

1988

Vera Morgan v. Dr. Wallace Jay Morgan : Brief of Respondent

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

VERA MORGAN,

Plaintiff-Respondent,

vs.

Case No. 88-414-CA
Priority No. 14B

DR. WALLACE J. MORGAN,

Defendant-Appellant,

BRIEF OF RESPONDENT

AN APPEAL FROM THE DECISION
OF THE THIRD JUDICIAL DISTRICT COURT,
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE RICHARD H. MOFFAT, JUDGE, PRESIDING

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DEPOSITED BY THE
STATE OF UTAH

AUG 16 1990

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VERA MORGAN,

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Priority No. 14B

DR. WALLACE J. MORGAN,

Defendant-Appellant,

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BRIEF OF RESPONDENT

- - - - -

RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

1. Did the lower court err in assessing the defendant husband in this case with expenses incurred by his wife for attorneys and other professionals needed by her to prosecute an action for divorce?

2. Did the lower court err in valuing the bank accounts of the parties?

3. Did the lower court err in awarding alimony to the plaintiff wife under the circumstances of this case?

4. In dividing the property did the lower court properly consider probable tax consequences accruing to the parties?

5. Did the lower court err in failing to apply a minority discount in valuing various assets owned by the parties?

STATEMENT OF THE CASE

Respondent Vera Morgan accepts the statement of the case made in Appellant's Brief as essentially accurate and complete.

(Appellant's Brief, pp. 2-3).

STATEMENT OF FACTS

The "Statement of Facts" contained in Appellant's Brief is basically an abbreviated argument of the legal issues subsequently raised. Respondent takes exception to these "facts" which are essentially a preliminary argument of the position taken by the defendant. Many of the statements contained in Appellant's Brief mischaracterize the evidence and editorialize the actions of the lower court.

Insofar as the Statement of Facts actually describes events of the marriage or property of the marriage which was subject to division Respondent does not disagree. (Appellant's Statement of Facts, pp. 3-10). Respondent Vera Morgan, however, believes that the decision of the lower court as contained in a minute entry of April 13, 1988 with the attached division of marital property prepared by the lower court (Exhibit A to Appellant's Brief); the Findings of Fact and Conclusions of Law entered by the Court (Exhibit D to Appellant's Brief); and the Decree of Divorce entered by the lower court (Exhibit E to Appellant's Brief) explain in detail the decision of the lower court as to the property and other issues now in contention.

There is no question but that the marriage of these parties involved substantial assets. The lower court concluded that the marital property had a fair market value of over \$3,600,000. (See Minute Entry, April 13, 1988 "Division of Marital Property" hereinafter referred to as "Court Division of Marital Property"). The plaintiff placed a value on the property of over \$3,800,000. (Proposed Division of Marital Property of Plaintiff, Exhibit 56,

contained in Exhibit I of Appellant's Brief). The defendant Dr. Wallace Morgan evaluated the property at slightly over \$3 million. (See Exhibit H to Appellant's Brief).

While there is some difference in the valuation of the property by the parties the real difference in this case resulted in the determination of the net assets available for division after various liabilities and proposed adjustments were deducted. For example, Plaintiff concluded that there was a net of over \$2,225,000 in divisible property and of that amount some \$1,200,000 should be awarded to the plaintiff with a little over \$1,000,000 awarded to the defendant. (See Exhibit I to Appellant's Brief). On the other hand, the defendant contended that after the various debits and adjustments were made that there was less than \$1,000,000 available for distribution in assets with defendant proposing that the plaintiff receive \$571,000 in assets and that he receive \$414,000 in assets. (See Exhibit H to Appellant's Brief). The lower court concluded that the marital property had a net value of over \$1,790,000 and awarded some \$906,000 to Plaintiff and some \$886,000 to Defendant. (See Court Division of Marital Property contained in Exhibit D to Appellant's Brief).

Fortunately for purposes of this appeal a large number of items that were divided by the lower court are not contested by the parties. Rather, Defendant has focused upon several valuations and divisions which he believes to be unjust. Because of this limited focus it would serve no useful purpose to discuss in detail all of the evidence that was produced by both parties

concerning the marriage and its many assets and liabilities. Instead, Respondent believes it is much more efficient and expeditious to reserve a factual discussion of the events and assets to each section of the brief in which such facts apply. Thus, only relevant facts and circumstances pertaining to the legal issues now raised by Appellant will be discussed in this Brief.

Before proceeding to the legal analysis, however, two observations should be made. First, it is apparent from reviewing the transcript in this trial together with the post-trial motions that the lower court was essentially having to give and take as to both parties. It is apparent that the lower court did not give either party the exact distribution of assets and liabilities they desired. Rather, the court made a series of compromises based upon what the court believed was in the best interest of both parties.

Plaintiff Vera Morgan believes that the court's distribution, while not entirely satisfactory to her, is nevertheless fair viewed in the total circumstances confronting the lower court. If, however, this Court should for any reason now argued by the appellant find that the lower court erred in the award of an asset or the requirement of an obligation then Respondent asserts that the entire matter should be remanded in order to allow the lower court to redistribute the assets and liabilities based upon any new distribution requirement.

In other words, it is essential that this case not be viewed in a vacuum and that this Court realize that any major change in

the present decree could result in a drastic misdistribution of property unless further adjustments were permitted. If, for example, an award to the plaintiff of \$50,000 is found to be incorrect then essentially the defendant would receive a net gain of \$100,000 if no adjustment were made since he would have previously received a corresponding \$50,000 asset to offset the asset awarded to the plaintiff. In such a case, therefore, rather than promoting equity of the parties, a reversal of the lower court without further adjustment would create gross inequity.

A second observation is also in order. It is apparent from reviewing the evidence in this case that the credibility of the parties was an essential element in the court's determination that the distribution urged by the plaintiff was more in line with the economic realities of the parties. It is axiomatic that the lower court is given a great deal of discretion in evaluating the demeanor of the witnesses as they testify in the lower court. Conversely, this Court has no ability to judge their credibility and is essentially left with the cold, hard record established below.

Respondent would suggest that the credibility of Appellant as to his valuation of the assets and other matters was highly suspicious in light of several circumstances which appeared at trial. First, Plaintiff produced a number of documents, many of them certified bank questionnaires, which were prepared by Dr. Morgan prior to the divorce proceeding being filed in which he listed his assets as substantially higher than that which he listed for purposes of trial. (Tr. 17-25; Exhibits 41, 42, 43,

and 49). He characterized these prior statements as "gross exaggerations" of his real net worth and as "false summaries" of his assets. These bank applications were viewed by the court in comparison with that prepared by Dr. Morgan for the purpose of the trial in which his assets were considerably reduced from the prior statements. (Tr. 27, Exhibit 45). The lower court, therefore, was certainly free to believe that the prior documents made by Dr. Morgan were the more correct accounting of his true assets and liabilities.

Second, Mrs. Morgan testified that her husband frequently used cash in order to avoid any "trail" of expenditures and assets. In addition, he spent large sums of money gambling in various ways including horse racing and cards. (Tr. 198-202). Dr. Morgan's gambling expenditures were verified by his stockbroker and social friend Jerrold Jenson. (Tr. 260-263). Thus, the court had ample evidence to believe that there were assets beyond those listed by the defendant.

Third, the credibility of Dr. Morgan was further impeached with the testimony of Shaunna Wixom, a paralegal for the attorneys of Mrs. Morgan, who testified that in a document search she accidentally discovered a banking account which contained \$60,000 which had not been reported by Dr. Morgan in previous requests for documents. In addition, three other financial statements were obtained by various means of discovery which had not been specifically listed by Dr. Morgan in his documentation. (Tr. 359-69).

These, and other instances, impeach the credibility of Dr.

Morgan as to the truthfulness of his testimony. The lower court was therefore justified in believing the evidence of distribution presented by the plaintiff based upon this credibility issue alone. That, together with the voluminous documentation and expert testimony offered by Plaintiff, clearly substantiated the lower court's division of property and provided a fair and equitable division for both parties based upon their individual abilities and circumstances.

As noted earlier, additional facts will be presented as required.

SUMMARY OF ARGUMENT

1. The court did not charge expenses such as accounting and appraisal fees as "costs" but merely considered these expenses as part of the overall debt of the parties. Since both sides admitted that these fees would have to be paid it was not erroneous for the lower court to take them into consideration in dividing the assets and liabilities.

Likewise, the lower court correctly found the attorneys' fees incurred by the plaintiff to be a liability which had to be dealt with in the division of property. The attorneys' fees were reasonable in light of the experience of the attorneys and staff involved in this case and in light of the extraordinary effort that was required because of Dr. Morgan's evasive conduct. There was, therefore, no abuse of discretion in the awarding of expenses or attorneys' fees.

2. The lower court correctly valued the bank accounts of the parties as of the most current statement presented at trial.

Defendant failed to produce any competent evidence as to the correct balances of these accounts as of the date of trial and the best evidence of the amounts in the accounts was the bank statements themselves introduced by the plaintiff. Defendant Dr. Morgan made no effort to show that these statements were incorrect in light of expenditures or to explain what expenditures in fact had been made. Thus, the court based its decision upon the most credible evidence available to it.

3. The lower court correctly awarded Plaintiff alimony in light of the circumstances of this marriage. Although Plaintiff is unable to be gainfully employed she is still entitled to maintain the standard of living which she enjoyed during her marriage. Defendant has a lucrative dental practice as well as the ability to enter into investments and other types of businesses. Defendant was left with sufficient assets for him to not only cover the expenses assessed against him but also to provide alimony for his wife of some 39 years. In addition, since Mrs. Morgan is still obligated to pay one-half of the \$4,000 plus monthly mortgage on the family residence this additional money is required to meet that obligation together with the increased expense of renting a residence now that she is no longer allowed to live in the family residence.

4. The lower court did not err in failing to apply a rule of tax consequences to the assets of this marriage. As to the PSI Ltd. asset Dr. Morgan applied the proceeds of this sale to pay down a line of credit for his own dental practice. Mrs. Morgan received no benefit from this payment and therefore was entitled

to a credit for half of the gain received. In addition, there was no showing at the trial that Defendant would necessarily have to incur any tax liability because of the award of the court in that Defendant had a substantial income which he could use to pay current expenses and, in addition, had substantial assets which he could use as collateral for a bank loan to meet any additional obligations he had incurred.

5. The lower court did not err in valuating the partnership interests of Dr. Morgan. Dr. Morgan was an equal partner in the operation of these partnerships and the agreements provided a means in which a buyout would occur with no loss to Dr. Morgan. In addition, there was no showing that a liquidation of these assets would have to occur because of this divorce and it would have been error for the lower court to apply a discount thereby penalizing Plaintiff by undervaluing the total assets.

ARGUMENT

POINT I

THE LOWER COURT WAS CORRECT IN ITS DIVISION OF EXPENSES AND ATTORNEYS' FEES BETWEEN THE PARTIES.

Defendant makes two arguments in his brief concerning expenses and attorneys' fees. First, he claims that the lower court incorrectly required him to pay certain fees incurred by Plaintiff for appraisals, accountings and incidental legal expenses. (Appellant's Brief, pp. 13-15). Second, he claims that the lower court improperly awarded Plaintiff attorneys' fees in that the fees were unreasonable and that there was no showing that she needed assistance in paying them. (Appellant's Brief,

pp. 16-19). These two assertions will now be discussed.

A. The Lower Court Did Not Abuse Its Discretion in Requiring Defendant to Pay Certain Expenses and Costs Incurred by Plaintiff in this Litigation.

Defendant asserts that Utah law specifically prohibits the awarding of certain "costs" which are incurred by one party in preparation for litigation against another. Defendant relies upon this Court's decision of Stevens v. Stevens, 754 P.2d 952 (Utah App. 1988) as supporting the proposition that appraisal, accounting and incidental legal expenses are not "costs" within the meaning of Rule 54(d)(1). (Appellant's Brief, p. 13).

Plaintiff does not disagree with the decision in the Stevens case since the accounting fees and appraisal fees as well as other costs incurred by Plaintiff's attorneys would clearly not be allowed as "costs" under Rule 54. It will be noted that under Rule 54 a party who claims costs must file within five days after the entry of judgment a verified memorandum stating the costs which he is requesting. The opposing party dissatisfied with these costs may then request that a bill of costs be taxed by the court in which the judgment was rendered. A review of the record in this case shows that plaintiff made no attempt to file such a memorandum of costs as is required by Rule 54.

Rather, the items now complained about by the defendant were introduced during the trial as evidence. Mr. Harold Christensen, attorney for Plaintiff, explained to the court why it was proper to allow the appraisal fee of Bud Ashley into evidence. He stated:

Your Honor, I think that ordinarily, expert witness

fees are not recoverable as a cost of the action in the typical, personal injury suit, and that's true. Here, we are talking about a situation where a liability has been incurred. This is a debt, and much like the debts the doctor will be testifying that he owes. And its an obligation that will have to be paid by Mrs. Morgan in this case; and I think under the circumstances, it's part of the overall debts, and assets, and liabilities of the parties. The court is entitled to consider her liabilities to the same extent the court is entitled to look at his liabilities.

THE COURT: I think Mr. Dolowitz is absolutely right, insofar as there being a provision by decision of our Supreme Court that expert witnesses, as far as chargeable costs are concerned, if you award costs against a party, the expert witness are paid only the ordinary fees.

MR. CHRISTENSEN: Well, I do agree.

THE COURT: I also agree with you, Mr. Christensen, as far as she has incurred here substantially, and I don't know how that is, but for all kinds of things, but including the services of you two gentlemen, but I don't know how in the world I can make an adequate decision in this case without knowing exactly what both parties on both sides are facing, as far as their liabilities, as well as what their assets are. So, I'm going to allow the evidence in, not as a chargeable cost Mr. Dolowitz, only for the purpose of showing that it is an expense that has been incurred in this matter. (Tr. 107-108).

The lower court in formulating its division of marital property in subdivision VII (i) through (n) listed both the plaintiff's legal, accounting and appraisal fees as well as the defendant's legal, accounting and appraisal fees. These fees were treated as a liability against the defendant which was then necessarily offset by an award of corresponding assets to the defendant since the total award to plaintiff and defendant are nearly identical. The court specifically found that these accounting and appraisal fees incurred by both parties were reasonable. (Finding No. 8; see Appellant's Exhibit D). As such, the court treated these obligations of both parties in the same

manner that it treated other liabilities. It did not treat these expenses as a "cost" in which no corresponding credit is given to a party who is found to have incurred such a cost.

Section 30-3-3 of the Utah Code Annotated empowers a court to award such sums "as will permit the opposing party to bring or defend the action. The decision to make such an award, together with the amount thereof, rests primarily with the sound discretion of the trial court." Kerr v. Kerr, 610 P.2d 1380, 1384 (Utah 1980).

The court correctly treated these various expenses as marriage debts incurred by both parties which had to be paid by someone. Even the defendant himself acknowledged that these fees were liabilities to himself and his wife and that "someone is going to have to pay them." (Tr. 435-437).

A review of the division of marital property made by the court shows that the defendant received a majority of the liquid assets including some \$314,000 worth of stocks. In addition, defendant had a net disposable income of \$155,000, \$189,000, and \$164,000 for 1984, 1985, and 1986 respectively. Thus, with the award of nearly three-fourths of the stock together with the substantial income from the defendant's dental practice these fees and expenses could be paid by the defendant much more easily than by the plaintiff who had very little liquidity in comparison.

As observed earlier, if the lower court incorrectly charged these particular expenses in the marital division then the matter should be remanded in order to allow the lower court to redistribute the assets and liabilities based upon the assumption

that Plaintiff would then be solely responsible for these fees and would have to obtain additional assets from the defendant in order to satisfy such obligations. Essentially, therefore, the defendant is complaining at most about form over substance. These expenses must be paid by someone and must be paid out of the assets of the marriage. The lower court did not consider these expenses as "costs" but included them in the total liabilities of the parties. This approach was correct and logical and accomplishes the same purpose as requiring plaintiff to pay her own fees but also requiring defendant to give up more assets to the plaintiff in order to do so. Thus, as to the expenses preceding, the lower court decision was correct.

B. The Lower Court Was Correct in Determining That the Attorneys' Fees Charged to Plaintiff Were Reasonable and, in any Event, Plaintiff Does Not Have Sufficient Liquid Assets to Incur this Obligation.

Unlike the other expenses incurred in preparation of the divorce proceeding, Dr. Morgan does not contest the authority of the lower court to order him to pay plaintiff's attorneys' fees. He acknowledges that under Utah statutory authority and case law one party can be required to pay the other party's attorneys' fees. Instead, he contends that the fee was unreasonable and furthermore that he should not be required to pay it since Mrs. Morgan has sufficient assets to take care of the matter herself. Before proceeding, however, it should again be noted as was stated in the preceding section that the lower court treated both the attorneys' fees of defendant and the plaintiff as equal and assigned them both as a liability to the marriage. Under this

approach, the combined attorneys' fees were essentially paid for by both parties since assets were adjusted to liabilities. Under this technique it cannot be said that Defendant incurred as a separate obligation apart and aside from the divorce proceedings the attorneys' fees which is normally the case in most of the authorities relied upon by the defendant.

Even if it is assumed arguendo, however, that attorneys' fees were awarded in the more traditional sense against Dr. Morgan with no offsetting asset given to him because of such award, it is clear that the court did not abuse its discretion. First, the attorneys' fees were definitely reasonable. The Utah Supreme Court has stated the test for reasonableness as follows:

Reasonable attorneys' fees are not measured by what an attorney actually billed, nor is the number of hours spent on the case determinative in computing fees. In determining the reasonableness of attorneys' fees...[a] court may consider, among other factors, the difficulty of the litigation, the efficiency of the attorneys in presenting the case, the reasonableness of the number of hours spent on the case, the fee customarily charged in the locality for similar services, the amount involved in the case and the result attained, and the expertise and experience of the attorneys involved. Cabrera v. Cottrell, 694 P.2d 622, 624-25 (Utah 1985).

See also, Beals v. Beals, 682 P.2d 862, 864 (Utah 1984).

In the instant case there was ample evidence showing that such fees were reasonable. Shaunna Wixom, a paralegal for plaintiff's attorney firm, testified as to her experience and her rate of \$47.50 an hour. She also testified as to the extraordinary effort that was required in this case because of the failure of Dr. Morgan to cooperate with plaintiff's attorneys. She stated that at least 250 hours were spent working on the case and that in fact some of that time was probably written off. (Tr.

356-371).

Mr. Harold Christensen, the chief attorney for the plaintiff, testified that his rate of service was reasonable in light of his experience and that the rates for the others involved in the case were also reasonable. (Tr. 372-374). Exhibit 62 contains the date and description of the services and persons who performed the service from the commencement of the employment to the time of trial.

Mr. Christensen further testified that a higher fee was required on her behalf than that of defendant since in cases such as this the information concerning finances is peculiarly available to the professional husband whereas the home-maker wife has little knowledge as to the financial affairs of her spouse. In addition, the husband has a relationship with CPAs and other professionals which the wife does not. (Tr. 375-376).

Mr. Christensen further stated that obtaining information from Dr. Morgan was, pardon the pun, like "pulling teeth." The plaintiff repeatedly requested information and would be given access to some but not all. It was necessary to take depositions of other third parties in order to verify that the information obtained was correct. (Tr. 376).

Furthermore, Mr. Christensen stated that his firm attempts to use lower billing type of people in these kind of cases since both parties ultimately pay the costs. He stated that the weighted average billing rate of the various attorneys and paralegals involved in this case was \$71.00 an hour. (Tr. 380).

Upon cross examination he stated that his rate of \$160 is not

uncommon in the community and that he was aware of several other attorneys charging this same rate. (Tr. 380-81).

The defendant called no witnesses to contest the opinion of Ms. Wixom and Mr. Christensen that the fees charged were reasonable. In addition, he put on no witnesses to contest the claim that the evasion by Dr. Morgan required extraordinary effort and thereby incurred additional fees. As such, there was nothing in the record to contradict the testimony of Plaintiff as to the reasonableness of the fees.

Next, Defendant complains that plaintiff is not in need of assistance in paying her attorneys' fees. In divorce cases, an award of attorneys' fees must be supported by evidence that it is reasonably needed by the party requesting the award. Huck v. Huck, 734 P.2d 417 (Utah 1986). Mrs. Morgan testified that she was requesting the court to award her attorneys' fees since she had no money to pay them. (Tr. 215). In addition, the evidence adduced at trial itself is a basis to show a wife's needs especially when monthly expenses are close to or exceeded by monthly income. Sinclair v. Sinclair, 718 P.2d 396 (Utah 1986); Walther v. Walther, 709 P.2d 387 (Utah 1985).

As will be discussed in the alimony portion of this brief, Defendant repeatedly attempts throughout the brief to characterize the awards to Plaintiff as overly generous and giving her ample money to live on, secured assets, and essentially no problems while at the same time characterizing his award as one with little liquidity, speculative assets, and many problems. This characterization is simply untrue.

It is undisputed that Mrs. Morgan has no useful occupation. As a housewife and mother for some 39 years Mrs. Morgan acquired no skills which she could use to produce an income anywhere near the income she would require just to live comfortably. On the other hand, Dr. Morgan has a substantial income and obviously is able to utilize that income in prudent investments. Thus, Mrs. Morgan must obtain her monthly income from either the assets themselves or from alimony.

The lower court observed in the initial minute entry that the court was "cognizant of the fact that the division of assets here awards to the plaintiff a substantial amount of money which should produce income for her." (Minute Entry, April 13, 1988. See Exhibit A of Appellant's Brief.). Thus, it is elementary that if Mrs. Morgan is to obtain a sufficient income to live each month she must maintain the integrity of her assets. She does not have the luxury of selling them and later replacing them with other income-producing property.

The stock cannot be sold by Mrs. Morgan for the purpose of paying attorneys' fees and other expenses. To do so would eliminate a valuable source of income for her continued comfort. Likewise, she is unable to liquidate the Bel-Aire Apartment Building in order to pay for these fees. Her award of alimony also goes to paying her monthly expenses.

It is therefore apparent that should Mrs. Morgan have to suddenly pay some \$75,000 in fees that the plan that the lower court devised would immediately be destroyed.

Defendant laments that he was "awarded only one income

producing asset, his dental practice." (Appellant's Brief, p. 19). This statement is simply not true nor, even if it were, would it justify Mrs. Morgan being required to pay these attorneys fees. In 1986 this "one asset" of the doctor's dental practice netted an income of \$164,000. In addition, Defendant received a distribution from the Eckman-Midgley partnership of \$43,000, \$15,000, \$6,000 and \$30,000 for the years 1984, 1985, 1986, and 1987 respectively. (Plaintiff's Exhibits 23, 52; Tr. 275-76). The partnership presently has a positive cash flow and has a tenant with a seven-year lease. (Tr. 277-79).

An examination of Exhibit 52 shows that in 1986 Dr. Morgan had a disposable income of \$223,433. While part of this includes the sale of stocks it also includes a debit for the Broadmoor Apartments which have now been sold by Dr. Morgan. Essentially, therefore, it is safe to assume that as long as Dr. Morgan continues his dental practice he has a disposable income of over \$200,000 a year and certainly has the capacity to pay the fees that were incurred in this action on both sides. Conversely, Mrs. Morgan as mentioned earlier, is solely dependent upon the income producing assets and certainly has no way of making these expenditures. Thus, even if it is assumed that the traditional test for attorneys' fees must be employed rather than the method utilized by the court in treating such fees as a liability of the marriage, Mrs. Morgan would clearly be entitled to such an award.

POINT II

THE LOWER COURT CORRECTLY VALUED THE BANK ACCOUNTS OF THE PARTIES.

The defendant argues that the lower court incorrectly placed values on six bank accounts utilized by the parties in their various businesses. Defendant claims that the court incorrectly relied upon bank statements that were presented in evidence showing balances in these accounts anywhere from four weeks to two weeks prior to the trial. He asserts that the lower court should have believed his testimony that these accounts had negative balances in them and therefore the lower court erred in awarding him cash balances that did not exist. (Appellant's Brief, pp. 19-21).

The trial in this case was held on December 14 through December 17, 1987. At the beginning of the first day Plaintiff produced several exhibits during the testimony of Dr. Morgan as to the balances showing on these various checking accounts. He acknowledged that these were the most recent statements from the banks. (Tr. 29-33). All of the statements were admitted by the court. (Exhibits 1, 2, 3, 4, 5, and 6).

Dr. Morgan maintained, however, that he had written checks on these accounts between the time of the statement and trial and that the balances were therefore considerably lower. These "calculations" of Dr. Morgan were unsubstantiated as to the checks written or the charges incurred. He simply gratuitously offered his opinion as to what the accounts had in them as of the time of

trial. (Tr. 29-33). He also gave this same information to his accountant who prepared it as part of Defendant's proposal for division of the assets. (Exhibit 79; Tr. 414-15).

During the motion to amend the findings this same argument as now being made by Dr. Morgan was raised to the lower court.

Plaintiff's counsel stated to the court:

We put that evidence on and Dr. Morgan did not account for where the money went after it was drawn out of the accounted and what he's saying is it was used to pay operating bills. Well, if that's true, then he should have accounts for that and frankly, if he had done that, we would have brought in the tenants who would have said that their rent checks were held for two or three months, not put into the account, they weren't cashed, so, I mean, there are two sides to that. (Tr. of May 16, 1988 hearing, p. 9).

The arguments now made by Defendant are fatally flawed. First, unlike the Berger case cited by Appellant, the evaluation in this case does not involve a year but only involves a maximum of four weeks prior to trial. As noted by Plaintiff's counsel there was no effort made to account for how this money was used. No backup documents were produced by Dr. Morgan. The mere summary offered by the accountant did not satisfy the evidentiary requirement of producing the primary evidence of the outstanding checks which had allegedly been paid. Harned v. Credit Bureau of Gillette, 513 P.2d 650 (Wyo. 1973). It would have required little effort for Dr. Morgan to obtain a more current bank record from the various banks involved had he elected to do so. In such a case, the bank statements would have been conclusive evidence of the balances left in the accounts and would also have been evidence as to how the money was spent.

The conduct of Dr. Morgan throughout this litigation also

justified the lower court in relying upon a previous date of evaluation. This Court has held that a trial court in dividing marital property may value property at a time earlier than the divorce decree if one party dissipates assets, hides its values, or otherwise acts obstructively. Teck v. Teck, 738 P.2d 1050 (Utah App. 1987). In addition, choice of time for valuation is within the broad discretion of the district court. In Re Marriage of Krause, 614 P.2d 525, 527 (Mont. 1980).

Finally, this argument again is form over substance. If Dr. Morgan in fact paid obligations out of these accounts then those obligations were not left to be paid and divided by the court. Whether he had cash in hand with an outstanding obligation or whether he had no cash with obligations paid results in the same effect.

Thus, the court did not err in evaluating these bank accounts based upon the best evidence available.

POINT III

THE LOWER COURT WAS CORRECT IN AWARDING ALIMONY TO THE PLAINTIFF.

This Court has stated that it will not disturb the trial court's award of spousal support absent a showing of a clear and prejudicial abuse of discretion. Rasband v. Rasband, 752 P.2d 1331 (Utah App. 1988); Passel v. Passel, 732 P.2d 96, 100 (Utah 1986).

An alimony award should, to the extent possible, equalize the party's respective post-divorce living standards and maintain them at a level as close as possible to that standard of living enjoyed during the marriage. Gardner v. Gardner, 748 P.2d 1076, 1081

(Utah 1988); Davis v. Davis, 749 P.2d 647, 649 (Utah 1988).

The Utah Supreme Court articulated three factors that must be considered by the trial court in determining a reasonable alimony award: (1) the financial conditions and needs of the requesting spouse; (2) the ability of the requesting spouse to produce a sufficient income for himself or herself; and (3) the ability of the other spouse to provide support. Olsen v. Olsen, 704 P.2d 564, 566 (Utah 1985); Jones v. Jones, 700 P.2d 1072, 1075 (Utah 1985).

Applying the above standards to this case shows that the lower court did not abuse its discretion in awarding alimony to the plaintiff. First, it is undisputed that the parties were married in 1950, that Mrs. Morgan bore five children, and raised them in the family residence until they all became adults. She worked in a publishing company and hospital while her husband was going to dental school and after he graduated she did not do any further income-producing work. (Tr. 183-85). Exhibit 52 (attached to Exhibit L of Appellant's Brief) shows that on the other hand Dr. Morgan averaged approximately \$200,000 of disposable income from 1984 through 1986. His dental practice alone produced on the average of \$170,000 as disposable income a year. While Dr. Morgan stated that his health was not as good as it had been and that he would like to retire some day, there is no substantial evidence that this income will be terminated in the immediate future. (Tr. 451-52).

Examining the expense end of the spectrum shows the following. Exhibit 54 (attached to Exhibit J of Appellant's

Brief) was an estimate by Vera Morgan that she required \$5,500 in order to maintain her present standard of living. However, this schedule was assuming that she maintained her residence at the family home on Marilyn Drive. (Tr. 191). In addition, it did not assume that the court would order that she be obligated to pay one-half of the over \$4,000 monthly mortgage existing on the Marilyn residence. [Tr. 232; Decree of Divorce, para. 2(d)]. In addition, plaintiff was not anticipating that she would also be responsible for an estimated \$28,000 in debts incurred when and if the Marilyn property was sold since the underlying mortgages on the property exceeded the appraised value of the property by some \$56,000. See, Court Division of Marital Property IIIA. Thus, Mrs. Morgan's expenses with the addition of the mortgage payment and the requirement of renting a new residence easily exceeds \$8,000 a month.

Even assuming that under today's rental market the Bel-Aire is capable of still generating \$4,000 net a month--which in all probability it is not, (See testimony of David VanDrimmelen concerning the Salt Lake real estate market, Tr. 340-45), this supposed \$4,000 plus the \$2,000 in alimony is still short of plaintiff's needs even assuming a return of 10% upon the other stock assets that plaintiff has been awarded. Without the \$2,000 alimony payment Plaintiff would be completely incapable of meeting her obligations.

On the flip side of the coin, Dr. Morgan, while he may have initial expenses because of the divorce, can easily satisfy these expenses out of his income, by obtaining short term loans or by

selling some of his liquid assets which were specifically awarded to him to enable him to initially recover from these court expenses. Such an award allowing an adjustment to pay expenses is proper. Fletcher v. Fletcher, 615 P.2d 1218 (Utah 1980). Since the major drain on Dr. Morgan's cash flow was the Broadmoor Apartments which have now been sold, Dr. Morgan cannot complain that his income is insufficient to meet his current obligations as well as to assist his wife during this transition period.

In summary, the court properly evaluated the factors necessary in determining alimony in this case and the record is patently clear as to her need and his ability to pay. Passel v. Passel, 732 P.2d 96 (Utah 1986).

POINT IV

THE LOWER COURT DID NOT ERR IN FAILING TO CONSIDER ALLEGED TAX CONSEQUENCES AS A RESULT OF THE DIVISION OF PROPERTY.

Defendant contends that the lower court erred in failing to consider the tax consequences which would occur because of the various awards made by the court. (Appellant's Brief, pp. 26-28). First, he contends that the court erred in failing to consider the existing tax debt caused by the sale of the PSI Ltd. interest totaling some \$30,000. He contends that not only did the court erroneously award plaintiff \$15,329 but also failed to consider the tax consequences of that sale. (Appellant's Brief, p. 27).

The court correctly awarded Plaintiff one-half of the proceeds from that sale since he unilaterally, without permission of the plaintiff, applied the entire proceeds to the Capital City

Bank line of credit which is written on his dental practice. The entire proceeds of the sale went to reduce a line of credit which can fluctuate from day to day and which is used by the defendant in his medical practice. Certainly, Plaintiff was entitled to half of the proceeds of this sale regardless of how the money was spent by defendant.

As to any tax liability on that sale it should be noted that the parties filed a joint return for 1987 and therefore it can be assumed that plaintiff and defendant shared equally in the tax consequences of that sale. In addition, since no return was due at the time of trial it is unknown whether the sale had any effect upon the actual return of the parties in light of other offsetting taxable events. In effect, therefore, the tax liability picture was not clear at the time of trial and certainly would have been speculative as to its effect.

In this same line, Dr. Morgan further contends that he should have been given a tax credit for having to liquidate his assets in order to pay the existing obligations. He contends that the lower court erred in not applying a credit to him because of the tax consequences which would be incurred as a result of selling these assets. (Appellant's Brief, pp. 27-28).

Again, such an argument is specious since there is no substantial evidence to show that Dr. Morgan must sell any stock in order to pay these debts. The income of Dr. Morgan together with his ability to borrow money could easily take care of these obligations especially on a time-deferred basis which he in all probability can arrange with many of the creditors.

It is fundamental that a decision to consider tax consequences in evaluating assets in a marriage dissolution must be based entirely on the totality of circumstances and such decision rests in the trial court's sound discretion. In Re Marriage of Grubb, 721 P.2d 1194 (Colo. App. 1986).

The Supreme Court of Utah has held that a trial court should not speculate about hypothetical consequences of taxable events. Alexander v. Alexander, 737 P.2d 221 (Utah 1987). Tax consequences should not be considered when such alleged consequences are in the future and are based upon hypothetical situations. In Re Marriage of Bayer, 687 P.2d 537 (Colo. App. 1984); In Re marriage of Marx, 159 Cal. Rptr. 215 (Cal. App. 1979).

The lower court was not required to accept the speculative testimony as to tax liabilities for events which may or may not happen at a time when tax consequences could not be known. The court correctly evaluated the division at the time especially in light of Dr. Morgan's substantial income and ability to handle his financial affairs in a prudent manner.

POINT V

THE TRIAL COURT DID NOT ERR IN FAILING
TO APPLY A MINORITY DISCOUNT TO THE
PARTNERSHIP INTEREST OF DEFENDANT.

Plaintiff does not dispute that in certain cases a minority discount should be applied in evaluating the assets of a divorce. A minority discount is a reduction in the value of the stock of a party who has a minority interest in a closely held corporation on the theory that the party lacks the voting power to control

decisions. See generally R. Longnecker, A Practical Guide to Evaluations of Closely Held Stock, 122 Trusts and Estates 32, 38 (Jan. 1983). Furthermore, a district court need not discount the stock in a closed corporation in all instances. In Re the Marriage of Johnson, 716 P.2d 322 (Mont. 1986).

It should also be observed that valuation of a closed corporation is discretionary and will not be disturbed on appeal unless it is contrary to the great weight and clear preponderance of the evidence. In Re Marriage of Popp, 1988 Wisc. App. LEXIS 909 (No. 87-0830, Oct. 12, 1988, Wisc. App.). Finally, a trial court in a divorce action is not required to accept any one method of stock valuation as more accurate than another accounting procedure. Dean v. Dean, 275 N.W.2d 902 (Wisc. 1979).

It should be noted that the two main partnership interests in this case are not closely held corporations but are in fact equal partnerships. Dr. Morgan owned a 25% interest along with three other investors in both the Eckman-Midgley and Associates partnership and in the Sunvest Ltd. partnership. See Court Division of Marital Property V. Thus, this is not an instance where one person is at a distinct disadvantage over the others since each person had a 25% say in the on-going operation.

Second, both the witnesses and the underlying documents of the principal partnerships, require an evaluation of the underlying property as the means of determining the value of the partners' interests. Mr. Jay Midgley, one of the four partners in the Midgley and Sunvest partnerships testified that the value of the partnership interest is essentially the value of the real estate

less the debt on the real estate. (Tr. 267).

Article XI of the Eckman-Midgley partnership (Exhibit 17) and Articles X and XI of the Sunvest partnership (Exhibit 30) provide that "the value of the interest of a deceased or withdrawing partner shall be determined by appraisal of the partnership property. . . ."

Mel Norman, defendant's CPA witness, while advocating that a minority discount of 35% be applied in this case conceded that a minority interest would not be appropriate in terms of the way this agreement was written. In a dialogue with the court the following occurred:

THE COURT: And it [the value of the partnership being higher than a minority discount] would also be true, or a similar scenario would be true if in relation to any of the minority interest, there is a provision for buyout at full interest and no discount by reason of the partnership agreement or the limited partnership agreement?

THE WITNESS: Well, let's see if I am understanding that. If the partnership agreement between the parties themselves, now the partner?

THE COURT: Yeah.

THE WITNESS: If, at the option of the party being bought out, the seller, the others automatically have to buy them out, I would say that's true. (Tr. 517-18).

Also, the minority discount theory assumes that a sale will be imminent because of the divorce decree. There was no evidence produced by defendant that such a sale would be required because of an award by the court and in fact, from all existing evidence, it appears that the partnerships will continue for many years.

Under the circumstances of this case the lower court was not obligated to apply a minority discount to the various partnership

interests of the defendant. To do so would have given defendant an artificially created advantage at the disadvantage of plaintiff. The evaluation was therefore correct.

CONCLUSION

There are no winners in a case such as this. A family unit which has for three decades existed is now destroyed--each party must now make the necessary adjustments to continue a productive life. Likewise, there are no hard and fast rules as to how this substantial marital estate should be divided. The law leaves such decisions to the wisdom of the trial judge provided he does not abuse his discretionay power.

Here, the lower court very carefully divided the assets and liabilities in such a manner as to give both parties the opportunity to rebuild their lives. Mrs. Morgan is left with sufficient income generating assets to provide a comfortable life style. Her liabilities are proportional to her ability to pay. Dr. Morgan is left with substantial assets as well as the potential of his dental practice and other proven business ventures. While his liabilites are greater, they too are proportional to his income producing ability.

Neither party received everything they thought they deserved. However, the law does not guarantee complete satisfaction in cases such as this--only substantial equity. Neither party can justly complain that they were treated unfairly in light of the circumstances.

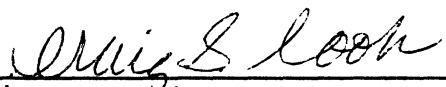
The judgment of the lower court should be affirmed.

Respectfully submitted,

SNOW, CHRISTENSEN & MARTINEAU

By 
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and


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MAILING CERTIFICATE

I hereby certify that I mailed four true and correct copies of the foregoing Brief of Respondent to David S. Dolowitz and Julie A. Bryan, COHNE, RAPPAPORT & SEGAL, 525 East 100 South, Fifth Floor, P. O. Box 11008, Salt lake City, Utah 84147-0008 this 31st day of January, 1989.

