

1999

Louise A. Symes v. Merlin David Symes : Brief of Appellee

Utah Court of Appeals

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

LOUISE A. SYMES, :

Petitioner/Appellee, :

vs. :

Case No. 990234-CA

MERLIN DAVID SYMES, :

Priority 15

Respondent/Appellant. :

BRIEF OF APPELLEE

APPEAL FROM THE SECOND JUDICIAL
DISTRICT COURT, DAVIS COUNTY
JUDGE DARWIN C. HANSEN

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FILED
Utah Court of Appeals

Julia D'Alesandro
Clerk of the Court



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CONSTITUTIONAL AND STATUTORY PROVISIONS

The following are the constitutional and statutory provisions which are addressed in this appeal:

§30-3-5, Utah Code Annotated (1953 as amended). "When a decree of divorce is rendered, the court may include in it equitable orders relating to the children, property, debts or obligations, and parties."

STATEMENT OF JURISDICTION

The Court of Appeals has jurisdiction in this matter pursuant to Utah Code Ann. §78-2a-3(2)(h) (1996).

STATEMENT OF ISSUES PRESENTED

I. Did the Court abuse its discretion in finding the appreciation on the Bear Lake cabin to be marital property? “Marital property encompasses all of the assets of every nature possessed by the parties, whenever obtained and from whatever source derived.” Gardner v. Gardner, 748 P.2d 1076, 1978 (Utah 1988).

II. Did the Court abuse its discretion by apportioning to Merlin the premarital value of the Bear Lake Cabin and declining to apportion to Merlin as separate property the appreciation on the cabin accumulated during the parties’ 28-year marriage? The appreciation on the cabin came as a result of 28 years of substantial additions and improvements to which both parties contributed. See Mortensen v. Mortensen, 760 P.2d 304 (Utah 1988).

III. Did the Court abuse its discretion by not dividing the costs of the appraisals incurred solely by the appellant? Morgan v. Morgan, 795 P.2d 684 (Utah App. 1990) stands for the proposition that, “neither land surveys nor appraisal fees, incurred in preparation for litigation, are recoverable as costs.” Id. at 684.

IV. Did the Court abuse its discretion in denying appellant’s post trial motions to take additional evidence on the monies received from the sale of the parties’ St. George property? Appellant’s post-trial motions were properly denied where all the documentation he requested was solely within Merlin’s possession and could have easily been raised by Merlin at trial.

STATEMENT OF THE CASE

A. Nature of the Case. This appeal is from a final Decree of Divorce in the Second District Court, Davis County, Layton Department in which the Honorable Darwin C. Hansen divided both premarital and marital property. The court assessed a value to the respondent's premarital interest in a summer home on Bear Lake and considered the remainder of the increase in equity of the property as a marital asset. The court then awarded the respondent the Bear Lake home and property but offset the petitioner's marital interest in the property by awarding her other interests. Respondent also appeals from the courts denial of apportionment of appraisal costs and the court's denial of a post trial motion to take additional evidence.

B. Course of Proceedings and Disposition Below. Trial was held in the above matter on October 8th and 9th, 1998 at the Layton District Court, the Honorable Darwin C. Hansen presiding. Thereafter, the court issued a written Memorandum Decision on October 20, 1998. The respondent filed two post-trial motions, first, a Motion to Assess Costs on November 18, 1998, and, second, a Motion to Reconsider Court Ruling and/or Re-Open Trial to Take Additional Testimony and Evidence. The court denied the respondent's post-trial motions on December 16, 1998. The Findings of Fact and Conclusions of Law and Decree of Divorce were signed by Judge Hansen on February 22, 1999, at a supplementary hearing on the property division. The respondent appealed.

C. Statement of Facts.

1. The parties were married on or about the 21st day of October, 1969. TT. Vol. I, p. 17, L. 1-4.

2. The parties separated on or about the 4th day of November, 1997. TT. Vol. I, p. 25, L. 10-13.

3. The parties have no children together, but each party has several children from prior marriages. TT. Vol. I, p. 18, L. 3-17.

4. At the time of the parties' marriage, Louise's five minor children and Merlin's four children resided with the parties at the marital residence. TT. Vol. I, p. 18, L. 3-17.

5. At nearly every job that Merlin held, for almost 28 years, Louise was also employed alongside Merlin, because "he asked her to do so because he needed her help and support." TT. Vol. I, p. 19.

6. At the time of the parties' marriage, Merlin was the record owner of two parcels of land at Bear Lake. An "A" frame cabin was constructed on one of these parcels. TT. Vol. I, p. 43 L. 5-8.

7. During the course of this 28 year marriage, various additions and improvements to the original "A" frame cabin were made by the parties, including the addition of three bedrooms, a new roof, a garage, a gate and posts, several turrets, and a sewer line. TT. Vol. I, p. 46-50 generally.

8. While Merlin completed the majority of the heavy labor associated with the

additions and improvements to the cabin, Louise was right by his side, doing everything she could to maintain the grounds and the cabin itself. TT. Vol. 1, p. 46-50 generally.

9. While title to the cabin remained in Merlin's name, any expenses associated with the cabin (including utilities and property taxes) were paid for out of marital funds. TT. Vol. I, p. 47, L. 18-25.

10. Insurance on this cabin was also maintained in the name of Merlin and Louise Symes. TT. Vol. II, p. 364, L. 5-15.

11. At trial, the trial court awarded Merlin his premarital interest in the Bear Lake cabin and found that the appreciation which resulted from the many additions to the cabin to be marital property. R. 103.

12. The trial court ultimately awarded Merlin the Bear Lake cabin, but offset Louise's interest in the appreciation accumulated during the parties' 28-year marriage, by awarding her other interests. R. 104.

SUMMARY OF ARGUMENT

The trial court has broad discretion in reaching an equitable distribution of the parties marital assets and can take into consideration the premarital estates of either party as it relates to the overall division and to the extent that the court finds that there has been efforts on the part of the other party toward the enhancement, maintenance and protection of the property. The court was not required to apportion the premarital value as advocated by the respondent particularly where the court can determine that the other spouse has enhanced the value of the property during the course of the marriage and where the evidence was clear that the original “A” frame cabin had be remodeled and additions added repeatedly during the course of the marriage. The court is further not required to believe the testimony of the respondent’s children over the testimony of the petitioner regarding her understanding of the source of funds for the additions, utilities, insurance and maintenance.

The court does have a right to assess costs but the Court of Appeals has specifically stated that neither the cost of land surveys nor appraisals incurred in preparation for litigation are recoverable costs.

The trial court, after a second, unscheduled day of trial, can in its discretion deny the motion of the respondent to hear additional evidence particularly where the complaint of the respondent regarding the claimed information was not raised at trial. In actuality the respondent had sufficient notice of all issues particularly as they were raised in the discovery

which answers were not provided to the petitioner until half way through the first day of trial. The issues regarding the funds were related to a bank account in the respondent's name only where the parties did not have a joint marital account and therefore the information was not in the control of the petitioner. If anyone has a complaint about the inability to prepare for trial testimony, it is the petitioner who had to prepare her case without the benefit of the respondent's overdue answers to discovery.

ARGUMENT

I. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN FINDING THAT THE APPRECIATION ON PREMARITAL PROPERTY OF THE RESPONDENT WAS A MARITAL ASSET UNDER THE FACTS IN THIS CASE.

The trial court was well within its discretion in finding the appreciation on the Bear Lake cabin to be a marital asset. The seminal case on this issue is Burke v. Burke, 733 P.2d 133 (Utah 1987). The Court set forth the general rule that, “[p]remarital property, gifts, and inheritances may be viewed as separate property, and in appropriate circumstances, equity will require that each party retain the separate property brought to the marriage. However, the rule is not invariable.” Id. at 135. The Court set forth thirteen (13) factors that the trial court should consider in “fashioning an equitable property division.” Id. These factors are:

[T]he amount and kind of property to be divided; whether the property was acquired before or during the marriage; the source of the property; the health of the parties; the parties' standard of living, respective financial conditions, needs, and earning capacity; the duration of the marriage; the children of the marriage; the parties' ages at time of marriage and of divorce;

what the parties gave up by the marriage; and the necessary relationship the property division has with the amount of alimony and child support to be awarded. Id.

The Court further stated that of specific concern is “whether one spouse has made any contribution toward the growth of the separate assets of the other spouse and whether the assets were accumulated or enhanced by the joint efforts of the parties.” Id. In Burke, the increase in land value came solely from inflation, whereas in the present case, the increase in land value came from substantial improvements to the land, specifically numerous additions to the original “A” frame cabin, which occurred repeatedly during this 20-year marriage.

The Burke court gave further guidance to trial courts in determining an equitable division of property:

In the exercise of their discretion, trial courts need to be guided by the general purpose to be achieved by a property division, which is to allocate the property in a manner which best serves the needs of the parties and best permits them to pursue their separate lives. Id.

The Utah Supreme Court concluded in Burke that Utah Code Annotated §30-3-5 confers “broad discretion upon trial courts in the division of property, regardless of its source or time of acquisition.” Id. at 134-35; Walters v. Walters, 812 P.2d 64 (Utah App. 1991) *cert. denied*, 836 P.2d 1383 (Utah 1992). Further, “in appropriate circumstances, one spouse may be awarded property which the other spouse brought in to the marriage.” Watson v. Watson, 837 P.2d 1 (Utah App. 1992); Workman v. Workman, 652 P.2d 931, 933 (Utah 1982) (holding that “achieving a fair, just, and equitable result may require that

the trial court exercise its discretion to award one spouse the premarital property of the other.”). Judge Hansen was cognizant of the fact that the cabin was acquired before the marriage and awarded Merlin his premarital interest. The court however, exercised its discretion in finding that the appreciation on the cabin was marital property.

In Mortensen, the Court consolidated the thirteen (13) factors discussed in Burke. The Court concluded that trial court should award premarital property to the party who brought the property into the marriage, unless:

(1) the other spouse has by his or her efforts or expense contributed to the enhancement, maintenance, or protection of that property, thereby acquiring an equitable interest in it, . . . or (2) the property has been consumed or its identity lost through commingling or exchanges or where the acquiring spouse has made a gift of an interest therein to the other spouse. Id. at 308.

The Petitioner has, by her efforts and expenses, contributed substantially to the enhancement, maintenance, and protection of the Bear Lake property, as identified in the trial court’s findings. When the parties were first married in 1970 and Merlin brought the cabin to the marriage, Louise testified to the nature of the land and the cabin as it was at that time: a small “A” frame cabin which consisted of two bedrooms and two loft bedrooms. TT. Vol. I, p. 43, Line 9-13. Louise then testified that in about 1980, the cabin has a total of seven (7) bedrooms with a garage being added. TT. Vol. I, p. 46, L. 21-23. Similarly, during the course of the marriage, a sewer line was put in which the residents paid for, TT. Vol. I, p. 48, Line 9-12, a gate and posts were added to the property, as well as turrets. As of 1996, the cabin has “been made to look like a castle type

of building now with the “A” frame being the old part that was in the center section.” TT. Vol. I, p. 48, Line 20-25. At some point during the course of the marriage, a new roof was also placed on the cabin. TT. Vol. I, p. 49, L. 10-12. Petitioner’s exhibits 2, 3, 4, 7, and 13 are photographs of the cabin taken throughout the parties’ marriage. These photographs demonstrate the incredible additions and improvements that occurred to this cabin during the parties’ 28-year marriage.

Louise testified that any and all monthly bills, utilities, and taxes on the cabin were paid for with marital funds. TT. Vol. I, p. 47, L. 18-25, p. 48, L. 1-3. Louise helped pay for the respective bills with her income from Social Security. TT. Vol. II, p. 325. Merlin also testified that the insurance on the cabin had both Merlin’s and Louise’s names on it. Therefore, if any damage was to occur to the cabin, any insurance payments would have been made jointly to Merlin and Louise. Contrary to appellant’s argument, Louise never contradicted herself. When Louise was asked, “[d]o you know for sure that marital funds were used for the Bear Lake property,” after a leading question was sustained, Louise testified that “household money” was used to pay the bills for the cabin. TT. Vol. I, p. 47, L. 10-25.

During the twenty-eight years that Louise and Merlin were married, when they and their respective families would go to this cabin, Louise testified to the following:

There was always lots of work to be done. I always cooked all the meals, washed all the dishes, cleaned the cabin, tried to make it an enjoyable weekend for everyone. I weeded in the yard. I eventually planted flowers, scrubs, and things in the yard to make it more beautiful. And then I took all

the laundry home. The bedding and everything, the towels and all and washed during the week while I was working. TT. Vol. I, p. 56, L. 4-11.

Judge Hansen found the above financial and labor contributions and efforts toward improvements by Louise to be sufficient to categorize the appreciation on the cabin as marital property.

The Court in Gardner v. Gardner, 748 P.2d 1076 (Utah 1988) stated another general rule: “Marital property encompasses all of the assets of every nature possessed by the parties, whenever obtained and from whatever source derived.” Id. at 1078. The Court in Woodward v. Woodward, 656 P.2d 431, 432-33 (Utah 1982) also emphasized that:

Whether a resource is subject to distribution does not turn on whether the spouse can presently use or control it, or on whether the resource can be given a present dollar value. The essential criterion is whether a right to the benefit or asset has accrued in whole or in part during the marriage.

Clearly, without specifically stating as such, the trial court found that Louise accrued a right to the cabin (the appreciation which accrued during the marriage) because of her substantial contributions to the asset for 28 years.

The cases have consistently followed the rule of law set forth in Mortensen. In Burt v. Burt, 799 P.2d 1166, 1169 (Utah App. 1990) the Court held that premarital property of a party is not beyond the court’s reach in an equitable property division. See Also Naranjo v. Naranjo, 751 P.2d 1144 (Utah App. 1988); Dubois v. Dubois, 504 P.2d 1380 (Utah 1973); Bailey v. Bailey, 745 P.2d 830 (Utah App. 1987); Argyle v. Argyle, 688

P.2d 468 (Utah 1984); Newmeyer v. Newmeyer, 745 P.2d 1276 (Utah 1987).

Appellant argues that the efforts Louise made to contribute to the cabin didn't rise to a level to classify the appreciation on the cabin as marital property. This determination however, is solely within the trial court's discretion. Dunn v. Dunn, 802 P.2d 1316 (Utah App. 1990) sets forth very specifically the efforts that can be considered by the trial court in determining a distribution of marital property. The Dunn Court refused to weigh financial contributions each partner made to the marriage in dividing marital property. It held that "[s]uch an analysis ignores contributions of love, encouragement, and companionship, which elude monetary valuation." Id. at 1322.

Louise testified that, at the time of the parties' marriage, her five (5) minor children and Merlin's four (4) children lived with the parties at their marital residence. TT. Vol. I, p. 18, L. 3-17. Louise testified that she was the primary caretaker of these nine (9) children TT. Vol. I, p. 18, L. 20-21, and "was employed with Merlin in most, in nearly all the jobs that he ever had during the marriage." TT. Vol. I, p. 19, L. 14-15.

Louise further testified that she was employed *with* the same employers as Merlin because he told her that "he needed [her] help in the jobs and so [she] went to support [her] husband." TT. Vol. I, p. 19, L. 19-24. Louise has a teaching degree, but gave it up in order to support her husband, and to "make the marriage work." TT. Vol. I, p. 19, L. 23-25, p. 20, L. 1-6. She sacrificed income, retirement, and most importantly: the opportunity pursue her dream of teaching. Louise has no retirement available to her

because she gave that up when she went to work at nearly every job Merlin held for twenty-eight (28) years. TT. Vol. I, p. 22, L. 17-21.

Louise was an equal partner in this marriage of twenty-eight (28) years. Her many contributions, although not of extreme monetary value, cannot be overlooked. Louise testified that Merlin has been fired consistently throughout the parties nearly twenty-eight (28) year marriage “from most of his jobs, from coast to coast.” TT. Vol. II, p. 293, L. 6-8. Louise was asked why she didn’t apply for jobs to supplement the parties’ incomes. TT. Vol. II, p. 292, L. 9-10. Her response was: “[b]ecause I needed to be with my husband to help him keep a job and support him in keeping employment. He always asked me to come in and help him.” TT. Vol. II, p. 292, L. 11-13.

A similar case to the one at hand arose in Rappleye v. Rappleye, 855 P.2d 260 (Utah App. 1993), the Court vacated an award of a hardware store to the party who brought the store into the marriage. The Court of Appeals found that the trial court never “considered [appellant’s] contributions in determining what financial benefits, if any, accrued to the hardware store by virtue of her contributions, financial or otherwise, during the period of the marriage.” Id. at 263. The trial court made specific and adequate findings as to the many contributions Louise made both to the marriage, and to the Bear Lake cabin. It was therefore not an abuse of discretion for the trial court to find that the appreciation on the cabin was a marital asset.

II. THE TRIAL COURT USED ITS EQUITABLE POWERS IN DETERMINING THE APPROPRIATE PREMARITAL VALUE OF THE BEAR LAKE CABIN AND THE APPORTIONMENT OF THE APPRECIATION THEREON.

Under §30-3-5, Utah Code Annotated (1953 as amended), the Utah Supreme Court as well as the Utah Court of Appeals has consistently held that “there is no fixed rule or formula for the division of property, the trial court has wide discretion in property division, and its judgment will not be disturbed on appeal unless an abuse of discretion can be demonstrated.” Mortensen v. Mortensen, 760 P.2d 304, 305-06 (Utah 1988); Bushell v. Bushell, 649 P.2d 85 (Utah 1982). Similarly, the Utah Appellate Courts “do not lightly disturb a trial court’s division of property in a divorce decree and will uphold a division made in accordance with the standards we have set and in the exercise of the trial court’s discretion ‘except where to do so would work a manifest injustice or inequity.’” Noble v. Noble, 761 P.2d 1369 (Utah 1988) (quoting Pusey v. Pusey, 728 P.2d 117, 119 (Utah 1986). See Also Newmeyer v. Newmeyer, 745 P.2d 1276, 1278 (Utah 1987). No manifest injustice or inequity will result if the trial court’s division of property is upheld. As the trial court’s Memorandum Decision indicates, great lengths were taken by the trial court to insure that the division of property was equal. See generally Memorandum Decision R. 101-108

The overriding consideration for the trial court in fashioning an equitable distribution of property is “that the ultimate division be equitable--that property be fairly divided between the parties, given their contributions during the marriage and their

circumstances at the time of the divorce.” Newmeyer v. Newmeyer, at 1278. Louise contributed 28 years of her life to the maintenance and enhancement of the family. As part of her contribution, Louise maintained the marital residence as well as the parties’ cabin to make it comfortable for everyone. Like many families, Merlin contributed his time and energy to building the additions to the cabin and Louise contributed her time and energy to the enhancement of the cabin, which included cooking, cleaning, laundry, yard work, and support and encouragement to Merlin.

Appellant argues that the trial court failed to apportion to Merlin his premarital interest in the Bear Lake cabin. However, as the court’s Memorandum Decision indicates, Merlin *was* awarded his premarital interest in the cabin of \$12,000. The trial court heard arguments from both parties on what they believed the value of the cabin was at the time of the marriage. However, the trial court rejected appellee’s argument that the original value of the cabin should be based on the valuation of the cabin for property tax purposes. The trial court also rejected appellant’s argument that the value at the time of the parties’ marriage is irrelevant. The trial court determined the current value of the cabin based on the following:

If the adjacent lot, which is the same size as the cabin lot was worth \$5,000 when initially sold [in 1974] and is now worth \$50,000, then by negative extrapolation, the cabin and its lot which is now worth \$119,000 would have been valued at approximately \$12,000 at the time of the parties’ marriage.
R. 104.

The trial court exercised its discretion in determining the value of the cabin before the

marriage. The trial court actually determined the value of the Bear Lake cabin and its lot based solely upon the testimony of appellant's appraiser. Appellee is at a loss to see how appellant can argue the trial court stated the cabin was entirely marital property. Clearly, Judge Hansen's Memorandum Decision awarded Merlin the value of the cabin (as determined by the court) at the time of the marriage. The court then determined the appreciation which accrued during the marriage to be marital property.

III. THE COURT DID NOT ERR BY REFUSING TO DIVIDE THE COST OF APPRAISALS OBTAINED BY THE RESPONDENT.

The petitioner is somewhat confused by this issue. Not only is the trial court, in its discretion, entitled make an distribution of costs but also the very case cited by the respondent specifically states that the trial court cannot assess appraisal costs. In Morgan v. Morgan, 795 P.2d 684, 687, the Utah Court of Appeals specifically stated, "Furthermore, our appellate courts make a distinction between 'legitimate and taxable "costs" and other "expenses," of litigation which may be ever so necessary, but are not taxable as costs.' For instance, neither land surveys nor appraisal fees, incurred in preparation for litigation, are recoverable as costs." Id. at 684 (quoting Frampton v. Wilson, 605 P.2d 771, 774.) All of the appraisals obtained by the respondent were in preparation for trial and, therefore, the court could not even consider the request made by the respondent for division of these expenses as costs apportionable by the court. No finding by the court is necessary when

the issue is a matter of law as set forth by a higher court.

**IV. THE TRIAL COURT MAY DENY POST TRIAL MOTIONS
WHEN THE COURT, IN ITS DISCRETION, BELIEVES
NO ADDITIONAL EVIDENCE IS NECESSARY.**

At the close of the two-day trial, appellant made a motion to re-consider the trial court's ruling and to re-open the trial to take additional testimony and evidence. As one of the reasons for this motion, Appellant alleges that the documentation regarding the monies which the parties received from the sale of the St. George property were solely within the control of Appellee.

The trial court's decision not to hear additional testimony is wholly within the trial court's discretion and will not be overturned unless a clear abuse of discretion has occurred. Katz v. Pierce, 732 P.2d 92, 93 (Utah 1986). While it is true that appellant's motion was filed before the entry of the final decree, it is not true that nothing in the pre-trial discovery or pleadings could have alerted appellant to the fact that large sums of money received and spent during the marriage would be at issue at trial.

The trial court decided to deny appellant's motion to hear additional evidence, particularly because this information could have easily been raised at trial. Appellant did have sufficient notice of each and every issue Louise intended to raise at trial. These issues were raised in Louises' Interrogatories and Requests for Production of Documents. Appellant failed to answer these requests in a timely manner, and in fact only provided

them to Louise halfway through the first day of trial. TT. Vol. II, p. 403, L. 5-22.

Appellant also alleges that he could not have anticipated information on the monies received from the sale of the parties' St. George property would be needed at trial, particularly where he alleges all the records pertaining to this issue were wholly within the control of Louise. This is simply not true. In fact, Merlin testified at trial that a joint bank account did not exist. He further testified that the funds from the sale of the St. George property was deposited into his separate account. TT. Vol. II, p. 466. Therefore, since this claimed information wasn't raised at trial, and was in fact, in Merlin's possession the entire time, Appellant's argument is without merit.

As the Supreme Court of Utah stated in Peay v. Peay, 607 P.2d 841, 843 (Utah 1980):

“[I]f the party ruled against were permitted to go beyond the rules, make a motion for reconsideration, and persuade the judge to reverse himself, . . . [i]n order to avoid such a state of indecision for both the judge and the parties, practical expediency demands that there be some finality to the actions of the court; and he should not be in the position of having the further duty of acting as a court of review upon his own ruling.” Id. at 843 (quoting Drury v. Lunceford, 415 P.2d 662 (Utah 1966)).

CONCLUSION

The trial court was well within its discretion in determining that the appreciation on the Bear Lake cabin was marital property. Judge Hansen found that Louise made substantial efforts towards the enhancement, maintenance and protection of the cabin during the parties' 28-year marriage. As such, the trial court did not abuse its discretion in

apportioning to Merlin the premarital value of the cabin and ultimately awarding to Merlin the entire cabin with an offset to Louise (in the form of other interests) of her marital interest in the cabin. The trial court also acted within its discretion by not dividing the costs of the appraisals which were solely incurred by Merlin and in denying Merlin's post-trial motions to take additional evidence.

DATED this 18th day of October, 1999.

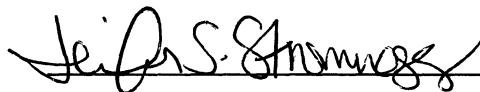


EMILIE A. BEAN
Bean & Smedley
Attorney for Appellee

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Brief of Appellee was mailed to the following, postage prepaid this 18th day of October, 1999.

Steven C. Tycksen
Zoll, Tycksen & Hall
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Sandy, UT 84091-0590



1 Q And you were married to the respondent in Salt
2 Lake City, Salt Lake County, Utah, on October 21st, 1970;
3 is that correct?

4 A That is correct.

5 Q And why did you file for divorce, Louise?

6 A The situation became so abusive and so
7 threatening. As my husband became increasingly more
8 militant, I had no choice but to try to file for divorce in
9 the best interest of everybody for the safety of all. He
10 was threatening myself as well as other people.

11 ● Did you believe he had the means to carry out
12 those threats?

13 A He certainly did.

14 MR. TYCKSEN: Objection. Irrelevance. Your
15 Honor, we will stipulate that there are grounds for
16 apparent irreconcilable differences and the testimony is
17 that she believes she suffered an amount of stress.

18 THE COURT: Is there any reason for additional
19 grounds?

20 MS. BEAN: Yes, your Honor. It goes to the issue
21 of alimony and that (inaudibles).

22 THE COURT: You may proceed.

23 MS. BEAN: The replacing of that really does not
24 cover it though.

25 Q (MS. BEAN) There are no children borne as issue

1 of this marriage, correct?

2 A That's true.

3 Q And you had five minor children prior to this
4 marriage?

5 A Yes, I did.

6 Q And Mr. Symes had four children who were living
7 with you, correct?

8 A That is correct.

9 Q Where was the fourth child?

10 A The fourth child was already previously married.

11 Q How old were your children at the time of the
12 marriage?

13 A My oldest child was fifteen and the youngest was
14 six.

15 Q And how old were Mr. Symes' children?

16 A The ones that lived with us would have been
17 seventeen down to about fourteen.

18 Q And who was the primary caretaker of these
19 children?

20 A I cared for all their needs; cooked their meals,
21 washed their clothes, sent them to school. I did for them.

22 Q Okay. Were you employed during the course of the
23 marriage?

24 A Yes, I was, with my husband.

25 Q By doing what?

1 A I was employed by European Health Spa during the
2 years in Florida, I was employed by Golden Villa Spa in
3 Salt Lake. I was employed for a brief time by his sister
4 when we entered the shop.

5 MR. TYCKSEN: Your Honor, my client can't hear
6 this testimony. She needs to speak louder.

7 THE COURT: Just speak up a little.

8 THE WITNESS: Okay. I was employed by European
9 Health Spas when we lived in Florida. I was employed by
10 his sister when we lived in Salt Lake, briefly at a dress
11 shop called Marie's. I was employed by Golden Villa Spa
12 when Merlin worked there. I was employed by Golden Villa
13 which took over Johnny Johnson's spas in Oregon when we
14 lived there and then I was employed with Merlin in most, in
15 nearly all the jobs that he ever had during the marriage.
16 I was also employed by Spa Lady in our years in California.
17 I was also employed by Mountain Coin where he worked in
18 Salt Lake.

19 Q (BY MS. BEAN) These are the same employers as Mr.
20 Symes?

21 A Yes, they were.

22 Q Why?

23 A Mr. Symes said that he needed my help in the jobs
24 and so I went to support my husband. I had an education to
25 teach but I gave that up in order to support him and make

1 the marriage work.

2 Q Okay. Did you have personal employment goals?

3 A Yes, I did. I planned to teach. I had a very
4 fine record with my education. I planned to carry on with
5 that. I could have built a good retirement had I not
6 sacrificed it.

7 Q Do you recall the most that you made per hour at
8 any of these --

9 A I started out at minimum wage on everyone of
10 them. And then I was kept on minimum wage. The bulk of
11 the larger amounts went into my husband's account and I
12 just basically supported him and started at minimum wage.
13 And then when I became a manager in California when we
14 worked for Spa Lady I was making more money. I would have
15 made the most money I've probably made during the marriage
16 then. I would have been paid on commission basis according
17 to what I sold.

18 Q Okay. When did you last work?

19 A I last worked in '92.

20 Q Okay. Why did you quit?

21 A I suffered a very severely broken leg and ankle
22 and ribs. I was in a wheelchair. I was unable to walk for
23 nine months and completely in the care of a caring
24 relative.

25 Q Who was that caring relative?

1 A Yes, I do.

2 Q And what is your current condition on those?

3 A My health has deteriorated greatly in the last
4 twenty-eight years, particularly in the last five and
5 especially in the last two. I have stomach ulcers. I have
6 many gastrointestinal problems. I have colon problems; a
7 spastic colon, irritable bowel. I suffer from interstitial
8 cystitis of the bladder which is a most painful condition
9 and there is no cure for it. I also suffered a heart
10 attack in the past and I have a rapid and irregular heart
11 beat now, yes, I do.

12 Q Okay. And is your condition agitated by stress?

13 A Yes. My doctors tell me it's all stress
14 oriented.

15 Q Okay. Do you have any medical insurance?

16 A Only Medicare and AARP.

17 Q Okay. Do you have any retirement income?

18 A No, I do not.

19 Q Why not?

20 A Because I was working at a job to support my
21 husband where there was no retirement income available.

22 Q Okay. You've asked for alimony, correct?

23 A Yes, I have.

24 Q Why?

25 A Because the church has had to help me with my

1 Judge Robert Hilder dated April 24, 1998. Is that the
2 order, counsel, that you are referring to?

3 MR. TYCKSEN: That's the order.

4 THE COURT: All right. The Court has a copy of
5 that. I read it and we'll feel leave to refer to it as
6 part of this proceeding if neither counsel objects.

7 MR. TYCKSEN: I have a copy of it marked as an
8 exhibit if you want it.

9 THE COURT: All right, thank you.

10 Q (BY MS. BEAN) All right. Let's back up just a
11 little bit. When did you and Mr. Symes (inaudible)?

12 A November 4, 1997.

13 Q Under what conditions did you separate?

14 A Threats and abuse on my life and on the lives of
15 other people. I had to leave the house. I was told I
16 would be thrown through the front door. I hadn't had my
17 trip to the front door yet. He made threats on judicial
18 people and his former employer and at some point I had to
19 start taking these seriously. I had discussed them with
20 professionals before.

21 Q Where was Mr. Symes living at the time?

22 A He was living at Layton, Utah, where he always
23 lived.

24 Q And where did the two of you keep your personal
25 property at Layton (inaudible)?

1 A The highway is right in my backyard. Highway 89
2 borders my backyard.

3 Q Okay. How old are you, Louise?

4 A I'm sixty-two, be sixty-three in January.

5 Q Okay. Let's move on to the Bear Lake Property.
6 It's your understanding that Mr. Symes originally owned
7 this property prior to the marriage, correct?

8 A Yes.

9 Q Okay. And when, at the time of your marriage
10 what was the nature of the property?

11 A The nature of the property, there were no grass,
12 no scrubs, anything put in. It was a small "A" frame cabin
13 that had two bedrooms with two loft bedrooms.

14 Q How many lots?

15 A I thought there were two separate lots. There
16 was one that was undeveloped that joins onto the Northern
17 side.

18 Q Okay. Where is this property located in
19 direction to the lake?

20 A It's right on water front. It's right on the
21 lake.

22 Q Okay. All right.

23 THE COURT: Counsel, I'd be interested in knowing
24 which side of the lake?

25 MR. TYCKSEN: On the East side of the lake.

1 of the cabin, it looks like there is some boat storage
2 underneath there, is that right?

3 A Yes.

4 Q And there are some boats there?

5 A Yes. There were canoes, catamarans, that type of
6 thing, stored under the porch.

7 MS. BEAN: Okay. Can I approach the witness,
8 your Honor?

9 THE COURT: You may.

10 Q (BY MS. BEAN) I'm going to show you what has
11 been marked at petitioner's Exhibit 3, we would also ask
12 that the record reflect that (inaudible). Can you identify
13 that picture for us, please?

14 A Yes. This is another photo of the cabin at Bear
15 Lake. The yard was still not developed. Merlin is
16 standing out in the front yard, he's walking along. This
17 was taken about 1980 after we returned from employment with
18 Spa Lady in California, and the stained glass windows, the
19 garage, and the addition is being made at that time to the
20 cabin.

21 Q Okay. Were there bedrooms added at that time?

22 A Yes. It now has a total of seven bedrooms.
23 There were three additional added and a garage.

24 Q All right. And that would have been prior to
25 1980 according to that photo?

1 A We returned during the Fall of '79 from
2 California. So this photo was probably taken about early
3 in 1980.

4 Q Okay. How old were Mr. Symes' sons in 1980?

5 A Craig was born in '55 and Scott in '53 so they
6 would have been about 25 and 27.

7 Q Okay. To your knowledge how was the addition
8 paid for?

9 A I don't know.

10 Q Okay. Do you know for sure that marital funds
11 were used for the Bear Lake property?

12 A Yes.

13 MR. TYCKSEN: She's already testified she doesn't
14 know. I think counsel is leading the witness.

15 (All Talking)

16 THE COURT: I'm going to sustain the objection in
17 terms of leading the witness.

18 Q (BY MS. BEAN) All right. Louise, did you ever
19 pay for anything?

20 A Yes. We always paid the utilities and taxes. I
21 paid the utilities along with monthly bills at the cabin.

22 Q When you say you paid for them?

23 A Out of household money that we were to pay, our
24 money, that we were to pay our bills with. I was employed
25 at the time, too. Some of mine would have gone into the

1 bills that I paid.

2 Q Okay. And do you have checks to show that?

3 A I did have.

4 Q Where are they?

5 A They were taken from my house.

6 Q Okay. In addition to the physical improvements
7 in the actual cabin, where there also improvements made by
8 Bear Lake Association?

9 A Yes. During the course of the marriage there was
10 a sewer line put in and that would have been at quite a
11 substantial cost. That came in during the course of the 28
12 years.

13 Q Okay. Do you know who did that? Did the city or
14 did the residents?

15 A No. The residents had to pay for it, the
16 residents that owned the property.

17 Q I hand you Petitioner's Exhibit 4, (inaudible)
18 and I'd also ask that the record reflect that Mr.
19 (inaudibles). Can you identify that picture?

20 A Yes. This is a very recent picture of the cabin
21 at Bear Lake. This is a lot like what it looks now. It
22 had the addition of the gate and some posts and some
23 turrets. It's been made to look like a castle type of
24 building now with the "A" frame being the old part that was
25 in the center section.

1 Q Okay. Do you know about when this photo was
2 taken?

3 A This would have been taken probably in 1996.
4 This is one of our granddaughters in front, Charlena and
5 two of her friends as they went to the cabin. They are
6 standing by the gate.

7 Q And what's been added to the cabin specifically
8 since the last photograph?

9 A More turrets and more castle like equipment.

10 Q Okay. What about the roof?

11 A It had a new roof from these early pictures. The
12 roof was replaced with longer lasting shake shingles.

13 Q Okay. All right. To your knowledge who paid for
14 these improvements?

15 MR. TYCKSEN: Objection. Foundation. Assumes
16 she knows who paid for it.

17 THE COURT: I'm going to sustain that objection.
18 But lay a better foundation and then re-ask the question.

19 Q (BY MS. BEAN) Do you know who paid for that
20 improvement on the roof?

21 A Merlin would have paid for them.

22 Q Okay. Do you know what funds he used?

23 A No, I don't.

24 Q Do you know what account that came out of?

25 A No, I don't.

1 Q Why don't you know?

2 A Because I never had a joint account and he was,
3 he usually dealt in cash and he never told me what he was
4 doing with his money. He didn't really want to tell
5 anybody about it.

6 Q Okay. Was any portion of this property sold
7 during the course of the marriage?

8 A Yes. The part that would, as I'm looking at the
9 photo, that would be on the left. An undeveloped piece of
10 property to the left going North toward Fish Haven was sold
11 to Gordon Reynolds for \$5,000 when Merlin accepted a job in
12 Florida, in 19 --

13 Q Okay. How do you know how much that was sold
14 for?

15 A We paid, he used that \$5,000 to finance the trip,
16 a, the move to Florida when he accepted a job with European
17 Health Spa in 1971.

18 Q Okay. You told the Court there were two lots.
19 Are there now two lots (inaudible)?

20 A When we moved back from Florida in '74 we wanted
21 to repurchase that land and it was repurchased from Gordon
22 Reynolds for in excess of \$20,000, to my knowledge.

23 Q How do you know?

24 A Merlin paid for it and he told me that he was
25 going to buy it back but it was going to cost him, cost us

1 Q Is that sufficient? Okay. During the course of
2 your marriage when you would go up to this property what
3 would (inaudible).

4 A There was always lots of work to be done. I
5 always cooked all the meals, washed all the dishes, cleaned
6 the cabin, tried to make it an enjoyable weekend for
7 everyone. I weeded in the yard. I eventually planted
8 flowers, scrubs, and things in the yard to make it more
9 beautiful. And then I took all the laundry home. The
10 bedding and everything, the towels and all and washed
11 during the week while I was working.

12 Q Okay. Was this cabin for recreational purposes?

13 A Yes, it was.

14 Q Did people recreate there?

15 A Oh, yes, yes.

16 Q What did they do?

17 A They went water skiing and jet skiing and sun
18 tanning and boating and played in the water.

19 Q Okay. Was there equipment there to do that?

20 A Yes, there certainly was. Much equipment.

21 Q Okay. Like what?

22 A There were multiple boats. At one time there
23 were, as I recall, at least five nice boats and that would
24 not include the sail boats nor the catamaran nor the
25 canoes. There were also recreation vehicles.

1 himself out of the house.

2 A There was an "L" shaped cut in the screen door
3 and he had reached through to a handle and I asked him to
4 replace the screen in the garage door or in the sliding
5 kitchen door which was done.

6 Q And how long ago was that?

7 A That was a few years back before he left the
8 house.

9 Q Can you explain why you didn't apply for other
10 jobs?

11 A Because I needed to be with my husband to help
12 him keep a job and support him in keeping employment. He
13 always asked me to come in and help him.

14 Q Okay. And then counsel asked you if you thought
15 it was fair that you would get the house and Merlin would
16 get the cars and I think the pile of metal in the driveway.
17 What are you actually proposing?

18 A The home has been my only source of security in
19 28 years. We have moved up and down.

20 MR. TYCKSEN: Objection, your Honor, non-
21 responsive. If she could just answer the question--

22 THE WITNESS: It is has been my only source --

23 THE COURT: Just a moment. The objection is
24 sustained. So counsel indicated to you what it is she
25 proposes and if you wish to get into the reasons you can

1 then ask her then.

2 MS. BEAN: Maybe I'll ask her specific questions,
3 your Honor.

4 Q (BY MS. BEAN) Do you believe you have an
5 interest in the Bear Lake cabin?

6 A Yes, the improvements during the time of the
7 marriage. I worked very hard up there.

8 Q Okay. Do you believe that Mr. Symes had an
9 interest in the marital residence?

10 A He's never wanted to live there.

11 Q But a legal interest?

12 A Probably.

13 Q So, are you proposing that he keep the cabin and
14 you keep the house?

15 A Yes. That would be in good interest to all.

16 Q Okay. And you're also proposing that he keep his
17 cars, his boats, his jewelry, his toys?

18 A Yes, I would want him to have those.

19 Q All right. Are you in a position where you could
20 go live with one of your children?

21 A No, I could not.

22 Q Why not?

23 A My children are renting. My children are not in
24 a good financial situation. I cannot --

25 Q Could you live with them if you rented your home?

1 THE COURT: Would you return to the witness
2 stand, please, Ma'am.

3 Q (BY MR. TYCKSEN) I believe on redirect
4 examination you said that you had been receiving Social
5 Security disability since 1993?

6 A That is correct.

7 Q And that you've been receiving more or less \$390,
8 probably a little less earlier and it has gradually come up
9 to \$390; is that right?

10 A That is correct. It started out at just a little
11 over \$300.

12 Q What have you done with the \$390 each month since
13 you've started receiving it?

14 A Using it to pay bills, food, medicine, household
15 things totally.

16 Q Where do you deposit that money?

17 A It was deposited in my bank and sometimes the
18 checks were just cashed and I went and paid bills.

19 Q Okay. When did the bank statements that you had
20 in your home get stolen?

21 A During, well, I noticed them during the course of
22 this last year.

23 Q So when was the first time you noticed it?

24 A I noticed it when I started cleaning out the
25 house because I had kept them in a specific bag for a

Q In the past. Let me hand you what has been marked as Petitioner's Exhibit 26. And ask you if this shows (inaudibles) any other time. That's the insurance document that's (inaudibles), correct?

A This is a copy of the insurance on the cabin and her name appears there and the reason why is because in order to insure the cabin you have to have a permanent residence that's insured also and then it's put on as like an auxiliary.

Q Okay.

A And our home in Layton on Woodridge Drive is in both of our names and consequently, I guess, if this is a copy of the insurance for Bear Lake that's probably the reason why her name's on it. That would be the only reason why her name would be on anything.

Q Did you ever purchase a boat from your son, Craig?

A Did I ever purchase a boat from Craig?

Q Uh-huh (affirmative).

A No, I did not.

Q Never?

A Well, we talked about it last night but I apparently suggested maybe he sell it to me but I never received it. He sold it to someone else.

Q Who did he sell it to?

denied access to all of his records. He has a brain damage injury. He's subject to remembering what he can remember. I've had to meet with him repeatedly to get answers to those interrogatories.

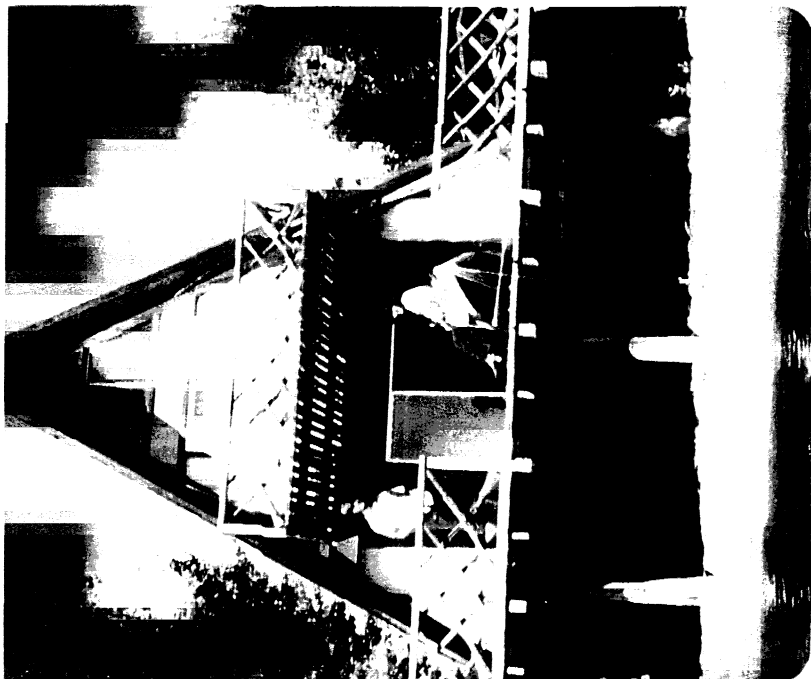
THE COURT: Well, if the interrogatories were in August and we're now in October, that's two months ago and, counsel, you recognize that those answers are to be filed within 30 days and if indeed you need more time you could have petitioned the Court and gotten a stipulation from Plaintiff's counsel. Correct?

MR. TYCKSEN: I believe I had two weeks in the hospital during that period of time and it was right about the time they were due to be responded to and that's the time when we had the last continuance and when I got back to work I was overwhelmed with things. I'm a sole practitioner. I did everything I could to get my client and he was on vacation. When he returned we worked at it as fast as we could and last Friday I thought I was close to having them finished. He came in on Monday, we made some additional changes, and on Tuesday he came back to sign them and then I wasn't able to get them to her on Wednesday.

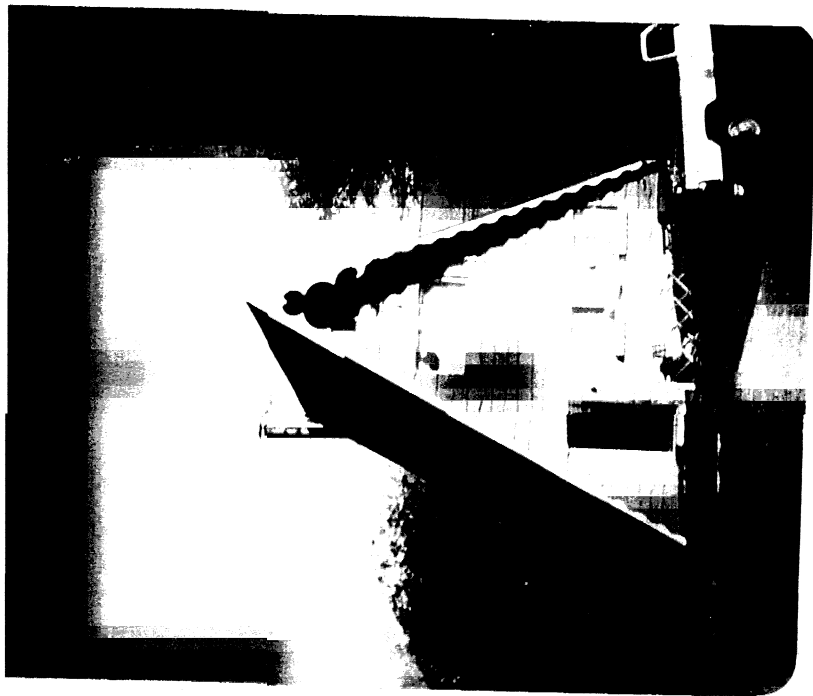
THE COURT: And you have documentation to show that title is in the name of someone other than defendant?

MR. TYCKSEN: I do. I have the deed and --

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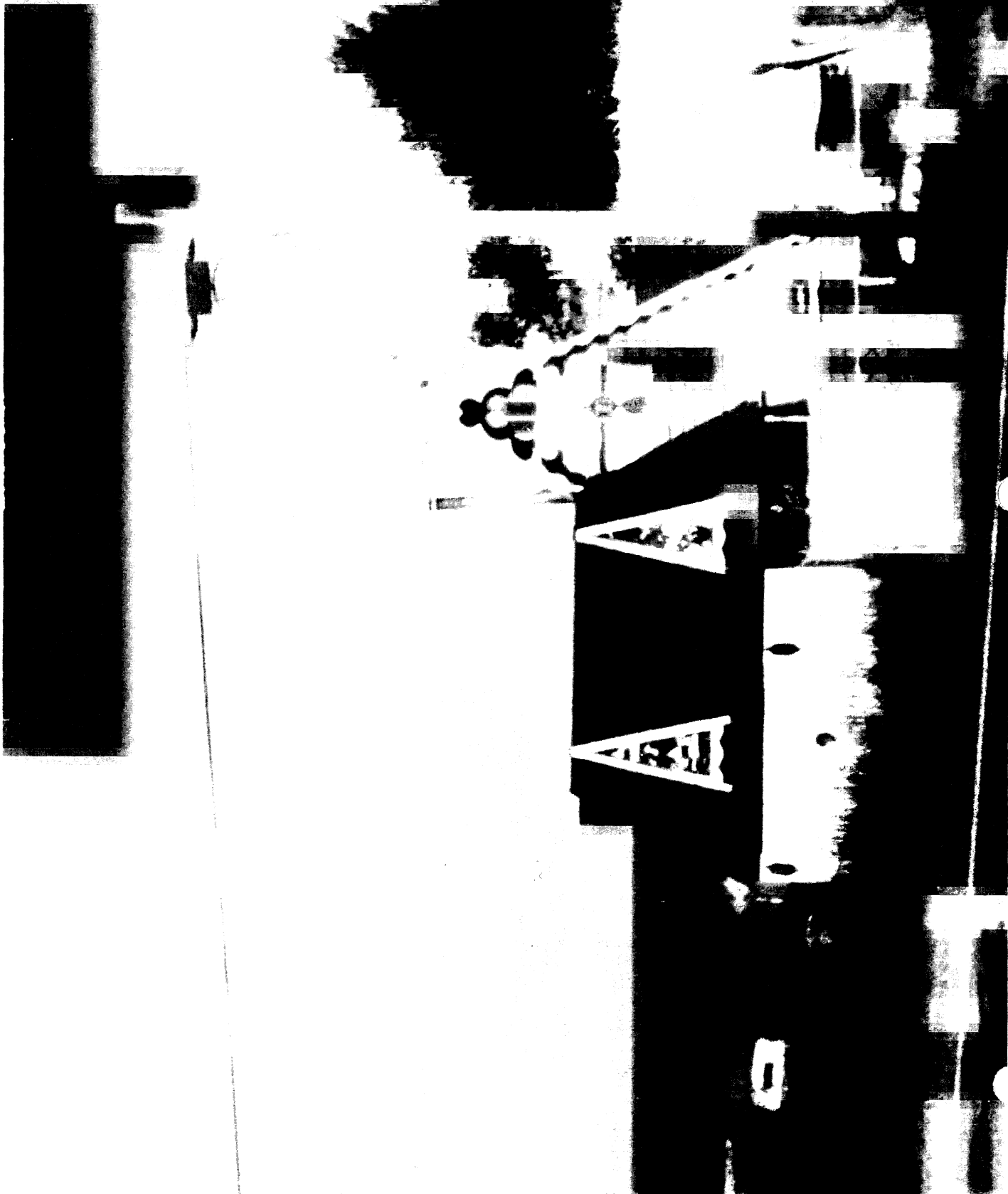
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EXHIBIT NO. 774 102275
CASE NO. 10/2/92
DATE REC'D 60 P
IN EVIDENCE
CLERK



PLAINTIFF'S EXHIBIT
EXHIBIT NO. 52
CASE NO. _____
DATE REC'D
IN EVIDENCE _____
CLERK _____



PLAINTIFF'S EXHIBIT
EXHIBIT NO 47
CASE NO _____
DATE REC'D _____
IN EVIDENCE _____
CLERK _____





PLAINTIFF'S EXHIBIT
EXHIBIT NO. 11
CASE NO. _____
DATE REC'D _____