

1981

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

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors Nicolaas de Jonge; Attorney for Defendant-Respondent Paul H. Proctor; Attorneys for Plaintiff-Appellant

Recommended Citation

Brief of Respondent, *Warren v. Warren*, No. 17514 (Utah Supreme Court, 1981).
https://digitalcommons.law.byu.edu/uofu_sc2/2544

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 -) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT OF THE STATE OF UTAH

----oo0oo----

BARBARA J. WARREN, :
Plaintiff-Appellant, :
v. : Case No. 17514
ROBERT L. WARREN, :
Defendant-Respondent. :

----oo0oo----

BRIEF OF RESPONDENT

Appeal from the Judgment of the Third District Court
in and for Salt Lake County
Honorable Peter F. Leary, Judge

Nicolaas de Jonge
Suite 14, Intrade Building
1399 South Seventh East
Salt Lake City, Utah 84105

Attorney for Defendant-
Respondent

Paul H. Proctor
DART & STEGALL
430 Ten Broadway Building
Salt Lake City, Utah 84101

Attorneys for Plaintiff-
Appellant

FILED

SEP 29 1981

IN THE SUPREME COURT OF THE STATE OF UTAH

----oo0oo----

BARBARA J. WARREN, :
Plaintiff-Appellant, :
v. : Case No. 17514
ROBERT L. WARREN, :
Defendant-Respondent. :

----oo0oo----

BRIEF OF RESPONDENT

Appeal from the Judgment of the Third District Court
in and for Salt Lake County
Honorable Peter F. Leary, Judge

Nicolaas de Jonge
Suite 14, Intrade Building
1399 South Seventh East
Salt Lake City, Utah 84105

Attorney for Defendant-
Respondent

Paul H. Proctor
DART & STEGALL
430 Ten Broadway Building
Salt Lake City, Utah 84101

Attorneys for Plaintiff-
Appellant

TABLE OF CONTENTS

	Page
NATURE OF CASE	1
DISPOSITION IN LOWER COURT	1
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	3
ARGUMENT	7
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.	7
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	24
E. The Trial Court Abused Its Discretion In Failing To Award To Mrs. Warren Any Attorney's Fees	27
F. Costs On Appeal.	29
CONCLUSION	29

CASES CITED

	Page
Adams v. Adams, 593 P.2d 147 (Utah 1979)	13, 26, 28
Alldredge v. Alldredge, 229 P.2d 681 (Utah 1951)	28
Bader v. Bader, 18 Utah 2d 407, 424 P.2d 150 (1968).	8, 28
Butler v. Butler, 23 Utah 2d 259, 461 P.2d 727 (1969).	28
Christensen v. Christensen, 21 Utah 2d 263, 444 P.2d 511 (1968).	3, 23
Cox v. Cox, 532 P.2d 994 (Utah 1975)	17
Curry v. Curry, 7 Utah 2d 198, 321 P.2d 939 (1958)	26
De Vas v. Noble, 13 Utah 2d 133, 369 P.2d 290 (1962).	15
Pope v. Pope, 589 P.2d 753 (Utah 1978)	16
Read v. Read, 594 P.2d 871 (Utah 1979)	13, 14, 16
Wilson v. Wilson, 5 Utah 2d 79, 296 P.2d 977 (1956).	7, 8, 13

IN THE SUPREME COURT OF THE STATE OF UTAH

----oo0oo----

BARBARA J. WARREN, :
Plaintiff-Appellant, :
v. : Case No. 17514
ROBERT L. WARREN, :
Defendant-Respondent. :

----oo0oo----

BRIEF OF RESPONDENT

NATURE OF CASE

In this appeal Plaintiff/Appellant has petitioned this court to review the judgment of the trial court regarding the distribution of property and obligations accumulated by the parties during the marriage; the award of alimony; and the trial court's failure to award reasonable attorney's fees.

DISPOSITION IN LOWER COURT

Following extensive pre-trial negotiations and pre-trial order, this matter was tried before the Honorable Peter F. Leary. During two days of trial, the court heard testimony from seven witnesses, including four expert witnesses testifying as to the value of personal property accumulated by the parties; received into evidence eighteen exhibits; and subsequently took the matter under advisement for a period in excess of 60 days. Based upon the evidence presented at the time of trial, plaintiff was awarded real and personal property valued at \$267,246.00, or 66% of the total, and defendant was awarded real and personal property valued at \$135,540.00, or 34% of the total. All real

and personal property awarded in the decree of divorce was valued either by appraisal or by stipulation of the parties.

The court further ordered that Plaintiff pay \$10,631.00 of the debts and obligations incurred during the marriage or 58% of the total, and that defendant pay \$7,567.00 of the debts and obligations so incurred, or 42% of the total, not the 72% - 28% split alledged in appellants brief.

In addition the court awarded Plaintiff \$400.00 per month alimony, to be paid for a period of 48 months, with the right of Plaintiff to petition the court for an extension of payment of alimony. Furthermore, Defendant was awarded a lien against the home of the parties for his share of the equity, to be paid by Plaintiff to Defendant upon occurrence of the first of the following events: re-marriage of the Plaintiff; Plaintiff ceases to reside in the home or any part thereof is rented; a non-related male resides in the home; the minor child graduates from high school or is otherwise emancipated.

RELIEF SOUGHT ON APPEAL

Plaintiff has petitioned this court to remand the case for a reconsideration of the property distribution; debt distribution; award of alimony; and award of attorney's fees. In the alternative, Plaintiff requests this court to review the evidence presented at the trial and fashion its own award.

It is the position of the Defendant/Respondent that the judgment of the trial court is consistent with the pre-trial order and the extensive evidence presented at the time of trial;

that the trial court went to great length to review and consider the evidence; and therefore, the judgment of the trial court should be affirmed, and this court ought to award Defendant his costs and attorney's fees on appeal.

STATEMENT OF THE FACTS

The parties were married in San Antonio, Texas on June 27, 1952. Four children were born as issue of the marriage, all of whom have now reached the age of eighteen years, and none of whom are living with either the Plaintiff or the Defendant. At the time of the marriage, Defendant had completed his Junior year at Rice University, and was completing studies for his bachelor's degree in Engineering. While completing his studies, and in order to assist in supporting his family, Defendant worked part-time during the nine month school year, and full-time during the summer months. (Tr.168; R.542.)

Following his graduation from Rice University, Defendant became employed with Chance-Vought Aircraft, a company now known as E-Systems, his present employer. At the time of the divorce, Defendant's net monthly income was \$1,887.00 (Exhibit 29-D), which sum, after the payment of alimony to the Plaintiff, is reduced to \$1,487.00. Although Plaintiff was not employed, she had independent income in the sum of \$800.00 per month from a trust standing in her name at National Bank of Commerce, San Antonio, Texas (Exhibit 22-D), and additionally was receiving \$600.00 per month in stock dividends from shares of National Bancshares stock standing in her name

(Pretrial Order, page 4, paragraph R), for a combined gross monthly income of \$1,400.00. After taking into consideration the \$400.00 per month alimony payment from Defendant, Plaintiff has available to her a gross monthly income of \$1,800.00. This does not take into consideration income she may earn from future employment.

Appellant's brief goes into great detail regarding depletion of the legacy she received at the time of her father's death. The fact of the matter is, and based on the pleadings and evidence submitted at the time of trial, the legacy received by Plaintiff and placed in trust with National Bank of Commerce on May 28, 1956, was valued at that time at \$66,386.01. (Plaintiff's Pre-Trial Memorandum - Page 1).

The principal balance of the trust on March 31, 1980 was valued at \$87,942.00 (Exhibit 22-D), and at the time of trial, the trust was valued at \$98,126.00. (Tr.220; R.594.) This in spite of the fact that there were distributions from the trust during a 23 1/2 year period amounting to \$146,599.10. (Exhibit 22-D) Plaintiff would like this court to believe that the entire \$146,599.10 was contributed to the marriage of the parties for the purpose of keeping body and soul together, and that Defendant contributed little or nothing to the marriage. The uncontroverted evidence, however, illustrates rather vividly that during their 29 year marriage, Defendant was always employed on a full-time basis, with the exception of two years when he was completing his education and working part-time. (Tr.168; R.542.) As a result of his employment, Defendant

contributed in excess of \$500,000.00 to the support and maintenance of the family unit. (Tr.174 & 175; R.548 & 549.) As one would reasonably expect from a marriage of 29 years, Defendant's income and the distribution from Plaintiff's trust were largely co-mingled and used by the parties to manage and pay the expenses of the family unit and provide the family with some of the luxuries in life. (Tr.176; R.550.)

During their marriage, the parties accumulated a sizeable estate of real and personal property. In addition, during the marriage, Plaintiff inherited some antiques and other miscellaneous items of personal property. The only evidence before the court with regard to the value of the real and personal property of the parties was the testimony of expert witnesses, the exhibits received at the time of trial, and the testimony of the Defendant. Throughout these lengthy divorce proceedings, Plaintiff has had repeated opportunities to present evidence or proffer testimony as to the extent and estimated value of the real and personal property inherited and accumulated by the parties during the marriage. On February 13, 1980, Defendant issued Interrogatories specifically directed at having Plaintiff provide information as to the extent and estimated value of the real and personal property owned by the parties. She failed to answer the Interrogatories. Defendant filed a motion to compel Plaintiff to answer the requested Interrogatories. The court ordered Plaintiff to file written answer to the Interrogatories, however, Plaintiff failed to abide by the court order. In the pre-trial order Plaintiff was again ordered to provide Defendant with estimated values of items of personal

property accumulated during the marriage. Again Plaintiff failed to abide by the court order.

The Defendant on the other hand, consistent with the pre-trial order, arranged for appraisers to inventory and value the personal property of the parties. In addition, Defendant arranged for a stock broker to testify as to the value of stocks and other marketable securities owned by the parties at the time of trial. Even though the court had specifically ordered the appraisal of the parties personal property in the home, Plaintiff refused to cooperate, and in fact made it extremely difficult for Defendant and the appraiser to inventory and value the property located in the home. The appraisers collectively valued the personal property in the home at \$126,781.00 (Exhibits 16-D, 18-D; 19-D), excluding a substantial amount of sterling silver which was not available at the time of the appraisal. Defendant in his inventory of the personal property located in the home, including the sterling silver not viewed by the appraisers, estimated the total value of personal property in the home at \$161,113.00 (Exhibit 21-D). If Defendant's estimate is reduced by \$16,500, the value he attributed to the silver and included in his estimate, but not included in the value arrived at by the appraisers, Defendant's estimate now reduced to \$144,613.00 is very similar to the professional appraisals.

In his suggested division of marital estate, and of the items of real and personal property not stipulated to, Defendant requested and received 1,214 shares of E-Systems Stock; his ESY Pension; his ESOP Retirement Plan; and some items of personal property valued at \$7,244.00. The value of the items

awarded to the Defendant, including his one-half equity in the home and some miscellaneous items of personal property awarded Defendant in the pre-trial order totals \$135,540.00. (Exhibit 31-D). The value of property awarded to Plaintiff pursuant testimony at the time of trial; Exhibit 31-D; the pre-trial order; and stipulation of the parties totals \$267,246.00. On the basis of \$402,786.00, the total value of property at the time of trial, Plaintiff was awarded 66% and Defendant was awarded 34%. If Plaintiff's inherited property is ignored, she still received \$98,030.00 or 42% of the property accumulated by the parties and Defendant received \$135,540.00 or 58%. Furthermore, the ESY Pension Plan and the ESOP Retirement Plan cumulatively valued on Exhibit 31-D at \$39,635.00 is not available for monthly distribution to the Defendant until age 60, thereby substantially reducing the lump sum value and liquidity of the property awarded to the Defendant.

ISSUES PRESENTED BY APPELLANT

I. THE TRIAL COURT ABUSED ITS 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 many occasions held that an action in a divorce is largely an equitable proceeding. Wilson v Wilson, 5 Utah 2d 79, 296 P.2d 977 (1956). There are many holdings that this court may review cases of this nature and substitute its judgment for that of the trial court under proper

circumstances. (See, Wilson v Wilson, supra.)

In Christensen v Christensen, 21 Utah 2d 263, 444 P.2d 511 (1968) this court recognized the unique position of the trial judge when it concluded:

Even though it is the established rule that divorce cases being in equity, it the duty of this court to review and weigh the evidence,² it is equally true that we have invariably recognized the advantaged position of the trial judge and given deference to his findings and judgment, declaring that they should not be upset unless the evidence clearly preponderates against them, or unless the decree works such an injustice that equity and good conscience demand that it be revised.

444 P.2d at 512.

In Bader v Bader, 18 Utah 2d 407, 424 P.2d 150, (1968) this court in again recognizing the advantaged position of the trial judge in matters of allocating property and income, the court stated:

It would lead to intolerable instability of judgments if this court should assume the prerogative and accept the responsibility of merely second guessing a trial judge who has done a conscientious job of attempting to make a just and equitable allocation of the property and income of the parties in regard to alimony and support money, as the trial judge appears to have done here. It is due to this fact, taken into consideration with the nature of the trial judge's authority and duty, and his advantaged position, that in such matters he is allowed a comparatively wide latitude of discretion which will not be disturbed in the absence of a clear abuse, a circumstance which we have not found here.

424 P.2d at 151.

B. The Trial Court Abused Its Discretion By Awarding
An Unwarranted Majority Of The Property To Mr. Warren.

Plaintiff alleges that the trial court adopted without modification the proposed distribution of marital property pursuant to Exhibit 31-D. Plaintiff, either prior to the trial or during the trial made absolutely no effort to submit either to opposing counsel, or the trial court, any evidence or testimony regarding the value of the real and personal property owned by the parties, nor did she provide any evidence with respect to what she believed would be an equitable property distribution. (Tr.259; R.633).

Plaintiff had many opportunities to present evidence or testimony regarding values and proposed distribution of property accumulated during the marriage. In fact, on February 13, 1980, Defendant served Interrogatories upon Plaintiff specifically directed to obtain that information. She failed to answer the Interrogatories. On April 28, 1980, she was ordered by the court to file answers, but again she failed to do so. In the Pre-Trial Order dated July 22, 1980, she was again ordered to provide her estimated value of items of personal property accumulated during the marriage, and her proposed distribution of property. (Pre-Trial Order. Page 6). Again, Plaintiff failed to comply with the court's order.

It would, therefore, appear a bit presumptuous on the part of Plaintiff to now fault the trial court for presumably having weighed in its decision, the testimony of Defendant and expert witnesses, each of whom provided testimony

regarding the value of personal property of the parties. Plaintiff should not now be allowed to petition this court and attempt to discredit the well reasoned judgment of the trial court.

Plaintiff, on page 10 of her brief alleges that Defendant's estimated value of personal property grossly exaggerates the actual value of the property. How can such a statement be given any credibility, particularly in light of the fact that Plaintiff has made absolutely no effort to either value the personal property herself or to have the property appraised by outside independent appraisers.

Defendant, on the other hand, made a sincere effort to itemize and value all of the items of personal property located in the home of the parties. His effort in that regard resulted in an estimated value of \$161,113.00. (Exhibit 21-D). In addition, Defendant arranged for independent appraisers, at his own expense, and as directed by the Honorable Judge Rigtrup at the pre-trial conference to appraise the personal property of the parties, which resulted in an estimated value of \$126,781.00. (Exhibit D-16, D-18 and D-19). It should be noted that because the items were not available, the appraisers excluded certain items of sterling silver place settings which Defendant had valued at \$16,500.00. (Exhibit 21-D). If the sterling silver is deducted from Defendant's estimated value per Exhibit 21-D, Defendant's estimate is only \$17,832.00 higher than the appraisals submitted by the experts at the time of trial.

The trial judge in his determination as to the disposition of the real and personal property of the parties must have recognized that Defendant's estimates were his own opinion, and that perhaps he had little professional expertise in appraising personal property of that nature. However, the Court also seemed to recognize that the estimates of Defendant were very similar to the appraisals submitted by the expert witnesses. Therefore, some credibility must be given his estimates, particularly in light of the fact that Plaintiff has never made any attempt to provide estimates or expert testimony to the contrary.

As a result of the evidence and testimony at the time of trial, and the stipulation of the parties as contained in the Pre-Trial Order, Plaintiff was awarded stocks, bonds, and other liquid, marketable securities valued at the time of trial at \$112,091.00 (Tr.220; R.594, Tr. 221; R.595, Tr..243; R.617) and awarded antique furnishings valued at \$57,125.00. (Exhibit 21-D). Additionally, Plaintiff was awarded household furnishings, jewelry, furs, Saab automobile and one-half of the equity in the home for an additional award of \$98,030.00. (Exhibit 31-D), for a total award of \$267,246.00.

Defendant on the other hand received his E-Systems stock, his non-liquid retirement benefits, one-half of the equity in the home and some miscellaneous items of personal property, for a total value of \$135,540.00. (Exhibit 31-D). Of the total property owned by the parties at the time of trial, Plaintiff was awarded property valued at \$267,246.00, or 66% of

the total, and Defendant was awarded property valued at \$135,540.00 or 34% of the total. If the stocks, securities and antiques awarded to Plaintiff valued at \$169,216.00 are deleted from Plaintiff's award, she still received property valued at \$98,030.00, or 42% of the total property.

Plaintiff attempts to discredit the trial court's decision by alleging the trial judge misunderstood the value of the retirement benefits of Defendant as set forth in Exhibit 31-D. The fact of the matter is, however, the trial court had in its possession, and it is part of this trial record, a published copy of Defendant's retirement benefits. Therefore, the trial judge was well aware of the fact that the values to be attached to Defendant's retirement benefits must be present values, not estimated values some twenty years into the future. It was for this reason and on that basis that the Honorable Kenneth Rigtrup, recognizing that these retirement benefits were not to be available to Defendant until retirement, reduced the inflated future values to present values.

The trial court, in addressing the question as to the division of personal property indicated that it may either require an appraisal or in the alternative divide the property based on documentary evidence and testimony. (Tr.261 R.635). In the final analysis, the trial court in fact did not request an item-by-item appraisal of the personal property located in the home, presumably because of the expense involved, (Tr.259; R.633) and in fact made its distribution based upon the evidence

and testimony provided at the time of trial. (Tr.261; R.635).

It is certainly a well recognized fact that the trial court does not have unlimited discretion in allocating personal property and financial resources in matters of this nature. However, it is also a well recognized fact that the trial court does have considerable latitude in allocating personal property and financial resources, and the decision of the trial court in that regard will not be changed, unless its decision works such inequity as to indicate a clear abuse of discretion. Wilson v Wilson, 5 Utah 2d 79, 296 P.2d 977 (1956) or unless the evidence clearly preponderates against the findings of the trial court. Adams v Adams, 593 P.2d 147 (Utah 1979).

In her brief, Plaintiff, in citing the case of Read v Read, 594 P.2d 871 (Utah 1979) suggests that there were some questions regarding the accuracy of estimates of value of personal property, and on that basis the case ought to be remanded to the trial court. The fact of the matter is, however, there was no confusion on the part of the trial judge, with the exception of the value of Defendant's retirement benefits. (Tr.256, 257; R.630,631). In that regard, a printed copy of Defendant's retirement plan was provided to the court, consistent with its order. (Tr.267; R.641), and presumably used in his deliberation. All of the remaining property of the parties, however, including the home, stocks, bonds, furs, jewelry, furnishings and fixtures were appraised by experts, including a real estate agent, stock broker, furrier, professional jeweler and professional estate appraiser. In addition, Defendant

offered his best opinion as to the values of the furniture and furnishings located in the home. There was no contradictory evidence before the court.

Furthermore, Read v Read should be distinguished from this case in that in the Read case there was no evidence before the trial court with regard to certain items of personal property, and the findings of the court were inconsistent with the evidence presented at the time of trial. In addition, in the Read case the court awarded the wife 90% of the personal property and awarded the husband 10% of the personal property. In remanding the case, this court recognized that the property distribution was not equitable, and that the trial court should obtain additional evidence regarding the value of certain items of personal property.

Plaintiff suggests that the detailed itemized valuation prepared by defendant and verified by qualified professional appraisers is of no value. Plaintiff further suggests that the valuation of the jewelry at \$19,886.00 is without any evidence of present market or actual value. To even suggest such a thing is not only to cast doubt on the expertise of the expert witness who so testified, but furthermore to contradict counsel for Plaintiff who recognized that Defendant's expert witness was a "well qualified gemologist". (Tr.32;T.406). Furthermore, the jeweler testified that the basis for his valuation at the time the appraisal was done was replacement cost, and furthermore, he testified that the value of gem stones and precious metal had been subject to tremendous increases in value since

the date of the appraisal of August 2, 1978. (Tr.31;T405), (Exhibit D-19). The appraiser of the contents of the home, based upon a visual inspection and based upon numerous photographs taken during his visit (Exhibit 17-D) testified and submitted his written estimate to the effect that on a piece by piece sale, the antique furnishings in the home, awarded to the Plaintiff, would bring near \$100,000.00. That was the uncontroverted evidence before the court, and was not rebutted by any evidence of the Plaintiff.

This court recognized the advantaged position of the trial judge to review and weigh the evidence in De Vas v Noble, 13 Utah 2d 133, 369 P2d 290 (1962), when it held:

Due to his function as the determiner of the facts and his advantaged position in close proximity to the witnesses and the trial, it is his privilege to be the exclusive judge of the credibility of the witnesses, the weight to be given the evidence and the facts to be found therefrom.

369 P2d at 293.

Plaintiff, in her brief, suggests that if the total value of real and personal property awarded to Plaintiff is reduced by the values assigned to her trust, National Bancshares stock and antiques, that Plaintiff's award of real and personal property by the trial court would be reduced to 16% of the remaining estate.

The fact of the matter is, however, that if the trust and National Bancshares stock valued at \$112,091.00, and the antiques valued at \$57,125.00 are deducted from the value of real and personal property awarded to Plaintiff, she was

still awarded \$98,030.00 in real and personal property and Defendant was awarded \$135,540.00 in real and personal property which represents a 42% - 58% split. Even given the worst case, the 42% - 58% split, this property settlement is well within the discretion of the trial court, particularly given the fact that in reality Plaintiff was awarded real and personal property valued at \$267,246.00. Plaintiff suggests that the property distribution by the trial court imposes a penalty upon the Plaintiff. In that regard counsel cites the case of Read v Read (Supra). In the Read case, the trial court awarded Plaintiff 90% of the real and personal property and Defendant was awarded 10%. In finding the trial court's distribution inequitable this court concluded:

When a marriage has failed, a court's duty is to consider the various factors relating to the situation and to arrange the best possible allocation of the property and economic resources of the parties so that the parties . . . can pursue their lives in as happy and useful 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 P2d 872.

Plaintiff cites the case of Pope v Pope, 589 P2d 753 (Utah 1978) as authority for a property distribution awarding 65% of the real and personal property to the Plaintiff/ wife, and 35% to the Defendant/ husband. This court upheld the decision of the trial court on the basis that the Defendant/ husband received income producing property.

In that regard, it should be pointed out, that of the total real and personal property awarded to the Plaintiff, in the amount of \$267,246.00, \$112,091.00 represents stocks, bonds and other income producing, readily marketable securities. Of the total property awarded to the Defendant, in the amount of \$135,540.00, only his shares in E-Systems valued at \$57,361.00 are income producing and readily marketable. The value attributed to his pension and retirement fund is not available to him at this time.

The decree of divorce in this matter, based upon all of the evidence, is well within the discretionary authority of the trial court. The court awarded Plaintiff 66% (\$267,246.00) of the total real and personal property of the parties, or 42% (\$98,030.00) of the total property if Plaintiff's stocks, bonds and antiques are excluded from the property distribution calculation. In the case of Cox v Cox, 532 P2d 994 (Utah 1975), this court held that a property distribution of one-third to the wife and two-thirds to the husband was not an abuse of the court's discretion. In Cox the parties had been married for approximately 15 years and had four children. During the marriage, the Plaintiff/wife had worked and had helped Defendant/husband complete dental school. After graduation, she assisted Defendant and was employed in his practice as a receptionist and bookkeeper. At the time of trial, the evidence indicated that the parties had accumulated personal property valued at \$210,000.00. The trial court awarded one-third of the personal property to the Plaintiff/wife and two-

thirds to the Defendant/husband. In upholding the trial court decision, this court held:

Because of the variability and complexities involved in family troubles, there is no firm rule or formula that can be uniformly applied in all cases in the legal surgery necessary to severing such relationships which will best serve the desired objective of allocating economic resources so that the parties involved can reconstruct their lives in the most happy and useful manner. However, as an aid in that endeavor, in the past courts have often resorted to a general "rule of thumb", of one-third to the wife and two-thirds to the husband . . . Upon our survey of the circumstances of these parties we see no reason to believe that the application of that general rule is so inequitable or unjust that we should interfere therewith.

532 P.2d at 996.

Plaintiff in her brief alleges that the decree leaves little but grossly overvalued personal property to the unemployable, uneducated wife and mother of twenty-nine years.

A review of the evidence presented at the time of trial simply does not substantiate such a conclusion. Although it is true that Plaintiff has not been employed outside the home since her marriage to Defendant, she does have a high school diploma and did attend the University of Texas for one and one-half years. (Tr.93; R.467). With respect to Plaintiff's allegation that the real and personal property is grossly overvalued, the evidence and testimony proffered at the time of trial and previously referred to herein certainly proves that statement to be without merit.

Furthermore, Plaintiff alleges that the values

attached to Defendant's ESOP Retirement Plan, valued at \$19,388.00 and his ESY Pension Plan, valued at \$20,247.00 created a question in the mind of the trial judge. Although it is true there was some confusion about Defendant's accessibility to his retirement plan and his pension plan, those matters were resolved in the mind of the trial judge when Defendant, pursuant to the court's order, provided both counsel for the Plaintiff and the trial judge, within 48 hours after the trial, a copy of E-Systems Employee Handbook, which explained in detail the retirement benefits of Defendant. (Tr.266,267; R.640,641).

The E-Systems Employee Handbook made available to the court verifies that the \$19,388.00 in the ESOP Retirement Plan is available to Defendant only upon the following conditions; (1) one year after his date of termination from E-Systems or (2) at such time as he retires after age 60. The value of Defendant's pension plan was determined at the pre-trial conference conducted by the Honorable Kenneth Rigtrup. Judge Rigtrup and counsel for both parties recognized and agreed that the future value of Defendant's pension plan must be reduced to a present value basis. Judge Rigtrup, over the objection of counsel for Defendant used an interest rate of 8% per annum in order to reduce the future value of the pension plan to a present value of \$20,247.00. (Pre-Trial Order P.2). Had Judge Rigtrup used a rate of interest more in line with current interest rates, such as 15% per annum as requested by counsel for Defendant, the present value of the pension plan would have been reduced to \$7,879.00. In her brief

Plaintiff suggests that the low 8% interest rate greatly undervalues the retirement fund. The fact of the matter is, however, the opposite is true. The greatly understated rate of interest in fact overvalues the present value of Defendant's pension plan.

With respect to whether or not the ESY Pension Plan and the ESOP Retirement Plan ought to be property subject to distribution, it should be noted that Defendant made that information available to counsel for the Plaintiff and included those values as part of his proposed property settlement contained in Exhibit 31-D. It would be naive to think that the trial court did not consider these amounts in its determination of what would be a fair and equitable distribution of the real and personal property of the parties.

C. The Trial Court Abused Its Discretion By Ordering That Mrs. Warren Pay A Disproportionate Amount Of The Marital Liabilities.

In her brief, Plaintiff alleges that the trial court adopted without modification the proposed division of marital obligations submitted by Defendant on Exhibit 33-D. The fact of the matter is, however, that the trial court did not adopt, without change, the proposed division as set forth in Exhibit 33-D, in that in addition to the \$4,604.00 Defendant proposed he should pay, he was ordered to pay the mortgage arrears in the sum of \$1,003.00, which amount was originally included in the amount proposed to be paid by Plaintiff, and additionally Defendant was ordered to pay income tax penalties and interest for calendar year 1979, not reflected

in Exhibit 33-D, but part of the trial court's memorandum decision, in the sum of \$1,960.00. Therefore, of the total debts and obligations in the sum of \$18,198.00, Plaintiff was ordered to pay \$10,631.00 and Defendant was ordered to pay \$7,567.00.

In making its decision relative to the distribution of the obligations, the court obviously considered the testimony of the parties. During examination, Plaintiff unequivocally admitted that the balances due to Felt Buchorn and ZCMI represented her own personal accounts. (Tr.87,88; R.461,462). Additionally, Plaintiff admitted incurring for her own personal benefit, the charges on National Bank of Commerce Master Charge, Valley Bank Visa and Master Charge, Castleton's, Makoff's, and Arent's. (Tr.103-106; R.477-480). In fact, without exception, each of the obligations Plaintiff was ordered to pay she either agreed to pay or agreed were charges incurred by her personally for her benefit. In addition, in his testimony, Defendant testified that the charge accounts in question were either in the name of the Plaintiff or used exclusively by the Plaintiff (Tr. 183-184; R.557-558, Tr.187; R.561).

When viewed in terms of the percentage of the total obligations each of the parties was ordered to pay, Plaintiff was ordered to pay \$10,631.00 of the total of \$18,198.00 of debts and obligations, or 58% of the total, not the 72% alleged by plaintiff in her brief. Additionally, Defendant was ordered to pay \$7,567.00 of the debts and obligations, or 42% of the total. Furthermore, Plaintiff testified during

the trial that some of the obligations Defendant proposed be paid by Plaintiff in Exhibit 33-D, specifically Valley Bank and Trust Visa and Master Charge, Felt Buchorn, and ZCMI had cumulatively been reduced at the time of trial in the amount of \$1,553.00 (Tr.87; R.461)(Tr.104;R.478). Taking that testimony into consideration, Plaintiff's share of the obligations is reduced and her percentage of total obligations she is required to pay drops to 55% and Defendant's share of obligations he is required to pay increases to 45%. Considering that practically all of the obligations were incurred by the Plaintiff for her personal benefit, such a distribution is more than reasonable, and well within the discretion of the trial court.

Plaintiff, in her brief, suggests that the Defendant has a greater ability, based on the respective incomes of the parties, to pay a substantially greater portion of the obligations of the parties. In fact, however, Plaintiff has a separate gross income of \$1,800.00 per month, excluding any allowance for income she may earn from future employment, whereas Defendant has a net income of \$1,487.00 per month.

Plaintiff also alleges that the trial court erred by requiring her to pay one-half of the income tax deficit for calendar year 1979. It should be pointed out, and the trial court so recognized, that the \$5,207.00 income tax deficit was in large part due to income Plaintiff had received by way of stock dividends and interest income from her trust and National Bancshares stock, and that Defendant's income

from his employer had in fact been subject to withholding the entire year. Therefore, the income realized by Plaintiff boosted the parties joint return into a substantially higher income tax bracket and as a consequence resulted in the Plaintiff's income being taxed at a substantially higher tax rate than would have been the case had this been the only income the parties had earned during calendar year 1979.

Plaintiff further suggests that Defendant admitted having used credit cards for his benefit or for the benefit of the children. The fact of the matter is, and the record clearly so indicates, that Defendant admitted to two specific charges on the Valley Bank and Trust Company Visa and Master Charge account. In the one instance the Defendant purchased a jacuzzi/whirlpool which was subsequently awarded to the Plaintiff and in the second instance the Defendant purchased a round-trip plane ticket for the parties' minor child. (Tr. 186; R.560). In fact throughout his testimony the Defendant specifically denied any knowledge of any of the credit card purchases. Furthermore, he denied having any personal knowledge as to the nature of the items purchased other than the fact they were purchased by the Plaintiff for the benefit of the Plaintiff. (Tr.187; R.561).

The distribution of marital obligations by the trial court is certainly well within the court's discretionary powers. As noted in Baker, (Supra), the trial court has considerable latitude in adjusting the financial affairs of parties in a divorce proceeding. In Christensen v Christensen,

444 P.2d 511 (Utah 1968), at page 512 this court held:

Even though it is the established rule that divorce cases being in equity, it is the duty of this court to review and weigh the evidence, it is equally true that we have invariably recognized the advantaged position of the trial judge and given deference to his findings and judgment, declaring that they should not be upset unless evidence clearly preponderates against them, or unless the decree works such an injustice that equity and conscience demand that it be revised.

The judgment of the trial court with respect to the distribution of the debts and obligations of the parties was not an abuse of the court's discretion. Plaintiff agreed to pay those obligations incurred solely by her. Plaintiff reaped the benefits of the purchases, since all of the personal property that was so acquired was awarded to the Plaintiff.

D. The Trial Court Abused Its Discretion In Awarding An Insufficient Amount Of Alimony For Too Limited A Period Of Time.

The evidence shows that Plaintiff has independent income in the sum of \$1,400.00 per month, (Exhibit 22-D) (Pre-Trial Order, page 4, paragraph R), and receives alimony in the sum of \$400.00 per month, for a total income of \$1,800.00 per month. Defendant receives a net income, after payment of alimony, in the amount of \$1,487.00. (Exhibit 29-D).

Plaintiff in her brief grossly understates her income when she suggests her gross income to be \$1,200.00 per month. Obviously Plaintiff is ignoring the evidence and exhibits presented at trial. The fact of the matter is, that

plaintiff receives \$800.00 per month income from her trust; \$600.00 per month income from stock dividends; and \$400.00 per month alimony from the Defendant. It seems inconceivable to think that one person cannot live comfortably on a monthly income of \$1,800.00. It should be noted that there are no children living at home; she has no obligations keeping her at home; Plaintiff is capable of finding employment to further increase her monthly income. In addition Plaintiff has been awarded personal property consisting of stocks, bonds, antiques and other liquid and readily marketable items of personal property.

In citing English v English in her brief, Plaintiff seems to suggest that a gross income of \$1,800.00 per month, without the benefit of income realizable from outside employment, is simply not enough to "prevent the wife from becoming a public charge". English v English 565 P2d at 411.

Based upon the independent income of the Plaintiff and based upon the vast amounts of real and personal property awarded her in the decree of divorce, it seems somewhat unlikely that the Plaintiff need ever become a public charge.

This court has consistently held that the trial court has broad discretion in determining when and how much, if any, alimony is to be paid by one party to another. There are numerous Utah Supreme Court decisions dealing with the issue of sufficiency or insufficiency of alimony. These cases can all be reduced to the basic premise that an award of alimony by the trial court will not be disturbed unless the evidence clearly demonstrates a misapplication of the law or

an abuse of discretion.

In Adams v Adams, 593 P.2d 147 (Utah 1979), at page 149, this court held:

An award of alimony is within the sound discretion of the court, and will not be disturbed on appeal unless the evidence clearly preponderates against the findings of the court or there has been a misapplication of the law, or the court has clearly abused its discretion.

In discussing the equitable powers of the trial court with respect to the distribution of property and the award of alimony, this court held in Curry v Curry, 7 Utah 2d 198, 321 P.2d 939 (1958) as follows:

The precept is well recognized that the trial court is vested with broad equitable powers in divorce matters and that its judgment will not be disturbed lightly, nor at all unless the evidence clearly preponderates against his findings, or there has been a plain abuse of discretion, or a manifest injustice or inequity is wrought.

7 Utah 2d at 203

Clearly the evidence being reviewed by this court does not in any way suggest that the decision of the trial judge was in any way unjust or unequitable. Furthermore, the income available to the Plaintiff is more than sufficient to provide her with a comfortable standard of living.

In her brief Plaintiff suggests that she will now be required to live off a severely depleted legacy and on an insufficient amount of alimony while the Defendant takes from the marriage any property that will provide an income in the future. It is interesting to note that the only

income producing property the Defendant was awarded are 1214 shares of E-Systems stock valued at \$57,361.00. Defendant was awarded no other income producing property. On the other hand, Plaintiff was awarded stocks, bonds and other marketable securities with a fair market value at the time of trial of \$112,091.00. In addition, Plaintiff was awarded antiques, valued at \$57,125.00, furs, jewelry, one-half equity in the home, and miscellaneous items of personal property valued at the time of trial at \$98,030.00.

In her brief, Plaintiff alleges that she is being asked to accept a depleted legacy, when in fact the value of her trust has increased from May 28, 1956, when the principal sum to be managed was \$66,386.01 to a value at the time of trial of \$98,126.00. In addition, during that twenty-three and one-half year period, there were distributions to Plaintiff in the sum of \$146,599.10.

Based upon the evidence and testimony offered at the time of trial, the award of alimony to the Plaintiff, when viewed in conjunction with the vast amount of personal property awarded her, and her ability to obtain outside employment, is more than generous and well within the sound discretionary judgment of the trial court.

E. The Trial Court Abused Its Discretion In Failing To Award Mrs. Warren Any Attorney's Fees.

In her brief, Plaintiff alleges that she was ordered to pay a substantial majority of the debts; was left with a decreasing income; and that Defendant's income is six times as great as hers. Plaintiff goes on to say that previous

decisions of this court have held that under such circumstances: an award of attorney's fees is appropriate.

There can be little argument with Plaintiff's contention that the award of attorney's fees is within the discretion of the trial court. Bader v Bader, 18 Utah 2d 407, 424 P.2d 150 (1967), Adams v Adams, 593 P.2d 147 (Utah 1979), Allredge v Allredge, 229 P.2d 681 (Utah 1951).

What Plaintiff, however, has chosen to ignore is the fact that at the time of trial there was no evidence proffered to the court with respect to her need for an award of attorney's fees, Defendant's ability to pay, or the amount of attorney's fees incurred by the Plaintiff. In fact, counsel for Plaintiff, at a hearing subsequent to the trial, readily admitted that no evidence had been proffered to the court. (Tr.8, 9, 10; R.651, 652, 653).

In that regard, this court has consistently held that unless there is competent evidence proffered at the time of trial to support an award of attorney's fees, none shall be awarded. In the case of Butler v Butler, 23 Utah 2d 259, 461 P.2d 727 (1969) this court reversed the trial court's award of attorney's fees on the basis that there was no evidence in the record to sustain such an award. Such is the case here.

Furthermore, the evidence in this case clearly demonstrates that the Plaintiff is financially capable of paying her own attorney's fees. She not only has a gross income, including alimony, of \$1,800.00 per month, but she was also

awarded a very substantial amount of real and personal property. Plaintiff alleges that if she is required to pay her own attorney's fees, this will result in an additional burden, and reduce her monthly income. In that regard it must be remembered that the burden of paying attorney's fees rests equally heavy on Defendant's limited income. It would seem that the trial court's decision requiring the parties to pay their own costs and attorney's fees was equitable, and ought to be affirmed.

F. Costs On Appeal.

Upon review of the evidence presented at trial, it becomes readily apparent that Plaintiff's appeal of the decree of divorce is without merit, and, as has been the situation throughout these divorce proceedings, is a continuing attempt on her part to create both mental and financial hardship on the Defendant. Therefore, and in the event this court affirms the findings of the lower court, Defendant respectfully requests this court to award him his costs and attorney's fees on appeal.

Conclusion

Based on the testimony of witnesses and the evidence presented at the time of trial, and based upon the thorough consideration of the trial judge in arriving at a well reasoned decision, there can be little doubt that the trial judge was well within his discretionary powers in his award of real and personal property, debts and obligations, alimony, and attorney's fees. Furthermore, Plaintiff in her brief

has failed to demonstrate that the evidence presented at the trial was contrary to the trial court's decision.

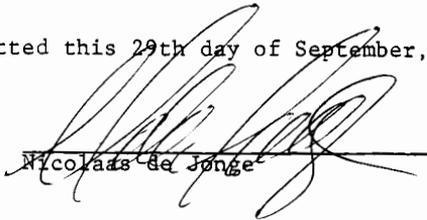
Based on the evidence the trial judge awarded the Plaintiff \$267,246.00 in real and personal property, or 66% of the total, and awarded Defendant \$135,540.00, or 34%; ordered Plaintiff to pay \$9,078.00 of the debts and obligations of the parties, or 55% of the total, and ordered Defendant to pay 45%; awarded Plaintiff \$400.00 per month alimony, which, when added to her independent income of \$1,400.00 per month, provides Plaintiff with a gross monthly income of \$1,800.00; and, based on the fact that there was no evidence to the contrary, ordered each party to pay their respective costs and attorney's fees.

In her brief, Plaintiff attempts to convince this court that she has been dealt a severe financial blow by the trial court, and that it simply will not be possible for her to make ends meet. The facts of the case simply do not lead to that conclusion. With the substantial award of real and personal property, her monthly income of \$1,800.00, and her ability to find outside employment to further increase her income, Plaintiff is financially secure, and ought to be able to live very comfortably on her income.

The evidence presented at trial and subject to review by this court clearly demonstrates that the trial court's determination was equitable and clearly within the discretionary power of the trier of facts. Therefore, the decision of the trial court and the decree of divorce should

be affirmed.

Respectfully submitted this 29th day of September, 1981.



~~Nicolaas de Jonge~~

CERTIFICATE OF SERVICE

I certify that on this 29th day of September, 1981,
I personally delivered two copies of the foregoing Respondent's
brief to Paul H. Proctor, attorney for Plaintiff-Appellant,
430 Ten Broadway Building, Salt Lake City, Utah 84101.

