

1986

Glade Stevens, Milton Stevens, and Margaret Stevens v. Ellen I. Stevens : Brief of Respondent

Utah Supreme Court

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UTAH COURT OF APPEALS

BRIEF

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DUCKET NO. 860138-CA

IN THE SUPREME COURT OF UTAH
STATE OF UTAH

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GLADE STEVENS, MILTON STEVENS, :
AND MARGARET STEVENS, :

Plaintiffs and Respondents :

vs. :

ELLEN I. STEVENS, :

Defendant and Appellant :

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BRIEF OF RESPONDENT

---0000000---

Appeal from Judgment of the Fourth Judicial District Court
for Millard County

Honorable George E. Ballif

---0000000---

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FILED

MAY 27 1986

IN THE SUPREME COURT OF UTAH
STATE OF UTAH

GLADE STEVENS, MILTON STEVENS, :
AND MARGARET STEVENS, :

Plaintiffs and Respondents, :

vs. : Case No. 20801

ELLEN I. STEVENS, :

Defendant and Appellant. :

BRIEF OF RESPONDENT

Appeal from Judgment of the Fourth Judicial District Court
for Millard County

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IN THE SUPREME COURT OF UTAH

STATE OF UTAH

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GLADE STEVENS, MILTON STEVENS :
and MARGARET STEVENS,

Plaintiffs and Respondents :

Case No. 20801

vs. :

ELLEN I. STEVENS, :

Defendant and Appellant :

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BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES

This is an appeal from a Judgment and Decree of the Fourth Judicial District Court for Millard County on Nov. 27, 1984. The Court had previously on the 27th day of November in an earlier hearing awarded a decree of divorce reserving the issues of child custody, visitation, child support and alimony and the matter of property settlement and court costs to be determined by this proceeding.

The Court after hearing the evidence and receiving 19 exhibits, required a written memorandum and brief in lieu of oral arguments from each of the parties, which were presented and considered and on the 28th day of January 1985 the Court entered its decision and plaintiff and respondent was requested to prepare findings of fact and conclusions of law and decree.

The primary issue decided by the court affecting the then related issues is recited on page two of the Decision in the following language:

"The Court finds that the marital assets acquired by the parties consist of an old and a new home located at Fillmore, each with certain household furniture and fixtures; a 1980 Freightliner hay truck, two Ford pickups and a Ford truck used by the plaintiff in his farming and business, and a 1980 Mercury automobile and twenty acres of land. (The Earl Stevens purchase)."

The Court in its decision thereafter specifically ruled out any other items or property as being part of the marital estate.

The Court then went about on page three of the Decision to distribute to the defendant the new home, with all furniture, fixtures and appliances with all mortgages or liens to be paid or discharged by plaintiff (\$27,000 to First Security). The Court also awarded the defendant the 1980 Mercury automobile, the same to be free of debt.

The Court awarded the plaintiff the old home and contents, the 1980 Freightliner and any miscellaneous farm implements and machinery and the benefit of plaintiff's interest in crops harvested and held for sale (200 ton of hay sold to Gordon Ogier for \$50 per ton) and other income related to his business. The plaintiff was to receive the twenty acres of farm land he owned with another individual (Ross Stevens).

The plaintiff is required to pay and discharge all the

debts of the parties, whether related to the business or against other items distributed.

Specifically in the Decision, the Court finds that the defendant has failed to establish that plaintiff, Glade Stevens has any interest in and to the property identified on the security agreement to Milton Stevens (Exhibit p4) and also to the various items of property listed, and identified in the plaintiff's "appraisal exhibit" attached to plaintiff's written summation and there identified as "no security agreement items, (Exhibit D).

The decision awarded the primary care and custody of the minor children to defendant, subject to right of visitation to plaintiff. The Court awarded child support in the amount of \$175 per month per child and \$175 per month alimony. Said payments to be made semi monthly.

The Court required the plaintiff to provide health, medical and dental insurance for the minor children and the parties were to split uncovered expenses. Plaintiff was to pay and discharge all the debts of the parties whether related to business or personal. Debts incurred during separation to be discharged by the party incurring said debt. The appellant raised as issues whether the court erred in making a fair and equitable division of the property, with a value on each contested item.

STATEMENT OF THE CASE

From the Decision of the Court, the plaintiff submitted on February 4, 1985 proposed Findings of Fact consisting of eleven separate findings and eight proposed conclusions. Thereafter on a date in February 1985 defendant presented his proposed Findings of Fact and Conclusions of Law. The defendant proposed findings numbered thirteen together with two conclusions. (Tr 338-344).

Thereafter on April 11th 1985 the Court entered its Ruling on the Proposed Findings (Tr 349-352), Paragraph 1 detailing custody and visitation. The Court adopted defendant's proposal and rejected plaintiff's request.

Paragraph Two dealt with child support; both plaintiff and defendant requested in their finding submitted that the plaintiff be required to pay the defendant \$175 per month per child for the support of the minor children, one half on the 1st and 15th of each month until each child reaches the age of majority. The Court in its Ruling stated, "The Court finds that the last sentence of said Paragraph Two should read, "In addition thereto the plaintiff shall provide health and medical insurance for the minor children including dental care and the parties shall divide equally any uncovered expense for these items."

It should be noted that this provision covering medical and dental insurance with uncovered items to be divided equally between the parties is adopted from defendant's request No. 3 (Tr pp 340 line 1-4).

Alimony of \$175 per month payable semi-monthly was provided in plaintiff's request No. 3 (Tr. 326) and in defendant's request No. 4 (Tr 340) with little or no variation. The Court's ruling found plaintiff's proposal consistent with the Court's Decision.

Plaintiff's finding No. 4 recited in the first half thereof the marital estate (Tr 326), Defendant's requested finding No. 6 a, b, c, d and e, recited the same identical items as the marital estate (Tr 340 line 17 to line 12 page 341). The Court in its ruling ordered deleted and stricken that part of paragraph 4 which reads, "The Court finds from the evidence adduced that there is a substantial amount of indebtedness against both the homes, truck and vehicle".

With that language deleted, the balance of plaintiff's⁴ was found to comply with the Decision (tr 350).

Plaintiff's finding No. 5 that plaintiff should be required to pay and discharge all the debts of the parties whether related to business activity or against other items (tr 328 Par 5) was approved. Defendant's requested instruction No. 9 makes the same request (Tr 342 line 7-12).

Plaintiff's proposed finding No. 6 (Tr 328) recited that "Defendant has failed to establish any interest in the property identified on the security agreement to Milton Stevens and the Court adopted said findings in its Ruling (Tr 350).

Defendant's requested finding no. 10 (Tr 342) contained

the same request in nearly the same language. Plaintiff's requested finding no. 7 found that the claims of the defendant contending plaintiff owns other real estate in Fillmore and St. George have not been established, was adopted by the Court's ruling. Defendant's requested instruction No. 11 (tr 343) was an identical requested finding.

Plaintiff's proposed finding no. 8 relating to the income of the plaintiff to justify the award of child support and alimony awarded in the Decision was disallowed in favor of the defendant's request on the same matter (tr 350), in defendant's request no. 5 which reads as follows: The Court finds that although the income tax returns supplied by the plaintiff on their face may not justify the award of support and alimony hereinabove provided, the Court has determined from the evidence submitted at trial that a substantial amount of tax free income is generated by the plaintiff's activities and that he can afford to pay the sums as support and alimony hereinabove provided.(Tr 340 line 10-16).

The Court in its ruling found that plaintiff's finding 9, 10 and 11 were in conformity with the Court's Decision and should be adopted (Tr 351).

Finding No. 9 was a finding of attorney fees of \$4,000 and found that plaintiff should pay for Dr. Ingrahm's medical fees, (Tr 329). Defendant's requested finding No. 12 (tr 343 line 14-19) requests the same fees and costs.

Plaintiff's requested finding No. 11 found there was insufficient showing to justify awarding claims against parents Milton Stevens and Margaret Stevens (tr 329). Defendant's requested finding No. 13 (tr 343) was the same requested specific finding.

The court thereafter, on May 17, 1985 adopted and signed the finding and conclusions which each party had submitted through request.

STATEMENT OF FACTS

The statement of facts as developed by the appellant recited that after the Court had made its Decision concerning the ownership of the property, that the Court in dividing the marital estate failed to attach a value to any of the items of property divided between the parties.

Appellant then ignores the decision wherein it describes the marital estate; ignores the provisions of his own requested finding of fact as to what items constituted the marital estate request No. 6 (tr p 340) and ignored the court finding requested by the appellant (tr P 357). "That the Court finds that defendant has failed to establish that the plaintiff, Glade Stevens has any interest in and to the property identified on the security agreement to Milton Stevens (Ex 4) and also the various items of property listed and identified in plaintiff's Exhibit D, identified as "No Security Agreement Items." (Tr 358).

The Court was meticulous and definate and articulate in

reciting in Finding 6 and 7 that the Court finds that although Glade Stevens, plaintiff herein, has the right to use many of the items in his farming operation and has economically benefited from them, there has been no showing that he has any equity interest in and to those items to which the defendant has any proper claim. (Emphasis added tr 358)

In Finding no. 7, the Court further finds that other claims registered by the defendant that plaintiff owns other real estate in Fillmore and St. George or elsewhere have not been established.

Despite this plain and unambiguous pronouncement of what is the marital estate and what is not the marital estate, the appellant spends the major portion of his statement and argument as to the sufficiency of the finding as to appraisal and value of what is not the marital estate. But those items too, which were found to not be part of the marital estate were described with exactness by Milton Stevens (tr Exhibit 4 & 9) and cancelled checks were furnished as exhibits showing how much was paid for each item, and from what and whose account it was paid and that the source of the funds emanated from Milton Stevens and Margaret Stevens' funds from the sale of Milton Stevens's water to IPP project.

The plaintiff respectfully submits there is evidence from which the Court did or could have determined the marital estate and the respective value of each item of said estate. Appellant is replowing old ground in his statement of facts wherein he recites on page 6 thereof "that some of the farm

machinery and farm land being utilized in the farming operation by the respondent, Glade Stevens, belonged to his father then questions court's value. As a matter of fact, the defendant in her testimony before the court testified as to the marital estate and the value thereof in the following language: (Volume 1 reporter's transcript page 206 line 22)

Questioning Ellen Stevens: How long had you known Glade Stevens prior to the time of your marriage in March of 1977?

Answer: We had dated a year previous to that. I had known him a year prior to that, but had not really known him.

Question: What was the source of his income, or what was his business or the nature of his livelihood at that time?

Answer: He worked for his father on the farm. (tr 207 line 5)
He also trucked hay with Trent and Kent Crapo.

Question: And were you familiar with the type of business that he was engaged in?

Answer: Yes.

Question: How long prior to your marriage were you aware of his business activities.

Answer: I was aware of his farming activities because I worked on my uncle's farm. So I was aware of it about the year that we had gone with each other.

Question: And you knew that he was working then on his father's farm?

Answer: Yes I did.

Question: Under a cropshare basis?

Answer: My understanding was that someday he hoped to own the farm.

(Line 23) Question: Did the nature of the business that he was engaged in, namely custom farming and selling hay, change over the years, or did he continue after your marriage in the same type of business.

Answer: He increased in what he did on his custom work.

Question: He continued to buy and sell hay as he was doing before your marriage?

Answer: Yes. He increased in that, too.

Question: Did he farm any additional farming property after your marriage? Now, you stated that he was farming his father's property prior to your marriage.

Answer: He had always farmed the Edwards' farm that I have known of. That's why I used to go visit him there, because I knew where the Edwards' farm was. He always had it. And then he acquired the one out by West Mountain.

Question: Burdick's?

Answer: Burdick's farm, yes.

Question: And each of these was on kind of a crop share basis, is that right?

Answer: That was my understanding with them.

Question: Now, prior to your separation, had you made any

contribution by way of monetary payment on any of the matters in which he was engaged, whether it be farming or buying and selling hay?

Answer: No, I didn't. During the first three years of our marriage, I had three children.

The value of the marital estate was developed and stated by defendant (Tr 218 line 16) and by plaintiff Glade Stevens (tr 101-125 Exhibit 4) and by Milton Stevens (tr Exhibit 4 and 9).

Question to Ellen Stevens: Are you aware that the new home with the money and interest cost approximately \$65,000?

Answer: I'm trying to think. I think we paid \$57,000 for the home. I don't know what the taxes and insurance would be over that.

Question: But does \$65,000 sound reasonable to you?

Answer: As far as I know it does, yes.

Question: Do you know what you paid for the old home?

Answer: No, I do not. Glade paid Elmo Louder so much for that house and then we got a loan for so much. I know we paid him in cash.

Plaintiff in his testimony detailed each item of the marital estate, together with the cost, the source of acquisition and any indebtedness or obligation against the said item of the marital estate. Plaintiff furnished an exhibit which was

received into evidence, which described the value of each said item. (See Exhibit 4 & 9) Referring to the new home, he valued it at just what he paid for it. (tr 108). With the interest and everything, plaintiff's testimony was \$65,000. (Tr 109 line 8) With regards to the old home, plaintiff testified \$30,000 as the value. (Tr 109 line 5) He recited a \$27,000 mortgage on the new home and a \$9,000 mortgage on the old home. (Tr 109 lines 9-12) Both of which he was required to pay.

In describing the Earl Stevens property, twenty acres of land purchased by the plaintiff five miles west of Holden, the property was purchased for \$23,200 (Tr 110 line 3). The plaintiff has made one payment on the property of \$4,474, which represents his equity in the property. (Tr 110 line 20)

Milton Stevens has made payment on the Earl Stevens property by way of loan in the sum of \$10,600, (Tr 111 line 13).

The plaintiff next describes the 1980 Cougar automobile which Ellen, the defendant, used and which was awarded to her. He testified that the blue book price on the vehicle was \$5,200 (Tr 112 line 2).

The next marital asset was the pickup truck awarded the plaintiff, the same being a 1976 Ford, for which the blue book quotes the value as \$2,100 (Tr 112 line 15). There is a \$930 lien against the said truck with Kimball and Company.

Another item of the marital estate is farm truck, one ton

1975 Ford with a present value of \$2,400. (Tr 113 line 9) There is a \$450 mortgage to Earl Frampton for the said truck. Plaintiff shows the value of the furniture in the new home received by the plaintiff at \$5,800 to which the defendant concurred. He further shows the furniture in the old home valued at \$5,600 (Tr 113 line 18).

The next and other asset of the marital estate is a 1980 Freightliner truck purchased at White Freightliner in Salt Lake in 1979. The truck cost \$60,000; \$30,000 was paid by the plaintiff and \$30,499 paid by Milton Stevens, father of the plaintiff, for which he has the cancelled checks and has shown the item on the security agreement. The freightliner has a present value of \$24,000, (Exhibit 4 and 9) with \$30,499 owed to Milton Stevens on the said item, the freightliner truck has a minus value of more than \$6,000, which is a loss rather than an asset.

Another marital asset described was a 1978 2 1/2 ton International Grain Truck, purchased for \$22,000. (Tr 116 line 15). That there are liens or mortgages against the said equipment in the amount of \$6,000 to Nephi Branch of the First Security Bank and a \$10,000 note and lien to Milton Stevens, the father. The fair market value of the truck is \$8,000 with \$16,000 still due and owing on it, the said item has a lien of \$8,000 in excess of its fair market value.

The plaintiff describes and details each specific item of machinery, equipment and personal effects used in connection with

the farming, the cost and value are described on pages 117 to 123 of the transcript.

It would serve no useful purpose in this statement of facts to describe said value or cost because the court specifically found that the plaintiff, even though he had the benefit of using the equipment, that he owned no interest, equity or title to such of said equipment. Neither will it serve any useful purpose to recite in this statement values incident to the farming property owned by Milton Stevens, consisting of approximately 360 acres, one half of which is farmed each year under a rotation type program. The plaintiff Milton Stevens furnished to the court and the same were received as exhibits in evidence (See Exhibit 1, 2, 3 and 4, deeds to the property owned solely and exclusively by Milton Stevens; also copies of his Last Will and Testament and Trust documents establishing that no other person or persons except his wife, Margaret Stevens had any interest, equity or benefit in the said real property. The same is true with regard to the old warehouse, located on the homesite property where the said Milton Stevens resides and which he used for storing eggs and grain but which is no longer useable and which has been totally abandoned as a feed or storage operation. The Stevens Feed Company was not a company nor a business, neither has it operated as such during the marriage of the parties. It was merely a name used by Milton Stevens to designate an account; no separate property or income tax was ever shown to Stevens Feed.

SUMMARY OF ARGUMENT

1. The Court described with detail the property comprising the marital estate and made distribution on an equitable basis after determining the value thereof.

2. The Court's decision and finding referred specifically to the earnings of the plaintiff as recited in the income tax returns filed by plaintiff and on which amount the Court found and assessed appropriate child support and alimony payments. The Court further referred to tax free income, and awarded support and alimony on both income reported and tax-free income.

3. The appellant received her fair share of the marital estate as evidenced by the appraisal exhibit which the court referred to as "Property identified on the security agreement to Milton Stevens," and also the various items of property listed and identified in the plaintiff's appraisal exhibit attached to the written summation and there identified as "no security agreement items".

4. The Court in its decision and findings exhibited a careful concern and scrutiny of the plaintiff's income and earnings historically earned, and the future potential income. The conjectures made by defendant's appraisal were unworthy, erroneous, and made upon non-existent properties or properties belonging to others, and mistakenly believed to include interest ownership by the plaintiff. However, these properties were found by the Court to have historically no ownership rights in the plaintiff, but only some benefit of use of his father's farming equipment in plaintiff's custom farming.

5. The Court awarded, along with the specific items of the marital estate, benefits to the defendant and the children by way of the requirement that plaintiff pay all existing debts, obligations or charges, whether incurred in the business or otherwise, and also provided for insurance benefits in the language requested by the defendant in her proposed findings.

6. The District Court has wide discretion in assessing costs, expenses and legal fees, and did not abuse its discretion in this matter.

ARGUMENT

POINT I

THE COURT IN ITS DECISION AND FINDINGS REFERRED TO APPRAISALS AND DETAILED VALUES SUBMITTED BY BOTH PARTIES, AND EQUITABLY DIVIDED THE PROPERTY.

The court in its decision and findings (Tr 357 no.6) referred to appraisal attached to Plaintiffs' summation Exhibit D where the values were detailed as submitted by both parties from the appraisal exhibit and from the cost statement given by the Plaintiff's testimony concurred in as to the new home by defendant were as follows:

New home (free of debt)	65,000.00
Furniture and appliances (debt free)	5,800.00
1980 Mercury car (debt free)	5,200.00
	<hr/>
	76,000.00
Defendant also received control of children's savings	4,000.00

MARITAL ESTATE TO THE PLAINTIFF

Old Home	30,000.00
Furniture and appliances	5,600.00
Parties interest in Earl Stevens' farm	4,474.00
75% interest in 200 ton of hay sold to Ogier @\$50	7,500.00
Interest in Freightliner (debt greater than value)	none
Interest in 1976 Pickup (2,100 less 930 owed)	1,170.00
One ton Farm truck (2400 less 450.	1,950.00
Total Plaintiff Distribution	<u>\$50,694.00</u>

EXPENSES AND DEBTS ORDERED TO BE PAID BY PLAINTIFF

Mortgage on new home	27,000.00
Mortgage on old home	9,000.00
Payment on car for defendant	
Overdraft of First Security Bank	9,500.00
Attorney Fees and costs to the Defendant	4,000.00
Witness fees and costs approved by the court (Tr. 353)	1,224.55
Child support ordered (175/child)	525.00/month
Alimony ordered	175.00/month

By any standard or formula the defendant's division was far in excess of 50% of the total marital estate. The court in Searle v. Searle, 522 P2d 697 (Utah) held that the separate property outside the marital estate was not divided by the court, but the balance of the real and personal property accumulated during the marriage was equally divided. (See also 24 Am Jur 2nd as supporting equal division)

The Utah Supreme Court in Pearson v. Pearson, 561 P2d 1080 (Utah) held that the trial court has great discretion in

making disposition of the property "as it deems fair, equitable, and necessary for the protection and welfare of the parties." (See Wilson v. Wilson, 296 P2d 977 (Utah))

An important factor although generally an unstated premise of the court, property allocation and alimony are often treated as exchangable items. (See Stucki v. Stucki, 562 P2d 240 (Utah)). When the parties discussed divorce and the defendant wife received and obtained the new home, she requested the new home, furniture and fixtures, the 1980 Mercury, and \$400.00 per month child support. Even though she withdrew from such proposal when she received the new home.

Klein v. Klein, 544 P2d 472, held that a withdrawn agreement may be taken into account by the court. The Court's division in the instant case of property to the wife was far in excess of one/half of the established marital estate. Klein, supra. justifies such division based on all the circumstances

POINT II

THE COURT CONSIDERED THE HISTORICAL EARNINGS OF
THE PLAINTIFF AS REPORTED ON INCOME TAX RETURNS,
THE TAX-FREE INCOME AND POTENTIAL FOR FUTURE INCOME

The courts adopted and approved findings of fact as it relates to child support and alimony as is copied verbatim from the requested finding of the defendant. (See Defendant's finding no. 2, 3, 4, and 5, File #2, page 339-340) Now she is found excepting and objecting to the findings she requested the

the court to make.

Jones v. Jones, 700 P2d 1072, (Utah 1985) holds as follows: That the wife's attorney prepared the questioned findings of fact challenged on appeal and the conclusions of law and decree of divorce, all of which the court entered without alteration as requested by defendant.

The court, before making the determination, considered the plaintiff's income tax returns from 1980 to 1983 both as to gross and net income as reported, and then found as requested by defendant (Finding no. 5 Tr. 340). The Court finds that although the income tax returns supplied by the plaintiff on their face may not justify the award of support and alimony herein above provided, the court has determined from the evidence submitted at trial that a substantial amount of tax-free income is generated by the plaintiff's activities, and that he can afford to pay the support and alimony herein above provided.

Obviously the court considered every income and resource available to the plaintiff in making the award.

Plaintiff, in describing his potential income for 1981 on Vol. 1 (Tr 25 page 130) testified as follows:

Q. Are you going to have any income for 1984?

A. That hay that's sitting out there in the yard, we usually sell it in the spring. That's why we hold it over in the Spring for 1985, so we can pay the expenses and fuel until

we raise our next crop. That hay pays for the expense for next year.

Q. And what are you going to pay your bank overdraft with, this?

A. I'll probably have to borrow money. I will probably have to mortgage the home.

Q. Do you have any income potential for 1984?

A. No.

Q. So you are going in the hole, is that right?

A. Yes, for this year. It wasn't in the past.

Q. Yes, that's what I'm asking.

A. Well it's because of the Winter and the price of hay. Everyone knows it's down. It's just been a bad year for farming.

Q. How much do you expect to go in the hole in 1984?

A. It depends on what the truck does. (Page 132 line 8)
About \$10,000.00, I would estimate.

Q. That will be loss over income, is that right?

A. Oh, yes unless I can move that hay now, and then borrow the first of next year to operate on. (Tr. vol. 1 P 132, line 12)

Mr. Gordon Ogier testified that he had known and worked in the same area hauling hay for more than 10 years, and before Glade was married. (Tr. Vol. 1 pg. 189). He further testified that Glade buys and sells hay, and that Ogier does the same thing. Mr. Ogier stated that there was a depressed

market in 1984 and the price of hay was down \$20.00 per ton.
(Tr. 190, vol. 25)

Mr. Ogier further testified (Tr. 191, vol. 23) "Well, what I was going to say is, really, all the farmers are having a problem this year. Farming is not good."

The source of the income from which machinery was purchased and expenses paid originated with the receipt of \$282,000 from the sale of water by Milton Stevens to I.P.P., and land sales of \$20,000 for each of two parcels. The land and the water being solely that of Milton Stevens.

Counsel for defendant in cross-examining Milton Stevens (Tr. Vol. 2, Pg. 406, line 2) questioned as follows:

Q. Do you still maintain that you have loaned all of this money to your son?

A. Yes I do.

Q. And that he didn't put his money into that farm account?

A. No, he didn't. He has never paid me back one penny. Not one bit.

Q. And the purchase of these pieces of equipment was not with monies he received from farming the land?

A. That's right. That's exactly right.

POINT III

THE APPELLANT RECEIVED AN EQUITABLE PORTION OF
THE MARITAL ESTATE.

Some confusion developed when the defendant employed the services of an appraiser, Thomas O. Kysar, whose attempt at an appraisal was misguided, and he in fact submitted Exhibit 12 appraising all of the farm equipment purchased by Milton Stevens in which the court found that the plaintiff had no interest or ownership comprising the marital estate.

Mr. Kysar testified on cross examination that the property he appraised was pointed out by Ellen Stevens and Murray Davies (Tr. Vol 2, pg. 318, Line 17) that as the appraiser rode around the Fillmore area with Murray Davies and Ellen Stevens, they pointed out what they felt was owned by Glade, and what they felt was owned by the farm, and both of them together. (Tr. 315, line 17)

The appraiser was asked by his counsel, Mr. Jensen (Tr. 320, line 21) as to the weight of 294 bales of hay:

Q. That's 1960 pounds per bale? Is that your position Mr. Kysar, that that hay weighed 1960 pounds per bale?

A. All I can tell you is that I would have to look back in my notes on this issue and determine that. Based on this information before me, apparently so.

Question by Mr. Eliason:

Q. Are you aware that bales of hay of this baling type

average between 80 and 110 pounds per bale?

A. Yes I am.

Q. How do you get then approximately 2000 pounds per bale in your computations here?

A. I can't honestly answer that, I don't know.

The witness was asked relative to six stacks of hay in his report by Mr. Eliason:

Q. And you have shown the hay in six different stacks, is that correct?

A. Yes, that's correct.

The witness was shown a picture on the third page from the back of exhibit 12 and asked if that was appraised as property owned by Glade Stevens. He stated it was. The witness was then asked if he was now aware that it was Ross Stevens' hay. The witness answered that it was included by mistake. (Tr. pg. 325, line 24)

In fact, all but one of the six stacks of hay appraised to Glade Stevens belonged to other owners.

The witness was shown a picture of a combine in his appraisal which was appraised at a value of \$50,000.00 to Glade Stevens, which was also in fact the property of Ross Stevens.

The witness further testified (Tr. 333) that he included in his appraisal a Farmall Tractor which in fact belonged to one Gary Stevens, and that it had been mistakenly identified to him as assets of the plaintiff.

The witness testified that he included in his appraisal a home with the value of \$49,921.00 which was in fact owned by one Michael Frazier, and not by Glade Stevens.

The witness further testified (Tr 336, line 11) that the total value of hay appraised to Glade Stevens was \$49,609.00. He again acknowledged mistake in favor of the \$10,000.00 gross price paid for all of the hay purchased from Glade Stevens.

The witness was further asked as to his appraisal exhibit as to the 830,376 ton of hay reported hauled from the Stevens farm on the first seven months of 1984, and was asked by Mr. Eliason:

Q. Are you aware Mr. Kysar that there is 65 acres of hay land capable of growing hay on the property belonging to Milton Stevens, and that the maximum amount of hay grown in any year is five ton per acre or a maximum potential of 325 ton?

A. The witness acknowledged that there was error in the information he gleaned. (Tr. 338, line 5)

The witness was asked (Tr.339, line 13) as to a two-ton Ford truck which was appraised at \$20,000.00. On further question (Tr 340, line 24, he was asked, "Are you aware that that is a 1970 GMC vehicle owned by Glenn Kenworthy?"

A. From the picture I assumed it was owned by Mr. Stevens. And based on my observation with a magnifying glass, it indicated

that it was a Ford Truck.

Q. So you didn't make a personal observation of the truck?

A. Not any closer than that photograph shows, no sir, other than with a magnifying glass.

The witness was asked relative to a 22 foot mobile home, (Tr 341, line 16) which he appraised as an asset of Glade Stevens. He testified that he obtained the value from a blue book. On further inquiry the witness was asked:

Q. Are you now aware that the mobile home belongs to one Robert DeLodge, and is not owned, and no interest is held by Glade Stevens?

A. I am aware of the testimony, yes.

He further testified as to appraising a Farmall Tractor at \$2,000.00 to Glade Stevens, and is now aware that the tractor is owned by Gary Stevens, a neighbor.

It will serve no useful purpose to describe at least six other inaccuracies in the appraisal report, which is sufficient to discredit it entirely.

Point IV

THE COURT WAS JUSTIFIED IN MAKING THE DISTRIBUTION OF THE MARITAL ESTATE THAT IT MADE:

In Proudfit vs. Proudfit, No. 16138 Sup. Ct. Utah filed July 17, 1979 the wife was awarded approximately \$21,000 out of an approximate marital estate of \$64,000.

In Gramme vs. Gramme, 587 Ps 144 (Utah) the wife of 31 years was awarded approximately 33% of the marital estate of \$650,000.

In Klein vs. Klein, Supra the Court awarded the wife approximately 42% marital estate, subsequently reduced by \$200,000.

Westenskow vs. Westenshow, 562 P2 1256 (Utah) the wife was awarded property with a net value of \$7,700. The husband's award had a negative value of \$3,650.

Reed vs. Reed disapproved and remanded an award of 90% to wife because of punishment to husband. Searle vs. Searle 522 P2 697 the Court upheld an equal division of property.

Pope vs. Pope 589 P2 752 (Utah) the wife received about 65% of the marital property but no alimony.

In Smith vs. Smith, 358 P2 183 (Ariz) the court said where there is any reasonable evidence to support judgment of the trial court, the Supreme Court will not disturb it; neither will Supreme Court disturb trial court's judgment where there is conflict in evidence.

Appellant cited In Re Marriage of Mayton, 588 P2 1235 for the proposition that the appellate court could not determine from findings whether the value reflected an equal division. Such does not exist in the instant case. The Court held there that while proper characterizations of property is not necessary, the Court must bear in mind the community or

separate character of the property being distributed.

This the Court did in the instant case.

In Williams vs. Williams, cited by appellant, the proportion that findings were indefinite held "Trial Court in deciding why alimony payments should not be reduced, the Court was not compelled to accept husband's statement but could make its own deductions from the evidence and accompanying circumstances.

The case also held "Determinations of amounts of attorney fees and witness fees in a divorce proceedings is a matter within the discretion of trial court."

POINT V

CHILD SUPPORT AND ALIMONY PAYMENTS ARE BASED UPON THE ABILITY TO PAY OF THE PAYOR AND THE RELATIVE NEEDS OF THE RECIPIENT

Mr. Scott Eastwood, Branch Manager of the Nephi Branch of the First Security Bank was called to testify as to the present finances of the plaintiff. Account No. 04700118-18 was described as an account with Glade Stevens' name on which there existed a \$2,018.13 overdraft. The account had been so overdrafted for five to six months (Tr. 70 line 231)

Another account No. 4711711-24 had an overdraft balance of \$7230.56.

There was a checking account in the names of Milton Stevens, Margaret Stevens or Glade Stevens, which had a positive balance of \$5,089.65.

Glade Stevens had a personal note with the bank, no. 11361 in the amount of \$27,117.00 with a maturity date of April 29, 1985. Also, a note no. 2225 in th amount of \$9,500.00 due January 4, 1985. Further, there was due a note by Glade Stevens no. 3195 for \$6,000.00 with a maturity date of December 10, 1984.

The bank manager testified of having written a letter to plaintiff on November 21, 1984 in which it was stated,

Because of how you have handled these accounts, if funds are not deposited to clear the overdrafts within 10 days from the date of this letter, your checks will be returned, and you accounts will be closed (See exhibit 6).

Plaintiff's ability is thus made apparent. Fathers sometimes waive strictness of payments banks often do not.

POINT VI

ALLOWANCE OF ATTORNEY FEES ARE AUTHORIZED BY THE PROVISIONS OF UCA SEC. 30-3-3. THE AWARD IS DISCRETIONARY (Garrand v. Garrand, 581 P2d 1012) and (Anderson v. Anderson, 368 P2d 264)

The defendant in her requested findings of fact no. 12 (Tr. File A2 p. 343) requests "Defendant is entitled to an award of attorney's fees in the sum of \$4,000.00 for necessary time and effort spent in connection with discovery and preparation for trial in this case. The court further allows the defendant her costs of Court and the additional expenses for hiring Dr. Ingram, and \$700 for the investigator, Tom Proctor.

When the Court signed the judgment and decree of divorce awarding defendant \$4,000.00 legal fees and 1,250 costs, the defendant forthwith on the 14 day of November, 1985 attached plaintiff's bank account and collected and obtained on execution all fees and costs.

Defendant is now estopped from obtaining court costs, legal fees, witness fees, when she has already received and accepted the court's awarded fees and expenses.

CONCLUSION

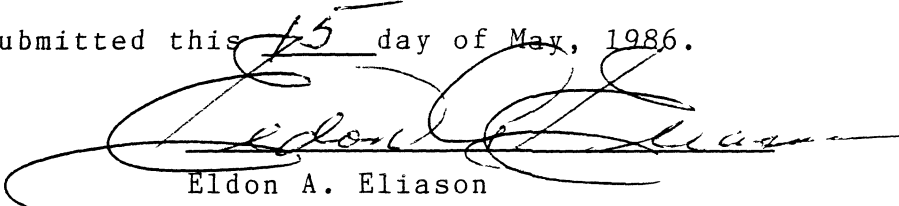
The Court was specific and definate in describing the marital estate item by item. The court was equally articulate in dividing the marital estate on what all of the circumstances and the case law would regard as an equitable basis. The value of the property distributed predominated in favor of the Defendant-Appellant.

Child support and alimony, as awarded, amounted to \$700.00 per month. In addition, defendant has benefited by plaintiff's paying all bills including back interest, personal and property insurance premiums, and personal and property taxes. These costs increased the monthly payments in excess of \$100 per month.

The defendant was awarded a \$65,000.00 home fully furnished and free of any payment or charge, which is another \$500.00 monthly benefit. She received a 1980 Cougar automobile free of debt or lien. Plaintiff was assessed \$4,000.00 legal fees and \$1,250 costs which defendant has already executed upon.

The Plaintiff's present circumstances as fully described will not tolerate more. If his circumstances should improve for the better or the defendant's worsen, the Court has the right to require a hearing for modification. As to now, the Court has not abused its right and prerogative of discretion, and the reviewing Court should not attempt to supplant the Trial Court's judgment.

Respectfully submitted this 15 day of May, 1986.



Eldon A. Eliason
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that I mailed four true and correct copies of the foregoing Respondent's brief, postage prepaid, to Donald R. Jensen, McCullough, Jones, Jensen and Ivins, 930 South State St. , Suite 10, Orem, Utah 84058 this 10 day of May, 1987.

