1979

Veneta Jesperson v. William Leroy Jesperson, Sr. : Appellant's Brief

Utah Supreme Court

IN THE SUPREME COURT

OF THE STATE OF UTAH

VENETA JESPERSON,	*	
Plaintiff and Respondent,	*	
vs.	*	No. 16413
WILLIAM LeROY JESPERSON, SR.,	*	
Defendant and Appellant.	*	

APPELLANT'S BRIEF

Appeal from the Judgment of the 5th
District Court for Washington County,
Hon. Robert F. Owens, District Judge Pro Tem

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AUTHORITIES CITED

STATEMENT OF POINTS

1. That the division of the property belonging to the parties reflects a punishment of the appellant for his marital misconduct and represents such a serious inequity as to manifest a clear abuse of discretion by the court below.

2. That the court below improperly refused to award appellant the value of his labor on the three personal residences and one half the gain realized on the sale of the three homes. Further, that the actual conduct of the parties demonstrates that a gift was made and that the parties considered themselves equal owners of their property.

STATEMENT OF THE KIND OF CASE

This is an action for divorce by the Plaintiff against the Defendant where the sole issue is the equitable distribution of the marital estate.

DISPOSITION IN LOWER COURT

This case was tried to the court Judge Robert F. Owens, District Judge pro tem and a Circuit Judge of the State of Utah presiding. Judgment of divorce from the Defendant was granted to Plaintiff and a division of property and assets was made. Defendant appeals only the division of property and assets.

RELIEF SOUGHT ON APPEAL

Defendant, WILLIAM LeROY JESPERSON, SR., seeks a modification of the division of property made by the court below consistent with the points raised in this appeal.

STATEMENT OF FACTS

The Plaintiff-Respondent and the Defendant-Appellant were married to each other on March 20, 1973 in Roswell, New Mexico and no children were born as issue of the marriage (Tr. P14, LL12-18). Plaintiff is now 74 years old and Defendant is now 79 years old (Full Disclosure Financial Declarati

At the time of the marriage Defendant had no assets but had been a contractor and builder prior to the marriage and during the marriage did a lot of work on the three residences of the parties (Tr. P201, LL11-22).

At the time of the marriage Plaintiff had an automobile, some furniture, $12,500.00 in certificates of deposit, and $10,000.00 in savings (Tr. P39, LL20-25). Plaintiff also owned a mobile home which she had purchased for $17,500.00 cash (Tr. P38, LL4-9) on September 7, 1972 (Tr. P94 and Defendant's Exhibit 4) just 6-1/2 months prior to their marriage on March 20, 1973.

At the time of the divorce Plaintiff valued the automobile at $3,000.00 and the furniture at $2,000.00 (Plaintiff's Full Disclosure Financial Declaration, page 2). The St. George mobile home the parties owned had been sold for $27,000.00 (Tr. P109, L22). After deducting closing costs of $1,802.67 the parties divided the net sales proceeds of $25,197.33 according to the trial court's findings with the Plaintiff receiving $23,778.15 (the first $19,027.00 plus 77% of the remaining $6,170.33) and the Defendant receiving $1,419.18 (23% of the remaining $6,170.33). The Plaintiff was awarded the automobile and the furniture (Tr. P290, LL14-20). The marital estate totaled at least $30,197.33 (the automobile, furniture, and net proceeds of sale). Plaintiff received $28,778.15, or 95.3%, and Defendant received $1,419.18, or 4.7%.

Plaintiff testified that her savings and certificates of deposit were entirely consumed during the marriage for moving and traveling expenses (Tr. P55, L21) and to buy a new car (Tr. P123, LL15-17). She also testified that she kept

the books and paid the bills (Tr. P142, L16). Defendant testified that he always recognized that this money was Plaintiff's separate property and that he never asked Plaintiff for any of that money (Tr. P192, LL7-15). Further, that he did not know anything about Plaintiff's savings or certificates of deposit or if Plaintiff had spent all that money during the marriage (Tr. P197, L25; P204, LL1-2 & P209, L6). Defendant testified that Plaintiff could still be in possession of some of that money (Tr. P198, L2). The trial court ruled that any savings or certificates of deposit still in Plaintiff's name were awarded to her in the divorce (Tr. P290, LL21-25).

Plaintiff testified that $1,050.00 of improvements were added to the $17,500.00 cost of the mobile home in Ruidoso, New Mexico (Tr. P44, LL6-7, 25). This home sold for $24,500 (Tr. P92, L15) and was sold by Mr. Jesperson (Tr. P174, L23) so that there were very few closing costs (Tr. P155, LL6-11). The Roswell, New Mexico home cost $17,500.00 (Tr. P47, LL24-25) and Plaintiff testified that $4,870.10 of improvements were made (adding up Tr. PP49-50) including a refrigerator for $892.00 that Plaintiff still has (Tr. P261, L23). The Roswell home was sold October 4, 1974, netting the parties $23,105.39 after closing costs (Tr. P98, L12 and Defendant's Exhibit 9). The St. George, Utah home and lot cost $19,027.50 (Tr. P197, L24) and Plaintiff testified that improvements of $6,958.39 were added (Tr. P53). This home was sold and netted the

parties $25,197.33 after all closing costs.

Defendant testified that he did considerable work on the Ruidoso home, amounting to approximately $2,120.00, including some $220.00 for materials (Tr. PP169-174); that his labor on the Roswell home was worth approximately $750.00 (Tr. PP176-180); and that his labor on the St. George home was worth $2,100.00 (Tr. PP183-186 and the trial court's Findings). A neighbor, Jesse Spencer, testified that Defendant's work considerably enhanced the value of the property (Tr. P85, L11).

At the time of the marriage Plaintiff had monthly income from social security of $247.60 and monthly interest of $50.00 from an insurance policy (Tr. P40, LL23-25) and her income at the time of divorce was the same except her social security is now $263.90 (Tr. P54, L20). Defendant's income at the time of the divorce was approximately $241.00 from social security (Tr. P198, L8). Neither the Plaintiff nor the Defendant were employed during the marriage.

Plaintiff is presently living in a mobile home in Alpine, Texas which she purchased, making a $1,000.00 down payment with money "borrowed" from her daughter (Tr. P75, L19), who owns a large shopping center (Tr. P57, L9 and P197, LL8-18). Defendant is presently living in a rented apartment in California with his widowed daughter (Tr. P157, L15 and P161, L16).

Plaintiff was allowed to testify, over Defendant's objection (Tr. P22, LL6-16), to some eleven different times that Defendant left the Plaintiff. In overruling the objection the trial judge stated that such instances of desertion may have some relevance on the property division (Tr. P22, LL17-20), which was the sole issue before the court. The trial judge found that:

> "Defendant was guilty of gross and repeated marital misconduct which not only constitutes grounds for divorce, but which should be considered in making an equitable division of property." (Findings of trial court, paragraph 2).

The proceeds from the sale of the Ruidoso home were made payable to Mr. & Mrs. Jesperson (Tr. P95, L10) and deposited in Roswell State Bank in the name of William and Venetta Jesperson (Tr. P96, LL2-5). The Roswell home was purchased and held in the names of both parties (Tr. P111, LL23-25). The improvements made on the Roswell home were paid for through a joint checking account to which they both made deposits as they received their monthly income (Tr. PP127-128). The proceeds from the sale of the Roswell home were deposited in a joint account at Zion's Bank in St. George (Tr. P100). The purchase of the St. George home was initially taken in both parties names as joint tenants, then placed in Plaintiff's name for a period when Defendant had some financial trouble with his former wife, and then finally put in both their names again on March 11, 1976 (Tr. P112, LL8-24 and Defendant's Exhibit 3).

ARGUMENT

Point 1. That the division of the property belonging to the parties reflects a punishment of the Appellant for his marital misconduct and represents such a serious inequity as to manifest a clear abuse of discretion by the court below.

Defendant seeks a readjustment of the property division made in the decree of divorce. He does not question the existence of grounds nor the propriety of granting the divorce to the Plaintiff. Defendant claims that the disposition of the property of the parties is so inequitable and unjust that it manifests a clear abuse of discretion that should be corrected.

Martinett v. Martinett, 8 Utah 2d 202, 331 P2d 821 appears to recite the law in this state pertaining to the grounds upon which a trial court's award may be reversed or modified when it said, at page 822:

> We are in accord with the postulate advocated by the defendant that divorce proceedings being in equity, this court will review the evidence and may substitute its judgment for that of the trial court if circumstances warrant doing so. Nevertheless, it is firmly established in our law that the trial judge will be indulged considerable latitude of discretion in adjusting the financial and property interests of the parties; conversely, however, if there is such serious inequity as to manifest a clear abuse of discretion, this Court will make the modification necessary to bring about a just result. (Exphasis Added).

The Defendant in this case feels he can meet the

burden of showing such inequity. The Plaintiff received 95.3% of the marital estate, not counting any savings or certificates of deposit which she held in her name at the ti of divorce. These funds were always regarded by the parties as her separate property even though she may have voluntaril consumed or used some of these funds during the marriage. Defendant received only 4.7% of their marital estate.

The Plaintiff received the furniture which she valu at $2,000.00 and the automobile which she valued at $3,000.0 These valuations were made under oath by the Plaintiff in a "Full Disclosure Financial Declaration" required in all contested divorces by order of the Fifth Judicial District Court for Washington County. Plaintiff also received $23,778.15 in cash from the sale of their home in St. George pursuant to the trial court's "Findings", while the Defendant received the balance of $1,419.18 from the sale of the St. George home as his total property settlement.

The marital estate totaled $30,197.33 and was distributed as follows:

Item	Value	To Plaintiff	To Defendant
1. Furniture	$ 2,000.00	$ 2,000.00	$ -0-
2. Automobile	3,000.00	3,000.00	-0-
3. Sale of Home	25,197.33	23,778.15	1,419.18
Totals	$30,197.33	$28,778.15	$ 1,419.18
Per Cent	100%	95.3%	4.7%

Defendant contends that the trial judge was influenced by Plaintiff's testimony concerning some eleven different times the Defendant left the Plaintiff and that the trial judge imposed a vindictive punishment in the property settlement upon the Defendant for his marital misconduct. Counsel for the Plaintiff consumed some 40-50 pages of the transcript questioning the parties about the times Defendant left Plaintiff despite an early objection by Defendant's counsel and an offer to stipulate to grounds for the divorce. In overruling Defendant's objection the trial judge stated:

> "The subject matter is relevant both to the issue of the grounds of divorce and there may be some relevance on proper division." (Tr. P22, LL17-19).

There is no question that the trial judge considered the relative guilt of the parties in making the property settlement. Paragraph 2 of his "Findings" states:

> "Defendant was guilty of gross and repeated marital misconduct which not only constitutes grounds for divorce, but which should be considered in making an equitable division of property."

The Utah Supreme Court filed its opinion in April, 1979 in Read v. Read 594 P. 2d 871, Utah (1979), a case with many similarities to this case, including the same trial judge. In that case the Defendant husband appealed the trial court's award of about 90% of the assets to the Plaintiff wife, arguing that the award was excessive and inequitable and that the trial court was imposing a vindictive penalty upon him because he was most at fault in the breakup of the

marriage. In remanding the Read case for modification because the property award was far too disparate the Court stated:

> "It is well established that the trial court has considerable discretion in the allocation of the property and financial resources of the parties. Nevertheless, this discretion is not entirely without limit.
>
> In the case before us it appears that the trial court's property award may reflect a degree of punishment against the defendant for his extra marital conduct and relative "guilt" in bringing about the dissolution of the marriage. A trial court must consider many factors in making a property settlement in a divorce proceeding, but the purpose of the settlement should not be to impose punishment upon either party."

The Court in the Read case then stated the law with respect to this issue by quoting Wilson v. Wilson 5 Utah 2d 79, 296 P. 2d 977 (1956) as follows:

> "In regard to the defendant's contention that the judgment represents an effort of the court to impose a punishment upon him: We recognize that there is no authority in our law for administering punitive measures in a divorce judgment, and that to do so would be improper, except that the court may, and as a practical matter invariably does, consider the relative loyalty or disloyalty of the parties to their marriage vows, and their relative guilt or innocence in causing the breakup of the marriage. It is to be recognized that it is seldom, perhaps never, that there is any wholly guilty or wholly innocent party to a divorce action. The trial court was aware, of course, that when people are well adjusted and happy in marriage, one of them does not just out of a clear blue sky fall in love with someone else; and that when this occurs it is usually an indication that the marriage has disintegrated from other causes.

This statement aptly applies to this case. The 79 year old Defendant testified that he left the Plaintiff because of her sarcastic nature and because of family disagreements that occurred on some 10 trips to Alpine, Texas to visit Plaintiff's family (Tr. P158, LL15-22).

In this regard the Martinett case, Supra is similar and instructive, as the Court, on page 822, stated:

> ". . . the trouble between them (the parties) has seemed to come largely from inability to make adjustments to ill health and advancing years, the matter of considering relative guilt or innocence in bringing about the divorce was properly considered by the trial court as minimal insofar as bearing on their property rights."

The Court went on to say, on page 823, that in cases such as this that:

> "It is necessary to so apply the law as to do justice between them on the basis of a realistic appraisal of their circumstances and the problems each must confront."

Defendant is 79, has a very small income, and finds it necessary to live with his widowed daughter in a rented apartment in California. Plaintiff is 74, also has a small income, but lives in a mobile home in Alpine, Texas near her daugher who owns a large shopping center. The Defendant testified that all of Plaintiff's children were "very well fixed financially" (Tr. P197, LL21-22), and his testimony was not disputed. The Court stated in the Read case, Supra that:

> "When a marriage has failed, a court's duty is to consider the various factors relating to the situation and to arrange the best possible allocation of the property and the economic resources of the parties so that the parties . . . can pursue their lives in as happy and useful a manner as possible. If it appears that the decree is so discordant with an equitable allocation that it will more likely lead to further difficulties and distress than to serve the desired objective, then a reappraisal of the decree must be undertaken."

The Defendant asks that a reappraisal of the decree be undertaken by the Supreme Court. In Harding v. Harding 26 Utah 2d 277, 488 P. 2d 308 (1971) the Court said:

> "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."

There is no need to remand this case to the trial court for additional evidence. To do so would impose a hardship upon the parties who now reside in Texas and California. The Supreme Court should review the evidence and make an adjustment so that the parties can adjust their lives in a happy and useful manner.

Point 2. That the court below improperly refused to award Appellant the value of his labor on the three personal residences and one half the gain realized on the sale of the three homes. Further, that the actual conduct of the parties demonstrates that a gift was made and that the parties considered themselves equal owners of their property.

The trial court found that the reasonable value of Defendant's labor on the St. George home was $2,100.00 (paragraph 4 of the trial court's Findings), but failed to make any findings as to what the reasonable value of Defendant's labor on the Ruidoso and Roswell homes in New Mexico might be despite considerable testimony on the subject.

In Corley v. Corley 594 P. 2d, 1172, a 1979 New Mexico divorce case where all the property was the husband's separate property, the New Mexico Supreme Court found, on page 1174, that:

> "Mrs. Corley contributed her labor and talents to the improvements on the 33.185 acres consisting of a three-bedroom house, a barn and an old milk barn remodeled into a guest house."

The Court then held:

> "that the community contributed labor and talent to the benefit of Corley's separate property. Mrs. Corley should be given credit for the value of her share of those contributions."

The trial court erred in not recognizing the value of Defendant's work on the New Mexico homes. It is hard to understand how the trial court could make a finding on the value of Defendant's labor on the St. George home and ignor his work on the New Mexico homes. If the trial court had recognized the Defendant's labor on the New Mexico homes, it would not have found that the $19,027.50 purchase of the St. George home all came from Plaintiff's separate funds but would have realized that the money brought to Utah and used to purchase the St. George home was already charged with

the value of Defendant's labor on the New Mexico homes.

Defendant testified that he did considerable work on the Ruidoso home, amounting to approximately $2,120.00 including some $220.00 for materials (Tr. PP 169-174). A breakdown of Defendant's testimony from page 169 to page 174 of the transcript shows that he did the following work and assigned the following values to his work:

1. Leveling the lot, which was "on a sloping ridge in the mountains" and had "big mounds of dirt and rocks" (Tr. P165, LL16-18).	$ 500.00
2. Trim deadwood out of several pine, oak, and juniper trees.	200.00
3. Built and painted a three foot fence around the lot.	
Materials	120.00
Labor ($100.00 to $150.00)	use 100.00
4. Enclosing, paneling, and painting area under back porch.	
Materials	100.00
Labor	100.00
5. Landscaping, planting flowers, shrubs, vines, and lawn and digging ditch to prevent runoff water damage to the lot.	1,000.00
Total	$2,120.00

Defendant's labor must have been worth in excess of this amount in view of the fact that the home was sold a few months after the marriage for $24,500.00 for a gain of $3,830.00 after deducting Defendant's labor as follows:

Sales Price (Tr. P92, L15)		$24,500.00
Less: Closing Costs (Tr. P155, LL6-11 and P174, L22)		NONE
Proceeds Received		$24,500.00
Less: Original Cost (Tr. P38, LL4-9)	$17,500.00	
Improvements - Plaintiff's Testimony (Tr. P44, LL6-7, 25)	1,050.00	
Defendant's Labor & Materials (Tr. PP169-174 and as shown above)	2,120.00	
Total Cost		20,670.00
Profit On Sale		$ 3,830.00

This is a significant profit for a mobile home, especially in view of the fact that the home was purchased September 7, 1972 (Defendant's Exhibit 4) six months prior to the marriage and sold within a year's time (Tr. P214, L7).

Defendant also testified that he did work on the Roswell home amounting to approximately $750.00. A breakdown of Defendant's testimony from page 176 to page 180 of the transcript shows that he did the following work and assigned the following values to his work:

1. Rebuilt six foot picket fence around large lot.	$ 300.00
2. Repair tool shed.	100.00
3. Cut down and dug up stumps of five tall poplar trees (about 25 hours x $6.00)	150.00
4. Level front yard, reseed the lawn, plant flowers	200.00
5. Paint eaves, windows and doors	?
Total	$ 750.00

Again, the parties made a profit of $877.79 in about a year's time when they sold this home on October 4, 1974 (Defendant's Exhibit 5) even after deducting the improvements and Defendant's labor as shown below:

Sales Price (Defendant's Exhibit 5)		$25,000.00
Less: Closing Costs (Defendant's Exhibit 5)		1,894.11
Proceeds Received (Defendant's Exhibit 5)		$23,105.89
Less: Original Cost (Tr. P47, LL24-25)	$17,500.00	
Improvements - Plaintiff's Testimony (Tr. PP49-50)	4,870.10	
Add Back Refrigerator Plaintiff Still Has (Tr. P261, L23)	(892.00)	
Defendant's Labor (Tr. PP 176-180 and as shown above)	750.00	
Total Cost		22,228.10
Profit On Sale		$ 877.79

The parties lost $2,888.56 on the St. George home after deducting the improvements and Defendant's labor, probably because both of them had left Utah and accepted a price below fair market value. Their loss is computed below:

Sales Price (Tr. P109, L22)		$27,000.00
Less: Closing Costs		1,802.67
Proceeds Received		$25,197.33
Less: Original Cost (Tr. P101, L24)	$19,027.50	
Improvements - Plaintiff's Testimony (Tr. P53)	6,958.39	
Defendant's Labor (Trial Court's Findings)	2,100.00	
Total Cost		28,085.89
Loss On Sale		($ 2,888.56)

Defendant's labor on all three homes totals $4,970.00 as follows:

Ruidoso home (see above)	$2,120.00
Roswell home (see above)	750.00
St. George home (see trial court's Findings)	2,100.00
Total Labor	$4,970.00

The parties realized an overall profit of $1,819.23 on all three homes after deducting the improvements and after deducting Defendant's labor as follows:

Ruidoso home (see above)	$3,830.00
Roswell home (see above)	877.79
St. George home (see above)	(2,888.56)
Overall Profit	$1,819.23

With an overall profit it is obvious that the parties did not need to take any money out of Plaintiff's separate funds in order to buy or improve any of these homes. Any of Plaintiff's separate funds used in the marriage must have been used for traveling, moving, or living expenses and would have to be considered voluntary contributions to the community. Plaintiff testified that they were used for moving and traveling (Tr. P55, L21). They certainly should not be charged against the Defendant who always regarded those funds as Plaintiff's separate property (Tr. P192, LL7-15) and who did not and does not know whether Plaintiff used that money during the marriage (Tr. P197, L25) or whether

Plaintiff still has those funds (Tr. P198, L2). It should be remembered that Plaintiff kept the books and paid the bills during the marriage (Tr. P142, L16) and that this information was exclusively within her knowledge. In this situation it would be just as wrong to conclude that Plaintiff used her separate funds to make these improvements as it would be to conclude that Defendant is entitled to credit for one-half the improvements simply because the improvements were paid for out of funds held in joint checking accounts to which both parties deposited their social security income (Tr. P127-128).

If one were to mathematically attempt to reduce Defendant's award to the minimum and still maintain some semblance of an equitable and logical approach, one would recognize that Plaintiff made the initial purchase with her separate funds, that improvements were paid for out of profits from the previous sale, and that Defendant is entitled to credit for the value of the labor and talent he contributed to the improvement of the properties. The overall profit of $1,819.23 would be divided equally between the parties. Defendant would receive $5,879.61 and Plaintiff the balance as follows:

Defendant's labor on all three homes (see above)	$4,970.00
Defendant's one-half share of overall profit on all three homes	909.61
Total To Defendant	$5,879.61

This approach could be considered a refinement of the method used in Lundgren v. Lundgren 112 Utah 31, 184 P. 2d 670 where the husband had paid for the property and the wife had done considerable work making improvements and the court awarded the wife one-half the excess of the market value over the husband's original cost. The court in the Lundgren case probably did not have the advantage of knowing the cost of the improvements or the reasonable value of the labor as it does in this case. Where such evidence is in the record the court should recognize both the cost of the improvements and the reasonable value of the labor before dividing the overall profit equally between the parties.

Applying this method to this case shows that Defendant is entitled to an award of $5,879.61, or an additional $4,460.43 over the $1,419.18 he has already received. Even so, Defendant's total property award would only come to 19.5% of the marital estate of $30,197.33. When a court of equity considers the age of the Defendant (79), the manner in which the parties handled the proceeds from each sale and took title on their next purchase (always in joint bank accounts or in joint tenancy - see last paragraph of the STATEMENT OF FACTS), and the present living situation of the parties (Defendant in an apartment with his widowed daughter and Plaintiff in her own mobile home near her daughter who owns a large shopping mall), it may well be that Defendant should have a settlement far in excess of $6,000.00.

Several days before the trial Defendant filed a "Memorandum" with the trial court and mailed a copy to Plaintiff's attorney. The Memorandum set forth the facts and then presented a "Gift Theory" for the resolution of this case, citing some 18 cases, 14 cases from 10 different common law states and 4 cases from 2 different community property states, showing that a gift results in those states when a conveyance is taken in the name of the husband and wife by the wife's consent and direction, notwithstanding the wife pays all the consideration. At the trial it was evident from Plaintiff's testimony that she had been advised of this argument and that she was prepared to refute it, possibly even to the extent of perjury. On direct examination Plaintiff claimed she deposited the proceeds from the Ruidoso sale to her savings account which did not have Defendant's name on it (Tr. P49, L9), but on cross-examination Plaintiff admitted that the proceeds were deposited in Roswell State Bank in the names of William & Veneta Jesperson (Tr. P96, LL2-5). Again, Plaintiff testified on direct examination that the improvements to the Roswell home were paid out of her own savings (Tr. P50, L24), but on cross-examination Plaintiff reluctantly admitted that the improvements were paid from a joint checking account (Tr. P127, L23). Again on direct examination Plaintiff testified that the proceeds from the Roswell sale were deposited into her savings (Tr. P52, L25), but on cross-examination admitted that she took

the check with them to California, then to Utah, where she deposited it in a joint account at Zions Bank (Tr. P100, LL9-15). Again, on direct examination Plaintiff testified that the improvements to the St. George home were paid out of her own savings account (Tr. P54, L5), but on cross-examination admitted that the improvements were paid from a joint account (Tr. P136, LL3, 8-13).

When the Plaintiff finally admitted that the proceeds of each sale were put in their joint names and that the title of each home was taken in their joint names, she then began to claim that it was done under pressure (Tr. P113, LL9-17) and that pressure was exerted upon her almost from the beginning of the marriage (Tr. P115, LL20-24). This is entirely inconsistent with the fact that Plaintiff kept the books, paid the bills, and opened the accounts (Tr. P142, LL13-23). It is also inconsistent with the fact that Plaintiff has operated a business and owned property in other places (Tr. P117, LL16-20) and inconsistent with the fact that, by her own testimony, she had always had an attorney take care of her properties and yet did not consult an attorney on any of these transactions (Tr. P117, L25 & P118, LL1-9). It is also inconsistent with Defendant's testimony that Plaintiff cannot be forced to do anything she doesn't want to do (Tr. P191, LL10-12). Certainly, if she was being pressured to do something against her own desires she would have been concerned enough to take some corrective action.

In a situation of this kind where both parties can make self-serving statements concerning their intentions, the best evidence of intention is what the parties actually did. In this case, despite Plaintiff's reluctance to admit what they actually did, the record is clear that:

1. The proceeds from the sale of the Ruidoso home were made payable to both parties (Tr. P95, L10);

2. The Ruidoso proceeds were deposited in Roswell State Bank in the name of William and Venetta Jesperson (Tr. P96, LL2-5);

3. The Roswell home was purchased and held in the names of both parties (Tr. P111, LL21-25);

4. The improvements made on the Roswell home were paid for through a joint checking account to which they both made deposits of their monthly income (Tr. PP127-128);

5. The proceeds from the sale of the Roswell home were deposited in a joint account at Zions Bank (Tr. P100, LL9-15 and P181, LL22-25);

6. The St. George home was initally taken in the name of both parties as joint tenants with full rights of survivorship (Tr. P112, LL8-13 and Defendant's Exhibit 6);

7. The St. George home was placed solely in Plaintiff's name when Defendant had some financial trouble with his former wife but that it was again placed in both their names as joint tenants with full righs of survivorship when

Defendant's financial trouble was over (Tr. P112, L24 and Defendant's Exhibit 3); and

8. The improvements made on the St. George home were paid for through a joint account (Tr. P136, LL3, 8-13 and P186, LL7-13).

With eight transactions to illustrate the parties intention it is doubtful that any kind of testimony to the contrary could overcome the presumption of a gift and consequent equal ownership, which presumption must be rebutted by clear and convincing evidence or evidence showing fraud, mistake, or undue influence. Defendant's Memorandum on this point and which is in the record on appeal recites 18 cases from 12 different states supporting this common law doctrine and additional supporting cases may be found at 43 ALR 2d 917. Although no Utah cases are included in the annotation, Defendant believes that this doctrine should be extended to include Utah.

CONCLUSION

Defendant and Appellant respectfully submits that the award of over 95% of the marital estate to the Plaintiff and Respondent is so inequitable that it manifests an abuse of even that wide latitude of discretion afforded the trial court and that this Court should modify the property division to allow the parties to adjust their lives in a happy and useful manner.

The court should not attempt to penalize one of the partners in a marriage which has apparently broken down by making what, on its very face, is a punitive, vindictive and inequitable distribution of the marital estate.

At the very least Defendant should be allowed to recover the reasonable value of his labor and talents expend on improving and making three homes more livable, more attractive, and certainly more valuable, together with his share of the overall profit realized on the sale of the three homes

Defendant's age, present living situation, and the evidence showing how the parties have held, improved, and sold their real property shows that Defendant, in equity, is either entitled to an increased award over and above the val of his labor and share of profits or that he is entitled to one half the proceeds on the sale of the St. George home because a gift, which was not adequately rebutted, was made to the Defendant as shown by the actual conduct of the parti

DATED this 18th day of September, 1979.

John Lyon Miles

JOHN LYON MILES
Attorney for Defendant-Appe