

1981

Barbara J. Warren v. Robert L. Warren : Brief of Appellant

Utah Supreme Court

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Recommended Citation

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TABLE OF CONTENTS

	Page
NATURE OF CASE	1
DISPOSITION IN LOWER COURT	1
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	3
ARGUMENT	8
POINT I	
THE TRIAL COURT ABUSED HIS DISCRETION AND WAS MISTAKEN AS TO THE APPLICABLE LAW IN THE DECREE OF DIVORCE.	
A. The standard for this court's review of the decree of divorce.	8
B. The trial court abused its discretion by awarding an unwarranted majority of the property to Mr. Warren.	9
C. The trial court abused its discretion by ordering that Mrs. Warren pay a disproportionate amount of the marital liabilities.	20
D. The trial court abused its discretion in awarding an insufficient amount of alimony for too limited a period of time.	22
E. The trial court abused its discretion in failing to award to Mrs. Warren any attorney's fees.	27
CONCLUSION	29

CASES CITED

	Page
Alldrege v. Alldrege, 119 Utah 504, 229 P.2d 681 (1951)	27-28
Allen v. Allen, 601 P.2d 760 (Okla. App. 1979)	21
Christensen v. Christensen, 21 Utah 2d 263, 444 P.2d 511 (1968)	9, 26
DeRose v. DeRose, 19 Utah 2d 77, 426 P.2d 221 (1967)	8
Ehninger v. Ehninger, 569 P.2d 1104 (Utah 1977)	17-18
Englert v. Englert, 576 P.2d 1274 (Utah 1978)	18
English v. English, 565 P.2d 409 (Utah 1977)	25
Frank v. Frank, 585 P.2d 453 (Utah 1978)	25
Gramme v. Gramme, 587 P.2d 144 (Utah 1978)	23
Granziano v. Granziano, 7 Utah 2d 187, 321 P.2d 931 (1958)	9
Griffiths v. Griffiths, 3 Utah 2d 82, 278 P.2d 983 (1955)	28
Harding v. Harding, 26 Utah 2d 277, 488 P.2d 308 (1971)	9
In re Marriage of Metcalfe, 598 P.2d 1140 (Mont. 1979)	21
King v. King, 25 Utah 2d 163, 478 P.2d 308 (1971)	8

Pope v. Pope, 589 P.2d 782 (Utah 1978)	15
Read v. Read, 594 P.2d 871 (Utah 1979)	12-13, 15
Tremayne v. Tremayne, 116 Utah 483, 211 P.2d 452 (1949)	26
Watson v. Watson, 561 P.2d 1072 (Utah 1977)	9
Wilson v. Wilson, 5 Utah 2d 79, 296 P.2d 977 (1956)	24

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husband, 72 percent consists of stocks valued according to national stock exchange quotations of the day of the trial and vested retirement funds. The husband was given a lien upon the home for his equity, which lien was to be paid in any event within six months of the decree of divorce, when the parties' eldest child graduated from high school. The wife was awarded alimony in the sum of \$400 per month for a period of 48 months. The wife was ordered to assume and pay 72 percent of the marital obligations.

RELIEF SOUGHT ON APPEAL

Plaintiff-appellant Barbara J. Warren respectfully requests that this court remand the case for a new trial with respect to the distribution of the property of the parties, the order for the payment of marital debts and obligations, for a reconsideration of a reasonable amount of alimony and the time period over which such alimony is to be paid and for a consideration of the attorney's fees incurred by the plaintiff-appellant in the trial of this action and upon appeal. Alternatively, plaintiff-appellant respectfully requests the Court to consider the evidence presented at the trial and contained within the record on appeal and to fashion its own award.

STATEMENT OF FACTS

On August 21, 1979, plaintiff filed the complaint for divorce. Following extensive discovery and numerous appearances before the court, the action was tried before the Honorable Peter F. Leary on September 5, 1980, and September 11, 1980. By a memorandum decision of November 14, 1980, the plaintiff-appellant, hereinafter "Mrs. Warren", was awarded a decree of divorce. In dividing the real and personal property of the parties, and in ordering the assumption and payment of marital liabilities, the trial court adopted without modification the proposed division of the marital estate and proposed division of the marital liabilities which had been presented by defendant-respondent, hereinafter "Mr. Warren". The trial court awarded additional personal property to Mr. Warren. Following a hearing on December 3, 1980, concerning the clarification of the court's memorandum decision, the decree of divorce was signed on December 16, and was entered on December 17, 1980. Custody of the one minor child of the parties was awarded to Mrs. Warren. During the pendency of this appeal, that child has graduated from high school and is now of majority.

The parties were married in San Antonio, Texas, on June 27, 1952. At the time of the marriage, Mr. Warren had just completed his sophomore year of college. While he

worked part-time for two months out of the year, he was a full-time student for nine months out of the year, and Mrs. Warren was the sole support of the family. (Transcrip: (Tr.) at 60-61; Record (R.) at 434-435.) Mr. Warren attende Rice Institute in Houston, Texas for five years. Mrs. Warr: paid his expenses for that attendance and in addition provided support and maintenance as well as luxuries such as three sports cars. (Tr. 61; R. 435.)

Following his graduation, Mr. Warren began to work for LCB in Dallas, Texas, the company now being known as E Systems. Mr. Warren has worked for this company for 26 years, during which time his income and benefits have increased dramatically. In the year before the divorce trial, 1979, Mr. Warren's gross income was \$46,628. (Tr. 152; R. 526.) In that same year, Mrs. Warren's gross income from a legacy was \$8,048.09. (Tr. 206; R. 580.)

Mrs. Warren's independent source of income is a trust and bank stock acquired from her father prior to her marriage. The principal of her legacy was, at the time of trial, approximately \$97,500. Despite the extreme differences in their income, Mrs. Warren's legacy was, many times during the marriage, depleted in order to pay the income tax liabilities of the parties. (Tr. 154; R. 528.)

In April of 1977, when Barbara's income was \$10,200, \$4,300 was applied to an Internal Revenue Service bill. (Tr. 161; R. 535.) Mr. Warren, incredibly, testified that of the 1979 \$5,200 tax obligation, one-half of the obligation is attributable to Mrs. Warren's income dividends and interest. (Tr. 185-186; R. 559-560.) From the principal of the trust, \$146,599.10 was contributed to the marriage (Tr. 57; R. 431.)

Mrs. Warren testified that the legacy was used for family expenses because Mr. Warren refused to provide for the family. (Tr. 59; R. 433.) In the years immediately prior to the divorce, pleas that Mr. Warren contribute to the expenses of the family produced only feeble responses. Mr. Warren's contributions sunk to the paltry sum of \$450 during one of these years. It fell upon Mrs. Warren to pay the children's living expenses, dental bills and educational expenses. (Tr. 71; R. 445.)

The trial court found that Mrs. Warren, who is 49 years of age, is "capable of being employed although she has never been employed, has no skills and is suffering from medical problem [sic] relating to her hands." This assumption, clearly inconsistent with recognized facts,

resulted in Mrs. Warren being awarded alimony of \$400 per month for a 48-month period.

According to Mr. Warren, the personal property either inherited by Mrs. Warren or awarded to her by the decree of divorce is worth \$161,000. (Tr. 180; R. 554.) This value, which was accepted by the court in its decree of divorce, is without foundation. Even the appraiser of the property, Thomas A. Olsen, a witness for the defendant, stated that he had spent little better than an hour in his appraisal of the personal property in the home and that this was insufficient time to perform a valid or satisfactory appraisal. (Tr. 15; R. 389.) Values of specific items of property declared by Mr. Warren are on their face speculative. For example, in defendant's Exhibit 21-D, Mr. Warren values china and art objects at \$17,000 and a large oil painting at \$2,500. Yet Mr. Warren had no recollection of the name of the painter, did not itemize the art objects and offered no foundation for this value other than his estimate of the replacement value of the property.

The value of the personal property ultimately awarded to Mrs. Warren was in fact an estimate of replacement value, without any relation to the actual market value of the property. (See testimony of Thomas A. Olsen, Tr. 22; R. 389.)

Testimony of William C. McConahay, Tr. 30; R. 404; Testimony of Carl G. Walberg, Tr. 38; R. 412.)

In addition to his substantial income, Mr. Warren acquired a substantial interest in stock. Valued according to the figures quoted by the Wall Street Journal on the day before the trial, Mr. Warren owned \$73,840.50 of currently traded marketable stock. Furthermore, he had a pension plan with a present value of \$20,247 and a future value estimated by Mr. Warren at \$51,000. (Tr. 193; R. 567.) During the marriage, Mr. Warren developed a capability to earn a substantial income (he estimated that he had made approximately \$500,000 in his lifetime), a capability which remained with him at the time of the decree of divorce.

On the other hand, Mrs. Warren, who contributed to the marriage approximately \$300,000 from the principal and interest of her legacy, was at the time of the decree of divorce and according to the judge's findings, not employed, without skills, and suffering from a medical problem related to her hands. She is left with a depleted inheritance with a greatly reduced value for generation of future income. The decrease in the value of the trust was directly related to her support of the marriage. It was for the purchase of the second marital home that money was withdrawn from the

principal of her inheritance. (Tr. 58; R. 432.) Money was also withdrawn to pay for the day-to-day living expenses of the family and to provide family necessities such as medical care (Tr. 71; R. 445). This same legacy conveniently provided Mr. Warren with an education which permitted him to substantially increase his own earning capacity and provide him with luxuries in life. (Tr. 60; R. 434.)

ARGUMENT

I. THE TRIAL COURT ABUSED HIS DISCRETION AND WAS MISTAKEN AS TO THE APPLICABLE LAW IN THE DECREE OF DIVORCE.

A. The standard for this court's review of the decree of divorce.

This court has on innumerable occasions held that a divorce action is equitable in nature and that the ruling of a trial judge is favored with a presumption of propriety and accuracy. This court has also held that it can review questions of both law and fact. King v. King, 25 Utah 2d 163, 478 P.2d 492 (1970); appeal after remand 27 Utah 2d 303 495 P.2d 823. Though they are favored, findings, judgments and decrees of the trial court are still subject to review for the trial court's discretion is not without limitation. DeRose v. DeRose, 19 Utah 2d 77, 426 P.2d 221 (1967). Should

the trial court fail to correctly apply principles of law or equity, or should evidence clearly preponderate against a finding, or should a judgment or decree so fail to do equity that a clear abuse of discretion is manifested, then this Court will take the appropriate corrective action necessary. Watson v. Watson, 561 P.2d 1072 (Utah 1977). When such error has occurred, the Supreme Court may review the evidence and make its own findings and may substitute its judgment for that of the trial court when the ends of justice so require. Harding v. Harding, 26 Utah 2d 277, 488 P.2d 308 (1971).

On appeal, this court may review a case, weigh evidence and may substitute its judgment for that of the trial court. Graziano v. Graziano, 7 Utah 2d 187, 321 P.2d 931 (1958). If after such a review it is found that the decree works an injustice contrary to equity and conscience, this court may revise the decree. Christensen v. Christensen, 21 Utah 2d 263, 444 P.2d 511 (1968).

B. The trial court abused its discretion by awarding an unwarranted majority of the property to Mr. Warren.

The trial court adopted, without modification, the proposed distribution of the marital property submitted on behalf of the defendant. Defendant's Exhibit 31-D. In so

doing, the court adopted the property or asset values which had been stipulated to by the parties or which were Mr. Warren's estimate. Mr. Warren's stated values grossly exaggerate the actual value of the property awarded to Mrs. Warren, particularly when compared to the actual value of the property awarded to Mr. Warren.

Within the pre-trial order, Mr. Warren agreed that the legacy left to Mrs. Warren, which she had acquired prior to the marriage, was to remain the personal property of Mrs. Warren. This legacy had a value of approximately \$97,500 and had in principal been reduced during the marriage by approximately \$146,500. The reduction of the principal had been utilized for the benefit of the marriage and in support of the family. (Tr. 57; R. 431; Tr. 59; R. 433.) From the marital estate, Mrs. Warren was awarded one-half of the agreed upon equity in the home or \$23,500. The balance of the marital estate awarded to Mrs. Warren was comprised of personal property valued on a replacement basis by the defendant or by experts chosen by the defendant. In particular, the one appraiser who testified, Thomas Olsen, stated that he had insufficient time in which to perform a valid or satisfactory appraisal. (Tr. 15; R. 389.)

On the otherhand, the portion of the marital estate awarded to Mr. Warren was substantially liquid and growth oriented or income producing. Mr. Warren was awarded stocks traded on the major exchanges and valued at the time of the divorce action at \$45.75 per share; he was also awarded a retirement fund with a present value of over \$20,000 and a future value of \$51,000. In addition, Mr. Warren was permitted to retain a substantial amount of his current income having been ordered to pay only \$400 per month for a period of 48 months as alimony.

The trial court's misunderstanding of the value of the property may be found in the internal inconsistencies in the defendant's own testimony and that of his experts with respect to the value. The defendant offered replacement value estimates or estimates of value without any reasonable foundation, for example his estimate of the value of a painting. (Tr. 246; R. 620.) In the pre-trial order, Mrs. Warren was ordered to provide supporting documentation reflecting purchase dates, costs, and present value of those items of personal property located within the home. Later, at trial, the court expressed its intention to have the property of the parties appraised. (Tr. 249; R. 623.) However, this appraisal was apparently never performed, and

the document presented by Mrs. Warren pursuant to the pre-trial order, Exhibit 5-P, was ignored by the court. The values accepted by the trial court were contrary to statements made by Mrs. Warren that the appraisals submitted by Mr. Warren were grossly exaggerated. (Tr. 73; R. 447; R. 146; R. 520.) Mrs. Warren's former counsel never elicited from her a valuation of the property.

In Read v. Read, 594 P.2d 871 (Utah 1979), the court recognized that the discretion afforded the trial court in allocating property and financial resources is not without limit. In that case, approximately 90 percent of the assets accumulated by the parties during a 25-year marriage were awarded to the plaintiff wife. This court stated the purpose of a property settlement should not be to impose punishment upon either party. Rather, the court is to consider many factors in making a property settlement in a divorce proceeding bearing in mind the ultimate goal of arranging the best possible allocation of the property and the economic resources of the parties so that the parties can pursue their lives in as happy and useful a manner as possible.

If it appears that the decree is so discordant with an equitable allocation that it will more likely lead to further difficulties and distress than to serve the desired

objective, then a reappraisal of the decree must be undertaken.

594 P.2d at 872. In Read v. Read, the court recognized the inconsistencies and unresolved questions in the trial record regarding the values of property and as a consequence remanded the case to the trial court for a further hearing concerning the nature and extent of the parties assets and liabilities. In particular, the court questioned the value of an unimproved parcel of real property at \$60,000 when the only credible evidence concerning its value indicated it to be worth \$30,000 and \$35,000.

Similar inconsistencies and unresolved questions may be found in the trial of the action now before the court. Even the trial court questioned the accuracy of the estimates of the value of personal property and indicated the need for an objective appraisal of the property. Such questions of the accuracy of the value of the property arises naturally when one sees estimates of \$17,000 for art objects that are not enumerated, or values of paintings without any reference to the artist. Questions also arise concerning the valuation of jewelry at \$19,886 without any evidence whatsoever of the present market or actual value of such jewelry.

In Exhibit 16-D received from the defendant, a statement is made by an appraiser that the personal contents

of the home were worth a minimum of \$50,000 on an immediate sale basis and had a retail replacement value of near \$100,000. This appraisal was based upon a walk-through of the home, which the appraiser himself testified was insufficient as the foundation for an accurate appraisal. The defendant then valued this property at \$161,000, this final value being the one accepted by the court. The defendant agreed that Mrs. Warren be awarded \$71,732 in inherited personal property and \$44,240 in personal property acquired during the marriage. Mr. Warren also claimed (Exhibit 31-D) that his valuation of the property awarded to Mrs. Warren compared favorably with the property he desired to be awarded. This comparison is inaccurate in light of the very different types of property; his is income-producing and hers of little value to her support.

When viewed without the taint of over-valued personal property, and considering only that portion of the marital estate (exclusive of Mrs. Warren's legacy) comprised of stocks, retirement plans and real property, Mr. Warren was awarded 84 percent of such property. It is this type of property distribution which has been found to be excessive and inequitable and one which results in the imposition of a

penalty upon a party, in this case Mrs. Warren. (See, Read v. Read, supra.)

An indication of the misunderstanding of Mrs. Warren's needs may be found in the court's statement with reference to Mrs. Warren that this was a case of "what I have is mine and what was acquired through the endeavors of my husband is ours." (Tr. 263; R. 637.)

In Pope v. Pope, 589 P.2d 752 (Utah 1978), the court approved a distribution of the net value of property which gave 65 percent to the plaintiff wife and 35 percent to the defendant husband. In response to the husband's claim that such a division was inequitable, the court pointed out that the defendant husband was awarded income-producing assets of the family. It was also noted that the defendant husband had two college degrees and several years experience in operating his businesses and thus was reasonably assured of future earnings and profits from his business activities. On the other hand, the plaintiff wife had no college education and was unemployed at the time of trial. The court had awarded her no alimony.

The trial court's decree of divorce in this case is contrary to the equitable principle of Pope v. Pope, for it awards a substantial majority of the total property, almost

all of the income-producing property and that which assures future earnings, to the educated, experienced and employable husband. The decree leaves little but grossly over-valued personal property to the unemployable, uneducated wife and mother of 29 years.

It may be that the trial court misunderstood the nature of Mr. Warren's future income. The accepted property distribution as submitted by the defendant, Exhibit 31-D, reflects a value of a retirement fund of \$20,247 and of a stock option plan of \$19,388, conditioned by defendant's statement that these were "assets realizable only upon retirement--not liquid." This was clearly a question in the court's mind as the court requested a detailed explanation of the pension plan. (Tr. 266; R. 640.) There is no evidence in the record that this information was ever provided. Mr. Warren's own testimony suggests that Exhibit 31-D is not an accurate statement of the value of the pension plan and stock option plan either in the future or at the present. The following exchange occurred between the court and Mr. Warren (Tr. 253; R. 627):

THE COURT: Mr. Warren, I have a couple of questions. In connection with your pension, if you were to die tomorrow, what would happen with your pension?

MR. WARREN: It would revert to my heirs on an annuity basis, I think.

THE COURT: Well, would it or wouldn't it?

ANSWER: I'm not really sure. I've got somewhere the information on it.

THE COURT: Well--.

ANSWER: And it would revert to them I believe at that lump sum value of \$50,000 rather than the discounted present value of \$20,000.

Contrary to his statement on Exhibit 31-D that the assets were realizable only upon retirement, Mr. Warren testified that the stock option plan was available to him one year after separation from the company (Tr. 194; R. 568) and that he was 80 percent vested in the company-funded pension plan.

What Mr. Warren was concerned about was the inclusion of his retirement fund at an accurate value into the marital estate. The propriety of the consideration of such a retirement fund as part of the assets available for distribution was upheld by this court in Ehninger v. Ehninger, 569 P.2d 1104 (Utah 1977). In that case, the dissatisfied husband contended that "the trial court erred in placing a value upon and making a division of . . . the defendant's profit sharing plan, the purpose of which [was]

for his retirement" and the benefit of which would be available to him only upon retirement. 569 P.2d at 1104. This court held that the inclusion of the husband's vested but not immediately available, interest in his retirement fund was appropriate. 569 P.2d at 1106. Moreover, this court recently upheld a property distribution which considered as a family asset the husband's accrued interest in a retirement fund. In Englert v. Englert, 576 P.2d 1274 (Utah 1978), the husband contended that:

His retirement fund is not "property" within the meaning of our statute and should not be so considered in determining the rights of the parties under the divorce decree. He reasons that because that fund was accumulated as a result of his service and tenure, it is inequitable to permit [his wife] to participate therein.

576 P.2d at 1275.

This contention was rejected and this court approved the inclusion of the fund at its accrued value at the time of trial. The future value as testified to by Mr. Warren of \$51,000 was based upon a perhaps unrealistic 8 percent interest rate. Such a low interest rate no doubt greatly undervalues the retirement fund.

Throughout the trial, Mr. Warren made gratuitous statements in an attempt to convince the court of his

impoverished condition and the wealth of his wife. In discussing his purchase of stock commencing in 1976, he stated "I had no estate whatever, because we had spent all of my income for all the years up until then, and I was planning for my retirement". (Tr. 190; R. 564.) In the same exchange with his counsel he admits that the company maintained a stock option retirement program and a company funded pension plan. Mr. Warren knew that Mrs. Warren had contributed heavily to the welfare and benefit of the household, had put him through school and that together they had amassed a significant estate, by his figures worth over \$150,000 in personal property alone. (Tr. 155; R. 529; Tr. 168; R. 542.) Mr. Warren also does not disclose that the stock valued at \$45.75 on the day before the trial was purchased at less than one half of that value. (See, Defendant's Second Amended Answers to Interrogatories, R. 87.)

Mr. Warren also inaccurately states that his wife did not need alimony because she had a separate estate of almost \$200,000. (Tr. 233; R. 607.) Mr. Warren must have known that this was an overvaluation of her estate as he admitted that he had prepared the tax returns throughout the marriage and as a consequence would have to have known what her estate was and that he was aware of bank documents which

stated the value of the estate at \$87,942. (Tr. 244; R. 618.)

C. The trial court abused its discretion by ordering that Mrs. Warren pay a disproportionate amount of the marital liabilities.

The court adopted without modification the defendant's proposed division of marital liabilities set forth in defendant's Exhibit 33-D. Of the \$16,238 in total marital debts and obligations, Mrs. Warren was ordered to pay \$11,634 or 72 percent. The testimony of both parties was to the effect that the majority of the debts listed on Exhibit 33-D were incurred prior to the separation of the parties which occurred in August of 1979. (Tr. 89; R. 463; Tr. 238; R. 612.)

In distributing the debts, the court apparently failed to consider that Mrs. Warren's income was a fixed income from the principal of the trust and from alimony and that reductions in principal of the trust utilized to pay the debts would reduce the amount of her monthly income. On the other hand, Mr. Warren had a significant monthly income which had grown consistently in the 26 years he had been with his employer and would in all likelihood continue to grow. (Tr. 238; R. 612.) The mistake made by the trial court is

its division of marital liabilities is most clearly pointed out by the ordering of Mrs. Warren to pay one-half of an income tax bill which totalled \$5,207 when her income for the year of the tax liability, 1979, was approximately 1/6 of Mr. Warren's income.

It has been found inequitable to award a party an interest in property but at the same time absolve them of any obligation to clear those debts which were created in the acquisition of the property. See, Allen v. Allen, 601 P.2d 760 (Okla.App. 1979).

It has been held an abuse of discretion for the court to fail to consider the liabilities of the party and the burden that these liabilities have on each party. Certainly they must be considered in arriving at the net award to each party. In re Marriage of Metcalfe, 598 P.2d 1140 (Mont. 1979). In Metcalfe, the court realized that the assumption of a debt would effectively reduce the marital estate awarded to one party. The court also recognized that the distribution of debt would make it difficult for one party to meet the obligations she had assumed. Certainly in the case before this court, a significant amount of the debt was ordered paid by that person with a fixed non-growth oriented income. The inequity of the debt distribution is

also made obvious by Mr. Warren's admissions of having used credit cards for his benefit or for the children. (Tr. 183-186; R. 557-560.)

D. The trial court abused its discretion in awarding an insufficient amount of alimony for too limited a period of time.

From Mr. Warren's demonstrated ability to acquire significant monthly income, Mrs. Warren was awarded \$400 per month alimony for a 48 month period. The court specifically found that Mr. Warren's net monthly take-home income was \$1,887. The court found that Mrs. Warren had an independent source of income of an unspecified amount. Throughout the course of this litigation, Mr. Warren has taken the position that Mrs. Warren had a gross income from her trust of \$800 per month. (See, Defendant-respondant's Motion for Summary Disposition; Tr. 205; R. 579.) With the \$400 monthly alimony, Mr. Warren maintains that Mrs. Warren has a gross income of \$1,200 per month.

However, Mr. Warren fails to take into account that Mrs. Warren's gross income is subject to taxes and that he will be receiving a substantial tax benefit from the deduction of the alimony payments. Consequently, the disparity of the monthly incomes is much more severe than

Mr. Warren will admit. Additionally, as Mrs. Warren must withdraw principal from her trust in order to pay obligations and in order to maintain the standard of living to which she has become accustomed, the amount of her gross monthly income will significantly decrease.

This court has recently recognized those factors to be considered by an award of alimony. Gramme v. Gramme, 587 P.2d 144 (Utah 1978). This court 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 the 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.

In the present case, and throughout the 29-year marriage, Mrs. Warren raised the parties' family and maintained the household, and as found by the court was never employed, has no skills and suffers a medical disability of her hands. During the marriage, Mr. Warren prospered in his career and developed a significant income which continued to grow after the dissolution of the marriage. Allowing Mr. Warren to take

from the marriage all marketable or liquid assets and pay; such a minimal amount of alimony can only be characterized as an enormous windfall to Mr. Warren.

In light of the long duration of the marriage, Mr. Warren's demonstrated substantial income and continued income potential, and the standard of living to which Mrs. Warren has grown accustomed during the marriage, the trial court's award of alimony in the amount of \$400 per month for a limited four-year period must be said to be an abuse of discretion. These very factors have long been held by the court to be of significance in determining the wife's entitlement to alimony. In Wilson v. Wilson, 5 Utah 2d 79, 296 P.2d 977 (1956), the marriage had lasted 15 years and the principal issue on appeal was the appropriate amount of alimony to be awarded. This court held that in determining alimony,

[T]he court's responsibility is to endeavor to provide a just and equitable adjustment of [the parties'] economic resources so that the parties can reconstruct their lives on a happy and useful basis. In doing so it is necessary for the court to consider . . . an appraisal of all of the attendant facts and circumstances: the duration of the marriage; the ages of the parties; their social positions and standards of living; their health; considerations relative to children; the money and property they possess and how it was

acquired; and their capabilities and training and their present and potential incomes.

296 P.2d at 979-80. Application of these factors in the present case renders inescapable the conclusion that the trial court abused its discretion in the alimony award.

In English v. English, 565 P.2d 409 (Utah 1977), it was held in connection with a 20-year marriage that:

[T]he most important function of alimony is to provide support for the wife as nearly as possible at the standard of living she enjoyed during the marriage, and to prevent the wife from becoming a public charge.

565 P.2d at 411.

In Frank v. Frank, 585 P.2d 453 (Utah 1978), in response to questions over an alimony award, the court observed:

How the defenant, or anyone on his behalf, could even suggest that a wife who had devoted 21 years to her marriage and reared a family should be turned out to subsist on her own is as discordant to our sense of justice as it was to the trial judge.

585 P.2d at 455.

During this marriage, Mr. Warren's salary has significantly increased. Utilizing both that income and depleting Mrs. Warren's legacy, the parties have acquired a significant marital estate. Mr. Warren has received a great

amount of benefit by the use of Mrs. Warren's legacy receiving luxuries in life such as three sports cars. He would now ask the court to force Mrs. Warren to live off a severely depleted legacy and on an insufficient amount of alimony while he takes from the marriage any property that will provide an income in the future.

In Tremayne v. Tremayne, 116 Utah 483, 211 P.2d (1949), the court addressed the matter of the distribution of property as follows:

Through schooling, appellant's earning capacity has been substantially increased during the marriage. And respondent's earning capacity has not been proportionally increased during that time. To make this schooling and their savings possible, she worked practically throughout their married life. Without her working the bulk of the property which they have, would not have been accumulated, and he probably could not have accumulated it had he been single and had he followed the same course which he did. How far either one would have gone without the other is largely a matter of conjecture.

211 P.2d at 454 (numerous citations omitted). This language is directly applicable to the circumstances of this case. Mr. Warren's schooling was provided by Mrs. Warren's legacy and the marriage was supported by that legacy in its early years. Substantial portions of her income were paid to support the marriage on a day-to-day basis as well as to

provide it with the luxuries of life, freeing Mr. Warren's income and permitting the acquisition of large amounts of stock. (Tr. 153; R. 527.) Under these circumstances, the alimony award is inadequate and inequitable.

E. The trial court abused its discretion in failing to award to Mrs. Warren any attorney's fees.

Mrs. Warren testified that she desired the court award her reasonable attorney's fees incurred in connection with this action. (Tr. 94; R. 468). However, the court in its memorandum decision stated "no evidence having been presented as to attorney's fees, none are awarded."

Mrs. Warren was ordered to pay a substantial majority of the debts of the parties and was left with a decreasing income. Mr. Warren's income at the time of the decree of divorce was approximately six times as great as Mrs. Warren's. In such circumstances, this court has repeatedly held that an award of attorney's fees to the wife is appropriate. For example, in Allredge v. Allredge, 119 Utah 504, 229 P.2d 681 (1951), it was pointed out that this Court had traditionally adhered to the policy that:

The awarding of counsel fees as well as alimony was in the discretion of the trial court, and that a finding of the trial court would not be set aside in the absence of an abuse of such discretion. . . .

It was error for the court to deny the [wife] counsel fees which are a part of her costs pendente lite and which could have ben required before the suit was concluded.

229 P.2d at 686-87.

The trial court's failure to award attorney's fees to the wife was, likewise, reversed in Christensen v. Christensen, 18 Utah 2d 315, 422 P.2d 534 (1967); and Griffiths v. Griffiths, 3 Utah 2d 82, 278 P.2d 983 (1955).

The trial court's failure to award attorney's fees can only be justified by the misapprehension that the property settlement favōrs Mrs. Warren. Once this misapprehension is dispelled, Mr. Warren's argument must evaporate along with it.

Mrs. Warren's trial counsel withdrew following the entry of the decree of divorce and in early January 1980 filed a civil action against her to recover those attorney's fees which she had incurred in the approximate sum of \$7,000. Robinson and Wells, P.C. v. Barbara J. Warren, Third Judicial District Court, Salt Lake County, State of Utah, Civil No. C-81-14. The trial court's failure to award the attorney's fees was but an additional burden upon Mrs. Warren which, like the other debts she was ordered to pay, will substantially reduce her monthly income.

CONCLUSION

Whether reviewed in part or in total, the decree of divorce fashioned by the trial court deprives Mrs. Warren of any meaningful benefit of the estate acquired by these parties during their 29-year marriage. Mrs. Warren takes from the marriage, only that which she brought to it. Mr. Warren does not dispute that Mrs. Warren's substantial legacy was utilized to a great extent to support the marriage and it is undisputed that the legacy returned to her by the decree of divorce is in no way capable of producing the income necessary to maintain the standard of living to which Mrs. Warren had grown accustomed. At the same time, when one considers the property awarded to the husband, it becomes clear that he leaves the marriage with a windfall with a substantial income and substantial income-producing stock. It must be kept in mind that Mrs. Warren's legacy supported the marriage, making possible the investments which Mr. Warren now takes from the marriage.

The decree of divorce fashioned by the trial court does abuse that court's discretion in the area of marital liabilities, for that party least able to pay was ordered to assume 72 percent of the marital obligations. The only reasonable source to satisfy these obligations, Mrs. Warren's

legacy, will be reduced and in turn so will Mrs. Warren's monthly income. This same argument is true with respect to the failure of the trial court to award any attorney's fees. Mr. Warren's substantial income and substantial assets remain untouched, while Mrs. Warren must further deplete that legacy which is to provide her with support for the rest of her life.

The alimony awarded to Mrs. Warren, \$400 per month for a 48-month period, is a clear abuse of the trial court's discretion when viewed in light of the nature of the property awarded to Mr. Warren as well as his present income. The trial court clearly misunderstood the evidence of Mrs. Warren's ability to support herself and that of Mr. Warren to provide for her. The decree of divorce is based upon a comparison of Mr. Warren's net income without consideration of the tax benefit from the payment of alimony to Mrs. Warren's gross income prior to the satisfaction of tax liabilities. Also, the court failed to take into account the decrease in the monthly income from Mrs. Warren's legacy due to the burdening of her by the marital obligations and her own attorney's fees.

Plaintiff-appellant requests this court reverse the decree of divorce entered by the trial court and either

remand this action for a new trial or fashion an equitable and just decree.

RESPECTFULLY SUBMITTED this 27 day of July, 1981.

DART & STEGALL

By 
Paul H. Proctor

CERTIFICATE OF SERVICE

I certify that on this 27 day of July, 1981, I placed with "The Runner-Service" two copies of the foregoing Appellant's brief to be delivered to Nicolaas de Jonge, attorney for defendant-respondent, Suite 14, Intrade Building, 1399 South 700 East, Salt Lake City, Utah 84105.


