1979

Margaret Fletcher v. William I. Fletcher : Appellant's Brief

Utah Supreme Court

IN THE SUPREME COURT OF THE
STATE OF UTAH

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MARGARET FLETCHER)
)
Plaintiff and Appellee,)
)
v.) No. 16407
)
WILLIAM I. FLETCHER)
)
Defendant and Appellant)

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APPELLANT'S BRIEF

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APPEAL FROM THE JUDGMENT OF THE 1st
DISTRICT COURT FOR CACHE COUNTY
HON. TED S. PERRY, JUDGE PRO TEM

* * * * * *

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Cases — Page

STATUTES CITED

IN THE SUPREME COURT OF THE
STATE OF UTAH

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MARGARET FLETCHER Plaintiff and Appellee, v. WILLIAM I. FLETCHER Defendant and Appellant	)	No. 16407

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APPELLANT'S BRIEF

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NATURE OF THE CASE

This arises out of a divorce decree as to the property division, the separation of the children and their custody and visitation rights ordered therein.

DISPOSITION IN LOWER COURT

The case was tried to the court which granted the divorce to the Appellee. A property settlement was made. Appellee was granted custody of the three younger children and Appellant of the three older ones. Appellee's and Appellant's visitation of the children was restricted to arrangements made by the consent of both parties, two weeks in advance.

RELIEF SOUGHT ON APPEAL

Appellant seeks a more equitable property division with present value given to Appellant's retirement assets and the children's accounts not considered in the division of marital propery, but considered to be held by Appellant as Trustee

thereof. Valuation of property, Appellant contends should be based on fair market value on date of separation, not of divorce. Attorney's fees incurred should be borne by each, not Appellant alone. Appellant also seeks the custody of all six children as children have a natural right to be raised together and Appellant's custody would be in their best interest. Appellant seeks a more reasonable visitation rights decree to allow for more flexibility and better opportunities for the children and the parents to get together. And finally, Appellant seeks to limit child support obligations to the children reaching eighteen.

STATEMENT OF THE FACTS

The parties to this divorce were married in June, 1961. There were six children of this marriage: Terrell born September 1, 1962; Saesha born January 2, 1964; Alisa born December 31, 1964; Krista born May 18, 1970; Andra born November 15, 1971; and Chad born July 21, 1974. The father, Appellant here, is an Engineer presently employed by Utah State University with a present gross income of $28,426 per year, not including outside earnings, which have been sporadic. Transcript at 7. The mother, Appellee, has worked as a registered nurse since 1961. She is presently employed by Logan Hospital, where she averages $9,404 gross income per year, based on a three day work week. Transcript at 160. Her potential gross income as given in the record is $15,000 per year. Transcript at 375.

Appellant and Appellee began having problems in their marriage as early as July of 1961. Transcript at 558. Finally, in 1974, the problems became more marked and they separated-physically and financially. Although the parties continued to live under the same roof, Appellee lived upstairs with the three younger children and Appellant lived downstairs with the three older ones. The younger children moved downstairs with Appellant during part of this time. The parties have kept their checking accounts separate since 1974 and have filed separate tax returns since 1975. Transcript at 169. During this four year period, Appellant provided for the household expenses while Appellee spent most of her money on tithing, presents and other personal needs. Transcript at 172.

During the summer of 1978, the younger children began living downstairs on a regular basis. Transcript at 290. The result of the change in living pattern was that Appellant assumed many of the so called "homemaker" duties. Transcript at 273, 280. Appellee, during this same period, was involved less and less in family activities, withdrawing to her room at times. Deposition of Margaret Fletcher at 27.

The marriage relationship declined steadily, though the couple made several attempts through counseling to reconcile. Two years prior to this action, Appellee filed for divorce,

but failed to pursue it when the older children told her theywould go with Appellant. Finally, in May of 1978, Appellee filed for divorce and Appellant cross-claimed for such also. The case was tried to Judge Ted Perry a recently appointed circuit court judge who acted as pro tem. Judge in the absence of Judge VeNoy Christoffersen. He granted the divorce to Appellee alone although both parties requested a divorce and presented evidence in support of that claim. Judge Perry deemed both parties to be fit parents for the custody of the children. His memorandum decision then devoted great length to the discussion of which parent was the most honest, had the highest standard of morality, courtesy, obedience to law and the constitution, respect, dignity of honest labor, unselfishness, financial and educati advantages of each parent, and best communication with the children. The Judge found against the Appellant as to the first seven virtues and in favor of him as to the last two.

Notwithstanding these findings, acting Judge Perry awarded custody of the three older children to Appellant and the three younger ones to Appellee. The Judge noted this was directly in opposition to the testimony of the Social Services counselor who recommended all six children stay with the Appellant. Record at 120,121. Mr. Wangerin, the counselor, was involved in the case at the request of the court; and had spent many hours with the family members as a unit and separately.

The trial court granted what it called "reasonable visitation rights", but restricted them to arrangements made two weeks in advance by the mutual consent of both parties.

Record at 121. No standard was provided for counseling to assist the children, especially the three older ones, in establishing their relationship with their mother and re-uniting as a family.

Appellant was ordered to paychild support until each child in Appellee's custody reaches the age of nineteen.

The property division contained in the same judgment gave full future value to Appellant's retirement pension. It considered the SNI fund and other stock, purchased for the children as their education funds, to be part of the husband's assets. Valuation of the Mendon home gave the equity as $6.500, though $5,000 of this was earned by Appellant and put on the home subsequent to the divorce being filed. The judge considered the division to be equal, but considered only the gross assets in valuing the marital estate.

He awarded $31,232 worth of assets to Appellee, and $63,126 worth of assets to Appellant. Judge Perry ordered Appellant to pay $48,600 to Appellee over the next 162 months and to assume the mortgages on two properties of $76,813, court costs, attorney's fees of over $12,600 and other debts. Record at 83. Transcript at 700. The result of this property division was that Appellee had $79,832 worth of assets with the mortgage on the River Heights home of $29,208 while Appellant had $63,126 worth of assets and $138,013 worth of liabilities. The net worth of Appellee was thus $50,623 while Appellant's net worth was (-)$74,887. Record at 122-23.

ARGUMENT

POINT I. IT WAS IMPROPER FOR THE TRIAL COURT TO CONSIDER THE CHILDREN'S SNI FUNDS AND OTHER STOCKS AS PART OF THE MARITAL PROPERTY SUBJECT TO DIVISION.

In the divorce property settlement, pro tempore Judge Perry considered the $6,000.00 worth of SNI funds and other stocks to be Appellant's property, and split its value between Appellant and Appellee. This was improper. As Mr. Fletcher stated, these investments were really purchased for the children and it was so acknowledged by the parties. They were left in his name because the children were minors. He also indicated he would have no objection to the court ordering that such funds be paid to the children. Transcrip at 42,43. Two thousand dollars is Terrell's mission and education fund; two thousand is Saesha's education fund; and two thousand is Alisa's education fund. Because the money is in these investments for the children, it is not really marital property that can be subject to division on divorce.

Bates v. Bates 17 Or. App. 641, 523 P.2d 579 (1974) was a case on this issue. The trial court had awarded the wife a certain savings account balance and considered this as part of her property award. The appellate court modified this holding because both parties had testified "that this account had been established to be used for their children's college educations. The wife here argues that in light of this fact she is, in effect, holding this account as trustee and it should not be considered as awarded to her for purpos of examining the division of the parties' property. The decree should be modified to reflect the position the wife now takes." Id. at 580-81.

So too in the case at bar, Appellant should be considered to be trustee of his children's stocks in the same way that Mrs. Bates was determined to be trustee of her children's savings accounts. And because the Appellant's interest in the stocks is limited to management responsibilities, the $6,000 the trial court attributed to his assets should be disregarded and the property division adjusted to reflect that change.

POINT II. IN DIVIDING THE RETIREMENT PENSION OF APPELLANT, THE TRIAL COURT ERRED IN ASCRIBING FULL VALUE THERETO WHERE THERE WAS OVER A TWENTY YEAR EXPECTED TIME PERIOD BEFORE APPELLANT WOULD RECEIVE ANY BENEFITS THEREUNDER.

The best statement as to valuation of pension rights was given in Copeland v. Copeland, 91 N.M. 409, 575 P.2d 99 (1978). The husbands' rights to the benefits were clearly "vested", that is, he would receive them whether or not he remained in the same employment. However, his right had not yet "matured". He had not yet reached retirement age and therefore was not qualified to withdraw the money. Because of this latter contingency, the court ruled that only the present value of the husbands' pension should be considered as part of the marital property. Such should be based on the "length of time remaining before eligibility matures" . . . and . . . the present value of the husband's retirement pay based on his life expectancy and discounted for present value." Id. at 103.

The other alternative outlined by the court would be to pay the ex-wife "as the benefits are paid". Id. This

latter alternative would be primarily used when the community asset did not have sufficient other assets to pay the ex-spouse the present value of the pension fund.

The trial courts use of the future value of Appellant's pension from Utah State University was erroneous. It was not presently worth $16,939. That is its future value. The more equitable distribution takes into account the present value of such interest. Clark England, manager of employee benefits at Utah State University, testified, that Appellant could not take out the retirement money prior to his retirement if he continued working at U.S.U. And if he were to quit working there, he would be restricted to receiving the money in a small monthly sum for the rest of his life. Transcript at 134-35. At the time of the divorce decree, Appellant was 40 years old, leaving 25 years before he would reach 65 and begin to draw on this money. The life expectancy of a 40 year old man is 42 years, or in other words, he would be projected to reach 82 years of age. These two factors should be taken into account in discounting the retirement fund to its present value. This determination as to retirement pension would reduce the total amount of property attributed to Appellant. This change should, in turn, result in a smaller property settlement to the Appellee. Since there is no evidence in the record reflecting the present value of Appellant's retirement asset, the other alternative of paying half of the presented "vested" benefits could be used. In other words, half his retirement benefits up to $8,469.50 would be paid to Appellee as it is received by Appellant upon his retirement.

POINT III. THE TRIAL COURT ERRED IN DIVIDING THE MARITAL PROPERTY SINCE THEY FAILED TO PROPERLY TAKE INTO ACCOUNT APPELLEE'S EDUCATION AND POTENTIAL INCOME, THE SOURCE OF THE MARITAL PROPERTIES AND THE CONTRIBUTIONS OF EACH, SUPPORT OBLIGATIONS RELATIVE TO THE CHILDREN, AND TO CONSIDER INDEBTEDNESS AS WELL AS ASSETS IN MAKING THE PROPERTY DIVISION.

A. Appellee's education; present and potential income. In making a property settlement in a divorce decree, the factors determined by the courts to be the general rule of thumb are: "the financial condition of the parties . . . the husband's income, his earning capacity, his health and ability to labor and the wife's age, health, station and ability to earn a living . . . ." Ellett v. Ellett, 573 P.2d 1179, 1182 (Nev. 1978) This test has been used in Utah as early as 1937 in Pinion v. Pinion , 92 Utah 255, 67 P.2d 265 (1937).

As stated on the trial record, Appellee's present income is $9,404 per year. Testimony also indicated her potential income would be approximately $15,000 per year. Transcript at 375.

Appellee is not in a helpless situation. She is a fully trained nurse, capable, and in fact, presently engaged in professional gainful employment and has been since 1961. There is not the disparity in education and employability as might otherwise be inferred from the Memorandum Decision of Judge Perry. He said "in reaching its decision the Court recognizes that in the society of the 1960s and 1970s it is not uncommon for a woman to work to support the family while the man furthers his education. Sometimes the result of such disparity of educational opportunities is that when the

man reaches his educational goals he no longer finds he has a wife with whom he can communicate because she has failed to maintain equality with him in educational pursuits . . . ." Record at 107. The rational expressed by the acting judge indicates his attitude toward women as a generally deprived sex in need of the court's protection and preference. Under the Equal Protection Clause of the 14th Amendmant, while a court need not be blind to a person's sex, neither is there to be a bias or preference towards one or the other. This especially true where the evidence of the lower court did not support Judge Perry's discourse on the subsurvi of Appellee with regard to education and employability.

The trial court judge awarded Appellee a far greater award than was equitable under the circumstances. Judge Perry failed to take into account the tax implications of his decree. Although Appellant was ordered to pay $1,800 a year child support for each of the three children in Appellee custody, he receives only a $1,000 tax deduction for such payment. So Appellant's $5,400 child custody obligation results in only a $3,000 deduction to him, but the $5,400 payments are untaxed income to Appellee. She is able to receive the full value of the money.

Another disparity is that the $9,000 per year support obligation of Appellant comes from his net income. Since he is in a 33% tax bracket, the real decrease in income is figured by dividing the $9,000 by .67. The result if a $13,432.84 reduction in Appellant's gross salary of $28,426. His gross salary after support is only $14,993.16.

Reflecting this decrease is Appellee's increase in salary. Her full-time salary would yield over $15,000. Add to this the untaxed child support payments of $5,400, divided by .7 since she is in the 30% tax bracket. The real increase in salary Appellee receives is $15,000 + $7,714 or $22,714. She thus receives over $7,000 more per year than Appellant in true salary. This result is even more disparate when the court considers all the indebtedness that the Appellant was burdened with by the trial court.

Both of the parties have three children to care for. Both must bear the expenses of maintaining a separate household. Both Appellant and Appellee are employed as professionals. Neither have need to be financially dependent on the other. The property settlement should be apportioned more equitably according to this and the other factors mentioned hereafter.

B. Source and contributions of each.

The trial court determined $94,358 to be joint assets of the marriage. Record at 128. However, in making this judgment Judge Perry failed to properly take into account the source of such and give proper deference to Appellant's interest therein. For instance, of the $5,000 gun collection attributed to the joint estate, $4,000 was a gift to Appellant from his father. Transcript at 152. In addition, Appellant invested $17,160 which he had inherited from his Aunt and Uncle to pay for remodeling of the parties' River Heights home. Transcript at 81.

In DuBois v. DuBois, 29 Utah 2d 75, 504 P.2d 1380 (1973) the greater part of the marital estate was composed of gifts from the wife's relative. The trial court gave sixty percent of the marital property to the wife, and the Utah Supreme Court held that such was not an abuse of discret The Court determined that the lower court had based its decision in part on the "source of the assets which comprised the marital estate." Id. at 1381.

This consideration as to the source of the marital property should be applied to the case at bar. Both parties to this action had steady incomes, both had money to invest. The fact that Appellant used part of his salary and inheritan to acquire and remodel certain fixed assets should be given proper deference in the division of the marital estate. It would be more equitable to give Appellant a greater share or interest in those assets which his independent funds have acquired, than to split them 50/50. Since the Appellant acquired all the assets subject to division by the court, with the exception of Appellee's car, the property would be apportioned more justly by awarding the majority of the assets to Appellant. For four years, Appellee has had the unrestricted use of her income for her own personal needs and now much like the proverbial ant and grasshopper, wishes to be given one-half of the full value of the assets.

C. Support obligations relative to the Children.

The Appellant and the Appellee were each awarded custod of three of their six children. Appellant is to support and

provide for the three teenagers in his care as well as the three younger children Appellee has. Raising children has become more and more costly over the years, with teenagers at the top of the list. Because of the substantial expenses thus shouldered by Appellant, Appellee's abilities and income should not have been dismissed so lightly. Appellee has substantial financial capabilities, and this factor should not have been overlooked by the trial court. If the court really intended to "equalize" the burden of assets and expenses for the two parties, they should have allowed Appellant significantly more income with which to support the teenagers, and allowed more of the financial burden of those children in Appellee's care to be borne by her.

D. Assets-Liabilities=Marital Community.

The trial court purported to divide the marital property equally, and although the theory was a fair one, the actual practice was not. Judge Perry apportioned the assets but left all the debts and obligations of the marital estate to be paid by Appellant. This resulted in an inequitable burden on Appellant. The ruling of the lower court should be reversed as to this result.

In Ray v. Ray, 11 Or. App. 246, 502 P.2d 397 (1972), the appellate court remanded a property settlement in a divorce case because of the inequitable division. The instructions given to the lower court were that it "could properly consider the indebtedness, as well as the assets, of the parties in determining the property division. Id. at 399.

This same holding was given in the Washington case of Anderson v. Anderson, 31 Wash. 2d 197, 195 P.2d 986 (1948). That court considered the total assets of the community to be $52,562.83. The total obligations were $19,417.06, leaving a net market value of $33,145.77. The wife was given only $10,000.00 of this, with the husband receiving the larger portion. The court's rationale for this distribu was "that respondent must pay all of the obligations of the community . . . . In addition to this, he must pay $900.00 a year for the support of his children, . . . added to these facts, the evidence shows there is much competition in the business in which respondent is now engaged, and he may not be able to make a profit each year." Id. at 987-88.

Division of the net marital property would make a much more equitable result. It would consider not only the joint assets but also the joint liabilities of the marital communi and apportion both so that the debts are paid for and assets equalized thereafter. The trial courts division of the marital property was as follows: To Appellee $31,232 worth of assets, $48,600 in alimony; $29,208 mortgage on the River HEights home; resulting in the total of $50,624 net value awarded to Appellee. Appellant was awarded $63,126 worth of assets, but required to pay the $48,600 alimony, court costs, attorney's fees of over $12,600, mortgage debts on marital property amounting to $76,813, as well as other debts. Record at 83. This made the net value awarded to Appellant a $74,887 debt, while Appellee's net value was $50,624 in assets. Record at 122-23.

The more equitable division would take into consideration not only the $94,358 worth of marital assets; but also the $113,621 worth of marital debts and apportion the two pro rata.

POINT IV. VALUATION OF THE MENDON HOME SHOULD HAVE BEEN BASED ON THE DATE THE DIVORCE WAS FILED RATHER THAN THE DATE OF THE DIVORCE DECREE.

Valuation of the marital property would be more equitable if it were based on the date the parties really separated i.e., 1974, rather than the date of the final decree. The parties to this action had been separated, though living under the same roof, for four years prior to filing for divorce. Upon filing for such, Appellant became involved in some extra work to provide for the children and earned $5,000 of the $6,500 equity in the Mendon home. The latter amount was listed as marital listed as marital property subject to division in the trial court decree. This was not in fact marital property. It was earned after the parties had decided to end their marriage. Appellee had earned none of this $5,000 nor had she been a contributing member of Appellant's household to in any way help him purchase this equity. Surely an injustice would result in allowing her to profit from his labors.

Eppley v Eppley, 341 N.E.2d 212 (Ind. 1976) held it was proper to value marital property based on valuations made at the time of separation. The court found no inflexible rule to mandate valuation to be made as of the date of the final hearing. The rationale was such a valuation might "distort

the true nature and value of marital property". Id. at 218. Neither was the valuation made at the date of separation to be taken as an inflexible rule when distortion of the true value might result.

In the case at bar, true value would best be determined by a valuation made on the date the divorce was filed. The parties had been separated for over four years by their own choice. They slept in different parts of the house, maintained separate checking accounts and filed separate tax returns. The act of filing for divorce finalized the divisio of the marriage. Appellant's investment from his extra work in providing for his children should not have been considered as part of the marital estate.

POINT V. IN ORDER TO "EQUALIZE" THE PROPERTY DIVISION, ATTORNEY'S FEES OF BOTH PARTIES SHOULD BE PAID BY EACH AS INCURRED.

Attorney's fees are not granted to the prevailing party in a divorce action as in a civil case. Instead, "the parties relative economic situations and earning powers are relevant factors to be weighed in determining whether to order payment . . . ." Johnson v. Johnson, 564 P.2d 71 (Alaska 1977), cert. denied, 434 U.S. 1048 (1978). In Johnson the court required each party to pay their own costs and attorney's fees. This was equitable where each party "expended approximately an equal amount of effort . . . the property was divided equally . . . [and] each party . . . expended approximately equal amounts." Id.

An application of this doctrine would require a reversal of the lower court's decision. The Appellant and Appellee both have the custody of three children. They both have good jobs and are earning a fair salary. Both expended approximately the same amount of time, effort, and money in bringing this action to trial. However, the decree was inequitable in that it put the full burden of attorney's fees on Appellant. Johnson determined that everything else being equal, the attorney's fees should be split. This the trial court did not do.

Appellant's attorney cross-examined Appellee as to investments she had made with her money as opposed to investments made with Appellant's money. Mr. Dart, Appellee's attorney objected submitting "that all of the assets that now exist are joint assets of the parties . . ." Transcript at 173. By this same reasoning, if all the assets are joint assets, all the debts are joint debts and should be apportioned accordingly.

Richards v. Richards, 5 Wash. App. 609, 489 P.2d 928 (1971) also gave the parties therein responsibility for bearing part of the financial burden of the divorce. The court said, "a wife is not entitled to free litigation. However, where property must be divided, a decision concerning the allowance of attorney's fees cannot be isolated. The trial judge must necessarily consider the costs of litigation in making an equitable disposition of property." Id. at 932. Since the wife had been required by the court to pay $6,000 of the community debt, a $5,000 award of attorney's fees was deemed equitable.

In consideration of the fact that Appellant was require by the court to assume most of the community debt, if attorn fees are to be equitably awarded to anyone, it should be to him. In the alternative, this court could require each party to pay its respective costs incurred. It constituted an abuse of discretion for the trial court to require Appell to pay both the greater part of community debt and $5,000 in attorney's fees incurred by Appellee.

When attorney's fees are properly awarded, such a determination is made

> to achieve fairness in domestic relations cases and to this end seeks to place the wife on a plane of equality with the husband in such litigation by allowing her suit money and attorney's fees out of the husband's estate or earnings, where such appears necessary to bring about such party. But such allowance will not be granted unless it is shown that the wife is destitute in whole or in part of the means necessary to maintain herself and carry on the litigation.

Peercy v. Peercy, 154 Colo. 575, 392 P.2d 609, 612 (1964)

There was no need to award attorney's fees herein where the wife's financial condition following the property settlement was far superior to that of the husband's. Nor was there proof offered with representative findings present by the court that Appellee was destitute of the funds necess to pursue the lititation.

A 1978 Montana case reiterated this principle that attorney's fees are to be paid by the respective parties unless proof is offered as to the dire financial straits of one of the parties. Allen v. Allen. 575 P.2d 14 (Mont. 1978) said: "This court has held a showing of necessity is

a condition precedent to an award of attorney's fees." Id. at 76. That court refused such an award even though the wife was in a tenuous situation, because the husband was in substantially the same sort of financial bind. Such is the case at bar.

POINT VI. RESTRICTING VISITATION RIGHTS OF THE PARENTS TO ARRANGEMENTS MADE TWO WEEKS IN ADVANCE WAS A CLEAR ABUSE OF DISCRETION ON THE PART OF THE JUDGE.

Utah Code Annotated §30-3-5 (1953) provides "visitation rights of parents, grandparents and other relatives shall take into consideration the welfare of the child." This statutory provision, "indicates the legislative intent to protect the relationships which affect the child whose parents are being divorced . . . ." Gribble v. Gribble, 583 P.2d 64,66 (Utah 1978). Gribble remanded a case which denied a stepfather visitation rights to his wife's child. The court determined even relationships beyond parent-child may be important enough to grant visitation.

Surely if the court is this sensitive to a step-father's interests, it will look with an even greater degree of deference to the natural parent's desires with regard to visitation.

The trial court seemed oblivious to these kinds of sensitivities when it restricted both Appellant and Appellee's right to visit their children in the other's custody, to times arranged two weeks in advance. Although some outings can be made with this much forethought, other occasions do not provide as much time. For instance, a family vacation

may be planned weeks in advance. However, the funeral of a relative could not planned for two weeks in advance of the event. Similarly, an afternoon off, for either party, may come up with little notice, but due to the lengthy arrangemer period the parent would not be able to spend it with the children in the other party's custody. Surely not only the parents, but also the children's best interests would better be served by more flexible visitation rights.

Such a restrictive order may have been based on the court's belief that the Appellant was solely responsible for the problems the three older children had in relating to their mother. Based on Dr. Cline's testimony, it should be apparent that the children were not "brain washed" by Appell Transcript at 487, 495. Dr. Cline said that in testing and interviewing Appellant and the two older girls he did not think Appellant "tried to destroy her [Appellee's] image to the children." Transcript at 500. The visitation rights ordered by the trial court failed to provide for the childre "best interests' in giving them flexible opportunities to be with both parents, and develop good relationships with both.

Henson v. Henson, 384 P.2d 721 (Wyo. 1963) modified the father's visitation rights when he moved out of state, from visits in the mother's home to right of vacation visits. The court's rationale was that "the prime if not the sole judicial objective respecting custody of a minor child and parental privileges of visitation where, by divorce, a chil is deprived of a continuous home with both parents, is to

serve the best interests of the child. Court decrees in these matters are neither to punish nor to reward one parent or the other for real or supposed derelictions." Id. at 723.

The Wyoming court's basis for decision was excellent. It refused to look upon either parent as a villian, but instead focused on the child and determined how his or her best interests might be served. This approach is commended to this court as a basis for making the visitation rights more flexible. This would better serve both parties interests in reconciliation of the parent-child relationships after the division of their family.

POINT VII. THE CHILDREN OF THE PARTIES HAVE A NATURAL RIGHT TO BE RAISED TOGETHER AND THEIR CUSTODY SHOULD BE GRANTED TO THE APPELLANT.

The Social Services counselor recommended that the children be allowed to remain together. The only parent he deemed capable and willing to assume this task was the Appellant. Transcript at 200-01. Appellant had indicated more willingness to cooperate with the other spouse, while Appellee indicated that she would be inclined never to see Appellant again. Transcript at 224-26.

The primary interest in the mind of the court in granting custody of the children should be the children's best interests. And wherever possible, the children are best served by being allowed to remain together.

Avons v. Avons, 94 So.2d 849 (1957) brought together under the mother's care, children who had been separated.

The court's decision was based on sound wisdom and judgment. They said:

> We are of the view that the children in a family should not be separated from each other and distributed about in different homes, except for the most compelling cause. For while brothers and sisters may not have a legal right to remain together, to share each other's lives, and to grow up together, certainly they have a natural right to do so. Justice requires that society exercise its moral duty to insure that children in a family enjoy this right until such time as absolute necessity and the welfare of the children, itself, requires their separation.

Id. at 853.

Though unmeasurable with mathematical accuracy, still there are substantial benefits for children when they are raised together. Not only the possibilities of interacting, but also deepening bonds of love grow as children are raised together. A Kentucky court gave the custody of both children to the mother because it felt that "children of the same parentage should live together as members of the same family and not be separated whereby their natural affection for each other becomes dimmed and sometimes entirely fades away, thereby losing the benefits of constant association as nature intended." Howard v. Howard, 307 Ky. 452, 211 S.W.2d 412 (1948)

The children involved in the divorce at bar have been taking greater than average responsibility and care for one another since their mother moved upstairs and became less involved in the family's activities. The older children took over some of the child care responsibilities and, as a

result, the bond of kinship deepened between the children. Neither absolute necessity nor the children's welfare demands the separation of these children. And in the absence of such, Avons determined the division of the children to be inappropriate. Transcript at 221.

POINT VIII. THE BEST INTERESTS OF ALL THE CHILDREN WOULD BE SERVED BY GRANTING THE FATHER CUSTODY.

Since child custody cases are equitable in nature, the court "may review the facts as well as the law on appeal." Sampsell v. Holt, 115 Utah 73, 202 P.2d 550 (1949). The facts in this case indicate that the children had been living primarily with the father subsequent to the divorce being filed. For the four years prior to the divorce action, the mother lived upstairs and the father down, with the three older children and Chad living downstairs and the two younger children living upstairs. After Appellee filed the action for divorce, the two younger girls left the bedrooms by the mother and moved downstairs to be by the father. Transcript at 290.

If this was due to any attempt on the part of Appellant to alienate the children from Appellee, the trial court should have been able to discover or control such. It had a social worker and at least two staff members of Bear River Mental Health Department who were very familiar with the situation and could have deterred any attempted alienation of the Appellee by Appellant' but this behavior was not demonstrated. The children moved down to be by the father because they loved him and wanted to be near him.

When the parties attempted to rotate temporary custody of the children, the week with the father went well. However, after only three days with the mother, the children called a halt to the experiment. They refused to live with Appellee, even in Appellant's absence.

In Johnson v. Johnson, 7 Utah 2d 263, 323 P.2d 16 (1958), the two children lived with the father for four years. The mother appealed the custody arrangement, feeling she was being left out of the children's lives. The court rejected her appeal. "While the parents are entitled to some consideration, the paramount objective in such proceedings is not therapy for them, nor vindication of asserted parental rights, but the welfare of the children". Id. at 17. The court determined that the father should have custody of both children even though one was under ten. There was no need to prove that the mother was immoral or incompetent in order to deny her custody, as such a proceeding is "always equitable and . . . the controlling consideration is the welfare of the children involved." Id. at 18.

Johnson has many similarities to the instant case. The children had been living with their father for some years prior, as here. The court granted custody of the child under ten to the father without requiring proof of the mother's immorality or incompetency. Such evidence was not necessary. The court determined that the children would be better off with their father and any proofs would have been irrelevant. Appellant urges such a determination be applied

here. There is no need to prove any transgression on Appellee's part. The most important evidence is that the children's interests would best be served by living with the father. The Social Services worker attested to this fact. In addition, Dr. Victor Cline also indicated that his test results showed Appellant "would be a very effective father. . . . he loves his children. He's also a person who is highly organized, and he's competent. Transcript at 488.

Another similar case is that of Dahlman v. Dahlman, 20 Or. App. 375, 531 P.2d 909 (1975). The father had the major responsibility of the children after the wife left to be with her boyfriend. The court commended him for his devotion and skills as a homemaker, and for his rescheduling of his time to be with the children more often. Both parents worked full-time, with the inherent child-care conflicts. The court granted custody to the father, because he demonstrated greater stability as a parent, and had proven his ability in handling the children while they were in his custody.

Although Appellee did not isolate herself from her family because of a paramour, she did in fact become reclusive as to family activities. As a result, the child-raising responsibilities rested largely upon Appellant. Because of this, Appellant manipulated his office hours in order to be at home in the morning and get the children off for school and activities. Transcript at 644. As the counselor stated, the children seemed stable and well-adjusted in spite of having to endure the difficulty of a divorce; and this

evaluation was made during the time the father was doing the primary parenting. Appellant has acted as a stabilizing force in the family. These factors indicate that in determining that situation which would be for the best welfare of the children, Appellant has proven greater stability as a parent and more adeptness in handling the children. He should be granted the custody of all six children.

The trial court's decree, rather than simply attending to the best interests of the children in granting custody, was instead a "vindication" of Appellee. Both parties had grounds for divorce, but Judge Perry granted the decree to Appellee only. Both were found to be fit and proper parents for custody, yet the trial judge devoted great length in his memorandum decision to why he felt Appellant was less honest, less moral, less obedient to the laws of the land, less respectful, less concerned with the dignity of honest labor and more selfish. Record at 108. The only positive words he had for Appellant was that that he had financial and educational advantages over Appellee and that he had established better communication with the children. The whole decision seems to reflect the idea of verbally punishing the Appellant rather than looking to the children's best interests.

The fact that "the two youngest girls are presently very well adjusted in their present elementary school and enjoying their schoolwork and friends", looks only at the edge of the child custody issue. Record at 109. The real heart of the matter was whether living with their mother instead of their father was in their "best interest". This

was never addressed by the court.

Read v. Read, No. 15859 (Utah, filed April 4, 1979) said that the court's duty in a divorce decree is to arrange the property settlement and child custody "so that the parties and their children can pursue their lives in as happy and useful a manner as possible." Id.

Justice Stewart quoted an opinion of a previous Utah case when he said, "there is no authority in our law for administering punitive measures in a divorce judgment . . ." Id. Given this perspective, it becomes clear that the custody order of the three younger children to Appellee was not made to further their best interests, but rather to punish Appellant. Such a determination was improper, not so much because of the defamation to Appellant's character, but because of the trial court's failure to consider the children's best interests. It is urged that this court take advantage of reviewing the case in its totality and make the children's concerns and interests of primary importance in granting custody. Appellant entreats the Court that serious consideration be given to awarding all six children to his care.

The presumption sometimes favoring custody of those children under ten years of age to the mother should not be controlling here. This rule has been outdated. Mecham v. Mecham, 544 P.2d 479 (Utah 1975) affirmed the trial courts ruling which granted custody of a minor child to the father. "[T]he welfare of minor children is of paramount importance in determining custody. . . . [N]either parent has an absolute right to custody, . . . any presumption favoring

the mother for children of tender years must yield to the controlling rule of the child's best interest under all the circumstances . . . ." Id. at 480.

The best interest of the child thus takes precedence over any presumption favoring the mother. When neither parent is given a judicial advantage over the other, the experience, ability and desire of Appellant to raise all six of their children together as a family, indicates that giving the custody of all of the children to Appellant would clearly be in the children's best interest.

Another reason why any preference of giving the custody of the younger children to the mother would be inappropriate, was given in Patton v. Armstrong, 16 Ill. App. 3d 881, 307 N.E. 2d 178 (1974). It said that the presumption favoring the mother's custody was based "on the assumption that she will remain in the home and thereby be better able to care for the young children on a full-time basis." Id. at 179. This court affirmed the award of custody to the father where the mother worked and expected to continue to do so.

The Appellee-mother in the case at bar has worked and expects to continue to do so. No preferential treatment need be made as she has eliminated such by her continued employment. And all things being equal, Appellant's custody of all six children would better serve their best interests.

POINT IX. NO UNUSUAL CIRCUMSTANCES EXIST TO ORDER CHILD SUPPORT PAST AGE EIGHTEEN.

Utah Code Ann. §15-2-1 (Supp 1975) provides that: "The period of minority extends in males and females to the age of eighteen years; but all minors obtain their majority by marriage. It is further provided that courts in divorce actions may order support to age 21." Id.

Ferguson v. Ferguson, 578 P.2d 1274 (Utah 1978) interpreted this statute to mean that the obligation of a parent to provide child support ends at age eighteen as a general rule. Although a parent can assist his or her adult child financially past that age, Ferguson held that "one should not be compelled to do so by court order, except perhaps in some unusual circumstance not present here." Id. at 1275.

All six children of this marriage are normal, active people. No curcumstances exist which would compel a court to order child support past the age of majority.

One of the most recent interpretations of Utah Code Ann. §15-2-1 (Supp. 1975) was Carlson v. Carlson, 584 P.2d 864 (Utah 1978). It held that support may be ordered to age twenty-one only where the court makes a specific finding of special circumstances. The Utah Supreme Court searched the findings of the lower court for such and finding none, vacated the lower court's order of child support to age twenty-one.

The trial court in the case at bar made no specific findings as to why child support should continue to age

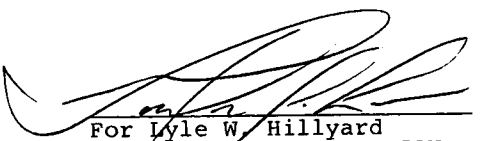
nineteen. The reason for such lack is that no special or unusual circumstances exist to support such an order, and following the rationale expressed in Carlson, "In the absence of such a finding, the order cannot properly stand". Id. at 866.

If Appellant is not awarded custody of all six children, his support obligation for those children in Appellee's custody should end as such children attain age eighteen.

CONCLUSION

Appellant prays that the property division of the trial court be reversed and a more equitable decree ordered: reflecting the present value of Appellant's retirement assets; removing the children's property from the marital property division, considering the assets as well as the liabilities in making the division, and in giving proper deference to the source of the marital property.

Appellant prays for more liberal visitation rights; and seeks to be granted custody of all six children so they may be raised together as a family and not divided up as mere spoils of war. If Appellant is not awarded custody of all of the children, he prays that the child support order be modified to end at age eighteen, when the children reach their majority.



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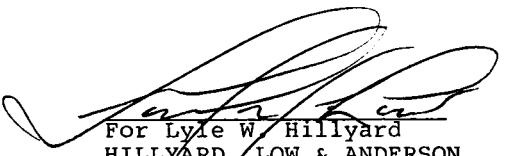
I hereby certify that I mailed post paid eleven (11) copies of the foregoing brief of Appellant to the Utah Supreme Court of Utah, two (2) copies to B. L. Dart, DART & SEGALL, suite 430 Ten Broadway Bldg., 10 West 300 South, Salt Lake City, Utah 84101 and two (2) copies to Bruce L. Jorgensen, OLSON, HOGGAN & SORENSON, 56 West Center, Logan, Utah 84321, on August 3, 1979.



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