

1978

Paul P. Rost v. Janet L. Rost : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT FOR THE
STATE OF UTAH

PAUL F. ROST,

Plaintiff-
Respondent,

vs.

Civil No. ¹⁵⁷⁶⁷~~15294~~

JANET L. ROST,

Defendant-
Appellant.

BRIEF OF RESPONDENT

Appeal from the Judgment of the Honorable
Wahlquist and from Findings, Conclusions,
of Divorce of the Honorable Ronald O. Rydell
Second Judicial District Court, Weber County

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FILE

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IN THE SUPREME COURT FOR THE
STATE OF UTAH

PAUL F. ROST,

Plaintiff-
Respondent,

vs.

Civil No. 15398

JANET L. ROST,

Defendant-
Appellant.

BRIEF OF RESPONDENT

STATEMENT OF THE KIND OF CASE

This is an action for divorce brought by the Plaintiff and Respondent, Paul F. Rost, against the Defendant and Appellant, Janet L. Rost.

DISPOSITION IN LOWER COURT

At hearings prior to trial, the Honorable John F. Wahlquist denied Appellant's Motion seeking abatement of the proceedings, alleging lack of jurisdiction in the State of Utah in the trial of the above entitled matter, and also seeking a stay of judicial proceedings allowing the State of New York to proceed in an action in that jurisdiction. An

Interlocutory Appeal was filed in the Supreme Court of the State of Utah and an Appeal on both Motions was denied by this Honorable Court and the Judgment of the Lower Court affirmed as to denial of plea in abatement and for stay of judicial proceedings.

On February 17, 1978, the Honorable Ronald O. Hyde granted a Decree of Divorce as between the parties.

RELIEF SOUGHT ON APPEAL

The Appellant seeks reversal of the Findings of Fact, Judgment, and Decree of the Lower Court and Respondent seeks reaffirmation of the Findings and Judgment of the Lower Court, and further alleges that the Supreme Court of the State of Utah erred in denying Appellant's Motion contesting jurisdiction in Utah and abatement of proceedings in favor of New York, which has previously been denied by this Honorable Court in the Interlocutory Appeal.

Respondent has filed a Cross Appeal, alleging as error the Judgment of the Lower Court in the amount and length of the period of alimony granted to the Appellant, and as to the requirement, that the Respondent pay one-half of all of the children's tuition and one-half of the doctor bills, and further alleges that the attorney's fees granted to the Appellant were excessive.

STATEMENT OF FACTS

The Appellant has filed with the Court 35 pages of Brief and approximately 40 pages of Appendix to which the Respondent will not respond in kind and Respondent requests that the Court take equal notice of the whole record in addition to the specific record which has been attached by the Appellant, so that the Brief of Respondent is given equal consideration even though it is of substantially less volume.

Respondent further objects to the Statement of Facts of the Appellant, in that there are characterizations of motive and intent, including conclusions as to such motive and intent, and in addition, Statements of Fact are not properly attributed by reference to record before the Court.

The Respondent is a Major in the United States Air Force (R-187), claiming his previous legal state of residence to be in Lubbock, Texas, and is stationed at Hill Air Force Base, and has been a resident of the State of Utah for more than one year (R-188), with domicile in Weber County.

A Complaint for divorce was filed by the Respondent on April 16, 1977, in the Second Judicial District Court of Weber County, (R-3) and service was made by the Appellant on a Decree of Divorce filed in the State of New York seeking Judgment on the New York Decree of Divorce and was served upon the Respondent August 18, both years being the year of 1977. (R-200)

The Respondent has acted as Flight Officer in the United States Air Force and was assigned to Udorn Air Base in Thailand in 1975, and was compelled prior to departing for Thailand to attend Georgia Air Force Base in California from February 20 to May 7 for transition into F-4 Aircraft, and at the time of being assigned was a resident and domiciled in the State of Texas. (R-200)

The Respondent was raised in New York and graduated from a school in New Jersey in 1962, leaving home in 1962 to go to Florida where he was employed by an aircraft company and has never lived in the State of New York since that time, except for visits to both the Appellant's parents and the Respondent's parents and spent only the month of May in 1976, two weeks in May of 1975, and a leave of absence in 1976 in New York (R-201). Respondent resided in Utah since June of 1976 (R-201), and has filed a request to be retained at Hill Air Force Base for introduction of the F-16 Fighter (R-201) and could be assigned as a Squadron Commander with that aircraft and hopes to be allowed to stay at least three more years in Utah and has expressed a desire to retire in the Utah area upon completion of his Air Force career. (R-202)

The Appellant moved to New York with the two children from the Texas domicile to be near her parents and relatives (R-339), and subsequently consulted an attorney in New York

for the purpose of drafting a written agreement of separation which is subscribed to by the Respondent and the Appellant, and if in fact the parties lived apart pursuant to a Decree of Judgment of Separation for a period of one or more years could then obtain a Decree of Divorce under the laws of the State of New York. (R-196)

The Respondent subscribed to the Separation Agreement, in that the Appellant stated that she would not move to Utah unless the Respondent agreed to subscribe to the agreement.

(R-275) The Respondent subscribed to the agreement after determining that in his own mind there was no doubt that if he did not sign the agreement or if he fought it or had argued for changes in the agreement, that there was no way he could save his marriage. (R-275) The Respondent did not desire the divorce and induced his wife, the Appellant, to attend with him a marriage counselor group prior to subscribing to the agreement. (R-270) The Appellant came with Respondent to Utah on a Friday and left the following Monday (R-274).

The Honorable Ronald O. Hyde in his Memorandum Decision made determination, that the Courts for the State of Utah and the Courts in New York are not absolutely bound by any agreement entered into by and between the parties prior to divorce where the agreement is a Separation Agreement made under the laws of the State of New York, and that the Court has equitable jurisdiction

to make such Findings as are necessary between the parties.
(R-100)

The Court granted to the Appellant the sum of \$350.00 per month alimony until the end of August, 1978, and then the sum of \$200.00 a month alimony for a period of two and one-half years from September, 1978, subject to termination upon the Appellant's remarriage or her having an income of \$800.00 a month, whichever is reached first, and in addition, awarded \$200.00 a month per child as child support to be increased upon the termination of the alimony to \$225.00 per month child support, and further providing that such child support shall continue until the children reach the age of 18, unless they continue their education, which in that event shall continue until the children have reached the age of 21, or become self-supporting, with all of the property and debt distribution allowed as set out in the Separation Agreement, and the Court further awarded to the Appellant the sum of \$1,500.00 as and for attorney's fees. (R-101)

The additional liabilities of the Respondent and award to the Appellant by reason of the Court's authorizing the property and debt distribution of the "Separation Agreement" to be included in the Decree of Divorce imposes the following liabilities upon the Respondent or a possible interpretation of such agreement imposing (R-101):

1. Maintenance of benefits under the Civil Health and Medical Program of the Uniform Services for all medical, dental, hospitalization, surgical expenses, including medications, nursing care, necessary appliances, psychiatric or psychological treatment, and cosmetic treatment if occasioned by a traumatic episode.
2. Any medical or dental expenses not covered under the Champlus Military Program shall be divided equally between husband and wife.
3. The Respondent shall be responsible for any security deposit required on any apartment obtained by the Appellant.
4. The Respondent to be liable for the payment of any utility deposits required to be placed by the Appellant.
5. The Respondent is compelled to pay to the Appellant the sum of \$1,200.00 within thirty days after signing of the Stipulation Agreement to represent one-half of the value of a 1970 travel trailer and a 1971 Chevrolet stationwagon.
6. The Respondent to be obligated to pay to the Appellant's attorney one-half of the fees for the Separation Agreement and the right of the Appellant to seek payment of all attorney's fees resulting from any breach of the Separation Agreement by the Respondent.
7. A specific agreement between the parties, that if an action of divorce is brought, that each party shall be responsible for their own counsel fees.
8. The Respondent to pay one-half of the Post Office Credit Union loan made by the Appellant and proceeds of same received by her.
9. The Respondent to pay one-half of the loan to Reese Credit Union.
10. The Respondent to have all obligation of paying all such other remaining debts and obligations for which the Appellant is responsible.
11. The Appellant be awarded all household goods, furniture, kitchen items, bedding, jewelry, antiques,

and items of personalty and personal property belonging to the Appellant and the children. (R-8-36)

The Appellant will be graduated from College in August, 1978, with a Bachelor Decree (R-333), has \$50.00 a week income from part-time employment (R-341).

The base pay of the Respondent is \$1,698.60 a month and at time of trial had received an increase for cost of living in the amount of \$94.00 a month, a quarters allowance for as long as he lives off the Base for \$301.80, which will be forfeited if he is compelled to live on the Base voluntarily or by the discretion of the Commanding Officer of the Base at which the Respondent is stationed, a rations allowance for \$59.53 a month, flight pay for as long as he is medically qualified to fly in the amount of \$245.00 a month, making a maximum total of \$2,304.93 a month, (R-277) less federal income tax of \$433.60 per month and F.I.C.A. of \$99.00 a month, leaving a net take-home pay after insurance and other deductions of \$1,771.00 a month (R-281), provided that the Respondent is living off the Base and qualified to continue to receive \$301.80 of the aforesaid gross income, and further provided that the Commanding Officer does not at his own discretion decide that the Respondent should live on Base, and further subject to reduction of \$245.00 a month if the Respondent should become medically not qualified to fly. (R-277)

The obligations remaining to be paid by the Respondent in accordance with the Agreement of Separation is in the amount of \$5,400.69. (R-146) In addition, the Respondent has the obligation of paying the Appellant's attorney the sum of \$1,500.00 plus \$27.00 in Court costs (R-151).

The budget of the Respondent evidence the minimal budget providing for a monthly expense to the Respondent in the sum of \$1,451.00, without the inclusion therein of alimony, child support, Appellant's attorney's fees, and Court costs, nor the costs of Respondent's attorney's fees. (Pl.Ex.1)

Respondent's mode of transportation is a 1971 Chevrolet with a 102,000 miles on it (R-282) and is in need of \$440.00 in repairs (R-283).

ARGUMENT

POINT I

THE COURT DID NOT ERR IN DENYING THE APPELLANT'S PLEA IN ABATEMENT OF THE UTAH PROCEEDINGS, IN THAT JURISDICTION WAS PROPER IN THE UTAH COURTS.

The Honorable John F. Wahlquist ordered the Appellant to proceed to trial and denied the plea of abatement, in that the Utah Court had jurisdiction and was not estopped by reason of the "Separation Agreement", as was subscribed to in the State of New York, and affirmed jurisdiction to the Utah Court, (R-55) after the Court listened to testimony as to the residence

be sufficient to base a presumption, that the evidence before the Court was sufficient to warrant jurisdiction to the Courts of Utah in this matter.

In the matter of Lyerla v. Lyerla, Supreme Court of Kansas, 195 Ks. 250, 403 P.2d 989, the wife secured a divorce from the husband with the wife being given custody of the minor children, allowing visitations during the summer to the father and weekend visitation privileges. Subsequently, the mother was given permission to remove the children to Las Vegas, Nevada, and compelled to post a bond to guarantee compliance with the Orders of the Court, and the husband was allowed to visit his children in Nevada four days of each quarter upon giving notice. The father brought an action in the Nevada Courts to obtain custodial rights previously established by the Kansas Court and an Order was entered by the Nevada Court on a Motion by the wife confirming existing custody rights and changing dates for the 1963 summer visits and raising support payments. Upon the minor son being sent by the mother to the Elsinore Naval Military School in California for the 1963-1964 school year, the husband filed a Motion in the Nevada Courts to change the son's custody and the Motions by the husband and the wife were continued until an appropriate date. The husband had the minor son visiting with him in Kansas for the two summer months and filed the

Motion in the Kansas Court seeking a change of the child's custody. The Lower Court granting the Order and granting to the wife visitation rights. The Kansas Supreme Court held in an action in this State (Kansas) is not subject to abatement because of the pendency in another state of an action for the same relief.

In Omar v. Omar, 108 Ks. 95, 193 P.2d 1094, the Court held:

The pendency of an action for divorce in another State is not a bar, nor a cause of stay of proceedings, in a similar action between the same parties in this State, where a Court of this State has attained jurisdiction of the Defendant by service of Summons.

In the instant matter before the Court, the action of the Respondent was filed in April, 1977, (R-3) and the Complaint of the Appellant was not served until August, 1977, (R-200), and by stipulation there was never a final adjudication of the matter before the Court of the State of New York. (R-72)

In Upton v. Heiselt Construction Company, 3 Ut.2d 170, 280 P.2d 971, The Supreme Court of Utah, March 9, 1955, the Court could not accept the principle, that where there are two actions between the same parties based upon the same cause of action and two different courts, even if they do not co-exist, stating:

1. Such contention assumes that the Colorado Court was the first Court to acquire jurisdiction

of the matter, when the fact is that the Utah Court first assumes such jurisdiction, justifying the conclusion, that applying Plaintiff's own test, the Utah Court had jurisdiction to deal with a Judgment, including the stay of execution thereof.

2. That although Plaintiff's contention, that the two identical actions between the same parties cannot co-exist in different courts generally is true, there is an established exception thereto when such actions are initiated first in one State then in another, or in a State Court then in a Federal Court or vice versa, in which cases it is held generally, that although the first action filed should be pursued to finality, such identical actions can co-exist in different states or in a State in a Federal Court, provided, however, that a Judgment in one may be pleaded in bar or in abatement to the other.

In Marcus v. Marcus, 3 Wa.App. 370, 475 P.2d 571, the Court of Appeals of Washington, October 13, 1970. In this matter the Plaintiff and Defendant were parties wherein an action of an Interlocutory Decree of Separate Maintenance was sought after each of the parties had initiated separate divorce actions in the State of Rhode Island. The husband abandoned his action so that the wife could obtain the Interlocutory Decree, which provided for payment of support for the wife and children and disposition of personal and real property and awarded custody of the children to the wife. The husband was a Navy Lieutenant Commander and was transferred to California while the wife continued to reside in their Rhode Island home. The Commander was thereafter ordered to attend a naval school in Oak Harbor, Washington. The Commander thereafter, one year

and three weeks after his first arrival in Oak Harbor, filed an action for divorce. The spouse challenging the Court's jurisdiction and moving for abatement of his action on the grounds, that an action for divorce was pending in Rhode Island Court. The Superior Court of Island County in Washington did grant the divorce to the husband making a determination that it possessed jurisdiction. The spouse as the Appellant assigned error to the Trial Court's denial of the Motion to Dismiss the Respondent's Complaint, alleging that because the divorce was pending in Rhode Island, that a Washington Court must abate a subsequent divorce action commenced in the State of Washington. The Court held:

Her claim is without merit, for the pendency of a prior action in one state is not a ground for abating subsequent action in this state. The Court holding further, that an abatement of an action can be had only where a matter is pending before another court of the same jurisdiction, and in that event, one of the actions must be abated.

POINT II

AN AGREEMENT ENTERED INTO BY AND BETWEEN A HUSBAND AND WIFE IN THE EVENT OF A SUBSEQUENT DIVORCE IS AN POST-NUPTIAL AGREEMENT AND IS NOT BINDING UPON THE COURT.

The Agreement entered into by and between the Appellant and the Respondent was planned by the wife, the Appellant herein, when she saw her attorney two days prior to the return of the Respondent from his tour of duty in Thailand, (R-129).

The Agreement was forced upon the Respondent on the basis of fiat delivered by the wife, that unless the Respondent subscribe to the agreement, she would seek a divorce. (R-269)

The Respondent did not wish a divorce and induced his wife to attend a marriage counseling group with him and did not want to go to his new assignment in Utah without his wife and signed the "Separation Agreement" in order to avoid a divorce action. (R-270 - 275) The Respondent was further induced to sign by reason of the statement made by the wife's attorney to the Respondent, that he would not be bound by the Agreement by the New York Court, in that it could be modified if necessary by the Court. (R-276)

The Honorable Ronald O. Hyde stated that the Agreement was a stipulation and was not a binding contract in the State of Utah (R-386), and further stated:

In the State of New York, it is grounds for divorce as I understand it to live under a Separation Agreement for a period of one year. We do not have that grounds. (R-387)

The Court further stated:

In this State, a Stipulation is just that. It is a tentative agreement. If approved, then it becomes binding, it is not binding on the Court and that's why I changed some of it. (R-387)

It should be noted at the outset the specific law of the State of New York under which the Separation Agreement was first drafted wherein the laws of the State of New York,

Section 170 thereof, provides as follows:

An action for divorce may be maintained by a husband or wife to procure a Judgment divorcing the parties and dissolving the marriage on any of the following grounds:

(5) The husband and wife have lived apart pursuant to a Decree or Judgment of Separation for a period of one or more years after the granting of such Decree or Judgment, and satisfactory proof has been submitted by the Plaintiff, that he or she has substantially performed all of the terms and conditions of such Decree or Judgment.

This citation is contained in the unsealed envelope on page 140 of record, which was submitted by the Appellant to the Court and is part of the record in this matter.

The attention of the Court is called to the fact, that the (5) specifically provides that the parties have lived apart for a period of one or more years after the granting of such Decree or Judgment of Separation, and that in the instant matter before the Court, the action was not pursued in the State of New York and there was no Judgment, and in addition thereto, the Appellant and Respondent lived together as husband and wife subsequent to the subscribing to the Agreement as set forth in the record. (R-369)

All of the citations of the Appellant in reference to the New York cases are not in point with the issues attempted to be stated by the Appellant, but that the New York case of Christian v. Christian, Court of Appeals of New York, 42 N.Y.2d 63, 365 N.E.2d 849, June 9, 1977, is specifically contrary to

the allegations of the Appellant. The Court stated:

Marriage being a status with which a State is deeply concerned, a Separation Agreement subjected to attack are tested carefully.

A Court of equity does not limit its inquiry to the ascertainment of the fact what has taken place would, as between other persons, have constituted a contract, and give relief, as a matter of course, if a formal contract be established, but it further inquires whether the contract between husband and wife was just and fair, and equitably sought to be in force, and administers relief for both the contract and the circumstances required.

The Court of Appeals referred to the provisions of paragraph 5 and 6 of the Divorce Reform Law of 1966, wherein the State of New York abandoned its position, wherein adultery was the sole ground for absolute divorce, stated that paragraph (5) of the Statute is called a conversion divorce, in that they permit the conversion of a judicial separation decree or separation agreement into an absolute divorce decree. It further stated, that in order to enforce such a separation agreement:

That the Plaintiff has complied with its terms and that the parties have lived apart pursuant to the document for the statutory period.

The Court further cited, that although written separation agreement is a sine qua non to a divorce, it is evidentiary in nature and admissible under the General Rules of Evidence, and the Court would allow proof independent of the agreement to be admissible on the question of whether or not the parties

actually lived separate and apart for at least one year.

The Court further stated that:

There is a strict surveillance of all transactions between married persons, especially separation agreements, ***equities so zealous in this respect, that a separation agreement may be set aside on grounds that would be insufficient to vitiate an ordinary contract.

The Court further cited cases to the affect in making its ruling here in the instant case cited, that it stated:

These principles in mind, Courts have thrown their cloak of protection about separation agreements and made it their business, when confronted, to see to it that they are arrived at fairly and equitably, in a manner so as to be free from taint or fraud and duress, and to set aside or refuse to enforce those borne of and subsisting in inequity.*** To warrant equities intervention, no actual fraud may be shown, for relief will be granted if the settlement manifestly unfair to his spouse because of the others overreaching.

The application of the laws of the State of New York have no bearing directly in the instant matter before the Court, in that Utah has no like statute as to separation agreements and has provided grounds for divorce of a much broader basis than the laws of the State of New York, and a Court in the State of Utah that enters into making a decision as to the rights, duties, and obligations of the husband and wife is acting as a Court of equity and is not morally nor legally bound to accept what is in affect an post-nuptial agreement as between the parties, particularly as evidenced

in the instant matter before the Court where the Respondent desired to save his marriage and as an alternative to outright divorce, sought a reconciliation by seeking marriage conseling with the Appellant (R-270), and sought to reconcile their differences by subscribing to the agreement so that the Appellant would accompany the Respondent to his new duty station in Utah. (R-275)

The wife's seeking the advice of an attorney in the drafting of a separation agreement two days before the Respondent's return from a year's duty in Thailand and her refusing to bring the children with her to Utah or their furniture (R-339), but arriving in Utah on Friday and leaving the following Monday to return to New York (R-274), are not in affirmation of the good faith reconciliation by the Appellant with the Respondent.

The Honorable Ronald O. Hyde, in commenting on the "Separation Agreement", stated in reference wherein he stated:

And I can't, for the life of me, believe that New York would take the same position that it is binding upon that Court when on the face of it, it is just non-liveable. It puts a person in a position that he can't live with it, and it is a foolish agreement, not within the bounds of equity. (R-377)

The Supreme Court of the State of Utah ruled in Pearson v. Pearson, 561 P.2d 1080:

It is the Court's prerogative to make whatever disposition of property, including the rights in

such contract, as it deems fair, equitable, and necessary for the protection and welfare of the parties. The Court need not necessarily abide by the terms of the litigant's Stipulation, and although such should be respected in giving great weight, the Court is not duty bound to carry over the terms thereof.

The Court further stated in reference to the right of the Court in considering a Stipulation between the parties:

It is also noted that the Trial Judge has considerable latitude of discretion in the disposition of property and his Judgment should not be changed lightly, and in fact not at all, unless it works such a manifest injustice or inequity as to indicate a clear abuse of discretion.

In the instant matter before the Court, the husband, who is the Respondent in the matter before this Court, signed the Agreement prepared by the wife with her attorney even prior to the return of the Respondent from his tour of duty overseas in Thailand (R-129), and signed the Agreement in order to avoid a divorce action (R-270,-275), and the Separation Agreement clearly was instrumental in the separation and divorce of the parties, Respondent and Plaintiff.

In Dawley v. Dawley, 131 Cal.Rpt. 3, 551 P.2d 323 (June, 1976), the Supreme Court of California stated that California Courts have uniformly held, that contracts and the State policy favoring marriage only insofar as the terms of the contract do not "facilitate", "encourage", or "promote" divorce or dissolutions.

In Christensen v. Christensen, 18 Ut.2d 315, 422 P.2d

534, January, 1967, the Supreme Court of Utah held that the Trial Court could ignore a stipulation, and in doing so, the Court would not be acting in excess of or without jurisdiction, and the Court has no obligation to accept a stipulation.

POINT III

THE COURT ERRED IN AWARDING EXCESS ATTORNEY FEES TO THE APPELLANT - IN GRANTING ALIMONY TO THE APPELLANT FOR THE AMOUNT AND PERIOD INVOLVED - COMPELLING PAYMENT OF ONE-HALF CHILDREN'S TUITION THROUGH AGE OF 21 - IN ORDERING PAYMENT OF ADDITIONAL COSTS OF ONE-HALF OF DOCTOR BILLS.

In Anderson v. Anderson, 18 Ut.2d 286, 422 P.2d 192, this Court stated:

The Court's responsibility is to endeavor to provide a just and equitable adjustment of their economic resources so that the parties can reconstruct their lives on a happy and useful basis. In doing so, it is necessary for the Court to consider, in addition to the relative guilt or innocence of the parties, an appraisal of all of the attendant facts and circumstances; the duration of the marriage; the age of the parties; their social position and standards of living; their health; considerations relative to children; the money and property they possess and how it was acquired; their capability and training and their present and potential income.

In the instant matter before the Court, the awarding of \$350.00 a month alimony to the Appellant, together with \$400.00 support for the two children, and the continuation of the alimony after August by the payment of \$200.00 to the Appellant for an additional period of two and one-half years, and the continuation of support for the children for \$450.00

a month, plus the payment of one-half of the children's tuition; one-half of the doctor bills; \$1,500.00 to the Appellant's attorney; together with all of the property and debt distributions set out in the Separation Agreement, (R-100,-101) the payment of \$5,400.00 of debts by the Respondent is manifestly not a just and equitable adjustment of the economic resources as to the Respondent. (R-145,-149)

The wife is a college graduate, and there is no evidence in the entire trial record of any infirmities of the wife, the Appellant herein.

The wife was obviously not too distraught by the pending action of divorce, in that she was accompanied to the trial by a male friend, who also loaned her money for the trip and with whom she admitted she was dating at time of trial, admitted that when the Respondent called her in New York between 11:00 and 1:00 o'clock at night, the Respondent was only able to reach her by talking to her at the home of her male friend and she has often had Sunday dinner at her male friend's home (R-357,-358).

The Respondent testified that he had not been selected for promotion at the last Promotion Board in August, and that the failure to be so promoted (R-290), and it would be a year and one-half before the Board would meet again and that when an officer of the Respondent's status does not make the Board for promotion at the first time selection, chances go

down drastically, "less than five percent and probably about one percent", and it is unlikely that he will be promoted, and the failure to obtain promotion also means that the Respondent would be required to retire at not more than 21 years of service. (R-291)

The Respondent has provided for the medical care of the minor children, in that they are covered under the Champus Program of the Air Force, wherein 80 percent of the costs of all medical care after deduction of the first \$100.00 of costs is provided for the children. (R-291)

Prior to the Respondent leaving for his tour of duty in Thailand and the Appellant moving to New York, the home of the parties in Texas was sold (R-372), most of the debts were paid off, and the Appellant was given \$5,000.00 which was first put into her checking account in the Spring of 1976 and all of the money was gone by the time the Respondent arrived home from Thailand. (R-369) The Respondent's pay check went directly to the Appellant from which she would send him \$300.00 a month. (R-374)

The Stipulation Agreement further provides that the Respondent shall be responsible for any security deposit required on any apartment obtained by the Appellant, and that the Respondent also agrees to pay for any utility deposits required. (R-27) The Respondent already having made a deposit on the premises

used by the Appellant at the time of trial in the amount of \$370.00 (R-348). Such provision for the paying of deposits upon any apartments selected by the Appellant is manifestly unjust and conscionable.

The Court incorporated the Agreement by reference except to minor modification due to the inequity of the Agreement as to its provisions for alimony and child support (R-147), and it is the contention of the Respondent, that the Court in rendering its Judgment provided that the Respondent pay to the Appellant \$1,500.00 attorney fees, even though the Agreement between the parties, that the Court chose to incorporate but modify, provided that each of the parties pay their own costs in the event of a divorce action as between the parties.

In accordance with Mitchell v. Mitchell, 527 P.2d 1359 (Nov., 1974), Supreme Court of Utah, this Court has held that the burden is on the Appellant to prove that evidence clearly preponderates against the Findings as made and that there was a misunderstanding or misapplication of the law resulting in substantial prejudicial error where a serious inequity has resulted so as to manifest clear abuse of discretion.

This Court further stated in Hendricks v. Hendricks, 63 P.2d 277 (Dec., 1936), that an appeal on the propriety of the Judgment of the Lower Court as to alimony, the Court is required to reveal the evidence in the nature of a trial de novo on the record and to submit it to the Court. The excess generosity of the Lower Court in the award which was made to

the Appellant was induced substantially by the Court believing that the contract referred to as the "Separation Agreement" was "under your New York Statute, I suppose it is basically acceptable" (R-379), and that the error of the Court in making minor modifications as to a reduction of the liability of the Respondent as set forth in the Separation Agreement was erroneously based upon the concept, that the Separation Agreement was an untouchable document in the State of New York, which as has been previously set forth in the citation of Christian v. Christian, supra, has been held by the Circuit Court of Appeals of New York as not an untouchable instrument and one in which the Court has substantial leeway and is not bound thereby.

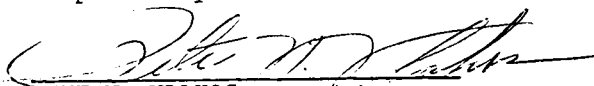
In addition, it is submitted to the Court, that the Respondent is further entitled to reimbursement for the allowable costs of the Appeal and attorney fees necessitated by reason of the Appeal of the Appellant, which has substantially increased the costs of the Respondent. This Court held in Barraclough v. Barraclough, 111 P.2d 792 (Apr., 1941), the Court held when it affirmed the Judgment of the Lower Court, that there was no basis for modifying the Decree and held against the Appellant, that the Respondent had incurred allowable costs that the Respondent would be entitled to reimbursement for the same from Appellant.

CONCLUSION

It is submitted to this Honorable Court, that the so-called "Separation Agreement" entered into in the State of New York and wherein no Court action was undertaken to make such Separation Agreement an order of any Court of the State of New York, that the Agreement was a stipulation in form and was in effect an post-nuptial agreement which was subject to modification and was so modified by the Lower Court using the equity and discretion of the Court in final Judgment rendered by the Lower Court, and further, that there can be no question that the Lower Court had jurisdiction and that such a jurisdiction cannot be in deprivation of the right of the Respondent, who was domiciled in the State of Utah, from filing an action of divorce in the State of Utah, in that the so-called "Separation Agreement" did not deprive the Utah Courts of its jurisdiction to hear the action brought before it and there was no right of abatement as to the Appellant in favor of the State of New York.

DATED this 11 day of August, 1978.

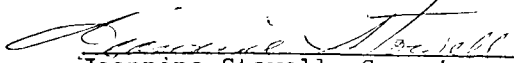
Respectfully submitted,



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CERTIFICATE OF MAILING

A copy of the foregoing Respondent's Brief was posted in the U.S. mail postage prepaid and addressed to the Attorney for the Appellant, Samuel King, 409 Boston Building, Salt Lake City, Utah 84111, on this 11 day of August, 1978.


Jeannine Stowell, Secretary