1981

John P. Dority v. Jeanne D. Dority v. Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

JOHN P. DORITY, Plaintiff-Appellant, vs. JEANNE D. DORITY, Defendant-Respondent.	)	Appeal No. 17376

BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT
OF THE THIRD JUDICIAL DISTRICT IN AND FOR SALT LAKE COUNTY,
STATE OF UTAH

THE HONORABLE JAMES S. SAWAYA, JUDGE

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STATEMENT OF THE NATURE OF THE CASE

This is an action for divorce brought by the plaintiff-appellant, John P. Dority, against his wife, Jeanne D. Dority, the defendant-respondent, who appeared and counter-claimed for divorce.

DISPOSITION OF THE CASE IN THE LOWER COURT

The trial of this matter was held on August 1, 1980, before the Honorable James S. Sawaya (Record, hereinafter "R." at 117). On August 4, 1980, the court issued its slip opinion in the matter granting a decree of divorce to each party and making the following division of property:

To the respondent--

1. The real property on Schoolhouse Lane in Devon, Pennsylvania.

2. 850 shares of Sperry Corporation stock and 100 shares of I.B.M. stock.

3. A fund of about $2,000.00 in a Pennsylvania checking account designated "Devon House Fund."

4. Her retirement fund with TIAA-CREF.

5. All personal property including automobiles, furniture, furnishings, etc. then in the name or possession of respondent.

6. Alimony in the sum of $500 per month for a period of 36 months commencing September, 1980.

To the appellant--

1. The real property in respondent's name in Salt Lake County.

2. The remaining 844 shares of stock in the Sperry Corporation and the remaining 120 shares of stock in I.B.M.

3. Stock in United Abestos Limited.

4. His vested retirement fund held by the Sperry Corporation.

5. All personal property then in the possession or name of the appellant.

Each party was to bear his or her own costs and attorneys' fees (R. 115-16). Formal Findings of Fact and Conclusions of Law

and the final Decree of Divorce, as prepared by counsel for respondent, were filed August, 11, 1980 (R. 127-34). On August 18, 1980, appellant filed his Notice of Objections to Findings of Fact, Conclusions of Law, and to the Decree of Divorce along with his Motion for a New Trial, or, in the Alternative, for Amendment of the Findings of Fact, Conclusions of Law, and Decree of Divorce (R. 135-39). A hearing on these objections and on the Motion for a New Trial was held on September 17, 1980 (R. 140, 295-312). Among other objections, it was noted that Finding 6(b) gave an unduly depressed figure for the equity in the home at Devon, Pennsylvania, in part because the equity had been reduced by the sum of $17,000 for a personal loan made to respondent from her mother purportedly for the purpose of maintaining and improving the Devon real property which sum counsel for respondent admitted was not properly a lien against the property (R. 297-99, Defendant's Exhibit 8). Another objection made was the lack of sufficient evidence to support the award of alimony in paragraph 9 of the Findings (R. 301-04). These and all other objections to the Findings of Fact and Conclusions of Law, with the exception of the correction of two typographical errors, were denied (R. 142).

On the Motion for New Trial, it was urged that the court had failed to adequately consider the requirements of Pennsylvania law with respect to the Pennsylvania real property, the house and lot located at Devon, Pennsylvania (R. 308-09). It was also urged that the evidence did not

support the award of alimony (R. 301-03), and that the court erred in not giving more consideration to Pennsylvania Law, which up until one month before trial, did not allow for any award of alimony after a decree of divorce in the circumstances presented here and which provided that suits begun before the effective date of the new law should generally continue under the old law, except "upon application granted" (R. 306-08). The court rejected these contentions, and specifically stated; "I don't think the Pennsylvania law should apply in this situation (R. 312-142).

Additional proposed findings were also submitted by counsel for appellant, but these were never adopted by the court (R. 311-12, 144-45).

The Notice of Appeal was filed October 16, 1980 (R. 147).

RELIEF SOUGHT ON APPEAL

Appellant requests that this Court reverse and vacate that part of the Findings and the Decree of the trial court which awarded the entire equity of the Pennsylvania real property to the respondent and which provided for an award of alimony. Appellant also requests that this Court remand this case to the trial court with an order directing the trial court to declare that the parties are tenants in common of equal one-half shares in value of the Pennsylvania real property, or,

in the alternative, to declare that appellant is entitled to additional property equivalent in value to $23,000, the sum appellant contributed, from his separate property which he brought to the marriage, to the purchase of the real property in Devon, Pennsylvania. Appellant further requests that this Court declare on remand that respondent is not entitled to any alimony.

STATEMENT OF THE FACTS

The parties were married in Binghamton, New York, on April 15, 1956 (R. 202). The appellant was then 31 years old (R. 202). The respondent was three years younger, as the appellant was 55 and the respondent was 52 years old at the time of trial (R. 202, 257).

At the time of the marriage of the parties, the appellant was a patent attorney employed by the International Business Machines Corporation in Endicott, New York, at an annual salary of $12,667.20 (R. 202-03). He had received a law degree in 1950 from the University of Wisconsin, had been admitted to practice law in the states of Wisconsin and Iowa, and had been registered to practice in the United States Patent Office as a patent attorney since early 1952 (R. 202-03). At the time of the marriage, the appellant owned a house and a lot located in Endicott, New York, that had a value of about $16,000 and was free and clear of any obligation and, by his

own unrefuted testimony, appellant had approximately $26,000.00 in other assets, held principally in the form of government bonds (R. 204-05, 242-43). Although respondent testified she did not know of appellant's $26,000 in assets at the time of the marriage (259-60), she never denied that he had such assets and she admitted that he owned the house in Endicott (R. 283).

The respondent, at the time of the marriage, was four credits short of receiving her Bachelor's Degree at the University of Minnesota, had been working as a reporter at a daily newspaper at a monthly take-home salary of about $500, which employment she quit about two weeks after the marriage, and she brought according to her own testimony at most $500 in savings into the marriage plus a wedding present of $500 from her parents (R. 258-60). Four children were born as issue of the marriage in the years 1956 through 1960, and the two youngest children, twins, were nineteen years old at the time of the divorce trial (R. 205-259). As these children have all reached their majority, there is no issue as to their custody or support.

In 1960, the appellant changed employers and began working for the Sperry Rand Corporation, and as a result of that change, the parties moved from the appellant's house in Endicott, New York, to Rye, New York (R. 206-07). Appellant purchased a lot in Rye and constructed a home on that lot using funds received from the sale of the house in Endicott, the assets he brought into the marriage in 1956, and by taking a

mortgage out for approximately $30,000 (R. 206). The real property in Rye was owned only in the name of the appellant (R. 207).

In 1966, when appellant's employer moved from New York City to a suburb of Philadelphia, the appellant moved himself and his family to another Philadelphia suburb by the name of Devon. He there acquired a house on Schoolhouse Lane for a down payment of $10,000 and by taking out a mortgage of $25,000 (R. 207-08). The down payment came from the proceeds of the sale of the house in Rye, New York (R. 208). The sale of the Rye property netted about $40,000 after payment of the $30,000 mortgage and commissions, which $40,000 was about the same amount invested by appellant from his separate property in the Rye property, of which another $10,000 was used to make improvements in the Devon property in the years 1967 through 1972 (R. 202-09). The Devon property was placed in the name of both parties as tenants by the entireties (R. 227-28).

The parties have been separated since August 7, 1972, on which date the appellant returned home from work to find that his wife and children had left and taken most of the household furniture and furnishings with them. Shortly thereafter, a court order was entered requiring the appellant to pay the sum of $1,100 per month for the support of his wife and four children, of which $400 was allocated to the support of the wife (R. 209-210, Plaintiff's Exhibit 2). At that time the appellant had a gross salary of $3,000 per month or $36,000

per year (R. 210-211, Plaintiff's Exhibit 3). The appellant continued to reside in and to make the mortgage payments on the house on Schoolhouse Lane in Devon until the latter part of 1978 (R. 211). He also used another $3,000 from the proceeds of the sale of the Rye property to make repairs on the Devon property after the separation of the parties (R. 225).

After a separation of almost five years, the appellant filed for divorce in Pennsylvania in 1977 (R. 212). At that time, appellant sought and obtained a court order reducing his support obligations to his wife from $400 to $250 per month and eliminating the requirement of support for the two older boys who had reached the age of majority (R. 217, Plaintiff's Exhibit 6). The respondent had begun full time employment in 1976 (R. 266). Moreover, the oldest child of the parties, Jim, resided with appellant at the home on Schoolhouse Lane from 1975 until the appellant left in late 1978. Also, the second son, Ben, resided with them from January 1978 until the appellant had to move to Salt Lake (R. 282). Also, the appellant has contributed to the support of these children while attending college even after they gained their majority (R. 282-83).

In August of 1978, the appellant learned that to continue employment with his employer, the Sperry Corporation, he would have to relocate to Salt Lake City (R. 215). At that time, the parties attempted to negotiate a settlement of the Pennsylvania divorce proceeding which the respondent was contesting and to

negotiate a property settlement but no agreement was reached (R. 267-69).

At the time of the appellant's involuntary transfer in late 1978, he was earning a gross salary of just slightly over $46,000 (R. 217). Upon moving to Salt Lake, the appellant acquired a home at 3621 Oakview Drive for a purchase price of $80,000 (R. 222). This was financed by borrowing a down payment of $27,000 for which appellant's stocks were pledged as collateral to Merrill Lynch, and by granting a mortgage to the bank for the balance (R. 222, 230). This property was not acquired with any of the proceeds from the real property located in Devon as the appellant has received no proceeds from the Devon property (R. 222).

In June, 1979, after appellant had established residency in Utah, and because of the frustration he had experienced with respect to the Pennsylvania divorce action, which by then had dragged on for some two years, and fearing that now that he was in Utah he would not be able to help move it along, appellant filed for divorce in Utah (R. 218). Respondent submitted to the jurisdiction of the Utah court and there is no issue as to the jurisdiction of this state over the persons of both parties.

After appellant left the house in Devon in late 1978, respondent did some general cleanup and repair work on the place and began renting it out on July 1, 1979, at a rate of $600 per month (R. 270-72). As of July 1, 1980, this rent was

increased to $650 per month (R. 271-72). Three hundred dollars of that amount is net income after payments of taxes, mortgage payments, and maintenance (R. 272). Respondent claimed at trial to have borrowed about $17,000 from her mother to bring all mortgage and tax payments on the Devon property current and to make repairs, but that only about half of this personal loan had been put into the restoration of the house or the making of payments on it (R. 270-71). On defendant's Exhibit 8, admitted over the objection of counsel for appellant that the listing and valuation of assets was not properly supported by foundation testimony or other evidence (R. 278), the listing of the assets of the parties improperly shows the $17,000 loan as a reduction of the equity in the Devon real property (R. 297-98), which equity is further understated by the fact that the appraisal of the Devon property dates from November 1979, almost ten months before the trial (Deposition of Laurence S. Scott at pages 13-14, published at R. 256).

Defendant's Exhibit 9, admitted for illustrative purposes only (R. 274), reflects the income of the parties at the time of trial. It shows that even without support from appellant, respondent had a net monthly expendable income, after taxes, of $1,332.02.

ARGUMENT

I.

THE TRIAL COURT COMMITTED ERROR IN AWARDING THE ENTIRE OWNERSHIP INTEREST IN THE DEVON REAL PROPERTY TO RESPONDENT.

A. The Court Erred by Not Applying Pennsylvania Real Property Law.

It is an often quoted principle that:

> it is both the duty and the prerogative of this court in an equitable action to review the law and the facts and make its own findings and substitute its judgment for that of the trial court.

Mitchell v. Mitchell, 527 P.2d 1359, 1360 (Utah 1974). However, appellant is quite cognizant of the discretion of a trial court in a divorce action to adjust financial and property interests, of the presumption of the validity that usually attaches to the judgment of a trial court in such a situation, and of appellant's burden to show on appeal that:

> the evidence clearly preponderates against the findings as made; or there was a misunderstanding or misapplication of the law resulting in substantial and prejudicial error; or a serious inequity has resulted as to manifest a clear abuse of discretion.

Id. See also English v. English, 565 P.2d 409 (Utah 1977). However, as this court has also noted, the discretion of the trial court:

> is not without limit nor immune from correction on review, if that is warranted. Due to the seriousness of such proceedings and the vital effect they have on people's lives, it is also the responsibility of this court to carefully survey

> what is done, and while the determinations of the trial court are given deference and not disturbed lightly, changes should be made if that seems essential to the accomplishment and the desired objectives of the decree . . . .

DeRose v. DeRose 19 Utah 2d 77, 426 P.2d 221, 222 (1967). See also Read v. Read, 594 P.2d 871 (Utah 1979).

In the present action, although it is undisputed that the trial court had jurisdiction over the persons of both parties, an important part of the property to be divided was the real property located on Schoolhouse Lane in Devon, Pennsylvania. It is a well accepted proposition of law that a court hearing a marriage dissolution proceeding should look to the law of the situs of real property to determine how the property or its proceeds should be allocated. Haws v. Haws, 615 P.2d 978, 981 (Nev. 1980), Burton v. Burton, 23 Ariz. App. 159, 531 P.2d 204, 207 (1975), Barber v. Barber, 51 Cal.2d 244, 331 P.2d 628, 631 (1958). This principle is particularly applicable to the Devon real property inasmuch as it was used as the marital residence from the time of its acquisition in 1966 to the time the parties separated in 1972. It should also be noted that the appellant continued to live there until late 1978 and since that time respondent has taken charge of the property and has rented it out since July of 1979.

Both at trial and on the Motion for New Trial, counsel for appellant asked the trial court to take judicial notice of and to apply Section 501 of Title 68 of the Pennsylvania Consolidated Statutes (R. 287-88, 308-309) which reads:

> Whenever any husband and wife, hereafter [the statute dates to 1927] acquiring property as tenants by entireties, shall be divorced, they shall thereafter hold such property as tenants in common of equal one-half shares in value and either of them may bring suit against the other to have the property sold and the proceeds divided between them. [The version quoted is an amended version effective June 27, 1980.]

The trial court's decree dividing the property of the parties clearly did not apply this statute, for it awarded all interest in the Devon property to the respondent. Moreover, at the hearing on the Motion for a New Trial, the court stated: "I don't think the Pennsylvania law should apply in this situation, because every case law or statute holds otherwise" (R. 312). It is not clear what law "holding otherwise" was had in mind by the court because the cases cited above squarely hold to the contrary. Appellant has not been able to locate any Utah law that is on point that would support the contention of the trial court.

It should also be noted that 68 Pa. Cons. Stat. Ann.§501 (Purdon) has been held by the Supreme Court of Pennsylvania to be strictly applicable according to its terms. Lykiardopoulos v. Lykiardopoulos, 453 Pa. 290, 309 A.2d 548 (1973). In Lykiardopoulos, the ex-husband, after a divorce, sought a partition of property held in a tenancy by the entireties during the existence of the marriage. Among other things, his former wife argued that before dividing the proceeds received from the sale of the property, she was entitled to expenses she had incurred to preserve and protect

the property since the date of the parties separation. Applying 68 Pa. Cons. Stat. §503 which provided for only recorded liens to be deducted before division of proceeds, the Pennsylvania Supreme Court held that the expenses incurred by the former wife cold not be deducted before division of the proceeds unless they had been reduced to a recorded lien against the property.

In the action at bar, the trial court should have similarly applied 68 Pa. Cons. Stat. Ann. §501 (Purdon) so as to declare the parties tenants in common with equal one-half shares in value to the Devon real property without any deduction for the personal loan respondent received from her mother. This the trial court failed to do. For having thus failed to properly apply the Pennsylvania law which governs the disposition of the Devon parcel of real property, the trial court's findings and decree should be reversed and this court should remand the case to the trial court with an order directing that the trial court apply the law of Pennsylvania as explained.

B. <u>In the Alternative, if this Court Does Not Deem the Pennsylvania Law to be Applicable to the Devon Real Property, The Trial Court Should be Directed to Award to Appellant The Equivalent Value of the Separate Property Appellant Brought Into the Marriage Which was Traced to the Acquisition of the Devon Real Property</u>.

Even if this Court does not apply the Pennsylvania Statute referenced above, Utah case law demands that appellant be awarded the equivalent value of his separate property brought to the marriage which was used in the acquisition of the Devon real property. Jesperson v. Jesperson, 610 P.2d 326 (Utah 1980), Humphreys v. Humphreys, 520 P.2d 193 (Utah 1974). In Jesperson, this Court noted as recently as last year that the "parties' respective contributions to the marriage" is an important factor to consider in making a property division in a divorce action. In that case the wife brought to the marriage assets valued at over $20,000 while the husband brought nothing to the marriage. A mobile home acquired during the marriage was found to have been financed with some $19,000 that were the separate funds of the wife. Upon dissolution of the marriage, this court affirmed the propriety of the trial court's action in awarding to the wife an amount equal to the quanitity of her separate funds used to acquire the mobile home before dividing the remaining proceeds from the sale of the mobile home in the following language: "It was not unreasonable for the court to permit plaintiff to withdraw from the marriage property the equivalent of those assets plaintiff brought into the marriage." 610 P.2d at 328.

In Humphreys, the principal asset acquired during the marriage was a home used as the marital residence. The defendant husband admitted that the home was purchased with at least $3,000 that had been the separate property of the

plaintiff-wife. The trial court held that any proceeds from the sale of the home remaining after all mortgages, liens, judgments, and debts had been paid, were to be divided equally between the parties. This Court modified that decree so as to require reimbursement to the plaintiff of the $3,400 she had contributed from her separate funds to the purchase of the home before dividing the proceeds that remained after the satisfaction of the mortgages and tax liens and before paying other debts of the parties.

In the case at bar, the marital residence in Devon, Pennsylvania was also the principal asset acquired by the parties during the period before they separated. Although appellant later acquired a residence in Salt Lake after his involuntary transfer here with assets acquired since the separation of the parties in 1972, it is only fair that if that portion of the trial court's decree awarding the Devon property to the respondent is to stand, that appellant first be awarded an amount equivalent to the separate property he contributed to the purchase of the Devon home. This amount should be $23,000, $10,000 of which went for the down payment in 1966, another $10,000 of which went for improvements in the period 1966-1972, and another $3,000 used for repairs in 1972 after the separation of the parties (R. 208, 225).

II

THE TRIAL COURT'S AWARD OF ALIMONY WAS NOT SUPPORTED BY THE EVIDENCE OR WAS AN ABUSE OF DISCRETION AND SHOULD BE VACATED.

The decree of the trial court made an award of alimony to respondent in the amount of $500 per month for a period of 36 months. This monthly amount is twice what the appellant has already been paying to the respondent for her support under the pre-existing Pennsylvania decree of temporary support for three years prior to trial for which there was no showing of hardship.

Because of the long duration of the residence of the parties in Pennsylvania, the continued residence of the respondent in Pennsylvania whose only contacts with Utah are her two appearances in this action, the fact that the appellant only came to Utah when his employment required him to do so, the fact that appellant had been supporting his wife and children since 1972 under a decree of temporary support issued by a Pennsylvania court, and because of the fact that divorce proceedings were first begun in Pennsylvania two years prior to the present divorce action in Utah, counsel for appellant strongly urged the trial court both during trial and at the Motion for New Trial to consider the provisions of Pennsylvania law in deciding whether any award of alimony was appropriate. Until July 1, 1980, just one month before the trial of the present action, Pennsylvania law did not allow for any award of

permanent alimony after a decree of divorce unless the wife was insane. E.g., Stambaugh v. Stambaugh, 329 A.2d 483, 488 (Pa. 1974). It shold also be remembered that the parties had been separated since August of 1972 and appellant had already provided under decree of the Pennsylvania court, for the support of respondent alone, without adding in support for his children, over $32,000 by the time of trial (R. 226). Moreover, the respondent had begun full time employment in 1976 and during the calendar year 1979 she had a gross income of $16,824. At the time of trial, not including the support money she was receiving from appellant, and after deducting federal, state and city taxes and social security, respondent still had a monthly expendable income of $1,332.02 (R. 266, Defendant's Exhibit 9).

Given the above, it is evident that the delay in the Pennsylvania divorce proceedings, which proceedings respondent admits she was contesting (R. 268), clearly caused an enormous windfall to accrue to the respondent in light of the trial court's generous award to her of property and alimony. Unless the trial court's award of alimony is reversed, respondent will have obtained the best of both worlds, over $32,000 in temporary alimony plus a very generous award of property and permanent alimony.

It is also evident that the trial court was impressed with the change in Pennsylvania law effective July 1, 1980, which allowed an award of alimony for the first time, because

on the hearing on the Motion for a New Trial, after counsel for appellant cited Stambaugh v. Stambaugh for the proposition that Pennsylvania law does not allow an award of permanent alimony after divorce, the court responded with: "Hasn't the error of that decision been changed by act of the legislature?" (R. 307). Also noted by counsel for appellant, both at the trial and at the hearing on the Motion for a New Trial, was the provision of the new law providing that:

> The provisions of this act shall not affect any suit or action pending, but the same may be proceeded with and concluded either under the laws in existence when such suit or action was instituted, notwithstanding repeal of such laws by this act, or, upon application granted, under the provisions of this act.

23 Pa. Cons. Stat. Ann. §103, as amended by Act No. 1980-26, as quoted from Purdon's Pennsylvania Legislative Service, 1980, Pamphlet No. 1, at page 50. Moreover, although the court apparently did not apply Pennsylvania law at all, an award of alimony was inconsistent with the terms of the new law. That is because 23 Pa. Cons. Stat. §501, as amended by Act No. 1980-26 (the new divorce law) provides:

> The court may allow alimony, as it deems reasonable, to either party, only if it finds that the party seeking alimony:
>
> (1) lacks sufficient property, including but not limited to any property distributed pursuant to chapter 4, to provide for his or her reasonable needs; and
>
> (2) is unable to support himself or herself through appropriate employment. (emphasis added)

The trial court's award to respondent of substantial property, including the entire Devon real property and approximately half

of appellant's stock holdings, together with respondent's net monthly expendable income in excess of $1,300 plainly would disqualify respondent from receiving an award of alimony under even the new Pennsylvania Statute.

While admittedly Pennsylvania law is not strictly binding on the trial court as to an award of alimony given the court's jurisdiction over the persons of the parties, still, in the exercise of its equitable powers, the court should not have completely disregarded Pennsylvania law when there is such a close nexus between the parties, especially the respondent, and Pennsylvania.

More importantly, the trial court's award of alimony in the present action also was erroneous as an abuse of discretion under Utah case law precedents. In perhaps the most recent definitive explanation of the purpose of alimony by this court, in Gramme v. Gramme, 587 P.2d 144, at 147 (Utah 1979), it was stated:

> The purpose of alimony is to provide post-marital support; it is intended neither as a penalty imposed on the husband nor as a reward granted to the wife. Its function is to provide support for the wife as nearly as possible at the standard of living she enjoyed during marriage and to prevent her from becoming a public charge. Important criteria in determining a reasonable award for support and maintenance are the financial conditions and needs of the wife, considering her station in life; her ability to produce sufficient income for herself; and the ability of the husband to provide support.

This enumeration of criteria to be considered in deciding whether an award of alimony is appropriate and in what amount, is significant in its listing of priorities. From its

place at the end of the list, it is evident that the ability of the husband to provide support only becomes relevant after it is determined that the wife does not have sufficient income to support herself at the standard of living she enjoyed during marriage. Where the separate property or income of the wife after divorce allows her to maintain such a standard of living, it would be inappropriate to punish the husband and reward the wife with a grant of substantial alimony just because the husband's income is higher than that of the wife. Read v. Read, 594 P.2d 871 (Utah 1979). That is particularly true in the present situation where, over the course of the separation of the parties lasting almost eight years, the respondent has successfully begun to rebuild her separate life with the support assistance she received from the appellant.

The trial court's award of alimony on top of a generous property award to the respondent is truly a harsh penalty for the appellant to bear after such a long separation during which the appellant has supported his children and carried the burden of supporting the respondent even though, at the time of the separation of the parties, she was a college graduate whose children were eleven years old or older, in school, and without apparent health problems. It must be remembered that the appellant's career was well established at the time he married the respondent who can not be said to have had any responsibility for helping him in his chosen profession.

Furthermore, the respondent was awarded, in addition to the real property in Devon, of which appellant only seeks his just share, approximately half of the stock holdings of the appellant. If the appellant is able to prevail on the present appeal, he does not begrudge this award of stocks to the respondent, which award, by respondent's own valuation, exceeded $53,000 in readily convertible assets at the time of trial (Defendant's Exhibit 8). It must also be remembereed that the stocks appellant was awarded as his share are pledged to Merrill Lynch for the $27,000 or more loan he took out to make the down payment on his home in Salt Lake when he moved here, which home is still encumbered with a mortgage to Walker Bank for $51,000 (R. 222,230). It is thus apparent that the respondent has been amply provided for, and that the trial court's award of alimony was only made either on the basis of the misleading valuations provided in Defendant's Exhibit 8 admitted over appellant's objection (R. 278), on the basis of Defendant's Exhibit 10 which shows inflated living expenses for respondent because, on her own admission, it included expenses for three or four of her children too (R. 275-76, 280-81), or in light of appellant's current salary which has reached its present level only after 30 years of professional experience, at least the first six and the last eight of which were without effective benefit of any of the real support or comfort one hopes for in a marital relationship. To now approve the trial court's award of alimony would be to countenance an additional

burden truly of a punitive nature. In an equitable action such as the present proceeding, to neglect such considerations is clearly an abuse of discretion not in accord with the evidence.

Therefore, for failure to even consider the provisions of Pennsylvania law, and for failure to properly apply Utah precedents, as evidenced by the present patent abuse of discretion, the trial court's award of alimony should be reversed and vacated.

CONCLUSION

For the failure of the trial court to apply Pennsylvania real property law to the home located on Schoolhouse Road in Devon, Pennsylvania, the trial court's award of that entire parcel of real estate to the respondent should be reversed and the case remanded to the trial court with a direction to apply Pennsylvania law as to that parcel of real property. In the alternative, Utah law requires that appellant be awarded a value equivalent to that contributed by him to the purchase of the Devon real property out of his separate funds brought to the marriage. Finally, the trial court abused its discretion in this equitable proceeding in making an award of alimony to the respondent by not at least considering the law of Pennsylvania as to alimony and by not properly applying Utah law on the subject. This error should be corrected by declaring that respondent is not entitled to any award of alimony.

DATED this 4th day of March, 1981.

Respectfully submitted,

NIELSEN & SENIOR

By David M. Swope
David M. Swope

By John K. Mangum
John K. Mangum

ATTORNEYS FOR APPELLANT.

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of March, 1981, I mailed, postage prepaid, two copies of the foregoing Brief of Appellant to B. L. Dart, of DART & STEGALL, Attorneys for Defendant, at 430 Ten Broadway Building, Salt Lake City, Utah 84101.