

1986

Joan H. Elton v. Curtis Beck Elton : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

William B. Parsons; Pace, Klimt, Wunderli and Parsons; attorney for appellant.

B.L. Dart, John D. Sheaffer; Dart, Adamson and Parken; attorney for respondent.

Recommended Citation

Brief of Respondent, *Elton v. Elton*, No. 860127.00 (Utah Supreme Court, 1986).

https://digitalcommons.law.byu.edu/byu_sc1/950

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH COURT OF APPEALS
BRIEF

UTAH
DOCUMENT
F U

10
DOCKET NO. 860127-CA

IN THE SUPREME COURT OF THE STATE OF UTAH

---ooo0ooo---

JOAN H. ELTON,	:	
Plaintiff-Appellant,	:	
v.	:	Appeal No. 20723
CURTIS BECK ELTON,	:	<u>860127-CA</u>
Defendant-Respondent.	:	

---ooo0ooo---

BRIEF OF RESPONDENT

Appeal from the Judgment of the Third District Court
in and for Tooele County, State of Utah
The Honorable Kenneth Rigtrup

B. L. Dart
John D. Sheaffer, Jr.
DART, ADAMSON & PARKEN
310 South Main, Suite 1330
Salt Lake City, Utah 84101

Attorneys for
Defendant-Respondent
Curtis Beck Elton

WILLIAM B. PARSONS, III
PACE, KLIMT, WUNDERLI & PARSONS
1200 University Club Building
136 East South Temple
Salt Lake City, Utah 84111

Attorney for Plaintiff-Appellant
Joan H. Elton

FILED
JAN 28 1986

Clerk. Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

---ooo0ooo---

JOAN H. ELTON,	:	
Plaintiff-Appellant,	:	
v.	:	Appeal No. 20723
CURTIS BECK ELTON,	:	
Defendant-Respondent.	:	

---ooo0ooo---

BRIEF OF RESPONDENT

Appeal from the Judgment of the Third District Court
in and for Tooele County, State of Utah
The Honorable Kenneth Rigtrup

B. L. Dart
John D. Sheaffer, Jr.
DART, ADAMSON & PARKEN
310 South Main, Suite 1330
Salt Lake City, Utah 84101

Attorneys for
Defendant-Respondent
Curtis Beck Elton

WILLIAM B. PARSONS, III
PACE, KLIMT, WUNDERLI & PARSONS
1200 University Club Building
136 East South Temple
Salt Lake City, Utah 84111

Attorney for Plaintiff-Appellant
Joan H. Elton

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	
Cases Cited	ii
Relevant Rules	iii
STATEMENT OF ISSUE PRESENTED FOR REVIEW	1
1. NATURE OF THE CASE	1
2. COURSE OF THE PROCEEDINGS	2
3. DISPOSITION OF THE COURT BELOW	2
4. STATEMENT OF FACTS	2
SUMMARY OF ARGUMENT	5
ARGUMENT	9
POINT I	
THE CONSIDERED AWARDS AND ORDERS OF THE TRIAL COURT ARE PRESUMED PROPER AND SHOULD NOT BE DISTURBED ABSENT A CLEAR SHOWING BY APPELLANT THAT THE TRIAL COURT ABUSED ITS DISCRETION, OR WAS MISTAKEN AS THE THE APPLICABLE LAW	9
POINT II	
APPELLANT HAS FAILED TO MEET HER BURDEN OF DEMONSTRATING MISAPPLICATION OF LAW OR CLEAR ABUSE OF DISCRETION; THEREFORE THE JUDGMENT BELOW SHOULD BE AFFIRMED IN ITS ENTIRETY	11
CONCLUSION	20
ADDENDUM	
Transcript of March 19, 1985	A-1
Findings of Fact and Conclusions of Law	A-15
Decree of Divorce	A-25
Appearance of Counsel	A-31
Motion For a New Trial or in the Alternative To Amend the Judgment	A-32
Affidavit of Joan H. Elton	A-39
Transcript of May 20, 1985	A-43
Order	A-69

TABLE OF AUTHORITIES

CASES CITED	PAGE
<u>Christensen v. Christensen</u> , 628 P.2d 1279 (Utah 1981)	10-11
<u>Clissold v. Clissold</u> , 30 Utah 2d 430, 519 P.2d 241 (1974)	19
<u>Despain v. Despain</u> , 610 P.2d 1303 (Utah 1980). . .	6, 8, 12
<u>Eastman v. Eastman</u> , 558 P.2d 514 (Utah 1976) . . .	6, 10
<u>English v. English</u> , 565 P.2d 407 (Utah 1979) . . .	10
<u>Klein v. Klein</u> , 544 P.2d 472 (Utah 1975)	6, 14-15
<u>Land v. Land</u> , 605 P.2d 1248 (Utah 1980)	6, 8, 12
<u>Lembach v. Cox</u> , 639 P.2d 197 (Utah 1981)	6, 11
<u>Tangero v. Marrero</u> , 13 Utah 2d 290, 373 P.2d 390 (1960)	19

RELEVANT RULES CITED

Rule 59 of the Utah Rules of Civil Procedure;

Rule 59: New Trials; Amendments of Judgment

(a) **Grounds.** Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes; provided, however, that on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial.

(2) Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by resort to a determination by chance or as a result of bribery, such misconduct may be proved by the affidavit of any one of the jurors.

(3) Accident or surprise, which ordinary prudence could not have guarded against.

(4) Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

(5) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.

(6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

(7) Error in law.

(b) **Time for Motion.** A motion for a new trial shall be served not later than ten days after the entry of the judgment.

(c) **Affidavits; Time for Filing.** When the application for a new trial is made under subdivision (1), (2), (3), or (4), it shall be supported by affidavit. Whenever a motion for a new trial is based upon affidavits they shall be served with the motion. The opposing party has ten days after such service within which to serve opposing affidavits. The time within which the affidavits or opposing affidavits shall be served may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) **On Initiative of Court.** Not later than ten days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion or a party, and in the order shall specify the grounds therefor.

(e) **Motion to Alter or Amend a Judgment.** A motion to alter or amend the judgment shall be served not later than ten days after entry of the judgment.

IN THE SUPREME COURT OF THE STATE OF UTAH

---ooo0ooo---

JOAN H. ELTON,	:	
Plaintiff-Appellant,	:	
v.	:	Appeal No. 20723
CURTIS BECK ELTON,	:	
Defendant-Respondent.	:	

---ooo0ooo---

BRIEF OF RESPONDENT

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Did the Court err or abuse its discretion in denying appellant's Rule 59 Motion for a New Trial or in the alternative To Amend the Judgment of the parties' Decree of Divorce, where that judgment incorporated the provisions of the parties' settlement agreement?

STATEMENT OF THE CASE

1. NATURE OF THE CASE.

This is a divorce action in which Mrs. Elton, the plaintiff-appellant (hereinafter "appellant") appeals the Order of the Court below denying her Rule 59 Motion for a New Trial or in the alternative To Amend the Judgment of the parties Decree of Divorce.

2. COURSE OF THE PROCEEDINGS.

The appellant was awarded a Decree of Divorce incorporating the parties' settlement agreement reached at the time set for trial of the parties' consolidated causes of action for divorce on March 19, 1985. Addendum at A25-30. The Decree of Divorce as prepared by appellant's attorney was entered on April 16, 1985, and shortly thereafter appellant retained other counsel and filed her Motion For a New Trial or in the alternative To Amend the Judgment of her Decree of Divorce pursuant to Rule 59(a) and (e) of the Utah Rules of Civil Procedure. Addendum at A31-34.

3. DISPOSITION IN THE COURT BELOW.

On May 20, 1985, the court below heard proffers of evidence and argument on appellant's alternative motion, received and reviewed the transcript of the divorce hearing, and denied appellant's Motion For New Trial or in the alternative To Amend the Judgment of her Decree of Divorce. Addendum at A69-70. The appellant appeals the Order of the court below denying her alternative Motion.

4. STATEMENT OF FACTS.

At the time set for trial of the parties' consolidated causes of action for divorce on March 19, 1985, both parties appeared with counsel before the Honorable Kenneth Rigtrup, Judge of the District Court in Tooele County, prepared

to try their cases on the merits. Addendum at A 2, 51, 24; T. of March 19, 1985 at 2, T. of May 20, 1985 at 9, 24. Counsel for Mr. Elton, the defendant-respondent (hereinafter "respondent") had arrived at the court before Judge Rigtrup and upon the judge's arrival engaged in social discourse unrelated to the parties' case. Addendum at A 40-41; Addendum at A 53-54, A 56-57, T. of May 20, 1985 at 11-12, 14-15.

Following conference in chambers between the court below and counsel for both parties, in which the various issues were discussed, the parties entered into negotiations with counsel and reached a settlement agreement disposing of all pending issues. Addendum at A 2, T. of March 19, 1985 at 2; Addendum at A51, A57, T. of May 20, 1985 at 9, 15. The parties with their attorneys then came before the Court below and appellant's attorney read the parties' detailed settlement agreement into the record in appellant's presence. Addendum at A 2-11, T. of March 19, 1985 at 2-11; Addendum at A 39-40. The settlement agreement was stated in clear and certain terms. Appellant voiced no objections to the terms, nor indicated in any manner that she did not understand the agreement in all particulars or desired to continue the trial hearing for any reason. Addendum at A2, A4, T. of May 20, 1985 at 2, 4; Addendum at A40. As the settlement agreement was read into the record, appellant interjected more than once as to the particulars of the

settlement agreement, expressed her continuing comprehension of the terms of the settlement agreement. Addendum at A4-5, A8, A10, T. of March 19, 1985 at 4-5, 8, 10; Addendum at A40; Addendum at A51-53, T. of May 20, 1985 at 9-11. When appellant's attorney concluded reading the settlement agreement into the record and in response to the specific questions asked of her by the Court below, appellant specifically indicated that she had heard the agreement and clearly expressed her understanding of the terms of the settlement and her agreement to be bound by those terms. Addendum at A-11, T. of March 19, 1985 at 11; Addendum at A51, A53, T. of May 20, 1985 at 9, 11; Addendum at A39-40. Immediately thereafter, the respondent and his attorney were excused from the proceedings and upon appellant's testimony as to jurisdiction and grounds she was awarded a Decree of Divorce. Addendum at A12-13, T. of March 19, 1985 at 12-13. Appellant's attorney prepared the Findings of Fact and Conclusions of Law, and Decree of Divorce, which were approved by respondent's attorney and signed and entered by the court below on April 16, 1985. These final documents approved and incorporated the parties' settlement agreement as read into the record on March 19, 1985 by providing for the distribution of the parties' property and awarding neither party alimony, among other things. Addendum at A15-30.

Shortly thereafter the appellant retained new counsel and filed her Motion For a New Trial or in the alternative To Amend the Judgment of her Decree of Divorce as provided by Rule 59(a) and (e) of the Utah Rules of Civil Procedure. Addendum at A31-34. In support of her motion appellant alleged, basically, that she did not hear or agree to the settlement agreement, that there were unfair irregularities in the proceedings, that there was insufficient evidence to support the judgment distributing the parties' property, and an abuse of discretion in failing to award her any alimony. Addendum at A31-37. Upon hearing appellant's Motion, the court below determined there was no irregularity or abuse of discretion, surprise or new evidence supporting appellant's Motion and that there was no substantial basis for granting a new trial or amending the judgment. Addendum at A66, A67, T. of May 20, 1985 at 24, 25. Accordingly, the court below entered its Order denying appellant's motion for a new trial or in the alternative to amend the judgment. Addendum at A69-70.

SUMMARY OF ARGUMENT

Although appellant is dissatisfied with the ruling of the Court below denying her motion for a new trial or in the alternative to amend the judgment of her Decree of Divorce, that court was in an advantageous position to receive the evidence presented, and to become acquainted with the parties' problems

and the totality of the circumstances relating to the issues. Despite the subjective dissatisfaction of one party to a divorce action, unless there is a clear showing of misapplication of the law or abuse of discretion, then the ruling of the trial court in awarding a Decree of Divorce should not be disturbed. Eastman v. Eastman, 558 P.2d 514 (Utah 1976). This standard does not significantly vary where the court below has had the opportunity to reconsider its judgment upon a Rule 59 motion for a new trial or in the alternative to amend the judgment. The ruling of the court below will be disturbed only where there is a clear abuse of discretion. Lembach v. Cox, 639 P.2d 197 (Utah 1981).

In the present case, appellant has utterly failed to show a misapplication of the law or a clear abuse of discretion by the court below. Although divorce proceedings are equitable in nature, when a decree of divorce is based upon a property settlement sanctioned by the court, equity is not available to reinstate rights and privileges voluntarily contracted away. Only under the most compelling circumstances will there be an abrogation of such an agreement and the judgment based thereon. Land v. Land, 605 P.2d 1248 (Utah 1980); Despain v. Despain, 610 P.2d 1303 (Utah 1980). The question as to whether appellant agreed to and should be bound by her settlement agreement was one for the trial court to determine within its discretion. Klein v. Klein, 544 P.2d 472 (Utah 1975).

Here, the evidence clearly shows that appellant could have litigated any issues of alimony and property, but instead entered into a settlement agreement at the time set for trial of those issues. She heard, understood, and consented to be bound by the terms of her settlement agreement. That settlement agreement was accepted and approved by the court below under circumstances where the trial court had an opportunity to consider the representations of the parties' counsel on the issues to be litigated. The Decree of Divorce incorporated the parties' settlement agreement. Though appellant asserts a grossly disproportionate division of the parties' assets, her assertion is unfounded and the evidence fails to show that the division was unfair. There are simply no compelling reasons to disturb the sanctity of appellant's settlement agreement or the judgment of the court below incorporating the same. The court below properly exercised its discretion, in view of the evidence presented, in refusing to abrogate the provisions of appellant's settlement agreement.

Nor does the weight of the evidence presented to the court below support any ground for a new trial or an amendment of the Decree of Divorce. There was clearly no irregularity in the divorce proceedings or abuse of discretion by the Court below which might have prevented appellant from having a fair hearing on the issues had she chosen to do so. Although appellant

asserted a physical disability as grounds for her Rule 59 Motion, there is firm evidence that the disability was known by appellant prior to trial and in no way interfered with her opportunity for a fair hearing. Further, the parties' assets were known to appellant prior to the day of trial in this matter, and though appellant now disputes their values she had ample opportunity to determine their value prior to trial and could have produced evidence as to their values at that time. Any accident or surprise to appellant could with ordinary prudence have been guarded against. Any newly discovered evidence could with reasonable diligence have been discovered and produced at trial had appellant chosen to do so.

Appellant's attempted analogy between summary proceedings and consent judgments is misplaced and there is no authority at law to support it. Appellant had her opportunity to fully litigate any issues in dispute but on the day of trial chose instead to enter into a settlement agreement disposing of all issues. This is sufficient evidence justifying the judgment of the court below. The decision of the trial court is in accord with the law in upholding the sanctity of settlement agreements and judgments based thereon. Land, supra; Despain, supra.

Appellant has not met her burden of showing misapplication of the law. Further, she has utterly failed to show a clear abuse of discretion to such a degree that the

judgment of the Court below and its Order denying appellant her Rule 59 motion are manifestly unfair and inequitable.

ARGUMENT

POINT I

THE CONSIDERED AWARD AND ORDERS OF THE TRIAL COURT ARE PRESUMED PROPER AND SHOULD NOT BE DISTURBED ABSENT A CLEAR SHOWING BY APPELLANT THAT THE TRIAL COURT ABUSED ITS DISCRETION OR WAS MISTAKEN AS TO THE APPLICABLE LAW.

It is clear from appellant's brief that she is dissatisfied with Judge Rigtrup's Order denying her Motion For a New Trial or in the alternative To Amend the Judgment of her Decree of Divorce. That Decree of Divorce, however, approved and incorporated the provisions of her settlement agreement, with which appellant has evidently become dissatisfied and in effect now desires to revise. It is not unusual that a party to the inherently stressful process of divorce becomes dissatisfied with the rulings of the trial court, however that fact alone is not indicative of the propriety and merits of those rulings.

This Court has on innumerable occasions held that where a divorce action is equitable in nature, the ruling of the trial judge is favored with a presumption of propriety and accuracy. It is only in those few instances in which the appellant can clearly demonstrate a manifest abuse of discretion or misapplication of law, such that the orders of the trial court are

inequitable in light of the circumstances of the case, that the considered judgment of the trial judge will be disturbed. Such a position is logically grounded upon the advantaged position of the trial court, which has observed the witnesses, received evidence presented on the issues and become acquainted with the parties problems and the circumstances relating to the issues.

As observed in Eastman v. Eastman, 558 P.2d 514 (Utah 1976):

We have many times stated that even though proceedings in divorce cases are equitable, in which this Court may review the evidence, due to the prerogative and advantaged position of the trial court, we give considerable deference to his findings and judgment; and we do not disturb them unless the evidence clearly preponderates to the contrary, or he has abused his discretion or misapplied principles of law.

558 P.2d at 516 (footnote citation omitted).

In view of the considerable discretion accorded to the trial judge and this Court's requirements that a clear abuse of discretion or misapplication of law be demonstrated as a condition precedent to any substitution of the trial judge's ruling, the burden is on the party dissatisfied with the trial court's decision to demonstrate such error. English v. English, 565 P. 2d 409 (Utah 1977). As recently summarized in Christensen v. Christensen, 628 P. 2d 1279 (Utah 1981):

On review, this Court will accord considerable deference to the judgment of the trial court due to its advantaged position and will not disturb the action of that court unless the

evidence clearly preponderates to the contrary, or the trial court abused its discretion or misapplied principles of law...

628 P.2d at 1299 (footnote citation omitted).

Nor does this standard of review significantly vary merely because appellant faults the decision of the trial court in denying a Rule 59 motion for a new trial or in the alternative to amend its judgment. As stated in Lembach v. Cox, 639 P. 2d 197 (Utah 1981):

...the trial court has a broad discretion... and...his ruling...should not be overturned unless it appears that his action was arbitrary, or that it clearly transgressed any reasonable bounds of discretion.

639 P.2d at 201 (footnote citation omitted).

Accordingly, the judgment of the Court below is presumed valid and will not be disturbed unless appellant has demonstrated that the trial judge has misapplied relevant law to such a degree that the Orders are manifestly unfair and inequitable or has so clearly abused his discretion as to result in substantial prejudice.

POINT II APPELLANT HAS FAILED TO MEET HER BURDEN OF DEMONSTRATING MISAPPLICATION OF LAW OR CLEAR ABUSE OF DISCRETION; THEREFORE THE JUDGMENT AND ORDER ENTERED BELOW SHOULD BE AFFIRMED IN THEIR ENTIRETY.

Appellant, though clearly dissatisfied with the rulings entered by Judge Rigtrup, utterly fails to demonstrate a

misapplication of law rendering the judgment of the Court below manifestly unfair or such a clear abuse of discretion resulting in substantial prejudice.

As this Court has held in Land v. Land, 605 P.2d 1248 (Utah 1980):

...when a decree is based upon a property settlement agreement, forged by the parties and sanctioned by the Court, equity must take such agreement into consideration. Equity is not available to reinstate rights and privileges voluntarily contracted away simply because one has come to regret the bargain made. Accordingly, the law limits the continuing jurisdiction of the Court where a property settlement is incorporated into the decree, and the outright abrogation of the provisions of such an agreement is only resorted to with great reluctance and for compelling reasons.

605 P.2d at 1251 (footnote citation omitted). Despain v. Despain, 610 P.2d 1303 (Utah 1980).

Although appellant asserts in her Brief that she has not had her day in court (Brief of Appellant at 10, 11) she was clearly accorded a full opportunity to litigate every pending issue of her cause of action on the day of trial, including those of alimony and property. Both parties appeared before the trial court on that date with the benefit of counsel. Addendum at A2, T. of March 19, 1985 at 2; Addendum at A51, A66, T. of May 20, 1985 at 9, 24. Instead of proceeding through trial, however, appellant entered into negotiations through her attorney and reached a settlement agreement disposing of all pending issues

including those of alimony and property. Addendum at A2, T. of March 19, 1985 at 2; Addendum at A51, A59, T. of May 20, 1985 at 9, 15. This settlement agreement was sanctioned by the trial court and incorporated in appellant's Decree of Divorce. See Addendum at A15-30.

Nor are there any compelling reasons why appellant's settlement agreement as incorporated into the Decree of Divorce should be abrogated. Appellant heard, understood and assented to the settlement agreement without reservation. She was present with her attorney at the time her settlement agreement was read into the record. Addendum at A2-13, T. of March 19, 1985 at 2-13; Addendum at A39-40. The agreement was stated in clear and precise terms. Appellant interjected more than once as to the particulars of the agreement and otherwise indicated her continuing comprehension of the terms of the agreement. She voiced no objections nor expressed any confusion. Addendum at A4-5, 8, 10, T. of March 19, 1985 at 4-5, 8, 10; Addendum at A2; Addendum at A51-53, T. of May 20, 1985 at 9-11. Although appellant asserted in her motion for a new trial or in the alternative to amend the judgment that she did not hear the proceedings due to a hearing impairment and did not agree to the settlement agreement as read into the record, the transcript belies her assertion:

THE COURT: Mrs. Elton, I assume you've heard what's been read into the record?

MRS. ELTON: Yes.

THE COURT: Do you understand those terms?

MRS. ELTON: Yes.

THE COURT: Do you agree to be bound by those terms?

MRS. ELTON: Yes.

Addendum at A11; T. of March 19, 1985 at 11. The question as to whether appellant agreed to and should be bound by her settlement agreement was one for the trial court to determine. Klein v. Klein, 544 P.2d 472 (Utah 1975). Clearly under the facts in the present case the trial court properly acted within its descretion in refusing to abrogate the settlement agreement or alter its judgment.

Further, as noted in Klein, supra:

It is the established rule that a stipulation pertaining to matters of divorce and property rights therein, though advisory upon the Court and would usually be followed unless the Court thought it unfair or unreasonable, is not necessarily binding on the Court anyway. It is only a recommendation to be adhered to if the Court believes it to be fair and reasonable.

544 P.2d at 476 (footnote citation omitted).

Here, on the day of trial and before the parties entered into their settlement agreement, the trial court was apprised of the outstanding issues through a pre-trial conference with the parties' attorneys. Addendum at A2, T. of March 19,

1985 at 2. Details relating to distribution of the parties' property were discussed, and afterwards the settlement agreement was reached and read into the record. Addendum at A58-59, T. of May 20, 1985 at 15-16. The settlement agreement was approved by the Court below and incorporated into the Decree of Divorce. In this context the Court below was in an advantageous position to consider the fairness of the settlement agreement in view of representations by counsel for the parties at the pre-trial conference. It was appropriate for the court below to consider what was contained in the settlement agreement in addition to what counsel represented on the issues as part of the totality of the circumstances in determining what will be a just and equitable decree. Klein, supra at 476. Obviously the trial court did not view the settlement agreement as unreasonable. Rather, he approved it and ordered it incorporated into the Decree of Divorce.

Having a further opportunity to reconsider its decision upon appellant's post-trial motion, the trial court was not convinced by appellant's proffers and supporting affidavits that there were other compelling reasons to abrogate the settlement agreement or alter its judgment. Clearly, appellant had every opportunity to litigate issues of alimony and property at trial, had she desired to do so. Although appellant in her brief argues she has suffered a reduced earning capacity due to a

hearing loss during the marriage which places her in risk of becoming a public charge (Brief of Appellant at 6-7), the record is devoid of any evidence to corroborate her self-serving allegations which were disputed by respondent. Appellant admits she was hearing-impaired prior to the parties marriage. Addendum at A49, T. of May 20, 1985 at 7. It was undisputed that she was unemployed at the time of her marriage, receiving disability for her hearing impairment, and is now capable of employment and involved in her family's investment affairs. In addition, she receives a monthly income from the parties' settlement agreement. Addendum at A54-55, T. of May 20, 1985 at 273. There was no compelling reason to alter the Court's order relating to alimony. Neither was there a compelling reason to alter the distribution of the parties' property. Although appellant argues a great disparity in the award, primarily by isolating from the total assets a certain parcel of real property the value of which was disputed (Addendum at A46, T. of May 20, 1985 at 4), she failed to consider the value of other assets she received in relation to the total assets available for distribution between the parties, together with the value of premarital assets and inheritance. Addendum at A50, A54-55, A61, A64-65, T. of May 20, 1985 at 8, 12-13, 19, 22-23. The appellant had the opportunity to litigate the issue of property at trial, the court below considered the property values prior to the parties'

settlement agreement, and its distribution again upon appellant's Rule 59 Motion. The court below was not convinced of any great disparity in the distribution, nor does the evidence clearly indicate any great disparity. Addendum at A57, A58-59, A61, T. of May 20, 1985 at 15, 16-17, 19. The court below, consistent with the latitude of discretion to which it is accorded, properly refused to abrogate the parties' settlement agreement.

Nor was there a clear abuse of discretion by the court below in denying appellant's motion for a new trial or in the alternative to amend the judgment. Appellant has failed to establish any irregularity in the proceedings of the court below which prevented her from having a fair trial. The evidence clearly showed that the "irregularity" in the proceedings of March 19, 1985 as alleged by appellant in support of her motion was merely courteous social discourse between respondent's counsel and the court below, resulting from an unanticipated encounter by respondent's counsel with the trial judge and entirely unrelated to the proceedings between the parties. Addendum at A53-54, A56-57, T. of May 20, 1985 at 11-12, 14-15; Addendum at A2-3. There was no accident or surprise which appellant could not have guarded against. Her hearing impairment had existed for years. Addendum at A49, T. of May 20, 1985 at 7. She knew prior to the proceedings on March 19, 1985 that her hearing aid was malfunctioning and that she had an ear infection.

Addendum at A36. The trial date had been set for several weeks and her attorney was present at the proceedings to represent her interests. She could have communicated her inability to go forward with the proceedings or requested a continuance, but she did neither. Addendum at A66, T. of May 20, 1985 at 24. Contrary to appellant's claimed inability to hear at her trial proceeding as grounds for a new trial or amendment of the judgment under Rule 59, the record discloses that appellant heard, understood, and agreed to the terms of her settlement agreement. Addendum at A11, T. of March 19, 1985 at 11. The evidence clearly disputed appellant's assertion of accident or surprise.

The record is also devoid of any evidence of newly discovered evidence which could not with reasonable diligence have been discovered or produced for trial. If, as appellant asserts, her hearing impairment worsened during the course of her marriage, then any such evidence was known to her prior to her trial date and could have been produced at that time. Appellant does not claim the parties owned any assets which were unknown to her at the time of trial and all of the parties' assets were itemized and distributed in the Decree of Divorce. At this late date, and evidently based on her sole opinion, she merely attempts to dispute the value of those assets, an issue which appellant had ample opportunity during the discovery process of

her divorce action to determine and an opportunity to establish at trial. Her opinion valuation of the assets was disputed by respondent, and through expert testimony he was prepared at trial to establish the value of those assets. Addendum at A50-51, A66, T. of May 20, 1985 at 8-9, 24. Appellant clearly could have discovered and produced at trial all evidence relating to the parties' property. Under similar circumstances this Court has upheld the decision of the trial court in denying appellant's Rule 59 motion. Clissold v. Clissold, 30 Utah 2d 430, 519 P.2d 241 (1974); Tangero v. Marrero, 13 Utah 2d 290, 373 P.2d 390 (1960).

The evidence is clearly sufficiently to justify the judgment of the court below. Where appellant, in the presence of the trial court and with the benefit of her attorney participated in reaching a settlement agreement, heard the agreement, understood it, and agreed to be bound by it. Addendum at A4-5, A8, A10-11, T. of March 19, 1985 at 2, 4-5, 8, 10-11. The court below was justified in entering its judgment upon appellant's stipulation. Though appellant argues in her brief that judgment in a divorce proceeding, as to which all issues in dispute have been stipulated, is a summary proceeding attaining the status of a summary judgment, her attempted analogy is misplaced and has no basis at law. There were no facts or other issues disputed at the divorce trial in this matter; there was

instead an agreement settling the pending litigation. Since no genuine issue of material fact existed, or was claimed to exist, it was entirely appropriate for the court below to enter its judgment in conformity with the parties' agreement. In reviewing the rulings of the court below the standard to be applied by this Court is not, nor could it be, whether a genuine issue of material fact existed at trial. Clearly there were none. Rather, the standard is whether the court below clearly abused its discretion in denying appellant's Rule 59 alternative motion. As clearly shown, supra, the trial judge properly exercised his broad discretion in denying appellant's motion for a new trial or to amend the judgment previously entered.

CONCLUSION

In divorce cases this Court has invariably held that the decision of the trial judge is to be respected unless it clearly appears that he has abused his discretion or manifestly misapplied relevant law to the substantial prejudice of the appealing party. This standard does not significantly vary where the court below has had the opportunity to reconsider its judgment upon a Rule 59 motion for a new trial or in the alternative to amend the judgment. It appropriately grants deference to the advantaged position of the trial judge who has received evidence presented on the issues and become acquainted

with the parties, their problems, and the circumstances relating to the issues.

Appellant's present dissatisfaction with the judgment of the trial court and its ruling denying her Rule 59 alternative motion is neither an appropriate nor sufficient ground for reversal of the trial court's orders. The court below appropriately applied relevant law on the issues and did not agree that appellant was justified in seeking to reopen its judgment. Nowhere does appellant isolate an instance in which Judge Rigtrup's judgment, and order denying her motion, prejudicially errs against her or is not supported by substantial evidence. The evidence clearly shows that appellant heard, understood, participated in, and agreed to be bound by the terms of her settlement agreement with the full benefit of legal representation and an opportunity to litigate any issues had she chosen to do so. The judgment of the court below which approved and incorporated appellant's settlement agreement cannot be legitimately analogized with that of a summary judgment where factual issues are in dispute and the question of whether there were disputed facts is on review. Here there were no disputed issues at trial. It was clearly within the trial court's discretion to determine whether appellant understood and agreed to the settlement agreement, and there was clearly substantial evidence that she did so.

Nor are there any compelling reasons shown by appellant to support an abrogation of her settlement agreement and the judgment of the trial court entered in conformity with that agreement. Appellant had unequivocally agreed to the distribution of the parties' assets and did not seek alimony. She should not now, upon settling all issues at trial, be accorded a second opportunity for trial simply because she has come to regret her decision.

In reconsidering its judgment, the court below properly exercised its broad discretion in denying appellant's Rule 59 motion. The evidence clearly shows there was no irregularity in the divorce proceedings, abuse of discretion, accident, surprise, or new (and previously unavailable) evidence which prevented appellant from proceeding through a fair trial had she chosen to do so, or which rendered the court's judgment unfair. Her valid settlement agreement was a sufficient basis upon which the trial court could enter its judgment and it clearly was not error in law to do so. Appellant simply failed to establish any grounds sufficient for a new trial or an amended judgment. The decision of the court below denying appellant's Rule 59 motion should be affirmed, and the judgment reflected by the parties' Decree of Divorce and based on their settlement agreement should be upheld.

There is no manifest injustice or clear abuse of discretion in this case.

RESPECTFULLY SUBMITTED this _____ day of January, 1986.

DART, ADAMSON & PARKEN

B. L. DART

JOHN D. SHEAFFER, JR.

CERTIFICATE OF DELIVERY

I hereby certify that on the _____ day of January, 1986, I hand delivered four copies of the foregoing Respondent's Brief to:

William B. Parsons, III
Attorney for Plaintiff-Appellant
PACE, KLIMT, WUNDERLI & PARSONS
1200 University Club Building
136 East South Temple
Salt Lake City, Utah 84111

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR TOOELE COUNTY, STATE OF UTAH

JOAN H. ELTON, :

Plaintiff, :

vs. :

CURTIS BECK ELTON, :

Defendant. :

Consolidated Cases
84-347
84-348

REPORTER'S TRANSCRIPT

BE IT REMEMBERED: That the above-entitled matter came on regularly for hearing on the 19th day of March, 1985, at the hour of 11:15 a.m., before the Honorable Kenneth Rigtrup, a Judge of the Third Judicial District Court of the State of Utah, at Salt Lake City, Salt Lake County, sitting without a jury, and the following proceedings were had.

A P P E A R A N C E S

For the Plaintiff: E. H. Fankhauser, Esq.
Attorney at Law
660 South 200 East
Salt Lake City, Utah

For the Defendant: B. L. Dart, Esq.
310 South Main, Suite 1330
Salt Lake City, Utah

GAYLE B. CAMPELL
CERTIFIED SHORTHAND REPORTER
SALT LAKE CITY, UTAH

1 P R O C E E D I N G S

2 (The Court having conferred with counsel off the
3 record, the following proceedings were had in chambers
4 at 11:15 a.m.)

5 THE COURT: This is the time and place set
6 for the hearing in the matter of Joan H. Elton versus
7 Curtis Beck Elton, 84-347 and 84-348, which cases were
8 consolidated. The record may show that plaintiff is present
9 in person and is represented by E. H. Fankhauser, that
10 defendant is present in person and is represented by B. L.
11 Dart.

12 The Court has discussed the various issues with
13 counsel, and the parties have discussed the issues with
14 their attorneys. The Court is advised that the parties have
15 a settlement in this case. Is that true?

16 MR. FANKHAUSER: Yes, your Honor.

17 MR. DART: Yes, your Honor.

18 THE COURT: Would you please state what the
19 settlement is?

20 MR. FANKHAUSER: Okay. Correct me if I'm
21 wrong, Bert. The plaintiff, Mrs. Elton, would receive, free
22 and clear of any claims of Mr. Elton, the residence she
23 owned before marriage at 280 Mar Vista in Tooele, subject
24 to the balance of the mortgage indebtedness owing thereon.
25 This is in her name and she will continue to pay that.

1 She will receive all of the furniture and furnish-
2 ings, appliances and personal property in her possession,
3 located at the home, with some exceptions, and we'll note
4 those later. She will receive her '69 Corvette automobile
5 owned before marriage.

6 THE COURT: 1969 Corvette?

7 MR. FANKHAUSER: Correct. All of the ten
8 shares of American Western Insurance that she owned before
9 marriage. She will receive a 1981 Toyota pickup truck with
10 the shell, subject to the balance owing to the Tooele
11 Federal Credit Union, which she will assume and pay and
12 hold Mr. Elton harmless.

13 THE COURT: Toyota truck?

14 MR. FANKHAUSER: Yes. And she will hold
15 Mr. Elton harmless on that.

16 THE COURT: As I understand it, you are co-
17 signed on that loan; is that correct?

18 MR. ELTON: I went down to the credit union,
19 and they said that that loan has been paid off. I presume
20 that she refinanced it.

21 MR. FANKHAUSER: She refinanced it, so
22 there's no problem with that. She will receive the 118
23 shares of Pacific Gas & Electric stock.

24 THE COURT: How many shares?

25 MR. DART: It's 100 shares of Pacific Gas &

1 Electric redeemable preferred, and 18 shares of common.

2 MR. FANKHAUSER: I was going to break that
3 down. She would receive that as part of the distribution
4 of the retirement account, or Mr. Elton's IRA account with
5 the Tooele Federal Credit Union. That will be transferred
6 over to her. She will also receive two of the lots at
7 Gold Hill town site. Which two do you want?

8 MR. DART: We just thought we would set it
9 up -- are they all four together?

10 MR. ELTON: No. I purchased them so that I
11 own a little corner of each major lot. They are spread
12 out.

13 MR. FANKHAUSER: There's two in Block C
14 and two in Block D.

15 MR. ELTON: They are not adjacent. Any two
16 that she would like.

17 MRS. ELTON: Wait until I talk to --

18 THE COURT: Plaintiff to have choice.

19 MRS. ELTON: Can I stipulate which ones
20 later? I haven't even seen the area.

21 MR. DART: That choice to be made within 30
22 days, otherwise she can have "C" and he have "D".

23 THE COURT: You can run an ad in the Wall
24 Street Journal to --

25 MR. FANKHAUSER: This is out by Fish Springs,

1 out in that area.

2 MR. FANKHAUSER: Do you understand what he's
3 saying? You get your choice within 30 days, otherwise
4 he'll get the two in Block C and you will get the two in
5 Block D.

6 MRS. ELTON: It was my understanding they
7 were right in Wendover.

8 MR. ELTON: They are south of Wendover.

9 MR. DART: How far south of Wendover is this
10 property?

11 MR. ELTON: It is south of Wendover by
12 probably 50 miles. It's in that Fish Springs-Calio area.

13 MR. DART: He only paid \$80 apiece for them.

14 MR. FANKHAUSER: Okay. That's two lots.
15 Right.

16 In addition, Mr. Elton will pay to Mrs. Elton as
17 her share of the real properties, principally her home and
18 the triplex, \$10,000 payable at the rate of \$300 a month
19 with 10% interest, and that is to be secured by a mortgage
20 lien on the triplex until paid.

21 MR. DART: It's \$300 per month or more. He
22 can prepay that.

23 MR. FANKHAUSER: Yes, because it's a division
24 of the property. So there's no penalty for prepayment on
25 that.

1 She will retain her own personal property, cloth-
2 ing, jewelry and effects.

3 Mr. Elton will then be awarded the 1978 Toyota
4 land cruiser, the 1978 Chev pickup with camper. As I under-
5 stand it, he has a one-third interest in that?

6 THE COURT: '78 Toyota.

7 MR. DART: Land cruiser.

8 THE COURT: Next item.

9 MR. DART: '78 Chevrolet pickup. He has a
10 third interest on it, with camper. He owns a third of a
11 '53 Willey's jeep, and he owns a Chevrolet Vega that he
12 owned before the marriage. And he owns an interest in a --

13 THE COURT: What was after the jeep?

14 MR. DART: A Chevrolet Vega, owned before
15 marriage. Then there's an '85 Chevrolet van, subject to the
16 loan obligation owing against it. He further would be
17 awarded his retirement in the United States Government. He
18 will be awarded the triplex free and clear of any claim of
19 the plaintiff. Well, there's no balance. That finally got
20 paid off. Subject only to her lien for her property settle-
21 ment.

22 THE COURT: What do you want, a note and
23 trust deed for your security?

24 MR. DART: It's in joint tenancy currently,
25 and we would like to either --

1 THE COURT: Deed out subject to --

2 MR. DART: Deed out subject to that, then

3 have another quit-claim deed held subject to when the

4 balance is paid.

5 They will each of them be awarded their own

6 checking accounts or savings accounts that they may have.

7 MR. FANKHAUSER: She is awarded the building

8 materials that she has in her possession.

9 MR. DART: And there's a bedroom set that

10 was owned by his mother, and also a washer and dryer that

11 are located in his residence that will be awarded to him.

12 MR. FANKHAUSER: Those were the items that

13 came from his mother's property.

14 THE COURT: What did you say besides the

15 dresser and --

16 MR. FANKHAUSER: A washing machine.

17 MR. DART: One thing we have not discussed

18 is that there are some currently outstanding charge accounts,

19 and we would agree to assume and pay the Master Charge and

20 the Visa. I think the other should be assured by her.

21 MR. FANKHAUSER: We would agree to take the

22 Penney's.

23 THE COURT: Defendant to pay Visa?

24 MR. DART: And Master Charge.

25 THE COURT: And Master Charge. And all

1 others except as specifically mentioned?

2 MR. DART: No. Our concern is that there are
3 some that we didn't know about, including the ones he's
4 talking about. So those were the only ones incurred
5 specifically during the marriage that we would assume.

6 MR. FANKHAUSER: There is a Penney's that
7 she will assume, then Sears.

8 MR. DART: Montgomery Ward. Those are the
9 only three, aren't they?

10 MRS. ELTON: That's it.

11 MR. DART: Each to pay own after separation
12 in July of 1984.

13 THE COURT: July 1, 1984.

14 MR. DART: Defendant will agree to pay
15 a portion of plaintiff's attorney's fees in the sum of
16 \$750, to be paid within 30 days from the entry of the de-
17 cree. And there is to be no alimony awarded.

18 MR. FANKHAUSER: Did you say he got the boat
19 motor and trailer also?

20 MR. DART: I said all vehicles in his posses-
21 sion or personal property in his possession.

22 MR. FANKHAUSER: And the Honda motorcycle?

23 MR. DART: And the same for whatever she
24 has.

25 MR. FANKHAUSER: He recently purchased a home

1 also, your Honor, and I don't remember the address.

2 MR. DART: That's located at 291 East Broad-
3 way, and he will be awarded that subject to any liabilities
4 owing against it, free of any claims of Mrs. Elton.

5 THE COURT: West Broadway?

6 MR. DART: East Broadway. Further, each of
7 them would be awarded any inheritance that they have not
8 yet received or would anticipate receiving from their own
9 parents.

10 MR. FANKHAUSER: Free and clear of any claims
11 of the other.

12 MR. DART: I think that covers it.

13 MR. FANKHAUSER: I think that does.

14 MR. DART: One other thing that he had pre-
15 marriage are some Scotch whiskey futures, which he will
16 retain subject to any obligation owing on that. I think
17 that's it.

18 As part of the stipulation, the defendant would
19 withdraw his complaint filed in a companion action which
20 was served as an answer and counterclaim in this action,
21 and consent that his default be entered and that the plain-
22 tiff be awarded a divorce on her grounds of mental cruelty.

23 We would request, in light of the fact that there
24 are no children as issue of the marriage, the length of
25 time since the separation, and the legislative intent now

1 in place but not yet at law, I don't suppose, that the de-
2 cree of divorce be made final on entry.

3 THE COURT: It usually takes a pie to get
4 that accomplished.

5 MR. DART: Would you like a doughnut?

6 THE COURT: All right. What happens with
7 respect to the '84 tax returns?

8 MR. DART: They have not been filed, and it
9 would be his intention to file separately. We've had some
10 problems getting some records, and it would be his desire
11 to do that.

12 MR. FANKHAUSER: Do you want to file
13 separately?

14 MRS. ELTON: Yes.

15 MR. FANKHAUSER: Okay. If you need some
16 information, let me know, Bert, and I'll be glad to help
17 you out.

18 THE COURT: Each to sign necessary documents.

19 MR. DART: Yes.

20 MR. FANKHAUSER: Each to execute any and all
21 documents necessary to carry out award of properties.

22 THE COURT: Mr. Elton, you have heard what's
23 been read into the record, have you not?

24 MR. ELTON: Yes.

25 THE COURT: Do you understand those terms?

1 MR. ELTON: Yes, I do.
2 THE COURT: Do you agree to be bound by those
3 terms?
4 MR. ELTON: Yes, I do.
5 THE COURT: Mrs. Elton, I assume you've heard
6 what's been read into the record?
7 MRS. ELTON: Yes.
8 THE COURT: Do you understand those terms?
9 MRS. ELTON: Yes.
10 THE COURT: Do you agree to be bound by those
11 terms?
12 MRS. ELTON: Yes.
13 THE COURT: Anything else?
14 MR. FANKHAUSER: Reluctantly, but yes.
15 THE COURT: If you win, you do the drafting.
16 MR. FANKHAUSER: Well, I hate to do the
17 drafting, but I guess I'd better. They would up the at-
18 torney's fees another \$250.
19 MR. DART: I'll draft them if you want.
20 THE COURT: We'll excuse you, then, and take
21 her default. Take a doughnut with you.
22 (Whereupon, Mrs. Dart and defendant withdraw.)
23 JOAN H. ELTON,
24 called as a witness on her own behalf, being
25 first duly sworn to tell the truth, the whole

1 truth and nothing but the truth, was examined
2 and testified as follows:

3 DIRECT EXAMINATION

4 BY MR. FANKHAUSER:

5 Q Would you state your full name for the record?

6 A Joan Harris Caldwell Elton.

7 Q How long have you lived in Tooele County?

8 A All my life.

9 Q Why do you want a divorce?

10 A Because of cruelty.

11 Q What kind of cruelty?

12 A Every kind, from being smacked in the face, which
13 caused me to end up wearing a hearing-aid, which I did not
14 wear in the past.

15 Q Anything else?

16 A I did have a disability retirement, but I didn't
17 have to wear it until he smacked me.

18 Q Anything else?

19 A That's the main thing.

20 THE COURT: Has that caused you physical and
21 mental pain and suffering?

22 THE WITNESS: Yes, it has.

23 THE COURT: Granted final on entry.

24 MR. FANKHAUSER: All right.

25 THE COURT: Do you want your former name

1 restored?

2 MRS. ELTON: No. I want to keep the name
3 Elton. I'm going to keep that name.

4 THE COURT: All right. Granted. Good luck
5 to you. You can have two doughnuts.

6 (Mr. Dart re-enters chambers.)

7 MR. DART: Mr. Elton asked if we could have
8 an understanding of when the \$300 a month starts, and
9 apparently he was paying \$300 on the prior order.

10 THE COURT: Well, the prior order was that he
11 pay four hundred, the four hundred due for February plus
12 payable March the 14th. How about the 15th of April and the
13 15th of each month thereafter?

14 MR. FANKHAUSER: That's all right. You'll
15 get \$300 a month the 15th of each month.

16 THE COURT: Commencing April 15th.

17 MR. DART: All right.

18 (Whereupon, the proceedings were concluded at 11:30
19 a.m.)

20 * * *

21

22

23

24

25

1
2
3
4
5
6
7
8
9
0
1
2
3
4
5
6
7
8
9
0
1
2
3
4
5
6
7
8
9
0
1
2
3
4
5

My Commission Expires:

E. H. FANKHAUSER
Bar No. 1032
Attorney for Plaintiff
60 South 200 East, Suite 100
Salt Lake City, Utah 84111
Telephone: 534-1148

FILED
TOOELE COUNTY UTAH

1985 APR 16 AM 9:16

[Signature]
Clerk
3rd District Court

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR TOOELE COUNTY, STATE OF UTAH

JOAN H. ELTON,

Plaintiff,

vs.

CURTIS BECK ELTON,

Defendant.

)

)

FINDINGS OF FACT AND

)

CONCLUSIONS OF LAW

)

Civil No. 84-347

)

Consolidated with
Civil No. 84-348

)

Judge Rigtrup

This cause came on for trial at a regular term of the above entitled Court, pursuant to notice, on March 19, 1985, before the Honorable Kenneth M. Rigtrup, District Judge. Plaintiff was present in person and represented by her attorney, E. H. Fankhauser. Defendant was present in person and represented by his attorney, Bert L. Dart. The Court held an informal Pre-trial conference with counsel in chambers; and the parties thereafter, through their respective attorneys, entered into a stipulation concerning all of the matters in the above entitled cause of action, which stipulation was read into the record, and acknowledged, accepted and approved by the parties hereto, and each of them and their respective

counsel; and, the Defendant having stipulated that his Complaint (Civil No. 84-348) consolidated with this action and deemed to be an Answer and Counterclaim, may be withdrawn and his default entered to the Complaint of Plaintiff; and the default of Defendant having been duly entered by the Court; and the stipulation and settlement agreement of the parties having been approved by the Court; and the Plaintiff having been sworn and testified in support of the allegations of her Complaint on file herein and more than ninety (90) days having lapsed since the commencement of this action; and the matter having been submitted to the Court for its determination and decision; and the Court, being fully advised in the premises, does now make and adopt the following:

FINDINGS OF FACT

1. The Plaintiff is a resident of Tooele County, State of Utah and has been for more than three (3) months prior to the commencement of this action.

2. Plaintiff and Defendant were married December 28, 1977 at Las Vegas, Nevada.

3. That no children have been born as issue of the marriage between Plaintiff and Defendant and none are expected.

4. During the marriage relationship Defendant treated Plaintiff cruelly causing her to suffer mental distress and nervous upset in that the Defendant was very demanding of the Plaintiff and critized her in front of family members, relatives and friends;

exhibited a violent temper and verbally and physically abused the Plaintiff, all of which acts caused the Plaintiff to suffer extreme mental distress and nervous upset to such an extent that continuation of the marriage relationship became impossible. The parties separated on or about July 1, 1984 and have remained separate and apart since said date. The Court finds sufficient cause existing for waiving the interlocutory period.

5. Pursuant to the stipulation entered into between the parties, through their respective attorneys, the Plaintiff is to be awarded as her sole and separate property, free and clear of all claims of the Defendant, the following:

(a) All personal property owned by Plaintiff prior to her marriage to Defendant, including and not limited to, furniture, appliances, household furnishings; 1969 Chevrolet Corvette; 10 shares of common stock in American Western Life; her own personal property, clothing, jewelry and effects;

(b) All of the furniture, furnishings, fixtures, appliances, housekeeping supplies and effects in possession of Plaintiff, including and not limited to, microwave oven, dishwasher, sewing machine, two color portable television sets, all building materials in possession of the Plaintiff; her bank accounts in her name; the 1981 Toyota pickup truck, subject to the balance of the obligation owing thereon to the Tooele Federal Credit Union, which she is to assume and pay and hold Defendant harmless;

(c) The home and residence in Plaintiff's name located at 280 Marvista, Tooele City, Utah, subject to the balance of the first mortgage indebtedness owing thereon which she is to assume and pay, free and clear of any and all claims of the Defendant; two (2) of the four (4) lots located in the Gold Hill Townsite, Westward Ho Addition, Tooele County, Section 1, Township 8 South, Range 18 West, Salt Lake Base and Meridian. Plaintiff shall have thirty (30) days from the date of the Decree of Divorce to elect which two lots she desires to be deeded to her. Should the Plaintiff fail to make the election within thirty (30) days from the date of the Decree of Divorce, Plaintiff shall be awarded Lots 18 and 26 of Block D, Gold Hill Townsite, Westward Ho Addition. Defendant will be awarded Lot 17 and 27 of Block C, Gold Hill Townsite, Westward Ho Addition.

(d) Plaintiff is to be awarded all sums on deposit in Defendant's IRA Retirement account with Tooele Federal Credit Union, including accumulated interest. Defendant is to make arrangements to transfer ownership of the account to Plaintiff. Plaintiff is awarded all shares of stock presently held by the parties in Pacific Gas and Electric comprising 100 shares of preferred stock and 18 shares of common stock;

(e) Defendant shall pay to Plaintiff as her share of the equity in and to the tri-plex located at 261 Marvista

Lane, Tooele, Utah, the sum of \$10,000.00, payable at the rate of \$300.00 per month with interest of ten (10%) percent per annum. Payments are to commence on or before April 15, 1985 and on or before the 15th day of each and every month thereafter until the entire sum of \$10,000.00, together with interest at ten (10%) percent per annum is paid in full. Plaintiff is to have a first mortgage lien on the tri-plex until the entire sum of \$10,000.00 is paid in full.

(f) Defendant stipulates and agrees that he will pay to Plaintiff to assist her in the payment of her attorney's fees the sum of \$750.00. Said sum shall be payable within thrity (30) days from the date of the entry of the Decree of Divorce herein.

6. Pursuant to the oral stipulation entered into between the parties, through their respective attorneys, the Defendant is to be awarded as his sole and separate property, free and clear of all claims of the Plaintiff, the following:

(a) The property owned by Defendant before marriage to Plaintiff, including and not limited to, the 1976 Vega, the Scotch Whiskey Future, proceeds from the sale of Jonathan Logan stock, camping equipment, the black & white television set, the other items of furniture and appliances in his possession, and the proceeds from the sale of his home at 990 Coleman Avenue, Tooele, Utah, which proceeds

were used to purchase the tri-plex at 261 Marvista Lane, Tooele, Utah; his own personal property, clothing, jewelry and effects;

(b) Defendant's tools, table saw and drill press; the couch and love seat received from his mother; the bedroom set received from his mother; the washer and dryer received from his mother; the 1985 Chevrolet van, subject to the existing loan owing thereon which he is to assume and pay and hold Plaintiff harmless; the one-third (1/3) interest in the 1978 Chevrolet pickup truck with camper, subject to the balance of the loan obligation owing thereon which Defendant is to assume and pay and hold Plaintiff harmless; the one-half (1/2) interest in the boat, motor and trailer; the 1978 Toyota Landcruiser; the one-third (1/3) interest in the Willy's Jeep; the 750 Honda motorcycle with trailer; and his Federal Retirement account with the United States Government;

(c) Defendant is to be awarded the tri-plex located at 261 Marvista Lane, Tooele, Utah, subject to any and all indebtedness and encumbrances owing thereon which Defendant is to assume and pay and subject to a first mortgage lien in favor of Plaintiff in the sum of \$10,000.00, which lien is to be payable at the rate of \$300.00 per month with interest at the rate of ten (10%) percent per annum, commencing April 15, 1985 and the 15th day of each and every month thereafter until paid in full;

(d) Two (2) of the lots located at Gold Hill Townsite, Westward Ho Addition, Tooele County, subject to the option of Plaintiff to elect within thrity (30) days which of the two lots she desires to be awarded to her. In the event Plaintiff should fail to make an election within thrity (30) days from the date of the Decree of Divorce, Defendant shall be awarded Lots 17 and 27 of Block C, Gold Hill Townsite, Westward Ho Addition, Tooele County, Utah. Plaintiff shall be awarded Lots 18 and 26 of Block D, Gold Hill Townsite, Westward Ho Addition, Tooele County, Utah;

(e) Defendant is to be awarded all right, title and interest in and to the home recently purchased by him located at 291 East Broadway, Tooele, Utah, subject to any and all indebtedness owing thereon which he is to assume and pay;

(f) Defendant, by stipulation, is to be responsible to assume and pay the debts and obligations owing to GMAC for the 1985 Chevrolet Van, GMAC for the 1978 pickup truck and camper; First Security Bank loan for attorney's fees, Tooele Federal Credit Union for Defendant's personal loans; the Elton estate for all sums borrowed, Rex Elton; the Mastercard account with Tooele Federal Credit Union; and the Visa card account at Tooele Federal Credit Union, together with any and all other debts and obligations he has incurred since separation and hold Plaintiff harmless;

(g) Plaintiff stipulates that she will be responsible to assume and pay the debts and obligations owing to Sears, Wards, J.C. Penneys, her truck loan to Tooele Federal Credit Union, and all other debts and obligations she has incurred since separation and hold Defendant harmless;

(h) Defendant is awarded his bank accounts in his name except for his IRA account with Tooele Federal Credit Union which is to be transferred to Plaintiff;

(i) Each party stipulates and agrees that they will execute any and all documents necessary to carry out the transfers and awards of property, real and personal, stipulated to, and approved by the Court.

7. Plaintiff, at the time she married Defendant, was totally disabled due to a loss of hearing (Tinnitus) and was receiving disability benefits from her former employer, Tooele Ordinance Depot. Plaintiff receives disability benefits at the present time of \$659.00 per month gross. Defendant is employed and working for the United States Government at Dugway Proving Grounds and has a gross income of \$30,000.00 per year. The parties stipulated that alimony not be awarded to either party. Under the present circumstances, it is reasonable that alimony not be awarded to either party.

8. Plaintiff has in force and effect a hospital and medical insurance policy. Defendant has in force and effect through his employment, a hospital and medical insurance policy. It is reason-

able that each party be required to maintain their own hospital and medical insurance policies for their own benefit.

9. The Court finds that the oral stipulation entered into between the parties is reasonable under the present circumstances, does hereby approve said stipulation and finds that the same should be incorporated in the Conclusions of Law and Decree of Divorce to be entered herein.

The Court, having made its Findings of Fact, now concludes as follows:

CONCLUSIONS OF LAW

1. The Court has jurisdiction of this matter and of the parties. The Plaintiff is entitled to a Decree of Divorce from the Defendant upon the grounds of mental cruelty, which Decree is to become final upon entry.

2. That the oral stipulation and property settlement agreement submitted to the Court, and duly approved by the Court, which stipulation and property settlement agreement is set forth in the Findings of Fact hereinabove, is adopted by the Court and is expressly incorporated in these Conclusions of Law.

3. Plaintiff should be awarded all of the real and personal property stipulated to be awarded to Plaintiff and as set forth in the Findings of Facts hereinabove

4. Defendant should be awarded all of the real and personal property stipulated to be awarded Defendant as set forth in the

indings of Fact hereinabove.

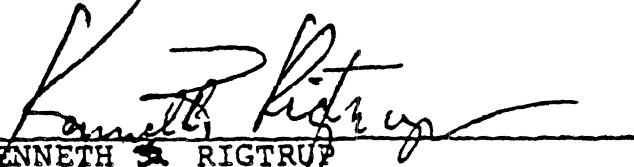
5. Neither party should be awarded alimony.

6. Each of the parties should be ordered to execute any and all documents necessary to carry out the awards of property stipulated to between the parties and as set forth in the Findings of Fact hereinabove. Further, each of the parties should be ordered to deliver those items of property in their possession awarded to the other party.

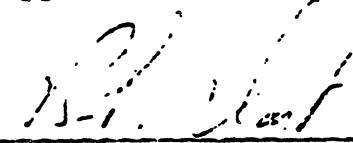
IT IS HEREBY ORDERED THAT JUDGMENT BE ENTERED ACCORDINGLY.

DONE IN OPEN COURT this 16th day of April, 1985.

BY THE COURT:


KENNETH A. RIGTRUP
DISTRICT JUDGE

Approved as to form:


B. L. DART
Attorney for Defendant

E. H. FANKHAUSER
Bar No. 1032
Attorney for Plaintiff
660 South 200 East, Suite 100
Salt Lake City, Utah 84111
Telephone: 534-1148

FILED
TOOELE COUNTY UTAH

1985 APR 16 AM 9:16

U. H. Fankhauser
CLERK
3rd DISTRICT COURT

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR TOOELE COUNTY, STATE OF UTAH

JOAN H. ELTON,

Plaintiff,

vs.

CURTIS BECK ELTON,

Defendant.

)
)
)
)
)
)
)

DECREE OF DIVORCE

Civil No. 84-347

Consolidated with
Civil No. 84-348

Judge Rigtrup

This cause came on for trial at a regular term of the above entitled Court, pursuant to notice, on March 19, 1985, the Honorable Kenneth Rigtrup, District Judge, presiding. Plaintiff was present in person and represented by her attorney, E. H. Fankhauser. Defendant was present in person and represented by his attorney, Bert L. Dart. The parties, through their respective attorneys, entered into a stipulation concerning all of the matters in the above entitled action; and which stipulation was acknowledged, accepted and approved by the parties hereto, and which stipulation was approved by the Court and ordered to be included in the Findings of Fact and Conclusions of Law, and the Decree of Divorce herein;

and, the default of Defendant having been duly entered by the Court to the Complaint of Plaintiff; and the Plaintiff having been duly sworn and testified in support of the allegations of her Complaint on file herein; and more than ninety (90) days having lapsed since the commencement of this action; and the matter having been submitted to the Court for its determination and decision; and the Court, having made and entered its Findings of Fact and Conclusions of Law; and in accordance therewith, now, therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. That Plaintiff, JOAN ELTON, be and is hereby granted a Decree of Divorce from Defendant, CURTIS BECK ELTON, dissolving the bonds of matrimony presently existing between Plaintiff and Defendant, which Decree of Divorce is to become final upon entry.

2. Plaintiff be and is hereby awarded as her sole and separate property, free and clear of all claims of Defendant, the following, to-wit:

(a) The home and residence owned by Plaintiff before marriage located at 280 Marvista, Tooele, Utah subject to the balance of the mortgage indebtedness thereon which he is to assume and pay;

(b) All furniture, household furnishings, appliances and effects in her possession, except for the items specifically awarded to Defendant;

(c) 1969 Corvette owned before marriage; 1981 Toyota pickup truck, subject to the balance of the

obligation owing thereon to Tooele Federal Credit Union which she is to assume and pay and hold Defendant harmless;

(d) Ten (10) shares American Western Insurance stock owned before marriage; 118 shares Pacific Gas and Electric stock (100 shares preferred, 18 shares common);

(e) All bank accounts in Plaintiff's name, including Plaintiff's IRA account. Defendant's IRA account with Tooele Federal Credit Union. Defendant is ordered to change over his IRA account to the name of Plaintiff;

(f) \$10,000.00 representing Plaintiff's share of the equity in and to the tri-plex property, which sum is to be paid out at the rate of \$300.00 per month commencing on or before April 15, 1985 and the 15th day of each and every month thereafter with interest at the rate of ten (10%) per annum until paid in full. Plaintiff is to have a first mortgage lien on the tri-plex to secure payment of this amount;

(g) All building materials in Plaintiff's possession, together her personal property, clothing, jewelry and effects.

3. Defendant be and is hereby awarded as his sole and separate property, free and clear of all claims of Plaintiff, the following, to-wit:

(a) The tri-plex located at 261 Marvista, Tooele, Utah, subject to any and all indebtedness and encumbrances thereon which he is to assume and pay and hold Plaintiff harmless and subject to a mortgage lien in favor of

Plaintiff in the sum of \$10,000.00 payable at the rate of \$300.00 per month commencing on or before the 15th day of April, 1985 and the 15th day of each and every month thereafter until paid in full, together with interest at the rate of ten (10%) percent per annum;

(b) The Scotch Futures owned by Defendant before marriage; all proceeds from the sale of the Jonathan Logan stock; together with Defendant's bank accounts in his name, except for Defendant's IRA account with Tooele Federal Credit Union, which account and all sums on deposit therein is to be awarded to Plaintiff. Defendant is to arrange for transfer of the IRA account to the name of Plaintiff;

(c) 1978 Toyota Landcruiser, one-third (1/3) interest in the 1978 Chevrolet pickup truck with camper, subject to the balance of the indebtedness owing thereon which Defendant is to assume and pay and hold Plaintiff harmless; the 1985 Chevrolet Van, subject to the indebtedness owing thereon which Defendant is to assume and pay and hold Plaintiff harmless; one-half (1/2) interest in the boat, motor and trailer, the Honda motorcycle with trailer, the one-third (1/3) interest in the 1953 Willy's Jeep; 1976 Vega owned before marriage;

(d) The items of furniture, furnishings and appliances in possession of Defendant, together with the furniture received from his mother consisting of a couch, love seat,

bedroom set, washer and dryer;

(e) Defendant's retirement account with the United States Government, Department of the Army;

(f) The residence recently purchased located at 291 East Broadway, Tooele, Utah;

(g) Defendant's tools, including his table saw and drill press and his own personal property, clothing, jewelry and effects.

4. Each of the parties are awarded two of the lots located at Gold Hill Townsite, Tooele County, Utah. Plaintiff is to have thirty (30) days from the date of the entry of this Decree of Divorce to elect which lots she desires to be awarded to her. Should Plaintiff fail to elect which lots she desires to be awarded to her, Plaintiff will be awarded Lots 18 and 26, Block D, Gold Hill Townsite, Westward Ho Addition, Tooele County, Utah; and Defendant will be awarded Lots 17 and 27, Block C, Gold Hill Townsite, Westward Ho Addition, Tooele County, Utah.

5. Plaintiff is ordered to assume and pay the balance of the mortgage indebtedness owing on her home, the balance of the loan obligation owing on the 1981 Toyota pickup truck, Sears, Wards, J.C. Penneys and any obligations and debts she has incurred since commencing this action and hold Defendant harmless.

6. Defendant is ordered to assume and pay all debts and obligations owing on the tri-plex, GMAC on the 1985 Chevrolet Van, GMAC on the 1978 Chevrolet pickup truck, the obligation owing to

First Interstate Visa card, First Interstate Mastercard, his personal loans to First Security Bank and Tooele Federal Credit Union and all other debts and obligations he has incurred since commencement of this action and hold Plaintiff harmless.

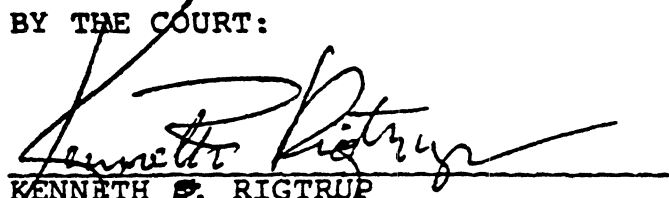
7. Neither party is awarded alimony.

8. Defendant is ordered to pay to Plaintiff the sum of \$750.00 for the use and benefit of her attorney to assist her in the payment of her attorney's fees and costs. Each party shall be responsible to pay the balance, if any, on their own attorney's fees and costs incurred in this action.

9. Plaintiff and Defendant are ordered to execute any and all documents necessary to carry out the awards of property as set forth herein.

DATED this 16th day of April, 1985.

BY THE COURT:


KENNETH S. RIGTRUP
DISTRICT JUDGE

Approved as to form:


B. L. DART
Attorney for Defendant

STATE OF UTAH)
County of Tooele) ss

DENNIS D. EWING, County Clerk and Ex-Officio Clerk of the District Court of the Third Judicial District of the State of Utah, in and for the County of Tooele, a Court of record, do hereby certify that the foregoing copy of _____

_____ has been by me compared with the original thereof, now of record in my office and that the same is a full, true and correct transcript herefrom and of the whole of said original, as the same appears of record in my office and in my custody.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal this 16 day of April, A.D. 1985

DENNIS D. EWING

Clerk

File No. 24-247

By 

Deputy Clerk

A-30

Original Filed 

1985

RECEIVED
APR 29 1985
GRT, ADJUT, PRK & PRCTR

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR TOOELE COUNTY, STATE OF UTAH

JOAN H. ELTON,)	
)	
Plaintiff,)	
)	
-vs-)	
)	
CURTIS BECK ELTON,)	
)	
Defendant.)	
)	

	MOTION FOR A NEW TRIAL OR
	IN THE ALTERNATIVE A MOTION
	TO AMEND THE JUDGMENT
	Civil No. 84-347
	consolidated with 84-348
	(Judge Rigtrup)

The Plaintiff substantiates in part the Motion for a New Trial on the provisions of Rule 59(a)(6) Utah Rules of Civil Procedure and asserts that no evidence was taken by formal sworn testimony nor were any documents admitted after a foundation was properly laid except the matter of grounds and jurisdiction and the general agreement as to understanding by the Plaintiff and that the evidence is not in any form sufficient to support the decision

or Decree or the division of property as set forth in said Decree. The nature of the agreements between the parties were not because of the averments in Plaintiff's Affidavit sufficient to sustain the decision and determination of the Decree and a division of the property as is evidenced in the Decree is not supported even by the general averments, proffers and representations, the nature of the division being excessive in favor of the Defendant, prejudicial to the rights of the Plaintiff, and not in the interest of justice.

Rule 59(a)(1-4), Utah Rules of Civil Procedure, require Affidavits to substantiate and support them as foundations for a new trial and the Plaintiff has in her Affidavit asserted irregularities in the proceedings which prevented her from having a fair trial, entitling her to a new trial on the merits.

In the alternative, should the Court not grant a new trial, the Plaintiff requests an extension of time in which to supply additional Affidavits to evidence such a disproportionate distribution of property acquired during the course of the marriage in favor of the Defendant and against the Plaintiff's best interest as to entitle the Plaintiff to an amendment of the existing Judgment and Decree of Divorce. It is the assertion of the Plaintiff that the distribution evidenced by the existing Decree so disproportionately favors the Defendant as to not be reasonable, prudent or in the interest of justice and as to not otherwise be justified based upon the evidence or proffers made at the time of the original hearing.

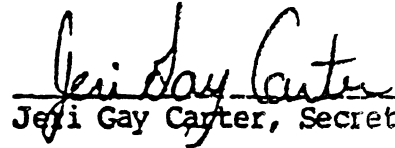
DATED this 25 day of April, 1985.

Wm. B. Parsons III
WILLIAM B. PARSONS III
Attorney for Plaintiff

MAILING CERTIFICATE

I do hereby certify that a true and correct copy of the above and foregoing was mailed postage prepaid this 25 day of April, 1985,
to:

B.L. Dart
DART, ADAMSON, PARKEN & PROCTOR
310 South Main #1330
Salt Lake City, Utah 84101


Jeri Gay Carter, Secretary

WILLIAM B. PARSONS III #2535
PACE, KLIMT, WUNDERLI & PARSONS
1200 University Club Building
136 East South Temple
Salt Lake City, Utah 84111
Telephone: (801) 364-1300

RECEIVED

APR 29 1985

DRT, ADMN, PRKN & PROTR

Attorney for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR TOOELE COUNTY, STATE OF UTAH

-000-

JOAN H. ELTON,)	
)	A F F I D A V I T
Plaintiff,)	
)	
-vs-)	
)	
CURTIS BECK ELTON,)	Civil No. 84-347
)	consolidated with
)	Civil No. 84-348
Defendant.)	(Judge Rigtrup)

I, Joan H. Elton, being first duly sworn do hereby depose and say that:

1. I am the Plaintiff in the above entitled matter.

2. A divorce trial was conducted between myself and the Defendant on or about the 19th day of March, 1985.

3. A Decree of Divorce, as the final Judgment in that proceeding, was signed by the Court and filed with Tooele County Clerk's office on April 16, 1985.

4. That as the Plaintiff in the above entitled matter at the time of the divorce trial I was pressured by my attorney into the settlement, I did not agree with the context of the settlement and was told by my attorney that he was going to see that it took place in the fashion that the decree

evidences.

5. That I wear a hearing aide and cannot hear with out it.

6. That on the day of the divorce trial I could not hear because my hearing aide was not functioning properly and because I had at that time a severe ear infection and I told my attorney, E.H. Fankhauser, of my problem, asked him to seek a continuance and he refused insisting that the proceeding go forward anyway.

7. That irregularities in the proceeding of the Court occurred in that the Defendant's counsel, B.L. Dart, had an extended conference with the Judge before Plaintiff's counsel arrived at the Court.

8. That the evidence is not sufficient in any form to support the decision as evidenced in the Decree of Divorce dividing the marital estate in

th limited particularity the following is asserted:

A. That the evidence was that the Tri-Plex acquired by the parties during the course of the marriage had a fair market value of well in excess of \$80,000.00, that the evidence clearly indicated that the Defendant contributed no more than \$31,000.00 of monies brought in to the marriage to the acquisition of the Tri-Plex and that the Plaintiff was awarded only a \$10,000.00 lien against the Tri-Plex therefore granting in excess of a \$40,000.00 difference and a \$30,000.00 windfall to the Defendant.

B. That even if the Tri-Plex was valued at \$68,000.00 the arithmetical computation would indicate that the Defendant still accrued a two to one equity benefit in the distribution

400
500

of that marital property.

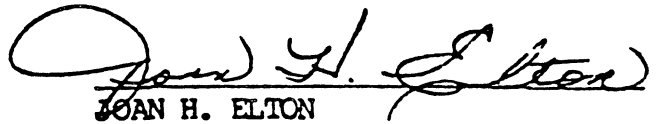
9. That considerable additional marital property was improperly valued and that the Defendant accrued substantial excessive distribution per the Decree.

10. That the Plaintiff through the contribution of time, labor and monies during the course of this eight year marriage also made substantial contribution to the equity in the properties including the Tri-Plex which should have reduced the Defendant's disproportionate original investment to zero.

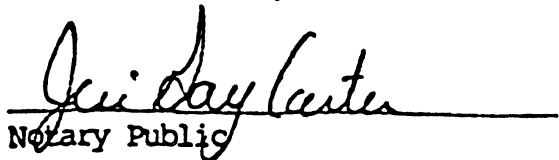
11. That in essence the Defendant caused the Plaintiff's present physical disability to some degree by virtue of the beatings and physical abuse that the Defendant subjected the Plaintiff to during the course of the marriage, limiting the Plaintiff's capacity to sustain herself following the division of their matrimonial bonds and yet no alimony has been awarded by the Court and the Plaintiff asserts that this is a clear abuse of discretion entitling the Plaintiff alone under the provisions of the Utah Rules of Civil Procedure 59(a)(1) to a new trial.

Further the Affiant saith not.

DATED this 25 day of April, 1985.


JOAN H. ELTON

SUBSCRIBED and SWORN to before me this 25 day of April 1985


Notary Public

My Commission Expires:

3-24-87

Residing At: S.L. County, Utah

MAILING CERTIFICATE

I do hereby certify that a true and correct copy of the above and foregoing Affidavit was mailed postage prepaid this 25 day of April 1985, to:

B.L. Dart
DART, ADAMSON, PARKEN & PROCTOR
310 South Main #1330
Salt Lake City, Utah 84101


Jeri Gay Carter, Secretary

B. L. DART (818)
Attorney for Defendant
310 South Main
Suite 1330
Salt Lake City, Utah 84101
(801) 521-6383

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR TOOELE COUNTY, STATE OF UTAH

---ooo0ooo---

JOAN H. ELTON,	:	
Plaintiff,	:	AFFIDAVIT IN OPPOSITION
	:	TO AFFIDAVIT OF PLAINTIFF
v.	:	
CURTIS BECK ELTON,	:	Civil No. 84-347
Defendant.	:	Judge Rigtrup

---ooo0ooo---

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

B. L. Dart, attorney for defendant Curtis Beck Elton,
being first duly sworn, replies to plaintiff's affidavit as
follows:

1. In answer to paragraph 4 of plaintiff's affidavit,
affiant is not aware of what discussions plaintiff had with her
attorney but does represent that the settlement which was reached
was reached after extensive negotiation; was fully read into the
record in the presence of plaintiff and plaintiff at that time

represented to the Court that she understood and agreed to the terms of the settlement.

2. In answer to the allegations of paragraph 6 of plaintiff's affidavit, affiant had an opportunity to observe, as did everybody else in the courtroom, plaintiff on the day of the trial and was able to observe that plaintiff engaged in conversation, responded to questions in an appropriate fashion and in every way demonstrated that she understood what was being said. No objection was made at the time of the hearing for a continuance based upon an ear infection or malfunction in plaintiff's hearing.

3. In answer to the allegations of paragraph 7, affiant denies that any irregularities took place by reason of a meeting between the undersigned and Judge Kenneth Rigtrup. Prior to the arrival of either Judge Rigtrup or E. H. Fankhauser the court reporter, Gayle Campbell, had invited the undersigned into the District Court Judge's Chambers for a doughnut and a cup of coffee. The undersigned did not know that Judge Rigtrup was going to be coming into the chambers in view of the fact that the trial was scheduled in the Juvenile Court courtroom. While the undersigned was drinking his coffee, Judge Rigtrup did enter the room and there was general conversation concerning the weather, the drive to Tooele, the height of the Great Salt Lake, and the University of Utah basketball season. There was no discussion

concerning the case between plaintiff and defendant including the merits of the case or any issues in the case.

4. Affiant does not respond to the allegations contained in the remaining paragraphs of plaintiff's affidavit for the reason that those allegations contain representations on disputed issues of fact which never came on for trial before the Court by reason of the Stipulation reached between the parties and are not relevant to a request for relief under Rule 59 of the Utah Rules of Civil Procedure under circumstances where a Stipulation has been reached by the parties and accepted by the Court.

DATED the _____ day of May, 1985.

B. L. DART

Subscribed and sworn before me this _____ day of May,
1985.

Notary Public

Residing at: _____

Commission expires:

MAILING CERTIFICATE

I hereby certify that on the _____ day of May, 1985, I
mailed a copy of the foregoing Affidavit in Opposition to
Affidavit of Plaintiff to:

**William B. Parsons III
Attorney for Plaintiff
1200 University Club Bldg.
136 East South Temple
Salt Lake City, UT 84111**

COPY

1 IN THE DISTRICT COURT OF TOOELE COUNTY, STATE OF UTAH
2 * * * * *
3 JOAN H. ELTON,)
4 Plaintiff/Appellant,) Civil No. 84-347
5 vs.) REPORTER'S TRANSCRIPT
6 CURTIS BECK ELTON,)
7 Defendant/Respondent.)
8 * * * * *

10 BE IT REMEMBERED, that the above-entitled case
11 came on regularly for hearing before the Honorable Kenneth
12 Rigtrup, a Judge of the Third Judicial District Court of
13 the State of Utah, at Tooele, Tooele County, State of Utah,
14 on the 20th day of May, 1985, and the following proceedings
15 were had.

APPEARANCES:

18	For the Plaintiff:	William B. Parsons III, Esq. Pace, Klimt, Wunderli & Parso 1200 University Club Building 136 East South Temple Salt Lake City, Utah 84111
19		
20		
21	For the Defendant:	Bert L. Dart, Esq. Dart, Adamson, Parken & Proct 310 South Main, Suite 1330 Salt Lake City, Utah 84101
22		

1 P R O C E E D I N G S

2 THE COURT: May we have Joan H. Elton
3 versus Curtis Beck Elton, Civil No. 84-347. May we have
4 your appearances for the record, please?

5 MR. PARSONS: William Parsons in behalf
6 of the petitioner, Joan Elton, your Honor.

7 MR. DART: B. L. Dart on behalf of the
8 defendant. Actually, two actions were filed and consolidated
9 Under this action Mrs. Elton was the plaintiff, so in this
10 proceeding we are representing the defendant.

11 THE COURT: Mrs. Elton, why don't you
12 come up here where you can hear a little better. The record
13 may reflect the presence of both plaintiff and defendant.
14 You may proceed, Mr. Parsons.

15 MR. PARSONS: Thank you, your Honor.
16 Your Honor, briefly, the petition as it has been submitted
17 to the Court, the motion as it has been submitted to the
18 Court is a motion for a new trial, or in the alternative,
19 a motion to amend the existing decree of divorce and findings
20 of fact and conclusions of law. That is predicated upon the
21 principles set forth in the Rules of Procedure, Rule 59(a)
22 and 59(e). I would suggest that the basic concepts as set
23 forth in the affidavit and in the motions themselves are
24 well stated. I did not, however, at the time of the filing
25 of the affidavit have particulars upon which to base the

1 motion beyond just in its roughest form.

2 By way of presentation today, not to be excessive
3 verbose, but if the Court would grant me the privilege of
4 giving some particulars, I would like to quickly show what
5 I consider to be the gross inequities in the distribution of
6 marital assets for the purposes of then evidencing why we
7 ought to go into a hearing.

8 THE COURT: You may proceed.

9 MR. PARSONS: Thank you, your Honor.
10 Your Honor, during the course of this marriage, the marriage
11 having taken place in approximately 1977, there was a tri-
12 plex that was acquired that was a major portion of the
13 marital estate. That triplex is mentioned in the affidavit.
14 That triplex is part of the decree and its distribution,
15 and the triplex was given to the defendant, Mr. Elton. Mr.
16 Elton, it is our understanding -- and I'm working on a
17 limited amount of information because of my newness in the
18 case -- but it's my understanding that Mr. Elton had the
19 opportunity of contributing up to \$31,000 worth of value to
20 the repair and the acquisition cost of that triplex. The
21 plaintiff, if having had the opportunity to present evidence
22 would have presented evidence to show that that triplex was
23 valued at \$80,000 at the time of the divorce. Thirty-one
24 from eighty is approximately \$49,000, and Joan received a
25 \$10,000 lien against the interest in the divorce.

1 It was the representation, and my understanding
2 is --

3 THE COURT: I'm not sure that I'm track-
4 ing you. Are you saying the triplex was free and clear?

5 MR. PARSONS: Yes, and that there was
6 \$67,000 -- I mean \$80,000 worth of value equity, and that he
7 contributed from pre-marital assets some \$31,000. So that
8 the marital equity amounted to approximately \$49,000, and
9 she got ten.

10 Now, it was the defendant's position that the
11 triplex was worth less than \$80,000. In fact, the defendant
12 indicated that, to the best of my knowledge, that the tri-
13 plex was worth about \$68,000. But even if it is sixty-
14 eight, thirty-one from sixty-eight gives you some \$37,000,
15 and again, she got ten. And that would be a three-to-one
16 distribution.

17 Now, during the course or the life of this triplex
18 with the marriage, Mr. Elton was in charge of the receipt
19 of the rents, and received in excess of \$31,000 in 1981,
20 '82, and '83 alone. In 1984 there was an additional sum of
21 money that was received from rent, but the rents changed and
22 we don't know the exact figures. That \$31,000 was used
23 exclusively by Mr. Elton during the course of the marriage,
24 and Mr. Elton maintained separate accounts.

25 THE COURT: During which period of time?

1 MR. PARSONS: During the marriage between
2 1981 and '83.

3 THE COURT: How much did he receive?

4 MR. PARSONS: \$31,680 for those three
5 years, plus rents from the 1st of January of '85 through
6 the time of the divorce. And they would have amounted to
7 approximately \$4,000 during that period of time. Roughly
8 three and a half to four thousand dollars. That marital
9 asset was exclusively controlled and maintained in terms of
10 the rent acquisition. Not the work that went into it, mind
11 you, and not the responsibility for it. But in terms of the
12 use of the proceeds of the rent by Mr. Elton, the defendant
13 in this case, Mr. Elton maintained separate accounts. This
14 marriage was a little different than your ordinary marriage
15 and your economic basis in that he bought and sold what he
16 wanted to buy and sell, and we don't know what happened to
17 that \$31,000. But we think that it went to his own purpose,
18 and we believe we ought to have some distributive interest
19 in that thirty-one thousand plus. It's probably closer to
20 thirty-five thousand with the 1985 rents on it.

21 Now, your Honor, those are reasonably nebulous
22 concepts, but I'll be very specific in the following. During
23 the course of the marriage there were bank accounts that
24 were established, and Mrs. Elton received cash or cash
25 equivalent stock certificates or cash in the amount of about

1 \$5,700. In fact, \$5,754 at the time of the termination of
2 this marriage.

3 THE COURT: Fifty-seven what?

4 MR. PARSONS: Fifty-seven fifty-four,
5 sir. Mr. Elton received cash or cash equivalent amounting
6 to \$20,987 plus, in the form of his government retirement.
7 And that's only marital contributions. In other words, that
8 was part of the contribution that occurred only during the
9 course of time when he was married. Half of that is \$10,000

10 And he received cash or cash equivalent or use
11 thereof over \$20,000 at the time of the breakup of this
12 marriage or at the time of the divorce. Now, relative to
13 personal property --

14 THE COURT: You're saying \$20,000 in
15 addition to the twenty thousand nine eighty?

16 MR. PARSONS: No. Only the \$20,987,
17 sir, versus her \$5,754.

18 Now, in terms of the personal property distributed
19 that was made at the time of this divorce, Mrs. Elton re-
20 ceived an equivalent for vehicles of \$864, according to the
21 figures prepared by Mr. Elton's counsel. And I'm led to
22 believe -- I don't know exactly who prepared these figures
23 but I think that it was Mr. Elton's counsel. And Mr. Elton
24 received a value of \$3,783 according to these computations.
25 Now, Mrs. Elton received no alimony as a result of this

1 divorce. Mrs. Elton wears a hearing aid, is incapacitated,
2 had a hearing loss before the time that the marriage took
3 place, but had that hearing loss, it is her position,
4 severely aggravated by physical abuse that occurred during
5 the course of the marriage. And no alimony was awarded.

6 I would suggest that the aggravation of the hear-
7 ing loss has given rise to a set of circumstances that would
8 have entitled her to alimony, even though she is receiving
9 a payment from the United States Government in the form of
10 a disability payment for having lost her hearing while she
11 was working.

12 THE COURT: Has there been any medical
13 evaluation of her hearing loss?

14 MR. PARSONS: There has been a medical
15 evaluation of the hearing loss, yes, sir.

16 THE COURT: Is it rated any more
17 severely now than what the Government rated it in compensat-
18 ing her?

19 MR. PARSONS: I don't bear the burden
20 of proof relative to that at this particular point. I only
21 make the basic allegation. I do know there was abuse, or
22 there is an allegation of --

23 THE COURT: How do you know that?

24 MR. PARSONS: The allegation. I say,
25 that's the allegation, sir. And the allegation is that

1 there was no hearing aid apparatus required before the abuse
2 took place. The abuse was in the nature of a slap against
3 the head, an open-handed slap to the side of the head. And
4 following that incident the hearing aid apparatus was re-
5 quired for any hearing.

6 Now, I've overlooked a good deal. I've given only
7 a sketchy concept, but I think basically the nature of the
8 rules are such, your Honor, that that's my responsibility at
9 this point. If I can show there is reason to believe, or
10 if I can show prima facie evidence to show that it is reason-
11 able to believe that there was a grossly disproportionate
12 distribution and that justice is not being served, then we
13 ought to have the opportunity of re-opening the matter.

14 Thank you, your Honor.

15 THE COURT: Mr. Dart.

16 MR. DART: My response, your Honor, is
17 that we can respond to the specific allegations, and if the
18 Court desires, I'd be glad to do so. Mr. Parsons fails to
19 take into consideration substantial assets that she received
20 in the form of appreciation in the house that she's living
21 in and reduction of the mortgage balance against that of
22 right at \$20,000. It fails to take into consideration the
23 inheritance that he received that was put into the triplex,
24 and in fact the pre-marital assets exceeded the value of the
25 triplex, as can be testified to by Jerry Roper, who is here

1 to testify as a witness at the trial.

2 Their argument fails to take into consideration
3 that this case was set for trial and we were here on the day
4 of trial and we were here prepared to try it, and through
5 the course of negotiations, a settlement was reached and
6 that settlement was read into the record, and I would like
7 to offer at this time a copy of the transcript.

8 MR. PARSONS: We so stipulate that that
9 did occur and that she was represented by counsel at that
10 time.

11 MR. DART: In which transcript the Court
12 can see that she was represented by competent counsel, Mr.
13 Fankhauser, and a full stipulation was read into the record
14 in the presence of both of the parties under circumstances
15 where each of the parties were asked if they understood the
16 stipulation and if they accepted the stipulation, and they
17 did. And under circumstances during the proceedings where
18 Mrs. Elton was responsive to questions and obviously track-
19 ing with the discussion, responding appropriately. And
20 under the circumstances, there has been nothing raised today
21 that gives a basis for relief under Rule 59(a). The stipu-
22 lation that was reached between the parties is evidentiary
23 information upon which the Court can rely in making a ruling
24 and did so in signing the findings and decree that were pre-
25 pared by Mr. Fankhauser. The stipulation is attacked on the

1 basis that she didn't understand, didn't comprehend, and
2 couldn't hear on the day of the proceeding. Your Honor was
3 in attendance on that day, and I would like to just mention
4 a few places in the transcript where it is obvious that she
5 was tracking with the discussion. It was on page 4, and we
6 were talking about lots that were located out here south of
7 Wendover, Utah. And there was a question of which two lots
8 she wanted to have, and the Court indicated on line 18,
9 "plaintiff to have choice." And Mrs. Elton, in response to
10 that, said, "Can I stipulate which ones later? I haven't
11 seen the area."

12 On the next page Mr. Fankhauser, on line 2, says,
13 "Do you understand what he's saying? You get your choice
14 within 30 days. Otherwise, he'll get the two in Block C
15 and you'll get the two in Block D."

16 "MRS. ELTON: It was my understanding they were
17 right in Wendover."

18 Further on the Court talks about a tax return for
19 1984, on page 10, and the Court says on line 6: "All right.
20 What happens to the 1984 tax returns?" I indicate they have
21 not been filed and that it would be his intention to file
22 separately. And then Mr. Fankhauser, on line 12, turned to
23 his client and says, "Do you want to file separately?" And
24 she said, "Yes."

25 Finally, on page 11, the Court on line 5 says,

1 "Mrs. Elton, I assume you have heard what's been read into
2 the record?"

3 "MRS. ELTON: Yes.

4 "THE COURT: Do you understand those terms?

5 "MRS. ELTON: Yes.

6 "THE COURT: Do you agree to be bound by those
7 terms?

8 "MRS. ELTON: Yes."

9 Under the circumstances, what we have here is a
10 desire on the part of the plaintiff to renegotiate a settle-
11 ment. It is a seller's remorse situation, which if allowed,
12 would result in almost every case being upset because some-
13 one else, after reflection, decided that maybe they didn't
14 get as good a deal as they may have gotten.

15 I submit that we have no basis under the rules
16 for relief. The basis for relief under 59(a) is that there
17 was, (a), an irregularity in the proceedings by which either
18 party was prevented from having a fair trial. There is an
19 allegation that your Honor and myself had discussions in
20 chambers before the case. I filed an affidavit to the ef-
21 fect that that discussion was under circumstances where I had
22 been invited for coffee and a doughnut, and related only to
23 nontrial matters. And in any event, in view of the fact
24 there was a full stipulation entered into, the Court made
25 no rulings, nor could not have made any rulings on the case,

1 so there is no way by which that incident could have had in
2 any way a bearing on whether she was prevented from having
3 a fair trial. The rules provide a basis for relief on newly
4 discovered evidence, but everything that's been talked of
5 today by Mr. Parsons as to the values in the properties,
6 the amount of rents that Mr. Elton received -- by the way,
7 there were payments against the utilities and maintenance
8 and mortgage payments, and the mortgage was down to a \$900
9 balance when the divorce action was filed and had been paid
10 by the time of the divorce. But during the marriage, during
11 the period when he received those rents, there was a mort-
12 gage balance. All that information was available.

13 Now, it was not something that came to light after
14 the fact. And as a result, I take the position that no
15 relief under Rule 59(a) or (e) is being requested consistent
16 with those rules, and that as such, that the motion ought to
17 be denied. With respect to the alimony issue, at the time
18 of the marriage of the parties Mrs. Elton was not working.
19 At the time of the marriage she was drawing a disability
20 check for a hearing impairment, and the circumstances are
21 the same at the present time that she is continuing to draw
22 that disability payment and is not working, although had
23 there been a trial we would have adduced evidence that she,
24 during the marriage, had employment at Kelly Girl, had been
25 able to carry on employment, but in fact was spending most of

1 her time involved with her father's affairs in connection
2 with real estate holdings that he has here in Tooele County.
3 And as such, the Court's determination of no alimony but a
4 property settlement paying her \$300 a month for a \$10,000
5 settlement is appropriate in all respects.

6 MR. PARSONS: Just a brief rebuttal, sir.
7 Thank you.

8 By way of rebuttal to Mr. Dart's comments, Mr.
9 Dart first mentioned the concept of Mrs. Elton's home equity
10 reduction and cited the Court approximately \$20,000 mortgage
11 reduction.

12 MR. DART: No; five thousand reduction,
13 fifteen thousand enhancement.

14 MR. PARSONS: I wanted to -- they had
15 made the allegation that there was a \$15,000 enhancement in
16 value during the course of the marriage in the document they
17 had originally prepared, and in fact there was \$4,500 in
18 mortgage reduction during the course of their marriage.

19 However, we would also point out to the Court that
20 Mrs. Elton singularly paid that mortgage entirely and paid
21 that out of her funds.

22 THE COURT: That doesn't really matter
23 who reduces it, does it?

24 MR. PARSONS: No. But there was only a
25 \$4,500 reduction.

1 THE COURT: I understand.

2 MR. PARSONS: There is a concept of the
3 existence of the hearing loss, and whether or not Mrs. Elton
4 could or could not perceive all that was going forth. I
5 have in my possession a doctor's letter indicating that Mrs.
6 Elton, on the day after this proceeding, went to her hearing
7 doctor for purposes of assisting her in acquiring better
8 hearing because she was not at that time capable of hearing
9 well. I have the hearing test results, in fact, but I only
10 received those this morning and I cannot discern them. I
11 can't tell to what degree she had a hearing impairment, but
12 the report itself does say that she had to come in because
13 she couldn't hear, and that he had to help her because of
14 her not being able to hear. And this was the day after --

15 THE COURT: Generally, discussions
16 concerning settlement didn't take place in the presence of
17 the Court. Mr. Dart did get here early, and there were some
18 doughnut old maids, or whatever they were. I don't know
19 what they are called. The reporter brought in some odds and
20 ends from Salt Lake Doughnut, or whatever. They were a lit-
1 tle hard and stale, as far as I recall.

2 MRS. ELTON: Your Honor, could you speak
3 up, please, or talk into the speaker?

THE COURT: Can you hear me now?

MRS. ELTON: A little better, thank you.

1 THE COURT: The doughnuts that were in
2 on my desk, Mr. Dart was invited to have a doughnut. The
3 case was not discussed. And then when Mr. Fankhauser ar-
4 rived, I generally discussed the case with Mr. Fankhauser
5 and Mr. Dart outside the presence of the parties, and there
6 was an inventory list of a lot of personalty which I didn't
7 pay really much attention to. I addressed the issues of her
8 having a home prior to the marriage, and I discussed the
9 issue of the triplex, and it was represented -- I don't re-
10 member the figures exactly, except I do recall the fact
11 that he put some \$30,000, or received some \$30,000 from a
12 home he sold at or about the time of the marriage, which
13 principally went into the triplex. And I discussed the issue
14 of him having some increased value in his retirement system.
15 And without getting into any nuts and bolts, I simply sug-
16 gested that it appeared to the Court that Mrs. Elton would
17 be entitled to something, and suggested that Mr. Dart make
18 some sort of a cash offer or a payment sort of offer. And
19 as I recall, that figure was \$10,000. I don't recall any of
20 the details.

21 Thereafter, the attorneys left my office and
22 talked with both parties about the matter. I was not in-
23 volved in any detailed discussions at that point. And
24 assuming you were totally deaf, Mrs. Elton, I've dealt with
25 deaf people. I don't sign, I don't talk with them, and it's

1 a slow and laborious process, but I have communicated to
2 them with my legal pad and pen. And I have a hard time
3 understanding why, if you don't have full details at hand,
4 why you couldn't communicate with Mr. Fankhauser in writing,
5 if nothing else. The Court didn't come out in the courtroom,
6 didn't direct the proceedings in any way, shape or form,
7 and so I wasn't involved in those details.

8 I think the record, if there is one, generally
9 bears that out. We didn't discuss a great deal of detail --
10 I haven't read the transcript, but I don't recall that they
11 went through the nuts and bolts of the settlement offer in my
12 presence at all.

13 MR. DART: At the time that the settle-
14 ment had been reached, we then, in chambers, went on the
15 record and read the stipulation. But before that point, your
16 Honor is correct.

17 THE COURT: I do have the recollection
18 that the offer was made or the \$10,000 figure was discussed
19 in my presence. As far as I understand it, that was a start-
20 ing point. Mr. Fankhauser and his client were certainly in
21 a position to counter. I did discuss with both counsel that
22 I generally was philosophically inclined to follow the
23 rationale of the Preston v. Preston case, which simply
24 recognized that parties in cases of second marriage that had
25 pre-existing estates brought them into the marriage, and that

1 they were restored to that position and were entitled to
2 that property back plus the appreciable gain on that prop-
3 erty. And it was within the context of those statements
4 that the parties addressed the settlement negotiations.

5 MR. PARSONS: I don't have any sub-
6 stantial dispute with what the Court has indicated. In fact
7 that really isn't the basis for my motion. We may or may
8 not be successful relative to the motion, but certainly the
9 fundamental basis of the motion is that there is such a
10 disproportionate -- a careful examination would show that
11 there is an incredibly disproportionate distribution of
12 assets, and as a result, there is an insufficiency of evi-
13 dence to substantiate the award as it exists. Now, I think
14 that even though it may well be a strained concept, it
15 nevertheless falls within the provisions of Rule 59(a)(6),
16 insufficient evidence to justify the verdict. Ordinarily
17 I understand the verdict would be a result of evidence sub-
18 mitted and adduced from a presentation on the merits and
19 not as a result of settlement negotiations. The fact that
20 Mrs. Elton has evidenced her dissatisfaction with the rep-
21 resentation that has taken place is neither here nor there.
22 It is evidence that she would have done something differ-
23 ently. My point is that that did not occur. It is up to
24 the Court today to determine, I believe, whether we do or
25 don't fall within the provisions of 59(a)(6). And if we do

1 we are entitled. And frankly, I think we do. I think that
2 the prima facie presentation of the disproportionate distri-
3 bution is sufficient to put us within that provision.

4 Now, even if we don't, sir -- even if we do not,
5 the Court has continuing jurisdiction over the distribution
6 of assets in a marital estate, and we fall clearly within
7 the provisions of 59(e) in that we were timely, you do have
8 continuing jurisdiction, and if there is an inequity that
9 I've evidenced to the Court, then we ought to be entitled to
10 a hearing to justify --

11 THE COURT: I'm not sure you have evi-
12 denced an inequity. If the substantial portion of his sale
13 proceeds went into the triplex, and if he had inheritance
14 payments during the marriage --

15 MR. PARSONS: That didn't go into the
16 triplex.

17 THE COURT: It went into various marital
18 assets.

19 MR. PARSONS: We dispute that. We don't
20 think he has put anything of his inheritance into the marital
21 assets.

22 THE COURT: Where did the inheritance
23 go?

24 MR. PARSONS: Into his own personal
25 toys.

1 THE COURT: How much was the inheritar
2 figure?

3 MR. DART: The inheritance was -- agai
4 if we've got a dispute of fact, then the time to raise it
5 was at the time of trial. But in any event, the inheritar
6 that he received was \$5,000 inheritance, and at the same
7 time he borrowed from his mother \$19,000. That loan was r
8 repaid until his mother's death, and then was taken as a
9 diminution of the estate. So it was sort of a pre-inherit
10 amount, but it did go into the triplex. There was a home
11 sold for \$35,000, then after selling costs there was \$31,0
12 in proceeds, so our position would be that he had a \$35,00
13 asset and he should get \$35,000 credit.

14 THE COURT: Well, at this point, witho
15 some more critical analysis, I don't see -- I don't see, c
16 the face of things, the shocking disproportionateness of i
17 unless you can show me wherein the Court had some misunder
18 standing. I was operating on the assumption that he had
19 substantial proceeds from the sale of a home, that he had
20 substantial inheritance moneys or family moneys that by an
21 large carried the triplex. And there may be some differen
22 in value. She had a home as well that she brought into th
23 marriage, and without going through detailed accountings,
24 which the Court didn't, the only other asset that had any
25 greatly enhanced value, other than the two pieces of

1 property was the retirement.

2 MR. PARSONS: There is a third piece of
3 real estate which also went to the defendant, Mr. Elton.
4 That third piece of real estate and all of its equity were
5 to his benefit, although the equities there were not sub-
6 stantial. But it is in that particular piece of real estate
7 that a portion of his proceeds of his inheritance, if we
8 understood it correctly, went. But that the triplex, on
9 maybe as much as a five-to-one ratio, or maybe as little as
10 a three-to-one ratio, went disproportionately to the de-
11 fendant. It is our position that the personal property, on
12 at least a three-to-one ratio, went to the defendant, and
13 the checking accounts and cash and cash equivalent accounts
14 on as much as a five- or six-to-one ratio went to the de-
15 fendant.

16 THE COURT: Do you have any evidence at
17 all to present to this Court to suggest that the capital
18 investment that went into the triplex wasn't substantially
19 all his, and that --

20 MR. PARSONS: The original capital in-
21 vestment was his.

22 THE COURT: All right. And that appreci-
23 ation thereon, to a large extent, was attributable as a
24 profit or return from that contribution?

25 MR. PARSONS: Yes, sir. I can address

1 that issue.

2 THE COURT: And building up that value?

3 MR. PARSONS: Yes, sir. That issue, I
4 can address.

5 I believe the concept is distinguishable between
6 the original investment capital and the appreciation on the
7 property. It was basically garbage at the time they bought
8 it. It was really deteriorated property. He only paid
9 something like \$23,000 for a triplex, in whole, or the whole
10 unit. And then they went in together and they rebuilt it
11 and they worked on it together. And Mr. Elton did a ton of
12 work, Mrs. Elton did a lot of work, and the rebuilding of
13 this property was a marital endeavor of the parties. It
14 truly was. Sir, your analysis is correct, that it was the
15 original capital investment of the defendant, not the plain-
16 tiff, that gave rise to the opportunity. But the oppor-
17 tunity would never have flourished had it not been for the
18 mutual endeavor of both plaintiff and defendant. And that
19 mutual endeavor enhanced the property in excess of three
20 times its original purchase price. It was bought for
21 twenty-three, and if our evidence showed that there was a
22 market value of eighty, which would be more than three times
23 the value at the end of the marriage. And that's in a
24 short period of time when my real estate was going to pot.
25 I have some considerable experience in recognizing the nature

1 of the depreciation that took place in 1981, 1982 and 1983.
2 And theirs markedly increased, and it could only do that by
3 virtue of change in the basic character of that which
4 existed. And that change of character was attributable to
5 the two people, not to the one. So I don't think that you
6 can attribute the theory that anything that is otherwise
7 associated with that which he brought into the marriage
8 vis-a-vis the triplex issue, goes back to him. Because that
9 wasn't the way it took place.

1 Again, your Honor, I submit that the appropriate
thing -- and I do not wish to belabor it -- but I would sub-
mit that the appropriate thing would be to set aside the
existing decree, hold an evidentiary hearing and make an
order accordingly.

MR. DART: If the Court will allow me
to respond, looking at the triplex as one asset misconstrues
the totality of all the assets. And as I say, there is
a disregarding of the \$20,000 enhancement she had in the
home that she kept. There is a disregarding of the money
that did come from the inheritance and a loan from his mother
that was used to upgrade the triplex from its original pur-
chase price. We did prepare and have submitted to the Court
an exhibit that we were going to rely upon at trial, which
under our approach would have put him in a posture of having
\$4,000 and with a proposal of \$2,000 paid from him to her

1 to balance those equities. Because of the negotiations,
2 that figure went from \$2,000 to \$10,000, and that's where
3 it stayed. What bothers me that they are saying that based
4 upon her own stipulation, under evidence available to her
5 at the time, she now doesn't like it and she ought to be
6 able to come in and ask for a new trial. I submit that's
7 not a basis under the rules. I have a case of Kline v.
8 Kline, where an attempt was made to set aside a stipulation
9 under circumstances where the husband said he didn't under-
10 stand what was being done. The court found that the trial
11 court's refusal to set it aside was appropriate, and that
12 the court under all the considerations and using the stipula-
13 tion could have made the ruling that it did. And whether
14 to set it aside is within the discretion of the court, but
15 there's got to be some rational basis. Here there is none
16 except, as I say, for remorse that on reflection it wasn't
17 the deal that she wanted.

18 MR. PARSONS: I just want to point out,
19 finally, that as long as there is no final judgment, and the
20 judgment is not final as long as we have filed within the
21 provisions of the rules, which we did, there is no final
22 judgment and the Court unquestionably has the discretion to
23 either re-enter the case or not re-enter. So it's a question
24 of whether we have or have not given sufficient reason for
25 the Court to re-enter the issue and make a determination.

1 I'll submit it.

2 MR. DART: We'll submit it.

3 THE COURT: With respect to the trial of
4 the matter, there were no communications to the Court as
5 to the plaintiff's underlying disability to go forward with
6 any trial. There were no requests made of the Court to
7 continue the matter. The matter had been noticed up for
8 some several weeks, had been set for trial, and it appeared
9 to the Court that both parties were present in person, were
10 represented by competent counsel, and were prepared to go
11 forward with the trial.

12 The matter of evaluation, I'm not sure what the
13 evidence would have been from either party with respect to
14 value. I heard one or both attorneys, at least, and I take
15 it from what Mr. Dart has said that he at least had an
16 appraiser present to testify as to the value of the property.

17 There's nothing in the way of surprise to either
18 party. They knew what the pieces of real property were. It
19 was apparent to both of them that there was a triplex, that
20 there was a home that Mrs. Elton occupied, and that of
21 recent time during the separation period and shortly before
22 trial, that Mr. Elton had acquired a new home which was sub-
23 stantially mortgaged, and there would have been little, if
24 any, independent generation of equity in. It was obvious
25 who his employer was, and it was obvious that with little or

1 no trouble one could ascertain what the increase in value
2 was in the federal retirement from the date of the marriage
3 to the date of divorce. Those things, I don't think, are
4 difficult to value. They were the substance of the marital
5 estate, with the exception of a lot of toys, as are character-
6 ized by Mrs. Elton.

7 And because those were known to the parties, there
8 appears to be nothing that the Court's been made aware of
9 that was overlooked or is a matter of oversight. It would
10 appear to the Court that there is no substantial basis for
11 granting a new trial or amending the stipulation at this
12 point.

13 MR. PARSONS: Thank you, your Honor.

14 THE COURT: The motion is denied.

15 MR. DART: Thank you, your Honor. I'll
16 prepare an order.

17 (Whereupon, the proceedings were concluded.)

18 * * *

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

REPORTER'S CERTIFICATE

State of Utah)
 : ss.
County of Salt Lake)

I, Gayle B. Campbell, do hereby certify:

That I am one of the Official Court Reporters of
the State of Utah; that on the 20th day of May, 1985, I
attended the within matter and reported in shorthand the
proceedings had thereat; that later I caused my said short-
hand notes to be transcribed into typewriting, and the fore-
going pages, numbered from 1 to 25, inclusive, constitute a
full, true and correct account of the same to the best of my
ability.

Dated at Salt Lake City, Utah this — — day of
July, 1985.

Gayle B. Campbell
Court Reporter

My Commission Expires:

B. L. DART (818)
Attorney for Defendant
Suite 1330
310 South Main
Salt Lake City, Utah 84101
Telephone: (801) 521-6383

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

---oooOooo---

JOAN H. ELTON,	:	
Plaintiff,	:	ORDER
v.	:	Civil No. 84-347
	:	(Consolidated with 84-348
CURTIS BECK ELTON,	:	
Defendant.	:	Judge Rigtrup

---oooOooo---

Plaintiff's Motion for a New Trial or in the Alternative to Amend Judgment entered in this action came on regularly for hearing on the 20th day of May, 1985, at the hour of 1:00 p.m., plaintiff appearing in person and by her attorney William B. Parsons III, and defendant appearing in person and by his attorney B. L. Dart, and the Court having heard argument from respective counsel, and the transcript from the divorce proceeding having been offered and received as an exhibit, and the Court having reviewed the presentations and being fully advised,

IT IS HEREBY ORDERED that plaintiff Joan H. Elton's Motion for a New Trial and her Motion in the Alternative to Amend the Judgment are both denied.

DATED this ____ day of _____, 1985.

BY THE COURT:

DISTRICT JUDGE

MAILING CERTIFICATE

I hereby certify that on the 21st day of May, 1985, I mailed a copy of the foregoing Order to:

William B. Parsons III
1200 University Club Building
136 East South Temple
Salt Lake City, Utah 84111

Attorney for Defendant.
