

1986

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

Utah Supreme Court

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

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DOCKET NO. 860127-CA IN THE SUPREME COURT OF THE STATE OF UTAH

JOAN H. ELTON,

Plaintiff/Appellant.

-vs-

CURTIS BECK ELTON,

Defendant/Respondent.

Case No. 20723

860127-CA

BRIEF OF APPELLANT

APPEAL FROM FINAL JUDGMENT
OF THIRD JUDICIAL DISTRICT COURT IN AND FOR TOOELE COUNTY
HONORABLE KENNETH RIGTRUP, JUDGE

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FILED
NOV 27 1985

Clerk of the Court

IN THE SUPREME COURT OF THE STATE OF UTAH

JOAN H. ELTON,)	
)	
Plaintiff/Appellant.)	
)	Case No. 20723
-vs-)	
)	
CURTIS BECK ELTON,)	
)	
Defendant/Respondent.)	

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TABLE OF CONTENTS

TABLE OF CONTENTS	1
TABLE OF AUTHORITIES	2
STATEMENT OF ISSUES PRESENTED ON APPEAL	3
STATEMENT OF FACTS	4
SUMMARY ARGUMENTS	4
POINT I THE TRIAL COURT ERRED IN FAILING TO GRANT ALIMONY TO THE PLAINTIFF WIFE	6
POINT II IT WAS AN ABUSE OF DISCRETION BY JUDGE RIGTRUP IN FAILING TO GRANT A NEW TRIAL OR AMEND THE JUDGMENT AND DECREE OF DIVORCE IN LIGHT OF THE APPELLANT'S DEMONSTRATION OF A DISPROPORTIONATE DIVISION OF ASSETS	7
POINT III A DEFAULT DIVORCE HEARING ATTAINS THE SUBSTANTIVE CHARACTERISTICS OF A SUMMARY PROCEEDING, AND SUMMARY PROCEEDINGS AND JUDGMENTS RENDERED IN SUMMARY PROCEEDINGS REQUIRE NO ISSUE OF MATERIAL FACT LEFT BETWEEN THE PARTIES	9
CONCLUSIONS	10

ADDENDUM

- (a) Decree of Divorce - April 16, 1985
- (b) Findings of Fact and Conclusions of Law - April 16, 1985
- (c) Motion for a New Trial or in the Alternative
 Motion to Amend the Judgment - April 25, 1985
- (d) Affidavit of Joan H. Elton - April 25, 1985
- (e) Order

TABLE OF AUTHORITIES

	Cited
1. <u>Gramme v. Gramme</u> , 587 P2d 144 (Utah 1978)	6
2. <u>English v. English</u> , 565 P2d 409 (Utah 1977)	7
3. <u>C. frederick May and Company v. Dunn</u> , 368 P2d 266 (Utah 1962)	9
4. <u>Bowen v. Riverton City</u> , 656 P2d 434 (Utah 1982)	9

STATEMENT OF ISSUES PRESENT ON APPEAL

1. Judge Rigtrup erred in the original Divorce Decree in failing to grant alimony to the Plaintiff, wife of the Defendant.

2. Judge Rigtrup erred in not granting a new trial in the divorce proceeding between Plaintiff and Defendant or in the alternative amending the Judgment and altering the Decree of Divorce in conformity with the provisions of the Utah Rules of Civil Procedure, Rule 59(a) and 59(e) in light of the Appellant's demonstration of the disproportionate division of assets at the time of the hearing on the Motion for the new trial or alternatively the Motion to amend the existing Judgment and Decree of Divorce. The Appellant argues this error was a clear abuse of discretion and that the evidence was insufficient to support the Judgment and Decree entered by the Court.

3. Judge Rigtrup erred in failing to grant a new trial because the Defendant had not had her day in Court alleging first a physical incapacity ie a hearing loss which prevented her from understanding the nature of the proceedings involved in the judicial process at the time set for the trial on the merits and secondly, in that default was entered in a summary form of proceeding as a result of proffer of evidence and stipulation which was subsequently disputed by the Affidavit of the Plaintiff and where the Affidavit of Plaintiff disputed the foundation for this summary proceeding, the summary proceeding as a Motion for Summary Judgment requires the Court to view the evidence in a light most favorable to the Plaintiff evidencing that no genuine issue of material fact exists in order to be sustained by the Court. The Appellant argues, was not the case.

STATEMENT OF FACTS

On the 19th day of March 1985, before the Honorable Kenneth Rigtrup, District Judge in the Third Judicial District Court in and for Tooele County, State of Utah, the case of Joan H. Elton v. Curtis Beck Elton came on for trial. Joan Elton was present with her attorney E.H. Fankhauser and Curtis Beck Elton was present with his attorney B.L. Dart.

Evidence was submitted by stipulation read into the record by the parties. The Court thereafter accepted the stipulation of the parties as read into the record, took testimony concerning grounds and jurisdiction and authorized the entry of a Decree of Divorce, Findings of Fact and Conclusions of Law in conformity with the stipulation and the testimony.

A Decree of Divorce was signed by Judge Rigtrup and filed in Tooele County Court Clerk's office on the 16th day of April 1985. A motion for a new trial or in the alternative a motion to amend the judgment in conformity with the provisions of Rule 59(a) and 59(e) of the Utah Rules of Civil Procedure was filed timely with the Court and on the 20th day of May 1985 a hearing was held on Plaintiff's motion as stated, before the Honorable Judge Rigtrup resulting in an Order subsequently signed by Judge Rigtrup denying both motions. From this Order and from the Order in the form of the existing Decree of Divorce this appeal is taken.

SUMMARY OF ARGUMENTS

The Summary of the Arguments essentially in this case is that the Appellant suggests that first Judge Rigtrup was in error in not granting

alimony to the Plaintiff. The Plaintiff has a significant hearing loss requiring the use of a mechanical hearing aid and finding it impossible to hear without the same. The Judge had a duty to prevent the Plaintiff from becoming a public charge and in allowing the Plaintiff to live as nearly as possible at the standard of living she enjoyed during the course of the marriage which duty he failed to fulfill by failing to grant alimony. Secondly, the Appellant suggests that Judge Rigtrup erred in failing to grant a new trial because of the Appellant's clear demonstration of a disproportionate division of assets per the existing Decree of Divorce. The Appellant asserts this to be a clear abuse of discretion and asserts that the evidence is insufficient to support the distribution of assets in the form and format provided by the Decree of Divorce. The Appellant asserts that the demonstration of this disproportionate division of assets occurred clearly at the time of the hearing on the Appellant's Motion for a New Trial or in the alternative a Motion to amend the Judgment and Decree of Divorce. Thirdly, the Appellant argues that the nature of this divorce proceeding was a summary proceeding and that in a summary proceeding there can be no foundation to uphold judgment on a summary proceeding where there is evidence of a dispute as to a material fact or an issue of material fact left unresolved between the parties. The Decree having been founded upon proffers and an oral stipulation read into the record is subject to attack by the presentation in a timely fashion of evidence of a disputed material fact which presentation was properly made to Judge Rigtrup.

POINT I

THE TRIAL COURT ERRED IN FAILING TO GRANT ALIMONY
TO THE PLAINTIFF WIFE

In the case of Gramme v. Gramme, 587 P2d 144 (Utah, 1978), at page 147 the Supreme Court of the State of Utah said:

"The purpose of alimony is to provide post marital support; it is intended neither as a penalty imposed on the husband nor as a reward granted to the wife. Its function is to provide support for the wife as nearly as possible at the standard of living she enjoyed during the marriage and to prevent her from becoming a public charge. Important criteria in determining a reasonable award for support and maintenance are the financial conditions and needs of the wife, considering her station in life; her ability to produce sufficient income for herself; and the ability of the husband to provide support."

In our case at bar the Appellant, as is affirmed in her sworn Affidavit submitted with her Motion for a New Trial, wears a hearing aid as a result of a severe hearing deficiency. The Appellant in this Affidavit avers an incapacity to hear without this hearing aid and further makes the averment that she did not have to wear a hearing aid before she was physically abused during the course of her marriage by her husband and has since that time needed the assistance of this mechanical device in order to hear. The evidence before the Court showed a substantial capacity for income production on the part of the Defendant husband and a very limited capacity for income production on the part of the Plaintiff wife. Further these affirmations as indicated herein and in the Affidavit of the Plaintiff would show or tend to establish a cause or one of the potential causes for this disproportionate earning capacity and for a genuine risk evident of the Plaintiff ultimately

becoming a public charge and failing to maintain herself in a financial position consummate with that position maintained during the course of her marriage. In fact no evidence exists to the contrary. No evidence exists that would give rise to any presumption that the Plaintiff wife, in this case Appellant before this Court, will have any ability to sustain herself as nearly as possible to the standard of living which she enjoyed during the course of the marriage.

With these arguments having been presented to Judge Rigtrup in the Motion for a New Trial and the Motion alternatively to Amend the Judgment and Decree of Divorce particularly with the allegation of a reduced earning capacity predicated upon the physical abuse of the wife by the husband during the course of the marriage, equity would demand a review of the question of an entitlement to alimony above and beyond the Plaintiff's legal right to acquire the same. This concept was not persuasive to Judge Rigtrup and the Appellant respectfully submits that this was a clear abuse of discretion on the part of the Court and an error at law.

POINT II

IT WAS AN ABUSE OF DISCRETION BY JUDGE RIGTRUP
IN FAILING TO GRANT A NEW TRIAL OR AMEND THE
JUDGMENT AND DECREE OF DIVORCE IN LIGHT OF THE
APPELLANT'S DEMONSTRATION OF A DISPROPORTIONATE
DIVISION OF ASSETS

In the case of English v. English , 565 P2d 409 (Utah 1977) at Page 410 the Court says:

"The Trial Court in a divorce action, has considerable latitude of discretion in adjusting financial and property interest. A party appealing therefrom has the burden to prove there was a misunderstanding or

misapplication of the law resulting in a substantial and prejudicial error; or the evidence clearly preponderated against the findings; or such a serious inequity has resulted as to manifest a clear abuse of discretion."

This case has resulted in just such a serious inequity as to manifest a clear abuse of discretion. The evidence submitted by Affidavit and proffered to the Court in the hearing held on the 20th day of May 1985 before the Honorable Judge Kenneth Rigtrup evidences a gross disparity in the division of the marital estate. Without reciting the nature of that gross disparity calling to the Court's attention the language of the Affidavit supporting the Motion for a New Trial and the language contained on pages 2 through 8 of the transcript of the hearing of May 20, 1985, evidences just such inappropriate and grossly disproportionate division of assets. Where such evidence was presented to the Court in a timely fashion a proper procedural review process and where such evidence was as clearly demonstrable, it was an error at law for Judge Rigtrup to fail to grant a new hearing on the merits or for purposes of amending the existing judgment or simply granting a new trial.

The nature of equity would require that basically the marital estate be divided equally between the parties as is the traditional route undertaken by the trial courts in this state and sustained by the Supreme Court of the State of Utah. As the English case evidences considerable latitude and discretion is allowed but grossly disproportionate divisions of the marital estate are not envisioned within this latitude. The facts allege a four to one and three to one ratio in favor of the Defendant/Respondent in the division of the marital estate. Allegations of that kind of disproportionate division are so great that the Court should be charged with the responsibility

of investigating by law and by equity. That investigation properly would take the step of a hearing on the merits in the form of either a new trial or a hearing to determine a more appropriate distribution in the form of an Amended Judgment and Decree.

POINT III

A DEFAULT DIVORCE HEARING ATTAINS THE
SUBSTANTIVE CHARACTERISTICS OF A SUMMARY
PROCEEDING AND SUMMARY PROCEEDINGS AND
JUDGMENTS RENDERED IN SUMMARY PROCEEDINGS
REQUIRE NO ISSUE OF MATERIAL FACT LEFT
BETWEEN THE PARTIES

To sustain a Motion for Summary Judgment which is in essence what this Court will be asked to do by the Respondent on appeal, the pleadings, evidence, admissions and inferences should be most favorably reviewed from the point of view of the party opposing the entry of the Summary Judgment or the sustaining review of the Summary Judgment and must show that there is no issue of material fact. See C. Frederick May and Company v. Dunn , 368 P2d 266 (Utah 1962) and Bowen v. Riverton City , 656 P2d 434 (Utah 1982).

Argumentatively even with a stipulation read into the record by the parties and agreed to by the parties before the Judge without the introduction of demonstrative evidence ie. testimony and documentary evidence the Court is in essence engaged in the rendering of a Summary Judgment from what essentially amounts to proffers by the parties and/or their counsel. For the protection of the rights of the parties where within a timely fashion particularly within the time provided for in the Utah Rules of Civil Procedure for the filing of a Motion for a New Trial, one or more of the parties represents evidence as in the form of a sworn affidavit of the

existence of an outstanding issue of material fact the Court cannot sustain, grant or endorse the Summary Judgment. That is exactly what took place in this case. The Utah Supreme Court has repeatedly remarked in its decisions in the past that the existence of issues of material fact will preclude the entry of a Summary Judgment and even though we are analogizing the traditional conduct of a Motion for Summary Judgment in a law and motion setting to the summary disposition of a case in default divorce setting the analogy is well formed. This client, the Appellant herein has not had her day in Court and the Decree and Findings have been based upon, again what essentially amounts to proffers, representations, and not upon demonstrative evidence or quantitative amounts of sworn testimony.

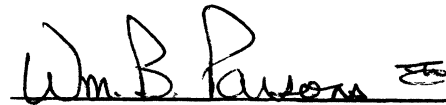
The Appellant submits that error has occurred in the lower Court by their failure to grant a new trial or an amendment to the existing Judgment and Decree because substantive and material issues of fact have been raised concerning the case between the parties and these issues were raised timely and procedurally in a proper format. Further, the Appellant respectfully submits that the Supreme Court should accept the analogy of the Summary Judgment proceeding to the summary disposition of the divorce proceeding because of the equitable considerations required for the benefit of the parties in a divorce proceeding where the nature of the issue of a material fact pertains to a disproportionate division of the marital estate between the litigants.

CONCLUSION

The Appellant has not been given a fair day in Court asserting in her

Affidavit that she could not hear on the date that her attorney and she appeared before Judge Rigtrup together with Mr. Dart and his client Mr. Elton. The Appellant has not been given her day in Court because of the nature of the summary disposition and the lack of demonstrative evidence involving this case. The Appellant has been given a grossly inadequate and disproportionate division of assets in the case and has not been given alimony to any degree even in light of her physical limitations and the disproportionate earning capacities. The Appellant has availed herself the appropriate procedural steps for the review by the lower Court and has failed to gain an open ear. The Appellant respectfully submits that this case is pregnant with inequities and errors of law and requires a remander to the trial Court with a direction for a new trial on the merits.

RESPECTFULLY SUBMITTED this 27th day of November, 1985.

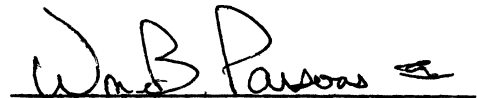


WILLIAM B. PARSONS III
Attorney for Plaintiff/Appellant

HAND DELIVERY CERTIFICATE

The undersigned hereby certifies that a true, correct and complete copy of the document to which this certificate is appended or included was hand delivered to the hereinafter designated addressee on the 27th day of November, 1985:

B.L. Dart
Attorney at Law
310 South Main #1330
Salt Lake City, Utah 84101

Wm B. Parsons 

FILED
TOOELE COUNTY UTAH
1985 APR 16 AM 9:16

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 B. 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 thereof and of the whole of said original, as the same appears of record in my office and in my custody.

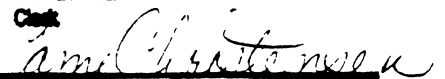
IN WITNESS WHEREOF, I have hereunto set my hand and official seal this 16 day of April A.D. 1985

DENNIS D. EWING

Clerk

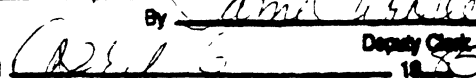
File No. 24-347

By



Deputy Clerk

Original Filed



1885

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FILED
TOOELE COUNTY UTAH

1985 APR 16 AM 9 16

[Signature]
CLERK
3-23-85

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 E. 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

Findings 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.

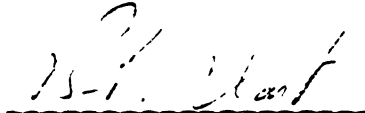
IT IS HEREBY ORDERED THAT JUDGMENT BE ENTERED ACCORDINGLY.

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

BY THE COURT:


KENNETH S. RIGTRUP
DISTRICT JUDGE

Approved as to form:


B. L. DART
Attorney for Defendant

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

Attorney for Plaintiff

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

-oo-

JOAN H. ELTON,)	
)	
Plaintiff,	)	MOTION FOR A NEW TRIAL OR
	)	IN THE ALTERNATIVE A MOTION
-vs-	)	TO AMEND THE JUDGMENT
)	
CURTIS BECK ELTON,	)	Civil No. 84-347
	)	consolidated with 84-348
Defendant.	)	(Judge Rigtrup)
)	

COMES NOW the Plaintiff by and through her attorney of record William B. Parsons III and moves the above entitled Court in conformity with the provisions of Rule 59(a) and 59(e), for a new trial in the divorce proceeding between Plaintiff and Defendant or in the alternative for an amended Judgment and altered Decree of Divorce.

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
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

Attorney for Plaintiff

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

-OO-

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 that with 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

Rents from Tri-Plex
for 7 years

of that marital property.

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

DE &
monies
attributed

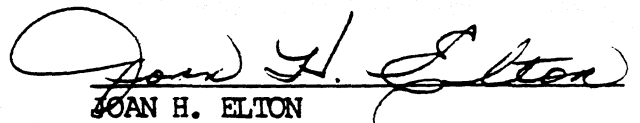
10. That the Plaintiff through the contribution of time, labor and monies during the course of this eight year marriage also made substantial contribution to the equity in the properties including the Tri-Plex which should have reduced the Defendant's disproportionate original investment to zero.

imony

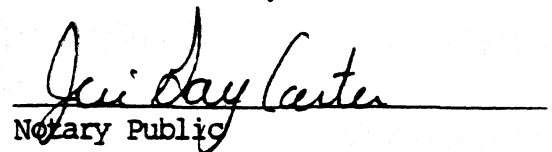
11. That in essence the Defendant caused the Plaintiff's present physical disability to some degree by virtue of the beatings and physical abuse that the Defendant subjected the Plaintiff to during the course of the marriage, limiting the Plaintiff's capacity to sustain herself following the division 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:

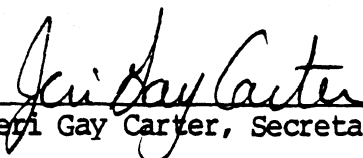
3-24-87

Residing At: S.L. County, Ute

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
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 Alternati
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 attorn
B. L. Dart, and the Court having heard argument from respective
counsel, and the transcript from the divorce proceeding having t
offered and received as an exhibit, and the Court having reviewe
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.
