

1989

Walter James Howell v. Barbara Joyce Howell : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 890596-CA UTAH COURT OF APPEALS

WALTER JAMES HOWELL,	:	Case No. 890596-CA
	:	
Plaintiff-Respondent.	:	District Court No. D87-4343
	:	
v.	:	
	:	Category No. 14b
BARBARA JOYCE HOWELL,	:	
	:	
Defendant-Appellant.	:	

BRIEF OF APPELLANT
BARBARA JOYCE HOWELL

APPEAL FROM DECREE OF DIVORCE ENTERED
ON MAY 12, 1989, IN THE THIRD JUDICIAL
DISTRICT COURT IN AND FOR SALT LAKE
COUNTY, STATE OF UTAH, BY THE
HONORABLE FRANK G. NOEL

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TABLE OF CONTENTS

	<u>PAGE</u>
Jurisdiction	1
Statement of Issues Presented For Review	1
Statutory Authority.	2
Statement of the Case.	2
Statement of the Facts	
Marital History	3
Employment History.	4
California Residence.	6
Summary of Arguments	8
Argument	
POINT I:	
THE TRIAL COURT SHOULD HAVE CONSIDERED THE DISPARITY IN THE PARTIES' INCOMES, THE LENGTH OF THE MARRIAGE, AND THE RESPECTIVE EARNING ABILITIES AND EXPENSES OF THE PARTIES IN MAKING ITS ALIMONY AWARD.	9
POINT II:	
THE TRIAL COURT ERRED IN AWARDED ALIMONY BASED UPON ITS MEASUREMENT OF THE PARTIES' STANDARD OF LIVING DURING THE YEARS 1981 TO 1986.	13
POINT III:	
THE TRIAL COURT ERRED IN NOT CONSIDERING THE CAPITAL GAINS TAX CONSEQUENCES OF THE SALE OF THE CALIFORNIA RESIDENCE PRIOR TO DIVIDING THE NET EQUITY DERIVED FROM THAT SALE	16
Conclusion.	20

ADDENDUM

Exhibit "A" Findings and Conclusions

Exhibit "B" Decree

Exhibit "C" In re Marriage of Epstein, 154 Cal.
Rprr. 413, 592 P.2d 1165 (Cal 1978)

Exhibit "D" In re Marriage of Beck, 631 P.2d 282
(Mont. 1981)

TABLE OF AUTHORITIES

CASES CITED

	<u>PAGE</u>
<u>Asper v. Asper</u> , 753 P.2d 978 (Utah App. 1988)	10, 17
<u>In re Marriage of Beck</u> , 631 P.2d 282 (Mont. 1981) . .	18
<u>Berger v. Berger</u> , 713 P.2d 695 (Utah 1985).	16
<u>In re Marriage of Epstein</u> , 154 Cal. Rptr. 413, 592 P.2d 1165 (Cal. 1978)	17
<u>Fletcher v. Fletcher</u> , 615 P.2d 1218 (Utah 1980) . . .	16
<u>Gramme v. Gramme</u> , 587 P.2d 144, 148 (Utah 1978) . . .	17
<u>Jones v. Jones</u> , 700 P.2d 1072, 1075 (Utah 1985) . . .	9
<u>Naranjo v. Naranjo</u> , 751 P.2d 1144 (Utah App. 1988). .	10, 13, 14
<u>Olsen v. Olsen</u> , 704 P.2d 564 (Utah 1985).	9, 10
<u>Paffel v. Paffel</u> , 732 P.2d 96, 100 (Utah 1986). . . .	9
<u>Sampinos v. Sampinos</u> , 750 P.2d 615 (Utah App. 1988) .	10, 11
<u>Savage v. Savage</u> , 658 P.2d 1201 (Utah 1983)	13, 14 15, 20

STATUTES

Utah Code Ann. § 30-3-5(1) (1989)	2
Utah Code Ann. § 78-2A-3(2)(g) (Supp. 1989)	1

RULES

Rule 3, Rules of the Utah Court of Appeals.	1
Rule 4, Rules of the Utah Court of Appeals.	1

GENERAL

24 Am.Jur.2d, <u>Divorce and Separation</u> , § 926	19
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JURISDICTION

This is an appeal from a Decree of Divorce entered in the Third Judicial District Court, Salt Lake County, State of Utah, on May 12, 1989. Plaintiff filed a Motion to Amend the Judgment or For Relief From the Judgment which was denied on August 31, 1989. The Utah Court of Appeals has jurisdiction of this appeal pursuant to Rules 3 and 4, Rules of the Utah Court of Appeals and Utah Code Ann. § 78-2A-3(2)(g) (Supp. 1989).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Court abused its discretion in only awarding plaintiff alimony in the sum of \$1,800.00 per month in light of the disparity between the parties' incomes, the length of the marriage, and the defendant's needs and lack of specified job training or skills.

2. Whether the Court abused its discretion in basing the award of alimony to the defendant using the current income of the plaintiff at the time of trial to establish his ability to pay alimony while at the same time basing the parties' standard of living on the reduced income earned by the plaintiff during the years 1981 through 1986.

3. Whether the Court abused its discretion by failing to consider, as an expense of sale, the capital gains tax consequences to be assessed against each party on the sale of the California home prior to equal distribution of the equity therein.

4. Whether the Court abused its discretion in awarding an equal division of the net equity from the California home in

light of the parties disparate ability to pay capital gains taxes.

STATUTORY AUTHORITY

Utah Code Ann. § 30-3-5(1) (1989).

Disposition of property -- Maintenance of health care of parties and children -- court to have continuing jurisdiction -- custody and visitation -- termination of alimony -- non-meritorious petition for modification.

(1) When a decree of divorce is rendered, the court may include in it equitable orders relating to the children, property, and parties.

. . .

STATEMENT OF THE CASE

Mr. Walter James Howell, the Plaintiff-Respondent in this case, filed a complaint against his wife, the Defendant-Appellant. Mrs. Barbara Joyce Howell filed a counterclaim, seeking a decree of divorce, alimony, child support, a fair and equitable division of the real and personal property, and attorney's fees.

The case was tried before the Honorable Frank G. Noel on December 22, 1988, and completed on January 19, 1989. Each side was represented by counsel and presented documentary evidence, as well as their own testimonies. In addition, Mr. Howell presented the testimony of two witnesses, one who offered testimony regarding the pension plans available to him, and the other who offered testimony regarding the availability of employment to his

wife. Mrs. Howell presented one additional witness who testified as to the tax benefits available to her husband upon the payment of alimony to her and as to the capital gains taxes which would be assessed against the parties upon the sale of the California home. After hearing closing arguments, the trial court issued its ruling. The Findings of Fact, Conclusions of Law and Decree of Divorce were signed and entered on May 12, 1989.

The ruling of the trial court applicable to the issues on appeal was as follows:

1. It awarded defendant alimony in the amount of \$1,800.00 per month, payable in two equal payments on the 1st and 15th days of each month, until the defendant remarried, cohabited or until further order of the Court.

2. It ordered that the California home be sold, and that the equity remaining in the home, after cost of sale, be divided equally between the parties.

Copies of the Findings, Conclusions and Decree are attached hereto in the Addendum as Exhibits "A" and "B" and by reference incorporated herein.

The plaintiff subsequently filed a Motion to Amend the Judgment or for Relief From the Judgment, which was denied on August 31, 1989. Defendant filed her Notice of Appeal on September 28, 1989.

STATEMENT OF THE FACTS

MARITAL HISTORY

The parties were married on October 14, 1956, in Cushing,

Oklahoma (Tr. 31). Shortly after their marriage, Mr. Howell began working for Western Airlines as a pilot (Tr. 38). During the marriage, the parties moved a number of times, (Tr. 39) and Mrs. Howell was primarily a full-time homemaker and mother, only working now and then on a part-time basis (Tr. 78). Five children were born as issue of this marriage, and at the time of trial, four were emancipated and one was a minor child, namely Sean Daniel Howell, born August 21, 1972 (Tr. 31). The parties separated on November 22, 1986.

EMPLOYMENT HISTORY

From 1957 through 1984, Mr. Howell was employed as an airline pilot for Western Airlines. Western Airlines was taken over by Delta Airlines in 1985, and he was thereafter employed as an airline pilot for Delta Airlines from 1985 through the time of trial (Tr. 40). In 1984, plaintiff's employer, then Western Airlines, suffered severe financial problems, and asked its pilots to accept a wage reduction (Tr. 113). The parties agreed, and as a result, the family experienced a financial strain during that period of time (Tr. 217) because Mr. Howell received no increases in compensation even though the cost of living was increasing (Tr. 115). During the period 1981 through 1986, Mr. Howell's average yearly income was approximately \$67,000.00 or \$5,500.00 per month.

In 1986, after Delta took over operation of the airlines, Mr. Howell began receiving increased compensation (Tr. 114). At the time of trial in December of 1988, he was earning

approximately \$10,120.00 per month (Tr. 45).

Defendant Mrs. Howell, at time of trial, was working as a part-time sales clerk for Casual Furniture and was earning a gross income of \$649.80 per month (Tr. 75). This employment was scheduled to end on December 31, 1988 because her employer was going out of business. (Tr. 75). Despite defendant's applications to several potential employers to find new employment, she had not been hired as of the time of trial, due to the fact that she did not have sufficient experience (Tr. 72).

Mrs. Howell graduated from high school in 1956, and has had no formal training, with the exception of approximately 30 hours of college courses taken at a junior college several years earlier (Tr. 70). Throughout the marriage, her part-time employment consisted primarily of unskilled labor, and included working as an aid in a day care center (Tr. 73); working as a secretary (Tr. 74); selling cosmetics (Tr. 74); working as a switchboard operator (Tr. 75); and teaching piano lessons out of her home (Tr. 72).

Mrs. Howell's monthly living expenses at time of trial were \$5,021.30 (Tr. 233-34).

The Court made the following specific Findings related to the plaintiff's income (Tr. 265):

5. At the time of the separation of the parties, the plaintiff was earning between \$5,500.00 per month and \$5,600.00 per month and had been earning this sum for five years prior to this time. . . .

6. The court believes the income level of \$5,500.00 reflects the income level and

living standards of the parties during the last five years of their lives together.

7. The plaintiff earns, from his present employment, a salary of \$10,000.00 per month. The court has determined in setting alimony that while \$5,500.00 per month represents the living standards of the parties in the last 5 years of the marriage, when the parties resided together, the ability of the plaintiff to pay alimony is based upon his present income of \$10,000.00 per month.

The Court made the following specific Finding related to the defendant's earning ability (Tr. 265):

8. The defendant earns, or is capable of earning, \$7,500.00 per year, or \$625.00 per month. At the time of trial, defendant was employed with Casual Furniture on a part-time basis earning a gross income of \$649.80 per month, although that employment was scheduled to end on December 31, 1988 and she had not yet secured replacement employment.

CALIFORNIA RESIDENCE

During the marriage, the parties acquired two homes, one in California (Tr. 57) and one in Utah (Tr. 58). The court found that the California home was valued at \$290,000.00 (Tr. 248) with a current mortgage of \$23,631.00 (Tr. 248). The court also found that the Utah home was valued at \$140,000.00 (Tr. 248) with a current mortgage of \$123,000.00 (Tr. 248). Mr. Howell testified at trial that he wanted to sell the California home and divide the remaining equity (Tr. 103). Mrs. Howell testified at trial that she wanted to reside in the California home for personal as well as financial reasons (Tr. 214-216). She also called Mark Papanikolas, a certified public accountant and certified financial planner (Tr. 165-166) as an expert to testify as to the

Plaintiff's tax benefits derived from the payment of alimony and as to the parties' potential tax liability on the sale of the California home. He testified that, based on Mr. Howell's 1988 payroll schedule, he would enjoy a substantial tax benefit by his payment of alimony (Tr. 199). For every dollar paid, Mr. Howell would save 33 cents (Tr. 199).

Mr. Papanikolas also testified that the capital gains tax on the realized equity from the sale of the California home would total \$23,400.00 (Tr. 201). His testimony also addressed the IRS requirements for qualifying for a tax exclusion or for "rolling over" this tax, one of which is that the California residence must be the primary residence of the parties (Tr. 184-185).

On this issue, Mr. Papanikolas stated as follows:

I don't think that it's possible to conclude affirmatively that the California home would be their primary residence unless Mr. and Mrs. Howell could prove that it was always their intent to return to California and to live in that home and the move to Salt Lake was temporary, and a number of things in line with that, then it would possible that that could be considered a primary residence.

The Internal Revenue Service may well take the position if the return were audited, when the home was sold, that that was not their primary residence because they moved to Salt Lake City because they purchased another home here and abandoned that as their primary residence. So I think it would be very difficult to say that you could use the provisions of Section 1034 to roll over any gain.

(Tr. 185 Lines 4-18).

Even if the parties could establish that the California

residence was their primary residence and thereby qualify to roll over the capital gains taxes incurred on its sale, Mrs. Howell testified that she was afraid that she would be financially unable to purchase another home in California, of greater value so as to roll over her capital gains taxes at that time (Tr. 215-216). Therefore, she requested the court to address the capital gains taxes as an expense in the event the court ordered the property sold. In the alternative, she asked the court to consider the parties' disparate ability to pay the tax and to adjust the division of equity accordingly (Tr. 198). The court failed to consider either option.

SUMMARY OF ARGUMENTS

1. The trial court's award of alimony failed to take into consideration the three factors relevant to alimony: (1) the needs of Mrs. Howell, which were established at \$5,021.30 per month; (2) her inability to meet those needs on her own due to her age, limited work experience and lack of formal education and skills; and (3) Mr. Howell's substantial ability to pay alimony based on his income at time of trial, in excess of \$10,000.00 per month. The award should be vacated and increased.

2. The trial court erred by failing to measure the parties' standard of living based on their income and needs at the time of trial. Instead the trial court based it on a life style maintained by the parties during a period when Mr. Howell's income was unusually low. Therefore, the alimony award should be vacated and increased, and this court should articulate a method

as to how and when the parties' standard of living should be measured.

3. The trial court failed to consider the immediate and concrete tax consequences precipitated by the court ordered sale of the California residence. As this failure resulted in an inequitable division of the net equity resulting from that sale, the property division as to the California residence should be vacated and the issue remanded.

ARGUMENT

I

THE TRIAL COURT SHOULD HAVE CONSIDERED THE DISPARITY IN THE PARTIES' INCOMES, THE LENGTH OF THE MARRIAGE, AND THE RESPECTIVE EARNING ABILITIES AND EXPENSES OF THE PARTIES IN MAKING ITS ALIMONY AWARD

The purpose of alimony is to "enable the receiving spouse to maintain as nearly as possible the standard of living enjoyed during the marriage and prevent the spouse from becoming a public charge." Paffel v. Paffel, 732 P.2d 96, 100 (Utah 1986); Jones v. Jones, 700 P.2d 1072, 1075 (Utah 1985).

In making its alimony award, the court must consider all relevant factors affecting one spouse's ability to provide for herself and the other's ability to pay support. As summarized by the Utah Supreme Court in Olsen v. Olsen, 704 P.2d 564 (Utah 1985):

An alimony should, as far as possible,
equalize the parties' respective standards of
living and maintain them at a level as close

as possible to the standard of living enjoyed during the marriage. In determining the amount of alimony to be awarded, it was necessary for the trial court to consider the financial condition and needs of the plaintiff, her ability to produce a sufficient income for herself, and the ability of the defendant to provide support.

Id. at 566 (footnotes omitted).

Pursuant to this standard, the lower court in this case abused its discretion in awarding a lower amount of alimony to Mrs. Howell than her needs, and than the plaintiff's ability to provide, would mandate. The court found that, for the purposes of awarding alimony, the plaintiff's income averaged \$5,600.00 per month during the years 1981 through 1986, the last five years the parties resided together during their marriage. However, it based Plaintiff's ability to pay alimony on his income at time of trial, \$10,120.00 per month (Tr. 265). At the time of trial, Mrs. Howell was earning \$645.00 per month and her living expenses were over \$5,000.00 per month (Tr. 229).

In addition to child support of \$1,363.00, the court awarded Defendant monthly alimony in the amount of \$1,800.00. The minor child will turn 18 on August 21, 1990, and the child support payment will terminate. If we analyze the court's award of alimony under the three factors set forth in Olsen v. Olsen, supra, as well as the cases of Asper v. Asper, 753 P.2d 978 (Utah App. 1988); Naranjo v. Naranjo, 751 P.2d 144 (Utah App. 1988); and Sampinos v. Sampinos, 750 P.2d 615 (Utah App. 1988), it is

clear the court abused its discretion, and Mrs. Howell is entitled to a greater amount of alimony.

First of all, the court must consider the financial condition and needs of the recipient spouse. At the time of the trial, Mrs. Howell was employed on a part-time basis as a furniture sales clerk, earning \$7.00 per hour (Tr. 75). Her employment was scheduled to terminate on December 31, 1988, due to the fact that the store was closing (Tr. 75). At trial, Mrs. Howell testified that her monthly living expenses were \$5,021.30, and these were compiled from actual expenses recorded in her check book register (Tr. 233). She had been unable to make ends meet with the combined amount of temporary support of \$2,400.00 per month that she had been receiving from the Plaintiff, and her own small salary (Tr. 211). In fact, she had to borrow money to meet her expenses on two separate occasions (Tr. 215). Mrs. Howell asked the court for an award of alimony in the amount of \$3,500.00 per month, and an additional amount of \$500.00 for child support. As in the Sampinos case, supra, there were no income producing assets awarded to the defendant in the divorce, and her only means of support would be the small income she could generate through her own efforts, and any additional amounts the court ordered plaintiff to pay.

The second factor to be considered by the court is the defendant's ability to produce sufficient income for herself. In the instant case, Mrs. Howell has a high school education, nominal additional formal training, and limited work experience.

At the time of trial, she was in her mid-fifties, with no professional training and limited marketable skills. Her limited work experience, during the 32 years of the parties' marriage, was in relatively unskilled jobs. During most of the marriage, including the separations, Mrs. Howell devoted her time to raising the parties' children and maintaining the parties' home. It is unrealistic to assume that Mrs. Howell, in light of her age and limited work experience and training, would be able to enter the work force and support herself in a style resembling that which she would have had if the marriage had continued. Needless to say, the standard of living she would have enjoyed had the marriage continued would have been based on an annual income in excess of \$120,000.00. At the time of trial, Plaintiff's income exceeded \$10,000.00 per month. The alimony award of \$1,800.00 is less than one-fifth of Plaintiff's monthly income, and not an adequate amount to allow Defendant to meet her basic needs and expenses much less maintain a comparable standard of living.

The last factor the court must consider in making an award of alimony is the paying spouse's ability to provide support. The record clearly demonstrates the Plaintiff's ability to provide adequate support for the Defendant. Based upon his monthly income at time of trial which was in excess of \$10,000.00 per month, it is clear that he has an ability to pay defendant a greater amount of support than what was awarded. In addition, uncontroverted evidence at trial established that Mr. Howell

would realize a substantial tax benefit of 33 cents for every dollar of alimony paid to his wife.

In light of Mrs. Howell's financial needs, her inability to meet those needs and Mr. Howell's substantial ability to pay, the court abused its discretion in only awarding Mrs. Howell alimony in the amount of \$1,800.00 per month. This court should vacate that award and enter its own award based on the evidence contained in the record. In the alternative, this court should remand to the lower court for a redetermination of an adequate award of alimony. In either event, the increase of alimony award should be made retroactive to the date of trial.

II

THE TRIAL COURT ERRED IN AWARDING ALIMONY BASED UPON ITS MEASUREMENT OF THE PARTIES' STANDARD OF LIVING DURING THE YEARS 1981 TO 1986

The court found that Mr. Howell's ability to pay alimony was based upon his monthly income at time of trial of \$10,000.00. However, inconsistently with this finding, the court determined that the standard of living enjoyed by the parties during the marriage was based on Mr. Howell's average income from 1981 to 1986 of \$5,500.00 per month. This figure represented the reduced compensation the parties agreed to accept from Western Airlines knowing that their income level would substantially increase once the take over of Western by Delta was accomplished. This measurement of the standard of living was an abuse of discretion.

Utah law requires consideration of the standard of living enjoyed by the parties during the marriage in making a

determination of the amount of alimony to be awarded to the recipient spouse. For example, in the case of Naranjo v. Naranjo, 751 P.2d 1144 (Utah App. 1988) the Utah Court of Appeals stated:

[Alimony] should, so far as possible, equalize the parties' 'respective standards of living and maintain them at a level as close as possible to the standard of living enjoyed during the marriage.' (citations omitted) '[T]he ultimate test of the propriety of an alimony award is whether, given all of these factors, the party receiving alimony will be able to support him- or herself as nearly as possible to the standard of living . . . enjoyed during the marriage.'

Id. at 1147. (citations omitted).

Although the courts mandate this consideration of the standard of living in fashioning an alimony award, Utah courts have never defined the term or articulated a formula for measuring a specific standard of living. One case even suggests that the appropriate standard is that which the parties would have enjoyed had the marriage continued. In Savage v. Savage, 658 P.2d 1201 (Utah 1983), the Utah Supreme Court stated:

Where a marriage is of long duration and the earning capacity of one spouse greatly exceeds that of the other, as here, it is appropriate to order alimony and child support at a level which will insure that the supported spouse and children may maintain a standard of living not unduly disproportionate to that which they would have enjoyed had the marriage continued.

Id. at 1205 (emphasis added) (See also Naranjo v. Naranjo, 751 P.2d 1144, 1147 (Utah App. 1988)).

This inconsistency and lack of a precise definition is generally not a problem because the standard of living enjoyed by the parties during the marriage is usually comparable to that which exists at the time of trial. However, in this case, the parties had accepted a temporary reduction in compensation in exchange for retention of Mr. Howell's employment and the expectation of substantially increased compensation in the future. During the years 1981 to 1986, the parties suffered financial strain as a result of this decision and did not enjoy the standard of living at that time which they anticipated they would enjoy in the future. However, the court used an average yearly income over that five-year period to arrive at a standard of living based on an average income of \$5,500.00 per month. This was error in several respects.

First, the lower income level was a result of the parties' conscious decision to defer present benefits in exchange for greater future benefits.

Second, Mr. Howell was receiving the increased benefits as early as 1987, and at time of trial in December of 1988 was earning in excess of \$10,000.00 per month, or nearly double the yearly average used by the court.

Third, under the standard outlined in Savage, supra, the court must consider the standard of living the parties would have enjoyed had the marriage continued.

Finally, a determination of the standard of living at the time of trial would be consistent with the requirement that

marital assets be valued at time of trial. In Berger v. Berger, 713 P.2d 695 (Utah 1985), the Utah Supreme Court held that "[t]he marital estate should be valued at the time of the divorce decree." Id. at 697. (See also Fletcher v. Fletcher, 615 P.2d 1218 (Utah 1980)).

Based on the foregoing, the trial court's use of a standard of living based on Mr. Howell's past income of \$5,500.00 per month was error and an abuse of discretion. Therefore, the award of alimony to the Defendant should be vacated, and this court should award Defendant an amount of alimony consistent with the evidence presented at trial, or in the alternative, remand the issue to the trial court. In either event, this court must provide guidance, define the term and time frame to be used, or articulate a formula for the trial court to measure an accurate standard of living.

III

THE TRIAL COURT ERRED IN NOT CONSIDERING THE
CAPITAL GAINS TAX CONSEQUENCES OF THE SALE OF
THE CALIFORNIA RESIDENCE PRIOR TO DIVIDING
THE NET EQUITY DERIVED FROM THAT SALE

Trial courts are granted broad discretion to equitably divide marital assets pursuant to Utah statutory and case law. An even distribution of assets is not always required to achieve equity and fairness. Courts have long recognized that expenses of an asset should be deducted prior to a determination and

division of the net equity in that asset. For example, in the case of Asper v. Asper, 753 P.2d 978 (Utah App. 1988), the Utah Court of Appeals upheld the trial court's deduction of the expense of the anticipated real estate commission prior to the division of the equity in the marital home. In so doing, the court stated:

The deduction of anticipated real estate charges seems to be reasonable as each party was charged with half of those charges. 'In the distribution of the marital estate, there is no fixed rule or formula. . . . The responsibility of the trial court is to endeavor to provide a just and equitable adjustment of their economic resources so that the parties might reconstruct their lives on a happy and useful basis.'

Id. at 982 (quoting Gramme v. Gramme, 587 P.2d 144, 148 (Utah 1978)).

Although the Utah courts have not addressed the consideration and treatment of tax consequences resulting from a court ordered sale of a marital asset, the issue has been addressed in other jurisdictions. One of the earliest cases in which the issue of taxes was addressed is In re Marriage of Epstein, 154 Cal. Rptr. 413, 592 P.2d 1165 (Cal. 1978). A copy of this case is included in the addendum as Exhibit "C". In that case, the wife appealed the trial court's order that the family residence be sold and the proceeds divided equally between the parties. She argued that the trial court erred by not expressly considering tax liability in the division of those proceeds. The Supreme Court of California agreed and stated:

The trial court's order does not mention the possibility that the parties might incur state and federal capital gains tax liability as a result of the sale of the residence. Noting that equalization of community property shares before taxes may result in her receiving less than half of the net value of community property remaining after payment of taxes, wife contends the trial court erred by not expressly considering tax liability in its order. We agree with wife that the court's division of community property should take account of any taxes actually paid as a result of the court ordered sale of the residence . . .

Id. at 1171. Although the court found that the trial court's order could be interpreted so as to avoid reversible error, and although California is a community property state unlike Utah, the principal outlined by the California Supreme Court is applicable to this case. The case concluded that the trial court must consider tax consequences where a taxable event has occurred during the marriage or will occur in connection with the division of property.

The Supreme Court of Montana was faced with a similar issue in the case of In re Marriage of Beck, 631 P.2d 282 (Mont. 1981). A copy of this case is included in the Addendum as Exhibit "D". In that case the Montana Supreme Court held that the trial court must consider the concrete and immediate tax consequences precipitated by a court ordered sale of marital property. In so holding, the court stated:

[W]here a property distribution ordered by a court includes a taxable event precipitating a concrete and immediate tax liability, such tax liability should be considered by the court before entering its final judgment.

In re Marriage of Gilbert, (1981), Mont. 628 P.2d 1088, 38 St. Rep. 743, we held that a District Court does not abuse its discretion by refusing to consider theoretical tax consequences when the court-ordered property distribution does not contemplate any taxable event which triggers present tax liability. But where a present tax liability will be triggered by the court-ordered distribution, the court must make allowance for such impact. Other courts have held that a property distribution must make allowance for the tax impact incurred by a husband on account of a court ordered transfer of an interest in real property to the wife. See, e.g., Wahl v. Wahl, (1968), 39 Wis. 2d 510, 159 N.W.2d 651. See generally, Annot. Divorce or Separation: Consideration of tax liability or consequences in determining alimony or property settlement provisions, 51 A.L.R. 3rd 461. We hold, therefore, that at a new hearing, the trial court must consider any concrete and immediate adverse tax impact that a division of marital property might have on the parties.

Id. at 285 (emphasis added).

These cases are consistent with what has been outlined as the generally accepted rule with respect to the deduction of expenses prior to a division of net equity in a marital asset. This general rule has been outlined in 24 Am.Jur.2d, Divorce and Separation, § 926. This section states:

While the courts generally recognize the rule, also stated in some statutes, that the tax consequences of any equitable distribution is a factor to be considered by the court, since disregarding the effect of taxes may result in an unrealistic and unjust result, it has frequently been said that a court is not required to consider theoretical tax consequences of transactions that are not necessary or probable but merely conjectural. Thus, in making an equitable distribution, a court need not take into account the fact that the husband is in the 50% tax bracket

where the divorce itself does not cause immediate taxable consequences. And it is too speculative to reduce the value of assets based on alleged tax consequences of the selling husband's assets for purposes of the property division in the absence of a showing of what assets would have to be sold at any given time. On the other hand, where the sale of real estate is required or is likely to occur within a short time after dissolution, the court should consider the tax consequences.

(Footnotes omitted and emphasis added).

Although the Utah courts have not specifically ruled on this issue, the courts have recognized that tax liability is an issue where there is evidence that such tax liability is concrete and immediate. In Savage v. Savage, 658 P.2d 1201 (Utah 1983), the Utah Supreme Court sanctioned the trial court's reservation of the issue of which party would bear the tax liability associated with the court ordered transfer of stock until such time as the liability could be specifically determined. (See Savage, 658 P.2d at 1204).

Applying these principals to the case currently on appeal, the trial court erred in not considering the capital gains tax consequences to both parties from the sale of the California residence for the following reasons. First, the sale of the residence was a court ordered sale, and the parties' tax liability could be determined within a short period after final dissolution, thereby making the liability neither theoretical nor speculative. Second, Defendant's expert testified that the tax liability, based on the values adduced at trial, would be

\$23,400.00. Third, he also testified that there was some uncertainty as to whether the parties could qualify to roll over any gains realized and therefore avoid paying the tax. Finally, Mrs. Howell testified that she could not afford a home of greater value in order to personally avoid the tax consequences.

In light of these circumstances, the court's failure to consider the tax consequences of the court ordered sale of the marital residence was reversible error. As a result, Mrs. Howell's ultimate share of equity in the home will be diminished and the property division rendered inequitable. The court should have considered the tax consequences as an expense of sale, or in the alternative, adjusted the division of the net equity to compensate Mrs. Howell for her disparate ability to pay the tax. Either option was necessary to achieve fairness. This court should vacate the division of net equity in the California home and remand the issue for a redetermination in light of the concrete and immediate tax consequences precipitated by the sale of real property.

CONCLUSION

The trial court erred in two respects: its inadequate award of alimony and its inequitable division of the net equity in the California home.

This was a 32-year marriage, and the disparity between the parties' respective earnings was enormous. At time of trial, Mr. Howell was earning in excess of \$120,000.00 per year. Mrs. Howell, by comparison, was earning approximately \$7,500.00 per

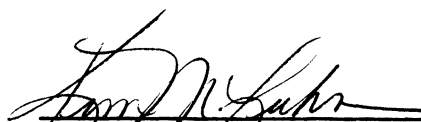
year. Due to her limited education, and lack of marketable skills Mrs. Howell is not capable of earning a greater amount.

The trial court only awarded Mrs. Howell \$1,800.00 per month as alimony in the face of monthly expenses which exceeded \$5,000.00. The trial court also erred by measuring the standard of living available to the parties based on Mr. Howell's income during the years 1981 through 1986, instead of on the parties' respective incomes at time of trial.

The court should vacate the alimony order, and make its own increased award consistent with the evidence in the record. In the alternative, the issue should be remanded to the trial court, with specific instruction on the proper measurement of the standard of living applicable to an award of alimony. In either event, the increased alimony award should be made retroactive to the date of trial.

The trial court also erred in dividing the net equity from the sale of the California residence without considering the immediate and concrete tax consequences, precipitated by that sale. As a result, its division of that equity was inequitable and should be vacated and remanded.

Respectfully submitted this 2nd day of February, 1990.

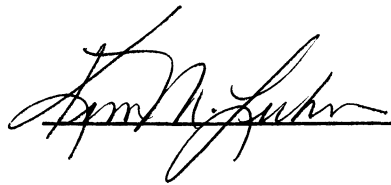


PAUL H. LIAPIS (USB # 1956)
HELEN E. CHRISTIAN (USB # 2247)
KIM M. LUHN (USB # 5105)

DELIVERY CERTIFICATE

I hereby certify that on this 2nd day of February, 1990, I caused to be hand delivered four copies of the foregoing Brief of Defendant-Appellant to:

David S. Dolowitz
Cohne, Rappaport & Segal
525 East 1st South, #500
Salt Lake City, Utah 84111



ADDENDUM

DAVID S. DOLOWITZ (0899)
of and for
COHNE, RAPPAPORT & SEGAL
Attorneys for Plaintiff
525 East 100 South, Suite 500
P.O. Box 11008
Salt Lake City, Utah 84147-0008
Telephone: (801) 532-2666

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

* * * * *

WALTER JAMES HOWELL,)	
)	
Plaintiff,)	FINDINGS OF FACT AND
)	CONCLUSIONS OF LAW
v.)	
)	
BARBARA JOYCE HOWELL,)	Civil No. D87-4343
)	Judge Frank Noel
Defendant.)	

* * * * *

The above-entitled matter came before the court for trial on Thursday, the 22nd day of December, 1988, the Honorable Frank G. Noel presiding. The plaintiff was present in person and represented by counsel, David S. Dolowitz and John Mason. The defendant was present in person and represented by counsel, Paul H. Liapis. The court heard and considered the testimony of the parties, received exhibits into evidence and determined to take the matter under advisement. Thereafter, being advised in the premises, the

EXHIBIT A

court announced its decision in open court on the 19th day of January, 1989. The plaintiff then submitted proposed Findings of Fact and Conclusions of Law and Decree to the court, provisions to which defendant objected. Those objections were heard and resolved before the court on April 27, 1989. Accordingly, the court now makes and enters the following as its

FINDINGS OF FACT

1. The defendant was a resident of Salt Lake County, State of Utah, when this action was filed and had been so for more than three months immediately prior thereto.

2. The parties are husband and wife, having been married on October 14, 1956, in Cushing, Oklahoma.

3. Irreconcilable differences arose between the parties which they attempted to reconcile, but were unable to do so.

4. There were five (5) children born as issue of this marriage; four (4) are emancipated. Both of the parties agreed that care, custody and control of the one (1) remaining minor child of the parties, Sean Daniel Howell, born August 21, 1972, age 16, should be awarded to the defendant, subject to reasonable rights of visitation in the plaintiff. The defendant is a fit and proper parent to be awarded the care, custody and control of the minor child of the parties.

5. At the time of the separation of the parties, the plaintiff was earning between \$5,500.00 per month and \$5,600.00 per month and had been earning this sum for five years prior to this time. After separation, the plaintiff filed an action for divorce which he dismissed at trial; that after a two-day attempted reconciliation, he filed this action.

6. The court believes the income level of \$5,500.00 reflects the income level and living standards of the parties during the last five years of their lives together.

7. The plaintiff earns, from his present employment, a salary of \$10,000.00 per month. The court has determined in setting alimony that while \$5,500.00 per month represents the living standards of the parties in the last 5 years of the marriage, when the parties resided together, the ability of the plaintiff to pay alimony is based upon his present income of \$10,000.00 per month.

8. The defendant earns, or is capable of earning, \$7,500.00 per year, or \$625.00 per month. At the time of trial, defendant was employed with Casual Furniture on a part-time basis earning a gross income of \$649.80 per month, although that employment was scheduled to end on December 31, 1988 and she had not yet secured replacement employment.

9. Application of the Child Support Guidelines

adopted by the courts of the State of Utah would require the payment of child support from the plaintiff to the defendant in the sum of \$1,363.00 per month based upon plaintiff's income of \$10,000.00 per month until Sean attains the age of 18 and graduates from high school with his regularly-scheduled graduating class.

10. The plaintiff filed separate tax returns in 1986 and 1987 and the defendant has not filed tax returns for those years.

11. The parties acquired, during the course of their marriage, a home and real property located in California, to-wit: 1767 Calle Rocas, Camarillo, California, which was the primary residence of the parties prior to their move to Utah in 1984; a home and real property located in Utah, to-wit: 8241 Top of the World Drive, Salt Lake City, Utah; seven (7) lots in the state of Texas; interests in a series of pension plans maintained by the employer of the plaintiff, to-wit: Western Airlines and Delta Airlines, (these plans are the Western Airlines Plan A, the Western Airlines Plan B, the Western Airlines Plan D, the Delta Plan and the Delta Savings Plan); and an interest in a military retirement plan, part of which was earned prior to the marriage; three IRA accounts, one in the name of the plaintiff for \$7,546.57, a second in the name of the plaintiff in the sum of \$4,196.43 and one in

the name of the defendant for \$10,397.00; bank accounts at Western Federal Credit Union, Ranier Bank, Valley Bank, Mt. West Savings, and Camarillo Community Bank; 8.6023 shares of Delta stock; stock in Continental Power Co.; furniture, fixtures, furnishings and appliances; five guns; an IBM computer and software; a 1977 Buick automobile; a 1987 Ford truck and camper; a 1980 Datsun 280Z; a 1978 ski boat; a 1982 fold boat and motor; several pieces of ivory; and a 35mm camera.

12. The plaintiff testified that the precise term of the military retirement plan is being re-examined by the United States Navy, as plaintiff was in the Naval Reserve prior to going on active duty and this period of time should have been included in the plan calculations but had not, as of the date of trial, and this determination had been appealed and was being reviewed by the Navy.

13. After separation of the parties, the plaintiff withdrew \$33,000.00 from a retirement fund which was expended to pay for marital debts of the parties, to-wit: \$16,000.00 to repay a loan \$3,400.00 on the VISA account; \$12,500.00 to pay income taxes; \$1,000.00 on their daughter's wedding; and \$600.00 to refinance the parties' home.

14. The parties acquired various debts which remain unpaid, to-wit:

Tracy Collins Bank
Camarillo Community Bank
Defendant's Personal Loan (attorney's fees)
Camarillo Bank VISA
Nordstroms
Weinstocks
ZCMI
Western Federal Credit Union
Western Federal Credit Union for camper
Security Pacific Solar Loan
Valley Bank VISA
State of California taxes.

15. The plaintiff has two life insurance policies, one with Delta Airlines for \$100,000.00 and one with Beneficial Life Insurance for \$100,000.00.

16. The defendant employed counsel to represent her in this matter and does not have a ready source of assets from which she can pay for the services which she has secured.

17. The plaintiff has available, through his employment, health and dental insurance and will maintain health and dental insurance for Walter and Sean as long as it is available through his employment.

From the foregoing Findings of Fact, the court now makes and enters the following

CONCLUSIONS OF LAW

1. This court has jurisdiction over the parties and subject matter of this action.

2. Each of the parties should be awarded a Decree of Divorce, terminating the marriage between them on the grounds of irreconcilable differences.

3. Care, custody and control of the minor child of the parties, Sean Howell, should be awarded to the defendant, subject to reasonable rights of visitation in the plaintiff.

4. The plaintiff should be ordered to pay child support to the defendant for Sean in the amount of \$1,363.00 per month until Sean is 18 and graduated from high school with his regularly-scheduled class. Payments should be made on the 20th of each month.

5. The income exemption for Sean should be awarded to the defendant.

6. The plaintiff should be ordered to pay alimony to the defendant based upon the standard of living enjoyed by the parties at the time of their separation in 1986. Accordingly, he should pay her \$1,800.00 per month, one-half on the 5th of each month; one-half on the 20th of each month until such time as she dies, remarries, cohabits with a man to whom she is not married, or further order of the court.

7. The parties should divide the retirement plan benefits acquired by them during the course of their marriage at the value determined by this court on December 22, 1988, by appropriate qualified domestic relations order, that is, the Western Airlines Plan A, Plan B, and Plan D, and the Delta Savings Plan and Delta Plan, which should be effected by separate orders to implement the provision of the Decree of

Divorce.

8. The military retirement plan of the parties, once finally valued and the period of service set, should be divided by application of the Woodward formula. The plaintiff should keep the defendant advised as to the progress of this inquiry and the actions and decisions of the United States Navy.

9. Plaintiff should be awarded the IRA in his name at Merrill Lynch in the amount of \$7,546.57 and the IRA at the Western Federal Credit Union of \$4,196.43, and the defendant should be awarded her IRA in the amount of \$10,397.00.

10. The plaintiff should be ordered to maintain the health and dental insurance that is available to him through his employment on both Sean and his older brother, Walter, so long as that insurance is available to him through the age of 21. Each of the parties should pay one-half of any extraordinary medical, dental, orthodontic or eyecare expense which is not covered by insurance.

11. The plaintiff has available to him life insurance in the sum of \$100,000.00. He should be required to maintain Matthew and Sean as beneficiaries of that policy until they attain the age of 21 years or are married. After that occurs, he shall be free to name whomever he wishes as beneficiary of that insurance. To assist the children in assuring this

coverage, the plaintiff should provide them with the policy number and name of the insurance company.

12. The plaintiff should be ordered to cooperate with the defendant in making available to her all health insurance benefits for which she can qualify under the COBRA provisions of the Internal Revenue Code.

13. The home and real property in California, at 1767 Calle Rocas, Camarillo, California, should be sold for the best possible price and at the earliest possible time. The net proceeds of sale divided equally between the parties. There is presently a debt due to the State of California for taxes. If it is determined that those are property taxes, they should be paid from the proceeds of sale of this property prior to division of the proceeds of sale. If it is determined that those are taxes for any other reason, the plaintiff should assume and pay those taxes and hold the defendant harmless therefrom. The plaintiff should be responsible for the sale of the California home, and should keep the defendant fully advised as to that transaction, and the defendant should take all actions necessary to effect sale.

14. The home and real property in Utah should be placed for sale at the best possible price and sold at the earliest possible date. The plaintiff should pay the

mortgage for the months of February, March and April, 1989, and if the January house payment has not been made, he should make that payment. Thereafter, the defendant shall be responsible for those payments if the home is not sold. The defendant shall be responsible for this sale and shall keep the plaintiff advised as to that transaction and the parties shall divide equally the net proceeds of sale.

15. The 8.6023 shares of Delta stock and Continental Power Stock should be awarded to the plaintiff.

16. The parties should sell one of the seven lots in Texas and divide the net proceeds of sale between them. Each should be awarded three of the remaining lots.

17. Each of the parties have accumulated savings accounts in their own names and they should be awarded those savings, to-wit: the plaintiff should be awarded the Western Federal Credit Union account; the Ranier Bank account; and the Valley Bank account, while the defendant should be awarded the Mountain West Savings account and the Camarillo Community Bank account.

18. The insurance proceeds for the 1977 Buick should be awarded to the defendant who should also be awarded the 1980 Datsun 280Z.

19. The 1987 Ford truck and camper should be awarded to the plaintiff.

20. The 1969 Ford automobile should be awarded to Matthew.

21. The 1978 ski boat should be awarded to the defendant.

22. The 1982 fold boat and engine should be awarded to the plaintiff.

23. Each of the parties should be awarded the furnishings, fixtures, furniture and appliances in their own possession with the exception of the IBM computer and computer software in the plaintiff's possession which should be awarded to the defendant and the 35mm camera which should be awarded to the plaintiff.

24. Each of the parties should be awarded one-half of the ivory collection.

25. Each of the parties should be ordered to make available family photographs in their possession to the other for copying. The photographs should be divided fairly between them.

26. The plaintiff has accounted for the \$33,000.00 he removed from the retirement to the satisfaction of the court and no order is entered in regard to those funds which the court believes are appropriately resolved in the division of the marital estate as set forth above.

27. Each of the parties should be ordered to assume

and pay the debts in their own name with the exception of the mortgage provisions set forth above, which, restated, are that the plaintiff should pay the mortgage on the California home and may use the rent received from the California home until its sale. The plaintiff should pay the mortgage payments on the Utah home for February, March, and April, 1989, and the January payment, if that has not been paid. Thereafter, the defendant should be responsible for payment of that debt.

The plaintiff should pay the debts due and owing to:

- a. Weyerhaeuser Mortgage (Calif. home);
- b. Western Federal Credit Union (pick-up);
- c. Western Federal Credit Union (camper);
- d. Security Pacific solar loan;
- e. Valley Bank VISA;
- f. State of California taxes.

The defendant should pay the debts due and owing to:

- a. Lincoln Mortgage (Utah home);
- b. Tracy Collins Bank;
- c. Camarillo Community Bank;
- d. Personal loan (attorney fees);
- e. Camarillo Bank VISA;
- f. Nordstroms;
- g. Weinstocks;
- h. ZCMI.

28. The parties should consult with an accountant regarding the filing of amended joint 1986 and 1987 tax returns. If these can be filed and the parties save money and secure a refund in excess of the \$2,500.00 that has been received by the plaintiff, they should do so and divide all refunds received in excess of the \$2,500.00 which has already

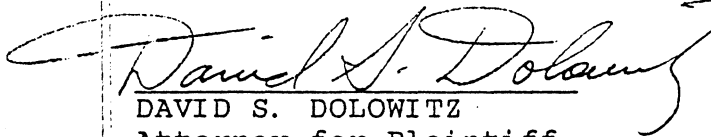
been received by the plaintiff.

29. The plaintiff should be ordered to pay on behalf of the defendant the sum of \$7,500.00 to assist her in the payment of her attorney fees within thirty (30) days from entry of the Decree of Divorce.

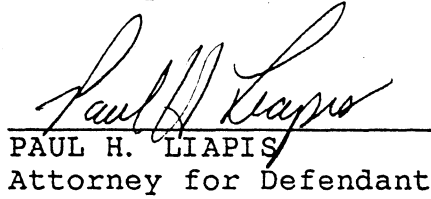
DATED this ____ day of _____, 1989.

FRANK G. NOEL
District Court Judge

APPROVED AS REFLECTING
THE RULING OF THE COURT:


DAVID S. DOLOWITZ

Attorney for Plaintiff

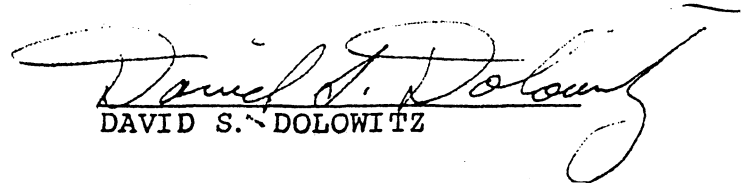

PAUL H. LIAPIS

Attorney for Defendant

Delivery
CERTIFICATE OF MAILING

I hereby certify that I caused to be *delivered* mailed a true copy of the above and foregoing Findings of Fact and Conclusions of Law, this 28 day of April, 1989, to:

Mr. Paul Liapis
Attorney at Law
48 Post Office Place, Third Floor
Salt Lake City, Utah 84101


DAVID S. DOLOWITZ

FILED DISTRICT COURT
Third Judicial District

MAY 12 1989

DAVID S. DOLOWITZ (0899)
of and for
COHNE, RAPPAPORT & SEGAL
Attorneys for Plaintiff
525 East 100 South, Suite 500
P.O. Box 11008
Salt Lake City, Utah 84147-0008
Telephone: (801) 532-2666

SALT LAKE COUNTY
By Pat Jones Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

* * * * *

WALTER JAMES HOWELL,)	
)	DECREE OF DIVORCE
Plaintiff,)	
)	
v.)	
)	
BARBARA JOYCE HOWELL,)	Civil No. D87-4343
)	Judge Frank Noel
Defendant.)	

* * * * *

The above-entitled matter came before the court for trial on Thursday, the 22nd day of December, 1988, the Honorable Frank G. Noel presiding. The plaintiff was present in person and represented by counsel, David S. Dolowitz and John Mason. The defendant was present in person and represented by counsel, Paul H. Liapis. The court heard and considered the testimony of the parties, received exhibits into evidence and determined to take the matter under advisement. Thereafter, being advised in the premises, the

EXHIBIT B

court announced its decision in open court on the 19th day of January, 1989. The plaintiff then submitted proposed Findings of Fact, Conclusions of Law and Decree to the court, provisions of which the defendant then objected. Those objections were heard and resolved before the court on April 27, 1989. Accordingly, the court, having made and entered its Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. This court has jurisdiction over the parties and subject matter of this action.

2. Each of the parties is awarded a Decree of Divorce, terminating their marriage.

3. Care, custody and control of the minor child of the parties, Sean Howell, is awarded to the defendant, subject to reasonable rights of visitation in the plaintiff.

4. The plaintiff is ordered to pay child support to the defendant for Sean in the amount of \$1,363.00 per month on the 20th of each month until Sean is 18 and graduates from high school with his regularly-scheduled class.

5. The income exemption for Sean is awarded to the defendant.

6. The plaintiff is ordered to pay alimony to the defendant in the sum of \$1,800.00 per month, one-half on the 5th of each month; one-half on the 20th of each month until

such time as she dies, remarries, cohabits with a man to whom she is not married, or further order of the court.

7. The parties shall divide the retirement plan benefits, valued as of December 22, 1988, acquired by them during the course of their marriage by appropriate qualified domestic relations order, that is, the Western Airlines Plan A, Plan B, and Plan D, and the Delta Savings Plan and Delta Plan, which shall be effected by separate orders to implement the provision of the Decree of Divorce.

8. The military retirement plan of the parties, once finally valued and the period of service set, shall be divided by application of the Woodward formula. The plaintiff shall keep the defendant advised as to the progress of this inquiry and the actions and decisions of the United States Navy.

9. Plaintiff is awarded the IRA in his name at Merrill Lynch in the amount of \$7,546.57 and the IRA at the Western Federal Credit Union in the amount of \$4,196.43, and the defendant is awarded her IRA in the amount of \$10,397.00.

10. The plaintiff is ordered to maintain the health and dental insurance that is available to him through his employment on both Sean and his older brother, Walter, through the age of 21, so long as that insurance is available to him. Each of the parties shall pay one-half of any extra-

ordinary medical, dental, orthodontic or eyecare expense which is not covered by insurance.

11. The plaintiff has available to him life insurance in the sum of \$100,000.00. He shall maintain Matthew and Sean as beneficiaries of that policy until they attain the age of 21 years or are married. After that occurs, he shall be free to name whomever he wishes as beneficiary of that insurance. To assist the children in assuring this coverage, the plaintiff shall provide them with the policy number and name of the insurance company.

12. The plaintiff should be ordered to cooperate with the defendant in making available to her all health insurance benefits for which she can qualify under the COBRA provisions of the Internal Revenue Code.

13. The home and real property in California, at 1767 Calle Rocas, Camarillo, California, legally described as:

LOT 44, TRACT NO. 1359, in the County of Ventura, State of California, as per Map recorded in Book 35, Page 59 of Maps, in the office of the County Recorder of said county,

shall be sold for the best possible price and at the earliest possible time. The net proceeds of sale shall be divided equally between the parties. There is presently a debt due to the State of California for taxes. If it is determined that those are property taxes, they shall be paid from the

proceeds of sale of this property prior to division of the proceeds of sale. If it is determined that those are taxes for any other reason, the plaintiff shall assume and pay those taxes and hold the defendant harmless therefrom. The plaintiff shall be responsible for the sale of the California home, and should keep the defendant fully advised as to that transaction, and the defendant should take all actions necessary to effect the sale.

14. The home and real property in Utah, at 8241 Top of the World Drive, Salt Lake City, Utah, and the adjacent lot, legally described as:

(House) LOT 18, TOP OF THE WORLD #3 SUBDIVISION;

(Lot) BEG S 84 FT FR NE COR` LOT 17, TOP OF THE
WORLD #3 SUBDIVISION; S 84 FT; E 100 FT;
W 100 FT TO BEG. 0.2 AC M OR L;

shall be placed for sale at the best possible price and sold at the earliest possible date. The plaintiff shall pay the mortgage for the months of February, March and April, 1989, and if the January house payment has not been made, he shall make that payment. Thereafter, the defendant shall be responsible for those payments if the home is not sold. The defendant shall be responsible for this sale and shall keep the plaintiff advised as to that transaction and the parties shall divide equally the net proceeds of sale.

15. The 8.6023 shares of Delta stock and Continental

Power Stock are awarded to the plaintiff.

16. The parties shall sell one of the seven lots in Texas and divide the net proceeds of sale between them. Each is awarded three of the remaining lots.

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23. Each of the parties is awarded the furnishings, fixtures, furniture and appliances in their own possession with the exception of the IBM computer and computer software in the plaintiff's possession which are awarded to the

defendant and the 35mm camera which is awarded to the plaintiff.

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26. The plaintiff has accounted for the \$33,000.00 he removed from the retirement to the satisfaction of the court and no order is entered in regard to those funds which the court believes are appropriately resolved in the division of the marital estate as set forth above.

27. Each of the parties is ordered to assume and pay the debts in their own name with the exception of the mortgage provisions set forth above, which, restated, are that the plaintiff shall pay the mortgage on the California home and may use the rent received from the California home until its sale. The plaintiff shall pay the mortgage payments on the Utah home for February, March, and April, 1989, and the January payment, if that has not been paid. Thereafter, the defendant shall be responsible for payment of that debt. The plaintiff shall pay the debts due and owing to:

- a. Weyerhauser Mortgage (Calif. home);
- b. Western Federal Credit Union (pick-up);

- c. Western Federal Credit Union (camper);
- d. Security Pacific solar loan;
- e. Valley Bank VISA;
- f. State of California taxes.

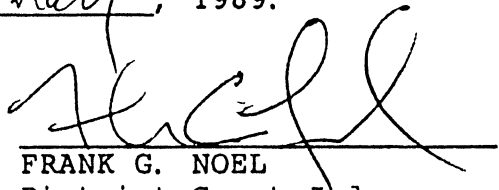
and the defendant shall pay the debts due and owing to:

- a. Lincoln Mortgage (Utah home);
- b. Tracy Collins Bank;
- c. Camarillo Community Bank;
- d. Personal loan (attorney fees);
- e. Camarillo Bank VISA;
- f. Nordstroms;
- g. Weinstocks;
- h. ZCMI.

28. The parties are ordered to consult with an accountant regarding the filing of amended joint 1986 and 1987 tax returns. If these can be filed and the parties save money and secure a refund in excess of the \$2,500.00 that has been received by the plaintiff, they shall do so and divide all refunds received in excess of the \$2,500.00 which has already been received by the plaintiff.

29. The plaintiff is ordered to pay on behalf of the defendant the sum of \$7,500.00 to assist her in the payment of her attorney fees within thirty (30) days from entry of the Decree of Divorce.

DATED this 12 day of May, 1989.


FRANK G. NOEL
District Court Judge

I CERTIFY THAT THIS IS A TRUE COPY OF AN
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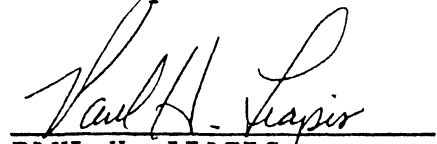
Pat Jones

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THE RULING OF THE COURT:



DAVID S. DOLOWITZ
Attorney for Plaintiff



PAUL H. LIAPIS
Attorney for Defendant

154 Cal.Rptr. 413

**In re Charles Robert ROICK, a Judge of
the Municipal Court, on Retirement.**

L.A. 31050.

Supreme Court of California,
In Bank.

Dec. 6, 1978.

BY THE COURT:

In this proceeding, the Commission on Judicial Performance has filed its record and recommendation that Judge Charles Robert Roick be retired for disability within the meaning of California Constitution, article VI, section 18, subdivision (c)(1). Judge Roick, through his conservator, has waived review and requested the immediate entry of an appropriate order. Accordingly, it is hereby ordered that Judge Charles Robert Roick be retired from the Municipal Court, North County Municipal Court District, County of San Diego. (Cal Const., art. VI, § 18, subd. (c)(1).) This order is final forthwith.



154 Cal.Rptr. 413

**In re the MARRIAGE OF Elayne C. and
Leon J. EPSTEIN.**

Leon J. EPSTEIN, Respondent,

v.

Elayne C. EPSTEIN, Appellant.

S.F. 23933.

Supreme Court of California.

April 12, 1979.

As Modified on Denial of Rehearing
May 17, 1979.

In marital dissolution proceeding, the Superior Court, Marin County, Charles R. Best, J., divided community property and awarded spousal support, and wife appealed. The Supreme Court, Tobriner, J., held

that: (1) rule that spouse is generally not entitled to reimbursement for separate funds utilized to meet community obligations does not apply to expenditures subsequent to separation; (2) case had to be remanded to trial court for resolution of factual questions determinative of whether sums expended by husband after separation to preserve and maintain family residence were paid to fulfill husband's support obligations; (3) capital gains tax, if any, incurred as a result of sale of residence had to be considered so as to equalize division of community property after payment of tax; (4) trial court erred in failing to require husband to reimburse community for community funds withdrawn by him to pay estimated taxes on his 1973 separate property income; (5) trial court did not abuse its discretion in fixing spousal support at \$750 per month, and (6) trial court abused its discretion in terminating spousal support as of April 15, 1981, in view of absence of evidence that wife would be self-supporting by that date.

Reversed in part and affirmed in part.

Vacating 83 Cal.App.3d 55, 147 Cal.
Rptr. 595.**1. Husband and Wife ⇌ 262.1(4)**

There exists presumption that, unless agreement between parties specifies that contributing party be reimbursed, party who utilizes his separate property for community purposes intends a gift to the community.

2. Husband and Wife ⇌ 265

Although spouse is generally not entitled to reimbursement for separate funds utilized to meet community obligations, that rule does not apply to expenditures subsequent to separation.

3. Husband and Wife ⇌ 4

Husband and wife assume mutual obligation of support upon marriage, and this obligation is not conditioned on existence of community support or income but, in fact, upon exhaustion of community property or income, spouse must utilize his or her sepa-

rate property to provide for the support of the other. West's Ann.Civ.Code, §§ 242, 5100, 5132.

4. Husband and Wife ⇐4

Upon exhaustion of community property or income, spouse must utilize his or her separate property to provide for the support of the other, and no statutory right mandates reimbursement for such expenditures. West's Ann.Civ.Code, §§ 242, 5100, 5132.

5. Divorce ⇐252.3(2)

A spouse who, after separation of parties, uses earnings or other separate funds to pay preexisting community obligations should be reimbursed therefor out of community property upon dissolution unless there exists circumstances indicating that reimbursement is inappropriate, such as where payment was made under circumstances in which it would have been unreasonable to expect reimbursement or where payment on account of preexisting community obligation constituted in reality discharge of the paying spouse's duty to support the other spouse or a dependent child of the parties; disapproving contrary language in *In re Marriage of Fischer*, 78 Cal.App.3d 556, 146 Cal.Rptr. 384.

6. Divorce ⇐287

Where, following separation, husband expended sums to preserve and maintain family residence, but where trial court did not determine whether husband's payments constituted in reality a discharge in part of his obligation of support, whether parties separated by agreement, whether they entered into an agreement for support, and whether husband should be estopped from denying that his payments were in discharge of his duty to support, case had to be remanded to superior court for additional findings concerning whether husband was entitled to reimbursement. West's Ann.Civ.Code, § 5131.

7. Divorce ⇐252.5(3)

Trial court's division of community property should take account of any taxes initially paid as a result of court-ordered sale of residence.

8. Divorce ⇐252.3(2)

Where sale of parties' residence occurs as a result of enforcement of trial court's order dividing community property and where there exists possible future tax burden since if parties use proceeds to purchase new residence, resulting deferral of capital gains tax will reduce basis of new residence, thereby possibly resulting in higher tax when and if new residence is sold, possible future tax burden is an example of speculative and uncertain tax consequences which trial court need not consider in dividing community property. West's Ann.Rev. & Tax.Code, § 18095; 26 U.S.C.A. (I.R.C.1954) § 1034(e).

9. Divorce ⇐254(1)

Where trial court's order dividing community property stated that, following reimbursement to husband for traceable separate funds used to maintain residence, balance of residence sale proceeds "shall be divided between the parties in a fashion which will equalize the division of the parties' community property," judgment was susceptible of construction consistent with principle that balance of proceeds should be divided so as to equalize division of community property after payments of any capital gains tax incurred upon sale of residence.

10. Divorce ⇐265

When husband utilizes community funds to pay taxes relating to his separate property income, he must reimburse community for such sums.

11. Divorce ⇐252.3(2)

Where, after separation, husband withdrew \$2,250 from savings account, conceded to contain only community funds, to make his quarterly estimated income tax payment on his 1973 salary and where all of husband's income earned during 1973, being postseparation, was his separate property and hence entire tax obligation attributable to his 1973 earnings was his separate debt, trial court erred in failing to charge husband's share of community property for \$2,250 withdrawn from savings account. West's Ann.Civ.Code, § 5118.

12. Divorce ⇐ 235

A trial court may abuse its discretion if it accords to one spouse a continued standard of living significantly higher than it accords to the other.

13. Divorce ⇐ 240(1), 308

Where husband's overall net income amounted to \$2,600 per month, where husband claimed expenses totaling \$1,750 per month, including \$350 per month to meet cost of parties' daughter's college education, where this left available income of \$850 per month, a sum less than the \$950 awarded in combined spousal and child support, and where husband's income was inadequate both to sustain two separate households at standard of living previously enjoyed by parties and to provide for daughter's college education, trial court did not abuse its discretion in awarding wife \$950 in combined spousal and child support.

14. Divorce ⇐ 245(1)

Where wife had no employment or job training since 1954, where, prior to her marriage in 1954, wife had held only brief and intermittent unskilled positions, where, although wife had earned bachelor of arts degree and expressed willingness to seek employment, she required considerable training before she would be qualified to compete in the job market, where, at time of trial, wife was 48 years old without any specific employment opportunities available to her, and where record was devoid of evidence justifying inference that wife would be self-supporting on or after April 15, 1981, trial court's decision to terminate jurisdiction to amend spousal support after April 15, 1981 was an abuse of discretion.

15. Divorce ⇐ 247

Award of support beyond husband's mandatory retirement date would not have conflicted with equal division of community property requirement of Civil Code section subdivision. West's Ann.Civ.Code, § 4800(a).

16. Divorce ⇐ 252.3(2)

There is no requirement excluding husband's half of community property as a source of future award of spousal support. West's Ann.Civ.Code, § 4800(a).

Roy A. Sharff, Stephen Adams, San Francisco, and Bernard N. Wolf, Oakland, for appellant.

Savitt & Adams, Verna A. Adams and Nancy Sevitch, San Rafael, for respondent.

TOBRINER, Justice.

In this marital dissolution proceeding both husband and wife challenge various rulings of the trial court. We state briefly our conclusions with respect to the issues raised.

First, we explain that although a spouse is generally not entitled to reimbursement for separate funds utilized to meet community obligations, that rule does not apply to expenditures subsequent to separation. Accordingly, husband may claim reimbursement for sums expended after separation to preserve and maintain the family residence, unless such sums were paid to fulfill husband's support obligations. The case must be remanded to the trial court for resolution of the factual questions determinative of that issue.

Second, the trial court ordered the family residence sold and the proceeds, after repayment to husband of reimbursable expenditures, divided in a fashion that would equalize the division of the community property. We interpret this language as permitting the court, upon the remand of this cause, to take into account the capital gains tax, if any, incurred as a result of that sale so as to equalize the division of community property after payment of that tax.

Third, the trial court erred in failing to require the husband to reimburse the community for community funds withdrawn by him to pay estimated taxes on his 1973 separate property income.

Finally, while we find no abuse of discretion in the court's order fixing spousal support at \$750 per month, its order terminating that support as of April 15, 1981, in the absence of evidence that wife will be self-supporting by that date, conflicts with our

recent decision in *In re Marriage of Morrison* (1978) 20 Cal.3d 437, 143 Cal.Rptr. 139, 573 P.2d 41.

1. *Summary of facts.*

The parties were married on August 8, 1954, and separated on April 15, 1972. At the time of trial wife was 48 years old and husband was 57. There were 2 children of the marriage, a daughter, over 18 years old at the time of trial and in college, and a son, age 16, residing with wife.

Wife has had no employment or job training since 1954. Before marriage she had held a temporary job as a doctor's receptionist for six months, had worked for her father for a brief period in his business, and for a wholesale firm in Los Angeles for slightly less than a year. She had a B.A. degree from the University of California, where she had majored in social work. Although she had not sought employment or job training during the two-and-one-half-year interval between separation and trial, attributing this fact to the demands of running the family home and responsibility for the children, she intended to seek job training and employment in the future.

The husband, a professor of psychiatry at University of California Medical School, also engages in part-time private practice of psychiatry. His gross income from all sources in 1973 totalled \$67,000; his net income from all sources after taxes, retirement and deduction for certain health and life insurance premiums amounted to about \$31,200.

After the parties separated, husband continued to provide to his wife approximately \$650 every month and in addition paid utilities, telephone, department store bills, gardener, gasoline card, house insurance, house taxes, and mortgage payment. In February 1974, he modified his monthly payments, paying \$950, from which wife was expected to pay the expenses husband had previously paid in addition to other incidental expenses. Throughout the pendente lite period wife and the son, David, remained in the family residence while husband made all the mortgage, insurance, and tax payments on the home. Wife

maintains that because of this arrangement she never sought an order for support pendente lite.

The trial court allowed the husband reimbursement for the money spent to maintain the family residence during the separation period. It refused, however, to order the community reimbursed for community funds used by husband to pay estimated taxes on his postseparation income although that income was husband's separate property.

The court divided the community property, awarding husband community personal property worth \$98,509.60 and wife community personal property worth \$19,695.55. It directed sale of the family residence, valued at \$140,000. It ordered the proceeds of the sale applied first to reimburse husband for traceable separate funds used to maintain that asset, with the balance "divided between the parties in a fashion which will equalize the division of the parties' community property."

Finally, the trial court awarded spousal support to wife in the amount of \$750 per month, retroactive to January 1, 1975, and continuing through April 14, 1981. The order provided that spousal support would terminate on April 15, 1981, and the court would retain no further jurisdiction to award spousal support. The court also ordered husband to pay child support for the parties' son living with the wife, in the sum of \$200 a month. The award of child support terminated on August 23, 1976, when the son reached the age of 18.

2. *Husband is entitled to reimbursement for separate funds utilized to preserve and maintain the family residence unless paid to discharge his duty of support.*

[1] Our decision in *See v. See* (1966) 64 Cal.2d 778, 51 Cal.Rptr. 888, 415 P.2d 776 established a presumption that, unless an agreement between the parties specifies that the contributing party be reimbursed, a party who utilizes his separate property for community purposes intends a gift to the community. Thus we said in *See*, "The

basic rule is that the party who uses his separate property for community purposes is entitled to reimbursement from the community or separate property of the other only if there is an agreement between the parties to that effect." (64 Cal.2d at p. 785, 51 Cal.Rptr. at p. 893, 415 P.2d at p. 781; *Weinberg v. Weinberg* (1967) 67 Cal.2d 557, 570, 63 Cal.Rptr. 13, 432 P.2d 709.)

[2] This court, however, has not previously addressed the applicability of this no-reimbursement rule to the situation in which, after separating, the party uses his separate property for payments on preexisting community obligations. Upon examination we think the no-reimbursement rule in *See* does not apply in such a situation.

Justification for the *See* presumption lies in the natural characteristics and legal incidents of the marital relationship. The strength of "the natural feelings of mutual affection and generosity presumably attending the marital state" (*In re Marriage of Smith* (1978) 79 Cal.App.3d 725, 746, 145 Cal.Rptr. 205, 215) may alone provide a basis for the inference that expenditures of separate property in behalf of the community are intended as gifts.

[3, 4] The legal incidents of marriage, however, provide an additional basis for such an inference. Husband and wife assume a mutual obligation of support upon marriage. (See Civ.Code, § 5100.) This obligation is not conditioned on the existence of community property or income. In fact, upon exhaustion of the community property or income a spouse must utilize his or her separate property to provide for the support of the other. (Civ.Code, §§ 242, 5132.) As we noted in *See v. See*, *supra*, 64 Cal.2d 778, 784, 51 Cal.Rptr. 888, 415 P.2d 776, no statutory right mandates reimbursement for such expenditures.

Similarly, we held that if a husband during marriage elects to utilize his *separate property* instead of community property to meet community expenses he may not claim reimbursement. The absence of a statutory

right to reimbursement together with basic equity considerations¹ led us to conclude that the husband acts with a donative intent that transmutes his separate property into community property. (See *v. See*, *supra*, 64 Cal.2d at p. 785, 51 Cal.Rptr. 888, 415 P.2d 776.)

[5] The recent Court of Appeal opinion in *In re Marriage of Smith*, *supra*, 79 Cal.3d 725, 145 Cal.Rptr. 205, however, held that the no-reimbursement rule of *See v. See* did not apply to payments made after the spouses have separated. Upon consideration of that matter, we agree with the conclusion of *In re Marriage of Smith*, and adopt as the view of this court the following portion of the Court of Appeal opinion of Justice Kaufman:

"The rule denying reimbursement in the absence of an agreement therefor is based largely on the presumption the paying spouse intended a gift. (See *See v. See*, *supra*, 64 Cal.2d at p. 785, 51 Cal.Rptr. 888, 415 P.2d 776; cf. *Dunn v. Mullan*, 211 Cal. 583, 589-590, [296 P. 604, 77 A.L.R. 1015]; *Ives v. Connacher*, *supra*, 162 Cal. 174 at p. 177, 121 P. 394.) . . . When the parties have separated in anticipation of dissolution of the marriage, the rational basis for presuming an intention on the part of the paying spouse to make a gift is gone.

"Moreover, the practical realities are that almost all married couples have incurred debts which are customarily paid out of their earnings and that, upon separation of the parties, their earnings, the usual, and perhaps only, liquid community asset available for payment of debts, become their respective separate property (Civ.Code, § 5118). . . . [W]hen, after separation, one of the spouses makes payments on preexisting community debts out of earnings or other separate funds, if the no-reimbursement rule is applied, the result is that community obligations which would otherwise be charged against community property and borne by the parties equally are

1. At the time of our decision husband had both management and control of the community property (former Civ.Code, § 172) as well as the right to select the mode of living (former

Civ.Code, § 156). It was considered inequitable to allow the husband to burden the community assets by consistently living beyond the means of the community.

charged exclusively to the paying spouse. Thus, application of the no-reimbursement rule will discourage payment of community debts after separation, exacerbate the financial and emotional disruption which all too frequently accompanies the breakup of a marriage and, perhaps, result in impairing the credit reputations of both spouses.

"So, we are persuaded the rule disallowing reimbursement in the absence of an agreement for reimbursement should not apply and that, as a general rule, a spouse who, after separation of the parties, uses earnings or other separate funds to pay preexisting community obligations should be reimbursed therefor out of the community property upon dissolution. However, there are a number of situations in which reimbursement is inappropriate, so reimbursement should not be ordered automatically.

"Reimbursement should not be ordered if payment was made under circumstances in which it would have been unreasonable to expect reimbursement, for example, where there was an agreement between the parties the payment would not be reimbursed or where the paying spouse truly intended the payment to constitute a gift or, generally, where the payment was made on account of a debt for the acquisition or preservation of an asset the paying spouse was using and the amount paid was not substantially in excess of the value of the use.

"Likewise, reimbursement should not be ordered where the payment on account of a preexisting community obligation constituted in reality a discharge of the paying spouse's duty to support the other spouse or a dependent child of the parties. Both spouses have a duty to support their de-

pendent children. (Civ.Code, §§ 242, 4700.) Similarly, the spouses owe to each other mutual duties of support. (Civ.Code, §§ 242, 5100, 5132.) Following separation, the preferred source for payment of support is the separate property of the supporting spouse that would have been community property if the spouses were not separated. (Civ.Code, § 4805.) Payment of a debt, of course, may constitute payment of spousal or child support. (See *Gay v. Gay*, 146 Cal. 237, 243, 79 P. 885; *Bushman v. Superior Court*, 33 Cal.App.3d 177, 181-183, 108 Cal.Rptr. 765; *In re Hendricks*, 5 Cal. App.3d 793, 797-798, 85 Cal.Rptr. 220; cf. Civ.Code, § 4358.) When in fact it does, reimbursement is inappropriate. (See *v. See, supra*, 64 Cal.2d at p. 784, 51 Cal.Rptr. 888, 415 P.2d 776.)" (79 Cal.App.3d at pp. 746-748, 145 Cal.Rptr. at pp. 215-216.) (Fns. omitted.)²

[6] In the instant case the trial court did not determine whether husband's payments constituted in reality a discharge in part of his obligation of support. Husband, however, maintains that we need not remand the cause for a finding on this issue because under Civil Code section 5131 he owed no obligation of support.

Civil Code section 5131 provides that "A spouse is not liable for the support of the other spouse when the other spouse is living [apart] from the spouse by agreement unless such support is stipulated in the agreement."³ To invoke the protection of this section, therefore, husband must prove both (a) that the spouses separated by agreement, and (b) that this agreement contained no provision for support. The trial court rendered no finding on either point, and the evidence adduced on the matter is equivocal.⁴

2. Language contrary to these views in *In re Marriage of Fischer* (1976) 78 Cal App 3d 556, 561-562, 146 Cal Rptr. 384 is disapproved.

3. Bruch, *The Legal Import of Informal Marital Separations: A Survey of California Law and a Call for Change* (1977) 65 Cal L.Rev. 1015, 1030-1031, calls for legislative amendment of section 5131; the writer argues that the statute would more closely conform to the reasonable expectations of separated spouses if it provided

that the duty of support continues after separation unless there is an agreement to the contrary.

4. The parties testified to an "arrangement" under which husband paid mortgage, insurance, real property taxes, and other expenses. Whether this evidence is sufficient to prove an implied contract for support is an issue for the trial court. We note also a dearth of evidence on whether the parties separated "by agree-

Because this case was tried before *In re Marriage of Smith*, *supra*, 79 Cal.App.3d 725, 145 Cal.Rptr. 205, the parties did not orient their presentation of evidence to the issues which *Smith* found to be crucial to the husband's right to reimbursement, and the trial court rendered no findings on those issues. The issues thus left unresolved include the crucial question whether husband's payments for maintenance of the family home were made in discharge of his support obligation⁵ which may turn on the subsidiary questions whether the parties separated "by agreement" (Civ.Code, § 5131), whether they entered into an "agreement" for support within the meaning of that section, and whether husband should be estopped, as wife claims, from denying that his payments were in discharge of his duty to support.⁶ All of these are issues for the trier of fact, not matters which can be resolved by an appellate court. We therefore perceive no alternative to remanding this case to the superior court for additional findings.⁷

3. Upon remand of this case the trial court should take into account the capital gains tax, if any, incurred by the parties as a result of the sale of the family residence.

The trial court ordered the family residence sold and the proceeds divided between the parties, less the reimbursement to husband discussed in part 2 of this opinion, in such a manner as to equalize the

ment," although arguably such an agreement might be inferred from the subsequent conduct of the parties.

5. "There occur to us several considerations pertinent to the determination whether a given payment was in reality in discharge of the paying spouse's duty to support. Where the payment was made pursuant to a court order, if the order specifies whether or not reimbursement is to be had, naturally the order will control. The advisability of including such a specification in every order for payment of debts is obvious. Where the court order does not specify whether or not reimbursement is to be had or where the payment made was not required by a court order, the determination will be made on the basis of the relevant facts and circumstances. However, two prime con-

division of the community property. Since husband received personal property of substantially greater value than that awarded wife, she will receive the larger share of the proceeds from the sale of the house.

[7] The trial court's order does not mention the possibility that the parties might incur state and federal capital gains tax liability as a result of the sale of the residence. Noting that equalization of community property shares before taxes may result in her receiving less than half of the net value of community property remaining after payment of taxes, wife contends the trial court erred by not expressly considering tax liability in its order. We agree with wife that the court's division of community property should take account of any taxes actually paid as a result of the court-ordered sale of the residence, but explain that this result can be achieved merely by construing the trial court's order, without need to posit error by the court below.

In re Marriage of Fonstein (1976) 17 Cal.3d 738, 131 Cal.Rptr. 873, 552 P.2d 1169, we held that the trial court, in assigning to husband the value of his interest in a law partnership, need not take into account the tax that might be incurred if husband at some uncertain future date sold that interest. We there declared that "Regardless of the certainty that tax liability will be incurred . . . the trial court is not required to speculate on or consider . . . tax consequences in the absence of proof

siderations will obviously be whether or not there was a need for spousal or child support at the time the payment was made and whether or not the payment made was in addition to reasonable support already being provided by the paying spouse either pursuant to or in the absence of a court order." (*In re Marriage of Smith*, *supra*, 79 Cal.App.3d at p. 748, 145 Cal.Rptr. at p. 216.)

6. Wife contends that she relied on husband's payments on the family home and consequently did not seek a court order for support.
7. We leave to the discretion of the trial court whether to reopen the proceedings for additional evidence or to render findings on the existing record.

that a taxable event has occurred during the marriage or will occur in connection with the division of the community property." (17 Cal.3d at p. 749, fn. 5, 131 Cal. Rptr. at pp. 879-880, fn. 5, 552 P.2d at pp. 1175-1176 fn. 5; see *Weinberg v. Weinberg*, supra, 67 Cal.2d 557, 566, 63 Cal.Rptr. 13, 452 P.2d 709.) (Emphasis added.)

Unlike *Fonstein*, which involved a speculative future tax liability arising on the hypothetical sale of an asset, in the present case the taxable event, the sale of the residence, occurs as a result of the enforcement of the court's order dividing the community property. In this respect the case at bar resembles *In re Marriage of Brigden* (1978) 80 Cal.App.3d 380, 145 Cal.Rptr. 716, and *In re Marriage of Clark* (1978) 80 Cal.App.3d 417, 145 Cal.Rptr. 602. In both cases the trial court awarded husband community property corporate stock, but ordered him to give wife a promissory note to equalize the division of community property; in fixing the value of the note, however, both trial courts failed to consider that state and federal taxing authorities would treat the property division as a sale of wife's interest in the stock and impose a capital gains tax on the proceeds of the note. On these facts the Court of Appeal in *Brigden* and *Clark* ordered the trial court to revise its award to take into account the wife's tax liability. When husband in *Clark* argued that *Fonstein* precluded consideration of the capital gains tax because the amount of the tax could not be immediately determined,⁸ the Court of Appeal rejected his contention and directed that "[i]n order to equalize division of the community property, [husband]

should pay one-half of the capital gains tax caused by the transaction." (80 Cal.App.3d at p. 424, 145 Cal.Rptr. at p. 607.)

[8] In cases such as the instant matter involving the sale of a family residence, the uncertainty concerning the amount of capital gains tax liability stems from provisions in state and federal tax law which defer liability to the extent that the proceeds from the sale are reinvested in a new residence within one year of the sale. (Rev. & Tax.Code, § 18091; Int.Rev.Code, § 1034(a).)⁹ That uncertainty, however, will be resolved within a year or two of the court's decree.¹⁰ In the present case, the amount of the tax liability may have been fixed by events pending the decision of this appeal, so the trial court, upon the remand of this case made necessary by our holding on the husband's right of reimbursement, can recognize that liability in dividing the proceeds of the sale. If not, and in similar cases arising in the future, the court can take account of tax liability by providing that the liability incurred, if any, is owed equally by both spouses. In unusual cases, it could retain jurisdiction to supervise the payment of taxes and adjust the division of the community property. (See *In re Marriage of Clark*, supra, 80 Cal.App.3d 417, 424, 145 Cal.Rptr. 602.)

[9] The trial court's order states simply that, following reimbursement to husband, "the balance of said sale proceeds shall be divided between the parties in a fashion which will equalize the division of the parties' community property." We do not

8. The Internal Revenue Code treats the award of the stock to husband, offset by a promissory note from him to wife, as the sale of wife's half interest in the stock, a sale which is subject to capital gains tax. Because husband undertook to pay the note in installments, the tax is spread over the years in which wife received the payments, and thus the amount of the tax turned in part on her taxable income in such years. (See discussion in *In re Marriage of Clark*, supra, 80 Cal.App.3d 417, 422 and fn. 3, 145 Cal.Rptr. 602.)

9. Amendments enacted subsequent to the trial of this case extended the period for reinvestment of the proceeds to 18 months.

10. If the parties use the proceeds to purchase a new residence, the resulting deferral of the capital gains tax reduces the basis of the new residence. Depending upon future events, that reduction in basis may result in a higher tax when and if the new residence is sold. (Rev. & Tax.Code, § 18095; Int.Rev.Code, § 1034(e).) That possible future tax burden, however, is an example of the speculative and uncertain tax consequences which the trial court need not consider under *In re Marriage of Fonstein*, supra, 17 Cal.3d 738, 749, 131 Cal.Rptr. 873, 552 P.2d 1160.)

think it necessary to interpret that order as rejecting consideration of the tax consequences of the sale, and then to brand the order so construed as erroneous. The judgment is susceptible of a construction consistent with the principles declared in this opinion. (See 4 Witkin, Cal.Procedure (2d ed. 1971) pp. 3209-3210.) We therefore construe the judgment to provide that the balance of the proceeds be divided so as to equalize the division of the community property after payment of any capital gains tax incurred upon the sale of the residence, and direct that the trial court, upon the remand of this case, so apply the judgment.

4. *The community is entitled to reimbursement for community funds used to pay husband's tax liability for his separate income.*¹¹

In January of 1974 husband withdrew \$2,250 from a savings account at the Crocker Bank, conceded to contain only community funds, to make his quarterly estimated income tax payment on his 1973 salary. All of husband's income earned during 1973, being postseparation, was his separate property. (Civ.Code, § 5118.) Hence the entire tax obligation attributable to his 1973 earnings was his separate debt. Yet in dividing the remaining community funds held in the account the trial court deducted the \$2,250 from the balance of the account on the date of separation. Husband was therefore not required to reimburse the community for the use of funds to meet his separate property obligations.

[10, 11] When a husband utilizes community funds to pay taxes relating to his separate property income he must reimburse the community for such sums. (*Somps v. Somps* (1967) 250 Cal.App.2d 328, 338, 58 Cal.Rptr. 304; *Estate of Turner*

(1939) 35 Cal.App.2d 576, 96 P.2d 363.) We conclude that the trial court erred in failing to charge husband's share of the community property for the \$2,250 withdrawn from the Crocker Bank account.¹²

5. *The trial court did not abuse its discretion limiting spousal support to \$750 per month.*

[12, 13] "Although not unlimited, a trial court's discretion is broad in setting the amount of spousal support to be awarded upon dissolution of marriage." (*In re Marriage of Morrison, supra*, 20 Cal.3d 437, 454, 143 Cal.Rptr. 139, 150-151, 573 P.2d 41, 52-53.) Although a court may abuse its discretion if it accords to one spouse a continued standard of living significantly higher than it accords to the other (see *In re Marriage of Andreen* (1978) 76 Cal.App.3d 667, 671-672, 143 Cal.Rptr. 94), we cannot agree with wife's contention that the trial court here abused its discretion in failing to provide her with support sufficient to maintain her past standard of living.

The record discloses that husband's net income from his salary, after mandatory deductions and medical and life insurance premiums amounted to \$2,471 a month; i. e., \$29,632 per year. In 1973 he netted an additional \$9,700 from his private practice but \$9,000 went to pay taxes that were due because he was "under withheld" on his salary. The trial court concluded husband's overall net income amounted to \$2,600 per month. He claimed expenses totaling \$1,750 per month, including \$350 per month to meet the cost of the parties' daughter's college education. This left an available income of \$850 per month—a sum less than the \$950 awarded in combined spousal and child support.

11. In parts 4, 5, and 6 of this opinion our decision follows the opinion prepared by Judge Sater for the Court of Appeal in this action with only minor changes in wording.

12. We are aware of husband's contention that the \$2,250 withdrawn from the Crocker account should be offset by the deposit of his unused vacation paycheck into the Gibraltar

savings account. Approximately two-fifths or \$2,051 of this \$5,000 check was husband's separate property. In dividing the funds in the Gibraltar account, however, the trial court apportioned only the \$13,839.12 in the account at the time of separation. Thus, the additional balance in the account at the time of trial remained husband's separate property.

The trial court in the present case was unable to provide fully for the anticipated expenses of both parties. Husband's income is inadequate both to sustain two separate households at the standard of living previously enjoyed by the parties and to provide for the daughter's college education. We cannot say that the court abused its discretion in fairly attempting to allocate the available income to meet the financial needs of both parties.¹³

6. *The trial court abused its discretion in terminating jurisdiction to modify support as of April 15, 1981.*

[14-16] The trial court ordered spousal support to terminate on April 15, 1981, without retaining jurisdiction to award further support after that date. The trial court entered its order without the benefit of our recent decision in *In re Marriage of Morrison*, *supra*, 20 Cal.3d 437, 143 Cal.Rptr. 139, 573 P.2d 41. In *Morrison* we determined that: "A trial court should not terminate jurisdiction to extend a future support order after a lengthy marriage, unless the record clearly indicates that the supported spouse will be able to adequately meet his or her financial needs at the time selected for termination of jurisdiction. In making its decision concerning the retention of jurisdiction, the court must rely only on the evidence in the record and the reasonable inferences to be drawn therefrom.

13. Wife maintains that husband currently has an increased ability to pay spousal support due to the availability of tax deductions for such support, the termination of child support and the reduction in his expenses because mortgage, tax and insurance payments on the family home will no longer be required. Husband in turn asserts we should evaluate wife's lack of effort to become self-supporting during the postseparation period. We hold only that the trial court did not abuse its discretion at the time of judgment. Both parties may in the future present further evidence to the trial court on a motion to modify spousal support. At such time the court should reconsider the needs, circumstances and financial status of the parties.

14. We cannot accept husband's contention that an award of support beyond his mandatory retirement date (July 1, 1984) would conflict with the equal division of community property

It must not engage in speculation. If the record does not contain evidence of the supported spouse's ability to meet his or her future needs, the court should not 'burn its bridges' and fail to retain jurisdiction." (20 Cal.3d at p. 453, 143 Cal.Rptr. at p. 150, 573 P.2d at p. 52; *In re Marriage of Stenquist* (1978) 21 Cal.3d 779, 789, 148 Cal.Rptr. 9, 582 P.2d 96.)¹⁴

The record in the instant case is devoid of evidence justifying an inference that wife would be self-supporting on or after April 15, 1981. At the time of trial she was 48 years old without any specific employment opportunities available to her. Although she had earned a Bachelor of Arts degree and expressed a willingness to seek employment, she would need to undertake considerable training before she would be qualified to compete in the job market. Prior to the marriage wife had held only brief and intermittent unskilled positions.

On the basis of this record the trial court could only speculate as to wife's ability to meet her financial needs on April 15, 1981. The trial court's decision to terminate jurisdiction should be deferred until the facts demonstrate whether further support is warranted. (*In re Marriage of Stenquist*, *supra*, 21 Cal.3d at p. 790, 148 Cal.Rptr. 9, 582 P.2d 96.) We conclude that the trial court abused its discretion in divesting itself of jurisdiction to amend spousal support after April 15, 1981.¹⁵

requirement of Civil Code section 4800, subdivision (a). The trial court's order terminates spousal support almost three years prior to the date of husband's retirement. Moreover, even if a future award of spousal support must come from husband's half of the community property there is no requirement excluding such property as a source of that support. As the Court of Appeal below noted, "in every case where one spouse receives permanent spousal support from the other spouse, the source is from the separate property of the paying spouse, including earnings or property which were once the community property of both spouses." Husband's financial position may be re-examined if necessary at the time of his retirement in light of both parties' circumstances.

15. We hold only that the trial court erred in divesting itself of jurisdiction to award spousal support after April 15, 1981. The portion of

7. Conclusion.

The portion of the trial court order granting husband reimbursement for traceable funds he has expended during the period of the parties' separation to preserve and maintain the family home is reversed, and the cause is remanded to the trial court for further proceedings consistent with this opinion. The portion of the trial court order terminating jurisdiction to award spousal support commencing April 15, 1981, is reversed. The portion of the trial court order dividing the community property is reversed to the extent that it fails to provide for reimbursement to the community for community funds used by husband to pay his separate tax liability. Interpreting the portion of the order directing sale of the family residence and division of the proceeds to require an equal division of community property after payment of any capital gains tax liability incurred by reason of the sale, we affirm that portion of the order, but the trial court is directed on remand of this cause to divide the community property to attain the aforementioned equal division. In all other respects the judgment is affirmed.

BIRD, C. J., and MOSK, CLARK, RICHARDSON, MANUEL and NEWMAN, JJ., concur.



the award terminating spousal support as of April 15, 1981, remains valid, but the trial court

154 Cal.Rptr. 423

**Clemens A. HACKETHAL, Plaintiff
and Appellant,**

v.

**Arthur S. WEISSBEIN, Defendant
and Respondent.**

**Clemens A. HACKETHAL, Plaintiff
and Appellant,**

v.

**Irving L. SPRATT, Defendant
and Respondent.**

**Clemens A. HACKETHAL, Plaintiff
and Appellant,**

v.

**J. Lamont MURDOCH, Defendant
and Respondent.**

L.A. 31016.

Supreme Court of California,
In Bank.

April 12, 1979.

Hearing Denied May 17, 1979.

Doctor sued witnesses, who testified against him in hearing before judicial commission of private medical society, on ground that the testimony was negligently given and was motivated by malice. The Superior Court, San Bernardino County, Don A. Turner, J., sustained demurrers on ground that the alleged defamatory publications were absolutely privileged and plaintiff appealed. The Supreme Court, Newman, J., held that: (1) hearing before the commission was not an "official proceeding authorized by law," within statute providing that privileged communication is one made in legislative or judicial proceeding or in any other official proceeding authorized by law, and (2) statute extending qualified privilege to communications that are intended to aid in evaluation of qualifications of a doctor, if communications are addressed to hospital, hospital medical staff and professional society, medical school, professional licensing board, peer review

must retain jurisdiction to modify that award if economic circumstances warrant.

**In re the MARRIAGE OF Andrew J.
BECK, Petitioner and Appellant,
and
Doris Beck, Respondent and Respondent.
No. 80-286.**

Supreme Court of Montana.

Submitted on Briefs Feb. 17, 1981.

Decided July 9, 1981.

Husband appealed from that portion of a judgment of marriage dissolution of the District Court, Third Judicial District, Powell County, Robert Boyd, J. P., as divided the parties' property. The Supreme Court, Shea, J., held that: (1) the trial court's findings of the husband's net annual income and the value of the marital estate were not supported by the evidence; (2) where a property distribution included a taxable event precipitating a concrete and immediate tax liability, that tax liability had to be considered by the court before entering its final judgment; (3) in making its equitable distribution, the trial court properly did not set aside the husband's joint tenancy transfer to the wife of an undivided one-half interest in ranch property.

Vacated and remanded.

1. Divorce ⇐253(3)

In marriage dissolution proceeding, trial court's finding that husband would have net annual income of \$21,000 and that value of marital estate was \$760,000 were not supported by the evidence.

2. Appeal and Error ⇐1010.1(1)

Findings and conclusions may not rely solely on perceived lack of credibility, but they must be supported by evidence.

3. Divorce ⇐252.3(5)

Where property distribution ordered by court in marriage dissolution case included taxable event precipitating concrete and immediate tax liability, that tax liability had to be considered by the court before entering its final judgment.

4. Divorce ⇐286(8)

In marriage dissolution proceeding, husband's joint tenancy transfer to wife of undivided one-half interest in ranch was not due to be set aside, with only \$15,000 acquired by parties during their marriage through sale of two bars being subject to equitable distribution between parties, in light of fact that both parties were in ill health and not able to find gainful employment.

Leaphart Law Firm, Helena, for petitioner and appellant.

Daniels & Mizner, Deer Lodge, for respondent and respondent.

SHEA, Justice.

Andrew J. Beck appeals from that portion of a judgment of the Powell County District Court dividing the parties' property as a result of a marital dissolution. He contends that the trial court's findings and conclusions are not supported by the evidence, that the court failed to consider the tax consequences of its property division, and that the court should not have considered certain assets which the husband brought into the marriage to be marital property subject to division.

Although we rule that the trial court could properly consider the assets which the husband had brought into the marriage, we nonetheless must vacate the judgment and order a new hearing. The findings and conclusions are not supported by the evidence. Further, the court should have considered the tax consequences of the property division.

Andrew J. Beck (husband) and Doris Beck (wife) were married in 1966 in Elko, Nevada. It was the third marriage for each of them. Both had children from previous marriages, but no children were born to them during this marriage.

At the time of their marriage, the husband owned a substantial amount of ranch property in Powell County, identified as the

Gold Creek property, the Red Hills property, and the Larabie Ranch.

During the marriage, the husband granted the wife, by joint tenancy deed, an undivided one-half interest in the Larabie ranch property. It is approximately 760 acres and was appraised at \$393,462.80. Most of the land has been leased to others. In 1980, they received \$14,000 in rental from the land, but in 1981, the rental income increased to approximately \$16,000 per year.

During the marriage, the husband sold the Gold Hills property under two contracts for deed, one to Don Beck, and the other to Ronald Cunningham. Payment from both land contracts is assigned to the First Security Bank of Deer Lodge and the Federal Land Bank of Missoula. In this appeal, the husband contends that neither party receives income from the contracts. The wife, however, contends that the husband will receive a significant amount of cash from these two contracts under the property distribution ordered by the trial court. Her claim is unsubstantiated.

The Red Hills property contains about 2,100 acres and is subject to a life estate in Andrew A. Beck (the father of the petitioner-husband here). The fair market value of this property has been appraised at \$247,386.

The husband and wife acquired other property during their marriage, in particular, two bars that they later resold for profit. These bars were purchased with the husband's funds but were improved by the wife's efforts before they were resold.

The only evidence regarding the value of the property was introduced by the husband. The trial court adopted the wife's proposed findings and conclusions almost in toto. We consider here only the major findings covering the division of the property.

The only evidence of the property value was introduced by the husband, as previously stated. He also introduced the only evidence of the debts of the parties. The undisputed evidence was that the Larabie ranch property had a value of \$393,462.80, and that the Red Hills property had a fair market value of \$247,386. The total estate was valued at \$740,573.95. The trial court

adopted the wife's proposed finding that the total value of the estate is \$760,000.

The husband introduced evidence that the proceeds from the contract for sale of the Gold Hills property were unavailable to either the husband or wife because they were assigned to a bank. The husband's accountant testified that the contract payments from the Don Beck contract were "completely assigned to the First Security Bank in Deer Lodge and the Federal Land Bank in Missoula." Under cross-examination, the accountant testified that the First Security Bank mortgage on the property had been paid off, but that the bank was holding the contract proceeds under an assignment until the parties' other unspecified indebtednesses to the bank were paid off. The accountant also testified that the proceeds from the Cunningham contract were also assigned to these banks. This testimony was uncontradicted. In fact, the only evidence introduced by the wife concerning their income was that they received \$14,000 per year from rentals on the Larabie place.

The undisputed evidence is that the parties have an indebtedness of approximately \$92,000. The husband introduced into evidence a cash-flow chart showing that the annual income of the parties was \$23,583, including the income from the Larabie property. This evidence was uncontradicted.

Adopting the wife's proposed findings, the trial court awarded the wife the Larabie ranch (valued at \$393,000) together with the right to receive the rental income (now \$16,000 per year).

The court awarded the rest of the property to the husband—the Red Hills property (valued at \$247,386, but subject to a life estate), and the Gold Hills property—being sold to Don Beck and Ronald Cunningham under contracts for deed. The trial court also ordered the husband to pay all debts of the parties, amounting to over \$92,000. The trial court based this order in part on a finding that the husband would have an annual income of \$23,583 per year. The court found his income to be sufficient to support the husband and also for him to pay all income taxes, mortgages, attorney fees,

and miscellaneous indebtednesses of the parties, amounting to over \$92,000. The uncontradicted evidence, however, is that the husband's annual income is only \$9,000 per year, and from this he must not only support himself but pay approximately \$92,000 in bills.

The error lies in the failure of the trial court to recognize an error, pointed out in the motion for a new trial, that the \$23,583 annual income figure for the husband was based in part on \$14,000 rental income of the Larabie ranch property. The court, however, not only awarded this ranch to the wife, but also awarded her the rental income, thereby cutting the income available to the husband to a little over \$9,000 per year. The uncontradicted evidence is that the lease payments from the Larabie ranch amount to the greatest portion of the total income available for distribution to the parties. From this \$9,000 annual income, the husband must meet his own living expenses plus pay off over \$92,000 of the debts.

Following entry of judgment, the husband moved for a new trial on the grounds that the findings and conclusions were unsupported by the evidence, and also because in entering the decree, the court failed to consider the tax consequences of the property division. The motion was initially noticed up for hearing, but a later minute entry indicates that the hearing was vacated upon stipulation of the parties. Both sides presented affidavits in support of their position on the motion for a new trial. In her counter-affidavit resisting the husband's motion for a new trial, the wife attested that the trial court's property division left the husband several sources of income which could furnish him with over \$25,000 annually. The wife's allegations are, however, partially speculative in nature and wholly unsupported by the evidence. These alleged amounts of income are not set forth in the record. The wife has pointed to absolutely no evidence in the record either supporting the trial court's findings nor refuting the husband's contentions that the property division left him with only \$9,000 in yearly income.

The motion for a new trial was not again noticed up for hearing, and the trial court

took no action on the motion. As a result, under Rule 59(d), M.R.Civ.P., the motion was deemed denied ten days after the wife served her counter-affidavit. A timely notice of appeal was filed, and this appeal followed.

[1] With no support in the record, the wife baldly asserts that the husband will have a gross annual income of \$37,000, and that he will have a net annual income of \$21,000. She bases this argument in part on an unfounded premise that proceeds from the Gold Hill contracts are subject to mortgage payments to the Federal Land Bank in the amount of only \$16,000 annually. The record supports neither the gross annual income of \$37,000 nor the \$16,000 annual mortgage payments.

[2] The only evidence supports a finding that the husband would have an annual net income of just over \$9,000. Further the only evidence supports a finding that the value of the marital estate is \$740,673.95 rather than the figure of \$760,000 set by the trial court at the suggestion of the wife. The trial court could have arrived at these findings or conclusions only if it disbelieved portions of the husband's evidence, but if the trial court did not believe this evidence, it was not free to arbitrarily set figures not supported by the evidentiary record. Findings and conclusions may not rely solely on a perceived lack of credibility; rather, they must be supported by evidence. See, *In Re Marriage of Lippert* (1981), Mont., 627 P.2d 1206, 38 St.Rep. 625.

The conflict between the evidence and the findings resulted from the trial court's wholesale adoption of the wife's proposed findings and conclusions. We recently disapproved of such a practice. See, *Tomaskie v. Tomaskie* (1981), Mont., 625 P.2d 536, 539, 38 St.Rep. 416, 419, citing Canon 19, Canons of Judicial Ethics, 144 Mont. at xxvi—xxvii. See also, *Louis Dreyfus & CIE v. Panama Canal Co.*, (5th Cir. 1962), 298 F.2d 733, 737; and *Roberts v. Ross* (3rd Cir. 1965), 344 F.2d 747, 751–752, which persuasively set forth reasons why the trial court should do its own work when drafting final findings and conclusions.

[3] Because the findings are clearly erroneous (see Rule 52(a), M.R.Civ.P.), we must set them aside and vacate the judgment. There is another reason, however, to vacate the judgment. As the result of the property division ordered by the court, the husband moved for a new trial based in part on his claim that some harsh tax consequences would befall him and that the trial court had failed to consider these tax consequences. While we need not detail the tax consequences here, for we order a new hearing in any event, we take this occasion to hold that where a property distribution ordered by a court includes a taxable event precipitating a concrete and immediate tax liability, such tax liability should be considered by the court before entering its final judgment.

In *Re Marriage of Gilbert* (1981), Mont., 628 P.2d 1088, 38 St.Rep. 743, we held that a District Court does not abuse its discretion by refusing to consider theoretical tax consequences when the court-ordered property distribution does not contemplate any taxable event which triggers present tax liability. But where a present tax liability will be triggered by the court-ordered distribution, the court must make allowance for such tax impact. Other courts have held that a property distribution must make allowance for the tax impact incurred by a husband on account of a court-ordered transfer of an interest in real property to the wife. See, e. g., *Wahl v. Wahl* (1968), 39 Wis.2d 510, 159 N.W.2d 651. See generally, Annot., *Divorce or Separation: Consideration of Tax Liability or Consequences in Determining Alimony or Property Settlement Provisions*, 51 A.L.R.3d 461. We hold, therefore, that at a new hearing, the trial court must consider any concrete and immediate adverse tax impact that a division of marital property might have on the parties.

[4] A final issue raised by the husband is that only \$15,000 acquired by the parties during their marriage through the sale of two bars is subject to equitable distribution between the parties. He argues that he owned the property before the marriage and it should still be his upon the dissolution of the marriage. Therefore, he asks this Court to rule that the joint tenancy

transfer to the wife of an undivided one-half interest in the Larabie ranch must be set aside. "The only purpose of that transfer, he argues, was to benefit the widow if the husband should die, and, because they are now divorced, that purpose has been mooted. He therefore asks that the one-half interest be set aside and the Larabie ranch be restored to him as the donor.

Section 40-4-202, MCA, specifically directs the court to equitably apportion between the parties property "belonging to either or both, however and whenever acquired and whether the title thereto is in the name of the husband or wife or both." This statute refutes the husband's argument, and we need not say more. An uncontested fact is that the trial court found both parties to be in ill health and not able to find gainful employment. Dividing only the \$15,000 profit realized from the sale of the bars is not our idea of an equitable property division.

The judgment is vacated and this cause remanded for further proceedings consistent with this opinion.

DALY, HARRISON, WEBER and SHEEHY, JJ., concur.



The ESTATE OF Douglas J. STANDING BEAR, Deceased, by and through Corrine Billy, Personal Representative, Plaintiff and Appellant,

v.

Gerald BELCOURT, Jean Belcourt, and Leota M. Standing Bear, Defendants and Respondents.

No. 80-390.

Supreme Court of Montana.

Submitted June 16, 1981.

Decided July 9, 1981.

Personal representative of estate appealed from order of the District Court,