

1980

Joel H. Izatt v. Mary C. Izatt, By and Through Her Guardian and Conservator, Kenneth G. Clark : Brief of Respondent and Cross-Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

JOEL H. IZATT,)	
Plaintiff, Respondent)	
and Cross-Appellant,)	
vs.)	Case No. 16882
MARY C. IZATT, by and through)	
her Guardian and Conservator,)	
KENNETH G. CLARK,)	
Defendant, Appellant)	
and Cross-Respondent.)	
)	

BRIEF OF RESPONDENT AND CROSS-APPELLANT

Appeal from the District Court of Salt Lake County
The Honorable Homer F. Wilkinson, Judge

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NATURE OF THE CASE

This is a divorce action. Each party sought a divorce from the other, and each sought property distribution and incidental relief.

DISPOSITION IN THE LOWER COURT

The case was tried before the Honorable Homer F. Wilkinson. The first day of trial was held on May 31, 1979, and the trial was completed on the 2nd day of trial, which was August 21, 1979. At the conclusion of trial, the Court granted each of the parties a divorce on the grounds of mental cruelty; custody of the four minor children of the parties was (pursuant to stipulation) awarded to the plaintiff with reasonable visitation in the defendant; and the Court took under advisement the other issues pending submission of memoranda. With respect to the issues thus determined, the Court entered Findings of Fact, Conclusions of Law (R67-70) and a Decree of Divorce (R77,78) on September 14, 1979. In accordance with the Court's prior determination, the Decree awarded each of the parties a divorce, awarded custody of the children to the plaintiff, subject to reasonable visitation in the defendant, directed that the foregoing provisions be final on entry, and noted that all other issues had been taken under advisement.

Thereafter, on October 5, 1979, the Court filed its

Memorandum Decision (R98-100), and proposed Findings, Conclusions were then prepared (R153,158) each of the parties having theretofore submitted memoranda as requested by the Court at the trial (R104-119) and (R49-63), and both parties filed motions objecting thereto. Defendant's objections are found at R146-148 and R163-164, and plaintiff's objections are found at R151-152. A hearing was had on these objections on October 16, 1979, (R150) and the Court directed that the defendant submit a written memorandum in support of her position by October 19 and that the plaintiff respond thereto by October 26. The defendant submitted her Memorandum on October 23, 1979 (an extension having been granted) (R176-180) with a proffered Affidavit (R182-190). Plaintiff filed his response October 26, 1979, (R165-172) along with a Motion to Strike the aforesaid Affidavit (R173-4). The matter was then argued orally on October 29, 1979, and the Court took the objections under advisement. (The Court disregarded said affidavit (R288-9))

The Court thereupon entered an Amendment to Memorandum Decision on December 14, 1979 (R191-92). Thereupon the Supplemental Findings of Fact and Conclusions of Law were entered on January 15, 1980 (R220-225), in accordance with the Court's Memorandum Decision (R98-100) as amended (R191-192), and a Supplemental Decree entered the same date (R226-230).

The Supplemental Decree granted plaintiff the following property, to-wit: Furniture - \$3,000; automobile (van) - \$6,000; savings account - \$488.76; checking account - \$200; and other

miscellaneous personal and business property. The Court awarded the home to the plaintiff, subject to a \$13,500 lien in favor of the defendant, payable when plaintiff sells the home, ceases to use it as a residence, or when the youngest child reaches majority, whichever occurs first; a vested profit sharing plan in the amount of \$124.57 and a vested stock plan in the amount of \$108.78, one-half the cash value of the life insurance (\$5,032). (The values are those found by the Court.)

The defendant was awarded jewelry - \$4,000 and miscellaneous personal property. She was awarded \$1.00 per year alimony. She was awarded \$97,320.22 cash, and she was awarded a \$13,500 lien against the house, and was awarded one-half of the cash value of the life insurance of \$5,032.00. (The values are those found by the Court.)

The plaintiff was ordered to pay the debts of the parties in the sum of \$7,310.45, and each of the parties was required to assume one-half of the debt to the plaintiff's parents, which amounted to \$5,102.50 each.

The Court stated in its Findings of Fact (Paragraph 19) that:

"The Court finds that the plaintiff has sustained trauma and medical problems resulting from the defendant's injuries and condition as a result thereof; The Court has taken this into consideration, together with the responsibility and the expense which plaintiff will have in raising the minor children in determining what is fair and equitable between the parties." (R223) (Substantially the same

provision is set forth in the Court's Amendment to Memorandum Decision (R192).

Thereupon defendant filed a Notice of Appeal (R231) and plaintiff filed a Statement of Points on Cross-Appeal (R241,242).

Note: The sum of \$97,320.22, the total net proceeds from the malpractice action (after attorney's fees and costs) was derived in two phases. The sum of \$85,346 was received by reason of settlement with the anesthesiologist (R41,43) and is the sum covered in the original Memorandum Decision (para. 8 at R99).

At the time of the oral arguments on October 29, 1979, dealing with the objections of the parties to the Court's proposed Findings and Conclusions, the second phase of the malpractice action had been settled for \$21,000 against the hospital and the Court duly advised (R255,267).

Thus the Court, in its Amendment to Memorandum Decision, (R192) with the total settlement before him, awarded defendant not only the original \$85,346, but also gave her all of the net proceed from the second phase of approximately \$12,000 (para. 1 at R191). The final net amount after attorney's fees and costs turned out to be \$11,974.22 (R216,219) for a total thus of \$97,320.22. In so doing the Court reduced the defendant's lien against the house by the sum of \$13,500 to a total lien of \$13,500. (In the said Amendment the Court also increased the amount payable to the parents from \$4,930 to \$10,205, with each required to pay one-half thereof. This amounted to an increase of \$2,637.50 to each party for this item.)

RELIEF SOUGHT ON APPEAL

In her appeal the defendant and appellant raises three issues: (1) that the plaintiff should not be awarded a divorce; (2) that the defendant should not be ordered to repay to the plaintiff's parents \$5,102.50, or any sum; and (3) that the defendant should have been awarded a larger lien against the property than the \$13,500 decreed by the lower court.

On appeal the plaintiff-respondent and cross-appellant seeks to have all of the aforesaid decisions affirmed as far as they go, and in addition asks the Supreme Court: (1) to reverse the lower court in awarding a lien of \$13,500 to defendant and contends that no lien should have been awarded to defendant; and (2) asks this court to direct that the parties repay the loan from plaintiff's parents in the full amount of \$13,205, (rather than just \$10,205 as ordered by the Court) and asks that this sum be repaid from the fund of \$97,320.22 (or in the alternative, that each of the parties pay one-half thereof, or \$6,612.50 each.)

STATEMENT OF FACTS

Plaintiff takes issue with defendant's statement of facts as being incomplete, inadequate and in some respects totally in error. For example, defendant does not even refer therein to plaintiff's serious and prolonged medical problems, both physical and emotional. As to the effect of defendant's brain damage and

psychosis on the family (and its resulting stress upon the lives of the parties and the children) defendant devotes one sentence (see page 3 of defendant's brief): "Defendant experienced some difficulty performing household chores."

We respectfully submit that it is necessary for the court to more fully understand the overwhelming problems this unfortunate couple has gone through and which they still face in order to reach a proper decision in this case. We will therefore attempt to set forth a more complete statement of facts, and we will attempt to note the errors contained in defendant's statement of facts in the areas to which they relate.

DEFENDANT'S HEALTH:

In May 1973 the defendant was hospitalized, and while she was undergoing an operation, she suffered two massive cardiac arrests on May 3, 1973 (R298-299). Medical personnel were able to sustain her life, but she was left severely mentally impaired, and we will set forth a description of her condition as reported by various witnesses at the trial:

Plaintiff:

The plaintiff stated that when defendant was brought home after physically recovering from the aforesaid cardiac arrests, that she did not recognize her mother or her children (R303); that he brought home a totally different person, and that it took approximately two and one-half to three years before she could

speaking full sentences (R303). From the time he brought her home until January or February 1974, she would mostly just sit and stare and was of no help in the home (R304). She had lost her former typing skills and was unable to carry on her former activities (R305). She could not cook or do household chores (R304).

The plaintiff stated that in about January of 1974 defendant exhibited psychotic behavior and was admitted to the University Hospital (R305) where she remained for about one month fulltime and approximately one month more parttime (R306-307). The behavior that prompted this hospitalization was that the defendant tried to run away, tried to take off her clothes and run in the snow and attempted to meet with imaginary people, and to hide in the closet (R305). Defendant did not appear to know who her children were and she would avoid them; for example, when they would come into the room, she would go into another room (R305). At that time she was treated by Dr. Paul Wender and was given substantial doses of medication (R306-307). Plaintiff elected to bring defendant home rather than to have her institutionalized (R306), but it was necessary to get a housekeeper to care for the defendant and the children. He obtained Elinor Cheever, a registered nurse and friend of the defendant, who came into the home to help and remained for approximately four years. Her expenses were paid by the LDS Church (R320-321). With the help of Mrs. Cheever, the defendant learned to

do the washing, learned to do some mending and housecleaning and learned to assist with meals, learned to take care of herself personally in an improved way (R321) and also was able to assist in taking care of the children (R322).

During the summertime Mrs. Cheever remained in the home during the day and until the plaintiff returned from work. During the school months she came in the morning and helped with breakfast and then came again in the afternoon and stayed to assist with the evening meal (R322).

The plaintiff stated that finally the defendant appeared to reach a plateau in her improvement (R360) and he thought defendant would need care from then on (R362). She was admitted as a patient at the Plantation Nursing Home in August of 1978 (R365), and she has improved in some areas while at the Plantation (R364). Defendant is approximately 41 years old (Ex.6-P).
Andrew Fisher, Psychiatrist:

Dr. Andrew Fisher, a practicing psychiatrist, stated that he had treated the defendant since she entered the Plantation Nursing Home. His diagnosis was that she had organic brain damage due to cardiac arrest or pschosis, or both (R413,414). She came to the Plantation Nursing Home with a history of not having taken care of her children very well and not doing her day-to-day duties very well (R414). She became better in the nursing home, and her medication was eventually reduced from 400 mg. of Meloril to 300

mg. (R414-415). He advised that the improvement took place in the structured nursing home setting and cautioned that if much responsibility or much pressure were given to defendant, she might regress (R415). Defendant had difficulty when they attempted to reduce her medication (R416).

Dr. Fisher stated that in his opinion she would never recover to the extent of her former abilities, but was making slow, but gradual progress in the nursing home situation, which (he noted) was less stressful than at home (R416,417). He thought it unlikely that she would ever be off her medications (R417) and that it was unlikely that she would ever be self-sufficient (R415,419). At page 419 of the transcript, Dr. Fisher was asked, "Do you think it also totally unlikely that she will ever be able to function as a wife and mother of the family?", to which he replied, "I think she could possibly function as a wife, but I think she would have difficulty handling the responsibilities of children."

When asked whether he felt that the defendant would ever be able to handle the physical side of the marriage, he answered that that issue was speculative, but he thought that there would be problems (R419).

Elinor Cheever:

Elinor Cheever, a registered nurse, stated that she was a very good and close friend of the defendant since before the

defendant's injuries (R440). She stated that after defendant's injuries, she was often in the home and determined that the defendant was unable to cook or keep house and stated that it was much like putting a child in charge of a home (R441). She stated that the plaintiff tried to keep the family together (R442). For the last four years she had served in the home during the days and occasionally at nights and was still caring for the children at the time of trial.

In her employment in the Izatt home, Mrs. Cheever said that she attempted to rehabilitate the defendant to a level that she could be a fulltime wife and mother (R442) and that she tried to be a model for the defendant in disciplining the children, in running the home and in purchasing for the home (R444). The defendant made some improvement and got so that she could purchase items at the store (R445), but she was never able to drive. She was able to make her bed and wash clothes, but never did learn to iron or follow recipes, nor to do much cooking (R445). Mrs. Cheever's work with the defendant was the most "difficult responsibility" in her entire life (R446). The defendant had difficulty expressing love for the children (R446) and defendant's discipline was not appropriate and it lacked consistency (R446,447). Mrs. Cheever said at R446: "It was not uncommon really to see her snatch a handful of hair out of Camille's hair, and she was a little girl without a whole lot of hair. And I

recall saying to Mary, 'There are better ways to discipline.'" She stated that the children had difficulty with defendant's discipline and they appeared to interpret her behavior as showing favoritism (R460). The defendant was able to show little affection for the children (R462). Over the years she has improved somewhat (R462) and particularly defendant could enjoy humor again and seemed to enjoy life more; she also improved socially somewhat and became more pleasant (R461).

Dr. Paul Wender, Psychiatrist:

Dr. Paul Wender, a professor of psychiatry at the University of Utah, testified that he cared for the defendant from the time she was hospitalized at University Hospital in January 1974 (she was hospitalized for approximately six weeks) until approximately July 1978 (R449,450,452).

Dr. Wender's diagnosis was that the defendant suffered from a significant degree of brain damage and extensive psychosis (R450). He stated that medication helped the psychosis, but the brain damage was not helped thereby. Defendant continued to suffer impaired memory, impaired social judgment, impaired recall of emotional responsibilities to her husband and to her children, all of which the doctor stated indicated brain damage (R450,451).

He further stated that the prolonged use of defendant's medication can cause brain damage in itself, so he tried to reduce the dosage, but when he got below a certain minimum "psychotic

halucinations would occur, halucinatory and auditory, and she would display a bad social judgment, such as a psychotic basis of hearsay injuries, the kids, physically going after them with a baseball bat, or things like that . . . " (R451).

Dr. Wender finally got her to a level of between 300 and 400 mg. of meloril per day (R452), and although there had been measurable improvement, it was not substantial (R453). He stated that in brain damage cases, it is not likely that much improvement occurs after two years (R453) although some improvement may continue in the area of her psychosis after two years (R458). Dr. Wender's conclusion at page 454 of the record (when asked whether or not defendant would ever be able to function in a normal capacity as a housewife) was as follows: " . . . my opinion is that she will never be able to function in that capacity." When asked, "Do you think that she will have the ability to care for the children?" he answered, "The probability, exceedingly nil." (R454).

Dr. Wender recommended institutionalizing defendant, but realized that it was hard for plaintiff to accept that alternative at first, and he had therefore had to present that matter of institutionalization of defendant to the plaintiff in a gradual way (R454-456). Dr. Wender brought in Dr. Lynn Clark as a consultant (who had much experience with brain damage cases) and Dr. Clark concluded that defendant suffered from loss of spontaneity, loss

of emotional expression towards plaintiff and the children and bad social judgment, and concluded that she was suffering from brain damage (R453,454).

Kenneth Clark, Defendant's Uncle and Guardian:

Kenneth Clark stated that defendant had made some improvement while at the Planation Nursing Home (R470).

Christine Miller Ferguson:

Mrs. Ferguson, a social worker at the Plantation Nursing Home (R481), testified that the plaintiff had stated that he wanted to institutionalize defendant because she was being disruptive at home (R483). Plaintiff told her that he did not want to upset the defendant by letting her know that she was going to be institutionalized permanently at the time she was first brought to the Plantation, and she also stated that the plaintiff had told her that he was not going to divorce defendant when she was institutionalized in August 1978 (R484). Mrs. Ferguson apparently took issue with plaintiff's not being more frank with the defendant about her admission at the Plantation. In this connection she was asked at page 501 of the record: "And whether the means of getting her admitted you thought peculiar or not, you don't and did not then and don't now quarrel with the fact that was an appropriate step to take, do you?", to which she replied at page 502, "No." She stated that the plaintiff was very upset and under much stress when the defendant was admitted (R500). Mrs. Ferguson stated

that the defendant had made considerable improvement while at the Plantation Nursing Home, that they had been able to reduce her medication from 400 to 300 mg. of Meloril (R485). The defendant was employed in a program at the nursing home where she assisted in the laundry and also worked at an inquiry center in a job similar to a librarian and had done some staff baby sitting (R485,486). Present plans for defendant called for her to begin secretarial training at Trade Tech in September 1979 (R486); that although her skill levels were low, the defendant was making progress in her typing skills, working on her memory and her budgeting skills and stated that her memory had improved and her grooming practices and sociability has improved (R486).

Mrs. Ferguson did not recommend that the defendant leave the nursing home as of that time (R487) and in fact stated at R487 that she didn't think that she would ever be able to leave the nursing home, but felt that she could be trained to become "capable of earning a livelihood " (R487), but stated that there was some question about her earning ability (R487).

PLAINTIFF'S HEALTH:

Plaintiff:

Plaintiff testified that he had been hospitalized in 1974, 1975 and 1979 with ulcer and stomach problems (R327), and that tension, worry and concern had led to removal of his stomach. (R327)

David L. Egli, M.D.:

Dr. David L. Egli, a psychiatrist, testified that he first saw plaintiff when plaintiff was hospitalized for gastric problems in April 1979. Plaintiff was suffering from depression and Dr. Egli administered anti-depressant medication. Shortly thereafter, due to an adverse reaction to this medication, he had to hospitalize the plaintiff (R344,345). Dr. Egli diagnosed plaintiff's condition as reactive depression. Plaintiff probably had a tendency for deprssion, he said, but his condition was caused "especially by stress situations that he had undergone in the past few years." (R346).

Dr. Egli further stated that these stresses not only cause depression and the nervous condition which he observed in plaintiff, but also likely manifested themselves in plaintiff's physical ailments as well (R346). Dr. Egli felt that the granting of a divorce in this case would probably result in an improvement of plaintiff's depression and anxiety (R347), and he stated that plaintiff suffered from an "ongoing condition characterized by a sense of inadequacy, depression, helplessness, so forth," (R349) and he felt that six months' psychiatric treatment would be necessary to overcome this problem (R347,349). Dr. Egli stated that he did not see evidence of the existence of these conditions prior to defendant's illness, except that he felt that plaintiff might have a "tendency" for such problems (R350). Dr. Egli had recom-

mended family therapy for the children at the LDS Hospital Out-patient Psychiatric Department (R348).

Ralph L. Tingey, M.D., Internist:

Dr. Ralph E. Tingey, a specialist in internal medicine, (R352) stated that he had treated plaintiff for approximately five and one-half years (R352) and had hospitalized plaintiff for duodenopeptic ulcer in 1974 (R353). Dr. Tingey had hospitalized the plaintiff in 1975 for abdominal pain and had determined at that time that the pain was not organic in nature, but rather "psycho-physiological" in nature and had referred plaintiff to psychiatrist, Robert Burgoyne (R354). Dr. Tingey also saw plaintiff in 1979 as a consultant to Dr. McAllister, a surgeon. Plaintiff was then complaining of abdominal pain (R354) and it was determined at that time that plaintiff had "functional bowel obstruction due to emotional psychological problems causing the pain." (R355). Dr. Tingey further stated that he had seen plaintiff from August 1975 to April 1979 (other than in connection with said hospitalizations) for "abdominal pain, diarrhea and functional bowel complaints." (R355). Dr. Tingey stated that plaintiff had had most of his stomach removed in 1974 by Dr. McAllister because of duodenal ulcer. Dr. Tingey felt that the operation cured the ulcer per se, but stated that the plaintiff has had ulcer syndrome since that time, particularly what he described as a "dumping syndrome," (R356) and he stated that dumping syndrome meant: " . . . because

of the rerouting of the food stream in the intestinal tract, food would dump quickly from his stomach into the intestinal tract. This is quite common, and this disturbed him for a long while and caused diarrhea. And this is always made more severe by emotional disturbance." Dr. Tingey said the majority of the plaintiff's symptoms had been due to emotional stress resulting from the defendant's condition, and in his opinion the divorce would help his condition. Dr. Tingey was asked on cross-examination (on the subject of the stresses on plaintiff): "If his wife's illness is one of those causes and the divorce is granted and he is no longer married to her, well, that will relieve some of the stress, I suppose?", to which Dr. Tingey stated: "I think that is right." (R358). Dr. Tingey said plaintiff's recovery will be gradual, (R358) and he felt that plaintiff "probably will always need some medical attention and care, although certainly not the kind he is requiring now." (R357) Plaintiff is approx. 40/
DEBT OWED PLAINTIFF'S PARENTS:

Plaintiff's father, Wilford Izatt, and his wife, Wilma, had spent considerable time in the Izatt home after defendant's operation and they advanced considerable sums of money to plaintiff and defendant:

Plaintiff:

Plaintiff testified that his parents had resided in the home of the parties for approximately one and one-half years

after defendant's accident (R304). They would come on Monday and remain until Friday or Saturday and sometimes would stay all week (R304).

Plaintiff had to obtain money from his parents to pay bills and obligations which arose because of defendant's condition (R312) or to pay living expenses which he was unable to pay because his money was otherwise committed because of defendant's illness (R313). Exhibit P-1 consisting of checks evidencing moneys received by plaintiff from his parents was introduced and received by the Court as showing support received by the family from plaintiff's parents in the sum of approximately \$5,105.00, though the Court noted that this money was not necessarily received by defendant individually (R314). Plaintiff stated that he was unable on his income to pay all his medical bills and other expenses and was required to go to the church and to his parents for assistance (R315), and he stated that his financial circumstances in this connection were aggravated by the expenses of his own medical problems (R316). Plaintiff testified that his parents made clothing for the children (R316) and bought groceries for the family during the period they resided in the home (R308). During the 18 months they resided in the home, they purchased virtually all of the groceries (R317,319), bought some of the groceries for the next four to five years (R319) and were still bringing groceries at the time of trial (R316). Plaintiff has not been able

to repay his parents any of the foregoing (R335).

Wilford Izatt, Plaintiff's Father:

Wilford Izatt, plaintiff's father, confirmed that he and his wife stayed with the Izatts for approximately 18 months after defendant's injury (R400), and he stated that after the first 18 months plaintiff's parents had spent other frequent periods in the Izatt home and estimated since May 3, 1973, he and his wife had spent approximately six months in the Izatt home aside from the initial 18 months (R402) for a total of approximately 24 months since defendant's accident (R402). Plaintiff's father stated that he and his wife had paid for the groceries during the initial 18-month period after defendant's injuries and that the cost thereof was between \$200 and \$250 per month (R401), and during the additional six-month period of their stay in the Izatt home they had spent approximately \$50 to \$75 per month on groceries (R401,403). Plaintiff's father stated that the money was furnished to plaintiff upon the understanding that plaintiff would repay it when he could (R405). There had been numerous small amounts under \$20 or \$25 which were paid to plaintiff in cash and for which no record had been made (R406). Plaintiff's father stated that he worked in the home of the Izatts painting, papering and doing general upkeep since the defendant's illness (R406) and stated that he had painted rooms in the house and had painted the outside of the house (R407) and

that plaintiff had told him that the parents would be repaid when plaintiff had the money to do it (R407). He stated that he and the plaintiff reached an agreement with regard to the reimbursement to be made by virtue of the painting, to-wit, the sum of \$1,500 (R410). Plaintiff's father also insulated the house and put sheet rock in the basement (R429), but no special discussion of repayment of these items was ever had (R430). Shortly before Mary's illness he had loaned plaintiff \$3,000 for dental expenses (R430,431,434).

The Court stated that with respect to the loans of the plaintiff's father to plaintiff, he was admitting that testimony on the basis that the money went for family expenses of plaintiff, defendant and the children, although the testimony indicated that the agreements to repay were between plaintiff and his father only (R437,438)

While in the home, in addition to caring for defendant and the children, plaintiff's parents did the cooking and laundry and assisted in general housekeeping (R400).

GROUND FOR DIVORCE:

Plaintiff's grounds for divorce in this case were the defendant's lack of affection for him and the children and the defendant's erratic behavior, causing such emotional and physical stress that he could no longer continue in the marriage. One aspect of this stress was stress brought on by the deteriorating

condition of the children because of their mother's condition. Counsel for plaintiff started to get into this matter as it related to grounds (R324). Plaintiff testified at R324 that the children had been cared for by a number of different people to the point where they were becoming very confused as to what was going on in their lives and where they fit into the scheme of things. Counsel for defendant objected to such testimony, stating that it "doesn't help or do any good." (R324). The Court thereupon stated at page 325 of the record: "I think there has been sufficient grounds put in." In view of that statement by the Court, plaintiff did not develop the matter of grounds further as it did not appear to be necessary and might indeed be disruptive and produce no worthwhile benefit, particularly in view of the fact that the defendant was present throughout the proceedings. (R262)

It should be noted that defendant's lack of affection for plaintiff, both emotional and physical, is noted numerous times by other witnesses as set forth in connection with the section on Defendant's Health (see pages 6 to 14 of this Statement of Facts.)

The defendant stated, when called as a witness, that she did not desire to contradict or add to that which had been stated at the trial (R505). On the question of grounds she stated that she wanted the divorce because the plaintiff "took me away from my children." (R506). She did admit that she sees the children on weekends when plaintiff brings them out and that

she had indeed seen the children on the last three weekends prior to trial (R505,508). Defendant stated that before the divorce plaintiff had shown affection for her (R506).

Defendant further stated that she did not object to plaintiff's having temporary custody of the children (R507). She stated that she knew that she had incurred attorney's fees and wanted an award of attorney's fees (R507); she wanted the children when she was well enough (R507); she wanted alimony (R507); she wanted certain enumerated books and pictures (R507); and she wanted plaintiff to pay the debts of the marriage (R508). She stated that she wanted plaintiff to keep up the insurance (R508).

At the conclusion of the trial it was decided that each of the parties would submit a memorandum in lieu of oral argument and in connection with that discussion, counsel for plaintiff stated at R420 that: "My inclination would be to request that the Court grant a divorce today and in effect keep under reservation those items that are disputed for future resolution, and then in effect we can start reconstructing their lives, and we would ask, as we have asked in our proposal that the court make it effective today, or upon entry rather than upon any waiting period, and, therefore, may expedite getting their lives reconstructed."

Defendant's counsel stated thereupon at page 521 of the record: "Your Honor can grant it now or else at the end of the interlocutory period. It appears that a divorce is going to have

to be granted. I have no objection to granting it now. I think there is a big question on the distribution of assets . . . "

(Emphasis added.) He also stated at page 521 of the record: "She does ask for a divorce. I guess he asks for it, so, I guess, you are going to have to make up your mind about which one it is to be granted to." The Court then stated: "My question is whether it is her desire, whether it be final upon entry or final in three months?" Mr. Hanson stated: "It doesn't matter to her, your Honor."

The Court then stated at page 521 of the record: "The Court does find that in this matter the plaintiff, Joel H. Izatt, and the defendant, Mary C. Izatt, have both petitioned the court for divorce, and the court grants the divorce to Joel H. Izatt and also Mary C. Izatt jointly, and that the divorce should become final upon entry." Whereupon Mr. Hanson stated: "Upon what grounds, your Honor?" and the Court stated: "Upon the grounds of mental cruelty."

PLAINTIFF'S INCOME:

Plaintiff is employed at Evans Advertising and has a gross income of \$1,700 per month (R333). Plaintiff's takehome pay is \$608.48 two times per month for a total of \$1,216.96 per month (R333), not \$1,300 per month net as stated at page 4 of appellant's brief. None of the children of the parties are employed (R377).

In addition, at the time of trial the parties were

receiving assistance from the LDS Church. Until August 1978, this consisted of the church paying for the services of Elinor Cheever to work in the home at a cost of \$4.70 per hour (R443) and amounted to the total sum of approximately \$22,698.89 (R463).

At the time of trial the church was paying for defendant's care in the nursing home in the sum of approximately \$1,125 per month (R487). Plaintiff's financial needs on a monthly basis as set forth on Exhibit 5-P are as follows:

<u>Description</u>	<u>Amount per Month</u>
House payment (includes prepaid taxes)	\$223.00
Maintenance (residence)	35.00
Food and household supplies	360.00
Utilities (including water, electricity, gas & heat)	114.00
Telephone	23.00
Laundry and dry cleaning	10.00
Clothing	80.00
Medical and dental for children (not covered by insurance)	140.00
Medical and dental for husband (not covered by insurance)	220.00
School	48.00
Recreation (Deseret Gymn \$28.48, ski passes for children \$65 for about 4 months = \$21.67 monthly)	50.15
Incidentals (grooming, gifts, tithing, donations, etc.)	169.00
Transportation (other than auto)	5.00
Auto expenses (gas, oil repair, insurance)	50.00
Auto payment	148.00
Piano lessons	40.00
First Security Visa	25.00
Mastercharge (Tracy-Collins)	25.00
ZCMI	55.19
Total	\$1,820.34

The foregoing itemization does not include any amount needed to repay plaintiff's parents nor to repay the church. In regard to the indebtedness to the church, plaintiff stated that he had agreed to repay the church for its assistance rendered by reason of defendant's problems, and that he felt obligated to do so. (R371, 373, 379). The church paid Mrs. Cheever alone approximately the sum of \$22,698.89 (R463) and other expenses of approximately \$8,300 for a total of approximately \$32,400. (Exhibit 12-P).

ASSETS:

For the convenience of the court we set out an itemization showing on the left a list of the assets as established at the trial. The middle column indicates those assets received by plaintiff, and the right hand column those assets received by defendant. (Values used are those found by the Court and were not contested except as to the debt to plaintiff's parents and debt to the LDS Church.)

<u>Assets</u>	<u>Plaintiff</u>	<u>Defendant</u>
House 474 K Street \$70,000 less \$16,000 mortgage, \$54,000 equity (R332,333) (11-D, 12-P)	\$40,500.00	\$13,500.00
Cash value of life insurance (\$10,064 total) (R464)) 11-D, 12-P)	5,032.00	5,032.00
Furniture (R342) (11-D, 12-P)	3,000.00	
Vested Profit-sharing (R464) (8-D, 12-P)	124.57	
Stock plan (R464) (9-D, 12-P)	108.78	

Plymouth van (R368) (11-D, 12-P)	6,000.00	
Savings account (R463,464) (11-D, 12-P)	488.76	
Checking account (R463,464) (11-D, 12-P)	200.00	
Cash proceeds from malpractice suit (R222,476)		97,320.22
Jewelry (12-P, 11-D)		4,000.00
Debts - general (R519) (12-P)	[7,310.45] (see Note 1)	
Debt to parents \$10,205 (R224) (Plaintiff contends this figure should be at least \$13,500 (12-P)	[5,102.50]	[5,102.50]
Debt to LDS Church \$32,400) (12-P)	No disposition	No disposition
Totals	\$43,041.16	\$114,749.72
Percentage of total net assets	27.28%	72.72%

Notes:

1. The aforesaid general debts consisted of a First Security Visa - \$492; Mastercharge - \$256.52; ZCMI - \$551.93; and \$6,000 owing on the Plymouth van.

2. In addition, each of the parties was awarded his (her) personal effects.

3. \$ 43,041.16
114,749.72

\$157,790.88 Total net assets.

INTEREST:

Pursuant to a hearing on defendant's Motion for Authorization to Withdraw Funds from the said sum of \$97,320.22, the Court ordered that \$15,000 of said sum be released to the defendant forthwith and that the balance be invested at interest pending disposition of this appeal (R434,435). The said sum has been invested at 11.892% per annum interest at United Savings, and interest is accruing and will amount to \$4,894 by October 24, 1980, and this is an asset available for distribution as may be directed by this court.

At the time of the hearing of said motion, the defendant represented, and in her written Memorandum also represented (R531), that the defendant was then attending trade school and earning a minimum wage under a federally-funded education program.

MEDICAL EXPENSES:

In her Statement of Facts defendant asserts that Exhibit 13-D indicates no payments for medical expenses or other expenses relating to defendant's illness (See page 6 of appellant's brief). It should be noted that Exhibit 13-D was not introduced at the trial, but rather was introduced by stipulation after the trial (R102). A number of the checks in Exhibit 13-D are medical in nature, but plaintiff was never asked to explain them. Many of the checks were to banks, presumably for loans or advances, and plaintiff was not asked to what extent those loans or advances were for medical

expenses. It should further be noted that the checks in Exhibit 13-D are only for the year 1979 (and a few for December 1978) and so are very limited in scope. Exhibit 13-D is no basis for the defendant's assertion that plaintiff had no medical expenses or other expenses because of defendant's illness. It is true that plaintiff was asked at the first hearing concerning defendant's medical expenses, but it should be noted that he was asked no further questions concerning that subject at the second hearing. All documents requested of plaintiff's counsel by defendant were furnished (R396). We submit that it is safe to assume the Eugene Hansen, counsel for both parties in the malpractice action, had the most complete list of medical expenses incurred by reason of the defendant's injuries, and those records were as easily accessible to the defendant as to the plaintiff.

ARGUMENT

Under familiar principles this court can review both facts and law in divorce cases, although the court will of course give due allowance for the advantaged position of the trial judge. Wiese v. Wiese, 24 Ut 2d 236, 469 P2d 504 (1970).

POINT I. THE TRIAL COURT WAS JUSTIFIED IN AWARDING PLAINTIFF A DIVORCE FROM THE DEFENDANT.

The thrust of defendant's argument under her Point I concerning the awarding of the divorce to the plaintiff (as well as to defendant) seems to be that defendant was not responsible for her conduct because of her mental condition. We believe that defendant's position in this regard is an extreme oversimplification of a very complex problem.

To begin with, it appears clear to everyone that a divorce was necessary in this case. Even defendant's counsel at the conclusion of the trial stated: "It appears that a divorce is going to have to be granted." (R521). It is true that the parties had an ideal marriage prior to the defendant's operation on May 3, 1973. It is likewise uncontroverted that plaintiff, from May 3, 1973, until he filed this divorce action in December 1979 (and even thereafter as far as that goes) had treated defendant with extreme kindness, care and consideration. He has nursed her, cared for her, assisted her in every way possible. Elinor Cheever,

the registered nurse who took care of the family for over four years, stated that it was amply clear that plaintiff did everything he could to keep the family together (R442). She stated at page 460 of the record that plaintiff treated defendant very kindly and did all that he could and left no stone unturned. She stated: "He treated her, every time I was there, he always treated her with loving, kind words and he made every opportunity to take her and entertain her as much as she could be entertained, and I think he did a princely job."

The strain of the situation created by defendant's condition made it necessary after approximately six years for plaintiff to make a decision for the sake of his own health and for the sake of the children whose lives were being disrupted. Dr. Wender and others had told him that the defendant would have to be institutionalized and he resisted this as long as he possibly could. He finally realized that it was necessary, and in August 1978 had defendant institutionalized. At that time he had no intention of seeking a divorce as the uncontroverted testimony discloses. By December 1979 the plaintiff had concluded that it would be advisable to obtain a divorce so that he could get remarried and bring a woman into the home to help care for the children.

Prior to entry of the Supplemental Decree, plaintiff did in fact marry Mary Ellen Fifield (This fact is not in the

evidence as such, but is noted in defendant's brief (page 18) and is not in dispute.) This remarriage did not thus grow out of improper conduct of the plaintiff, nor is that claimed. When advised of the remarriage, counsel for the defendant said: "As far as we are concerned, I appreciate that problem and I am not in any way criticising Mr. Izatt for getting married so fast here on this thing. The children have got to have a home. That is the realities of this situation." (R282). Defendant's counsel thereupon expressed a willingness on the behalf of the defendant that the home not be sold by reason of said remarriage.

The testimony was uncontroverted that the defendant could not take care of the children and in all likelihood never would be able to do so. If plaintiff permitted the severe stresses to continue on him, chances were extremely good that his own health would break down, and upon his demise (or becoming incapacitated), the children of necessity would be left without parents because defendant would not be able to take care of them.

Thus, although the defendant postponed the inevitable, he finally yielded to the overwhelming demands of the situation and obtained a divorce.

When asked what her grounds were against plaintiff, the defendant stated that he "took me away from my children." (R506). That appears to be the sole grounds which she asserts against the plaintiff. Notwithstanding that assertion, the testimony was

uncontroverted that defendant was given liberal visitation, and also uncontroverted that placing defendant in a nursing home was essential, necessary and appropriate (R501,502).

Although the evidence discloses that the defendant had brain damage and psychosis, it also disclosed that the psychosis was controlled to a considerable extent by medication. Thus, even though defendant had severe impairment, she was by no means a vegetable and certainly had a significant degree of free agency in the carrying out of her life and in her conduct. Defendant's counsel chose to have defendant sit throughout the entire trial, presumably because she did have capacity to appreciate what was going on and to participate in the proceedings. Defendant testified. In having defendant testify, it seems to us that defendant's counsel represents that she has sufficient competency to assist the court by her testimony. Certainly, in placing her on the stand, her counsel represents to the court that she knows the difference between right and wrong as she was sworn to tell the truth. She testified in an intelligible manner, and she appeared to perceive and understand what she was talking about. She testified about the property that she desired to have awarded to her, the fact that she wanted attorney's fees awarded to her, the fact that she was willing to let plaintiff have temporary custody of the children, but that she desired custody ultimately, and that she desired that plaintiff pay the bills of the marriage and keep up the insurance. It therefore appears clear that the Court was justified in

determining that defendant had a significant measure of self-control, was not without free choice in her actions, and that some measure of culpability was inherent in her lack of affection for the plaintiff and in her lack of responsiveness and affection for the children and in her erratic behavior.

Therefore, upon consideration of the foregoing principles, it appears clear that (1) a divorce was necessary, and (2) that the plaintiff was no more culpable in this unfortunate case than was the defendant, and even if the Court should conclude that the culpability of one or both of the parties is slight in this instance, still the best interests of the parties and of the children will not be served in failing to award a divorce, and we feel that the Court exhibited considerable wisdom in its decision to award a divorce to both parties.

Where fault is substantially equal between the parties to a divorce proceeding, this court held in Mullins v. Mullins, 26 Ut 2d 82, 485 P2d 663 (1971), that it was proper to award a divorce to both parties. We believe that this is such a case and that the decision in Mullins should be followed in this case. (If defendant were totally lacking in mental capacity, Section 30-3-1, UCA, 1953, would perhaps more clearly apply. Where, as here, defendant is severely lacking in some areas, but better in others, its applicability becomes more tenuous. That section purports to require two separate proceedings, one conditioned upon

the other, which appears to serve no useful purposes in a case such as this one. It is perhaps regrettable that Section 30-3-1 has not been drafted somewhat more realistically as it might indeed minimize the trauma in cases such as the instant one.)

Johnson v. Johnson, 107 Ut 147, 152 P2d 426 (1941), cited by defendant, does not support her position. It holds that a physical condition alone is not grounds for divorce, but that the conduct of one having that condition can be, and indeed was in that case. It is defendant's conduct that gives plaintiff grounds in the instant case.

Finally, more evidence of grounds could and would have been introduced but for the trial court's statement that he was satisfied on the matter of grounds (R325,262).

POINT II. PLAINTIFF SHOULD HAVE BEEN AWARDED THE ENTIRE EQUITY IN THE HOME.

In this Point we desire to respond to the contention of defendant in her Point III that the lien awarded to her should have been in excess of \$13,500, and in addition deal with plaintiff's position on the cross-appeal that no lien should have been awarded to the defendant. Defendant appears to take the position that the house should be equally divided between the parties and she further contends that at the same time defendant should receive all the money from the malpractice action. As we noted in the Statement of Facts at page 26 of this brief, distribution as between the parties as it now stands awards to defendant 72.72% of the total assets of the parties and awards to plaintiff only 27.28% of the total assets of

the parties. If defendant is awarded an additional \$13,500 as a lien against the home (making her total lien \$27,000), defendant will have been awarded 81.28% of the total assets and plaintiff will have been awarded only 18.72% of the total assets of the marriage. Perhaps no further argument is necessary to demonstrate the inequity of that proposal.

Nevertheless, we believe the following should be noted: Defendant has clearly lost sight of the fact that plaintiff, with severely impaired health, now has the obligation to raise the four children of the parties. He has only modest income (he testified that he has approx. \$1,216 per month net takehome pay and that his monthly needs were in excess of \$1,800 per month.) The inexcusable conclusion is that it is going to be next to impossible for plaintiff to ever raise sufficient funds to pay out any lien on the home.

The primary concern in this case should be the welfare of the children. They need to know that they have a secure home, one from which they will not be uprooted. An important factor in their happiness is the knowledge that their father will not be facing difficulties which he cannot handle and that his health will not be further impaired, to the end that they may in effect be orphaned before reaching the age of majority. Plaintiff realistically is the only parent who will ever be able to raise the children. If the burdens placed upon him are such that he cannot handle them and he breaks down physically or mentally, the children will indeed suffer, and they should be the primary concern at this time.

The defendant apparently takes the position that all of the money from the malpractice action is clearly that of the defendant, to which the plaintiff has no claim or right whatsoever. We do not quarrel with the fact that the defendant has been severely injured. We do however think it equally important to note that plaintiff's life has likewise been severely damaged by this incident, his health severely impaired, and in a very real sense, his life left in a shambles. Furthermore, it is the plaintiff who has borne the burden of pursuing the malpractice action, of assembling data and dealing with the lawyers over the six years or so in which that action was pending. It should also be noted that the plaintiff was one of the parties to that action and certainly has a claim upon those proceeds. We are not asking for any of that money to be awarded to the plaintiff, but rather that the equity in the home be awarded to him, the proceeds from the malpractice action awarded to the defendant (after payment of the indebtedness to plaintiff's parents), and each party enabled then to rebuild his or her life as best the circumstances permit.

It should be further noted that the Court has wisely reserved the issue of alimony. It is clear that with the large settlement which she now has, the defendant has no need of alimony at the present time (and alimony is not an issue in this action). If at a later time the defendant should require alimony, however, the plaintiff will still have to assume that obligation to the extent a court may later determine it is appropriate. If the

defendant uses up the proceeds of the malpractice action and needs further money, the plaintiff can be called upon to the extent of his then ability in the light of his health and other circumstances to pay support. (And of course defendant will presumably also be eligible for church assistance and/or Medicaid.)

To award a \$27,000 lien to the defendant in addition to the sum of \$97,320.22 is simply not warranted by the facts of this case.

It is true that the Court has placed some conditions upon the payment of the lien which tend to mitigate the harshness of the award. But those limitations effectively preclude the family from ever making a change in their place of residence. If plaintiff can improve himself in his employment by a move of any kind, he will be effectively precluded from doing it because as soon as he moves out of the house or sells it, he must pay the lien to the defendant and he has no funds with which to do so. We acknowledge that the terms such as those imposed by the Court are frequently employed and often produce an equitable result, but it should be noted that normally those restrictions are placed upon the wife's use of the home as it is usually the wife who is awarded the home in which to raise the children. More often, if the wife moves from the home or ceases to use it as a residence, it is because she has remarried and her new husband has assumed financial obligations for her. In the instant case, however, those circumstances do not exist. Plaintiff is the breadwinner and has the obligation

to go where his work requires him to go.

If the court is inclined to feel that a lien is proper in this case, we urge the court not to increase it in any way. A lien of \$13,500 is more than ample and is more than the plaintiff will in all likelihood ever be able to pay. To double that lien as the defendant seeks is, we believe, unfair and unnecessary to the welfare of the defendant.

The defendant has apparently attempted to make an issue out of the fact that no interest is being paid to the defendant on the money under the Court's order, and we acknowledge that that is so, but think it should be noted that the plaintiff is carrying out the difficult task of attempting to rear four children who have been through six extremely traumatic years, and although he is living in the home without paying any interest or rent to the defendant, he is nonetheless to the very best of his ability attempting to provide the children with the necessities of life, and to the extent that he is able, the extras such as music lessons, and to deprive the children of money which they presently need in order to build a large fund for the defendant is, we believe, wholly unjustified.

Pursuant to the Court's order of March 26, 1980, the parties have invested \$82,320.22 (\$97,320.22 less \$15,000 which was withdrawn by defendant pursuant to said court order) in a six month money market certificate at United Savings & Loan Association. This money was invested on April 24, 1980, bears

an interest rate of 11.892% per annum and will thus earn interest as of October 24, 1980, in the sum of \$4,894, which sum is available for disposition by this court, or as it may direct. (R534, 535).

POINT III. THE AWARD OF \$10,205 TO THE PLAINTIFF'S PARENTS WAS PROPER AS FAR AS IT GOES, BUT IT SHOULD HAVE BEEN REPAID IN FULL (\$13,205) FROM THE \$97,320.22 FUND.

We think that from the evidence there can be no doubt that the plaintiff's parents loaned to the parties at least the sum of \$13,205 during the approximately six years prior to trial. Exhibit 1-P shows checks paid by the plaintiff's parents to the plaintiff in the sum of \$5,105. Even if checks number 4141 and 4303 are excluded because one of them has the word "gift" written on it and the other one has the word "Xmas" written on it, it leaves a sum of \$4,805. In addition the plaintiff's parents advanced \$1,500 for painting and repairs to the home and loaned plaintiff \$3,000 for dental work. Groceries were provided for 18 months at a figure of at least \$200 per month for a total of \$3,600, and in additional groceries were provided for another six months at a minimum figure of \$50 per month for a total of \$300, making a total of \$13,205. Of this the Court allowed \$10,205, and presumably therefore did not allow the \$3,000 for dental

work. We believe that that omission was unjustified and that the full amount of \$13,205 should be allowed.

The only evidence before the Court was that those moneys were to be paid by plaintiff to his parents as soon as he was able. Certainly as to the moneys loaned after defendant's accident, it was clear from the evidence that the plaintiff would not be able to repay those sums except from the settlement of the lawsuit in which both plaintiff and defendant were joint plaintiffs. It seems clear that defendant's accident likewise made it impossible to sooner repay the \$3,000 dental loan until such time as the settlement was achieved because additional expenses to the family created too much of a burden on plaintiff.

The trial court found that although the transaction was negotiated between the plaintiff and the plaintiff's father, that the plaintiff, defendant and the children were the beneficiaries of those sums, and there is no evidence to the contrary. It therefore seems inexcusable that equity requires that that sum be repaid. We believe that it should be paid from the personal injury settlement, but at the very least, the order of the Court ordering that each of the parties assume one-half of that obligation should not be disturbed by this court.

The defendant asserts four reasons why she feels that she should not be required to participate in that obligation. We would like to treat each one briefly:

1. As stated at page 9 of defendant's brief, the first

reason is that " . . . the liability, is supported at best by a moral obligation to repay which is not consideration for an obligation."

We desire to point out that even if it were only a moral obligation, it would be entirely appropriate for the Court to award the plaintiff in the divorce settlement sufficient funds out of the marital assets with which to pay that obligation. In other words, in apportioning the assets between the plaintiff and the defendant, the Court is not limited in making that award based upon "legal obligations." The Court is at liberty to divide the assets of the parties in such manner as equity indicates. If it is proper for the plaintiff to honor his obligation to his parents, whether legal or moral, the Court is not precluded from awarding him sufficient funds with which to do that. (The form of the award is secondary.)

Nevertheless, we believe the evidence overwhelmingly indicates that it is a legal obligation. The understanding between the plaintiff and his father was that he would repay it when he was able, and the loans were to be repaid from the malpractice settlement money.

It appears to be uniformly held that a "promise to pay when the promissor is able" is enforceable. Some courts take the position that such promise is absolutely enforceable, subject only to the condition that the promissor be given a reasonable time in which to perform. Other courts hold that such a promise

is enforceable at such time as the promisor is able to pay. See In Re Clover's Estate, 237 P2d 391 (Kansas, 1951), and 94 ALR 721, on the question of ability to pay "when able." See also 17 Am Jur 2d, Contracts, Section 80.

2. The defendant claims at page 19 of her brief: "The obligation is a gift." We believe that from what we have heretofore pointed out, that is obviously not the case. The money was furnished to the plaintiff upon the understanding that it would be repaid, and that is clearly inconsistent with the notion of a gift. It is true that the father had on occasion provided other sums to the plaintiff, particularly cash sums of under \$25, of which no record was kept, and the plaintiff's father undoubtedly would have provided more if he had been able to do so. But those considerations do not prevent the larger transactions from being loans, as was testified to by both the plaintiff and his father.

3. The defendant asserts that the claim was barred by the statute of limitations. As an affirmative defense, this should have been raised in defendant's pleadings prior to trial to give plaintiff notice of this assertion. Nevertheless we respectfully submit that the defendant is in error for at least the following reasons: First of all, the statute of limitations would not begin to run until the debt became due inasmuch as the understanding between the parties was that the debt would have to be repaid when the plaintiff was able to pay it, and that contemplated a settle-

ment of the malpractice action. We believe that the debt as understood by the parties did not become due until the malpractice action was settled, which was at or about the time of the trial in 1979.

It should be noted that in a contract payable when a person is able, it has been held that the statute of limitations does not begin to run until the promissor becomes able to pay. See In Re Clover's Estate, supra.

The statute of limitations on the debts evidenced by checks would be six years and that in no instance would that time period have run as of the time of the trial as the checks were dated 1974 or later. Furthermore, the loans from plaintiff's father to the plaintiff constituted a series of transactions starting in 1973 and continuing thru to the time of the trial.

Thus, as to the items not evidenced by a writing, we
UCA, 1953,
believe Section 78-12-25/would apply, which states:

"An action upon a contract, obligation or liability not founded upon an instrument in writing; also upon an open account for goods, wares and merchandise, and for any article charged in a store account; also on an open account for work, labor or services rendered, or materials furnished; provided, that action in all of the foregoing cases may be commenced at any time within four years after the last charge is made or the last payment is received." (Emphasis added.)

Further, if indeed defendant has been mentally incompetent since 1973 (a legal guardian was appointed for her the day before the trial (R293)), Section 78-12-36, Utah Code Annotated, 1953, provides that the period of time a party is "mentally

incompetent and without a legal guardian" is not included within the period of the statute of limitations. The Court found, and the evidence is unconflicting that the moneys loaned were for family expenses and therefore we believe that this section would be applicable.

The defendant apparently takes the position that the obligation to the parents is not enforceable because it does not fall within Section 30-2-9, UCA, 1953, which states:

"The expenses of the family and the education of the children are chargeable upon the property of both husband and wife or either of them, and in relation thereto they may be sued jointly or separately."

We believe that the expenditures referred to, being for groceries, for the family, clothing, medical expense, and other expenses of household, clearly falls within that statute. It is difficult to imagine an indebtedness which more clearly meets the requirements of that statute. It should be observed, however, in that connection that even if this indebtedness were not a family expense, but rather were solely the indebtedness of the plaintiff, it would still be appropriate for the Court to make the order which was made. The divorce courts of this state are empowered to divide the assets and apportion the indebtedness of the parties in such manner as is equitable. Whether or not those debts are those of the plaintiff, or those of the plaintiff and the defendant, is really immaterial. It is likewise immaterial whether the money was used for medical expenses for the defendant, for medical

expenses for the plaintiff, or for other household expenses such as food and the like, all are proper family expenditures.

4. Defendant asserts that the evidence was insufficient to establish the amount of the debt. We submit that the debt was established by uncontroverted testimony, and the amount was established with reasonable certainty, and this is all that the law requires. See 22 Am Jur 2d, Damages, Section 25, and see also Howarth v. Ostergaard, 30 Ut 2d 183, 515 P2d 442 (1973).

Finally, at page 13 the defendant asserts that, since the plaintiff's parents were not parties to the action, no award should have been made to them. It should be noted that the Court has not made an award to the parents. The Court has made an order, as it frequently does, as between the parties as to which of the parties will discharge a certain obligation. This the Court was entitled to do. The Court stated at paragraph 13 of the Supplemental Decree: "The indebtedness of the parties to the plaintiff's parents should be repaid in the amount of \$10,205, and it is ordered that each of the parties assume and pay one-half of said amount and hold the other harmless from said one-half."

We believe that it is worth noting that the defendant apparently takes the position that the malpractice settlement is entirely hers, and at the same time takes the position that the money loaned by the parents to the plaintiff, but used for the family, is entirely plaintiff's responsibility. There appears to us to be a very significant inconsistency in this kind of reasoning.

With respect to the cases cited by defendant in her Point II, we desire to note:

Manwill v. Oyler, 11 Ut 2d 433, 361 P2d 177 (1961), does not help defendant. Manwill requires that "promisee expected to be compensated" and that requirement is clearly met in the instant case.

Mace v. Tingey, 106 Ut 420, 149 P2d 832 (1944), is distinguishable from the instant case. In Tingey the parties to the transaction were not able to testify to their intent as one of them was dead and the other was presumably barred by the dead man statute. In the instant case both parties were available and did testify that the parents were to be repaid by the plaintiff when he was able.

Because separate debts of the parties (as well as their joint debts) are proper subjects for equitable apportionment in a divorce case, (at least where, as in the instant case, they are reasonable and proper) the cases cited by defendant at page 15 of her brief dealing with the family expense doctrine do not appear to be relevant. They are Berow v. Shields, 48 Ut 270, 159 P 538 (1916), and Gilman v. Matthews, 20 Colo. App. 170, 77 P 366 (1904).

For the same reason, Walker Brothers Dry Goods Co. v. Whitehall, 61 Ut 259, 212 P 523 (1923), cited by the defendant is not applicable. If the debt is owed by one spouse, it is irrelevant in a divorce case that the statute of limitations has run against the other. Further, as noted above, defendant's incapacity

would appear to toll the statute of limitations as to defendant in any case.

CONCLUSION

For the foregoing reasons, the plaintiff respectfully requests that the court confirm the lower court in awarding a divorce to the plaintiff (as well as the defendant). In addition plaintiff asks this court to direct that the parties repay to plaintiff's parents the full amount of \$13,205 from the malpractice award, or at least that it be paid one-half by each of the parties, and finally the plaintiff asks this court to hold that no lien against the home be awarded to the defendant, and that thus the equity in the home of the parties be awarded in full to the plaintiff.

Respectfully submitted:

ROBERT C. CUMMINGS
GORDON A. MADSEN