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IN THE SUPREME COURT OF THE STATE OF UTAH

MERIEL M. HACKING,	)	
Plaintiff-Respondent,	)	Docket No. 16821
v.	)	
RULON C. HACKING,	)	
Defendant-Appellant.	)	

BRIEF OF PLAINTIFF-RESPONDENT

Appeal from the Fourth Judicial District Court of Uintah County, Honorable George E. Ballif, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

MERIEL M. HACKING,)
Plaintiff-Respondent,) Docket No. 16821
v.)
RULON C. HACKING,)
Defendant-Appellant.)

BRIEF OF PLAINTIFF-RESPONDENT

NATURE OF THE CASE

This is a suit for divorce by the Plaintiff-Respondent Meriel M. Hacking from her husband, Rulon C. Hacking, the Defendant-Appellant. (Respondent shall cite to pages in the record as follows: Trial transcript, "Tr--," and Court file, "R--.")

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the trial court's decision and Findings and an award for Respondent's attorneys fees incurred on appeal.

DISPOSITION IN THE LOWER COURT

After approximately 27 years of marriage, the Plaintiff-Respondent Meriel M. Hacking was granted a divorce from the Defendant-Appellant Rulon C. Hacking (hereinafter sometimes referred to by his common nickname, "Jude Hacking") pursuant to a Partial Decree entered by the trial court on March 22, 1979. (Partial Decree, R. 86) Findings of cruelty were made

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by the court supporting the Partial Decree. (Findings, R. 84) No appeal has been taken by Appellant from these Findings or that Decree. The trial court therein specifically reserved for trial at a later date the issues of division of the property, permanent alimony and support and attorneys fees.

Thereafter, following a two-day trial on the issues reserved, the Honorable George E. Ballif filed his Memorandum Decision on September 4, 1979. (R. 92) Judgment and Findings were entered thereon on September 20, 1979. (R. 96-112) Following Appellant's Motion to Amend, the court entered Amended Findings of Fact and Conclusions of Law and an Amended Judgment on October 10, 1979. (R. 135, 146) Except for certain specific items, the court awarded the marital property equally as tenants in common to both parties, subject to the outstanding obligations. (R. 147) Respondent was awarded the home furnishings while Appellant was awarded all interest in the Ouray Brine Company which was organized by Appellant with his eldest son. (R. 136, 146; Tr. 162-71)

Among the properties divided equally between the parties included the family ranch and livestock operation, the home and a hamburger drive-in. The Appellant appeals from this portion of the court's decision. Contrary to Appellant's suggestion (Appellant's Brief, p. 1), the trial court did not purport to divide or adjudicate property interests owned by the Appellant's mother, Vera Hacking. (Tr. 275-76)

The court awarded to Respondent alimony until December, 1980, and child support for the minor diabetic child. (R. 149)

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However, Respondent was required to pay her own costs and attorneys fees. (R. 149)

STATEMENT OF FACTS

Respondent takes issue with Appellant's statements of fact as being incomplete and interspersed with Appellant's conclusions and opinions in an attempt to reargue the evidence. Appellant states only those facts favorable to his contentions to the exclusion of evidence supporting the Findings and Judgment of the trial court. Therefore, Respondent provides the following statements of facts and corrections of Appellant's statements:

The parties were married in December, 1950, live in Vernal, Utah, and, during their marriage, acquired substantial property. (Tr. 27; R. 214) Five children were born during the marriage: Mitchell (Mitch) (1952), Susan (1953, Rodney (1955), Shara (1960) and Sonya (1967). (Complaint, R. 1) Except for Mitch, the children still reside with Respondent. (Findings, R. 84)

At the time of the marriage, Appellant's father, Rulon S. Hacking, had purchased and was still buying ranch land upon which approximately $9,000.00 was owing on the purchase loan. (Tr. 28-29) At some time, Appellant and his father agreed that if Jude would stay and run the ranch that after the loans were paid off, the parties would receive part ownership of the ranch and some day it would all belong to them. (Tr. 47-48, 227, 276-7) This "partnership" agreement was explained to and discussed between Appellant and Respondent over the years.

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(Tr. 276-7)

Accordingly, in 1968 Appellant's parents, Rulon S. and Vera, conveyed to Appellant an undivided one-half interest in a portion of the ranch property known as the "Diamond Mountain property." (Exh. 4) Appellant still claims that pursuant to that "agreement," he is entitled to receive the remaining one-half interest for his services in operating the ranch after his marriage to Respondent. (Tr. 48-50)

In 1957, during the early period of the marriage, Appellant and his father purchased, as tenants in common, from Appellant's uncle an additional 1,057 acres of ranch property on Diamond Mountain. (Exh. 3; Tr. 342) Respondent also signed the note for its purchase. (Tr. 308) In connection with the ranch operation, Appellant and his father also acquired various government grazing permits and leases. (Tr. 342; Exh. 4) Later, the parties purchased a 5% interest in the Uintah Basin Grazing Association, 108 acres of land in Coal Mine Basin; and Appellant purchased stock in Hiko Bell (60,000 shares) and Dinah Bowl. Title to these assets are in Appellant's name. (Tr. 51, 68) The parties also purchased 54 acres known as the Allen place, the Maeser home where the parties resided and a hamburger drive-in. Title to these properties is in joint tenancy. (Tr. 68-69)

From 1950 to 1969, Mr. Hacking was employed full-time by McCullough Tool Company. (Tr. 29) Respondent was employed in several jobs in the Vernal area, except for periods during the birth of two children in 1952 and 1953. Following each birth,

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Respondent returned to work with the encouragement of her husband. (Tr. 214-15) In 1962 Respondent began employment in a government office. Respondent continued with this job until the birth in 1967 of their diabetic daughter, Sonya. Contrary to the claims in Appellant's Brief, the evidence was undisputed that all of Respondent's income was put in the parties' joint bank account and went "to pay off the home and help support the family." (Tr. 215)

In about 1963, Appellant purchased a one-half interest in an A&W hamburger drive-in. (Tr. 216) Although the drive-in was initially managed by its co-owner, Mr. Merkley, Respondent was called in "a lot" to help in the drive-in in addition to her full-time employment and family duties. (Tr. 216) In 1969, Appellant quit McCullough Tool Company and the parties acquired the other one-half interest in the drive-in, title to the property being taken in the names of both Appellant and Respondent. Since 1970, Mrs. Hacking has managed the drive-in on a full-time basis to produce income to support the Hacking family and the ranch. (Tr. 217, 227, 299, 342) Respondent often worked at nights while also taking care of Sonya, whose diabetic condition often required constant care. (Tr. 227-9) The rest of the family, including Appellant, also assisted in the operation of the drive-in as well as the ranch. (Tr. 156, 345-6)

The statement in Appellant's Brief that the "unwillingness of Respondent to continue to operate the drive-in business led the trial court to conclude" it should be sold is a self-serving

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and misleading conclusion by Appellant which ignores his assertion that he didn't want to operate the drive-in either. (Appellant's Brief, p. 4; Tr. 341) Mrs. Hacking did testify of numerous specific factors (e.g., more modern competition, obsolescence, fuel shortages and road construction) indicating the declining value of the drive-in as an investment and a source of income. (Tr. 221-4, 226-7, 289-92, 341) The yearly net income from the drive-in has steadily declined from $33,134.00 in 1975 to $1,624.00 in 1978. (Exh. 22; Tr. 316-19)

The Ranch Operation

In addition to their separate employment and the operation of the A&W drive-in, Appellant and Respondent and the children all worked together in the family ranching operation. (Tr. 32-3, 153-6, 161, 226, 269-70, 310) From about 1970 until 1978 when Appellant set up the Ouray Brine Company, Appellant generally supervised the ranch. (Tr. 155-165) Respondent and the children have also worked hard to make the ranch successful. (Tr. 360-1) Contrary to his claim that the ranch's expansion is to his credit, Appellant admitted that the drive-in money was "plowed in" to the ranch over the years, thereby, presumably, helping to make expansion possible. (Tr. 35) And, during this period, Respondent's efforts supported the family. (Tr. 34, 215, 217-8, 341-2)

Although Appellant's "facts" attempt to minimize as "occasional" the participation in the ranch by Respondent and the children and to ignore their substantial contributions, the record contains more than sufficient evidence to support

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the trial court's finding that "the parties have worked together in acquiring various assets . . . as a family enterprise. . . ." (R. 135, Finding #1; Tr. 32, 35, 153-7, 197, 217, 219, 225-26, 270, 299, 308-12, 361)

In addition to providing funds for the ranch's operation and expansion, Respondent signed notes and has been personally liable for the yearly ranch loans from the PCA and on the purchase money note for the purchase of part of the "Diamond Mountain property." (Tr. 35, 83, 91-2, 308-12, 216) Respondent and the children always participated in cattle drives such as from Diamond Mountain to the Coal Mine Basin, often walking on foot. (Tr. 219) Respondent has fed and cared for the horses used on the ranch and helped with regular ranching and cattle chores. (Tr. 270) On occasions Mr. Hacking has referred to the ranch and cattle as being Mrs. Hacking's. (Tr. 277-78) Although the children worked hard on the ranch and earned wages which were reported as income on their tax returns (as much as $9,000.00 in 1973), the money was not paid to them but was left in the ranch to be otherwise used in building up its operating capital. (Tr. 360). These specific examples are uncontroverted but are completely ignored in Appellant's Statement of Facts.

Since February, 1978, the ranch has been managed by the eldest son, Mitch, who is responsible for its day-to-day operations. (Tr. 58, 156, 270) While, naturally, the parties are not always in agreement, even since their separation Respondent has worked satisfactorily with Appellant and their

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son in cooperating in the financial and business affairs of the ranch. (Tr. 225, 270-1, 166, 192, 306) The other adult children, although pursuing their education and other interests, still are involved in helping at the ranch and the drive-in. (Tr. 157-58, 197, 218, 226, 270)

The "substantial evidence" upon which Appellant relies to claim that he is "the most capable to operate the ranch," that Respondent is incapable or that the operation cannot be divided are merely his self-serving opinions. (Tr. 334, 339) The "substantial" testimony is to the contrary.

Much of the ranch properties, including Diamond Mountain, were previously owned by various members of the Rulon S. Hacking family (Appellant's father). The fences from previous family divisions of the same property are still there and can be used again to divide the property, if necessary. (Tr. 207-212, 304-305) Grazing lands and permits, as well as the livestock and land, can be physically separated or operated together. (Tr. 281-2, 186-7) They have so operated in the past. (Tr. 188) The farm machinery, which at trial Appellant opined was "junk," is operable and can be physically divided. (Tr. 70, 294, 181-2, 294) Whatever physical labor and equipment may be needed to help Respondent is available from Respondent's family. (Tr. 204-8, 210-11, 286) In fact, Respondent's brother, Bill Murray, has helped the Hackings harvest corn in the past. (Tr. 204)

The Ouray Brine Company

Not surprisingly, Appellant's Brief does not mention the

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Ouray Brine Company, a business enterprise which Appellant has developed since 1978 and which the court awarded separately to him. (Findings 2, 3; Tr. 136, 147)

In February, 1978, Appellant left his full-time management of the ranching operations and that responsibility was delegated to Mitch with "no strings attached." (Tr. 156, 201, 332) Appellant took employment as a "shop hand" for Delgarno Transportation with a gross income of $18,000.00 a year. (Ans. to Int. R. 33-34; Tr. 55-6)

In June, 1978, Appellant formed the Ouray Brine Company, a business, since operated by Appellant, to haul brine and oil to and from the nearby oil fields. (Tr. 56-7, 61-3)

Appellant claimed that although he was operating the brine company, legal title thereto was in Mitch. (Tr. 339-40, 167) However, there was contradicting evidence that it was Appellant's idea for the business; and Appellant wanted Mitch involved to keep the business out of the divorce. (Tr. 59, 165, 173) Appellant has made all the contacts with customers. (Tr. 347-8, 168). Mitch Hacking's involvement is to supply his signature when required. (Tr. 169-70, 172, 174) The business records are kept by Appellant and are in his possession. (Tr. 59-60, 170-1) Appellant has hired as a "bookkeeper" and pays a salary to Marilyn Caldwell, who was referred to as Appellant's girlfriend. (Tr. 169, 171) Appellant personally guaranteed the purchase of equipment, including a truck purchased from proceeds of the sale of ranch cattle. (Tr. 61, 76, 176-79) The business was not registered

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with the Secretary of State. (Tr. 65)

The trial court found that although evidence showed the legal title to belong to Mitch, "an exchange of jobs between the Defendant and Mitchell appears to be for convenience and appearances only and does not affect the true equitable ownership of the business." (Finding #2, Tr. 136) Nevertheless, because the business was developed when the parties were separated, the court awarded the entire property to Appellant as his separate property. (Finding #3, ibid.) Although Respondent has not cross appealed from the trial court's finding to award this business to Appellant, Respondent does point to the fact that (1) Appellant received more than one-half of the total assets of the parties; and (2) Appellant was awarded a going business which presently occupies nearly all of his time and attention.

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ARGUMENT

POINT I

THE JUDGMENT AND FINDINGS OF THE TRIAL COURT SHOULD BE AFFIRMED.

It is apparent that the object of Appellant's Brief is to reargue the weight of the evidence. Appellant asks this Court to accept his testimony, resolve all the disputed issues and facts in his favor where there is a conflict in the evidence and ignore the substantial evidence supporting the trial court's findings and decision.

Appellant gives lip service to, but completely disregards, the rule of law that the trial court's findings are endowed with a presumption of validity and will not be disturbed because an appellant views the facts differently. Searle v. Searle, 522 P.2d 697 (Utah, 1974); Stone v. Stone, 19 U.2d 378, 431 P.2d 802 (1967). On appeal this Court will review the evidence in the light most favorable to support the findings of the trial court. Cook v. Gardner, 14 U.2d 193, 381 P.2d 78 (1963).

The trial court is in an advantaged position in factual matters, particularly in dividing the assets of a marriage. Considerable deference is given to the findings and judgment of that court. It is the prerogative of the trial judge to judge the creditability of witnesses, observe their demeanor and conduct in testifying and give to the testimony such weight as the trier of fact deems it is entitled. If there should be conflict in the evidence, the Supreme Court assumes that the

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trial court believed the evidence supporting the findings. Fletcher v. Fletcher, #16407, July 18, 1980 (Utah); Stone v. Stone, supra; Child v. Child, 8 U.2d 261, 267, 332 P.2d 981 (1958).

The burden is on the Appellant to show error. Mitchell v. Mitchell, 527 P.2d 1359 (Utah, 1974); Stone v. Stone, supra. The question on appeal is not what the trial court could have done but were the findings supported by the evidence. As particularly set forth and cited in Respondent's Statement of Facts (and throughout this Brief), the Findings and Judgment were amply and substantially supported by the evidence. Appellant cannot reargue the weight of the evidence by selected testimony and opinion which do not comport to all the facts. Failing to prevail in the lower court, Appellant may not recite his evidence favorable to his contentions to the exclusion of evidence supporting the lower court's findings. Thompson v. Condas, 27 U.2d 129, 493 P.2d 639 (1972).

Appellant complains that the Findings of the court did not "recite specific findings to justify its general conclusion . . ." or specifically find that Appellant's proposed distribution of assets was unjust. (Appellant's Brief, p. 14) This is merely an assertion without substance. A finding that the parties worked together in acquiring and developing a family enterprise adequately supports the court's ultimate conclusion that the parties should each receive a one-half interest therein. A trial court need not make specific "negative" findings. (Findings, #1; R. 135-6) Findings should be limited to the

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ultimate facts. If they ascertain ultimate facts and conform to the pleadings and supporting evidence, they are regarded as sufficient. They will support the judgment, though they are "very general." Pearson v. Pearson, 561 P.2d 1080, 1082 (Utah, 1977).

Respondent submits that Appellant's Brief does not show any abuse of discretion by the trial court. That court has wide discretion to divide the properties in a manner fair and equitable for the protection and welfare of both parties. Fletcher v. Fletcher, supra, and cases cited therein; Slaughter v. Slaughter, 18 U.2d 274, 421 P.2d 503 (1966). The decision of the trial court should be affirmed.

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POINT II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN AWARDING THE MARITAL PROPERTY EQUALLY BETWEEN THE PARTIES AS TENANTS IN COMMON.

As previously noted, the lower court awarded Appellant his interest in the brine company, which business Appellant operates full-time. The household furnishings were awarded to Respondent. The remaining properties were divided equally between the parties, each party to receive a one-half interest in common.

Appellant's sole contention is that the court abused its discretion when it did not award him the ranch properties and equipment outright. Appellant seems to be of the opinion that the court was obliged to accept whatever Appellant asserted was "fair and equitable" to him to the exclusion of any other considerations. However, the court has the discretion to divide the marriage property in a fair and equitable manner for the protection of both parties. After due consideration to all the evidence and various factors, it was not an abuse for the court to refuse to divide the properties in a manner Appellant believed most beneficial to him. (R. 92, 95) Lowery v. Lowery, #16170 (Utah, filed Dec. 4, 1979).

At the trial court's request, each party proposed to the court a division of the assets. (R. 12-16, 17-24, 272-95) Respondent's proposed division is Exhibit 20. Appellant's proposal is Exhibit 1. In arriving at its decision, the trial court did not completely accept the proposal of either party, obviously giving consideration to the interests and equities

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of each. The court was entitled to compare and evaluate the evidence regarding the following factors:

1. Respondent's contributions to and sacrifices in the marriage and in acquiring and developing the ranch and other assets. (Tr. 32, 34-5, 83, 91-2, 155, 213-20, 227-29, 270-77, 308, 312, 342, 360-1)

2. The physical and mental health of the parties. (Tr. 265-8, 337-8, 345)

3. The relative education, training and ability of the parties. (Tr. 34, 165, 168-79, 190, 193, 204-211, 215, 217, 221-24, 299, 341)

4. The duration of the marriage: 28 years and the age of the parties (approximately 45 years). (R. 1; Tr. 213)

5. The present income of the parties and the property acquired and owned either jointly or by each one, including Appellant's interest in the brine company and the present value of the drive-in. (Tr. 127, 291-2, 319)

6. The definite expectancy of Appellant in his mother's estate as a future contingency. (Tr. 48-9)

7. Their obligations to and needs of the children, all of whom, except for Mitch, reside with Respondent (Findings, R. 84), particularly the needs of Sonya. (Tr. 227-29; Exhs. 17, 18) <u>Harding v. Harding</u>, 26 U.2d 277, 488 P.2d 308 (1971); <u>MacDonald v. MacDonald</u>, 120 Utah 573, 581-2, 236 P.2d 1066 (1951); <u>Wilson v. Wilson</u>, 5 U.2d 79, 296 P.2d 977 (1956). This Court has also stated that consideration may also be given to the "relative loyalty or disloyalty of the parties to their

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marriage vows and their relative guilt or innocence in causing the breakup of the marriage." Searle v. Searle, 522 P.2d 697, 699 (Utah, 1974); Wilson v. Wilson, supra, at p. 82. (Findings, R. 84) There is no abuse of discretion when the trial court has given "conscientious and judicious consideration" to these various factors. Slaughter v. Slaughter, supra. In spite of the overwhelming evidence, cited herein, which supports the court's decision, Appellant still argues that his testimony was "substantial."

It is interesting to note that in the lower court, Appellant admitted that his wife was entitled to one-half the assets of the family operation. (Tr. 355-56, 375) Even Appellant's counsel agreed that the court's suggestion of dividing property equally was a "possible" alternative and further conceded that "there are dozens of ways" in which the property can be split up. The question, counsel stated, is to pick "the very best." (Tr. 376) Appellant claimed his proposal was "the very best," which it no doubt was for his own interests. If Appellant's proposal of an "equal" division of property is fair and equitable to both parties, then Appellant should be willing to take the "equal" portion he allocated to Respondent and let Respondent have that portion which Appellant allocated himself on Exhibit 1. (Tr. 272) Yet, Appellant refused. (Tr. 355-57)

Also, Appellant says he does not now dispute the award to him of one-half of the A&W drive-in. (Appellant's Brief, pp. 4-5) Apparently, he claims that an "equal" division requires

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he also receive all the ranch properties and assets, as well as his present brine company business and one-half of the drive-in.

Obviously, Appellant agrees with Respondent's testimony that the "Diamond Mountain" ranch property is the "cream" of the ranch property with recreation, hunting, fishing opportunities. (Tr. 278-9) The self-interests of Appellant are even more apparent considering the substantial differences between the parties as to the values of such assets as the cattle and the drive-in. (Exhs. 1, 20, 9) It is patently ridiculous to argue that to give the Diamond Mountain property to Appellant and a declining asset (the drive-in) to Respondent is "equal" or "fair."

Respondent submits that the trial court acted clearly within its discretion in dividing equally the interests in the ranch and other assets as tenants in common. This Court has heretofore affirmed a decision of this trial court in dividing marriage property equally, including ranch properties. Searle v. Searle, 522 P.2d 697 (Utah, 1974). Also see Naylor v. Naylor, 563 P.2d 184 (Utah, 1977); English v. English, 565 P.2d (Utah, 1977); Gramme v. Gramme, 587 P.2d 144 (Utah, 1979); Kerr v. Kerr, 610 P.2d 1380 (Utah, 1980); Hansen v. Hansen, 537 P.2d 491 (Utah, 1975). In each of these cases (and others cited by Appellant as authority for his assertion that the lower court abused its discretion), this Court affirmed the trial court's exercise of that discretion. See, also, Pope v. Pope, 589 P.2d 752 (1978).

In Searle, the trial court found that the property in the names of either or both of the parties was accumulated "as a

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result of the joint efforts of the parties. . . ." The testimony of each side as to properties and their values was "contradictory and ambiguous." The court divided the ranch property equally, giving the husband an option to purchase the wife's portion. (522 P.2d, at 698-9) The husband was also awarded a separate business. The husband argued, just as Appellant argues here, that his wife was not entitled to one-half of the assets accumulated during the marriage and that an equitable distribution would be to award him "all of the businesses and the ranching property. . . ." (522 P.2d, at 699) This Court held that the Honorable Judge Ballif had not abused the "broad discretion reposed in him." (522 P.2d, at 700) There is no material distinction between Searle and the Findings and Judgment of Judge Ballif here.

In English v. English, supra, at 565-66, this Court affirmed the trial court's decision to divide commercial property between the husband and wife as tenants in common, subject to the outstanding debts.

In the instant case, as a tenant in common, Appellant may seek a partition as provided by law if he determines he cannot get along with Respondent in the operation of the ranch. He is not "forced into a partnership." (Judgment, R. 149) There is no abuse of discretion in making the parties tenants in common of an on-going business or of business property. Jacobsen v. Jacobsen, 600 P.2d 1183 (Mont., 1979); Propper v. Propper, 221 N.W.2d 566 (Minn., 1974); Lee v. Lee, 78 Ill. App. 3d 1123, 398 N.E.2d 126, 132-34 (1979); Nelson v. Nelson,

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590 S.W.2d 293 (Ark., 1980); In the Matter of the Marriage of Trujillo, 580 S.W.2d 873 (Tex. Civ. App., 1979); Levin v. Levin, 43 Md. App. 380, 405 A.2d 770, 775-77 (1979); Smith v. Smith, 535 P.2d 1109 (Ha., 1975). An Illinois Appellate Court held it was error not to award the wife a joint interest in the husband's grain elevator business to which she had made contribution of funds and labor. Leone v. Leone, 39 Ill. App. 3d 547, 350 N.E.2d 545 (1976).

Appellant argues that Respondent arbitrarily refuses to cooperate with Appellant in operating the ranch and that their son, Mitch, must referee and resolve their differences. He also asserts that there is no evidence to "suggest" that the parties can work together, "even under /Mitch's/ benevolent stewardship." (Appellant's Brief, pp. 5-7) Again, Appellant entirely ignores the evidence supporting the trial court and selects certain portions out of context. (E.g., Tr. 186-88, 198-201)

While there are differences, Mrs. Hacking and the children continue to make significant contributions to a cooperative and efficient management of the ranch. They have "a good working relationship" satisfactory to Respondent and to Mitchell. (Tr. 157, 161, 166, 193, 199, 269-72) Respondent desires to keep the ranch intact and operating. (Tr. 279, 304, 306) If their interests are together, there is not much trouble. (Tr. 207) In fact, the ranch has so operated since 1978. (Tr. 186-88)

If Appellant believes the ranch cannot be operated in

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cooperation, it must be a result of his apparent unwillingness to do so. (Tr. 339, 77) If that be the case, he may seek for partition of the ranch. Contrary to Appellant's claims, the interests of the parties can be separated and divided. (Tr. 187-88) Much of the equipment isn't presently used and can be divided. (Tr. 180-2) Cattle and grazing permits can be divided. (Tr. 186-7, 282) The Diamond Mountain property can be physically separated into parcels already divided by existing fences. (Tr. 206-12) Respondent has available the assistance and equipment to operate on her own, if necessary. (Tr. 204-210, 280, 305) While Appellant says there is substantial evidence to the contrary, the only such testimony was Appellant's own general denial. (Tr. 334)

Also, contrary to Appellant's conclusions, the court did not force Mitchell into participating in the management. Mitch testified he was asked by his father to manage the ranch--"no strings attached." (Tr. 200-1) Following his testimony that he would be willing to continue to operate the ranch, Mitch also agreed that:

/By Mr. Nielsen/

Q If you were operating the ranch, it wouldn't present any problem to you, would it?

A No.

Q As a matter of fact, that is the way you have been operating with your 50 head of cattle mixed in with the families /sic/ operation for the last several years, isn't it?

A Correct.

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Q You have been using part of the A.U.M.'s that don't belong to you? You have been using the feed from the Allen place, and so on, haven't you?

A Correct.

Q And that has not interferred with the management and operation of the ranch, has it?

A No.

(Tr. 188)

Appellant quotes Mitchell's testimony out of context in efforts to accentuate, as fact, Appellant's opinions as to family conflict and bitterness.

/By Mr. Howard/

Q Now, I know that you have a high regard for your mother and father, and I would have no doubt about that, and you don't either, do you?

A No.

Q And it's an unfortunate situation that you find yourself in?

A I just don't know how they will feel about me when this is over.

Q Well, I don't think they are going to feel badly toward you, either one of them.

(Tr. 198)

Appellant's specious attempt to equate a tenancy in common with a partnership is a mere smokescreen to cloud the obvious equities of the trial court's decision. A tenancy in common is not a "partnership." The court has not in any way imposed an involuntary partnership upon Appellant. As noted, if dissatisfied with common ownership of the ranch assets, Appellant may seek partition. But he cannot create the appearances that he is an unwilling "partner," handcuffed to

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a former spouse. Such a position indicates a surprising ignorance of the relevant principles of law. Rocky Mountain Stud Farm v. Lunt, 46 Utah 299, 151 Pac. 521 (1951); Garner v. Anderson, 67 Utah 553, 248 Pac. 496 (1926); Bussell v. Barry, 61 Ida. 216, 102 P.2d 276 (1940); 59 Am. Jur. 2d, Partnership, §11, pp. 936-7. Appellant does not cite any authority to support his claims here.

The record herein, when considered in full, provides no support for any claim that there will inevitably be further unmanageable difficulties and distress between the parties. Nor was there any misunderstanding or misapplication of the law by the trial court. DeRose v. DeRose, 19 U.2d 77, 426 P.2d 221 (1967). The only case cited by Appellant wherein the lower court abused its discretion was Read v. Read, 594 P.2d 871 (Utah, 1979). In Read, this Court said it was inequitable to award 90% of the assets to the wife when the apparent purpose was to punish the defendant husband.

In the instant matter, Respondent suggests that the apparent purpose of the Defendant-Appellant is to ignore the substantial contributions to and investment in the marriage by the Respondent now that it is time to distribute the dividends. Respondent has just as equal a right as Appellant has to reconstruct her life on a happy and useful basis. Gramme v. Gramme, supra, at 148.

Since Point II of Appellant's argument (Appellant's Brief, p. 12) is merely repetitious of Point I, Respondent has not discussed that point separately.

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Considering the record and facts of this case, the trial court did not abuse its broad discretion in dividing the property equally between the parties as tenants in common.

POINT III

THE DECISION OF THE TRIAL COURT REGARDING CHILD SUPPORT FOR THE MINOR, DIABETIC CHILD SHOULD BE AFFIRMED.

In his Docketing Statement, Appellant takes issue with the portion of the trial court's decision awarding child support for the minor, diabetic child, Sonya, until she reaches 21 years, unless otherwise ordered. (R. 149; Appellant's Docketing Statement, p. 3) Since Appellant did not discuss this point in his Brief, Respondent presumes he has abandoned the issue. See, also, Section 15-2-1, U.C.A., 1953, as amended.

POINT IV

RESPONDENT IS ENTITLED TO AN AWARD OF ATTORNEYS FEES INCURRED ON APPEAL.

Respondent submits that she is entitled to an award of attorneys fees incurred in this appeal, particularly considering the appellate record herein and the lack of support in the trial court record for Appellant's appeal here. This Court may make such an award of attorneys fees to the wife for defending an appeal by the husband. Swain v. Salt Lake Real Estate & Investment Co., 3 U.2d 121, 123, 279 P.2d 709 (1955); 5 Am. Jur. 2d, Appeal and Error, §1022. Or, this Court may remand to the trial court for such an award. Gramme v. Gramme, supra, per curiam; Eastman v. Eastman, 558 P.2d 514 (Utah, 1976).

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CONCLUSION

The trial court did not abuse its discretion awarding the assets equally between the parties as tenants in common. Its Judgment and Findings should be affirmed and Respondent should be awarded her attorneys fees incurred herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

SERVED the foregoing Brief of Plaintiff-Respondent by mailing two copies thereof, postage prepaid, to Jackson Howard Howard, Lewis and Petersen, Attorneys for Defendant-Appellant, 120 East 300 North, P. O. Box 778, Provo, Utah 84601, this 8th day of September, 1980.

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