

1980

## Melvin J. Abbott v. Larae Victor (A/K/A Larae Parkes) : Brief of Respondent

Utah Supreme Court

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UTAH LEGAL SERVICES; Attorneys for Appellant Harold A. Hintze; Attorneys for Respondent

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8 IN THE FOURTH JUDICIAL DISTRICT COURT FOR DUCHESNE COUNTY  
9 STATE OF UTAH

10 LARAE VICTOR,

11 Plaintiff,

12 vs.

13 MELVIN JAY J. ABBOT,

14 Defendant.

ORDER

Civil No. 6320

15 Upon motion of Harold A. Hintze, attorney for the Defendant,  
16 the court being duly advised in the premises thereof and good  
17 cause appearing therefore

18 IT IS HEREBY ORDERED that the Plaintiff's Complaint be  
19 stricken, *and the same ordered dismissed without*  
20 *prejudice.*  
21 Done this 25<sup>th</sup> day of September, 1978.

22 BY THE COURT:

23 *Deog E. Ball*  
24 DISTRICT JUDGE

25 STATE OF UTAH )  
26 County of Duchesne ) ss.

27 I, Janet Cowan, Clerk of Duchesne County, Utah  
and ex-officio Clerk of the District Court, do hereby  
certify that the above and foregoing is a full, true  
and correct copy of the original document which is on  
file in my office.

IN THE SUPREME COURT  
OF THE STATE OF UTAH

---

MELVIN J. ABBOTT,	:	
	:	
Plaintiff-	:	
Respondent,	:	
	:	
vs.	:	Case No. 16931
	:	
LaRAE VICTOR,	:	
(a/k/a LaRae Parkes),	:	
	:	
Defendant-	:	
Appellant.	:	

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BRIEF OF RESPONDENT

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Appeal from the Judgment of  
The Fourth Judicial District Court for Duchesne County  
Honorable Allen B. Sorensen, Judge

---

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FILED

JUN 24 1980

IN THE SUPREME COURT  
OF THE STATE OF UTAH

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MELVIN J. ABBOTT,	:	
	:	
Plaintiff-	:	
Respondent,	:	
	:	
vs.	:	Case No. 16931
	:	
LaRAE VICTOR,	:	
(a/k/a LaRae Parkes),	:	
	:	
Defendant-	:	
Appellant.	:	

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[d]efendant...has by her conduct abandoned any and all claims for rescission or voidance of the terms and provisions of the settlement agreement entered into on October 10, 1973; and she is by her conduct barred and estopped from seeking relief therefrom in this action.

(Conclusions of Law, Paragraph 2.)

The court awarded Appellant custody of the parties' three minor children and child support of \$100.00 per month per child. The only subject of this appeal is the trial court's decision as it relates to the property settlement, as Respondent acknowledges the propriety and jurisdiction of the court to amend, modify, alter or change the child custody and support provisions of the property agreement.

#### RELIEF SOUGHT ON APPEAL

Respondent seeks to have the judgment of the trial court affirmed.

#### STATEMENT OF THE FACTS

Respondent Melvin J. Abbott and Appellant LaRae Victor (aka LaRae Parkes), were married in Salt Lake City on August 15, 1959. (T. 35) Four children were born as issue of the marriage, three of whom are still minors in Appellant's custody. (Findings of Fact, Paragraph 1) In 1962 the couple moved to Mr. Abbott's father's dairy farm in Duchesne County which was the couple's main homestead from 1962 to 1972. (T. 37) During this period LaRae separated from Mr. Abbott on several occasions for time periods of up to six months; also, the couple spent two years of this time period in Phoenix. (T. 58)



In September of 1972 the parties obtained a Mexican divorce. The divorce Decree did not attempt to divide the property or deal with child custody. (T. 4) The parties talked periodically about a property settlement during the year which followed their divorce, but no agreement was reached. (T. 39-40)

Less than a year after the divorce, Mrs. Abbott married Robert Leroy Ringham. (T. 32) She and her second husband decided to go to Singapore. (T. 40) Shortly before they left, Mr. Abbott and LaRae were able to work out a property settlement. (T. 40-41)

Appellant admitted at trial that between the time of the Mexican divorce and the signing of the property agreement she had "talked to different lawyers" regarding what her position was or should be in regard to the settlement. (T. 50) Later in trial, she claimed she was confused as to when she actually talked with attorneys regarding the settlement agreement and stated "I don't know whether it was before or after [the date the agreement was signed] on that." (T. 50-51)

Mr. Abbott retained David Sam (now Judge Sam) to draw up the property settlement. (T. 47,50) Appellant read the agreement and manifested her acceptance of it by signing it on October 10, 1973. (T. 31, 40-41) The agreement, however, was never submitted for approval by the court. The agreement provided LaRae with a mobile home that was purchased by Mr. Abbott at a cost of \$15,669.40. In addition to purchasing the home, Mr. Abbott paid for the set up charges. (T. 49) The agreement also gave LaRae a

two year old Ford LTD and \$50.00 a month per child for child support. (See, Settlement Agreement attached to Respondent's Complaint as Exhibit "B.") Respondent received all the assets and debts relating to the operation of the farm plus the following:

1. 1963 Cadillac (10 years old).
2. 1955 Ford Fairlane (18 years old).
3. Hydroskiff boat purchased used for \$1,000.
4. Cemetery lot.
5. Suzuki motorcycle.
6. 334 shares of Western General Dairies, Class D stock.
7. Highland Dairy stock, 159 shares Class A stock;  
454 shares Class C stock.

(T. 27, 28; Settlement Agreement attached to Respondent's Complaint as Exhibit "B")

Following the signing of the settlement agreement, LaRae remained married to Mr. Ringham for another eleven months whereupon she divorced him in September of 1974 and was married to Eugene G. Victor that same month. This third marriage lasted two years, ending in divorce in September of 1976. LaRae married a fourth time in February of 1978. At the time of the trial, November 28, 1979, LaRae was separated from Mr. Parkes and had filed for divorce. (T. 32-33, 53) No evidence was offered relative to property settlements or alimony payments made or due under any of these divorces.

In 1977 Appellant filed suit against Respondent seeking to

have the settlement agreement amended or set aside and to have an "equitable division" made of the property. (Victor v. Abbott, No. 6320, Duchesne County.) Appellant did not pursue her action. Mr. Abbott's attorney noticed her deposition twice but each time Appellant failed to appear and to tell her attorney where she was. (T. 11) On September 25, 1978 a motion was granted to strike her complaint without prejudice. (See Exhibit "B" of Appellant's Brief).

Mr. Abbott filed this instant action in November of 1978 primarily seeking adjudication of a court-ordered support payment so that the Welfare Department would know what his monthly obligations were, and seeking an order approving the property settlement the parties had lived with for five years. In addition, he sought judicial recognition of the Mexican divorce. At the trial, held November 28, 1979, the District Court heard testimony concerning the factual setting of the 1973 property settlement and the conduct of the parties since that time. In the court's Findings of Fact and Conclusions of Law, dated January 14, 1980, the court found that the parties had lived pursuant to the property settlement for the past six years, that Appellant's prior action had been dismissed by her failure to attend her deposition and that the parties had conducted themselves in such a way as to constitute an acceptance and reliance of the property settlement. (Findings of Fact, Paragraphs 4-6) The court entered Judgment on January 14, 1980 in favor of Respondent stating that the property agreement entered into between the parties on October 10, 1973

insofar as it pertained to division of the marital property "is hereby valid and enforceable... the said defendant having abandoned any action to void said agreement or, by her conduct, having been estopped from asserting any claim for avoidance thereof." (Judgment, Paragraph 1) (emphasis added) The court did modify the agreement by raising the child support from \$50 to \$100 per month per child and by awarding custody of the children to LaRae (Abbott) Parkes.

#### ARGUMENT

In this appeal, Appellant gives three reasons why the decision of the trial court should be reversed. First, the Appellant alleges that an involuntary dismissal of a complaint, without prejudice, does not constitute abandonment of a claim raised therein so as to estop the Appellant from raising the claim as a defendant in a subsequent action. The Respondent's reply to this allegation is addressed in Point I.

Second, Appellant alleges the evidence is totally insufficient to support the finding that Appellant is estopped from seeking an equitable distribution of the parties' marital property. Respondent's address to this claim is Point II.

Finally, Appellant alleges that she is entitled to an equitable division of the marital property by the District Court even if the division differs from the terms of the settlement agreement. This issue is addressed in Point III.

## POINT I

AN INVOLUNTARY DISMISSAL OF APPELLANT'S COMPLAINT WITHOUT PREJUDICE IN A PRIOR ACTION IS ONE FACTOR A JUDGE MAY CONSIDER IN DETERMINING WHETHER TO APPLY THE DOCTRINES OF EQUITABLE ESTOPPEL AND LACHES TO BAR A CLAIM COMMON TO THE PRIOR AND INSTANT ACTION

Respondent does not take issue with Appellant's argument that an involuntary dismissal of a complaint without prejudice is not a bar to a second action and that collateral estoppel will not apply. This point is so fundamental that it needs no further comment. It should be noted, however, that collateral estoppel is not at issue in this case, but, rather, the doctrine of equitable estoppel.

Where Appellant has gone awry is in asserting that Judge Sorensen's ruling, i.e. that she was estopped to seek a modification of the property settlement, was based solely on the fact that her prior suit was dismissed without prejudice as a sanction for her failing to submit to discovery deposition or resist the motion to strike her complaint. That could be true if one considers only part of what the relevant portion of the Judgment stated, and then only if one misconstrues that part. The relevant portion of the Judgment reads as follows:

a. The property settlement agreement entered into between the parties on October 10, 1973... is hereby held valid and enforceable as between the parties, the said defendant having abandoned any action to void said agreement, or, by her conduct, having been estopped from asserting any claim for voidance thereof.

(emphasis added)



The Appellant, in making her argument, apparently has ignored the alternative portion of the Judgment which is underlined above. Also, Appellant has misconstrued that portion of the Judgment which states "the said defendant having abandoned any action to void said agreement." The misinterpreted portion of the Judgment by Appellant will be discussed at this point; the underlined portion of the above-referenced Judgment will be analyzed, infra.

Judge Sorensen did not base the portion of the Judgment on which defendant relies merely on the fact that her prior action was dismissed. Although the Court's decision was based in part on that fact (see, Findings of Fact, Paragraph 5), it relied heavily on her other conduct to find that she had "abandoned any action to void said argument." This is pointed out in the Court's Conclusions of Law, Paragraph 2, where it was held:

2. Defendant LaRae Victor Parkes has by her conduct abandoned any and all claims for rescission or avoidance of the terms and provisions of the settlement agreement entered into by the parties on October 10, 1973; and she is by her conduct barred and estopped from seeking relief therefrom in this action.

(emphasis added)

An analysis of the Appellant's "conduct" relating to the abandonment of her action reveals that the dismissal of her complaint because of her repeated failure to attend her deposition was only one factor the Court relied on, and not the only factor as asserted by Appellant. Appellant offered no testimony at trial regarding the circumstances surrounding the dismissal of

the complaint. She clearly had the opportunity to do so while on the witness stand.

After Appellant's action was dismissed on September 25, 1978 she made no effort to refile a complaint. In an effort to settle the property rights of the parties once and for all, Respondent on November 21, 1978 filed a complaint. Appellant now asserts that she could have filed another complaint similar to the one dismissed if Respondent had not "beat her to it." There was no "hot" race to the courthouse in this case. Appellant could have in effect filed a similar complaint to the one dismissed by asserting a counterclaim in the present action. She did not. Surely, Judge Sorensen relied on this conduct as one factor showing her lack of diligence in pursuing her action. (T. 29-30) It was not until one year later at trial, and after Appellant had recently separated from her fourth husband, that she decided to reallege her prior claims. These factors, considered together, are sufficient to justify Judge Sorensen's conclusion that Appellant by her "conduct" abandoned her cause of action. This conclusion is reinforced when considered together with the conduct of Appellant which had taken place from the time the settlement agreement was filed up to the time Appellant had her complaint dismissed. These factors will be discussed, infra.

In any event, it should be noted that the court's Judgment was in the alternative; i.e., the court gave two separate and distinct grounds for finding that the property settlement was valid and should not be modified. This Court's upholding of

either ground will be sufficient to sustain the Judgment. The second ground will be discussed in the following Point II.

## POINT II

THE EVIDENCE CLEARLY ESTABLISHES THAT APPELLANT'S ACTIONS FROM THE TIME SHE SIGNED THE AGREEMENT UNTIL SHE CHALLENGED IT JUSTIFY THE USE OF THE EQUITABLE DOCTRINES OF ESTOPPEL AND LACHES. RESPONDENT HAS RELIED ON THESE ACTIONS TO HIS DETRIMENT.

As stated above, the alternative portion of the court's Judgment upholds the settlement agreement as valid and enforceable because Appellant "by her conduct" is "estopped from asserting any claim for voidance thereof."

The doctrine of equitable estoppel is very appropriate to this case. Many Utah cases have commented on the requirements for the use of the doctrine. For example, in Farmers & Merch. Bank v. Universal C.I.T. Credit Corp., 4 Utah 2d 155, 289 P.2d 1045 (1955) the court stated:

Equitable estoppel is bottomed upon the notion that, when one person makes representations to another which warrant the latter in acting in a given way, the one making such representations will not be permitted to change his position when such would bring about inequitable consequences to the other person, who relied on the representations and acted thereon in good faith.

Id. at 1048, citing J.T. Fargason Co. v. Furst, 287 F. 306 (8th Cir.). See also, Carnesecca v. Carnesecca, 572 P.2d 708 (Utah 1977); J.P. Koch, Inc. v. J.C. Penney Co., Inc., 534 P.2d 903 (Utah 1975).



Appellant has made representations to Respondent that would justify him in relying on the property agreement as being valid. Contrary to Appellant's assertions, the record is full of such representations. First, she read the agreement and agreed to it by signing it on October 10, 1973. (T. 31, 40-41) Second, she discussed the agreement alone with several attorneys shortly before or after signing it (T. 50-51) and again manifested her acceptance of it by not objecting at that time. Third, she lived and abided by the terms of the agreement for over four years and with a second and third husband before ever making an objection. (T. 32-33) Note, the court specifically found in its Findings of Fact that both parties have lived pursuant to the agreement from 1973 to the present time. (Findings of Fact, Paragraph 4) The court further found that Appellant entered into her second, third and fourth marriages in reliance on the property settlement. (Findings of Fact, Paragraph 4) Last, she executed all documents of conveyance to effectuate the terms and provisions of the property settlement thus assenting to it. (Findings of Fact, Paragraph 4)

Also, Respondent, in good faith, has relied to his detriment on Appellant's representations. Respondent has changed his form of livelihood from a dairy farmer to a cattle rancher. (T. 63-66) As a result, he has had to purchase new equipment and finance the cattle operation which has caused him to incur debt which has stayed around \$40,000 for the last four years. If Appellant were now allowed to force a sale of some of Respondent's cattle or

needed grazing land for her benefit, Respondent would be left with a larger debt and a diminished capacity to repay it.

Respondent is making a meager living as a cattle rancher and is barely able to support himself and meet his child support obligations. His taxable income (loss) for the last five years has been as follows: 1978 - \$14,000; 1977 - \$14,000; 1976 - (\$35,000); 1975 - (\$14,000); and 1974 - (\$10,000). (T. 66) Respondent will suffer great detriment and damage if any of the assets relating to the cattle operation are taken away from him at this point in time.

The record also supports a finding that the related doctrine of laches should apply. Appellant, in her Brief, cites Leaver v. Grose, No. 16477 (Utah Supreme Court, decided April 2, 1980) for the proposition that two elements must be established for the defense of laches to apply. First, the lack of diligence on the part of the party the doctrine is being asserted against, and second, an injury to the party asserting the defense owing to the lack of diligence. State of Utah Bulletin, May 1, 1980 at 56.

Appellant boldly states in relation to the first element that there is no evidence in the record to demonstrate the reasons for the four year wait in filing her complaint (which was later dismissed) or whether it was reasonable or justifiable under the circumstances. This is not the case. The record clearly reflects reasons for the long wait; however, none of them help Appellant. As noted, she read and signed the agreement, discussed it privately with several attorneys and she lived under

it with two husbands and for four years. Apparently, she was satisfied with it during this time. Certainly it was Appellant's burden to establish why her actions in waiting four years were reasonable or justifiable. This she did not do. Counsel for Appellant "speculates" in her Brief on appeal as to a possible explanation for the inaction, to wit: impecuniosity. Such "speculation" is completely irrelevant. Appellant had her day in court to establish any justification. She cannot now dream up a reason which was not supported by evidence at trial.

Appellant next states that Respondent failed to establish the elements of laches. She quotes Papanikolas Bros. Ent. v. Sugarhouse Shopping Center Assoc., 535 P.2d 1256, (Utah 1975) for the proposition that laches is not merely delay. By so doing, she has apparently conceded to her lack of diligence (first element). She then states that there is no evidence other than delay on which the trial court could base a finding on the applicability of this defense. This is not so. The evidence establishes that the second element, i.e. an injury to the party asserting the defense owing to such lack of diligence, is present. The injury to Respondent caused by his detrimental reliance on Appellant's actions was discussed above.

This Court noted in Papanikolas, supra, that a reviewing Court must tread lightly in interfering with the trial court's discretion in this area. The court stated:

The existence of laches is one to be determined primarily by the trial court; and reviewing courts will not

interfere with the exercise of the trial court's discretion in the matter, unless it appears that a manifest injustice has been done, or the decision cannot reasonably be supported by the evidence.

Id. at 1260.

The decision of the trial court is clearly supported by the evidence and no injustice has been shown that would require any different division of the marital property than that agreed to and accomplished by the parties four years earlier.

### POINT III

ALTHOUGH THE DISTRICT COURT HAS DISCRETIONARY AUTHORITY BY STATUTE TO MODIFY A PROPERTY SETTLEMENT ENTERED INTO BY THE PARTIES, IT NEED NOT DO SO WHERE BOTH PARTIES AGREED TO IT ORIGINALLY AND WHERE A PARTY'S SUBSEQUENT CONDUCT JUSTIFIES THE USE OF THE EQUITABLE DOCTRINES OF ESTOPPEL AND LACHES.

Utah Code Annotated, Section 30-3-5(1) states:

When a decree of divorce is made, the court may make such orders in relation to the...property and parties... as may be equitable. The court shall have continuing jurisdiction to make such subsequent changes or new orders with respect to...the distribution of the property as shall be reasonable and necessary. (emphasis added)

The language of the statute is permissive, not mandatory as Appellant would like the Court to believe. Although the lower court was not required to, it did take testimony as to the fairness of the property distribution. It was established that Appellant received a mobile home at a cost of \$15,699.40, a two-year old Ford LTD, and \$50 a month per child for child support. (See, Statement of Facts, supra.)

As to the items of property Mr. Abbott received and the court's scrutiny of those items, the following excerpt from the trial transcript is relevant:

MR. WILKERSON: ...our position is that in looking at the property of the parties, both listed in the settlement agreement and his answers to interrogatories, we say this was not an equitable contract and the court of law is not bound to follow it. As you can see he received all of the real property and most of the personal property.

THE COURT: I take it that was an operating, going dairy business, is that correct? Is there anything in Paragraph 5, except for the mining interests at the tail end of it, that do not bear directly on the dairy operation?

\*\*\*

THE COURT: All right. What I am going to do is I am going to recess... See if you can determine...if there is any property in the rest of Paragraph 5 that is not directly involved in the dairy operation.

\*\*\*

MR. HINTZE: Your Honor, as to also identify those items under number five of the property settlement agreement which did not directly pertain to the operation of the dairy business, we have agreed on five and disagree on a couple of others. But the ones that we do agree on is that the 1963 Cadillac which was then ten years old was not used directly in the dairy.

THE COURT: There is a diminimous rule there.

MR. HINTZE: And the 1955 Ford Fairlane, which was an eighteen year old vehicle --



THE COURT: The diminimous rule applies there too, doesn't it?

MR. HINTZE: Yes. A HydrosSwift boat purchased used for a Thousand Dollars. I don't know how many years before 1973.

THE COURT: I guess the cemetary lot isn't used in the dairy business either.

MR. HINTZE: The Suzuki motorcycle and the cemetery lot. Those five we would acknowledge do not have a direct relationship with the operation of the dairy. The balance of those items we submit, Your Honor, are directly related to the operation of the dairy, and Mr. Wilkerson takes exception to a couple of those.

MR. WILKERSON: We take exception to the fact that the shares of stock would necessarily have to be included to operate the dairy.

THE COURT: You mean General Dairies, Inc. in Highland Dairy?

MR. WILKERSON: Yes. They may have been obtained through the process of operating the dairy, but they are not necessary to the operation of it.

THE COURT: Very well.

(T. 24-25, 27-28)

Although the court did not feel the need to incorporate a finding of the fairness of the property settlement into its Findings of Fact and Conclusions of Law because of the application of the doctrines of abandonment, estoppel and laches, it can be inferred that the court was satisfied with the property division. Respondent received those items which were necessary

to the operation of the dairy. Those items were necessary for Respondent to (1) make a living, (2) meet his child support obligations, and (3) make the monthly payments on Appellant's mobile home. (These payments have been kept current at all times.) (T. 24) In addition to the dairy assets and the debts associated with them, Respondent received a few other items most of which the court ruled to be diminimous; moreover, Respondent also assumed the debt on the mobile home. This was not a "manifestly unjust" settlement. Under Utah Code Annotated, Section 30-3-5(1), the court clearly had the discretion whether or not to modify the settlement agreement and the court did not abuse its discretion in refusing to do so under the facts of this case. Certainly it did not merely "rubberstamp" the previous agreement as Appellant charges. The court's decision was made after taking testimony as to who received what and after considering all of the facts unique to the case.

Appellant's last argument is that the court's discretion under Utah Code Annotated, Section 30-3-5(1), to modify a property settlement cannot be totally defeated by a contract or agreement between the divorcing parties. While Respondent takes no issue with this proposition as a general rule, it has always been the rule that each such application of said rule is on an ad hoc basis. Appellant cites three cases as authority for the Court to disregard the settlement agreement and remand this case to the District Court for a modification of it. The application of the principles from these cases to the facts of this case is

at best questionable.

The reliance which the Appellant places on Callister v. Callister, 1 Utah 2d 34, 261 P.2d 944 (1953) is totally unfounded. Appellant reasons from Callister that a court can disregard a property settlement argument entered into by the parties because in the middle of an emotional period of marriage breakdown or separation or divorce, the parties may agree to a division which, in light of all the circumstances, may be unfair. The problem with this argument is that Appellant was not in the middle of such an emotional period when she entered into the agreement. The couple had been divorced for over a year and Appellant was remarried at the time the property agreement was entered into. No allegation nor proof was made of fraud, duress or undue influence.

Appellant's reliance on Mathie v. Mathie, 12 Utah 2d 116, 363 P.2d 779 (1961) is likewise unfounded. In Mathie the Court recognized that a District Court could make a property division inconsistent with a contract entered into between the parties. Moreover, as noted by Appellant, the Court stated that careful scrutiny should be given to such agreements before they are given effect. Id. at 784. The problem with relying on Mathie is that the facts were far from similar to the instant case. In Mathie the plaintiff, who was granted a Decree of Divorce, was appealing the property disposition made therein. The parties in that case had not lived under the agreement for years and without complaining of it as in this action. There were no grounds for the



application of estoppel, abandonment or laches in that case. Neither did the case involve an unproductive family farm which was being retained by the husband in order to make a meager living and meet his support obligations. And last, it did not involve an ex-wife who was complaining of the agreement only after receiving all of the benefits provided to her under the agreement.

The case of Pearson v. Pearson, 561 P.2d 1080 (Utah 1977) likewise involved an appeal from a divorce proceeding contesting a division of the property made by the trial court that was different from the parties' stipulation. The case contains none of the unique facts of the instant action that transpired since the adoption of the agreement by the parties.

This Court in Blair v. Blair, 40 Utah 306, 121 P. 19 (1912) pointed out the great discretion a trial judge has in awarding permanent alimony in divorce actions. The District Court had awarded the ex-wife \$4,500 in permanent alimony while allowing the husband to retain farm property which was not very productive but which had a value of around \$40,000 and which he had accumulated before the marriage. This Court upheld the distribution finding that it was not so inequitable or inadequate as to justify reversal on the ground of abuse of discretion. The Court noted that in awarding alimony and fixing the amount thereof, the trial court should consider all of the circumstances of the particular case such as, among other things, the amount of property owned by the husband, his capabilities and opportunities

for earning money, and whether or not the husband's property is productive. Id. at 21. The Court specifically noted that the property in question consisted principally of farming lands and improvements thereon, and was not very productive. Id. The Court in Blair seemed to place primary importance on the fact that the husband relied on the farm as a source of meager income.

In Anderson v. Anderson, 18 Utah 2d 286, 422 P.2d 192 (1967) this Court stated in reliance on Blair:

The court frequently emphasizes that "no firm rule can be uniformly applied in all divorce cases, ...each must be determined upon the basis of the immediate fact situation. ...[R]ecent pronouncements of this court, and the policy to which we adhere, are to the effect that the trial judge has considerable latitude of discretion in such matters and that his judgment should not be changed lightly, and in fact, not at all, unless it works such a manifest injustice or inequity as to indicate a clear abuse of discretion.

The extent of this discretion is emphasized by the great disparity of results allowed in differing factual situations. In Blair v. Blair, 40 Utah 306, 121 P. 19, 38 L.R.A., N.S., 269 (1912), the court upheld a property division awarding \$40,000 to the husband and \$4,500 to the wife, even though the divorce had been granted in her favor. At the other extreme, in Wilson, supra, where "the court awarded her substantially all of the property possessed by the parties" (in excess of \$20,000 to the wife and approximately \$500 to the husband), the decree was also affirmed.

Anderson at 192-93

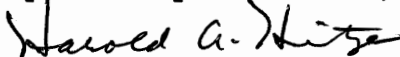
Based on the facts of the instant case, the trial court

clearly did not abuse its discretion in refusing to modify the property settlement agreement. The alleged disparity, if any, of the property division in the agreement is not patently "inequitable" considering the nature and source of the real property, and its use, value and productivity. It was not challenged, and when the subsequent acts and omissions of the Appellant are taken into consideration, the trial court's decision should be upheld with greater justification. Moreover, the court found in its Judgment that the settlement agreement was "valid and enforceable as between the parties"; this is tantamount to finding that there was nothing so inequitable as to suggest the agreement be revised by the court.

#### CONCLUSION

Based on the facts of this case and the applicable rules of law, the Respondent requests that this Honorable Court affirm the judgment of the lower court.

Respectfully submitted,



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CERTIFICATE OF MAILING

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This is to certify that the undersigned mailed two copies of the foregoing BRIEF OF RESPONDENT to Annina M. Mitchell at Utah Legal Services, Inc., 352 South Denver Street, Salt Lake City, Utah 84111, by placing said copies in the U.S. mail, postage prepaid, this 23<sup>rd</sup> day of June, 1980.

FOX, EDWARDS & GARDINER

By *Jean Ann Smith*