

1979

Nina Doreen Davis Boyce v. Milan Mack Boyce : Brief of Appellant

Utah Supreme Court

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OF THE STATE IN THE SUPREME COURT
Utah Bookbinding Comp THE STATE OF UTAH

NINA DOREEN DAVIS BOYCE,)
Plaintiff-Appellant,) No. 16342
v.)
MILAN MACK BOYCE,)
Defendant-Respondent.)

APPELLANT'S BRIEF

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FILED

NOV 15 1979

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OF THE STATE OF UTAH

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Plaintiff-Appellant,)	
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IN THE SUPREME COURT
OF THE STATE OF UTAH

NINA DOREEN DAVIS BOYCE,

Plaintiff-Appellant,

v.

MILAN MACK BOYCE,

Defendant-Respondent.

No. 16342

APPELLANT'S BRIEF

NATURE OF THE CASE

This is an action for an equitable property distribution, alimony, and child support payments following dissolution of the marriage of plaintiff-appellant and defendant-respondent.

DISPOSITION IN THE LOWER COURT

The Third Judicial District Court, the Honorable David B. Dee, presiding, denied appellant's motions to set aside the decree of divorce, for relief from the final decree and to modify the decree of divorce.

RELIEF SOUGHT ON APPEAL

Plaintiff-appellant seeks a reversal of the Amended Judgment and Order of January 31, 1979 denying appellant's

Motion to Set Aside the Decree, Motion for Relief from Final Decree and Motion to Modify Divorce Decree and ordering appellant to remove the lis pendens previously filed by her in connection with this action.

STATEMENT OF FACTS

Because of the complexity of the facts in this case, appellant will set out her Statement of Facts in two parts. First is a procedural overview necessitated by the volume of the file herein. This overview will serve to fix the chronology involved which is unclear from the file. Second is a review of the facts which came to light after the entry of the Decree of Divorce and which show that respondent at the time of the divorce had fraudulently misled the appellant and the court below as to his true assets in order to prevent appellant from receiving her fair and equitable share of the assets of the parties on dissolution of the marriage.

A. Procedural overview

On May 27, 1977, appellant filed her Complaint in the Third District Court, together with a Motion for Temporary Support. Respondent requested a formal hearing on the above-described Motion by way of a pleading entitled Notice, which was filed on June 24, 1977.

On July 28, 1977, appellant filed an Affidavit to the effect that she had no knowledge of the financial condition of respondent. By Order signed on July 28, 1977, a hearing requiring respondent to appear and show cause why he should not be required to make a full accounting of his assets and liabilities was set for September 6, 1977. Respondent filed his Answer to appellant's Complaint on August 1, 1977.

At the hearing on the Order to Show Cause, counsel for respondent requested a continuance "for the reason that defendant's business schedule would not allow him to appear on September 6, 1977." (R. 17) The hearing was continued to September 27, 1977 at which time appellant's Motion for Temporary Support was also to be heard.

On September 12, 1977, appellant filed her First Set of Interrogatories to Milan Mack Boyce.

At the September 27th hearing, respondent testified that he was renting his current residence from and was paid a salary by Insul-Guard Corporation, of which he was president. When asked by his attorney who owned the corporation, respondent answered:

A. Well, shareholders.

Q. Do you own an interest in that corporation?

A. I own a small interest in it, yes.

Q. What interest do you own?

A. I don't honestly know because I have so many commitments out to others.

As a result of this hearing, respondent was ordered to pay \$400 per month temporary support, to allow appellant the use of an automobile, and to maintain in force a policy of health insurance for the benefit of appellant and the minor children of the party.

On December 5, 1977, appellant filed a Motion for Order Compelling Discovery or in the Alternative, Motion for Entry of Default Judgment. Said Motion was noticed up for hearing on December 21, 1977. As a result of that hearing, respondent was ordered to answer the Interrogatories propounded by appellant on or before January 11, 1978, or failing that, respondent's Answer would be stricken and his default entered. On December 22, 1977, the case was set for trial on February 7, 1978, before Judge David Dee.

On January 16, 1978, respondent's Answer was stricken and his default entered.

On January 31, 1978, appellant filed a Notice of Default Hearing, which hearing was to be held on February 1, 1978, before Judge Marcellus K. Snow. On February 1, respondent filed a Motion to Vacate Default. As grounds for his Motion, respondent represented that he had been ill and that his illness had caused him to be late in responding to discovery. Respondent incorrectly represented that he had partially responded to discovery prior to the entry of default. The record reflects that respondent's Response to Written Interrogatories or to Demand for Admissions was filed on February 1, 1978. (R. 60) On February 1, Judge Snow granted respondent's Motion to Set Aside

Default, and further ordered "that no more continuances will be granted." (R. 59)

On February 8, 1978, Mr. Gayle Dean Hunt withdrew as counsel for respondent, and although no entry of appearance is found in the file, Jed W. Shields became counsel for respondent.

On February 15, 1978, the trial in this matter was set for March 17, 1978. On March 14, 1978, Mr. Shields requested a continuance of the trial date in spite of the Order of Judge Snow. Counsel gave as the reason for the requested continuance the fact that he had another trial set for March 17, and noticed up his motion for March 15, the day following the date of his motion. By Order filed March 15, 1978, Judge David B. Dee continued the trial of this case to April 7, 1978.

By Order of Judge Dee filed March 22, 1978, respondent was ordered to supply more complete answers to the Interrogatories of appellant, said answers to be submitted by March 24, 1978. The file contains no record of respondent ever having complied with said Order; however, at a hearing on October 17, 1978, appellant indicated that she received a single sheet of paper through her attorney a few days prior to the April 7 trial date, which sheet of paper purported to be answers as compelled by the March 22nd Order. (R. 803 and Plaintiff's Exhibit 1.)

By Minute Entry dated April 7, 1978, the divorce was granted and a settlement reached between appellant and respondent was read into the record. Findings of Fact and Conclusions of Law and a Decree of Divorce were filed on May 19, 1978. On June 20,

1978, a Motion and Order were presented to Judge Dee which recited that the Findings and Decree entered on May 19, 1978 were erroneously entered. Therefore, new Findings of Fact and Conclusions of Law and Decree of Divorce were entered on June 22, 1978.

On July 20, 1978, appellant filed a Motion for Relief from Final Decree pursuant to Rule 60(b), U.R.C.P., alleging (1) that she had obtained material and relevant information regarding the real property of the parties which could not have been discovered by due diligence in time to move for a new trial, (2) that defendant, Milan Mack Boyce, had been guilty of fraud, misrepresentation, or misconduct in relation to the divorce action, and (3) that she had entered into the oral stipulation for settlement while under duress. This Motion was scheduled by appellant to be heard on October 2, 1978 but pursuant to a request for special setting filed by respondent an Order for Special Setting was signed by Judge Dee on July 27, 1978, and hearing on the Motion was set for July 31, 1978.

On August 1, 1978, the hearing on appellant's Motion was heard and based upon the affidavit of appellant filed August 1, 1978 (R. 182) the divorce decree was in effect set aside, and by Minute Entry of the same date, Judge Dee ordered "All real property and cash to be restored as they were on April 7, 1978." (R. 162) An Order reflecting the results of the August 1, 1978 hearing was drawn up by counsel for appellant but was never

On August 17, 1978, R.M. Child entered his appearance as counsel for appellant.

On approximately August 21, 1978, respondent filed his Petition to Set Aside the Temporary Order of the Court and to Restore the Decree of Divorce Herein, and an Objection to form of the proposed Order submitted by appellant, in which he protested that it would be impossible for respondent to comply with the Court's Order of August 1, 1978. Respondent's Petition and Objections came on for hearing before the Honorable Judge Dee on September 8, 1978. However, by reason of the fact that appellant had filed a Notice of Appeal contemporaneously with her Motion for Relief From Final Decree and Notice of Intent to Appeal, the file was not before the Court.

At that hearing Judge Dee questioned his authority exercised on August 1, 1978 in setting aside the Divorce Decree by reason of the prior filing of appellant's Notice of Appeal (R. 149) and suggested that if appellant dismissed the appeal to the Supreme Court, the trial court could again assume jurisdiction to hear appellant's Motion for Relief From Final Decree. (R. 774, 789)

Judge Dee further indicated that the Motion for Relief From Final Decree should be refiled as "a proper Rule 60(b) motion" (R. 788), and set the matter for hearing on October 17, 1978.

Appellant, respondent and the Court presumed that appellant could not conduct discovery unless and until the Divorce Decree had been set aside. From the transcript of the September 8, 1978 hearing the following pages contain material

which show that the indicated persons presumed discovery could not proceed: The Court - R. 782; appellant - R. 784, 785, 786; respondent - R. 781, 785, 786. From the transcript of the October 17, 1978 hearing the following pages show the same: the Court - R. 887; appellant - R. 886-87. (See Appendix 1 attached)

Appellant subsequently on September 12, 1978 voluntarily withdrew her appeal to the Supreme Court and on September 13, 1978 filed a Rule 60(b) Motion to Set Aside Decree (in whole or in part).

Commencing at 2:00 p.m. on October 17, 1978, hearing was held before Judge Dee on the various motions which had theretofore been filed by the parties.

At the beginning of the October 17th hearing, counsel for respondent represented to the Court that he had an affidavit of some length to counter the Affidavit in Support of Motion for Relief from Final Decree filed by appellant on August 1, 1978. Counsel for respondent also represented that he had case law standing for the proposition that the Court had no authority to set aside the Decree. (R. 795) The Court invited counsel to submit whatever affidavits or law he might have and then permitted the hearing to go forward.

At the hearing, appellant called four witnesses to testify and had three more prepared to testify. The purpose of this testimony was only to place before the Court evidence previously set forth in the affidavit of appellant upon which the Court relied in indicating its intent to set aside the decree on August 1, 1978. The evidence and Exhibits offered by appellant at this hearing are more specifically referred to in the second part

of this Statement of Facts. No evidence was offered by the respondent.

After approximately two hours of testimony the Court announced that it had another commitment. The Court stated: "And I've already got the feeling for whether or not this matter should be opened up based on the testimony so far." (R. 887-888)

The Court gave counsel for respondent one week to submit a memorandum on the issue of whether the court had authority to set aside the Divorce Decree in whole or in part. (R. 889) Appellant was given leave to file reply to respondent's memorandum. The Court indicated that after said memorandum had been filed the Court would hold further hearing for argument on whether the Court would "open it up." (R. 887)

On October 24, 1978, respondent filed his memorandum captioned "Motion to Dismiss Plaintiff's Motion to Set Aside Decree (in whole or in part) and Plaintiff's Motion for Relief From Final Decree." (R. 538) Reference was made therein to a counter-affidavit by respondent which was never in fact received by appellant until December 6, 1978. Said Motion was in fact a Memorandum of Law which sought to establish that the trial court was without authority to set aside the Decree. In response to this Motion, appellant submitted her Memorandum in Support of the Court's Authority to Set Aside Decree on or about October 31, 1978.

Following this, and because respondent had made no child support payments since the August 1st hearing, a Request for Early Ruling dated November 17, 1978 was filed with the Court followed by a Request for Ruling dated December 19, 1978.

On December 29, 1978, Judge Dee handed down his Memorandum Decision. After stating it was the Court's opinion that appellant had failed to establish a basis upon which her motion could be granted, the Court stated as follows:

The Court is of the opinion that all the information contained in the subsequent Affidavit and all of the allegations both pro and con contained in Affidavits filed by defendant and Counter-Affidavits by plaintiff were well known to the plaintiff and her competent counsel prior to the original Decree having been entered into on the 19th of May, 1978, and also prior to the entering into the Stipulation of the 7th of April, 1978. (R. 529)

After the Memorandum Decision was handed down but before any Order was signed by Judge Dee, appellant filed a Motion to Modify Divorce Decree and for Leave to Take Depositions. (R. 566-570) The Motion to Modify was based on the continuing jurisdiction vested in the divorce court by Section 30-3-5, U.C.A., 1953, as amended. Said Motion requested that Judge Dee consider appellant's prior motions as being motions to modify the decree of divorce entered June 22, 1978 and also requested that the Court delay ruling thereon and for leave of Court to take depositions "In order to determine the full facts and true holdings and earnings of the defendant for the guidance of the Court." (R. 567) This Motion was filed on January 25, 1979 and was in effect denied by Judge Dee.

An Amended Judgment and Order was signed by Judge Dee and filed January 31, 1979. Appellant filed her Notice of Appeal on February 27, 1979.

The preceding procedural over-view was given in an attempt to show the status of this matter before Judge Dee entered his Order denying the relief sought by appellant.

B. Facts learned after divorce as compared with respondent's representations at time of divorce

As was stated above, appellant sought relief from the lower court for fraud she alleges was perpetrated on her and the court below. Because of the inherent difficulty in showing fraud, appellant considers it essential to set forth the operative facts showing fraud in the detail as hereafter set forth.

In his Response to Written Interrogatories filed February 1, 1978, respondent delivered to appellant a Financial Statement dated April 30, 1977 and which was originally given to Zions First National Bank. Said Financial Statement shows respondent as having a net worth of \$814,637.39 with total assets of \$962,367.43. (R.78 and Defendant's Exhibit 7)

On the date of the divorce trial, April 17, 1978, respondent represented to the Court and to the appellant that he had total assets of \$300,000.00 and debts of \$100,000.00. This situation was confirmed to this Court on April 16, 1979 when in oral arguments on a motion in this matter, respondent's counsel on behalf of respondent made the following statement:

When the decree of divorce was entered, basically you were dealing with a total balance sheet of \$300,000 in assets and \$100,000 in liabilities. (Transcribed from tape recording of proceedings before the Supreme Court on April 16, 1979, Law and Motion Calendar)

Appellant relied on the representations of respondent in deciding whether to enter into the offered settlement. Had these representations been true, the settlement agreed on which awarded appellant \$98,000 as property distribution and \$2,000 lump-sum alimony for a total of \$100,000 cash, and which left respondent with the assets and liabilities of the parties, would indeed have been just and equitable. Judge Dee in explaining his unwillingness to award attorney's fees even characterized the settlement as "the handsome settlement you got." (R. 241) However, as the following discussion will point out, the settlement was far from "handsome" and in fact grossly inequitable and unjust.

According to the testimony of appellant at the October 17, 1978 hearing, respondent's representation on April 7, 1978 that his net worth was only \$200,000 was made and substantiated in the following fashion:

(1) On or about April 7, 1978 respondent supplied appellant with a document entitled "Contract and Agreement" and a document entitled "Addendum Number One." (Plaintiff's Exhibit 2 and 3, respectively) The Contract and Agreement indicated that on December 1, 1975 respondent sold his interest in all of his corporations to his parents, Milan C. and D. Noriene C. Boyce,

"for \$10.00 and other valuable consideration." Addendum Number One modifies some of the terms of the original Contract and Agreement but indicates that on February 1, 1977, respondent's parents were still the owners of the corporations. Likewise, in "answer" to an Order Compelling Answers, respondent supplied to appellant a single typed page indicating that he no longer owned any stock in any of the corporations he had organized. (Plaintiff's Exhibit 1)

Appellant testified on October 17th that the first time she saw Plaintiff's Exhibits 2 and 3 was within a few days before the April 7, 1978 hearing. She further testified that although she was listed as Secretary-Treasurer of the corporations for some years, she had no knowledge of the transfer of corporate ownership from respondent to his parents. (R. 834-387) The effect of these representations was to lead appellant to believe on April 7, 1978 that although the Financial Statement of April 30, 1977 indicated that respondent owned the corporations and had a net worth in excess of \$800,000, as a result of the transfer of corporate ownership he no longer owned those assets.

(2) Appellant and respondent jointly owned ten $\frac{1}{2}$ acre lots in the Dimple Dell Oaks Subdivision in Salt Lake County. Within a few days before the April 7, 1978 divorce hearing, respondent delivered to appellant a certified appraisal dated March 13, 1978. (Plaintiff's Exhibit 4) According to that appraisal each lot had an estimated value of \$4,650 for a total value of the property of \$46,500. (R. 809-810) Thus respondent

represented to and appellant acted upon the belief that said property had only a value of \$46,500.

(3) The personal residence of the parties was represented by respondent to have a market value of \$100,000 with encumbrances of \$83,463 (\$54,368 to Zions Bank and \$39,095 to American Concrete Construction, Inc.). (R. 66) This left an equity of \$16,537.

(4) Appellant and respondent jointly held property located at 1295 East 4800 South in Salt Lake City. In his answers to Interrogatories respondent represented the value of the property to be \$55,000 with encumbrances totalling \$63,055 (\$40,000 to Zions Bank and \$32,055 to Rhea B. Jacobs Groves Estate). (R. 66) Within a few days prior to the April 7, 1978 divorce hearing respondent delivered to appellant a certified appraisal report dated March 13, 1978 which gave as the value of the property \$65,000. (Plaintiff's Exhibit 5)

All of the foregoing information which was given to appellant by respondent seemed to support respondent's representation that on April 7, 1978 he had total assets of \$300,000 with liabilities of \$100,000 for a net worth of \$200,000.

However, as also shown by the testimony at the hearing of October 17, 1978, some time in May, 1978 respondent attempted to borrow approximately \$100,000 from the Lockhart Company and in connection with this loan application gave Lockhart a Financial Statement dated May 1, 1978. (Plaintiff's Exhibit 8) That Statement showed the following:

(1) Respondent included as his own the assets of the corporations he had purportedly sold to his parents. On cross-examination of Thomas Pike, Vice-President of The Lockhart Company, counsel for respondent asked if Mr. Boyce hadn't informed him that the Financial Statement included total Boyce family assets. Mr. Pike, who dealt with respondent, testified that he did not recall that any of the assets listed on the Statement were assets of others than the respondent. (R. 840-841) When Mr. Pike was asked what the Lockhart Company considered respondent's net worth to be, he answered, "I would say the figure on the financial statement of May 7." (R. 844)

(2) The May 1 Financial Statement shows a fair market value of \$250,000 for the ten $\frac{1}{2}$ acre lots in Dimple Dell Oaks. Mr. Pike of the Lockhart Company testified on October 17 that his company had the lots appraised and made a loan based on the value of the property being \$260,000. (R. 846-847) Thus on May 1, 1978 respondent represented to Lockhart and Lockhart found the value of these lots to be in excess of five times what respondent had represented their value to be on April 7, 1978, three weeks earlier. The Financial Statement of May 1 also reflects that the liens in favor of American Concrete Construction, Inc. were no longer on the property.

In this regard it should be noted that respondent was President of American Concrete Construction, Inc. Release of all liens in the name of that corporation immediately following the divorce of the parties must indicate to an impartial observer

that the presence of said liens in the course of the divorce proceeding was a sham and a fraud upon the court and the appellate

(3) In the May 1 statement the former residence of the parties is listed as having a market value of \$150,000. A mortgage in the sum of \$35,728.32 is listed. The liens in favor of American Concrete Construction, Inc., again, no longer encumber the property.

(4) The property located at 1295 East 4800 South is listed in the May 1 Statement as having a market value of \$125,000 with a mortgage of \$11,502.50. Thus respondent represented to Lockhart on May 1, 1978 this piece of property to have a value double that which he represented to appellant three weeks earlier on April 7, 1978.

The Financial Statement of May 1, 1978 reflects respondent's net worth as being \$1,154,690.10 with total assets of \$1,383,920.92. This is a considerable improvement over his financial status approximately three weeks earlier when he represented to appellant and the trial court a net worth of \$200,000 with total assets of \$300,000.

ARGUMENT

POINT I

THE EVIDENCE IN THE CASE AT BAR SHOWS SUCH AN ABUSE OF DISCRETION ON THE PART OF THE TRIAL COURT IN DENYING APPELLANT'S RULE 60(b) MOTION AND MOTION TO MODIFY DECREE THAT THIS COURT SHOULD REVERSE AND REMAND WITH DIRECTIONS TO SET ASIDE THE DECREE OF DIVORCE AND REOPEN THE CASE ON THE ISSUES OF PROPERTY DIVISION, ALIMONY AND CHILD SUPPORT

A divorce action is a proceeding in equity. Iverson v. Iverson, 526 P.2d 1126 (Utah 1974). It follows that a Motion to Modify a divorce decree must be considered an equitable matter. Indeed it is submitted that a Rule 60(b) Motion such as that initially brought by appellant is an equitable matter.

This Court has the responsibility to review the evidence in a case in equity. Article VIII, Section 9 Utah State Constitution; Section 78-2-2, U.C.A., 1953, as amended; Rule 72(a), U.R.C.P.; Nokes v. Continental Mining & Milling Co., 6 Utah 2d 177, 178, 308 P.2d 954 (1957).

The weight to be given by this Court to the findings of the trial court has been stated in various ways. The following statement is found in the case of Richins v. Struhs, 17 Utah 2d 356, 412 P.2d 314 (1966):

. . . It is the duty and the prerogative of this court to review both the law and the facts, and to consider the weight and sufficiency of the evidence. However, in such cases we make allowance for the advantages the trial court has because of proximity to the parties, the witnesses and the trial. (Footnotes omitted) (17 Utah 2d at 358)

In referring specifically to a situation involving a requested modification of a divorce decree this Court in Harding v. Harding, 26 Utah 2d 277, 280, 488 P.2d 308 (1971), stated:

This proceeding seeking to modify the divorce decree is in equity; and it is the prerogative of this court to review the evidence, to make its own findings, and to substitute its judgment for that of the trial court when the ends of justice so require. However, due to the prerogatives and advantaged position of the trial court, we pursue that broad authorization under certain rules of review which are now well established: Its actions are indulged with a presumption of validity and correctness and the burden is upon the appellant to show a basis for upsetting them: either (1) that findings have been made when the evidence clearly preponderates the other way; or (2) that there has been a misunderstanding or misapplication of the law resulting in substantial and prejudicial error; or (3) that it appears plainly that there has been such an abuse of discretion that an inequity or injustice has resulted. (Emphasis added) (Footnotes omitted)

More recently in the case of Ingram v. Forrer, 563 P.2d 181, 183 (Utah 1977) this Court stated:

While in equity cases we accord due regard to the position of a trial judge in making his findings of fact, we are not required to affirm him where it appears that he has erred. (Citing, Article VIII, Sec. 9, Utah State Constitution; First Security Bank of Utah v. Demiriz, 10 Utah 2d 405, 354 P.2d 97 (1960); Wiese v. Wiese, 24 Utah 2d 236, 469 P.2d 504 (1970))

In the case of Kettner v. Snow, 13 Utah 2d 382, 384, 375 P.2d 28 (1962), Mr. Justice Crockett writing for this Court stated:

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We are in accord with the proposition urged by the defendant that the trial court has broad discretion in granting new trials; and in allowing relief under Rule 60(b). But its power is not without limitation and cannot be exercised capriciously or arbitrarily. It is elementary that under usual circumstances the regular rules of procedure are binding, and that a party who has allowed the time to move for a new trial to expire is thereafter precluded from doing so. This can be avoided only where it is made to appear that for one or more of the reasons specified in Rule 60(b) justice has been so thwarted that equity and good conscience demand that this extraordinary relief be granted. And the burden of showing facts to justify doing so is upon him who seeks such relief.

It is respectfully submitted that when this Court reviews the evidence, it will be abundantly clear that the trial court erred in that "it appears plainly that there has been such an abuse of discretion that an inequity or injustice has resulted."

A review of the record in the case at bar shows that respondent through trickery, misrepresentations and fraud accomplished his purpose of obtaining a grossly inequitable proportion of the assets of the parties. His plan seems to have been to (1) transfer all of his corporate holdings to members of his family while maintaining complete control of those assets and all without the knowledge of appellant, and (2) encumber all jointly held property while understating the true value thereof.

This inequitable and plainly fraudulent conduct was pointed out to the trial court. It was an abuse of discretion for the trial court to refuse to correct this inequity. An injustice had been done and the trial court refused to do equity. Therefore this Court should reverse the trial court and remand this case with directions to reopen the divorce on the issue

of property settlement, alimony and child support. Furthermore, the appellant should be permitted to make use of the full range of discovery devices in order to present the true status of respondent's financial condition to the trial court.

POINT II

THE TRIAL COURT ERRED IN CONSIDERING THE AFFIDAVITS OF RESPONDENT IN THE FACE OF DIRECT EVIDENCE ADDUCED BY APPELLANT AT THE OCTOBER 17 HEARING

As was stated under Point I above, the evidence put on by appellant at the October 17 hearing was the only evidence that was actually presented to the trial court. At the end of the October 17 hearing appellant had additional witnesses waiting to testify.

Respondent has never offered any competent material evidence in rebuttal to the evidence adduced by appellant at the October 17 hearing. Instead, respondent submitted a voluminous, rambling, largely irrelevant affidavit. This affidavit cannot be considered as evidence in the face of testimony by witnesses in open court because appellant was not afforded the right to cross-examine any of the affiants connected with said affidavit. This Court has recognized that the right to cross-examine is a valuable right. Hunter v. Michaelis, 114 Utah 242, 198 P.2d 245, 251 (1948).

Furthermore, jurisdictions which have considered the question have uniformly held that, at least in the absence

of a statute permitting it, affidavits are not competent evidence to establish the facts contained therein. See, e.g., Holton v. Laucomer, 504 P.2d 872 (Hawaii 1972); Crabtree v. Measday, 508 P.2d 1317 (N.M. App. 1973), cert. den. 508 P.2d 1302; Caye v. Caye, 211 P.2d 252 (Nev. 1949).

Professor Wigmore states at Section 1384 in the Third Edition of his treatise on evidence:

Upon the principles already examined, it is clear that a mere affidavit — i.e. a statement made upon oath before an officer — is inadmissible. . . .

A case very similar to the one at bar in which the issue of the admissibility of affidavits was decided is Pavaroff v. Pavaroff, 130 P.2d 212 (Cal. App. 1942). That case involved a motion to modify a divorce decree with respect to custody of minor children. The trial court denied the motion based not only on the oral testimony of witnesses but on affidavits which it had received in evidence over objection. In reversing the trial court for receiving the affidavits in the ^{fact} ~~fact~~ of oral testimony by the other party, the reviewing court stated:

It is elemental that the issue below, pertaining as it did solely to the custody of minor children, could not have been tried wholly or in part on affidavits in the original divorce proceeding, over objection. This for the reason that evidence by way of affidavit on controverted issues of fact is an inappropriate link in the chain of proof. From time immemorial it has been a fundamental precept of the common law that testimony to sustain a cause of action, a defense thereto or any other issuable controverted fact must

be given in open court or by deposition with cross-examination then and there accorded. Where cross-examination was not accorded, not only was the testimony classed as being hearsay but it was considered too uncertain and unreliable to be considered in the investigation of controverted facts, and should therefore not be received as evidence. As an affidavit is but the ex parte sworn statement or testimony of the affiant, it was accordingly inadmissible at the common law on a controverted issue of fact.

* * *

In short, the common law, accepting the experience of ages, regarded cross-examination of a witness or affiant as to his relation to the case or parties, his motives, if any, his means of knowledge and opportunities for information, his powers of observation and tenacity of memory as of prime importance to test the credibility and accuracy of his statements, so as to render reliance thereon safe. (130 P.2d at 213)

Appellant objected to the use of respondent's affidavits as evidence. On November 4, 1978 appellant wrote to the Honorable Judge Dee regarding possible use of affidavits by the respondent saying, "If the defendant had evidence for the Court he should properly have submitted it in form other than affidavits (Appendix 2) Again in her Request for Ruling dated December 19, 1978, respondent stated:

. . . the plaintiff believes the "Answer and Counter Affidavits to Plaintiff's Affidavit in Support of Motion for Relief from Final Decree," consisting of approximately one hundred fifty pages filed by the defendant with the Court on or about the 6th or 7th

day of December, 1978, contains multiple misstatements and untruths and constitutes an attempt by the defendant to get evidence before the Court without taking the stand under oath and without permitting the opportunity of cross examination. (R. 531, Appendix 3)

Utah's Rules of Civil Procedure allow for the use of affidavits only in fairly limited circumstances. Affidavits may be used in regard to motions for summary judgment (Rule 56(e)); application for new trial (Rule 59(c)); disqualification of a judge (Rule 63(b)); provisional and final remedies (Rules 64A, 64B, 64C, 64D and 71B); and appeals by indigents (Rule 73(c)).

On August 1, 1978, faced with an accelerated hearing date, appellant submitted an affidavit. (R. 182) However, she had witnesses present whom the Court ^{refused} ~~requested~~ to hear. (R. 750)

On October 17, 1978 appellant presented evidence both by way of testimony in open court and documents, identified and received in evidence as Exhibits. Appellant's witnesses were subject to cross-examination by respondent. Respondent failed to put on evidence of any kind. It is clear that the trial court relied heavily on the matters contained in respondent's affidavits in deciding whether the motions should be granted. To do so was error, an abuse of discretion, and prejudicial to appellant.

It is therefore respectfully submitted that this case should be remanded to the trial court with instructions to reopen

the divorce proceedings on the question of what is a fair and equitable property settlement between the parties.

POINT III

THE TRIAL COURT ERRED IN ORDERING
APPELLANT TO REMOVE THE LIS PENDENS
SHE HAD FILED IN CONNECTION WITH
THE CASE AT BAR

On or about July 31, 1978, appellant filed for record a Notice of Lis Pendens pursuant to Section 78-40-2, Utah Code Annotated, 1953, as amended. Said Notice applied to the three properties held in joint tenancy by appellant and respondent during their marriage and was necessary because appellant had Quit-Claimed her interest in said properties to the respondent pursuant to the Decree of Divorce. Said properties included the family residence on Top-of-the-World Drive, the ten lots in Dimple Dell Oaks Subdivision and the property located at 1295 East 4800 South. (R. 214-215)

Section 78-40-2 provides in pertinent part:

In any action affecting the title to, or the right of possession of, real property the plaintiff at the time of filing the complaint or thereafter . . . may file for record with the recorder of the county in which the property or some part thereof is situated a notice of the pendency of the action From the time of filing such notice for record only shall a purchaser or encumbrancer of the property affected thereby be deemed to have constructive notice of the pendency of the action, and only of its pendency against parties designated by their real names.

Although the Utah Supreme Court has not addressed the issue, the courts of other jurisdictions have found that a divorce action is a proper subject for a notice of lis pendens. The Colorado Supreme Court adopted this position by analogizing to a prior Colorado case involving a suit for separate maintenance in the case of Clopine v. Kemper, 344 P.2d 451 (1959). The Oklahoma Supreme Court came to the same conclusion in the case of Bowman v. Bowman, 206 P.2d 582 (1949).

In Utah, the district courts have jurisdiction to hear divorce suits. Section 30-3-5 of the Utah Code Annotated gives the district courts power to "make such orders in relation to the . . . property . . . of the parties . . . as may be equitable." The district court is also given continuing jurisdiction with respect to "the distribution of property . . ." Hence, in Utah a divorce action must be considered an action "affecting the title to, or the right of possession of, real property."

In the case of Hansen v. Kohler, 550 P.2d 186, 190 (Utah 1976), the Utah Supreme Court stated:

The sole purpose of recording a notice of lis pendens is to give constructive notice of the pendency of the proceeding; its only foundation is in the action filed--it has no existence independent of it.

Both Section 78-40-2 and the Hansen case make it clear that so long as an action is pending, that action will support a lis pendens. Black's Law Dictionary, Fourth Edition,

defines "pendency" as follows:

Suspense; the state of being pendent or undecided; the state of an action, etc., after it has been begun, and before the final disposition of it. (emphasis added)

It is a settled rule in Utah that a judgment, and hence an action, is not final until the time for appeal has expired or an appeal timely taken has been disposed of. The Supreme Court in Young v. Hansen, 117 Utah 607, 218 P.2d 674, 675 (1950) stated:

In the cases of State Bank of Sevier v. American Cement and Plaster Co., 80 Utah 250, 10 P.2d 1065; Vance v. Heath, 42 Utah 148, 129 P 365; and Schramm - Johnson Drugs v. Kleebe, 51 Utah 159, 169 P 161, this court held that a judgment is not final pending appeal

This rule is generalized in 51 AmJur 2d, Lis Pendens, Section 32 as follows:

Under what may be designated as a general rule that is subject to exceptions, once the doctrine of lis pendens comes into operation in connection with particular litigation, it remains in operation until the rendition of a final decision that puts a definite end to the litigation. (citing, inter alia, Dupee v. Salt Lake Valley Loan and Trust Company, 20 Utah 103, 57 P 845)

The instant matter is in all respects still "pending" hence the lis pendens filed in connection herewith fully complies with the law. That being the case it was error and an abuse of discretion for the trial court to order the appellant to withdraw and cancel the lis pendens she has recorded in connection with this action.

POINT IV

THE TRIAL COURT WAS IN NO WAY
BOUND BY THE SETTLEMENT AGREE-
MENT ENTERED INTO BY THE PARTIES,
BUT HAD A RESPONSIBILITY TO DO
EQUITY

The divorce court as a court of equity had a duty to see that equity was done insofar as the distribution of the marital assets and the setting of alimony.

This Court speaking through Mr. Justice Maughan in Strong v. Strong, 548 P.2d 626, 627 (1976) stated:

In Callister v. Callister, 171 Utah 2d 34, 41, 261 P.2d 944 (1953), this court stated that Section 30-3-5, U.C.A. 1953, gave the Courts power to disregard the stipulations or agreements of the parties and enter judgment for such alimony or child support as appeared reasonable; to modify such judgments when a change of circumstances justified it; regardless of attempts of the parties to control the matter by contract.

Likewise, Mr. Justice Crockett in Klein v. Klein, 544 P.2d 472, 476 (1975), stated:

It is the established rule that a stipulation pertaining to matters of divorce, custody and property rights therein, though advisory upon the court and would usually be followed unless the court thought it unfair or unreasonable, is not necessarily binding on the court anyway. It is only a recommendation to be adhered to if the court believes it to be fair and reasonable. (Citing Openshaw v. Openshaw, 102 Utah 22, 126 P.2d 1068, and Callister)

Mr. Justice Crockett also stated in Mathie v. Mathie, 12 Utah 2d 116, 123, 363 P.2d 779 (1961):

The parties cannot by contract completely defeat the authority expressly conferred upon

the court by our statute, Sec. 30-3-5, U.C.A. 1953, in cases of divorce, to "make such orders in relation to * * * property * * * as may be equitable." Under it there can be no doubt of the court's prerogative to make whatever disposition of the property, including the rights in such a contract, as it deems fair, equitable and necessary for the protection and welfare of the parties.

Based on the duty imposed by Section 30-3-5 and the record in the case at bar, it is clear (1) that the court was prevented from performing its duty at the time of the Divorce by the misrepresentations of the defendant, and (2) that the lower court abused its discretion by refusing to set aside the Decree of Divorce as it related to property distribution, alimony and child support.

This Court has gone so far as to direct a decree which it considers just and equitable in situations where the trial court has failed to do equity. In Hendricks v. Hendricks, 63 P.2d 277, 279 (1939) this Court stated:

. . . The decree in each case must be determined upon the facts, the conditions, and the circumstances of the parties in each particular case, and that if, upon examination of the record, this court is convinced that the award in the trial court is inequitable and unjust, it should direct such decree as it finds to be just and equitable.

It is respectfully submitted that the trial court's refusal to set aside the divorce decree has resulted in an unjust and inequitable award. Therefore this Court should

reverse the trial court and remand with instructions to set aside the decree insofar as the same relates to property distribution, alimony and child support, and to permit appellant to proceed with the discovery she needs to fully inform the lower court of the fraud perpetrated on that court and appellant.

POINT V

THE OUTCOME OF THIS APPEAL MAY
DECIDE WHETHER APPELLANT WILL
EVER BE ABLE TO OBTAIN RELIEF
FOR THE FRAUD PERPETRATED ON HER

Because of the trial court's refusal to grant the relief requested by appellant, appellant filed a Complaint in the Third Judicial District Court, Civil No. C79-1221, on February 22, 1979. (R. 692-734) That case is captioned Doreen Boyce v. Insulation Corporation of America, et al. That action is one for fraud and conspiracy and is an attempt to show the involvement of respondent's corporations, elderly parents and elderly aunt in putting respondent's assets and property beyond the reach of appellant. Since the Honorable Judge Dee had by his Order in the divorce action closed the door to the discovery required by appellant, it was intended that the fraud action would permit appellant to pursue such discovery in order to establish the extent of her damage.

However, the defendants in that action have been able to convince the District Court to set aside scheduled depositions and stay proceedings until this case is decided on appeal. This

is more particularly set forth in the petition filed with this Court of Doreen Boyce, plaintiff, for leave to file an intermediate appeal from Order staying proceedings in Civil No. C79-1221 and consolidate same with this appeal now pending, and defendants' Response thereto, one of which defendants is respondent here.

It is emphasized that the testimony put on by appellant at the hearing of October 17, 1978 was intended only to make a sufficient showing of fraud to allow the trial court to reopen the divorce. It was expected that if reopened, this would allow the discovery necessary to fully inform the court of the nature and extent of the respondent's true assets and the fraud perpetrated on the court and appellant. The October 17 hearing was not intended to, and it did not, amount to formal proof of common law fraud.

The Honorable Judge Dee on August 1, 1978 had ruled the Divorce to be set aside and the parties restored to the economic status quo as of April 7, 1978 on the mere representation by counsel of what appellant's affidavit showed.

On October 17, 1978, the appellant reduced the contents of that affidavit to substantive evidence found in testimony and Exhibits. No other or additional testimony was deemed to be necessary at that time and indeed the full nature and extent of the fraud cannot be determined without the opportunity of discovery.

The respondent should not be permitted to retain the disproportionate distribution of marital assets he received through fraud, connivance and misrepresentation. If the ruling of Honorable David B. Dee is allowed to stand the appellant will be unable to secure relief and her equitable share of the marital estate in the divorce action itself. Furthermore, that ruling if allowed to stand and become final will undoubtedly be urged as a bar to appellant's action in D. Boyce v. Insulation Corporation of America, et al. Civil No. C79-1221. (See Petition for leave to appeal from order staying proceedings and to consolidate same with this case on appeal and Response thereto)

CONCLUSION

It is respectfully submitted that the foregoing analysis has shown that the trial court abused its discretion in failing to reopen the divorce and/or modify the decree after opportunity for discovery on the questions of property distribution, alimony and child support. This Honorable Court should therefore reverse the trial court and remand with instructions to reopen the divorce on the issues stated above and to permit the appellant to proceed with discovery.

Respectfully submitted,

BAYLE, CHILD & RITCHIE

/s/

R. M. Child
Attorneys for Appellant

MAILING CERTIFICATE

Mailed two true and correct copies of the foregoing
Appellant's Brief, first-class postage thereon prepaid, on
this 15 day of June, 1979, to the following:

David S. Dolowitz, Esq.
PARSONS, BEHLE & LATIMER
79 South State Street
P. O. Box 11898
Salt Lake City, Utah 84147

Jed W. Shields, Esq.
243 East Fourth South
Salt Lake City, Utah 84111

/S/

APPENDIX 1

The following is taken from the transcript of the hearing of September 8, 1978, to show that the lower court, counsel for appellant and counsel for respondent each assumed that discovery could not proceed until the divorce decree had been set aside:

MR. SHIELDS: What I would like to know procedurally, how is the plaintiff before this Court to take any depositions?
There are some limitations to taking depositions.

THE COURT: Well, by the dismissal of the of the appeal.

MR. SHIELDS: There is a Decree.

THE COURT: Then--then this Court has continuing jurisdiction over this matter after the Decree is entered.

MR. SHIELDS: Right.

THE COURT: And to Rule 60(b), if there's a proper showing that there is reason for us to look at the Decree on the grounds of one of those subparagraphs which you claim. Then of course, I'd look at it in terms of setting it aside, modifying or whatever. So I guess the next move is to file a motion, and maybe what you have already done highlights that, to look at it as a 60(b) motion.

MR. SHIELDS: There's nothing--that's correct. There's nothing before the Court now.

THE COURT: I'm telling Mr. Childs (sic) if there isn't, that's what you do. If I grant it, you take depositions. * * * (R. 781-82)

MR. CHILD: 60(b), I think we have properly brought before the Court, but Mr. Shields points out the problem. The rules say that depositions may be taken after judgment only by leave of Court for purposes of preserving testimony.

MR. SHIELDS: Right.

MR. CHILD: I think that's what he had in mind when he said you do have some limitations on depositions. But if the Court gave assurance I could use the depositions to explore--

THE COURT: Uh-huh.

MR. CHILD: If Mr. Shields is going to object to that, then we're going to have a lot of troubles and so forth, so I assume.

Now, if I might point out to the Court this. I do not accept the fact that this Court lost jurisdiction until that record went up on appeal--

THE COURT: I understand.

MR. CHILD: --because this Court had the right to grant an extension of I think up to two months beyond the forty days for the record to go up on appeal for purposes of doing things the Court required in the case.

MR. SHIELDS: Only--

MR. CHILD: Now--

MR. SHIELDS: --there's a limitation on that. And I have the rule before me. There is a limitation only for the purpose, Your Honor, of doing whatever needs to be done or corrected to make the appeal proper. You see Mr. Child has forgotten part of the--part of the rule. But that's what it says, because I have it in front of me. (Indicating.)

MR. CHILD: That may be.

MR. SHIELDS: That is.

MR. CHILD: That may be. The point I'm getting at, though, Your Honor, is this. I don't believe that the August 1st ruling of the Court would be beyond the Court's power.

THE COURT: Uh-huh.

MR. CHILD: And if that ruling stands, it was really accomplishing exactly what everybody needs. And that was the Decree was set aside. At that point discovery could be started again, unlimited discovery could start again, and that's what we really need right now in order to properly put the parties back in the positions they were on April 7th and protect interest problems and things of this type. I think we could all move with dispatch.

MR. SHIELDS: But the order has been set aside. All I'm saying, if the Court please, Mr. Child is not before this Court. There is a final Decree. And the only thing--if he withdraws the appeal, the only thing he's in front of the Court

with is a motion to reform the decree, which you have indicated is improper and it's not there. Now, this is equivalent, as I see it, to some lawyers coming in, they get a decree, the whole thing is over with, final, ended, the decree is signed. All of a sudden you get a notification from one of the counsel we're going to start taking depositions. That can't be done, you see.

MR. CHILD: That's the problem.

MR. SHIELDS: Well, it can't be. There's nothing before the Court.

MR. CHILD: That's the problem, but once vacated it's before the Court.

THE COURT: Under 60--

MR. CHILD: Yes. Once vacated--

THE COURT: --if I grant that?

MR. CHILD: Once the Notice of Appeal is vacated it's before the Court, but I don't think we can proceed with depositions until the Court rules the Decree has been set aside in order to reevaluate the property distribution, so--

MR. SHIELDS: But we're missing--I'm sorry. We're missing one point. We're missing one point.

MR. CHILD: I think we better get it.

MR. SHIELDS: All right. If the Court sets aside-- if he dismisses his appeal obviously this Court then has

continuing jurisdiction from hence forward. I don't think we're in any dispute on that. But the problem is that you just can't go out and take depositions on a divorce case that's a month old a year old or five years old, without getting before this Court with some kind of a motion and the only thing which I have the right to resist. And the only thing he has at this moment upon which to predicate taking depositions is a motion to reform the Decree which motion this Court has already decided is improper.

MR. CHILD: Oh, it's--the motion is entitled Motion for Relief From Judgment, as I recall, or Final Decree.

MR. SHIELDS: Well--

MR. CHILD: Motion for Relief From Final Decree. It's obviously brought under Rule 60. If the designation was somehow inartful, it doesn't deprive the Court from the motion. ***
(R. 783-86) (All emphasis added)

Likewise, from the transcript of the hearing of October 17, 1978, the following passages reflect the fact it was still considered necessary to set aside the decree before discovery could proceed:

MR. CHILD: I think his last testimony has illustrated something. I'm being forced to use the Court's time for purpose of discovery, and I have Milan C. Boyce in the hall. If the Court is inclined, and once we get over this hurdle, once the Court if it does, sets aside in part the decree so we are actually looking

into what the property interests are, then we can proceed with depositions, but the rules don't allow depositions until that's been opened up for that purpose. And so I think an orderly development dictates that both Mrs. Boen and the Boyces, Sr., really shouldn't take the Court's time the way we are doing it this afternoon.

THE COURT: Well, this is a matter of discovery. And you're saying until I open this up to see whether or not, and that would have to be on the basis of the fact Mrs. Boyce did not know or misunderstood or didn't understand what the real property was, then I can open that up.

MR. CHILD: Not just the real property. Corporate property.

THE COURT: Really what the property was. I didn't mean real property in the legal sense.

MR. CHILD: I see.

THE COURT: The amount of the property Mr. Boyce had control of, if she had that matter misrepresented to her at the time she agreed in stipulation, then, of course, I must consider that, if that's the situation.

Why don't you, at this juncture at least, get ready to meet, Mr. Child, Mr. Shields' objection to opening this up, because he apparently has some law on it.

MR SHIELDS: I--

THE COURT: And why don't you brief that to the Court

in response by Mr. Child, and I'll look at at and then I will have another hearing on whether I'm going to open it up after I hear those arguments. *** (R. 886-87) (Emphasis added)

APPENDIX 2

November 14, 1978

Honorable David B. Dee
Judge
Third District Court
New Courts Building
250 East Fourth South
Salt Lake City, Utah 84111

Re: Boyce v. Boyce
D-26810

Dear Judge Dee:

In its deliberations on the matter now before the Court in the above-captioned case, we assume that the Court is not considering a "Counter Affidavit" by the defendant, referred to at page nine of defendant's memorandum dated October 25, 1978.

The plaintiff has never been served a copy of such "Counter Affidavit" and would have no idea of its contents.

If the defendant had evidence for the Court he should properly have submitted it in form other than affidavit.

Respectfully,

R. M. Child

RMC:lc
cc: Jed Shields

APPENDIX 3

R. M. CHILD
Attorney for Plaintiff
1200 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
Telephone: (801) 363-2091

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY,
STATE OF UTAH

NINA DOREEN DAVIS BOYCE,)	
)	
Plaintiff,)	<u>REQUEST FOR RULING</u>
)	
v.)	
)	
MILAN MACK BOYCE,)	Civil No. D-26810
)	
Defendant.)	

Plaintiff respectfully requests the above Honorable Court that a ruling be entered in this matter on plaintiff's Motion to Set Aside Decree and for Relief from Final Decree based upon the evidence which was received by the Court in open hearing on the 17th day of October, 1978. This request is made upon the ground and for the reason that the plaintiff believes the "Answer and Counter Affidavits to Plaintiff's Affidavit in Support of Motion for Relief from Final Decree," consisting of approximately one hundred fifty pages filed by the defendant with the Court on or about the 6th or 7th day of December, 1978, contains multiple misstatements and untruths and constitutes an attempt by the defendant to get evidence before the Court without taking the stand under oath and without permitting the opportunity of cross-examination. Furthermore, the contents of said Affidavits are in nearly every respect irrelevant to the issue before the Court on plaintiff's Motion to Set Aside Decree.

Evidence was presented by the plaintiff to the Court on the 17th day of October, 1978, that at the time of the

Stipulation and entering of the Divorce Decree herein the

plaintiff had been misled by the defendant and his counsel immediately prior to said hearing as to the values of the real property of the parties and as to the extent of ownership of the defendant in and to his corporations and their respective assets.

Defendant has offered no probative testimony nor any testimony wherein he would be subject to cross-examination which would explain or excuse the defendant's conduct in misleading the plaintiff and her attorney at the time scheduled for the hearing of divorce as to the values of the properties or the ownership of defendant's interests in his corporations.

A prompt ruling is requested by the plaintiff for the reason that the defendant has made no payments to the plaintiff for the support of the minor children of the parties since payments made to cover the month of August, 1978, notwithstanding the approach of Christmas, 1978, and further notwithstanding the fact that on the 17th day of November, 1978, a copy of the plaintiff's former "Request for Early Ruling" was mailed to counsel for the defendant.

Lest the Court construe silence on the part of the plaintiff to be tacit acceptance of the many misstatements set forth in the above-referred one hundred fifty-page document filed as an Affidavit by the defendant with "Supporting Affidavits," there is attached hereto an Affidavit by the plaintiff which does not attempt to negate all of the many misstatements and misrepresentations set forth by the defendant, but puts the plaintiff on record as advising the Court that she takes exception to said Affidavits and has a story of her own to tell.

Respectfully submitted this 17th day of December, 1978.

R. M. CHILD
1200 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
Attorney for Plaintiff