

1978

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

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

PAUL F. ROST, :
 :
 Plaintiff/Respondent, :
 :
 vs. :
 :
 JANET L. ROST, :
 :
 Defendant/Appellant. :

APPELLATE CASE

APPEAL FROM THE DISTRICT COURT OF THE
WAHLGUTH DISTRICT OF THE COUNTY OF KANE
AND DECEMBER TERM, 1980
BOTH SIDES
UTAH.

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STATEMENT OF THE KIND OF CASE

This is an action for divorce.

DISPOSITION IN LOWER COURT

At hearings prior to trial, the Honorable John F. Wahlquist denied appellant's motions asking that Utah decline jurisdiction or abate proceedings in favor of concurrent proceedings in New York State.

On February 17, 1978, Judge Hyde entered a Decree of Divorce between the parties.

RELIEF SOUGHT ON APPEAL

1. Judge Hyde's Decree of Divorce should be modified so as to incorporate the parties' previously executed Agreement of Separation in its entirety.
2. Appellant should be released from a Utah imposed order staying her from concurrent proceedings in New York State so that in the future, she may proceed there to enforce or modify the Utah decree if neither party then resides in Utah.
3. Prays for fees and costs.

STATEMENT OF FACTS

Both parties were born and raised in Brooklyn, New York.

In 1962, plaintiff-respondent, graduated from college, received a commission in the United States Air Force and married

Major Rost remained in the Air Force. Mrs. Rost and the parties' two children have accompanied him when possible. Since May, 1975, the parties have been separated with Mrs. Rost and the children residing in the home state of New York.

The children are John Kenneth Rost, born January 24, 1964, and Suzanne Louise Rost, born November 17, 1966.

In June, 1976, Major Rost, while enroute to a new assignment at Hill Air Force Base, Utah, went home to New York. The parties discussed their marital problems and decided to attempt reconciliation by Mrs. Rost going with Major Rost to Utah for the summer, and the children to follow in the fall if the reconciliation works.

They made an alternative arrangement, an Agreement of Separation pursuant to the laws of New York State in the event that reconciliation failed.

This Agreement of Separation is attached as Annex 1. Courts requests the court read it. It has many terms, such as precisely defining emancipating events (Annex 1, P 12-15), notice and consent on children's health treatment, etc., that are beneficial to both the parties and desirable in defining the privileges and duties of each party in event of separation or divorce.

In preparation for execution of the agreement, both parties saw an attorney, Marvin Malin, several times. In his Findings of Fact, Judge Hyde specifically found:

"The Court finds such an Agreement of Separation to be reasonable, to have been properly executed without duress, and incorporates it herein except that the Court finds its provisions of alimony and child support to be inequitable, and hereby modifies such provisions as hereinafter set forth, and the remaining terms administered in accordance with the law of the State of New York."

By the terms of the Agreement, the parties split the then existing debts evenly.

They also split their existing personal property (there being no real property) evenly (Annex 1, P 24,25), except that, Major Rost getting more than Mrs. Rost, agreed to pay her \$1,200 to make the distribution equal. (Annex 1, P 16, §16c) The last two pages of the Agreement of Separation are a specific itemization of the parties' property.

In preparatory work on the Agreement, Major Rost spent many hours working out depreciation schedules to arrive at the valuations. (T 274, L 7-12; T 298, L 29 - T 299, L 7; T 300, L 2-8; T311, L 4-11; T 331, L 12-17; T 338, L 30-39, L 2)

He borrowed the \$1,200 and paid it to Mrs. Rost as part of execution of the agreement. This gave Major Rost obligations or fixed debts at the time of separation of \$4,200. (T 305, L 8 - 306,L3)

At that time, Mrs. Rost was a college student. She had then, and at the time of the divorce, part time work giving her \$50 per week.

Major Rost's monthly income at that time was a gross of \$2,169.01. (Ex P-2) From this, he had tax deductions of \$397.85, FICA of \$93.56 (for 9 months only), and service life insurance of \$3.40, and voluntary deductions of a U. S. Savings Bond at \$37.50, charity at \$8 and payment on a bank loan at \$70, for a net pay of \$1,558.68 per month, or \$1,674.18 with the voluntary deductions excluded.

Each party paid one-half of the \$750 attorney fee charged preparing the Agreement of Separation.

The attorney, Mr. Malin, indicated that he represented Mrs. Rost. Major Rost chose not to have an attorney because of his involvement in the terms, and his feeling that being an officer, a college graduate, he did not need one. (T 331, L 30 - T 332, L 1) He stated in the agreement that he "refused" legal representation (Annex 1, P 17, §18a)

The Agreement provided that Major Rost pay Mrs. Rost \$950 per month total. This was \$350 per month as support for Mrs. Rost (Annex 1, P 11) and child support in the amount of \$300 per month per child. (Annex 1, P 12-15, §11)

After paying the \$950 to his wife and two children, he had left \$724.18 per month. As his actual taxes for 1976 came to \$180 per month (T 295, L 20-22), and he received all the refund pursuant to the Agreement (Annex 1, P 15, §13a), adding \$217.85 to his monthly net (\$397.85 tax deduction less \$180 actual tax), he had an effective take home after all deductions and support of \$942.03.

In essence then, the Agreement split his income equally, as it did assets and debts. Granted, Mrs. Rost earned \$200 per month on her own, she also had three people to provide for, and tuition to pay. School was expensive. (See Ex D-8)

In addition, each year in October, it had been his expectation to get a federal employee pay raise. He also obtained raises through promotion and automatic raises for tenure in the Air Force.

In sum, the Agreement evenly divided the parties' debts, evenly divided their assets, and income.

After signing the Agreement, the couple drove to Utah but after several days, the reconciliation failed.

As Major Rost put it,

"... My wife accompanied me out here to Utah after the separation agreement was signed, and attempted to have a reconciliation. And she found she would like to live out here. But shortly after arriving here, it was obvious that it was not going to work, so I sent her back home." (T 206, L 20-24)

By coming to Utah with Major Rost, in reliance on the Agreement, Mrs. Rost acted adversely to her own legal position in the event that the parties did divorce.

This was anticipated as a real probability in the Agreement. It provided that either party could file for divorce in any state provided that such party would read the Agreement into the record and have it be part of the Decree. (Annex 1, P 20-21)

Mrs. Rost's position change was that, should Major Rost seek divorce in another state and ignore the Agreement, she had given up jurisdiction in New York when she could have had him served there in June, 1976. Such eventuality came to pass.

From the end of their reconciliation effort, the parties lived separately. Each honored the Agreement.

Mrs. Rost paid off the debts that she had assumed pursuant to the agreement. On his part, Major Rost increased his then indebtedness of \$4,200, by taking an apartment in Ogden across the mouth of Weber Canyon from Hill Air Force Base, and borrowing

of \$6,200 in summer, 1976.

At time of trial, November, 1977, he had reduced this \$6, indebtedness to \$5,400. (T 303, L 21029; T 304, L 22-25; T 305 L 8 - T 306, L 3)

At time of trial, Major Rost's gross pay had increased by \$135.92. (Ex P-2, P-5)

At time of trial, Mrs. Rost's circumstances had not changed favorably. Her part-time income was the same. She was \$7,000 in debt. These debts were incurred after the Agreement. They included loans of tuition money, loans for her to paint and fix up the apartment she had taken after the reconciliation failed, but were mostly for attorney fees and travel expense in connection with divorce litigation.

Major Rost filed for divorce in Utah in April, 1977, but Mrs. Rost was not served until June, 1977. She responded by immediately filing a complaint for divorce in New York, in which she asked for divorce pursuant to the terms of the Agreement.

She was forced to file in New York because Major Rost, in his Utah complaint stated,

"7. That the parties entered into an Agreement of Separation dated the 15th day of June, 1976, and that plaintiff now rescinds that agreement." (T 2)

Mrs. Rost's New York Counsel located counsel in Utah who filed a Special Appearance in the Weber County Court asking the court "decline" jurisdiction due to the New York oriented

terms of the separation agreement and the facts that spouse, children and parties' basic home was in New York.

This Special Appearance was denied by Judge Wahlquist at an ex parte hearing where Major Rost appeared and testified, but no notice was given to Mrs. Rost or her counsel. (T 41)

On receiving notice that her Special Appearance had been denied, Mrs. Rost filed an Answer and Counterclaim, and also filed a broader motion in regard to appropriate jurisdiction, requesting that Utah proceedings be "abated" in favor of New York proceedings. (T 44, 45)

Pursuant to the terms of the Agreement, Mrs. Rost sent the children to Utah to visit Major Rost in August, 1977. On receiving them, he took them on a vacation to Jackson, Wyoming, and then asked for their custody saying that they wished to remain with him permanently. The children stayed with him voluntarily for a while, but the 10 year old daughter returned to New York after two weeks and the 13 year old boy, in two months.

Although Major Rost had filed no reply to the Answer and Counterclaim, and the Plea in Abatement had not been heard, so that there was no determination as to which state should try the case and hence no discovery had been attempted in either state, Mrs. Rost was advised on August 29, 1977, that the case was set for trial on the merits on September 7, 1977.

By courtesy of Major Rost's counsel, Mrs. Rost's counsel was allowed to file a pleading (T 48, 49), asking for ruling on the issue of abatement, and for time to prepare for trial should

At hearing of this motion on August 31, 1977, Judge Wahlquist (1) denied her Plea for Abatement; (2) allowed Major Rost to claim custody, something he had previously conceded; (3) confirmed the trial setting for September 7, 1977; (4) compelled Mrs. Rost to go to trial on that date, or the first open date thereafter, by terminating entirely the Major's support obligation as of trial date (This was not before the court, but was sua sponte); and (5) denied Mrs. Rost any travel fees or attorney fees to enable her to appear and defend in Utah. (T 74, 75)

At that hearing, Judge Wahlquist did allow discovery. As there were only three court days intervening before trial, it would be difficult to set, take, transcribe and deliver testimony in that form in that time.

Mrs. Rost was not present at the August 31, 1977, hearing, it having come on so suddenly. Her counsel did argue to Judge Wahlquist that if custody were an issue, there were no witnesses in the State of Utah who could give useful information so that the court could make an advised decision. Included among such witnesses would be the three psychiatrists who had treated the children and Mrs. Rost during their separation from Major Rost.

Subsequently, at trial, a letter from each of these psychiatrists was admitted in evidence, subject to Major Rost's right to rebut. (T 270, L 25 - T 271, L 7; letters in transcript between pages 80 and 81)

The importance of these letters in advising the court on custody, can be shown in Judge Hyde's ultimate ruling that Mrs. Rost, not the Major, was entitled to the divorce because of his "unfeeling" treatment of his family. (T 145, L 23-27) As an example, the letter of the daughter's psychiatrist had pointed out that she suffered severely, in part because she "tried to idealize" her father as being "nice and kind" but in actuality couldn't think of any specific times when he ever had been. (Letter of Dr. Steven L. Zaslow, T 80-81)

Never having met her Utah counsel, being entirely unprepared for trial, particularly with custody an issue, and feeling that New York was the better state to try to the case, Mrs. Rost filed a petition for interlocutory appeal and for mandate staying Utah proceedings. The petition is attached in full as Annex 2. The factual details are not recited here to save space, but the court is respectfully requested to read it. It is the foundation for Mrs. Rost's argument, Point II.

The case came on for trial before Judge Ronald O. Hyde, September 7, 1977. On seeing that Mrs. Rost was not prepared for trial, the interlocutory appeal's petition for writ of mandamus having been denied, but the court and parties not being advised as to disposition of the petition itself, and it appearing to Judge Hyde that Judge Wahlquist had been attempting to "push the matter to early hearing" (T 226, L 14-19), Judge Hyde continued trial until the next day.

Judge Hyde also stated that the trial would have to proceed forthwith as he couldn't overrule a brother judge (T 223, L 1-12; T 231, L 12-15; T 236, L 30 - T 237, L 9), even though he frankly stated that he disagreed with Judge Wahlquist. (T 252, L 8-14)

On the following day, September 8, 1977, Mrs. Rost proposed that she agree to stay all proceedings in New York until and if she were allowed to proceed by a Utah court, provided she could be allowed a continuance in which to prepare for trial in Utah, and to find if the Utah Supreme Court would hear her Interlocutory Appeal and allow trial in New York.

This offer by Mrs. Rost was voluntary in the sense that she proposed it, but involuntary in the sense that she was forced by circumstances. There was no other way that the issue of which state should try the case could be preserved before trial in Utah and no other way she could proceed to trial in Utah on a preparatory basis except by gaining time in which to obtain and present evidence concerning the children's best interests in custody.

Judge Hyde accepted her offer. Her consent to stay of proceedings in New York was filed in Utah and New York. (T 73, L 143)

The Utah Supreme Court denied Mrs. Rost's Petition for Interlocutory Appeal without hearing, and the case came on for trial before Judge Hyde on the merits on November 23, 1977.

Judge Hyde incorporated the Agreement of Separation into the Decree in regard to its allocation of assets and obligations, but modified it to eliminate life insurance, reduced the alimony by

allowing it to continue to run at \$350 per month but only until August, 1978, at which time it reduced to \$200 per month for 2 1/2 years, and then terminate. (T 148, L 1-6)

He based the alimony schedule on Mrs. Rost's time schedule to complete college. (T 145, L 28 - 146, L 4)

He also reduced child support from the \$300 per child per month provided in the Agreement to \$200 per child per month, such to increase to \$225 per month per child on alimony terminating. (T 148, L 7-15)

He made changes because he found the Agreement at time of trial to be "inequitable" on these terms. (T 100-101; T146, L5-12)

Judge Hyde found Major Rost's debts to be a total of \$5,400.69. (T 146, L 13-22), and his monthly budget, as submitted by the Major, at \$1,451. He found "this figure to be essentially realistic although somewhat high... ." (T 147, L 6-20)

In regard to Mrs. Rost, he found her monthly cost of living to be \$1,342.75 (T 147, L 21-32), and such to be entirely necessary. (Ex D-1, D-3, D-6, D-7, D-8, D-9) He found her obligations from the separation agreement to have been entirely met by her, but that she had incurred other debts totaling \$7,124.07. (T 146, L 23-31, Ex D-7)

Judge Hyde required each party to pay their separate obligations.

Major Rost had outlined his obligations, income and budget in Ex P-1, a 3 page handwritten document. This was prepared and

anticipated that his son who was with him then might remain with him.

That exhibit was based on his then gross pay of \$2,169.01, per month (Ex P-2), and was verbally amended at trial to increase to \$2,304.93. (Ex P-5)

Judge Hyde found that each party needed \$1,400 a month to live on, but there wasn't \$2,800 net. For this reason, he cut alimony and child support. That finding, though, was based on Major's circumstances at time of trial including \$404.97 a month payable on debts.

Mrs. Rost contends that analysis of his finances is necessary.

Major Rost had not only lived with the Agreement from June 1976, to August, 1977, but during that time he reduced his indebtedness by \$800. He could have lived at base officers quarters at Hill Air Force Base if he had chosen to. Instead he took a \$2,000 loan to furnish his new apartment in Ogden. Because he did not choose to economize until he had reduced his debts, he was substantially overburdened at the time of trial with many short term debts including over \$2,000 on a number of charge accounts, which is why his monthly payment on debts exceeded \$400.

By comparison, Mrs. Rost was living very frugally. Her expenses were high due to school tuition, the substantial medical expenses of the children to which she had to contribute, and cost of living in New York. Exhibit P-1 is her comparison between the apartment she and the children live in and the apartment Major

Rost lives in. It shows newer and better items for him down the line.

Her food for 3 people in New York is \$300 per month (Ex D-6), while his is only \$50 less (Ex 1-P, page 3). Her total clothing is \$82.80 including two growing children, while he has \$70 a month for new clothes plus \$30 to clean them.

Included in the Major's style of living, according to his exhibit (Ex P 1, page 3) were the following: housing, \$300 per month in a two bedroom apartment, with utilities at \$95 more (her utilities total \$54.33), gasoline at \$75 per month; food at \$250 per month; a new car at \$160 per month; a savings bond at \$37.50 per month; school lunches (his son had returned to the mother a month prior) at \$22 per month.

His debts are included in his cost of living, although some of them, such as Mastercharge (717.25 total, \$99.75 per month), American Express (\$523.64 total, 70.22 per month), and Bank Americard (\$415.05 total, \$20 per month), must duplicate, be payment for, his monthly expenses such as food and clothing.

By contrast, while Mrs. Rost has to pay her debts also, she omitted them from her list of monthly expenses.

Had he chosen to live on post, and then been moderately conservative about clothing, new car, gasoline, food and charge account interest charges, he could easily have lived on a budget of \$900 per month until he had retired his short term debt.

The amount of taxes to be withheld from Major Rost's gross

pay was a point of contest. While stationed in Texas, he had taken

that as his state of permanent residence for tax purposes, Texas having no income tax. (T 294, L 4-13)

In the year prior to the divorce hearing, 1976, the family federal tax had averaged \$180 per month as previously set out. Major Rost estimated his monthly taxes at \$450 for 1977. (T 295, L 28 -T 299, L 17). The Agreement gave him the right to the tax refunds in 1977 as it had in 1976. (Annex 1, P 15, §13a) Exhibit P-5 shows an actual monthly withholding of \$433.60 for federal taxes for him.

While he lost exemptions for wife and one child by divorce and would file a separate return after 1977, still he would gain an alimony deduction which would substantially offset his losses \$250 a month, or \$3,000 a year, seems more realistic as his federal tax figure for 1977 and future years.

Putting these figures together, his total necessary deductions from his monthly pay check would be \$327.92 (\$74.52 FICA, \$3.40 service life, \$250 federal income tax), giving him a take-home pay of \$1,977.01 per month.

Deducting \$950 a month as per the Agreement, would leave him a take-home pay of \$1,027.01 per month and his family \$1,150 when Mrs. Rost's earnings are included.

Having him pay, as Judge Hyde ordered, \$750 per month, gave the wife and two children a total of \$950, and gave the Major a take home of \$1,227.01 per month.

While Judge Hyde found it would be "inequitable" to have Major Rost pay over \$750 per month, it is questioned whether

this is because of basic economic disparity, or whether it only appears inequitable because of his high monthly debt payments and living style.

Mrs. Rost concedes that Major Rost should not have to live stingily.

Neither should his children.

Their budget is more rigid than his.

The factual question rises as to whether avoiding "inequity" to Major Rost was not productive of causing "inequity" to his family.

ARGUMENT

POINT I.

IT IS SUBMITTED THAT THE CRITERIA USED IN
NEW YORK JUDICIAL REVIEW OF A SEPARATION
OR DIVORCE AGREEMENT ARE APPROPRIATE FOR
USE IN UTAH IN GENERAL, AND FOR THIS CASE
IN PARTICULAR.

The parties' Agreement of Separation was carefully considered, well drafted, and Judge Hyde found it to have been willingly and intelligently executed.

While Judge Hyde found that the Agreement's monthly payment terms were "inequitable" at time of trial, there is no such finding in his Findings of Fact in regard to the equities at the time of the execution of the Agreement. Judge Hyde candidly stated the issue in his Memorandum Opinion:

"The State of New York recognizes a no-fault grounds of divorce based upon a separation agreement and living apart for a period of one year. This is not grounds for divorce within this jurisdiction. The courts of New York are not blindly bound by such agreements. The courts of this state are not bound by stipulation until approved. I intend to use the separation agreement basically as a stipulation and settlement of the parties' rights subject to such changes as I feel justified in equity." (T 100)

It is submitted that this case illuminates the difficulty in applying simple equitable principles in review of a separation agreement, even though the Utah courts are specifically empowered to do equity pursuant to 30-3-5, UCA.

There is an apparent conflict between Utah and New York law concerning criteria for review of separation agreements.

On analysis, the difference in criteria may be more semantic than real. Should the Court find the difference to be real, counsel submits that this is an appropriate time to reconsider what criteria Utah should apply.

The Utah criteria was most recently stated in Pearson v. Pearson, 561 P2d 1082.

There, the question was whether the trial court should have accepted the parties' stipulation of settlement made in open court. The court instead accepted the stipulation in part, and modified it in part. The Utah Supreme Court ruled:

"It is noted at the outset that the trial court, pursuant to U.C.A. 1953, 30-3-5, may make such orders in relation to property as may be equitable and parties cannot by contract completely defeat the authority expressly conferred by said statute. 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 litigants' stipulations, and although such should be respected and given great weight, the court is not duty bound to carry over the terms thereof."

New York holdings will be cited later, but to give contrast to the Pearson holding, the New York rules will be summarized now. They provide that a properly executed separation agreement is to be honored by the trial court, unless the trial court is persuaded that the agreement was tainted by "fraud," "duress," "concealment of assets," or "gross overreaching," (also called "palpable unfairness")

Even though the court finds the agreement valid at its inception, it can still be modified at trial if there has been a substantial change of circumstance since its execution, by the same criteria that a Utah decree can be modified for change of circumstance.

The qualifying language in Pearson, that the parties cannot by contract "completely defeat" the authority of the court, implies that the parties can reasonably, partially, defeat the court's authority. That is, if the agreement appears reasonably sound, so as not to "defeat" equity, Pearson implies the agreement should be upheld.

Other language in the quoted section from Pearson supports this interpretation, as the court adds that "the litigants' stipulations...should be respected and given great weight..."

This must also mean that the trial court should not invade the set terms of an agreement without very substantial cause.

On reflective consideration, these qualifying terms may well accord with the New York criteria. If so, the New York criteria

might have some advantage, because of their well defined legal meanings, in assisting counsel and trial judges in preparation and evaluation of separation agreements.

The basis for the New York criteria are:

First, contract. The rights given and obligations assumed by a separation agreement, particularly when lived out by the parties, are matters of contract. These contracts are extremely important contracts to the people involved.

A party who performs a contract in good faith should be allowed to expect the aid of the court in holding the other party equal to the contract. Such person shouldn't be advised by his attorney that his performance of, and reliance on, the contract can easily go for naught because the court will modify the contract in any way it sees fit, i.e., equitable.

The New York law applies the concepts of contract law as firmly to domestic contracts as to other contracts.

It tailors the contract approach by using modifying criteria that are particularly appropriate to domestic law. "Gross overreaching,"--one of the New York criteria--is an example. It is scarcely appropriate to general contract law, but highly appropriate to domestic law because it gives the court clear authority to modify where one spouse has simply beaten the other down into submission to bad terms.

The second New York criteria is judicial restraint. It is extremely difficult for a court to do equity on existing circumstances, and harder yet for past circumstances.

What appears inequitable in viewing the agreement today might have appeared equitable at the time of its execution.

This is particularly true because self-serving parties change their testimony to meet their purposes, so that what facts existed at the time of agreement execution may well appear in a different form and be accepted by the court, at trial.

The case at bar gives an example.

At trial, Major Rost testified that he was pressured into signing the agreement to try to save his marriage, yet on arrival in Utah, his wife turned around and left him 3 days later without cause, making only a show on her part of an effort to reconcile, and thereby getting him stuck to a bad agreement that she could use as grounds and terms for a divorce a year later in New York. (T 269, L 25 - T 270, L 14; T 275, L 6-18; T 290, L 5-11; T 310, L 15-29) His purpose was to break the financial terms (and he succeeded).

How different his testimony at a prior hearing--where the issue was abatement--and his purpose then was to show his family wasn't deeply rooted in New York, so that New York shouldn't be the trial situs. This testimony was given by him on August 31, 1977, at the abatement hearing before Judge Wahlquist and is at page 5 of this Brief. (T 206, L 9-30)

A wise sense of judicial restraint, a healthy suspicion of hindsight, is appropriate.

The third basic New York rationale is peace. It is far better for parties to negotiate and agree on terms of separation or divorce, knowing they are going to be substantially bound by those terms, than it is for them to feel that such agreements can easily be invaded by the trial courts, because that leads either to the agreements being casually violated by the parties or to the agreements not being made. Both of these consequences produce litigation, attorney fees, and emotional stress to the parties and their families. To honor a properly executed agreement is a judicial act favoring amicable resolution of domestic problems.

Other Utah cases include Klein v. Klein, 544 P2d 472; Pearson v. Pearson, 561 P2d 1080; Madsen v. Madsen, 2 U2d 423, 276 P2d 917; Christensen v. Christensen, 18 U2d 315, 422 P2d 53; Callister v. Callister, 1 U2d 34, 261 P2d 944; and Barraclough v. Barraclough, 100 U2d 196, 111 P2d 792.

Klein, supra, touches on the contract rationale stating:

"Plaintiff advances the proposition that it would be neither fair nor proper to enter a 'consent decree' purporting to be based on the agreement of a party who does not agree thereto at the time of final submission to the court. This appears to be a sound proposition when applied to appropriate circumstances. But it is also true that the same rules apply to binding parties to such an agreement as apply to any other agreement. If there is any justification in law or equity for avoiding or repudiating a stipulation, and he timely does so, he is entitled to be relieved from it, otherwise not." [Emphasis added]

The timely repudiation requirement recognized in Klein agrees with New York rationale relative to contract, that a party who executes a contract in good faith will change position to

detriment in reliance on the contract if the other party can later freely repudiate.

In the case at bar, there was no prompt repudiation of the Agreement of Separation by either party.

Somewhat apposite is Callister, supra. The decree incorporated a settlement agreement between the parties. Subsequently, one of the parties sought to modify the decree based on change of circumstances.

The other party resisted arguing that not only was the decree of divorce entered final, but that regardless of that, as the decree incorporated the contract of settlement agreement, the other party was bound to the contract regardless of the decree.

The Utah Supreme Court made short work of that argument holding that nothing could take away from the Utah trial court the power under 30-3-5, UCA (1953) to do equity in domestic cases. It did qualify this by holding that there had to be an appropriate proof of change of circumstances in order to relieve a party from the effect of an existing decree, and that if such were proved, it would also relieve the party from the binding effect of a separation agreement.

The Callister acknowledgement of change of circumstances to modify an agreement is appropriate.

There is so much case law on what constitutes "change of circumstance" that many cases to modify a decree are never brought because counsel advises the client that they can't meet the change of circumstance test.

Would it not be entirely appropriate to apply the same specific criteria to a separation agreement?

A judicial doctrine of judicial self-restraint has long been recognized in Utah. That is, the substantial change of circumstance test must be met before a decree of divorce will be modified even though it might be equitable to modify lacking such.

The judicial restraint in not modifying existing decrees, even though simple equity might justify that, is no different concept than applying a similar criteria to thoughtfully executed separation agreements.

It is recognized that a court can correct drafting errors in a separation agreement just as it can correct drafting errors in any other contract.

Before approaching specific New York case holdings, it would be well to note as stated in 24 AmJur 2d, Divorce & Separation, §884, that under basic rules of Conflict of Laws, a separation agreement is to be interpreted according to the law of the state where it is made. New York law would clearly have upheld the separation agreement as drawn because, as Judge Hyde found, it was properly executed in all respects and on the second stage, change of circumstance, there was no adverse change of circumstance for Major Rost, other than his voluntary excursion into short term high payment, debt, which does not persuasively appear necessary in view of the fact that he had reduced his total indebtedness.

To what extent would courts of New York, if they were tried in this case, accept or modify the Separation Agreement entered into

by the plaintiff and defendant, in view of the fact that the Agreement provides by the parties' joint consent that it be interpreted by the laws of New York State and that it be the terms of any divorce granted to either party.

Section 21. Legal Interpretation. "All matters affecting the interpretation of this Separation Agreement and the rights of the parties hereto shall be governed by the laws of the State of New York." (Annex 1, P 19)

Section 23. Reconciliation and Matrimonial Decrees. (b) "Both parties agree, stipulate and consent that no judgment, order or decree in an action for divorce or separation, whether brought in the State of New York, or in any other state or country having jurisdiction of the parties hereto, shall make any provision for alimony or affect the property rights of either party inconsistent with the provisions of this Separation Agreement. . .". (Annex 1, P 20)

"Contemporary theory, embodied in Section 170 of the Domestic Relations Law, sanctions the incorporation of a Separation Agreement into a divorce decree whether the divorce was contested or non-contested, and promotes the concept of a pre-divorce agreement. Generally, therefore, a Court will not inquire into the adequacy of the provisions made in an agreement unless that agreement is palpably unfair or inadequate. While there is no presumption, binding or rebuttable, that a separation agreement adequately provides for child support, the fact of negotiations between two parties having knowledge of the requirements of the children and theoretically, at least, equally concerned about their welfare, suggests persuasively that the agreement is fair. The fact that the law does permit modification upon proof of a change in circumstances provides an avenue of relief in the event problems should arise later on." Steinmetz v. Steinmetz, 353 NYS2d 819 (1974)

"Husband and wife may agree upon the scale on which the home will be maintained, or if they live apart, they may agree on a reasonable amount which the husband should pay for the support of his wife and children. . . . Such agreements, lawful when made, will be enforced like other agreements unless impeached or challenged for some cause recognized by law. It is not in the power of either party acting

alone and against the will of the other to destroy or change the agreement. In such case this court has said: 'The law looks favorably upon and encourages settlements made outside of courts between parties to a controversy. If, as in this case, the parties have legal capacity to contract, the subject of settlement is lawful and the contract without fraud or duress is properly and voluntarily executed, the court will not interfere.' " Goldman v. Goldman, 282 NY 296, 26 NE2d 265 (1940)

Since the decision in Galusha v. Galusha, 138 NY 272, in 1889, the New York courts consistently have given great weight and preference to separation agreements.

The weight is not absolute. As indicated above, an agreement can be modified if palpably unjust or unfair. It can also be modified or set aside if induced by fraud or duress. Stoddard v. Stoddard, 227 NY 13, 124 NE 91 (1919).

It can also be modified if there has been a substantial change of circumstances since entry of the agreement to time of divorce, as set forth in McMains v. McMains, 15 NY 2d 283, 206 NE2d 185, 258 NYS2d 93 (1965).

Subject only to specific judicial findings of duress, fraud, palpable injustice, or substantial change of circumstances, the Separation Agreement should stand as a matter of policy. In accordance see:

Smith v. Smith, 349 NYS2d 874 (1973)
Seligman v. Seligman, 356 NYS2d 978 (1974)
Morse v. Morse, 357 NYS2d 534 (1974)
Riemer v. Riemer, 299 NYS2d 318 (1969)
Millner v. Millner, 301 NYS2d 250 (1969)
Moat v. Moat, 277 NYS2d 921, (1967)
In Re Kendall, 126 NYS2d 684 (1953)
Manketo v. Manketo, 100 NYS2d 269 (1950)
Wimpfheimer v. Wimpfheimer, 29 NYS 102 (1941)
Goldman v. Goldman, 282 NY 296 (1940)

One of the most important functions of a Decree of Divorce is to create a wall between parties. The wall is to prevent personal disagreements staying alive between them.

It seems appropriate, when parties divorce, to assume that their personal relationship has failed. If they could resolve their personal difficulties, they would not separate or divorce.

Insofar as a decree of divorce has very few terms, does not define their future relationships, duties and privileges, they dispute these matters.

Insofar as a decree is drawn in detail, with thoughtful attention to the needs of the parties as well as can be forecast, it serves to avoid these personality conflicts. It does this by saying, in the event of such and such happening, the provision is such and such. By being specific and in point, it avoids the parties having to fight out the resolution of these matters.

This is conceptually the same as a good contract which provides for as many eventualities as can be reasonably anticipated. Then, when facts arise, adverse to one or the other party to a contract, rather than fighting, they see the contract, see their obligations and act on that basis without warfare.

As example, the Agreement between the parties here specifically takes cognizance of the fact that Major Rost is in the Air Force, that accordingly he may frequently be away from the children for long periods of time. (Annex 1, P 6-11) It protects him in this regard in important aspects. Whenever his duties might take him unexpectedly into the area where the children reside, he is

given carte blanche rights of visiting without notice to incorporate this occasional, but unpredictable, traveling characteristic of Air Force personnel. It provides that should he be away for long periods of time, this is in no way to prejudice him and he is to be freely entitled to exercise visits whenever he can regardless.

In Utah, traditionally, separation agreements and decrees of divorce attempt to be quite brief. Utah also has a tremendous volume of litigation after divorces are entered seeking interpretation of areas not covered by the decrees. This indicates there is much to be said in favor of a long, thoughtful and detailed Agreement or decree.

Too much human damage is done in domestic litigation. Attorneys are gradually learning that in the field of domestic law the traditional duty of "winning" is inappropriate.

A domestic case is not a case to be won, but a problem to be solved.

If there is a winner, there is a loser. In domestic law, the equation is entirely human.

A father, though divorced, is still father and breadwinner. A mother, though divorced, is still mother and needs financial stability and emotional acceptance to be a good mother.

Neither can perform these roles well if they feel strongly and rightly, that they are "losers" in their case. Bitterness, defeat, or hostility will cripple their efforts.

The entire trend of American law is away from an adversarial

procedure in domestic cases. This is laudable. A comprehensive article appearing in the Family Law Reporter of the Bureau of National Affairs is in point.

The article appears at 2 FLR 3083, October 12, 1976. The FLR is probably the most prestigious source in the field of domestic law.

The article sets forth the approach and criteria of the American Arbitration Association's Family Dispute Services, which in turn is sponsored by the American Bar Association.

The essence of the article is the use of arbitration on a skilled and organized basis to avoid divorce and separation, to provide for divorce and separation agreements in those borderline cases that might end either in reconciliation or divorce, and for sound resolution of disputes when divorce goes through.

As stated (2 FLR 3085), in reference to separation agreements: "Both parties benefit from a lasting agreement fair to all concerned."

As cited in the article, the states that are using this arbitration machinery, including the separation agreements, include Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Kansas, Louisiana, Maine, Maryland, Michigan, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Virginia, Washington, Wisconsin and Wyoming.

herein, is that agreements may be frequently tilted, put in such a way that they are unfair as a whole, even though the individual parts might appear tenable. To restrict judicial intervention, going beyond a criteria of simple equitable principles would be to allow such poor contracts.

In answer, it is respectfully submitted that while this prophesying will undoubtedly come true on occasion, it is equally probable that courts, in applying hindsight after parties have relied and changed position, will miss the mark.

In balance, counsel submits that the determinative factors are that a greater judicial approval of separation and agreements will result in their broader use. This, in turn, can reasonably be expected to produce some reconciliations because the parties can separate safely knowing their agreements will be honored if the reconciliation fails, thus giving the reconciliation a chance. It will result in agreements rather than litigation; and will save the time of courts. Should only one of these benefits come to fruition, the doctrine will be justified.

POINT II.

THE COURT ERRED IN DENYING APPELLANT'S MOTIONS WHICH CONTESTED JURISDICTION IN UTAH AND WHICH SOUGHT TO ABATE UTAH PROCEEDINGS IN FAVOR OF NEW YORK.

As Texas, not Utah, is Major Rost's state of permanent residence, and he has no ties in Utah other than his present duty assignment, it would be more appropriate to let New York proceed.

if such is necessary to enforce or modify the decree once Major Rost has left this state.

If Mrs. Rost is not relieved of her commitment not to go forward in New York, it would require her following Major Rost to whatever state or foreign country he goes to to have the decree enforced, which might make the decree unenforcible.

The facts are stated in Annex 2 and pages 6 to 9 of this Brief.

In essence, appellant stands on the facts, law and argument contained in her Petition for Interlocutory Appeal. (Annex 2)

Frequently, the appellate court relies on and accepts the discretion of the trial court in its decision as to whether or not to retain jurisdiction. Appellant submits this case is not appropriate.

In regard to the trial court's hearing of appellant's Special Appearance to contest jurisdiction, the issue raised in that pleading was not whether the court had jurisdiction over Major Rost and the domestic relationship. This was conceded. The point was whether, under the Union Ski Company v. Union Plastics case, cited in the interlocutory petition, the court should decline the jurisdiction it had because another state was better situated to handle the entire case.

Appellant did not appear at the ex parte hearing at which Judge Wahlquist denied that Special Appearance! A transcript of that July 11, 1977, hearing is attached (T 185-189).

Reading of that transcript indicates that neither Judge Wahlquist nor Major Rost's counsel ever considered the issue raised by the Special Appearance. They took the title, to "Contest Jurisdiction," examined Major Rost as to whether he had resided in Utah for more than 90 days, and the pleading was summarily denied.

The trier of fact not having seen the point, nor read the pleading as is apparent from the transcript, does not put the trial court in a position where its ruling is to be given discretionary approval.

Similarly, in the hearing on August 31, 1977, in which Judge Wahlquist denied appellant's Plea in Abatement, Judge Wahlquist allowed Major Rost to raise a claim of custody of both children.

Judge Wahlquist's order put custody of both children before the trial court. While the son, John, was then residing temporarily with Major Rost, the daughter was not then in Utah. Her permanent residence was with her mother in New York. She had visited with Major Rost from August 12 to August 28. In his complaint, he conceded the custody of both children to Mrs. Rost. It was on August 31, 1977, that he raised, for the first time, a plea for custody of both children.

The Utah court had no power of any kind over the daughter and any order it might make concerning her could not be enforced.

Brown v. Cook et al., 123 U 505, 260 P2d 544

Clark v. Clark, 261 P2d 207 (Okla, 1961)

McMillin et al. v. McMillan, 158 P2d 444 (Colo. 1945)

Because she was not in Utah when a complaint asking for her custody or amendment of complaint, was presented, jurisdiction over her remained solely in New York.

In holding jurisdiction of the entire case in Utah, the order on the August 31, 1977, hearing is clearly in error in regard to the daughter.

As a result, had the sole custody of the son, John, been awarded to Major Rost, the result would have been to split the children. This is sometimes necessary but only under the most grievous of circumstances.

This is a point that counsel, under pressure of the hearing, did not appreciate. After all, custody was then raised for the first time.

By itself, the court's entire lack of jurisdiction over the daughter is a persuasive reason for the court declining jurisdiction or abating Utah proceedings in favor of New York.

Counsel submits that three basic policy considerations should be considered as criteria as to which state, when there is concurrent jurisdiction, should exercise ongoing jurisdiction in a domestic case.

First, importance of first filing. See discussion at Annex 2, page 8.

Second, comparative expense. Here custody was in issue. In which state did the witnesses, such as the three psychiatrists reside? In which case would it be most feasible and economical to

give a full evidentiary presentation to the court so it could make an advised decision, as is necessary on a matter as critical as custody. The Major didn't offer to pay these expenses, and she couldn't.

Third, broadest jurisdiction. When Major Rost originally filed his complaint, the Utah court had the jurisdiction over him and the domestic relationship only. It lacked jurisdiction over the children, and in personam jurisdiction of the wife. The Utah court could have made no enforceable orders concerning the children.

It is respectfully submitted that Judge Wahlquist erred in his ruling.

SUMMARY

Major Rost used the State of Utah as a foil to break his sworn contract, which he would have been compelled to honor in the state where he executed it.

It is proper that the Utah court hold him to his contract and that it free Mrs. Rost to proceed in New York as is appropriate in the future.

She pays attorney fees and costs.

DATED June 16, 1978.

Respectfully submitted,

SAMUEL KING

MAILING CERTIFICATE

I certify I mailed two copies of the foregoing Appellant's Brief to Pete N. Vlahos, attorney for respondent, 2447 Kiesel Avenue, Ogden, Utah 84401, U. S. mail, postage prepaid, June 16, 1978.

Hazel Sykes

AGREEMENT OF SEPARATION

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THIS AGREEMENT made this 15th day of June, 1976 between JANET ROST, residing at 34 Wilson Road, Valley Stream, New York, (hereinafter referred to as the "WIFE" and/or "MOTHER"), and PAUL ROST, residing at 65 Home Street, Malverton, New York, (hereinafter referred to as the "HUSBAND" and/or "FATHER").

W I T N E S S E T H:

WHEREAS, the parties are Husband and Wife, having been married in Brooklyn, New York, on the 18th day of June, 1962 and

WHEREAS, there are two children of the marriage, JOHN KENNETH ROST, born January 24, 1964 and SUZANNE LOUISE ROST, born May 17, 1966, (hereinafter referred to as the "CHILDREN") and there are no expectant additional issue of the marriage;

WHEREAS, certain unhappy and irreconcilable differences have arisen between the parties, as a result of which they have separated, and are now living separate and apart from each other; and

WHEREAS, it is the intention of the parties to continue to so live separate and apart from each other, and it is their desire to enter into an agreement, under which their respective financial and property rights, and the care

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and custody of their unemancipated children and all other respective rights, remedies, privileges and obligations to each other, arising out of the marriage relation, or otherwise, shall be fully prescribed and bounded thereby; and

WHEREAS, the "WIFE" hereto has been fully, separately and independently apprised and advised of her legal rights, remedies, privileges and obligations, arising out of the marriage relation or otherwise, by counsel of her own choice and selection, and the "HUSBAND" refusing to be represented by counsel and representing himself, and each having in addition thereto, made independent inquiry and investigation with respect to all of the same, and each having been fully informed of the other's assets, property, holdings, income and prospects; and

WHEREAS, the parties hereto each warrant and represent to the other that they, and each of them fully understand all the terms, covenants, conditions, provisions and obligations incumbent upon each of them, by virtue of this Separation Agreement to be performed, or contemplated by each of them to perform, and each believes the same to be fair, just, reasonable and to their respective individual best interests,

NOW, THEREFORE, in consideration of the premises and of the mutual covenants and promises contained herein, the parties hereto mutually agree as follows:

1. SEPARATE RESIDENCE

It shall be lawful for each of the parties here at all times to live separate and apart from each other, and to reside in such place or places as either of them chooses or deems fit, without interference, direct or indirect, by the other party, as if such parties were single and unmarried.

2. FREEDOM FROM INTERFERENCE

Each party shall have the right to contract, carry on and engage in any employment, business, trade or profession which either may deem fit, free from control, restraint, interference or harassment, direct or indirect by the other, in all respects as if such parties were single and unmarried.

3. NO MOLESTATION

Neither party shall in any way molest, disturb or trouble the other, or interfere with the peace and comfort of the other, or compel or seek to compel the other to associate, cohabit or dwell with him or her, by any action or proceedings or restoration of conjugal rights or by any means whatsoever.

4. SEPARATE OWNERSHIP

Each party shall own, free of any claim or right of the other, all of the items of property, real, personal and

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mixed, of any kind, nature or description and wheresoever situate, which are now owned by him or her, or which are now in his or her name, or to which he or she is, or may be, beneficially entitled or which may hereafter belong to or come to him or her with full power to him or to her to dispose of the same as fully and effectually in all respects and for all purposes as if he or she were unmarried.

5. RESPONSIBILITY FOR DEBTS

(a) Subject to the provision of this Separation Agreement, the "WIFE" covenants and represents that she has not heretofore, nor will she hereafter, incur or contract any debt, charge or liability whatsoever for which the "HUSBAND", his legal representatives or his property or estate may become liable, except as set forth on Schedule A hereof, if any; and for so long as the "HUSBAND" complies with all the alimony and support provisions of this Separation Agreement, the "WIFE" further covenants to keep the "HUSBAND" free, harmless, and indemnified of and from any and all debts, charges or liabilities hereafter contracted by her for herself or for the account of any person, except as set forth on Schedule A hereof, if any.

(b) The "HUSBAND" covenants at all times to keep the "WIFE" free, harmless and indemnified of and from any and all debts, charges and liabilities heretofore contracted or incurred by him individually or jointly with the "WIFE"

for which the "HUSBAND" and "WIFE" are, or may become liable, and agrees to pay the debts as shown on Schedule A hereof, if any.

6. MUTUAL RELEASE AND DISCHARGE OF
GENERAL CLAIMS

Subject to the provisions of this Separation Agreement, each party has remised, released and forever discharged, and by these presents does for himself or herself, and his or her heirs, legal representatives, executors, administrators and assigns, remise, release and forever discharge the other of and from all cause or causes of action, claims, rights or demands whatsoever in law or in equity, which either of the parties hereto ever had or now has, against the other, except any or all cause or causes of action for divorce or separation, and any defenses either may have to any divorce or separation action now pending, or hereafter brought by the other.

7. MUTUAL RELEASE AND DISCHARGE
OF CLAIMS IN ESTATES

Each party hereby releases, waives, and relinquishes any and all rights that he or she may have or may hereafter acquire, as the other party's spouse under the present or future laws of the State of New York, or any other jurisdiction, (a) to share in the estate of the other party upon the latter's death; and (b) to act as executor or administrator of the other party's estate. This provision

is intended to, and shall constitute, a mutual waiver by the parties to take against each other's Last Will and Testament, now or hereafter in force, under the present or future laws of any jurisdiction whatsoever. The consideration for each party's waiver and release is the other party's reciprocal waiver and release. The parties intend, by the aforedescribed waiver and release, to relinquish any and all rights in and to each other's estate, including the rights of set-off now provided in Section 5-3.1 of the ESTATES, POWERS AND TRUSTS LAW of the State of New York, any and all distributive shares presently provided in Section 4-1.1 of the ESTATES, POWERS AND TRUSTS LAW and all rights of election presently provided for in Section 5-1.1 of said Law or any prior or subsequent similar provision of law of this or any other jurisdiction.

8. IMPLEMENTATION

The "HUSBAND" and "WIFE" shall, at any and all times, upon the request by the other party or his or her legal representatives, make, execute and deliver any and all such other and further instruments as may be necessary or desirable for the purpose of giving full force and effect to the provisions of this Separation Agreement, without charge therefore.

9. CUSTODY AND VISITATION

(a) The "MOTHER" shall have the absolute

matters of similar importance affecting the "CHILDREN", whose well-being, education and development, shall at all times be the paramount consideration of the "FATHER" and "MOTHER".

(i) The "MOTHER" agrees, that in the event of acute illness of any one of the "CHILDREN", at any time, the "FATHER" shall have the right of visitation with the "CHILD" at the place which he or she is confined.

(j) Although the parties hereby acknowledge that nothing herein contained shall be construed as an obligation or duty on the part of the "FATHER" to exercise his rights of visitation, nevertheless, the "FATHER" acknowledges need for planning activities for the "CHILDREN" and further acknowledges that disappointing them may have serious, adverse effects upon them. Accordingly, the "FATHER" agrees that, on all occasions when he does not plan to exercise his rights of visitation, or expects that he will be tardy in so doing, he intends to return the "CHILDREN" at an earlier hour, he will give to the "MOTHER" as much advance notice as possible in order that she may make appropriate plans for the "CHILDREN".

(k) The parties shall exert every reasonable effort to maintain free access and unhampered contact between the "CHILDREN" and each of the parties, and to foster a feeling of affection between the "CHILDREN" and the other party. Neither party shall do anything which may estrange the "CHILDREN".

from the other party or injure the "CHILDREN'S" opinion as to their "MOTHER" or "FATHER" or which may hamper the free and natural development of the "CHILDREN'S" love and respect for the other party.

(l) Each parent shall be entitled to complete, detailed information from any pediatrician, general physician, dentist, consultant or specialist attending the "CHILDREN" for any reason whatsoever and to be furnished with copies of any reports given by the latter, or any of them to the other parent.

(m) Each parent shall be entitled to complete, detailed information from any teacher or school giving instruction to the "CHILDREN" and to be furnished with copies of all reports given by them, or any of them, to the other parent.

(n) The "MOTHER" agrees that, on all occasions of visitation or vacation, she will provide the "CHILDREN" with proper clothing and apparel.

(o) It is the "FATHER'S" intention to exercise fully his rights of visitation as herein provided, but the exercise thereof shall be entirely optional with him, and his failure to exercise such rights on any particular occasion shall not be deemed or construed to constitute a waiver of his rights thereafter to full compliance with the provisions hereof.

(p) All rights of visitation and vacation privileges shall be exercised with both "CHILDREN" at the same time.

(q) It is understood and agreed that in the event of the death or adjudicated mental incompetency of the "MOTHER" the "FATHER" shall have absolute custody and control of the "CHILDREN" irrespective of any provision in any Will executed by the "MOTHER".

10. SUPPORT AND MAINTENANCE

(a) The "HUSBAND" shall pay to the "WIFE" as much for her support and maintenance, by check, postal money order or allotment, if possible, at her present place of residence or at such other addresses as she may hereafter, in writing, designate to the "HUSBAND", the sum of \$350.00 per month commencing on the first day of each month succeeding the date of this Separation Agreement and continuing on the first day of each succeeding month.

(b) The parties hereby agree that the support and maintenance hereinabove set forth shall cease upon the earliest happening of one of the following events:

(1) The death of either of the parties hereto, or

(2) The remarriage of the "WIFE", regardless of whether such remarriage shall thereafter be terminated by divorce, annulment or otherwise.

(c) In addition to the foregoing, the "HUSBAND" shall maintain his benefits in the Civilian Health and Medical Program of the Uniformed Services (known as CHAMPUS) covering the "WIFE", provided she qualifies for said coverage.

10A. LIFE INSURANCE

(a) The "HUSBAND" agrees that he will maintain in full force and effect, and neither pledge, hypothecate nor encumber, the policy insuring his life, described at the foot of this paragraph, with the "WIFE" as irrevocable beneficiary thereof until the earlier of the following events:

(1) remarriage of the "WIFE".

(2) Youngest "CHILD" reaching age of TWENTY-TWO (22) years.

(b) In the event of the death or remarriage of the "WIFE" before the youngest "CHILD" reaches the age of TWENTY-TWO (22) years, the "CHILD" or "CHILDREN" shall be equal contingent beneficiaries of the said policy.

(c) Promptly after the execution of this Separation Agreement, the "HUSBAND" shall deliver to the "WIFE" said insurance policy, or certificate or instrument evidencing such irrevocable designation of the "WIFE" and the "CHILDREN" as beneficiaries under said insurance policy as set forth hereinabove, and the "HUSBAND" further agrees that he will, at any time upon request, execute and deliver to the "WIFE" whatever instruments or documents or letters of authorization which may be required to enable the "WIFE" to document that the "HUSBAND" has complied with all of the provisions hereof.

(d) The "HUSBAND" agrees and undertakes to pay, or cause to be paid all premiums, due and owing, on said insurance

policy at least FIFTEEN (15) days prior to the grace period thereof; and to deliver to the "WIFE", forthwith upon her request therefor, documentation of such payment.

(e) All dividends hereafter payable under said policy shall belong exclusively to the "HUSBAND", who shall have the option of accepting payment thereof or applying them in reduction of premiums.

<u>NAME OF COMPANY</u>	<u>POLICY NO.</u>	<u>TYPE</u>	<u>FACE AMOUNT</u>
UNITED BENEFIT LIFE INSURANCE COMPANY (Air Force Association Life Insurance)	Group Policy No. GLG-2625, Cert #28170	Life Insurance	Per schedule in declining balance (see attached)

ANNA

Air Force Association

LIFE INSURANCE

Maj. Paul F. Rost
NAME OF MEMBER

28170
CERTIFICATE NUMBER

September 30, 1973
EFFECTIVE DATE

\$30.00
PREMIUM

Quarterly
MODE OF PAYMENT

Beneficiary: Shown on member's application unless subsequently changed as provided herein.

MEMBERS INSURANCE PLAN

HIGH OPTION PLAN ☐ STANDARD PLAN ☒

DEPENDENTS LIFE INSURANCE

YES ☐ NO ☒

If dependent insurance is provided, the dependents insured shall be those named (unless deleted by rider) on any attached copy of the application; subject to the DEPENDENTS LIFE INSURANCE PROVISIONS herein.

The member named above is insured under Group Policy Number GLG-2625 (herein referred to as the policy) issued to First National Bank of Minneapolis as Trustee of the Air Force Association Group Insurance Trust, subject to the terms and conditions of the policy, for the applicable amount specified in the Plan of Insurance. Payment of the amount for which the member is insured shall be made to the beneficiary upon receipt of due proof that the member died while insured according to terms of the policy.

The policy is delivered in the State of Minnesota and is governed by the laws of that jurisdiction.

The insurance evidenced by this certificate is provided under and is subject to all of the provisions of the policy, certain of which provisions are set forth in this certificate.

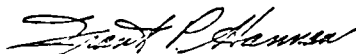
underwritten by

UNITED BENEFIT LIFE INSURANCE COMPANY

(Herein called the Company)

Omaha, Nebraska

This certificate supersedes and replaces any certificate previously issued under the policy.



Executive Vice President and Secretary

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PART A.**PLAN OF INSURANCE****FOR MEMBERS ONLY**

The amount of insurance for a member shall be in accordance with the premium submitted, the Plan requested, and the attached copy of the application and the member's attained age at the time of death. A change shall become effective only on an anniversary date as determined by the effective date of this certificate provided the member makes application satisfactory to the Company within thirty-one days following such date. A member may not increase in amount of insurance by a change of Plans on or after his sixtieth birthday.

If the member is totally disabled as defined in the **WAIVER OF PREMIUM BENEFIT IN THE EVENT OF DISABILITY** provision as provided herein, such member will not be eligible to apply for a change in Plans above until the anniversary date following the date such member is no longer totally disabled.

Amount of Insurance HIGH OPTION PLAN	Attained Age of Member LIFE INSURANCE BENEFIT	Amount of Insurance STANDARD PLAN
\$100,000.00	20 - 24	\$66,000.00
90,000.00	25 - 29	60,000.00
75,000.00	30 - 34	50,000.00
60,000.00	35 - 39	40,000.00
37,500.00	40 - 44	25,000.00
22,500.00	45 - 49	15,000.00
15,000.00	50 - 54	10,000.00
15,000.00	55 - 59	10,000.00
11,250.00	60 - 64	7,500.00
6,000.00	65 - 69	4,000.00
3,750.00	70 - 75	2,500.00
12,500.00	ACCIDENTAL DEATH BENEFIT	12,500.00
22,500.00	AVIATION DEATH BENEFIT	15,000.00

Benefits terminate on the first premium due date coinciding with or immediately following the attainment of age 80.

FOR DEPENDENTS ONLY

Attained Age of Member	Coverage for Spouse	Coverage for Each Child (Age Six Months but Less Than Age Twenty-one)
20 - 39	\$6,000.00	\$2,000.00
40 - 44	5,250.00	2,000.00
45 - 49	4,050.00	2,000.00
50 - 59	3,000.00	2,000.00
60 - 64	2,250.00	2,000.00
65 - 69	1,200.00	2,000.00
70 - 75	750.00	2,000.00

The amount of insurance for a dependent child age fifteen days but less than six months shall be \$250.00.

PART B.**MEMBERS INSURANCE PROVISIONS**

ELIGIBILITY - The following classes of persons are eligible for the insurance provided by the policy:

Members of the Air Force Association under sixty years of age who are:

- (a) active members of the Armed Forces of the United States;
- (b) members of the National Guard or Ready Reserve Forces of the United States; or
- (c) Armed Forces Academy cadets or ROTC cadets.

Members who reside in Florida, New Jersey, Ohio, or Texas at the time of application for this insurance are:

EFFECTIVE DATE OF MEMBER INSURANCE - Each member shall become insured on the last day of the month in which the application for this insurance is approved by the Company and the initial premium is paid.

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11. CHILD SUPPORT

(a) The "FATHER" will pay to the "MOTHER" as and for the support and maintenance of the unemancipated "CHILDREN" by check, postal money order or allotment, if possible, at her present place of residence, or at such other addresses as she may hereafter, in writing, designate to the "FATHER", the sum of \$300.00 per month for each "CHILD" commencing on the first day of each month succeeding the date of this Separation Agreement and continuing on the same day of each succeeding month.

(b) The support and maintenance of each unemancipated "CHILD" shall cease upon the happening of an "Emancipation Event" as hereinafter defined.

(c) In addition to the foregoing, the "FATHER" shall maintain his benefits in the Civilian Health and Medical Program of the Uniformed Services (known as CHAMPUS), or an equivalent plan or plans providing similar coverage, covering the "CHILDREN" during their minority; and, in the event of his failure so to do, he shall promptly pay, and forever save, hold harmless and indemnify the "MOTHER" on account of all charges reasonable and necessarily incurred by her on behalf of the "CHILDREN" for medical, dental, hospitalization and surgical expenses, including medications, nursing care, necessary appliances, psychiatric and psychological treatment; not including cosmetic treatment unless the need for same is occasioned by a traumatic episode, provided, however, that "FATHER'S" liability shall be limited to expenses for treatment

such as would be covered by the aforementioned CHAMPUS plan.

(d) It is further agreed that any and all medical and dental expenses incurred on behalf of the "CHILDREN" which are not covered by the CHAMPUS plan shall be divided equally between the "HUSBAND" and "WIFE".

(e) The "FATHER" shall not be obligated to make any payment with respect to the "CHILDREN'S" camp expenses. When the time comes for the "CHILDREN" to attend camp, the parties shall confer with a view to arriving at the choice of a camp and the amount of the "FATHER'S" contribution to the expenses.

(f) The "FATHER" agrees that he will pay one-half of the college tuition for the "CHILDREN", limited to the least expensive State College or University in the "WIFE'S" State of residence.

12. EMANCIPATION EVENT

The "CHILDREN" shall be deemed, for the purpose of this Separation Agreement, to have been emancipated, as contemplated by Article 11(b) herein, upon the earliest happening of any of the following events:

(a) Attaining the age of TWENTY-ONE (21) years, or the completion of four academic years of college education, whichever last occurs, but in no event beyond the date on which the children attain the age of TWENTY-TWO (22) years. However, the "emancipation" shall be deemed to be

defined as extending beyond the TWENTY-FIRST (21) birthday of the "CHILDREN" only if, and so long as the "CHILDREN" continuously pursue a college education on a full-time and continuous basis, and with reasonable diligence; but in no event beyond the date on which the "CHILDREN" attain the age of TWENTY-TWO (22) years, if school is being attended. "College education" shall not include the pursuit of courses in the evening, unless it is a part of a daytime program.

(b) Marriage of the "CHILDREN" even though such marriage may be void or voidable, and despite any subsequent annulment thereof.

(c) Permanent residence away from the residence of the "MOTHER". A residence at Boarding School, Camp or College is not to be deemed a residence away from the residence of the "MOTHER" sufficient to constitute emancipation.

(d) Death of the "CHILDREN" or the "FATHER".

(e) Entry into the Armed Forces of the United States, to continue only so long as the "CHILDREN" are members of the Armed Forces before attaining the age of majority, so that in the event of discharge before attaining majority, the "CHILDREN" shall be deemed not to have been fully emancipated, from discharge to time of majority.

(f) Engaging in full-time employment upon and after attainment of the "CHILDREN" of the age of EIGHTEEN (18) years except that (i) engaging by the "CHILDREN" in partial,

part-time or sporadic employment shall not constitute emancipation and (ii) engaging by the "CHILDREN" in full-time employment during vacation and summer periods shall not be deemed emancipation. Emancipation stemming from employment shall be deemed terminated and nullified upon the cessation by the "CHILDREN" for any reason, from full-time employment, and the period, if any, from such termination until the earliest of any of the other events herein set forth, for all purposes under this Separation Agreement, be deemed a period prior to the occurrence of such emancipation.

13. INCOME TAX RETURNS

(a) The "WIFE" agrees that she will join with the "HUSBAND" in the execution and filing of all requisite income tax returns for the calendar years, 1976 and 1977, if the parties are not divorced, and that all refunds, if any, be divided in proportion to the tax paid by each party.

(b) The "HUSBAND" does hereby agree that he will forever save, hold harmless and indemnify the "WIFE" on account of all tax levies, assessments or fines arising out of said 1976 and 1977 returns and any income tax returns heretofore filed jointly by the parties to the extent that the same are applicable to any item other than the "WIFE'S" independent income.

(c) It is agreed between the parties that the "HUSBAND" shall have the right to claim one "CHILD" to wit, JOHN KENNETH ROST, as a dependent on his income tax returns.

the "WIFE" shall have the right to claim one "CHILD" to wit, SUZANNE LOUISE ROST, as a dependent on her income tax returns.

14. WIFE'S INDEPENDENT INCOME

Regardless of whatever income the "WIFE" may now or hereafter have or the source thereof, or whether earned or unearned, the same shall in no way affect or limit the obligation of the "HUSBAND" to provide for her support and for the support of the "CHILDREN" as herein required.

15. MARITAL ABODE

Inasmuch as the "WIFE" and "CHILDREN" will shortly be unable to reside at their current residence, the "HUSBAND" agrees to be responsible for any security deposit required on any aptmt obtained by the "WIFE". Further, the "HUSBAND" also agrees to pay for any utility deposits required.

16. PERSONAL PROPERTY

(a) The parties have heretofore divided their personal property to their mutual satisfaction, notwithstanding the fact that some of the property is still in storage.

(b) The parties own a 1970 Travel Trailer and a 1971 Chevrolet Station Wagon. Title to both shall belong to the "HUSBAND", including equipment in both vehicles.

(c) The "HUSBAND" agrees to pay to the "WIFE" the sum of ONE THOUSAND TWO HUNDRED (\$1,200.00) DOLLARS not

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later than thirty (30) days after signing this Separation Agreement, which amount represents one-half ($\frac{1}{2}$) of the value of said vehicles.

(d) Each party agrees to pay one-half ($\frac{1}{2}$) of the shipping costs pertaining to the transfer of the furniture being shipped to "WIFE'S" new residence.

17. CHANGE OF ADDRESS

The parties hereby agree that each will notify the other by certified mail of any change of address, and/or telephone number, within five (5) days of the date of such change.

18. LEGAL REPRESENTATION

(a) The parties respectively acknowledge that each has had the option to obtain independent legal advice by counsel of her or his own selection; the "WIFE" has been represented by MARVIN MALIN, ESQ., 375 North Broadway, Jericho New York 11753, and the "HUSBAND" has refused legal representation. Simultaneously with the execution of this Separation Agreement the "HUSBAND" will pay to the "WIFE'S" attorney, one-half ($\frac{1}{2}$) of his fee for this Separation Agreement, and upon such payment the "WIFE" does hereby agree that she will forever save, hold harmless and indemnify the "HUSBAND" on account of any claim may hereafter be asserted for legal services rendered on her behalf to the date hereof, of any kind or nature.

(b) Nothing herein contained shall be deemed or construed as a waiver or denial of the "WIFE'S" right to

secure payment of counsel fees, as provided by law, for any breach by the "HUSBAND" of the terms of this Separation Agreement.

(c) In the event that either party brings an action for divorce, each party shall be responsible for his own counsel fees.

19. FULL DISCLOSURE

The parties both acknowledge that this is a fair Separation Agreement and is not the result of any fraud, duress or undue influence exercised by either party upon the other or by any other person or persons upon either.

20. MODIFICATION AND WAIVER

Neither this Separation Agreement nor any provision thereof shall be amended or modified or deemed amended or modified, except by an Agreement in writing duly subscribed and acknowledged with the same formality as this Separation Agreement. Any waiver by either party of any provision of this Separation Agreement or any right or option hereunder shall not be deemed a continuing waiver and shall not prevent or estop such party from thereafter enforcing such provision, right or option, and the failure of either party to insist in any one or more instances upon the strict performance of any of the terms or provisions of this Separation Agreement by the other party shall not be construed as a waiver or relinquishment for the future of any such term or provision, but the same shall continue in full force and effect.

21. LEGAL INTERPRETATION

All matters affecting the interpretation of the Separation Agreement and the rights of the parties hereto shall be governed by the laws of the State of New York.

22. POSSIBLE INVALIDITY

In case any provision of this Separation Agreement should be held to be contrary to, or invalid, under the law of any country, state or other jurisdiction, such illegality or invalidity, shall not affect in any way any other provision hereof, all of which shall continue, nevertheless, in full force and effect in any country, state or jurisdiction in which such provision is legal and valid.

23. RECONCILIATION AND MATRIMONIAL DECREE

(a) This Separation Agreement shall not be invalidated or otherwise affected by a reconciliation between the parties hereto, or a resumption of marital relations between them unless said reconciliation or said resumption be documented by a written statement executed and acknowledged by the parties with respect to said reconciliation and resumption and, in addition, setting forth that they are cancelling this Separation Agreement, and this Separation Agreement shall not be invalidated or otherwise affected by any decree or judgment of separation or divorce made by any Court in any action which may presently exist or may hereafter be instituted by either party against

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other for a separation or divorce, and the obligations and covenants of this Separation Agreement shall survive any decree or judgment of separation or divorce and shall not merge therein, and this Separation Agreement may be enforced independently of such decree or judgment.

(b) Both parties agree, stipulate and consent that no judgment, order or decree in any action for divorce or separation, whether brought in the State of New York, or in any other state or country having jurisdiction of the parties hereto, shall make any provision for alimony or affect the property rights of either party inconsistent with the provisions of this Separation Agreement, but if any provision be made in any judgment, order or decree which is inconsistent with the provisions of this Separation Agreement, or imposes a different or greater obligation on either of the parties hereto than provided in this Separation Agreement, the provisions of this Separation Agreement shall take precedence and shall be the primary obligation of both of the parties hereto. It is further agreed that upon the trial of any action which may hereafter be instituted by either of the parties against the other for an absolute divorce in any Court of competent jurisdiction, the party instituting such action shall read the provisions of this Separation Agreement relating to the custody, alimony and support into the record of such action as a stipulation between the parties as to the question of alimony and support, and the custody of the issue of said marriage. Such party shall further request that the decree shall contain a provision

specifically reciting, in words or substance, "Said Agreement Separation is not merged in, but survives this decree, and the parties thereof are hereby ordered to comply with it on its terms at all times and places."

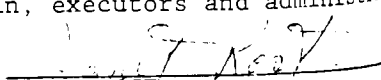
24. INDEPENDENT COVENANTS

Each of the respective rights and obligations of the parties hereunder shall be deemed independent and may be enforced independently irrespective of any of the other rights and obligations set forth herein.

25. ENTIRE UNDERSTANDING

This Separation Agreement contains the entire understanding of the parties who hereby acknowledge that there have been and are no representations, warranties, covenants or undertakings other than those expressly set forth herein. The parties agree that a Memorandum of the Agreement shall be executed upon the signing hereof and that the same may be filed in the office of the Nassau County Clerk.

IN WITNESS WHEREOF, the parties hereto have hereunto set their respective hands and seals the day and year first above written, and they hereby acknowledge that the provisions of this Separation Agreement shall be binding upon their respective heirs, next-of-kin, executors and administrators.


JANET ROST


PAUL ROST

SCHEDULE A

The following credit union loans are to be immediately paid off by both parties equally:

1. Post Office Credit Union loan in the name of JANET ROST.

2. Reese Credit Union loan in the name of PAUL ROST.

All remaining obligations and debts for which the "WIFE" is responsible are to be paid for immediately by the "HUSBAND".

0 Tape Recorder
 1 Chevy Station Wagon
 2 Nomad 17' Travel Trailer
 3 Radio Control Set
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Shop Vacuum
Sander
Trouble Light
Pauls books
Electronic organ and bench
Chrome desk and directors chair
Goose-neck black floor lamp
Cassett Player
Gold clubs & bag & cart
Model airplanes
Multi tester
Battery Charger
AM/FM Radio
Portable tape recorder
Clock Radio
Electric Starter
Polaroid camera
2 Male Eikos
King Size Bed and Linens
Records
Lawn Edger
Power Lawn Mower
Cassette Tapes
Personal Jewlery
Personal Clothing
Rivet Gun

Page 2 Property Settlement

Rost vs Rost

In general all hobby, electronic, stored equipment and items associated with the car and trailer belong to Paul.

Property of Janet Rost

All household goods, furniture, kitchen items, bedding, jewelry, antiques, children and wives clothing in general belong to Janet except as noted under the section listed as Paul's Property List.

Paul Rost

Janet Rost

Marvin Malin

MARVIN MALIN
Notary Public, State of New York
No. 100877100
Qualified in Nassau County
Commission Expires March 20, 1977

Marvin Malin

MARVIN MALIN
Notary Public, State of New York
No. 100877100
Qualified in Nassau County
Commission Expires March 20, 1977

SAMUEL KING
KING & SCHUMACHER
Attorney for Defendant
409 Boston Building
Salt Lake City, Utah 84111
355-7493

PETE N. VLAHOS
Attorney for Plaintiff
Legal Forum Building
2447 Kiesel Avenue
Ogden, Utah 84401
62102464

IN THE SUPREME COURT OF THE STATE OF UTAH

* * * * *

PAUL F. ROST,

Plaintiff and
Respondent,

vs.

JANET L. ROST,

Defendant and
Appellant.

*

* PETITION FOR INTERLOCUTORY
* APPEAL AND FOR STAY OF
* JUDICIAL PROCEEDINGS

*

* Civil No. 15398

*

* * *

ORDER COMPLAINED OF

On August 31, 1977, the Honorable John F. Wahlquist, Weber County District Judge, entered a verbal order from the bench denying respondent's Motion for Abatement of Proceedings, and also denied appellant's alternative Motion for Continuance of Trial, ordered the trial to proceed on September 7, 1977, and released respondent from financial obligations to appellant and his children which respondent had pursuant to his sworn Agreement of Separation dated June 15, 1976, although there was no pleading nor argument before the court concerning any determination of respondent's obligation under such agreement.

RELIEF SOUGHT

1. That the court grant appellant an interlocutory appeal to determine the issues of whether the Utah court should either continue jurisdiction of this case or abate the Utah proceedings under appropriate terms.

2. For an order pursuant to Rule 65(A), 65(B)(b)(2), 65(B)(d)(5), URCP, on such terms as the court deems appropriate, but to which appellant prays that it be without notice, and that it stay further proceedings in the District Court until the issue of abatement has been determined.

3. Setting aside and striking paragraph 6 of the District Court's "Order on Defendant's Motion for Abatement and for Alternative Relief," if such is in the order signed by the Court for the reason that it grants respondent relief from a Separable Agreement obligation prior to trial and with no notice or hearing to appellant of any such request for relief and it not having been verbally argued to the court at the hearing on August 31, 1977.

STATEMENT OF FACTS

Annexed are copies of the "Order Allowing Amendment of Complaint" and "Order on Defendant's Motion for Abatement and for Alternative Relief." Appellant does not know if these have been entered in their form by the court as copies, not indicating signature, as proposed drafts were submitted by mail on Friday, September 2, 1977, and the courthouse has been closed since.

In chronological sequence, the facts are as follows:

Prior to 1962 - Both parties born and raised in New York State.

1962 - The parties marry in Brooklyn, New York.

January 24, 1964 - Parties' son John born.

May 17, 1966 - Parties' daughter Suzanne born.

February, 1974 - Parties stop residing together, although there are brief attempts at reconciliation up to July, 1975. Appellant and children reside in New York.

June 15, 1976 - Parties enter into Agreement of Separation which is prepared by an attorney suitable to both parties and filed of record in the New York Courts. In the event of divorce, parties agree to read its terms into divorce record, to comply with them and such terms to provide that Agreement is to interpreted subject to laws of New York.

1974 - 1977 - Respondent, U. S. Air Force Officer on duty in Texas, California, Thailand, and present assignment at Hill Air Force Base, Utah. Designates Texas as his state of permanent residence.

June 6, 1977 - Appellant served with Summons and Complaint in this case. Complaint concedes custody of children to appellant. Complaint also states that appellant "rescinds" the Agreement of Separation without stating cause therefor.

June 21, 1977 - Appellant files action for divorce in the Supreme Court of the State of New York, County of Queens, annexing Separation Agreement and agreeing to abide by its terms.

June 24, 1977 - Appellant submits special appearance motion requesting that Utah Court exercise discretion to decline jurisdiction on basis that New York is the appropriate forum.

July 11, 1977 - Without filing response to which appellant can plead, respondent appears ex parte before District Court and gets Order denying contest of jurisdiction by appellant.

July 18, 1977 - Appellant submits Answer and Counterclaim and also submits "Defendant's Plea in Abatement," which submits law and facts and requests Utah Court abate its proceedings without dismissing them, in favor of New York action.

July 22, 1977 - Respondent files request for trial setting, certifying that the case "is now at issue" although respondent has filed Reply to Counterclaim, there has been no opportunity for discovery and plea in abatement is not ruled on.

August 11, 1977 - Respondent files "Answer to Defendant's Plea [sic] Abatement."

August 12, 1977 - Appellant sends children to Utah for first visit with appellant in two years.

August 18, 1977 - Respondent served with Summons and Complaint in New York action. Constable advises that she believes respondent evaded service, as respondent refused to accept it at Hill Air Force Base and would not answer at his apartment in Ogden.

August 19-26, 1977 - Respondent appears before court, ex parte, asks for both children's custody and for immediate trial.

August 28, 1977 - Ten year old daughter, Suzanne, returned to New York via airplane by respondent. Thirteen year old son, John, remains with respondent, apparently at John's choice.

August 29, 1977 - Appellant receives notice of trial setting for September 7, 1977. Custody to appellant is not in issue, appellant's plea in abatement is pending, respondent has not filed Reply, discovery on both sides is being deferred until which state is to try case is determined.

August 31, 1977 - By courtesy of respondent's counsel, appellant's counsel is heard on request for ruling on issue of abatement and, if Utah is to proceed with case, for time to prepare for trial.

District Court denies Plea in Abatement.

District Court enters Order raising custody as issue, but staying respondent from claiming appellant is "unfit."

District Court enters Order terminating respondent's duties under Agreement of Separation as of September 7, 1977. Such has never been plead, argued, or submitted to the court.

Respondent's Reply is filed.

At hearing, appellant raises points that Plea in Abatement is proper, that there is no possibility in three remaining court days to take discovery, that now that respondent has raised issue of custody, it is necessary for a well-informed decision that witnesses concerning the parties and the children be allowed to appear, that custody evaluation is appropriate, that it is impossible for appellant to go to trial adequately prepared on

September 7, 1977

Trial court advises respondent to cooperate in discovery. Appellant argues that interrogatories and interrogatory answers can't be prepared, served and considered, nor oral deposition transcribed before September 7, 1977, regardless of best efforts of either party. The court denies all relief requested by appellant except for allowing three court days of discovery. August 31, September 2, 1977 - Appellant fails at efforts to set aside even though, for purposes of settlement, appellant agrees to Utah jurisdiction and to \$300 per month reduction of child support and alimony from terms of Agreement of Separation.

ARGUMENT

Appellant's Special Appearance to Contest Jurisdiction, while meritorious, was not as strong as her subsequent Plea in Abatement.

In her pleadings, appellant conceded that the Utah court had jurisdiction because respondent had resided in Utah for more than 90 days which gave the court jurisdiction over respondent of the marriage, even though it lacked in personam jurisdiction over appellant and the parties' children.

The law supports a court exercising its discretion to refuse to accept jurisdiction in a proper case.

While not exactly in point because it involved a "long-arm" statute proceedings, Union Ski Company v. Union Plastics Corporation, 548 P2d 1257 (Utah, 1976), is of help. The case involved "long-arm" filing in Utah, but where most of the parties and

activity were in California. In declining to exercise jurisdiction, the Utah court held,

"...there is a further principle, recognized in this area of the law, which may be regarded as having some bearing on the trial court's determination here. That is, that it is generally thought to be more fair and logical to find jurisdiction in the forum state when the major aspects of the activity out of which the cause of action arises occurs in that state; and conversely, that determination of jurisdiction in the forum state is less likely to be found where the principal activities: (the execution of the contract, manufacture of the boots, and the payments therefor and defendant's alleged breach of the contract) take place elsewhere."

As stated above, appellant felt that her Plea in Abatement had a stronger basis than her request that the court decline jurisdiction.

The reason is that if a court declines jurisdiction, the case is dead before that court. A party might abuse this by then delaying proceedings in the other forum.

If the court "abates" a local proceeding, it is then in a position to recommence proceedings whenever the interests of justice indicate, such as to avoid delay.

A plea in abatement and order thereon is an appropriate procedural step.

"The simultaneous exercise of jurisdiction over a case involving the same subject matter and the same parties by more than one court may be prevented by various procedural means. Ordinarily, a court will grant a plea in abatement or a request for a stay on the ground that a proceeding concerning the same case had been commenced in a court of concurrent jurisdiction." 20 AmJur, 2nd, Courts, §219.

Appellant urges that it is very important, where states have concurrent jurisdiction, that the first filing of a complaint be a matter of very small significance. What should be significant is which state is actually the most appropriate forum based on the facts. While divorce is sometimes necessary as a general matter, it should not be encouraged. To make the first filing of a divorce complaint a significant factor in determining which of courts of concurrent jurisdiction should act, is to reward the party who rushes to the courthouse. Any policy of law that encourages a speedy filing for divorce would be contrary to other more basic policies of law.

Following is a listing of reasons on which the issue of abatement can be determined.

<u>FOR UTAH</u>	<u>FOR NEW YORK</u>
1. Respondent stationed in Utah.	1. Parties born and raised in New York.
2. Respondent filed for divorce first.	2. Appellant has resided in New York with children continuously for last two years before then on occasion living on respondent's state assignment.
3. Thirteen year old son has been with respondent in Utah since August 12, 1977.	3. The children resided in New York at the time the case started.
4. The Utah District Court ordered trial in Utah.	
5. Respondent alleges the 13 year old son wishes to stay permanently in Utah.	

FOR NEW YORK

4. Proper trial of an issue of custody requires submitting substantial information to the trial judge as to the fitness and qualifications of each parent, the character of the home the children have resided in, with testimony of people such as school teachers and neighbors being very valuable. No such witnesses reside in Utah, but do in New York.
5. Respondent can travel without expense by Military Air Transport Service. Appellant, children, and witnesses cannot. There is a high expense factor in delivering appropriate witnesses to Utah for trial on the issues of custody and whether the separation agreement should be enforced. If these witnesses do not travel to Utah, the expense and attorney fees of taking their depositions in New York for use in Utah will still

be extremely high.

6. Since separating from respondent, appellant and the children have had rehabilitative help from mental health experts in New York. Appellant and each child has seen a different psychiatrist. The testimony of these professionals would be invaluable in a proper determination of custody. All these professionals are in New York.
7. The Separation Agreement provides that it is to be interpreted according to New York law. It is both advisable to have the Agreement interpreted originally by New York courts as to its enforcement or modification and if the Agreement is upheld in whole or in part, further interpretation it can best be made by New York judges and lawyers.
8. As respondent is a professional law enforcement officer, it is entirely possible that he will not remain in Utah. He has indicated that his state of permanent residence is Texas. Cases involving domestic law, and particularly the

involving child support or custody, frequently return to the court for further hearing or modification. The probability is extreme that neither party will reside in Utah for such modification, yet if Utah entered the primary decree, appellant will have no basis of bringing him before the New York courts unless he be there physically, which might involve trial in some third state, territory of the United States, or either a foreign country or no hearing at all, if respondent is on foreign assignment. (The Utah long-arm statute allows doemestic jurisdiction only for acts done by the absent party while in the jurisdiction. 78-27-24(6) UCA.)

9. Only extraordinary reasons justify separation of children, granting custody of one child to one party and custody of the other child to the other party. Should respondent's claim for custody

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of the son be granted, this will be the result. As New York is best suited to try the entire issue of custody, it can best determine the issue of avoidance of separating children from each other.

CONCLUSION

Appellant recognizes that granting any of the relief she seeks in this Petition will delay trial. There is a question to how this will effect their 13 year old boy who now, apparently wishes to reside with his father in Utah. Such delay may be desirable. Not having been with his father for the previous two years, it really is too early to tell whether the boy has a so permanent base for residing with his father away from his mother, sister, known friends and schools. It is, for example, possible that his wish to stay with his father is primarily and expressive of his need for his father which has not been met. Time may be advisable to let this child work his relationships out.

DATED September 6, 1977.

SAMUEL KING