

1988

Janet T. Millikan v. Clark H. Millikan : Reply Brief

Utah Court of Appeals

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COURT OF APPEALS

DOCKET NO. 88-0213 STATE OF UTAH

JANET T. MILLIKAN,)	
)	
Plaintiff-Appellant,)	Case No. 880213-CA
)	
vs.)	
)	
CLARK H. MILLIKAN,)	District Court
)	
Defendant-Respondent.)	D-86-2818

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STATE OF UTAH
AUG 16 1990

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SUMMARY OF THE ARGUMENT

In her Brief of Appellant, Mrs. Millikan cites authority involving abuse of discretion and unjust apportionment of marital property. She asked the trial court to award her a present lump sum payment of her share of the cash value of the Utah and Mayo retirement assets. She testified about the problematic issue of risk. The trial court made no distribution whatsoever of the Utah and Mayo retirement assets, and placed solely upon Mrs. Millikan the entire burden of surviving Dr. Millikan to ever realize any of those retirement assets. The only retirement asset the trial court awarded her was an \$8,319 IRA--1.8% of the \$451,580.53 in total retirement assets.

The trial court wrongly excluded the Scheinberg letter, which contained the most probative and trustworthy evidence Mrs. Millikan was ever able to obtain regarding the material fact of Dr. Millikan's Miami private patient income. The trial court denied her a continuance to complete discovery of that information. The inability to discover Dr. Millikan's private patient

income continues to prejudice Mrs. Millikan's substantial right to alimony.

The trial court erroneously used the homeowners' policy 60% valuation of household contents in finding the average valuation of those contents. Instead, the trial court should have used the valuation Dr. Millikan made in the 27-page inventory supporting the policy. The valuation error amounted to 25% of the actual average value of the contents.

This Court has already denied Dr. Millikan's claim that Mrs. Millikan's appeal is frivolous and request for costs. This Court should not reconsider those issues.

An immediate offset award to Mrs. Millikan now of her 31% interest in the Utah and Mayo retirements does not preclude consideration of Dr. Millikan's monthly retirement benefits in determining alimony. The case law Dr. Millikan cites has been expressly disapproved.

ARGUMENT

POINT I. MRS. MILLIKAN'S CLAIM OF REVERSIBLE ERROR, BASED UPON THE TRIAL COURT'S ABUSE OF DISCRETION AND UNJUST APPORTIONMENT OF MARITAL PROPERTY, IS MORE THAN SUSTAINED BY THE RECORD IN THIS MATTER.

At the outset of argument in her Brief of Appellant, Mrs. Millikan cites Carlton v. Carlton, 756 P.2d 86 (Utah App. 1988) in support of Point I there that the trial court committed reversible error in failing to find the present value of the substantial Utah and Mayo retirement interests and make an immediate offset award. The Carlton cite provides, in pertinent part:

. . . Finally, the trial court's failure to include property valuations in divorce actions may constitute an abuse of discretion sufficient to require remand for determination. Jones v. Jones, 700 P.2d at 1074; Boyle v. Boyle, 735 P.2d at 671.

756 P.2d at pp. 87-88. [Brief of Appellant, p. 17; emphasis added] This Court vacated the property award in Carlton and remanded for further proceedings consistent with its opinion.

Likewise, in Gardner v. Gardner, 748 P.2d 1076 (Utah 1988) the Utah Supreme Court cited the standard of review in a divorce proceeding:

In a divorce proceeding, the trial court should make a distribution of property and income so that the parties may readjust their lives to their new circumstances as well as possible. Turner v. Turner, 649 P.2d 6 (Utah 1982); MacDonald v. MacDonald, 120 Utah 573, 236 P.2d 1066 (1951). Although this Court may modify decisions of the trial court, its apportionment of marital property will not be disturbed unless it is clearly unjust or a clear abuse of discretion. Turner, 649 P.2d at 8.

748 P.2d at 1078.

Mrs. Millikan's claim of reversible error, based upon the trial court's abuse of discretion and unjust apportionment of marital property, is more than sustained by the record in this matter.

POINT II. THE VALUATION AND APPORTIONMENT OF THE RETIREMENT ASSETS BEING PROPERLY BEFORE THIS COURT, CONTROLLING AUTHORITY ENTITLES MRS. MILLIKAN TO AN IMMEDIATE OFFSET AWARD NOW OF HER 31% EQUITABLE INTEREST IN THOSE RETIREMENT ASSETS.

A. The Issue of Valuation and Apportionment of the \$405,603.53 Utah and Mayo Retirements is Properly Before this Court.

In Dugan v. Jones, 724 P.2d 955 (Utah 1986), the Utah Supreme Court wrote:

An objection to findings of fact and conclusions of law may be made in the form of a motion for a new trial or amendment of judgment, procedures governed by Rule 52(b) and Rule 59 of the Utah Rules of Civil Procedure. "It is settled that . . . a rule 59 motion is [not] a condition precedent to appeal from final judgment." The Nature Conservancy v. Nakila, 4 Hawaii App. 584, 671 P.2d 1025 (1983); Kahn v. Weldin, 60 Or. App. 365, 653 P.2d 1268 (1982); Alaska Airlines, Inc. v. Sweat, 568 P.2d 916 (Alaska 1977). 6A J. Moore, Federal Practice § 59.15[3] (2d Ed. 1986) addresses the submitted issue in language as follows:

A motion for a new trial is not a prerequisite for an appeal from a judgment; and on such appeal review may be had of any legal error, properly raised, that appears in the record, whether the action be a jury or court action. And in the latter action the scope of review also embraces the facts, but the trial court's findings of fact are not to be set aside by the appellate court unless clearly erroneous.

In this proceeding in equity, this Court is free to review both the facts and the law as found and applied by the trial court, but will not disturb the trial court's findings of facts unless the evidence clearly preponderates against them. In re Estate of Hock, 655 P.2d 1111 (Utah 1982); Jensen v. Brown, 639 P.2d 150 (Utah 1981); Carnesecca v. Carnesecca, 572 P.2d 708 (Utah 1977). The failure to object to the findings was not fatal to defendants' appeal. . . .

724 P.2d at 956-957.

While Mrs. Millikan may not have objected immediately after trial to the retirement findings prepared by Dr. Millikan's counsel, nevertheless it is crystal clear that Mrs. Millikan asked the trial court to award her a present lump sum payment of her share of the cash value of the Mayo and Utah retirements. Her request, and her analysis of the problematic issue of risk, are set out in full in Addendum "E" to her Brief of Appellant. Her request was clear:

Mr. Palmer: Are you asking now for the court to award you a present lump sum payment of your share of the cash value of those annuities?

Mrs. Millikan: Yes, I would very much like to have that because otherwise, if I am just left with future money, it is not worth nearly as much as present money.

Obviously, that would take care of my needs, and it would be immediate. And it wouldn't have to be a future possible thing. There is a lot of risk, obviously, in hoping to get something in 10 or 15 years, especially with the history of cancer in my family.

Q. And if Dr. Millikan were to pay out now your share of the present value of those plans, he would then be taking the risk that he would not live long enough to reap his share?

A. Yes, that's correct. It is a difficult problem, I think.

[Tr. December 1, 1987: 243-245/R. 482: 243-245 (Addendum "E" to Brief of Appellant)]. The remainder of Mrs. Millikan's testimony regarding the problematic issue of risk is set out in Addendum "E" to the Brief of Appellant.

Mrs. Millikan's testimony regarding the problematic issue of risk hardly constitutes a waiver of her right to an award of a present lump sum payment of her share of the present cash value of the Mayo and Utah retirements. Barnes v. Wood, 750 P.2d 1226 (Utah App. 1988); Morgan v. Quailbrook Condominium Co., 704 P.2d 573 (Utah 1985); Hunter v. Hunter, 669 P.2d 430 (Utah 1983); Bjork v. April Industries, Inc., 547 P.2d 219 (Utah 1976); and American Savings & Loan Association v. Blomquist, 445 P.2d 1 (Utah 1968).

Mrs. Millikan left the problematic issue of risk to the trial court. The trial court ducked that issue by failing to make findings on the basis of undisputed evidence of the

\$405,603.53 present value of the Utah and Mayo retirements. The trial court's abuse of discretion in failing to make those findings, and the clearly unjust and equitable apportionment of marital property resulting therefrom, should be reversed by this Court.

It cannot be disputed that Mrs. Millikan asked the trial court to award her a present lump sum payment of her share of the present cash value of the Mayo and Utah retirements. That issue was before the trial court. That issue is properly before this Court now.

B. Dr. Millikan's Improper Attempts to Supplement the Record Do Not Preclude an Award to Mrs. Millikan of her \$125,848.07 Interest in the Mayo and Utah Retirements.

In Corbet v. Corbet, 472 P.2d 430 (Utah 1970), the Utah Supreme Court stated the general rule against supplementing the record on appeal with matters not before the trial court. Chief Justice Crockett wrote:

. . . On Appeal to this court we review the judgments and orders appealed from on the basis of the record upon which the trial court acted, and do not permit the supplementing of our record with matters not before the trial court.

472 P.2d at 433. (Footnotes omitted.) See also, Blodgett v. Zions First Nat. Bank, 752 P.2d 901 (Utah App. 1988); Chapman v. Chapman, 728 P.2d 121 (Utah 1986); Matter of Estate of Cluff, 587 P.2d 128 (Utah 1978); and Watkiss v. Symonds, 385 P.2d 154, 14 Utah 2d 406 (Utah 1963).

Dr. Millikan attempts to supplement the record on appeal with Addendums A, B and C to his Brief in Answer to Appeal and in Support of Cross-Appeal ("Dr. Millikan's Brief"). The materials

in Addendum A and C were admittedly **never** before the trial court. (Dr. Millikan's Brief, p. 28) The proper way to get Addendum B before this Court is by motion under Rule 11(b) of the Rules of this Court. Hansen v. Stewart, 761 P.2d 14 (Utah 1988). Dr. Millikan's attempts to supplement the record are clearly improper. In addition, they miss the mark.

Mrs. Millikan is not seeking and indeed has never sought lump sum payments from the Mayo or Utah plans. As set forth on pages 30 to 33 of her Brief of Appellant, Mrs. Millikan seeks an award of \$125,848.07 for her interest in the Mayo and Utah plans from the \$272,997.13 in CD's, an IRA and annuity the trial court awarded Dr. Millikan. The marital assets are clearly sufficient to permit the present lump sum cash award Mrs. Millikan asked the trial court to make.

C. Controlling Authority Entitles Mrs. Millikan to an Immediate Offset Award Now of Her 31% Equitable Interest in the Joint Marital Retirement Assets.

Dr. Millikan attempts to distinguish the retirement distribution cases cited by Mrs. Millikan on the basis that "they are addressed to retirement plans where the spouse had no entitlements to the retirement benefits without a court award." (Dr. Millikan's Brief, p. 32.) That hollow distinction without a difference begs the question. In this case, if Mrs. Millikan predeceases Dr. Millikan she has no entitlement to the retirements even with a court award.

Dr. Millikan laboriously argues that "Mrs. Millikan will receive roughly 57% of the entire benefits." (Dr. Millikan's Brief, p. 33; emphasis in original.) If she dies before Dr.

Millikan, she will receive nothing. Fifty-seven percent of nothing is still nothing. Mrs. Millikan is not "full protected" in her right to enjoy her share of Dr. Millikan's considerable retirement assets.

Mrs. Millikan asks only for a fair and equitable distribution now of her equitable interest in the \$405,603.53 in Mayo and Utah retirement assets. Rather than settle for a "windfall" 57% sometime in the future if she survives Dr. Millikan, Mrs. Millikan willingly asks now for the mere 31% to which she is undisputedly entitled.

Dr. Millikan cites no case law whatsoever where an election under ERISA precludes a state trial court from making an immediate offset distribution of retirement assets. The "irrevocable election" argument is a red herring at best. It was attractive to the trial court. This Court should reject it for the spurious argument that it is.

The trial court abused its discretion in failing to find the undisputed present value of the Utah and Mayo retirements. The trial court compounded that abuse by making no distribution whatsoever of the Mayo and Utah retirement assets. This Court should reverse the trial court's non-distribution of retirement assets and remand for entry of an immediate offset cash award to Mrs. Millikan of \$125,848.07 for her equitable interest in those retirement assets.

POINT III. UNDER THE CIRCUMSTANCES, THE TRIAL COURT
ABUSED ITS DISCRETION IN ITS AWARD OF THE
IRA ASSETS.

Property settlement agreements are not binding upon the

trial court in divorce proceedings. Nunley v. Nunley, 757 P.2d 473 (Utah App. 1988). The trial court failed to find the value of the Mayo and Utah retirements and make an immediate offset lump sum award of \$125,848.07 to Mrs. Millikan. The trial court further abused its discretion in failing to find each party's respective percentage interest in the \$45,977 in IRA's and make an award to each party in accordance with those percentages. The net result is that Mrs. Millikan was awarded only \$8,319 of the \$451,580.53 in Utah, Mayo and IRA retirement assets, a mere 1.8%. This is not equitable.

The trial court's award of the IRA's should be reversed. The trial court should be instructed to find each party's percentage interest in both IRA's and make awards in accordance with those percentages.

POINT IV. THE TRIAL COURT COMMITTED REVERSIBLE ERROR
IN REFUSING TO ADMIT THE SCHEINBERG LETTER
OR GRANT MRS. MILLIKAN A CONTINUANCE TO
COMPLETE DISCOVERY OF DR. MILLIKAN'S MIAMI
PRIVATE PATIENT INCOME.

A. The Scheinberg Letter Should Have Been Admitted Under Rule 803(24) of the Utah Rules of Evidence.

Dr. Millikan does not deny entering into an agreement with Mrs. Millikan to accomplish discovery of Dr. Scheinberg's evidence regarding Dr. Millikan's private patient income at the University of Miami. On page 37 of his Brief, Dr. Millikan states:

. . . The parties agreed to interview Dr. Scheinberg by telephone to avoid the cost of travel to Miami.

On page 40, Dr. Millikan states:

. . . The depositions of Dr. Scheinberg and the payroll clerk were cancelled by stipulation and counsel interrogated Dr. Scheinberg by telephone. (R. 482-Tr. at 258.)

It can readily be inferred from Dr. Millikan's admissions that any information obtained from Dr. Scheinberg in that three-way telephone interview would be in lieu of the depositions Mrs. Millikan had scheduled and that Mrs. Millikan would be entitled to rely on that information. It can also be readily inferred that Mrs. Millikan **was surprised** when, in contravention of the agreement, Dr. Millikan objected to the admission of Dr. Scheinberg's letter to Mr. Palmer regarding information discovered in the course of that three-way telephone conference. The record attests to the surprise. (R. 329-343; 482 - Tr. 249-273.)

Similarly, Dr. Millikan does not deny that Mrs. Millikan was unable to complete his two-day deposition in the one day he deigned to be available. Rather, Dr. Millikan attempts to justify his evasiveness. He argues, in essence, that if Mrs. Millikan or any of her attorneys could not get satisfactory income information from him in her October 1986 discovery, her May 1987 discovery, her September 1987 discovery, or in Dr. Millikan's October 1987 half-completed deposition, then what satisfactory income information she finally did get from Dr. Scheinberg, pursuant to the three-way telephone-conference-in-lieu-of-deposition agreement, he really did not intend she could use. The trial court committed reversible error in excluding the Scheinberg letter and refusing Mrs. Millikan a continuance to complete discovery of Dr. Millikan's Miami private patient income.

Rule 803(24)

Rule 803(24) of the Utah Rules of Evidence provides:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

. . .

(24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purpose of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Rule 803 is the federal rule verbatim.

In United States v. Mathis, 559 F.2d 294, 298 (5th Cir. 1977), the Fifth Circuit Court of Appeals ruled:

In order for evidence to be admitted pursuant to Rule 803(24), five conditions must be met. These are:

(1) The proponent of the evidence must give the adverse party the notice specified within the rule.

(2) The statement must have circumstantial guarantees of trustworthiness equivalent to the 23 specified exceptions listed in Rule 803.

(3) The statement must be offered as evidence of a material fact.

(4) The statement must be more probative on the point for which it is offered than any other evidence the proponent can procure through reasonable efforts.

(5) The general purposes of the Federal Rules and the interests of justice must best be served by admission of the statement into evidence.

559 F.2d at 298.

In Huff v. White Motor Corp., 609 F.2d 286 (7th Cir. 1979), the United States Court of Appeals for the Seventh Circuit vacated summary judgment for a determination of whether the deceased declarant was mentally competent when he made a statement the trial court excluded. If competent, Federal Rule 803(24) mandated admission of the statement and a new trial. Utah Rule 803(24) should similarly apply here.

Notice

Mrs. Millikan made the letter and her intention to offer it at trial known to Dr. Millikan sufficiently in advance of trial to provide Dr. Millikan a fair opportunity to prepare to meet it. (R. 482: 263, lines 7-22.) Dr. Millikan knew Dr. Scheinberg's name and address; Dr. Scheinberg was Dr. Millikan's long-time friend and immediate supervisor.

Trustworthiness

The Scheinberg letter possessed circumstantial guarantees of trustworthiness. He was a hostile witness so far as Mrs. Millikan was concerned. There was no reason for him to invent the private patient income information the letter contained.

The evidence the letter contained was developed in the course of a stipulated three-way telephone-conference-in-lieu-of-deposition held between Dr. Scheinberg, Mrs. Millikan's counsel, and Dr. Millikan's counsel. Dr. Millikan's counsel had an opportunity in that stipulated three-way telephone conference to explore any weaknesses in Dr. Scheinberg's perceptions, memory, and narrative of the matters he later reduced to writing and sent

to Dr. Millikan's counsel. (R. 482: 249-273.)

Evidence of a Material Fact

The Scheinberg letter was offered as evidence of a material fact, namely that the University of Miami would collect approximately \$80,000 in income from private patients Dr. Millikan would attend over the term of his 15-month contract, and that Dr. Millikan would gross about \$1,920 of that as private patient income in addition to his regular income. (R. 482 - Tr. 265, lines 20-24.)

More Probative Than Any Other Evidence

The Scheinberg letter was more probative on the point of Dr. Millikan's Miami private patient income than any other evidence Mrs. Millikan was able to procure in either her May 1987 discovery, her September 1987 discovery, or in Dr. Millikan's October 1987 half-completed deposition. Mrs. Millikan was prepared to depose Dr. Scheinberg and the payroll clerk in Miami, but agreed by stipulation with Dr. Millikan to cancel the Miami depositions to avoid the cost of travel to Miami and to interview Dr. Scheinberg in a three-way telephone conference with Dr. Millikan's counsel.

Mrs. Millikan's efforts to procure evidence of Dr. Millikan's Miami private patient income were more than reasonable. That evidence just was not forthcoming.

The Interests of Justice

Admissibility of the Scheinberg letter would have been consistent with the interests of justice. The trial court would have had available a range of private patient income upon which

to base an alimony award: the \$650 net per month Dr. Millikan was willing to admit and the \$1,920 gross per month derived from the Scheinberg letter. Admission of the Scheinberg letter could well have resulted in an additional \$400 per month in alimony to Mrs. Millikan.

As it is, Mrs. Millikan has been left to file an Order to Show Cause with the Domestic Commissioner in May, 1989, seeking judgment against Dr. Millikan for accrued alimony arrearages based upon evidence of his "regular," "PIP," and "incentive" income from the University of Miami.

Proffer

Mrs. Millikan's counsel made a proffer of the Scheinberg letter evidence and argued its admissibility under Rule 803(24). Mrs. Millikan's substantial right to additional alimony was prejudiced by the trial court's exclusion of the Scheinberg letter and denial of a continuance.

B. The Issue of Dr. Millikan's Miami Private Patient Income is Not Moot.

In May, 1989, Mrs. Millikan filed an Order to Show Cause with the Domestic Commissioner seeking judgment against Dr. Millikan for accrued alimony arrearages based upon evidence of his "regular," "PIP," and "incentive" income from the University of Miami. Dr. Millikan's "regular" income check was admitted as Plaintiff's Exhibit "A" at trial. (Brief of Appellant, Addendum "I," Exhibit "D.") However, Dr. Millikan sent Mrs. Millikan copies of his "PIP" checks with his alimony. Some of his "PIP" checks included "incentive" income. (Brief of Appellant, Addendum "I," Exhibit "E.")

That Dr. Millikan only sent Mrs. Millikan copies of his "PIP" and "incentive" pay does not render the Miami income issue moot. Instead, it illustrates the problem Mrs. Millikan has faced all along: Just how much income does Dr. Millikan derive from all sources? Because he has never sent Mrs. Millikan a complete copy of his 1987 or 1988 federal income tax return as required by paragraph 7 of the Decree of Divorce, Mrs. Millikan still does not know what his combined "regular," "PIP," and "incentive" income was from the University of Miami, even though he left there a year ago.

The Scheinberg letter should have been admitted at trial or upon its denial, Mrs. Millikan should have been granted a continuance to complete discovery of Dr. Millikan's private patient income. Mrs. Millikan has been substantially prejudiced by the exclusion of that evidence and the denial of a continuance.

This Court should reverse the trial court's exclusion of the Scheinberg letter on the basis of Rule 803(24) or remand with instructions to permit Mrs. Millikan to complete discovery of Dr. Millikan's Miami private patient income prior to retrial on the issue of alimony.

POINT V. THE TRIAL COURT COMMITTED REVERSIBLE ERROR
IN USING THE HOMEOWNERS' POLICY STANDARD
60% HOUSEHOLD CONTENTS VALUATION AS EVIDENCE
IN AVERAGING THE PARTIES' VALUATIONS OF
THE HOUSEHOLD CONTENTS.

The trial court found the 23-page typewritten inventory attached to the Family Affairs appraisal (Brief of Appellant, Addendum "J") to be "very incomplete." (R. 482 - Tr. at 342.)

That appraisal valued the household contents at \$43,300.35, with a net value after commission of \$30,310. .

In his handwritten four-page addition (Brief of Appellant, Addendum "J," pp. "24-27"), Dr. Millikan valued the woodworking equipment and wood at \$20,776. Mrs. Millikan's figures off to the right valued the equipment and wood at \$14,226.96. (Brief of Appellant, p. 45.) Dr. Millikan never disputed Mrs. Millikan's valuations of the items in the first 23 pages of inventory. His complaint was simply that she forgot to include the woodworking equipment and wood.

As set out on page 45 of the Brief of Appellant, the range of values established by the parties' own inventory valuations would have been \$56,438.35 for a high and \$49,451.42 for a low. Both of this figures are less than the \$66,155 valuation found by the trial court.

The homeowners' policy was admitted by stipulation. Its impeachment value lay in the 27-page typed and handwritten inventory supporting it, and not in the \$102,000 Mrs. Millikan testified was 60% of the revised appraised value of the structure. (R. 482 - Tr. at 435.)

The trial court erred in splitting the difference between the \$102,000 policy valuation and the Family Affairs appraisal value of \$30,310 [$(\$102,000 + \$30,310) / 2 = \$66,155$], instead of splitting the difference between the policy's 27-page inventory as valued by Dr. Millikan (\$56,438.35) and the Family Affairs 23-page inventory furnished by Mrs. Millikan (\$49,451.42). The correct valuation, using Mrs. Millikan's Family Affairs evidence

and Dr. Millikan's 27-page policy inventory impeachment evidence should have been:

$$\begin{array}{r} \$56,438.35 \\ + \quad 49,451.42 \\ \hline \$105,889.77 \end{array} \quad / \quad 2 = \$52,944.89$$

This Court should reverse the trial court's valuation of the household contents at \$66,155 and order entry of a valuation of \$52,944.89, a substantial twenty percent reduction in valuation.

POINT VI. THE DOCTRINE OF LAW OF THE CASE PRECLUDES
RECONSIDERATION OF THE ISSUES OF FRIVOLOUS
APPEAL AND AWARD OF COSTS.

In Point IV of his June 6, 1988 Motion of Defendant/Respondent for Summary Affirmance of Judgment and for Attorney's Fees and Costs ("Dr. Millikan's Motion for Summary Affirmance"), Dr. Millikan claimed there was no arguable basis for an assertion of error by the district court and that Mrs. Millikan's appeal was frivolous. Dr. Millikan moved this Court for an Order awarding him double costs. Point Six of Dr. Millikan's Brief makes the same claim. In fact, much of the language is identical and he seeks identical relief.

This Court summarily denied Dr. Millikan's Motion for Summary Affirmance, thereby denying his claim that Mrs. Millikan's appeal is frivolous and denying him double costs. Those denials are the law of the case and preclude reconsideration of the identical issues raised in Dr. Millikan's Brief. State in Interest of C. Y. v. Yates, 765 P.2d 251 (Utah App. 1988).

The issues of frivolous appeal and double costs are presented in the same light in Dr. Millikan's brief as in his Motion for Summary Affirmance. No exception to the doctrine of law of

the case applies. Sittner v. Big Horn Tar Sands & Oil, Inc., 692 P.2d 735 (Utah 1984). This Court should again deny Dr. Millikan's claim of frivolous appeal and motion for costs.

POINT VII. ALIMONY AND EQUITABLE DISTRIBUTION INVOLVE
FUNDAMENTALLY DIFFERENT CONSIDERATIONS WHICH
PRECLUDE THE POSSIBILITY OF "DOUBLE COUNTING"

Dr. Millikan cites D'Oro v. D'Oro, 454 A.2d 915 (N.J. Sup. Ct. 1982) for the proposition that pension benefits cannot be considered income to the recipient for an alimony assessment. (Dr. Millikan's Brief, p. 63.) However, in Innes v. Innes, 542 A.2d 39 (N.J. Sup. Ct. App. Div. 1988), the Appellate Division of the New Jersey Superior Court expressly disapproved as "superficial" and "unsound" the rationale in D'Oro:

The argument is unsound because equitable distribution and alimony are not the same. They are fundamentally different in one important respect:

[Equitable distribution to a wife] gives recognition to the essential supportive role played by the wife in the home, acknowledging that as homemaker, wife and mother she should clearly be entitled to a share of family assets accumulated during the marriage. Thus, the division of property upon divorce is responsive to the concept that marriage is a shared enterprise, a joint undertaking, that in many ways it is akin to a partnership.] Rothman v. Rothman, 65 N.J. 219, 229, 320 A.2d 496 (1974).]

Alimony, on the other hand, is meant to impose on the supporting spouse the duty to give the dependent spouse sufficient financial support, within the means of the supporting spouse, to continue to live according to the economic standard that was established during the marriage. Mahoney v. Mahoney, 91 N.J. 488, 501-502, 453 A.2d 527 (1982).

. . . .

This relationship between equitable distribution and alimony may require the dependent spouse to tap her assets, including property received in equitable

distribution, to absorb some of the diminution of the supporting spouse's ability to pay alimony when upon retirement his earned income is replaced by lower pension payments.

. . .

We reject the D'Oro rule that whenever upon divorce a dependent spouse receives a lump sum share of the value of the supporting spouse's anticipated pension payments as part of equitable distribution, those pension payments or any portion thereof are not to be considered in readjusting alimony after the supporting spouse retires. The same is true for other assets that spouses acquired in equitable distribution.

542 A.2d at 41-42.

Under Innes and the cases cited in Point II of the Brief of Appellant, the trial court should consider Dr. Millikan's income from all sources in awarding Mrs. Millikan alimony.

CONCLUSION

The trial court abused its discretion and failed to make an equitable apportionment of the joint marital retirement assets. The trial court's non-distribution should be reversed, with instructions to find the \$405,603.53 present value of the Mayo and Utah retirement assets and award Mrs. Millikan an immediate offset award of \$125,848.07, together with her percentage interest in the \$45,977 in IRA's.

The trial court committed reversible error in excluding Dr. Scheinberg's letter regarding Dr. Millikan's private patient income. The trial court should be instructed to admit the letter or grant Mrs. Millikan the opportunity to complete discovery of Dr. Millikan's private patient income prior to retrial of the alimony issue. The trial court should be instructed to base its determination of alimony upon a consideration of Dr. Millikan's

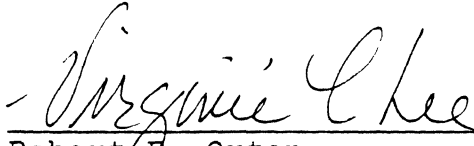
income from all sources, including retirement benefits.

the trial court committed reversible error in using the homeowners' policy 60% valuation figure, rather than Dr. Millikan's valuation of the 27-page inventory supporting the policy. The issue of valuation of the household contents should be remanded for entry of the average valuation based upon the parties' actual figures, \$52,944.89.

This Court should deny Dr. Millikan's claim of frivolous appeal and request for costs under the doctrine of "law of the case."

DATED: May 22, 1989

RESPECTFULLY SUBMITTED,



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CERTIFICATE OF SERVICE

Mailed a copy of the foregoing REPLY BRIEF OF APPELLANT to Janet C. Graham, JONES, WALDO, HOLBROOK & McDONOUGH, 1500 First Interstate Plaza, 170 South Main, Salt Lake City, Utah 84101, this 22nd day of May, 1989, postage prepaid.

