

1979

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

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

David S. Dolowitz; Jed W. Shields; Attorneys for Defendant-Respondent;

R. M. Child; Donovan C. Snyder; Attorneys for Plaintiff-Appellant;

Recommended Citation

Brief of Respondent, *Boyce v. Boyce*, No. 16342 (Utah Supreme Court, 1979).

https://digitalcommons.law.byu.edu/uofu_sc2/1660

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

I N T H E S U P R E M E C O U R T
O F T H E S T A T E O F U T A H

NINA DOREEN DAVIS BOYCE,
Plaintiff-Appellant,
vs.
MILAN MACK BOYCE,
Defendant-Respondent.

No. 1 6 3 4 2

RESPONDENT'S BRIEF

R. M. CHILD
DONOVAN C. SNYDER
Bayle, Child, & Ritchie
1105 Continental Bank Bldg.
Salt Lake City, Utah 84101

Attorneys for Plaintiff-
Appellant

JED W. SHIELDS
243 East Fourth South
Suite 300, Upper Level
Salt Lake City, Utah 84111

DAVID S. DOLOWITZ
Parsons, Behle & Latimer
79 South State Street
P. O. Box 11898
Salt Lake City, Utah 84147

Attorneys for Defendant-
Respondent

FILED

AUG 8 1979

IN THE SUPREME COURT
OF THE STATE OF UTAH

NINA DOREEN DAVIS BOYCE,
Plaintiff-Appellant,
vs.
MILAN MACK BOYCE,
Defendant-Respondent.

No. 1 6 3 4 2

RESPONDENT'S BRIEF

R. M. CHILD
DONOVAN C. SNYDER
Bayle, Child, & Ritchie
1105 Continental Bank Bldg.
Salt Lake City, Utah 84101

Attorneys for Plaintiff-
Appellant

JED W. SHIELDS
243 East Fourth South
Suite 300, Upper Level
Salt Lake City, Utah 84111

DAVID S. DOLOWITZ
Parsons, Behle & Latimer
79 South State Street
P. O. Box 11898
Salt Lake City, Utah 84147

Attorneys for Defendant-
Respondent

TABLE OF CONTENTS

	<u>Page</u>
NATURE OF THE CASE	1
DISPOSITION IN THE LOWER COURT	1
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2
ARGUMENT:	
I. NO FRAUD WAS PERPETRATED ON THE APPELLANT BY THE RESPONDENT AND APPELLANT WAS AFFORDED A FULL OPPORTUNITY TO PROVE SUCH AVER- MENTS AND FAILED TO DO SO	8
II. THE TRIAL COURT'S ORDER TO APPEL- LANT TO REMOVE THE LIS PENDENS IS A MOOT ISSUE UPON APPEAL	20
CONCLUSION	21

CASES CITED

	<u>Page</u>
U.S. Supreme Court:	
<u>Doremus v. Board of Education</u> , 342 U.S. 429 (1962)	21
<u>North Carolina v. Rice</u> , 404 U.S. 244 (1971) . .	21
Supreme Court of Utah:	
<u>Haner v. Haner</u> , 13 U. 2d 299, 373 P. 2d 577 (1962)	9, 10, 11, 14
<u>Richins v. Struhs</u> , 17 U. 2d 356, 412 P. 2d 314 (1966)	9
<u>Warren v. Dixon Ranch Co.</u> , 123 U. 416, 260 P. 2d 741 (1953)	8, 9
Other Authorities:	
Black's Law Dictionary, Fourth Edition	15

IN THE SUPREME COURT
OF THE STATE OF UTAH

NINA DOREEN DAVIS BOYCE,
Plaintiff-Appellant,
vs.
MILAN MACK BOYCE,
Defendant-Respondent.

No. 16342

RESPONDENT'S BRIEF

NATURE OF THE CASE

This is an appeal from a judgment of the Third District Court denying Appellant's Motion to set aside the Decree of Divorce entered after the Court reviewed and accepted the settlement agreement of the parties.

DISPOSITION IN THE LOWER COURT

The Third District Court, the Honorable David B. Dee presiding, after hearing the motion of the Appellant submitted pursuant to Rule 60(b) of the U.R.C.P. to set aside the Decree of Divorce which he had made and entered after reviewing and accepting the stipulation of the parties, denied said motion

and ordered Appellant to remove a Notice of Lis Pendens she had filed against property awarded to Respondent.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmation by this Court of the Order of the District Court entered January 31, 1979.

STATEMENT OF FACTS

Because the Appellant submitted argument in place of a statement of facts, the Respondent hereby submits the following as the statement of facts in this case.

On May 27, 1977, the Appellant, Nina Doreen Davis Boyce, filed a Complaint for divorce against the Respondent, Milan Mack Boyce (R. 2). As part of her action, Appellant had the Court issue an Order requiring Respondent to make a full accounting of his assets on July 27, 1977 (R. 10).

On August 1, 1977, Respondent filed an Answer to Appellant's Complaint (R. 7). A hearing was thereafter set for September 27, 1977 to consider the matters requiring resolution pending final judgment. At the September 27 hearing before Judge David K. Winder, the Respondent testified that he owned a small interest in Insul-Guard Corporation; that he was paid a salary by Insul-Guard Corporation and had been paid a salary by Insul-Down

Corporation; that he was the president of Insul-Guard; that he had insurance benefits coming in from his efforts as an insurance agent; that he owned real property at 8457 Top of the World Drive, and at 1295 East 4800 South; that he owned ten 10 1/2 acre lots of Dimple Dell Oaks Subdivision which he estimated was worth in excess of One Hundred Fifty Thousand Dollars (\$150,000.00); that Insulation Corporation of America, Insul-Down, and Insul-Guard owned several pieces of realty which he itemized in his testimony; and he testified regarding the balance of his checking accounts and other miscellaneous items of property (transcript of hearing of September 27, 1977). As a result of this hearing, Respondent was ordered to pay Four Hundred Dollars (\$400.00) a month temporary support, to allow Appellant the use of an automobile and to maintain a policy of health insurance for the benefit of the minor children (R. 263).

On December 5, 1977, Appellant filed a Motion for Order Compelling Further Discovery or in the alternative, for Entry of Default Judgment (R. 46-47). Said motion was heard on December 21, 1977 and Respondent was ordered to answer the Interrogatories propounded by Appellant on or before January 11, 1978, or suffer his Answer to be stricken and his default entered (R. 265 *et seq.*).

On December 22, 1977, the case was set for trial on February 7, 1978 before Judge Dee. On January 16, 1978, Respon-

dent's Answer was stricken and his default entered (R. 53). 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 (R. 54). On February 1, 1978, Respondent filed a Motion to Vacate Default (R. 55). As grounds for his Motion, Respondent submitted a medical statement with his Motion stating that he had been ill and that his illness had caused him to be late in responding to discovery (R. 55-58). Respondent's Answers to Appellant's written interrogatories was filed on February 1, 1978 (R. 60-89). On February 1, Judge Snow granted Respondent's Motion to Set Aside Default (R. 59).

On February 8, 1978, Mr. Gayle Dean Hunt withdrew as counsel for Respondent and Jed W. Shields became counsel for Respondent (R. 736).

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 and were submitted by March 24, 1978 (R. 101).

On April 7, 1978, the divorce was granted after a settlement reached between Appellant and Respondent was read into the record (R. 231 *et seq.*). Findings of Fact and Conclusions of Law and a Decree of Divorce were filed by Appellant's counsel on May 19, 1978 (R. 104-121). On June 20, 1978, a Motion and Order

were presented by Appellant's counsel to Judge Dee which recited that the Findings and Decree entered on May 19, 1978 were erroneously entered (R. 122-123) and new Findings of Fact and Conclusions of Law and Decree of Divorce were entered on June 22, 1978 (R. 124-132).

Mr. Gary A. Sargent withdrew as counsel for the Appellant and David A. Goodwill became counsel for Appellant (R. 735).

On July 20, 1978, Appellant filed 1) a Motion for Relief from Final Decree pursuant to Rule 60(b) of the U.C.R.P., 2) a Notice of Lis Pendens against the realty that had been awarded to the Respondent, and 3) a Notice of Appeal alleging 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 new trial, that Defendant, Milan Mack Boyce, had been guilty of fraud, misrepresentation, or misconduct in relation to the divorce action, and that she had entered into the stipulation for settlement while under duress (R. 216).

On July 27, 1978, Respondent filed a Motion to Require Plaintiff to remove her lis pendens (R. 153). Pursuant to a Motion for Special Setting filed by Respondent (R. 155), the matter was heard August 1, 1978 (R. 735 *et seq.*). By Minute of Entry of August 1, 1978, Judge Dee ordered all real property and

cash to be restored as they were on April 7, 1978 (R. 162). Appellant's counsel drew up an order reflecting the Court's August 1, 1978 decision.

On August 17, Mr. David A. Goodwill withdrew as counsel for the Appellant, and Mr. R. M. Child entered his appearance as counsel for the Appellant.

On August 21, 1978, the Respondent filed an Objection to the Order requiring the restoration of the property and money based on Respondent's previous irrevocable disposition of some of the property in order to raise the necessary funds to satisfy the demands of the Decree of Divorce imposed on the Respondent (R. 279-281). In support of the Objection, Respondent filed his "Petition to Set Aside the Temporary Order of the Court and to Restore the Decree of Divorce Herein", explaining the dispositions of the property and the consequent impossibility of compliance with the Order (R. 307-335).

Thereafter, a hearing on the various pending motions was held on September 8, 1978. At that hearing, Judge Dee related to counsel a conversation he had with the Chief Justice of this Court in which he was told that the filing of the Notice of Appeal had stripped the trial court of the jurisdiction necessary to make the August 1, 1978 decision (R. 773). Judge Dee consequently refused to sign the Order drawn by Appellant's counsel

(R. 221) and Judge Dee directed Respondent's counsel to prepare an Order vacating the August 1, 1978 decision (R. 789). Judge Dee also ruled the matter was open for additional discovery upon the withdrawal of the Notice of Appeal so that he would have facts adequate to decide whether the Court should grant the Rule 60(b) motion (R. 787-788).

On September 20, 1978, Appellant's Appeal #15958 to this court was dismissed at Appellant's request (R. 277).

On October 5, 1978, Judge Dee signed Respondent's Order Vacating the Order of August 1, 1978, and he concurrently initialed the Appellant's Order as not signed (R. 336-341).

On October 10, 1978, a hearing was set for October 17, 1978 (R. 342).

On October 17, 1978, a full evidentiary hearing was held; Appellant called several witnesses, examined those witnesses and proffered evidence in an attempt to prove the allegations of fraud set out in her Motion. Appellant indicated at the hearing that she had received a sheet of paper through her attorney a few days prior to the April 7, 1978 stipulation date, which sheet of paper contained the answers as compelled by the March 22, 1979 Order (R. 212, R. 803, and Plaintiff's Exhibit 1). The Court ruled that the Appellant failed to prove the allegations of fraud (which she admits on page 30 of her brief) (R. 527-530), after a

full and complete opportunity to do so was afforded her (R.792-891). Appellant then filed her Notice of Appeal (R. 661).

ARGUMENT

I.

NO FRAUD WAS PERPETRATED ON THE APPELLANT BY THE RESPONDENT AND APPELLANT WAS AFFORDED A FULL OPPORTUNITY TO PROVE SUCH AVERMENTS AND FAILED TO DO SO.

The parties in this matter entered into a stipulated divorce. Appellant now seeks to set aside her agreement and the Decree entered pursuant to that agreement insisting that the Respondent perpetrated fraud upon her by hiding and otherwise misrepresenting his assets, thus depriving her of the ability to present the full extent of such assets to the Court and causing her to enter into an unfair Property Settlement. The trial court correctly determined that no fraud had been perpetrated and that the Appellant had a full and complete opportunity to present her evidence in support of her Rule 60(b) Motion and failed to prove her averments. When the trial court, after hearing determines that an Appellant failed to establish grounds justifying setting aside a judgment, this court has ruled it should not disturb that ruling absent of a clear abuse of discretion on the part of the trial judge. Warren v. Dixon Ranch Co., 123 U. 416, 260 P.2d 741

(1953). In setting out this rule, this Court declared that the key consideration is that the parties should be given an opportunity to present their position to the Court. 123 Utah at 419-420. As this Court stated in Warren:

"The Rule that the Courts will incline toward granting relief to a party who has not had the opportunity to present his case is ordinarily applied at the trial court level, and this Court will not reverse the trial court where it appears that all elements were considered, merely because the Motion could have been granted. The Supreme Court will not substitute its discretion for that of the trial court." Id., at 744.

In this case Appellant had her day in Court (two of them, first on April 7, 1978 at the time of the stipulated settlement and again a second time on October 17, 1978) and now attempts to retry the facts, not the law here. That is something this court can do but does not do on the facts because of the great deference given to the trial court's advantage in being in close proximity to the parties and the witnesses during the trial. Richins v. Struhs, 17 U. 2d 356, 358, 412 P.2d 314 (1966).

This Court has considered precisely the issues presented in this matter in Haner v. Haner, 13 U. 2d 299, 373 P.2d 577 (1962) where an appeal was taken from an order denying a Motion to Set Aside or Modify Divorce Decree. The Motion was based on allegation that Respondent had introduced evidence of fraudulent values on some of the properties which were subject to

property settlement. In affirming the trial court, this Court ruled:

"In order to justify granting relief, the alleged wrong would have to be of the type characterized as extrinsic fraud: that is, fraud based on conduct or activities outside the court proceedings themselves; and which is designed and has the effect of depriving the other party of the opportunity to present his claim or defense." 13 Utah 2d at 301.

This is not the type of fraud being pleaded in the instant case by the Appellant. Appellant's position is that the Respondent deliberately understated and denied ownership of certain properties in his answers to interrogatories and affidavits (see Appellant's Brief, "Statement of Facts"), all of which could have been or were presented to the Court at the time of the April 7, 1978 stipulation and could have been challenged by the Appellant in the Court proceedings. In fact, they were subject to just such scrutiny in the hearing held October 17, 1978. This Court stated in Haner in regard to this type of appeal:

"It is obvious that quite a different situation exists where there is no prevention of the party from contesting the issues in a trial, and where the complaint is simply that one party presented perjured testimony or false evidence. This charge is simply a continuation of the same dispute which the trial was supposed to resolve. It is the purpose of the law to afford parties full opportunity to have themselves and their

witnesses present; and to present their evidence and their contentions to the Court. When this has been done and the Court has made its determination, that should end the matter, except for the right of appeal. It is so patent as to hardly justify comment that a judgment should not be set aside merely to grant the losing party another chance to accomplish the task at which he just failed; to prove that he was right and that the opponent was wrong. To reopen a case just because a party persists in asserting and attempting to prove that his version of the dispute was the truth and that of the opponent was false would open the door to a repetition of that procedure, whoever won the next time; and thus to keeping the dispute going ad infinitum with no way of determining when the merry-go-round of the law suit would end. This would involve not only a waste of time, energy, and expense but also would result in such uncertainty as to people's rights that the very purpose of a law suit, the settling of disputes and putting them at rest, would be defeated. Resort to the Courts would be frustrating and impracticable unless there were some point at which decisions became final so that parties could place reliance thereon, leave their troubles behind and proceed to the future. It is for these reasons that Courts accord to judgments regularly entered a high degree of sanctity; and would overturn a judgment such as the instant one on the ground of fraud only if it were shown that the complaining party had been wrongfully deprived of the opportunity to meet and contest the issues at trial." 13 Utah 2d at 301-302.

The Appellant had her day in Court, in which she had a full opportunity to present evidence to support her accusations of fraud. She simply failed to prove those accusations. She asserts that the trial court made its decision based on affidavits

rather than testimony but that is not true. From the record it is obvious Judge Dee did not rely on the Respondent's Affidavit in reaching his decision because at the end of the October 17, 1978, fraud hearing he indicated that he already had a feeling for whether or not the Appellant had met her burden of proof in the matter, based on the testimony presented at the hearing (R. 887-888). She had the opportunity to present evidence on October 17, 1978 and simply failed to prove her case. She now seeks to try it one more time before this Court.

It is interesting to note that the Appellant in her brief admits that she failed to meet her burden of proof:

"The October 17 Hearing was not intended to, and it did not, amount to formal proof of common law fraud." (emphasis added) (page 30).

Respondent is in full agreement with the Appellant that the hearing did not result in proof of fraud, but the Appellant is gravely mistaken if she is under the impression that the October 17, 1978 hearing was not intended as evidentiary in character, fully intended to allow her a full opportunity to prove the averments of her Motion. Judge Dee, during the hearing which preceded the October 17, 1978 hearing, characterized that hearing as a full evidentiary hearing (R. 779) and put Appellant on notice that the October 17, 1978 hearing was indeed the occasion to present proof of her allegations of fraud (R. 779 *et seq.*).

Appellant also takes the position that Judge Dee "gave the impression" at the September 8, 1978 hearing that Appellant could not proceed with any discovery prior to the October 17, 1978 hearing. Appellant attempts to persuade this Court that such was the case by including selected portions of the record of the September 8, 1978 hearing in the appendix to her brief, evidently to excuse her failure to prove her allegations of fraud. If Appellant would have read the remainder of the record of the September 8, 1978 hearing, she would have discovered that Judge Dee took quite the opposite position:

"THE COURT: . . . but if there is an indication that at the time the Decree was entered the person who entered into a Stipulation on the basis of which the Decree was issued was acting under a mistake of fact or surprise or with some kind of excusable neglect or there was some misrepresentation or fraud, the Court will exercise jurisdiction as a Court of equity, to look into those problems. And the only way I am going to get information which will be a basis on which I can decide whether or not the Court has made a mistake in entering that Decree is to allow the defendant and the plaintiff broad opportunities to take what other steps they need to take to implement their discovery: Depositions, demand for production of documents, whatever you need to take, whatever steps you need to take in order that the Court can properly have all of the facts.

* * * * *

And now I'm opening it up for the purpose of giving you gentlemen the opportunity to advise me as to what property is involved

and how it should be divided, and that's got to be the way to go. (emphasis added).
R.787-788.

The above-quoted statement of the Court shows not only did the Court not "give the impression" that discovery was blocked, Judge Dee directly stated the opposite. How Appellant arrived at the "impression" that discovery was blocked by the Court is a virtual mystery to the Respondent.

A reading of the record will also reveal that all of the issues which the Appellant raises in relation to her allegations of fraud were "tried or triable" in the lower court proceedings in the fashion contemplated under the authority of Haner v. Haner, supra. For the purposes of clarity of explanation, each property allegedly put out of Appellant's reach by the alleged fraud will be listed and responded to respectively:

1. The Transfer of the Corporations to Mr. and Mrs. Milan C. Boyce, Respondent's Parents: Appellant alleges that the Respondent transferred certain corporations which he allegedly "owned" to his parents without her knowledge, causing her to enter into a stipulation awarding her less than that to which she was entitled.

Mrs. Boyce, the Appellant, was in fact fully apprised of the ownership or lack thereof in said corporations (R. 821-825). She was aware of the financial statement submitted by the

Respondent to Zions First National Bank and Respondent's Answers to Interrogatories, which were submitted to Appellant prior to the April 7, 1978 Stipulation (R. 60-89). In paragraph twelve (12) of her Affidavit of January 22, 1979, entitled "Affidavit of Nina Doreen Davis Boyce In Response to Defendant's Answer and Counter Affidavit", Appellant states that she knew of the transfer of the corporations prior to the April 7, 1978 hearing wherein the stipulation was entered (R. 571-584).

Appellant was afforded and took a full opportunity to try, contest, and offer proof regarding the alleged fraud involved in the corporate transfers (R. 829 *et seq.*). Since no fraud occurred, she was unable to prove any.

"Fraud" is defined by Black's Law Dictionary, Fourth Edition, as "concealment of that which should have been disclosed which deceives and is intended to deceive another so that he should act upon it to his legal injury." In light of the fact that Appellant admitted under oath that she was fully apprised of the transfers, no claim of fraud can be based on these acts.

2. Respondent's Statement of Value Regarding the Dimple Dell Oaks Subdivision Property: Appellant alleges that the Respondent defrauded her by presenting a certified MAI appraisal stating the value of the Dimple Dell Oaks property as Forty Six Thousand Five Hundred Dollars (\$46,500) when in fact it

was worth in excess of One Hundred Fifty Thousand Dollars (\$150,000) (R. 255 See also R. 66).

To say that the Respondent attempted to defraud the Appellant in the fashion alleged shows an absolute and total disregard of the record. In the September 27, 1977 hearing, Respondent himself stated under oath that the property was worth, in his opinion, in excess of One Hundred Fifty Thousand Dollars (\$150,000) (R. 255 and R. 66). Further, in a financial statement given to Appellant in response to interrogatories, Respondent valued the Dimple Dell property at \$175,000.00 (R. 79).

The Forty Six Thousand Five Hundred (\$46,500) Dollar figure was a net value figure that was calculated by a certified appraiser. See Plaintiff's Exhibit 4. Apparently, Appellant is not able to distinguish between market value and net value/equity after required improvements, a critical distinction when the net asset value of real property is in question. Respondent's statements of the market value of the property were entered into the record prior to the April 7, 1978 Stipulation and thus served to inform Appellant of Respondent's perception of the value of the property. Appellant was afforded and took a full opportunity to try, contest, and offer proof of this allegation, her evidence failed and the Trial Court correctly rejected her claim (R. 255 *et seq.* R. 841 *et seq.*)

3. Parties Residence at Top of the World Drive.

Prior to the April 7, 1978 stipulation, the parties sold this property in a bona fide sale to an unrelated third party for One Hundred Thousand (\$100,000.00) Dollars (R. 443), which fairly and accurately established the fair market value of this property. This sale established that Appellant's claims regarding any other representation of value is without merit. If other evidence existed it has not been presented by Appellant.

4. Liens in Favor of American Concrete Construction, Inc. Appellant knew of said liens prior to the April 7, 1978 stipulation (R. 66). Said liens did not evaporate as claimed by the Appellant. The liens for labor and materials were (after the stipulation of April 7, 1978) traded for land the Respondent was awarded in the settlement. The Appellant was informed of this prior to the October 17, 1978 hearing (R. 328-329). Since there was no fraud involved, Appellant failed to prove it occurred.

5. The Higher Valuation Placed on the 1295 East 4800 South Property. Appellant alleges as fraud the fact that the Respondent's family gave a higher value for this property in the Lockhart financial statement of May 1, 1978 than Respondent had previously given prior to the stipulation. This is true but the higher valuation was given because of a zoning change and sale of a neighbors property after the zoning change caused a rise in the value of that similar property. Even the application

(R. 439) for the said zoning change was not filed by the neighboring owner until after the April 7th 1978 stipulation. The zoning change and its subsequent windfall to the Respondent's family was completely beyond the Respondent's control and certainly nothing the Respondent knew of or withheld from the Appellant who was as able as was the Respondent or his family to learn of these events (R. 435-440 See also R. 316-318).

6. Sale of the Red, Inc. Partnership Interest in the Highland Drive Property to May V. Boen: In answer to Appellant's Interrogatories, Respondent described the complete status of this property to the Appellant prior to the April 7, 1978 stipulation (R. 212 See also R. 67). Appellant later tried to contend that Respondent fraudulently transferred the interest in this property allegedly purchased by the Respondent (in his capacity as President of Insul-Guard Corporation) and a Dr. Tarbet. May V. Boen testified that this was a bona fide purchase and sale between herself and the Insul-Guard Corporation (R. 883-884). She made the purchase with her own money (contrary to Appellant's assertions).

Appellant did not prove any attempts by the Respondent to conceal the sale from the Appellant (R. 861 *et seq.*). In fact Dr. Tarbet testified that the transactions were discussed with the Appellant (R. 851).

Thus Appellant was afforded and took a full opportunity to contest, try and offer proof of the allegation of fraud in this respect and her evidence did not support her assertion.

7. The Lockhart Company Financial Statement of May 1, 1978: Appellant alleges that the Respondent represented at the lower court proceedings that he had no interest in the corporations heretofore described (due to the transfer of the same to his parents). But asserted that after those proceedings, he applied for a loan at The Lockhart Company telling them in his consolidated family financial statement that he owned the corporations. Appellant asserts this as evidence of fraudulent concealment.

Appellant was afforded and took a full opportunity to try, contest, and offer proof of this allegation. Respondent contended and does now contend that the assets listed on the Lockhart financial statement were family assets, not personal assets. This was discussed with and understood by the Lockhart Company's loan officer, Thomas G. Pike. Mr. Pike testified that there had been a discussion of family assets being pledged as security for the loan (R. 841). The heading on one of the pages of the financial statement plainly states that the assets thereon belong to the Respondent's Aunt, May V. Boen (R. 208 and plaintiff's Exhibit 8) and there is in the statement a summary page

showing the summary of family assets being consolidated into the statement (R. 204 and plaintiff's Exhibit 8).

Further this Lockhart financial statement was exactly the same kind of consolidated family financial statement (even as to layout and format) as was given to the Appellant in answers to interrogatories before the April 7, 1978 stipulation (R. 78-89) and Defendant's Exhibit 7). The Trial Court correctly concluded that Appellant had ample opportunity to examine all of this information and this being true she had failed to prove to the satisfaction of the Court that there was any fraud involved (R. 837 *et seq.*).

In sum, the Appellant's contentions are defeated by the record as it existed prior to the April 7, 1978 stipulation. The Appellant was given every opportunity to conduct discovery and present her evidence to the trial court. She did so and failed to prove her contentions. She is now attempting to retry the case in this Court in order to have a third chance to succeed in proving what she twice failed to prove at the trial court level. This is contrary to this Court's position regarding appeals of this nature. It should be treated accordingly and this Court should affirm Judge Dee's ruling.

II.

THE TRIAL COURT'S ORDER TO APPELLANT TO REMOVE THE LIS
PENDENS IS A MOOT ISSUE UPON APPEAL.

Courts are without power to decide questions that cannot affect the rights of litigants before them. Doremus v. Board of Education, 342 U.S. 429 (1952). The Courts do not sit to decide arguments after events have put them to rest. North Carolina v. Rice, 404 U.S. 244, 246, (1971).


The lis pendens issue raised by the Appellant is such an issue. If, *arguendo*, Judge Dee's decision is reversed and remanded, the lis pendens would not need be removed since a trial *de novo* would be set. If Judge Dee is sustained, his Order would stand and the lis pendens must be removed as the litigation would be terminated.

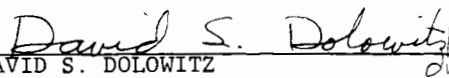
A decision of this Court on the issue of the lis pendens would not affect any of the rights of the parties and is a false issue which should be disregarded.

CONCLUSION

Appellant, represented by able counsel, had her day in court. Now after the demands have been met, she seeks vacation of the Decree which awarded \$100,000.00 cash and other valuable assets to her. She wants more but the trial court denied Appellant's motions to set aside her own agreement and the Order based thereon after giving her a full and fair opportunity to show she had been defrauded. This Court should affirm that ruling.

Respectfully submitted,


JED W. SHIELDS
243 East Fourth South
Suite 300, Upper Level
Salt Lake City, Utah 84111


DAVID S. DOLOWITZ
Parsons, Behle & Latimer
79 South State Street
P. O. Box 11898
Salt Lake City, Utah 84147

Attorneys for Defendant-
Respondent

CERTIFICATE OF SERVICE

I hereby certify that I personally delivered copies
of the foregoing Respondent's Brief, on this 8th day of
July, 1979, to the following:

R. M. Child, Esq.
DONOVAN C. SNYDER, Esq.
Bayle, Child & Ritchie
1105 Continental Bank Bldg.
Salt Lake City, Utah 84101

