1981

George W. Preston v. Lorna A. Preston : Appellant's Brief

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

GEORGE W. PRESTON	*	
Plaintiff and Appellant	*	
vs.	*	APPELLANT'S BRIEF
LORNA A. PRESTON	*	
		No. 17597
Defendant and Respondent	*	

APPELLANT'S BRIEF

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TABLE OF CONTENTS

AUTHORITIES CITED

CASES

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APPELLANT'S BRIEF

NATURE OF THE CASE

This is an action for divorce brought by the Plaintiff to dissolve a marriage entered into between the parties on the 2nd day of October, 1972. No children were born of the marriage and issues on appeal involve the settlement of property between the parties.

DISPOSITION IN LOWER COURT

This case was first heard in the District Court for the First Judicial District in and for Cache County before the Honorable Calvin Gould on the 27th day of March, 1980. Judge Gould entered a decree of divorce, reserved all matters of property settlement for trial upon the merits and restrained the Defendant, Lorna A. Preston, from removing all property acquired during marriage from the Plaintiff's home. The trial on the merits was held on the 23rd day of December, 1980 before the Honorable John F. Wahlquist. Judge Wahlquist awarded to each party the property they held

prior to marriage including houses, funds and other personal property and required each party to assume the debts on the property they received.

The Court without making any finding granted to the Defendant all property she acquired by inheritance or gift during marriage.

The trial Court granted to the Defendant a lien in the amount of $17,000.00 upon a cabin, constructed during marriage upon land inherited by the Plaintiff prior to marriage without giving Plaintiff credit for contributions made to the construction from funds he had acquired before marriage.

The Court awarded all personal property to the Defendant which she had removed from the residence contrary to the order of Judge Gould, with the exception that Plaintiff was awarded a silver spoon, dining room furniture, tools, his rifle and his mother's diamond ring. The Court expressly found that the Defendant was not entitled to either alimony or attorney's fees and decreed accordingly. Notwithstanding that finding, however, the Court awarded the personal property to the Defendant in "lieu of any further alimony and/or attorney's fees".

RELIEF SOUGHT ON APPEAL

The Plaintiff seeks a modification of the Judgment of the Trial court as follows:

A. An award crediting Plaintiff for his contribution to

the cabin of $9,310.93 equaling approximately 50% of the construction costs as property owned by the Plaintiff prior to marriage to be deducted (together with its appreciation) from the market value of the cabin prior to any division of the equity between the parties.

B. For an award to the Plaintiff of 50% interest in the farm land and cattle acquired by the parties in the name of the Defendant during the marriage of the parties, the figure of 50% being the same figure used by the Trial Court in dividing the equity in the cabin at Bear Lake.

C. For an award equitably dividing the personal property of the parties removed from Plaintiff's residence by the Defendant contrary to and in violation of Judge Gould's Order of April 4, 1980.

STATEMENT OF FACTS

The parties in this action were married on October 2, 1972 and were divorced on April 4, 1980. The Plaintiff has been married on one prior occasion and has 3 children as a result of that marriage. The Defendant had been married on two prior occasions and has three children from the two prior marriages. The Defendant at the time of the marriage of the parties was not receiving alimony but was receiving child support from her two prior husbands. There were no children born as issue of the marriage.

The Plaintiff brought into the marriage property as follows:

real estate located in Rich County, Utah (TR-27) which was owned by Plaintiff and his brother as tenants in common; a residence in Logan, Utah which was owned jointly with Plaintiff's first wife, Jane P. Preston, a boat, car, partnership interest in a law firm, retirement benefits from his employer as a deputy county attorney and also from his law firm, stocks and bonds and a savings account. This property was awarded to the Plaintiff.

The Defendant brought into the marriage, a house in Logan, Utah, savings accounts in the approximate amount of $12,000.00 an automobile and a trust deed and note from her first husband with a face amount of $65,000.00, part of which had been paid (TR-28) prior to marriage. This property was awarded to the Defendant.

During the course of the marriage the Plaintiff remained employed and supported the Defendant and her children to the extent that he paid for all living expenses over and above child support payments, when made, and when they were not made he provided all of the support for the children. (TR-25) The Plaintiff and the Defendant filed a joint income tax return but any tax due on the Defendant's income was paid from the funds generated by the Plaintiff. (TR-33)

During the course of the marriage the Plaintiff was instrumental in collecting for the Defendant the balance due of the note secured by a trust deed in the amount of $28,000.00 which

funds were thereafter delivered to the Defendant and invested by the Defendant, and none of these funds were used by the Plaintiff. Nevertheless, the Plaintiff's income paid the taxes on the net income. At the time of the divorce the Defendant had in excess of $43,000.00 cash in her name or available to her. (TR 118-119)

During the course of the marriage each party prepared a will. The Defendant's will provided that all property would pass to her children. The Plaintiff's will provided, initially that his property pass to his children. Following a specific request by the Defendant, the Defendant was included into the Plaintiff's Will as a beneficiary. (TR-53)

The Plaintiff and the Defendant acquired various items of personal property during their marriage which were located in the residence and at the cabin. The Defendant, immediately following the separation, removed all of her property and some of the Plaintiff's property from the cabin. An order was obtained from Judge Gould restraining the Defendant from removing from the Plaintiff's residence any property acquired by the parties during their marriage pending a division of the property by the Court. The Defendant upon leaving the residence, when ordered by Judge Gould, stripped the house, removed fixtures from the walls, and took all property acquired during the marriage, down to and including the Plaintiff's hunting rifle, his mother's ring and a silver heirloom spoon, all telephone books and the cable t.v. connectors. (TR 35) The Defendant

left furniture owned by the Plaintiff prior to marriage, a dining room set the Plaintiff had purchased shortly after marriage with funds he had acquired prior to marriage, and nominal other personal property. (TR-35) Judge Wahlquist, who heard the matter relating to the division of property found that the acts of the Defendant were in "contemptuous disregard of the order of Judge Gould. He ordered the Defendant to return but 5 items and awarded the Defendant the remaining personal property in lieu of alimony or attorney's fees. (see the minute entry of the District Court) The Defendant on two occasions waived alimony. (TR-111) "I do not want support from Mr. Preston". (TR-138) Q. Okay. Just so I understand, you are not asking for alimony in this divorce, is that correct? A. That's correct.

In the year 1975 the Plaintiff commenced construction of a cabin at Bear Lake upon land owned (TR-27) by Plaintiff and his brother as tenants in common. (See Exhibit 7) The total cost of the construction was $18,918.38. $9,310.93 was contributed by Plaintiff to construction by reason of the sale of assets owned by the Plaintiff prior to marriage consisting of stocks and the trailer house that was on the property at the time of marriage. The balance of $9,607.45 came from the earnings generated by the Plaintiff during the three year period of construction. The Defendant did not contribute to the construction of the cabin from her own funds held prior to

marriage or from the income of said funds or from funds collected by the Plaintiff for the Defendant during marriage or the income from the funds. (TR-30-39) The Defendant stated she wanted no part of the Bear Lake property, that she never asked Plaintiff to put her name on the deed "and, I told him at the time that I wanted no part of that". (TR-84) The Defendant claims a work contribution in the cabin as it was a family project and that the children of both parties participated in the construction. (TR-90) The cabin was valued by the appraisers in the neighborhood of $34,000.00 and the Trial Court arrived at that figure as the market value of the cabin.

The Trial Court held by minute entry as follows: "The chief property that was acquired during the marriage was the construction of a home on his property at Bear Lake." The court in its findings stated as follows: "During the marriage acting as a family, and drawing on their earnings, and daily funds of all, the family constructed a cabin on the Plaintiff's land." The Trial Court granted the Defendant a lien of $17,000.00 on the cabin to be paid by the Plaintiff within 18 months. The Trial Court in its findings of fact and its conclusions of law failed to mention the $9,310.93 contribution made by the Plaintiff from prior owned funds to the construction and failed to give the Plaintiff credit for the construction.

The Defendant, following the death of her father in August, 1977, inherited farm land situated immediately west of Logan,

Utah. (TR-90) This land was, during the marriage of the parties, annexed to the city limits of Logan City. The Defendant's mother at the time of the setlement of the estate deeded additional land to the Defendant and her brother. (TR-91) The transfer also included two bulls, 42 cows and their offspring, Taylor grazing permits and a building lot in Logan City. The Plaintiff, an attorney, aided the family in the administration of the estate, including the preparation of estate tax returns. (TR-42) A substantially reduced fee was charged for the purpose of offsetting only the expenses of the law firm as the Plaintiff considered the property an acquisition by the family. (TR-42) The building lot was measured and deeds prepared by the Plaintiff for the purpose of obtaining deeds from the Defendant's mother to the Defendant. (TR-42) Following the acquisition of the farm land, the Plaintiff helped with the harvest of the crops, helped feed the cattle and transport them from summer range. (TR 43-69) He helped fence the east and west boundaries of the property (TR-43) and Plaintiff would have requested his statutory share of the property had Defendant died during the marriage. (TR-43)

The Defendant does not deny Plaintiff's participation in the farm work but comments that "he did come out once in a while after work. He was drinking and he caused alot of problems and great dissension, and finally he was asked not to go back around the property any more." (TR-99) The Defendant did not deny

however Plaintiff's participation in the acquisition of the property through the administration of the estate, his preparation of deeds for the acquisition of the property from the Defendant's mother, the fencing and transportation of the cattle.

The appraiser, Mr. Lynn Balls, stated that the highest and best use of the property would be for commercial and industrial purposes. (TR-20) His valuation, based upon facts at the time of the entry of the divorce decree, results in a value to the Defendant of $161,850.00. (and a similar value attributed to her brother). (TR-4) December 23, 1980 values were between $11,000.00 and $20,000.00 per acre with a confirmed sale less than 4 blocks away of comparable land of $12,000.00 per acre. (TR-153) yielding a net appraised value of $526,600.00 and a one-half interest value of $262,800.00 in the name of the Defendant. Added to that figure would be the cattle, and the building lot in the amount of $16,645.00 (Exhibit 6) all of which was acquired during marriage.

During the marriage the Defendant received substantial income from the investment of assets acquired during the marriage as set forth in Plaintiff's Exhibit 8. This income was retained by the Defendant while the parties maintained themselves on the income earned by the Plaintiff. The uncontroverted facts show the Defendant's earned income of at least $14,180.00 acquired by her during the marriage was not considered by the Trial Court in arriving at the property

distribution, yet the Trial Court concluded that the Plaintiff's (husband's) wages were "their earnings and daily funds of all". The Trial Court further found that the PARTIES enhanced interests in both real and personal properties during marriage, and from these findings the Trial Court concluded as follows:

Except as hereinafter specifically provided, each of the parties should be awarded all of the real and/or personal properties they owned or had interest in prior to their marriage, or that inherited during the marriage.

The Trial Court's division of the property acquired during marriage resulted in an award to the Plaintiff (husband) approximately 10% of the total properties acquired during marriage and a distribution of 90% to the Defendant, wife.

POINT I

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN AWARDING THE DEFENDANT A ONE-HALF INTEREST IN THE CABIN AT BEAR LAKE.

The Trial Court said in its minute entry that each party shall have all of the property they had before their marriage. The Findings of Fact reflect this concept and further find that during the marriage, the parties enhanced interests in both real and personal properties.

Exhibit 7 shows the history of the Bear Lake Cabin and shows that there was a contribution to the construction costs of the cabin by Plaintiff from prior owned assets of approximately 50% of the construction costs. The Trial Court ignored not only

the content of the exhibit but also the testimony of the Plaintiff as to this contribution. (TR 38) Had the Court considered this fact, the equity would have been only one half of the net value of the cabin and the Defendant's lien should have then have been in the amount of $8,500.00 instead of $17,000.00.

This Court as recently as March 2, 1981 in the case of Georgedes vs. Georgedes, #17073, approved the concept of allocating to each party the property he or she brought into the marriage. The Trial Court in the present case for reasons not found in the Findings of Fact first announced that each shall have all property they had before marriage then failed to give the Plaintiff credit for this expenditure.

This is not the first time that this Trial Court has failed to give a party credit for an expenditure of funds owned prior to marriage. In 1974 the Utah Supreme Court decided the case of Humphreys vs. Humphreys, Utah 520 P2d 193, in which the same Trial Court that heard the present case directed that the home of the parties be sold and that the remaining equity, after payments of debts, should be divided equally between the parties. The Trial Judge in Humphreys, as in this case, failed to give Plaintiff credit for $3,400.00 received from a previously owned home and the Supreme Court speaking through Justice Crockett said:

> ".....it is our conclusion that it would be equitable and just that the Plaintiff's $3,400.00, which was used as a downpayment to purchase their family home, should be reimbursed to her, and that it should be a preferred claim on the proceeds realized from the sale...."

The facts of the Humphreys case are virtually the same as in the present case except for the fact that there were children born to the Humphreys' marriage. The Supreme Court modified the decision of the Trial Court in Humphreys to correct the omission of the Trial Court and similar relief is sought in the present case. The Plaintiff now asks this Court to modify the decision of the Trial Court and to reimburse the Plaintiff for his contribution to the Cabin from funds owned prior to marriage.

In the case of Jesperson vs. Jesperson, No. 16513 decided March 20, 1980, 610, P2d, 326, this Court stated the criteria for the making of an equitable property division. The Trial Court may consider the length of the marriage and the parties' respective contributions to the marriage.

> "It is not unreasonable for the court to permit the Plaintiff to withdraw from the marital property the equivalent of those assets Plaintiff brought into the marriage. All that may be considered to be marital property acquired through the joint efforts of the parties was therefore the proceeds from the sale of the St. George home over and above its purchase price of $19,027.00".
>
> "Where the marriage is of short duration and neither party has forgone employment opportunities, the amount of each parties' contribution to assets acquired during the marriage is a more important factor in formulating an equitable property division than it would be after a long-term marriage where one spouse relinquished employment to case for the family.....while both parties should share in the increase in value of marital assets, the general approach in dividing property after a short term marriage is to place the parties as nearly as possible in the financial position they would have held if no marriage had taken place."

The decision of the Trial Court, as rendered, awards the Defendant one-half of Plaintiff's contribution in the amount of $4,655.46, plus the appreciation on that amount through inflation. This is clearly an inequitable result taking into consideration the Trial Court's finding that each party was awarded the property they held prior to marriage.

POINT II

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN NOT AWARDING THE PLAINTFF A ONE-HALF INTEREST IN AND TO THE FARM LAND, ANIMALS AND BUILDING LOT ACQUIRED BY THE PARTIES DURING THEIR MARRIAGE.

The Trial Court in its minute entry said with respect to the farm land "each party shall have all of the property they had before the marriage or inherited after marriage". The Findings of Fact provide that the "Defendant inherited interests in real and personal properties during the marriage". The Conclusions of Law parallel the statements with regards to the inheritance. The Supplemental Decree of Divorce grants to the parties "all real and personal properties they owned or had interest in prior to their marriage or that inherited during the marriage.

The Trial Court therefore divided outright the total value of the cabin located on the Plaintiff's property and totally ignored, without definitive findings, real and personal property acquired by the parties during marriage in the name of Lorna A. Preston as follows:

A. Land valued between $161,850.00 and $262,800.00

B. Building lot valued at $12,500.00

C. Cattle valued at $14,270.00

D. Grazing permits valued at $1,575.00

E. Income cash derived by Defendant from investments valued at $14,180.00

The total value of the property awarded to the Defendant by a stroke of the pen was between $204,375.00 and $305,325.00.

Recent cases seem to support the proposition that a distinction should not be drawn between property inherited by a man verses a woman when the issue is the division of property acquired during marriage. The Trial Court saw fit to divide the property acquired by the parties during the marriage as it relates to property in the name of the Plaintiff yet it failed to divide the property acquired by the parties during the marriage as it related to that property in the name of the Defendant.

The Georgedes and Jesperson cases, supra, deal with property brought into the marriage and therefore had no application to this issue. The Defendant testified that the value of the property at the time of her father's death was appraised at $1,000.00 per acre for the 43.80 acres which accounts for an inherited value of $43,800.00 and increase in value of the land of $118,050.00 and $219,000.00 depending upon the appraisement figure used.

The Montana case of Vivian vs. Vivian, 583 P2d 1070, bears a resemblance to this case. The husband inherited about $13,000.00 during the marriage from his mother. The Trial Court deducted this amount from the assets of the parties prior to any division. The Supreme Court held that the Trial Court erred in making the decision because the Trial Court had made no specific findings to support the distribution to the husband. The Supreme Court held that inherited property was not per se excluded and the Court could not properly review the decision of the lower Court because the findings in the case lack specific detail, a criticism not uncommon to the present case.

The value of the farm, the animals and the lot in the name of the Defendant must be considered in the settlement. McKibban vs. McKibban, Oregon, 533 P2d 362, found that the wife, about 15 years before the divorce, had received title to a 160 acre farm in Iowa from her father's estate. The wife through a verbal agreement with the family agreed that the farm should stay in the family. The Oregon Supreme Court held as follows:

> We held that the wife's farm must be considered as one of the marital assets nothwithstanding the family agreement.

Colorado has adopted the position that inherited property is not per se excluded from consideration by a court in marital property division. Santilli vs. Santilli, Colo. 453 P2d 606, where the husband argued that the increase in the value of the inherited land cannot be considered. The Court held that the

increased value is not per se, excluded from consideration by the Court in making a determination of the property rights of the parties. Following the case of Santilli the Colorado Supreme Court decided the case of Gaski vs. Gaski, 534 P2d 629, where the Court said as follows:

> "Inherited property is not per se excluded from consideration by a court in marital property division.....However he must show that by his efforts conjoined with his wife's he either built up or kept the family worth intact. He is then entitled to the value of those efforts in a property settlement."
>
> "Each case must be decided upon its own merits."
>
> "He performed his legal obligation of supporting his family for 20 years. This included clothing, groceries and medical bills. It also included paying his own federal and state income taxes and paying the taxes on the ranch income once with a half-baked recollection of a second time."

The Court in the Gaskie case held that the ranch had not lost its separate identity as the wife's property, but it must be remembered that it was inherited 11 years before the marriage.

The State Supreme Court of Oklahoma has also addressed this question in the case of Hauser vs. Hauser, Okla, 460 P2d 436. The Supreme Court remanded the case saying:

> "The enhanced value of separate property resulting from the parties' joint efforts should be adjudicated in final settlement of their affairs, time and manner of acquisition being elements of consideration."

The later Oklahoma case of Kirkland vs. Kirkland, 488 P2d 1222 adds a further dimension to the Hauser case. There the

Oklahoma Supreme Court said as follows:

> In some of our cases we have treated the increase in value of the separately owned or acquired property as being jointly acquired, and have approved consideration of this enhanced value in the equitable division of the property..... However, in these cases the increased or enhanced value was considered jointly acquired because the enhanced value was due to the joint efforts of the husband and wife.

The Utah Supreme Court has not had the opportunity to rule on this question to the same extent as other states. However, in the case of Dubois vs. Dubois, 504 P2d 1380, this court considered whether or not the husband was entitled to share in the enhancement of gifts given to the wife by the wife's uncle. This Court approved the award of 40% of the marital estate to the husband, and reduced alimony to one dollar per year. In the present case the evidence reflects that the Defendant received substantial property through gifts and inheritance during the marriage of the parties. This property was appraised at $1,000.00 per acre for inheritance tax purposes at the time of the receipt but was later appraised at values of up to $12,500.00 per acre. The Defendant demeans the efforts of the Plaintiff in the acquisition of the property and the increase in the value of the property, yet the fact remains that the Plaintiff secured the acquisition of the property as a family asset, improved the property and the animals situtated thereon. Inflation and annexation into the Logan City limits increased the value of the property to its present status. The increase

in value can be attributed to each party. As with the Bear Lake Cabin inflation increased the value of the property. The Defendant shared in that property as the Plaintiff should share in the increase in the valuation of the Defendant's land, cattle and building lot.

POINT III

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN AWARDING THE DEFENDANT SUBSTANTIALLY ALL OF THE PERSONAL PROPERTY ACQUIRED BY THE PARTIES DURING THEIR MARRIAGE.

The first judge to enter this case was Judge Gould, who upon hearing the preliminary matters entered a decree of divorce, and restrained the Defendant from removing jointly acquired personal property from the residence that was ultimately restored to the Plaintiff. Upon separation Plaintiff left the home he had purchased 16 years earlier with only his shaving kit (TR-34) He later returned to take possession of records, clothes and other items. Upon the Defendant's removal of many items from the Bear Lake Cabin the Plaintiff sought and received a restraining order prohibiting the Defendant from removing items from the home that the parties had jointly acquired. (TR-145) The Defendant in knowing disregard of Judge Gould's order removed substantially all of the jointly acquired property from the home. The Defendant says in defense of her actions: (TR-116) I remember that's what the papers said, but I did not interpret it that way because I wouldn't have been able to take clothes, the children's beds, nothing. Q. Notwithstanding that

order, you did elect to take certain property out of that home which is still in your possession. A. Yes.

The Trial Court found the Defendant in contemptuous disregard of Judge Gould's order. The Plaintiff seeks only to receive an equitable portion of the personal property in an orderly manner and not to receive merely that portion left by the Defendant. Standing alone this Point as grounds for appeal may be de minimus and of little consequence, but taken in context with the other Points it reflects the continuing failure of the Trial Court to provide an equitable distribtuion between the parties. This is particularly true in view of the Trial Court's award of the property to the party in contempt.

CONCLUSION

The decisions of this Court relating to the Appellant's burden have been printed so often that it is redundant to repeat them here, except to quote Justice Hall in the case of McCrary vs. McCrary, 599 P2d 1248, stating that a party seeking a reversal of the Trial Court must prove a misunderstanding or misapplication of the law resulting in substantial and prejudicial error, or that the evidence clearly preponderates against the findings or that such a serious inequity resulted from the order as to constitute an abuse of the Trial Court's discretion. Reviewing the facts of this case, in the framework of Justice Hall's decision, causes the following questions to come to mind:

A. The Trial Court concluded that each party should have

that property restored to them that they held prior to marriage, why then did the Trial Court award to the Defendant, one-half of the Plaintiff's contribution to the cabin from funds held by him prior to marriage?

B. The Trial Court concluded that the Bear Lake cabin was constructed by the parties, "acting as a family and drawing on their earnings, and daily funds of all," why then didn't the Trial Court seek to divide between the parties the Defendant's income as it divided Plaintiff's income.

C. The Trial Court concluded that the Planitiff's income and cabin was the income and cabin of the parties, should the Trial Court have also concluded that the Defendant's farm income and assets were the income and assets of the parties, particularly in view of the fact that the Plaintiff supported the Defendant's children over and above child support and paid the taxes on all of the Defendant's income.

D. The Trial Court concluded that the Bear Lake Cabin was constructed by the parties, acting as a family and drawing of their earnings, and daily funds of all, and awarded the Defendant one-half of the appraised value of the Bear Lake Cabin, why then didn't the Trial Court conclude that the parties had acting as a family and drawing upon their earnings, increased the value of the farm property, cattle and the building lot and divided those assets in the same fashion as the assets in Plaintiff's name were divided.

E. The Trial Court concluded that the Defendant was entitled to neither attorney's fees nor alimony and found the Defendant in contemptuous disregard of Judge Gould's order, why then did the Trial Court award the Defendant the very object of her contempt in lieu of further alimony or attorney's fees. The Defendant had on account and available to her the sum of $43,000.00 in cash at the time of the initial hearing.

The Defendant, in concluding her testimony, was asked by her attorney what she recommended as being a fair and equitable settlement. The Defendant said: (TR11 -221) "I would like to keep the property that I owned prior to the marriage and the property that I inherited and the things that I own, that I have. I would like to keep those. I think that Mr. Preston should ---- I feel Mr. Preston should keep the property at Bear Lake; I think the cabin --- we both worked very hard and built, and I think that that should be divided between us. Our home on Thrushwood Drive I would like to get the money back that I put --- I invested in redecorating it, the $5,000.00. I think Mr. Preston should take the money that he had in it prior to our marriage and then I think the equity between that should be, minus the mortgage, should be distributed between us.

The concept is not new but time has tarnished it beyond recognition. What is mine is mine and what is yours is one-half mine. Such dogma has been uttered before but rarely taken seriously. The Trial Court awarded to the Defendant more than

90% of the total property acquired by the parties during marriage. In two separate cases this Court considered the percentage of distribution between the parties. The first was the case of Kerr vs. Kerr filed April 29, 1980, 610 and 1380, where this Court approved a 55% vs. 45% distribution to the parties and the second is the case of Dubois vs. Dubois, 504 P2d 1380, where this Court approved a 60% vs. 40% distribution.

The Trial Court misunderstood and misapplied the law as it related to the total property acquired by the parties during their marriage. The result was substantial and prejudicial error in denying the Plaintiff credit for his contribution to the cabin from prior owned funds and denying the Plaintiff a one-half or equity interest in the farm, building lot and cattle, together with the accumulation of funds generated by the Defendant during marriage while the parties lived upon the income and resources generated by the Plaintiff. The evidence in this case preponderates against the conclusions of law that the Defendant should be awarded valuations in excess of $204,000.00 while the Plaintiff should be awarded valuations at $17,000.00 less his contribution of $9,300.93. The inequity may reasonably be termed an abuse of discretion. The net result of Trial Court's decision is that the Defendant and her children have, for the past 8 years, been supported by the Plaintiff, Defendant has reaped the benefit of her acquisitions in property and cash, in excess of $200,000.00. She has neither paid income taxes

from her funds nor has she consumed them for day to day living expenses.

The Plaintiff does not desire an equal division but the Plaintiff does desire an equitable division of the property based upon the sound discretion vested in this Supreme Court. The abuse of discretion in this case by the Trial Court overshadows the shadings of fact and circumstances known only trier of fact and involves substantial issues of equality of the parties before the courts, and the right of the Plaintiff as a litigant to have his evidence properly considered by the trier of fact. McCrary vs. McCrary, supra.

RESPECTIVELY SUBMITTED this 28th day of May, 1981.

HARRIS, PRESTON & GUTKE

BY: Robert W. Gutke
Robert W. Gutke
Attorney for Plaintiff, Appellant

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing APPELLANT'S BRIEF to the Defendant's Attorney, Findley P. Gridley, 427 27th Street, Ogden, Utah 84401, on this 28th day of May, 1981.

Robert W. Gutke
Robert W. Gutke