. 223). Defendant also admitted that the Plaintiff's arm limited her physical ability to work. (R. 468, 469).

Dr. Peterson also testified that he doubted if the Plaintiff was presently emotionally prepared to be employed.

Plaintiff testified that Exhibit 24-P reflected an itemized list of monthly expenditures which would sustain Plaintiff at a standard of living to which she had become accustomed, (R. 155, 156) and that she had no other source of income other than the alimony awarded by the Court. (R. 158).

Plaintiff testified that living in Carmel, California, had greatly improved her physical and emotional well-being, and that she had joined the French Club in Carmel and goes to the symphony (R. 153, 154). The Plaintiff testified that she had not found it necessary to use tranquilizors while living in Carmel, California (R. 158, 218).

Defendant also testified that the Plaintiff's physical and emotional well-being had improved since she had lived in Carmel, California (R. 506). Dr. Peterson testified that he has observed a change in Plaintiff since she

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has resided in Carmel, California, which he described as "quite remarkable" in that she was much more calm, physically she had ga[illegible] weight, and her general appearance had greatly improved. (R. 578).

ARGUMENT

POINT I

THE TRIAL COURT UNDERSTOOD AND PROPERLY APPLIED THE [illegible] TO THE FACTS OF THIS CASE.

The Defendant-Appellant, in his Brief, cites the record, spe[illegible] cally the dialogue between the Trial Court and Defendant's Counsel and alleges certain facts not in the record which transpired in chambers to support his position that the Trial Court failed to consider the miscond[illegible] of the wife or the relative guilt or innocence of the parties in making the award of alimony. However, it is essential to point out that the Trial Court's statements and comments on the record were made in the fra[illegible] work of the Defendant's position that the Plaintiff had, by her conduct, forfeited her right to alimony. Although the Defendant's Counsel men[illegible] relative guilt or innocence in his statements, the Court's statements w[illegible] not directed to the element of relative guilt, but were directed toward [illegible] theory of forfeiture.

After the Trial Court sustained Plaintiff's objection to Defend[illegible] question to the Plaintiff concerning events that occurred in the hospita[illegible] the following dialogue between Defendant's Counsel and the Court trans[illegible]

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THE COURT: All right. Suppose you show the attack. (R. 240)

MR. ALLRED: Excuse me. (R. 240)

THE COURT: Suppose you show that. What then? What does it prove so far as this case is concerned? (R. 240)

MR. ALLRED: The conduct of the wife, Your Honor, the misconduct of the wife. (R. 240).

THE COURT: Objection is sustained. <u>You see, we can go into all sorts of peripheral things. We have gone back now 20 or 30 years, and I'm not sure what you are claiming for all of that.</u> (R. 241) (Emphasis added).

At this point the Court was concerned about the relevance of matters peripheral to the issues that were before the Court. Further on in the dialogue between Defendant's Counsel and the Court, Defendant's theory of a forfeiture surfaced in the following exchange:

THE COURT: So what you are saying is old misconduct affects the amount of alimony. (R. 242)

MR. ALLRED: I am saying that what it does is to alleviate the presumption that was raised by the---not a presumption, it doesn't rise to that point, but <u>the really basic principle of the Alldredge case is that alimony will, in most cases, be denied if the wife is guilty of gross or prolonged immoral conduct.</u> And I'm saying that I am attempting to establish that the mitigating circumstance which the Court provided for in the Alldredge case does not exist in this circumstance because the misconduct is of long origin. (R. 242) (Emphasis added).

THE COURT: <u>That is the position you are taking in this case?</u> (R. 242) (Emphasis added).

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MR. ALLRED: That is a position that I am taking in this Your Honor. (R. 242) (Emphasis added).

And further during the dialogue, the following transpired:

MR. ALLRED: (Referring to the Alldredge case) It has been widely nationally cited, and I think that is of McDonald vs. McDonald, and also the case of Anderson vs. Anderson, where the Court, speaking per curium, talks about the importance of testimony pertaining to relative guilt or innocence of the parties. (R. 244).

THE COURT: As it goes to effect a denial of alimony? (Emphasis added).

MR. ALLRED: As it goes to effect a denial of alimony, or goes to effect the amount of awarded alimony your Honor, both. (R. 245).

MR. ALLRED: ...and that case is cited at Amjur, your Honor this proposition: 'It has been held that in considering the equities upon granting a divorce the husband, if the Court finds that the wife has been guilty of gross or prolonged immoral conduct, then an award of alimony to the wife may be denied in most cases.'

That represents the central position taken by Alldredge case. (R. 250)

THE COURT: What do you suppose the language "gross or prolonged immoral conduct" means? (R. 250)

MR. ALLRED: Excuse me? (R. 250).

THE COURT: What do you support the language "gross or prolonged immoral conduct" means? (R. 250)

MR. ALLRED: ...I am saying that relative guilt or innocence of the parties is one of a number of factors considered by the Court. I am saying that if the wife is guilty of prolonged immoral misconduct that she may be subject to a forfeiture as far as alimony is concerned. (R. 255) (Emphasis added)

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THE COURT: Even though her needs and abilities of both parties might require something different but for that prolonged and immoral misconduct? (R. 255).

MR. ALLRED: Well, Your Honor, I'm not saying that should necessarily be the case, but I'm saying that the Court has the power to consider the misconduct of the wife as an element respecting a total forfeiture, or the Court has the power to take the position that if misconduct of the wife is serious and prolonged that it can be a partial forfeiture. (R. 255)

THE COURT: Of course, in Aldrich v. Aldrich, when the Court was looking at that question, they said the wife shall have alimony in this case. (R. 256)

MR. ALLRED: That's perfectly clear. (R. 256)

THE COURT: All right. But you see, you are throwing some terms out and you are saying they don't mean what they appear to mean. <u>By "grossly prolonged immoral conduct or misconduct", can you point to any case where the Court has denied alimony for gross or prolonged immoral conduct where the conduct is of the nature that you are alluding to here</u>? (R. 256) (Emphasis added).

MR. ALLRED: Yes, I can. McDonald v. McDonald (R. 256).

Further in the dialogue, the Court asked Defendant's Counsel to make a proffer of proof as to what his evidence would show and the proffer of proof was made at R. 260, at which point the Court stated:

THE COURT: Are you claiming that the conduct in the hospital is evidence of gross or prolonged immoral conduct? (R. 260)

MR. ALLRED: Am I claiming that? I think it relates to the conduct of Mrs. Gramme during the period of the marriage. (R. 261).

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THE COURT: I didn't lay down what the rules were, an[d] I'm just quoting the language that you quo[te] from the cases, and that is "gross or pro- longed immoral conduct". It's not just a[n] conduct, it's not just grossly prolonged co[n]duct, it's grossly prolonged immoral cond[uct]. And that's the adjective that is used to mo[dify] the word "conduct". It is immoral conduc[t].

Is it your contention that that conduct up t[o] constitutes gross immoral conduct? (R.2[63])

MR. ALLRED: ...Your Honor, you must understand som[e] too: My client isn't here trying to avoid h[is] responsibilities. <u>You must simply unders[tand] that we are trying to put this in a decent [way] that there is legal principle that permits [for]feiture under circumstances where the co[urt] finds</u>--Okay. (R.263) (Emphasis added).

THE COURT: <u>And that's what he is asserting, is that by virtue of this conduct during the course of the marriage she ought to be deemed to hav[e] forfeited her right to support for the remai[nder] of her life</u>? (R.263) (Emphasis added).

THE COURT: If that is not your position, then, why are [you] going through this? (R.263)

THE COURT: That was not what I was asking. <u>I want to [know] why you are here asserting a position that [con]stitutes total forfeiture. That's what you [are] asserting</u>. (R.264) (Emphasis added).

Defendant's Counsel summarized his position to the Trial Cou[rt] with respect to his theory of forfeiture at P. 266 of the Record; howe[ver] Defendant in his summation failed to mention the issue of relative guilt but spoke solely concerning his theory of forfeiture with respect to the relevance of the evidence he was trying to introduce.

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As is set forth in the above dialogue, the context in which the Trial Court made its statements concerned the Defendant's position that Plaintiff, because of her conduct, had forfeited her right to alimony. The issue of relative guilt or innocence as bearing on an award of alimony was not directly raised in that dialogue and the Trial Court at no point in the record stated that relative guilt or innocence of the parties in causing the break up of the marriage was not a factor to be considered by the Trial Court. In addition, Appellant in his Brief has chosen to submit facts to this Court not in the record:

> "In that dialogue, the Court 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." (Appellant's Brief, p. 20).

Although Plaintiff submits that the reference to facts off the record may be improper, Plaintiff is compelled to respond to such a statement.

Plaintiff's Counsel has no recollection of the Trial Court having stated in Chambers that relative guilt was not to be considered or that the Trial Court's decision would be based solely on economic considerations and Plaintiff submits that the dialogue in the chambers, again, solely involved Defendant's theory of forfeiture.

Plaintiff readily concedes that the relative guilt or innocence of the parties in causing a break up of the marriage was a factor to be considered by the Trial Court. In fact, during the trial of this matter, the

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Plaintiff cited the cases of Wilson v. Wilson, 5 Ut. 2d, 79, 296 P.2d
Searle v. Searle (Utah, 1974) 522 P. 2d 697, for the proposition that
guilt or innocence was, indeed, a factor that the Court may consider
rendering its decision. (R. 524).

It is important to note that at the point in time, during the tri
when the dialogue transpired between the Trial Court and Defendant's
Counsel relative to Defendant's theory of forfeiture, the Trial Court
already heard the testimony of the Defendant himself concerning his
involving Sharon Morecroft, and the Court had properly concluded at
point in time that this case was distinguishable from Alldredge v. All
119 Utah 504, 229 P. 2d 681, wherein the wife alone was guilty of misc
The facts before the Trial Court at that time clearly indicated that gu
may lie with both parties as was the situation in English v. English
565 P. 2d 409, cited by the Trial Court, wherein both of the parties we
granted the divorce.

The Defendant in his Brief assumes that the principle of for
discussed in Alldredge v. Alldredge applies to the instant case. Duri
trial of this matter, Defendant took the position that Plaintiff's conduc
should result in a total forfeiture of alimony. (See for example Defen
Exhibit 67). Again, in this appeal, the Defendant is, in effect, asking
Court for a total forfeiture, without considering all of the facts and ci
cumstances present. This Court has stated on many occasions that

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firm rule can be uniformly applied in all divorce cases, and each case must be determined on the basis of the immediate fact situation before the Court. Wilson v. Wilson, 5 Ut. 2d 79, 296 P. 2d 977 (1956). Even the Court in Alldredge applied this flexible standard to the facts and circumstances of that case. In Alldredge, the Court concluded that the facts and circumstances presented to the Court did not warrant applying the theory of forfeiture that was discussed therein. Likewise, the facts and circumstances of the instant case do not justify a forfeiture as urged by the Defendant. In the Alldredge case, the Plaintiff (husband) who was 64 years of age, was granted the divorce against the Defendant (wife), who was 53 years of age. All of the property that the parties owned consisted of a home and $400.00 in a bank account. Plaintiff had a monthly income from labor of approximately $200.00. The Supreme Court concluded that the wife's conduct did not rise to the level of gross or prolonged immoral conduct. However, the Court also acknowledged the flexible standard that is to be applied in all divorce cases wherein it stated:

> 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. Other considerations, such as years of living and toiling together. . . interruptions of this way of life by dibilities not the fault of either party. . . become a part of the picture to be viewed as a whole in deciding the best thing to be done. Alldredge v. Alldredge, 119 Utah 504, 229 P. 2d 681 (Emphasis added).

In the Alldredge case, the other considerations which the Court considered were: The Defendant had no skills which she could apply in

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order to make herself a living; there was no evidence that the wife h

separate income and she was 53 years of age, and it seemed likely th

would not be able to support herself. There was evidence that the wi

in ill health. Many of these same factors are present in the instant

Considering all of the factors, the Court in Alldredge concluded that

was entitled to alimony.

It is submitted that the Alldredge case in its essence represe

the standards which have long since been applied to divorce cases in t

State, that is, misconduct, together with all the facts and circumstanc

of the case are to be considered by the Court. In the instant case, as

hereinabove mentioned, it is critical to note that Plaintiff (wife) was a

the divorce as well as the Defendant and that her conduct cannot be is

and viewed in terms of the language of the Alldredge case wherein the

husband alone was awarded the divorce. The conduct of the Plaintiff

be considered in light of the conduct of the Defendant. In other words,

relative guilt or innocence of the parties in causing a break up of the m

An examination of the facts relevant to the issue of the relati

guilt or innocence of the parties in causing a break up of the marriage

the following:

The Defendant blamed the fires that occurred at the residence

Cortez Street, on the Plaintiff and to support this position, Dean Calli

testified that there was enough evidence to file charges against Plainti

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(R. 489). However, Plaintiff denied that she was responsible for any of the fires. (R. 200). It is also important to note that according to the testimony of Dean Callister, the fires occurred over a relatively short period considering the length of the marriage, that is, for approximately a 13-month period between May, 1973, and June, 1974. (R. 488). The last fire occurred almost two and a half years before the parties separated. (R. 45).

The Defendant blamed Plaintiff for the burglaries occurring in their own residence. (R. 432). However, under cross examination, Defendant admitted that after the home was burglarized in which the guns and jewelry were taken, that he hired a private investigator and as a result, a person named Bob West was arrested for the burglaries and he admitted having burglarized the home. (R. 503, 504).

Prior to the Plaintiff's surgery for breast cancer in 1969 (Exhibit 37-D), the Defendant testified that the difficulties he had experienced in the marriage were the Plaintiff's fainting, the untruths, the bickering with the family. (R. 505).

The Defendant in his Statement of Facts states: "The Plaintiff was a regular drug user and began taking them as early as 1949 or 1950. They included sleeping pills and tranquilizers." (Appellant's Brief, page 10).

The specific testimony from which Defendant arrives at that statement is as follows:

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MR. ALLRED: What can you tell us, Mr. Gramme, abo when the use of drugs began and what it consisted of through the years.

MR. GRAMME: Well, at the earliest stages, she took, I believe, mostly sleeping pills, Sominex, type of thing. (Emphasis added).

MR. ALLRED: How long ago did that begin?

MR. GRAMME: Oh, as far as back as I can remember,

MR. ALLRED: Okay, will you describe then how that ma itself over the years?

MR. GRAMME: Well, I don't know exactly what she was before her operation, but I know she was some type of tranquilizer. I never did lo it that deeply. Then after her operation take some tranquilizers prescribed to her doctor and her doctor, and subsequently psychiatrist. She took many, 4 or 5 othe I don't know what they are, but I just beca alarmed when she took overdoses of it. (426) (Emphasis added).

On the other hand, the Plaintiff testified that the marriage w until she was stricken with cancer. (R.164,165). Plaintiff also testi she had never taken sleeping pills except in the hospital. (R.208). D Peterson testified that Plaintiff had shown no hints of drug abuse or a (R. 577), and that a cost of $60.00 to $80.00 a month for her medicat not excessive for an individual such as Plaintiff requiring such medic (R. 587).

Dr. Peterson further testified that the Plaintiff had a difficu adjusting to the bilateral mastectomies (R. 576), and that he had had

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opportunity to observe Mrs. Gramme's fainting spells and that it was his opinion that the seizures were caused by intense emotional anxiety and were not feigned in any way. (R. 576, 577).

The Defendant further testified that Plaintiff has threatened him with a knife and at times he slept in the bathroom (R. 454). However, the Defendant admitted that the times he slept in the bathroom because of insecurity were after he had started his relationship with Sharon Morecroft (R. 454, 455).

The conduct of the Defendant which Plaintiff asserted caused a break up of the marriage revolved around the Defendant's relationship with Sharon Morecroft. As the Appellant noted in his Brief: "The relationship of the Defendant with Mrs. Morecroft was not, Defendant testified, secret or clandestine." (Appellant's Brief, p. 15).

Plaintiff readily admits that the Defendant's relationship with Sharon Morecroft was not secret or clandestine. To the contrary, it was flagrant. During the same period of time that the Defendant was living with the Plaintiff, he traveled extensively with Sharon Morecroft: to Mazatlan, Mexico (R. 42); to San Diego, California (R. 42); to San Carlos, Mexico (R. 41); to Oroville, California and Reno, Nevada (R. 46); to Phoenix, Arizona (R. 49); and to Carmel, California (R. 54), while the Plaintiff stayed home with her drapes drawn. (R. 171) (and Appellant's Brief, p. 10). Defendant maintained an apartment in Salt Lake City where Sharon Morecroft visited him. (R. 50).

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Defendant was a frequent guest in Sharon Morecroft's home for dinner (R. 45). The Defendant purchased jewelry and clothing for Sharon Morecroft (R. 43, 44, 45), and on one occasion Defendant showed a gift to Plaintiff he had purchased for Sharon Morecroft. (R. 147). On numerous occasions Defendant refused to stay at home and eat meals that Plaintiff had prepared for him because, he told the Plaintiff, "I am taking Sharon out to dinner" (R. 146). Based upon the privilege against self-incrimination, Defendant refused to answer whether he had had sexual relations with Sharon Morecroft (R. 52).

In spite of Defendant's knowledge of Plaintiff's highly emotional state due to her being obsessed with the loss of femininity (R. 573), the Defendant chose to publicize to the Plaintiff his relationship with Sharon Morecroft. Plaintiff pleaded with the Defendant to terminate his relationship with Sharon Morecroft. (R. 147, 233). The Defendant continued his relationship with Sharon Morecroft for more than a year prior to the time they separated. (R. 213). In light of the Defendant's continued relationship with Sharon Morecroft, the Plaintiff had no choice but to seek this divorce.

The Trial Court considered the relative guilt or innocence of the parties and in light of the relative conduct of the parties set forth above, the Trial Court found that each of the parties was with fault and granted Plaintiff the divorce as well as the Defendant. The Trial Court considered

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the parties relative guilt or innocence and the Trial Court's division of assets and award of alimony in light of the relative guilt of the parties as well as all of the other considerations discussed later in this Brief is supported by the facts and is equitable.

POINT TWO

THE TRIAL COURT PROPERLY EXCLUDED THE TESTIMONY OF THE DEFENDANT'S WITNESSES.

Appellant asserts that the Trial Court committed legal error and abused its discretion by excluding the testimony of Defendant's witnesses.

The Trial Court based its ruling upon Rule 45 of the Utah Rules of Evidence which provides:

> Except as in these Rules otherwise provided, the Judge may in his discretion exclude evidence if he finds that its probative value is substantially outweighed by the risk that its admission will (a) necessitate undue consumption of time, or (b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury, or (c) unfairly and harmfully surprise a party who has not had reasonable opportunity to anticipate that such evidence would be offered. (Emphasis added).

In deciding to exclude Defendant's proferred testimony, the Trial Court was very careful not to exclude evidence that had not previously been presented to the Court. This is reflected in the following dialogue between the Trial Court and Defendant's Counsel:

> MR. ALLRED: Well, Your Honor, I will characterize that in the context of a proffer of proof. And I suppose in connection with the proffer the Court can determine if there is evidence that should come in with these witnesses. (R. 529)

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THE COURT: Well, now, all I want you to do is tell m what you intend to offer that is new, that something that has not been presented that has not already been testified to in five days that we have been in trial. (R. (Emphasis added).

THE COURT: I know you don't, and that's why I am ha difficult time understanding why you can simply what new evidence you intend to duce through these witnesses, if any. (R. (Emphasis added).

MR. ALLRED: Okay. The problem with that, Your Hon that Mrs. George's testimony will take a mately, say 45 minutes to an hour, and asking me to crystalize or capsulize in what I expect to elicit by way of testimon say, an hour. But I will try. (R. 531)

Following the above dialogue, Defendant's Counsel made his of proof and the Trial Court later stated:

THE COURT: ...I don't want to cut off either side--if have got additional evidence that is not c I want you to understand that you have a opportunity to present that on both sides. (R535) (Emphasis added).

Rule 45 of the Utah Rules of Evidence empowers the Trial C exclude evidence if it finds the probative value of the evidence is outw by an undue consumption of time. Defendant avered to the Trial Court Mrs. George's testimony would take 45 minutes to an hour. There is showing in the Record that the other two witnesses' testimony would ha been any shorter. Assuming each witness would have undergone direc examination for one hour and cross examination for one hour, the pr

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testimony would have consumed a full day and it may have necessitated the Plaintiff calling other family members for rebuttal. The Trial Court found that the proferred testimony was cumulative or corroborative and would necessitate an undue consumption of time. (R. 528).

The Trial Court was very careful not to exclude evidence concerning new facts. The Appellant in his Brief makes no assertion that his proferred testimony would have included new facts but only that it "would have added materially to the weight and clarity of the evidence." (Appellant's Brief, p. 36, 37).

As is indicated by the above dialogue, Defendant's proferred evidence was cumulative and had little probative value:

> Even though proferred evidence is otherwise relevent to the issues in a case, it will not be considered relevent and material and, therefore, admissible, when it is merely surplusage or cumulative and is consequently unnecessary to the proper determination of the case. (29 AmJur 2d Evidence, page 307)

As the above quotation indicates, cumulative evidence is not considered relevant and material and is consequently unnecessary for a proper determination of the case.

The Appellant in his Brief has failed to make a showing as to how the excluded testimony would have changed the Trial Court's decision. Even in a situation where proper evidence is erroneously excluded, the judgment will not be reversed unless the excluded evidence would have had a substantial influence in bringing about a different finding upon which the judgment is based.

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Rule 5 of the Utah Rules of Evidence provides:

> A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless (a) it appears of record that the proponent of the evidence either made known the substance of the evidence in a form and by a method approved by the Judge, or indicated the substance of the expected evidence by questions indicating the desired answers, and (b) the Court which passes upon the effect of the error or errors is of the opinion that the excluded evidence would probably have had a substantial influence in bringing about a different verdict or finding.

Plaintiff submits that Defendant's proferred testimony was not relevant because of its cumulative nature; that the Trial Court acted within the bounds of the discretion given the Trial Court pursuant to Rule 45; that the excluded testimony would not have changed the Trial Court's Findings and Judgment.

POINT THREE

THE DECREE IS FAIR AND EQUITABLE AND SHOULD BE AFFIRMED

A. THE ALLOCATION OF THE PROPERTY AND THE AWARD OF ALIMONY WAS FAIR AND EQUITABLE UNDER THE FACTS OF THE CASE.

The Defendant asserts that the Trial Court's decision with respect to the division of assets was inequitable. However, Defendant has failed to show, in light of all the criteria set forth by this Court in Anderson v. Anderson, and Wilson v. Wilson, why the Decree is inequitable. The Defendant looks solely to the amount of property awarded the Plaintiff without any reference whatsoever to the fact that the Defendant was awarded, in

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approximately 2 1/4th times what the Plaintiff was awarded. That is, the Plaintiff was awarded property valued at approximately $200,000.00, and the Defendant was awarded property valued at approximately $450,000.00 (Exhibit 66-P). Therefore, the Plaintiff was awarded approximately 32% of the marital estate while the Defendant was awarded approximately 68% of the marital estate.

In Anderson v. Anderson, 18 Ut.2d 286, 422 P.2d 192 (1967), this Court stated that:

> 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, 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: The duration of the marriage; the age of the parties; their social position and standards of living; their health; considerations relative to children; the money and property they possess and how it was acquired; their abilities and training and their present potential income.

The Defendant in asserting that the Decree is inequitable has failed to address a majority of the considerations set forth above.

Applying the standards of Anderson to the facts of the instant case, it is clear that the Trial Court's decision was equitable.

Duration of the Marriage: The parties have been married for 31 years.

Age of the Parties: At the time of the hearing, the Plaintiff was 50 years old and the Defendant was 51 years old.

Social positions and Standards of living: The parties have enjoyed a relatively high standard of living as is indicated by the frequency that the parties traveled, which travel included many trips to Las Vegas, Nevada;

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Oregon; Carmel, California; and to Wyoming. Further, the parties to Europe and the Plaintiff traveled back East for a period of appro[illegible] three weeks. The extent of the parties' travel is further indicated [illegible] number of vacations that the Defendant took with Sharon Morecroft. [illegible] Addition, the parties enjoyed the use of a private airplane valued at [illegible] (Exhibit 34-D). Plaintiff was allowed to spend money freely and the [illegible] annually spent between $2,000.00 and $3,000.00 on Christmas. The [illegible] owned a boat in San Carlos, Mexico, as well as a boat in Carmel, Ca[illegible] The parties were able to maintain the residence in Salt Lake City, [illegible] residence in Carmel, California, as well as owning an interest in the vacation home in San Carlos, Mexico. The parties could afford a ga[illegible] for their home in Carmel, California, which cost over $150.00 a mo[illegible] and for the past 10 or 12 years, they could afford to hire a woman to [illegible] with the housework in the home in Salt Lake City, Utah.

The health of the parties: The Defendant is in good health [illegible] the record is clear that the Plaintiff is in poor health as the result of [illegible] numerous operations that she has undergone between 1969 and 1975. [illegible] testified that due to the surgery for breast cancer, she has little mo[illegible] her left arm and no feeling in her left hand and is unable to work (R.[illegible] She tires easily and has recurring headaches for a week to ten days [illegible] Dr. Peterson also testified that Plaintiff was not capable of employm[illegible] at the present time (R.578).

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The Money and Property they Possess and how it was Acquired: The record is clear that neither of the parties brought into the marriage any assets, the Plaintiff having worked for her father prior to the marriage and the Defendant having entered into a partnership with the Plaintiff's father in Belgium after the marriage. The evidence is also clear that Plaintiff worked during a substantial period of the marriage and that her income was used for utilities and groceries and entertainment of the parties. Both Plaintiff and Defendant testified that Plaintiff terminated her employment at the request of the Defendant (R.416, 135). The evidence is also clear that the marital estate is substantial ($650,000.00) and that the Trial Court's property award to the Plaintiff was substantially the Savings Certificate and the home in Carmel, California, while the property award to the Defendant included virtually all of the parties' investments: the lots in Park City; the home in Salt Lake; the airplane, the interest in the home in San Carlos, Mexico, the Commercial property, the $75,000 savings certificate (Exhibit 66-P), as well as the corporation which is capable of generating substantial sums of money so that Defendant's estate will continue to grow while the Plaintiff is presently in a position where she must conserve and her assets are not likely to increase.

The Abilities and Training of the Parties and their Present and Potential Incomes: The record is clear that the Plaintiff has no special skills which would qualify her for employment which did not involve physical

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labor and the record is also clear that the Plaintiff is physically una

perform physical labor (R. 222, 578). Plaintiff's potential income i

future will be restricted almost entirely to the Court's award of alim

and to the interest she can earn on the $25,000.00 savings certifica

awarded to her. On the other hand, the Defendant was awarded the

corporation which is capable of generating substantial income to him

if the past is any indication of the corporation's future growth (gross

1972 - $480,908.85, as compared to $1,176,052.43 in 1976), the Defe

can expect a substantial increase in his income in the future. Furthe

Plaintiff's expert witness Frank Stewart, testified that the Defendant

capable of earning a salary in the construction business of $50,000.0

annually at the present time.

<u>Other Factors:</u> Due to the Plaintiff's history of cancer as

as her numerous other physical disabilities, it is entirely possible a

bable that the Plaintiff will require medical attention in the future.

as the Plaintiff testified, because of her history of cancer, the cost o

insurance is prohibitive to her (R. 158), and she is virtually self insur

The Plaintiff must, therefore, look to her own estate to pay medical c

that may be incurred in the future.

In light of the above considerations, the Trial Court was obli

endeavor to provide a just and equitable adjustment of the economic

of the parties so that they could reconstruct their lives on a happy and

basis. <u>Anderson v. Anderson</u> (Supra). With this responsibility in m

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Trial Court in awarding the home to Plaintiff in Carmel, California, undoubtedly gave great weight to the Plaintiff's testimony that she desired to live in Carmel, California (R. 154, 155); that she had not found it necessary to take tranquilizers while living in Carmel, California; that she has felt very good since living in Carmel; and that her physical and emotional well being have greatly improved. Prior to the trial of this matter, the Plaintiff had already began to reconstruct her life in Carmel, California. Plaintiff speaks French fluently and has joined the French Club in Carmel and goes to the symphony often. It is also important to note that the Defendant testified that the Plaintiff's general emotional state had improved since she had been living in Carmel (R. 506). Also, Dr. Vern Peterson testified that he had observed a change in Plaintiff since she had resided in Carmel, which he described as "quite remarkable" in that she was much more calm, physically she had gained weight, and her general appearance had greatly improved (R. 578).

The Decree that the Court fashioned also allows the Defendant to continue his life virtually undisturbed from what it was prior to the divorce. Defendant was awarded property valued in excess of $450,000.00 (Exhibit 66-P). Defendant was awarded the home in Salt Lake City; the vacation home in San Carlos, Mexico; his private airplane; the lots in Park City, Utah; the $75,000.00 savings certificate, as well as the corporation which generates substantial income so that his assets will continue to grow. (See Statement of Facts, this Brief, page 10-11).

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This Court has stated in the case of Searle v. Searle, Utah, 522 P. 2d 697 (1974):

> Although it is both the duty and prerogative of this court in a case of equity to review the facts as well as the law, Article VIII, Section 9, Constitution of Utah, the trial judge has considerable latitude of discretion in adjusting the financ[illegible] and property interests in a divorce case. The actions of the trial court are indulged with a presumption of validity, and t[illegible] burden is upon appellant to prove such a serious inequity as [illegible] manifest a clear abuse of discretion. There is no fixed rule or formula for the division of property; Section 30-3-5, U.C.[illegible] 1953, provides that when a decree of divorce is made the Co[illegible] may make such orders in relation to property as may be equitable. The trial court has a responsibility to endeavor to provide a just and equitable adjustment of their economic resources so that the parties might reconstruct their lives on a happy and useful basis.

As is set forth above, the Trial Court in this case is empowe[illegible] with a broad discretion and his actions are indulged with a presumptio[illegible] validity. The Trial Court's decision with respect to the property divi[illegible] was equitable and well within its broad discretion and the Trial Cour[illegible] decision fulfilled its responsibility to equitably divide the assets in a manner to assist the parties in reconstructing their lives.

B. THE AWARD OF ALIMONY WAS EQUITABLE AND IS SU[illegible]PORTED BY THE FACTS.

The Defendant asserts in his Brief that the award of alimony t[illegible] Plaintiff was inequitable and that Plaintiff should be denied alimony bec[illegible] of the property award made to her. Defendant's argument totally igno[illegible] the standards that this Court has established in determining the amou[illegible] alimony as they apply to the facts of this case:

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"... The amount of alimony is measured by the wife's needs and requirements, considering her station in life, and upon the husband's ability to pay." English v. English (Utah, 1977) 565 P.2d 409. Henricks v. Hendricks 91 Utah 553, 63 P.2d 277 (1936)

Plaintiff testified that the monthly expenditures set forth in Exhibit 24-P, which totaled $1,545.00 would sustain her at the standard to which she had become accustomed. (An examination of the facts concerning the standard of living is set forth in pages 33 and 34 of this Brief. The Court awarded Plaintiff $1,400.00 a month alimony. It is important to note that at no time during the trial did the Defendant cross examine the Plaintiff as to her requirements and the amount of alimony she would need for those requirements. Further, Defendant introduced absolutely no evidence to show that he was unable to pay $1,400.00 per month alimony. In fact, it would have been entirely reasonable for the Trial Court to conclude that the Defendant's income for the year immediately preceding the divorce (1976) was in excess of $150,000.00 as is evidenced by the amount of money the Defendant spent for assets that were acquired in that year (see pages 13-14 of this Brief).

Defendant thwarted every effort of the Plaintiff to establish the Defendant's true income. Based upon his privilege against self-incrimination, Defendant refused to answer where or how he obtained the money to purchase assets totaling over $300,000.00. The purchases were made during the years 1972 through 1976, when during the same period his adjusted gross income was approximately $89,000.00. (R. 89, 90).

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Plaintiff's expert witness Frank Stewart, testified that based on Defendant's past performance, he could presently command a salary in the construction business of $50,000.00 annually (R. 387).

In his Brief, Defendant argues that the case of Dubois v. Dubois, 29 Ut. 2d 75, 504 P.2d 1380 (1973), supports his contention that the Plaintiff in the instant case should be required to live on the income that could be produced from the value of the property awarded to her. However, the facts of the Dubois case are clearly distinguishable from the facts in the instant case. In the Dubois case, the Court found the marital estate to have a value of $588,581.00 and the Court awarded the Plaintiff (wife) approximately 60% of the marital estate, whereas in the instant case the Court awarded Plaintiff approximately 32% of the marital estate. The wife in the Dubois case, after the action was filed, became a beneficiary to a substantial estate and she had an expectancy in the estate of her mother who was still living but of an advanced age. There has been no showing of such in the instant case. The nucleous of the marital estate in the Dubois case was the result of investments of gifts from the Plaintiff's relatives, whereas in the instant case the marital estate was acquired during the marriage through the joint efforts of the parties. In addition, in the Dubois case there is no showing that the husband had a substantial income as is true in this case. Further, the inference from a reading of the Dubois opinion is that the property awarded to the Plaintiff was income producing property,

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in the instant case the only income-producing property awarded to the Plaintiff is the $25,000.00 savings certificate.

What the Defendant failed to accomplish in the Trial Court with his theory of forfeiture (denial of alimony to the Plaintiff), he now seeks to accomplish by urging this Court that Plaintiff should be forced to live on the income that could be produced from the value of the property awarded to her. In order to support this position, the Defendant urges this Court to impose a trust upon the Plaintiff, funded with money derived from the forced sale of the Carmel home where she now resides. There is absolutely no credible evidence in the record which would support the imposition of a trust upon the property awarded to the Plaintiff and had the Defendant informed Plaintiff and the Court (other than in his closing argument) that the question of imposing a trust upon Plaintiff was being tried, the Plaintiff could have introduced testimony to rebut any evidence which could inferentially support Defendant's position.

As in the Trial Court, the Defendant on this appeal urges this Court to deny the wife alimony without giving any consideration to the needs of the Plaintiff or asserting any evidence to show that the Defendant is unable to pay the amount of alimony awarded to the Plaintiff by the Trial Court.

The award of alimony was equitable and as set forth above, the facts of this case fully support the Trial Court's award of alimony.

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POINT FOUR

THE TRIAL COURT PROPERLY AWARDED ATTORNEY'S FEES AND COSTS TO THE PLAINTIFF.

Plaintiff fully concurs with the Defendant in his Brief, where he states:

> 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 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. (Appellant's Brief, page 48-49).

The facts in this matter clearly support an award of attorney's fees to the Plaintiff.

At the conclusion of the trial in this matter, the Plaintiff had incurred attorney's fees totaling $14,920.00, (R. 592, 594), which sum included $2,500.00 Plaintiff owed for previous attorneys in this matter (R. 163) Of the $14,920.00 that Plaintiff had incurred in attorney's fees the Court awarded her $8,000.00 attorney's fees.

This matter required extensive discovery, necessitated in part by the Defendant's own conduct. This fact is clearly illustrated by the manner in which Defendant answered the first set of Interrogatories propounded to him. (Answers to Interrogatories, R. 34, and Amended Answers to Interrogatories, R. 44). In his Answer to those Interrogatories, the Defendant

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stated that the mortgage on the home at Cortez Street, Salt Lake City, Utah, was $30,000.00, when, in fact, the mortgage was $15,000.00 (Exhibit 34-D); he stated that the lots owned in Park City were a joint venture when, in fact, he owned the lots himself (R.25); and he stated that he owned a one-half interest in the $100,000.00 savings certificate at Silver King Bank, when, in fact, he was the sole owner of the savings certificates (R. 11, 12). It should also be noted that the Trial Court required Plaintiff to pay her own expert witness fees (Finding, Record 124).

In the case of Dubois v. Dubois (Supra), the wife who was granted the divorce and awarded 60% of the marital estate valued at $588,581.00 was also awarded attorney's fees in the amount of $10,000.00, which this Court held was not an abuse of discretion.

The Trial Court's award of attorney's fees to Plaintiff was within its discretion, was fair to the parties, and was supported by the evidence.

PLAINTIFF SHOULD BE AWARDED ATTORNEY'S FEES FOR THIS APPEAL.

Although the Plaintiff was not awarded, in full, the property and alimony that she requested at the trial (Exhibit 24-P and Exhibit 66-P), the Plaintiff chose not to appeal the Trial Court's decision. However, the Defendant did choose to appeal the Trial Court's decision and as a result the Plaintiff has had to incur substantial attorney's fees.

Section 30-3-3, U.C.A. (1953), provides that the Court can award attorney's fees and this Court has held that a reasonable attorney's fee may

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be awarded on appeal. See Anderson v. Anderson (Supra), Hendric[illegible]

Hendricks (Supra), Peterson v. Peterson, 112 Utah 542, 189 P.2d 9[illegible]

Plaintiff should be awarded her attorney's fees on this Appe[illegible] and this case should be remanded to the District Court for a determi[illegible] of the amount of the attorney's fees.

CONCLUSION

The Trial Court in this case rendered its decision with consi[illegible]ation given to all of the facts and considerations involved in this case, including the conduct of each of the parties.

In light of all of the facts and circumstances, the Trial Cou[illegible] formulated a Decree that was equitable to each of the parties. The D[illegible] was awarded property valued at $450,000.00, which included his man[illegible] investments and the corporation which is capable of generating subst[illegible] income to him. The division of assets allows Defendant to continue [illegible] life in a manner virtually undisturbed from what it was prior to the di[illegible]

The Decree awarded to Plaintiff property valued at $200,000[illegible] which included the home in Carmel, California, where the Plaintiff de[illegible] to reside. The Decree allows Plaintiff an opportunity to continue to [illegible]struct her life in Carmel.

The Trial Court's award of alimony to Plaintiff was based u[illegible] her need, in light of her standard of living, and on the ability of Defe[illegible]

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to pay such alimony. The award of alimony permits Plaintiff to reconstruct her life on a happy and useful basis.

The Decree of the Trial Court should be affirmed in its entirety and Plaintiff should be awarded her attorney's fees on this appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify I served three (3) copies of the foregoing Respondent's Brief, by mailing the same, postage prepaid, to Joel M. Allred, Attorney for Defendant, Appellant, at 345 South State Street, Suite 101, Salt Lake City, Utah 84111, this _____ day of March, 1978.

____
MARK C. McLACHLAN

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