

2001

# Patricia Ida Coryell Martin v. Albert E. Martin : Brief of Appellant

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

1435-2A

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IN THE SUPREME COURT OF THE **BRIGHAM YOUNG UNIVERSITY**  
**J. Reuben Clark Law School**  
STATE OF UTAH

PATRICIA IDA CORYELL MARTIN, /

Plaintiff and /  
Respondent, /

vs. /

Case No. 14352

ALBERT E. MARTIN, /

Defendant and /  
Appellant. /

BRIEF OF APPELLANT

Appeal from the Judgment of the  
District Court of Weber County  
Honorable J. Robert Bullock, Judge

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FILED

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Clark, Supreme Court, Utah

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

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PATRICIA IDA CORYELL MARTIN, /  
Plaintiff and /  
Respondent, /  
vs. / Case No. 14352  
ALBERT E. MARTIN, /  
Defendant and /  
Appellant. /

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BRIEF OF APPELLANT

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STATEMENT OF THE KIND OF CASE

This is an action of divorce brought by Patricia Ida Coryell Martin, Plaintiff and Respondent, against Albert E. Martin, Defendant and Appellant.

DISPOSITION IN LOWER COURT

Upon a hearing held in the Lower Court, the Lower Court granted a Decree of Divorce to both the parties, Appellant and Respondent, and entered an order for division of the real and personal property and business of the parties to this action.

#### RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the Judgment and Order of the Lower Court on the grounds, that the division of assets and the compelling of the Appellant to pay child support to the Respondent was inequitable, unconscionable, and an abuse of discretion, and that the Supreme Court should grant a trial de novo, or such division of the assets of the parties and liability for support of the minor child as the Court shall deem just and equitable.

#### STATEMENT OF FACTS

Appellant who was the Defendant in the Lower Court will be referred to in this Brief as "husband"; and the Respondent, who was the Plaintiff in the Lower Court, will be referred to in this Brief as "wife". The parties were intermarried on or about September 18, 1964, (R-1). Issue was born to the parties herein on June 24, 1974.

At the time of the marriage, the husband was in the Service and the wife was attending Weber College. The husband was shortly thereafter discharged from Service by obtaining an educational release and both the husband and wife attended Weber College, with the wife attaining a Degree in Education and Psychology and the husband attaining a Degree in Business

Management (R-48). During the period in college, the wife testified that the husband was employed on a regular basis.

(R-54)

The parents of the Respondent were the owners and operators of an answering service, and the parents of the Respondent, being elderly, the father being 75 years of age (R-103), were desirous of selling the business out to the Appellant and the Respondent. The Appellant and Respondent returned from California to Utah and entered into a contract with the parents of the Respondent for the purchase of the business known as Coryell Answering Service and did finalize a contract for the sale of the business.

An original contract was entered into requiring the payment of \$120,000.00 for the business with interest at the rate of 8 percent per annum and the contract was signed, but upon the advice of the company's C.P.A. (R-155), a new contract was entered into providing in affect for the payment of the same money (R-156), but changing the property value from \$120,000.00 to a gross of \$90,000.00, with interest thereon at the rate of 12.1 percent (R-156). The Court in its Judgment in the Lower Court, stated that the Court did not believe the transaction was wholly an arms-length transaction (R-230).

The contract as set forth in Plaintiff's Exhibit A reveals the payment of \$33,500.00 for building improvements and the real property; the purchase of fixtures and equipment for the sum of \$5,805.00; the purchase of the name, good will, and going business of the Answering Service for the sum of \$20,695.00; and an agreement of sellers not to compete with the buyers set forth as a value of \$30,000.00; for a total value of \$90,000.00.

The contract payment provided for \$1,000.00 a month with payment of the accrued interest on the entire unpaid balance of the sale price, which is the interest on \$90,000.00, and any amount left over thereafter applying to the \$30,000.00 for the noncompetitive agreement until the noncompetitive agreement was paid in full, after which the balance of each monthly payment after payment of accrued interest would apply pro rata to the then-balance of the sale price for the entire assets sold.

(Plaintiff's Exhibit A)

Possession of the business and commencement of operation as to the Appellant and Respondent was July 1, 1973.

The premises wherein the business was conducted was a large home with the main floor used as the place of operation of the Answering Service, the upper floor used as the residence and dwelling of the parties, Appellant and Respondent, and the basement apartment being rented to a tenant. R-40,-41)



The taxable income of both parties herein was \$6,230.00 in 1969, \$5,620.00 in 1970, \$5,075.00 in 1971, \$14,463.00 in 1972 (Defendant's Exhibit 1), and the 1974 income for six months operation of the business was \$13,907.00, together with wage earnings in the amount of \$11,370.00, for a total gross income for the parties herein for the year 1973 in the amount of \$25,279.00. (Defendant's Exhibit 1)

The gross cash receipts from the business for the six months of 1973 was \$41,964.00 and there was rent from the apartment for the period as additional income in the amount of \$720.00, making a gross income for 1973 in the amount of \$25,999.00. (Defendant's Exhibit 1)

For the year 1974, the gross income of the business was in the sum of \$99,310.00, with an alleged net profit from the business in the amount of \$24,800.00, with an additional income contributed by the Appellant in the amount of \$3,073.00, constituting a gross net income and earnings for allegedly the amount of \$27,696.00. (Plaintiff's Exhibit B)

The Respondent testified at time of trial, that the business was still worth the original amount set forth in the contract of purchase, namely the sum of \$90,000.00, which includes the figure of \$30,000.00 as and for good will (R-63), 1974 net profit deducts \$6,000.00 of the good will from the

gross of the business as a deductible expense; a deduction of \$1,266.00 as and for alleged travel and entertainment of the Respondent; a deduction for auto travel in the amount of 13,300 miles, for a sum of \$1,995.00, which in affect would establish an actual net profit for 1974, after adding the rent from the apartment of the premises in the amount of \$970.00, to be in the sum of \$37,927.00 as the true net income of the business. (Plaintiff's Exhibit B)

The parties, Respondent and Appellant, also resided in the business premises and there appears to be no allocation in the State or Federal Tax Statements of monies paid for and expended for maintenance of heat, utilities, upkeep, repairs, and other costs involved in the use of the upper floor of the business premises as a residence, and the value of the premises should account for the rental value of the dwelling area as income and should include in actuality an income allowance for home and dwelling, which was also being paid for out of the net profits and earnings of the business. (R-40,-41) (Plaintiff's Exhibit B)

The Appellant testified and submitted an Exhibit setting forth his testimony (Defendant's Exhibit 6), accounting for the improvements made on the real property by the Appellant, together with the aid of the 75-year old father-in-law of the

Respondent, with an expenditure for materials only of \$16,000.00 and without consideration of the labor of the Appellant or the Respondent's father-in-law.

An allocation of this sum of money, which is reflected in the tax returns only by \$265.00 allocation of money invested as capital investment for improvements, and allocated for the half year of 1973 and the full year of 1974, would make a very substantial addition to the true net profits of the business, and as a substantial increase in the value of the premises and the improvements.

#### ARGUMENT

##### POINT I

#### DIVISION OF ASSETS EVIDENCE CLEAR ABUSE OF DISCRETION.

This Court held in Wilson v. Wilson, 5 Ut.2d 79, 296 P.2d 977 (1956), that the Court's function and responsibility is "to endeavor to provide a just and equitable adjustment of their economic resources, so that the parties can reconstruct their lives on a happy and useful basis. In doing so, it is necessary for the Court to consider, in addition to their relative guilt or innocence of the parties, an appraisal of all of the attendant facts and circumstances: the money and property they possess and how it was acquired; their capabilities and training, and their present and potential income."

This Court further held in Foreman v. Foreman, 176 P.2d 144 (1956), that on the hearing by this Court on appeal from the Lower Court, this Court will try the case de novo upon the record made in the Lower Tribunal, and the Court will consider the record and all of its ramifications and render Judgment based upon same.

The evidence before the Court, in the nature first of the contract, (Plaintiff's Exhibit A) shows a purchase entered into for the acquisition of the Answering Service and signed by both the husband and the wife of a business for a total sale price of \$90,000.00 and to be paid off at 12.1 percent per annum, with acquisition of the business commencing July 1, 1973.

The record further shows that the business netted for the first six months of its operation from July 1, 1973, to December 31, 1973, the sum of \$13,907.00, the sum was supplemented by \$11,370.00 earned by the parties to this action prior to the acquisition of the business, most of which funds were earned by the Appellant (Defendant's Exhibit 1).

The net earnings for the business in 1974 was \$24,841.00, with additional wages contributed by the Appellant, making a total net taxable income of \$27,696.00, and that if the items

for alleged travel and entertainment expense of \$1,266.00, the deduction for auto travel alleged at \$1,995.00, and the netting back in of the depreciation taken from the gross earnings of \$6,000.00 was added in, that we would show an actual net earnings of the business of \$36,957.00, plus rental income from the premises in the amount of \$970.00, for a total net income of \$37,927.00. (Defendant's Exhibit 1)

The further testimony of the Respondent's Certified Public Accountant was to the affect, that the year 1975 to September 30 evidenced a substantially larger net profit and an increase in accounts of 25 new accounts to 325 accounts as against 300 for 1974, together with an average monthly billing of \$9,300.00, which would compute the gross earnings at \$111,600.00 for 1975 as against \$99,000.00 for 1974. (R-150) This testimony was given by the C.P.A. who admitted to the Court, that all of his approaches to values were on the conservative side (R-165), and that he had been employed the greatest part of his business career by the parents of the Respondent and subsequently by the Respondent also. (R-140,-151)

The Court in rendering its Judgment, stated this business would produce \$25,000.00 worth of income regardless of the management (emphasis added) (R-229), and that determination

of the amount to be paid to the Appellant was hard to determine (R-230). The Court ordered that the fair amount to be awarded to the Appellant, as his share of a business which did from \$25,000.00 to \$37,000.00 a year in net earnings, was the sum of \$11,000.00. (R-230)

It is submitted to this Honorable Court, that the principle of this Court as is set forth in Martinett v. Martinett, 8 Ut.2d 202, 331 P.2d 821 (1958), applies to the matter now before the Court wherein the Court stated:

Nevertheless, it is firmly established in our law, that the Trial Judge will be indulged considerable latitude of discretion in adjusting the financial and property interest of the parties; conversely, however, if there is such a serious inequity as to manifest a clear abuse of discretion, this Court will make the modification necessary to bring about a just result.

In order for this Court to draw a reasonable conclusion as to what is a just and equitable distribution, the Appellant submits to this Court the testimony of the wife and the experts selected by her, together with the testimony of the husband and the experienced and business expert selected by the Appellant, together with an actual consideration of the Exhibits before the Court, which clearly indicate that an award of \$11,000.00 to the Appellant as and for his equitable interest in a business which has evidenced a long period of stability in twenty years of operation and which shows a gross cash earnings and sales

for six months in the amount of \$41,964.00, a gross cash income and earnings of \$99,310.00 for the year 1974 and which evidences a 1975 earnings in accordance with Respondent's own C.P.A. of \$111,600.00 as gross earnings for 1975, with admitted net profits of \$25,000.00 for 1974 and greater profit for 1975 (Plaintiff's Exhibit B, Defendant's Exhibit 1) (R-150), and in addition to which are a number of hidden profits which were not reflected in the tax return, but which constituted additional income but allowed by reason of depreciation and other factors to be deducted, does not equate to the purchase of the total equitable interest of the Appellant in said business by an award of the sum of \$11,000.00.

The wife's formula for payment of the husband's share of the business as an outright purchase of his interest was set forth by the wife in testimony as taking the approximately \$25,000.00 a year net earnings and then deducting \$20,000.00 a year for her services as a manager and taking the remaining \$5,000.00 per year, multiplying it by three, for \$15,000.00, and splitting the \$15,000.00 by giving \$7,500.00 to the husband and retaining \$7,500.00 for the wife in addition to her \$20,000.00 value as the manager of the business. (R-66)

The wife did not ever consider the continuous earning ability of the business as a factor and admitted that the

\$16,000.00 for material exclusive of labor could have been made as improvements on the property. (R-78) The wife admitted excluding the husband and rebuffing him from any attempt to enter into the management of the business over his continued objections, and this was based upon her belief, that he was not as competent as she was, even though the husband had a Degree in Business Management and was previously employed as a supervisor of a business in California with 140 people under his direction. (R-81)

The wife stated that she would not accept an offer from her husband to buy out her interest for \$35,000.00 (R-85), and alleging as a basis that he was not as competent as she to run the business successfully.

The Certified Public Accountant testified that he had been an accountant for the parents of the Respondent from 1962 (R-40), and for the biggest portion of his accounting life, had been in the employ of the Coryell Answering Service. (R-151) The further computations of the C.P.A. take the 1974 earnings of approximately \$25,000.00 and deduct \$20,000.00 for the services of the wife (R-142) and multiply the \$5,000.00 remainder by three for \$15,000.00 as the value of the business. (R-144) The witness did admit that the manager's salary is an arbitrary figure (R-153) and that he did not seek to determine what salaries were paid by a comparable or same business in



the market area. The witness further used two of the formulas, all arriving at the same net value (R-154,-156), while admitting that all his approaches to value were on the conservative side (R-165).

The testimony of Frank D. Roberts was taken who testified that he is the owner of three answering services in Salt Lake City and has been engaged in the same business since 1960 (R-168).

Roberts further testified that he took over a going answering service with no experience whatsoever and acting as a general manager and was still manager of the telephone services at the time of the hearing (R-169), Roberts' testimony was to the affect, that he has purchased other answering service businesses, and that a business that produces \$25,000.00 a year is worth five or six times the net worth less the indebtedness of the company, plus the value of the real property. (R-172)

Mr. Roberts also stated that there is a "per client basis" of evaluating a business, wherein a business making \$25,000.00 a year and well established, as the instant answering service before the Court, would have a value of as much as \$500.00 per account times 325 accounts, which would total \$162,500.00 less the debts of \$84,000.00, leaving a market worth of \$78,500.00. (R-178)

Roberts further testified, that in Salt Lake City he is paying a manager in one of his telephone answering services

\$700.00 a month (R-138) and that the manager also acts as a full time secretary for the business (R-180).

The Court is reminded that the figure of \$25,000.00 used by all of the experts is only a tax report devised balance of net profits and is not the true net profits as has been set forth herein before, and that the items of depreciation have really not depreciated but have appreciated for purposes of taxes, they may be deducted from the net profit, but does not represent the true net annual profit of the business.

This Court stated in Christensen v. Christensen, 21 Ut.2d 263, 444 P.2d 511 (1968), that a divorce case is an action in equity and that it is the duty of the reviewing court to review and weigh the evidence before the Court in order that equity may be done to the parties.

It is submitted to the Court, that there has not been an equitable division of the value of the business, particularly in view of the fact that the husband is able and willing to pay \$35,000.00 to the spouse for her share of the business.  
(R-211)

#### POINT II

THE HUSBAND SHOULD NOT BE REQUIRED TO PAY CHILD SUPPORT.

This Court stated in Tsoufakis v. Tsoufakis, 14 Ut.2d 273, 382 P.2d 412 (1963), that a divorce case is equitable in nature

and that the Appeal Court may review the evidence and substitute its Judgment for that of the Trial Court where it finds, that in the division of property or the awards of alimony and child support, that the division and award in the Lower Court was unjust and inequitable and was an abuse of discretion. This Court further stated, that the facts and circumstances in each particular case will govern such decision.

It is submitted to this Court, that if the inequitable distribution is allowed to stand and if the wife is allowed to retain a business that makes substantially more than \$25,000.00 a year net profit, and whereby the husband as of the time of the Divorce Decree was working in construction work on an hourly basis at \$4.00 an hour with a maximum net weekly income of \$139.00 if fully employed, that it is not equitable to compel the husband to also contribute \$75.00 per month to the support of the child when the wife has been awarded the residence, the business, and an income in excess of \$25,000.00 a year. (R-205)

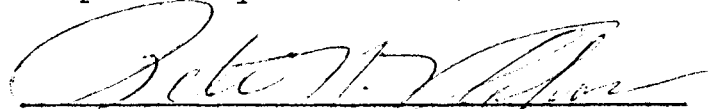
It is submitted to the Court, that the support of a child should be solely the responsibility of the wife if she is allowed to retain the entire business on the basis of the division made in the Lower Court, and that if at any future time there was a substantial lessening of the wife's income

or earnings, then the husband should take up the burden of aiding in the support of the minor child.

#### CONCLUSION

It is submitted to this Honorable Court, that it has the right and power, as well as the duty, to consider the evidence before this Court, and that the Court should thereupon do justice between the parties allowing the husband to purchase the business from the wife in the sum of \$35,000.00 or make a more just and equitable payment schedule for paying back to the husband a more reasonable value of the equity of his interest in the business, and doing equity to both of the parties herein.

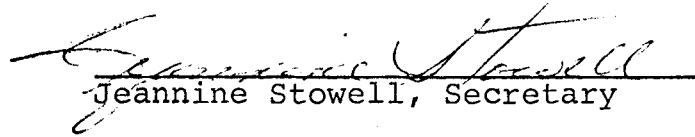
Respectfully submitted,



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CERTIFICATE OF MAILING

A copy of the foregoing Brief of Appellant was posted in the U.S. mail, postage prepaid, and addressed to the Attorney for the Respondent, Glenn J. Mecham, Esq., 2506 Madison Avenue, Ogden, Utah 84401, on this 11 day of February, 1976.

  
Jeannine Stowell, Secretary