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IN THE SUPREME COURT

OF THE

STATE OF UTAH

WILLIAM BAILEY STUMP, Plaintiff and Appellant, vs. BONETA LOU STUMP, Defendant and Respondent.	)	Case No. 18036

BRIEF OF RESPONDENT

An appeal from a judgment of the
Third District Court of Salt Lake County
the Hon. Christine M. Durham, Judge

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FILED

FEB - 4 1982

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT

OF THE

STATE OF UTAH

WILLIAM BAILEY STUMP, Plaintiff and Appellant, vs. BONETA LOU STUMP, Defendant and Respondent.	)	Case No. 18036

RESPONDENT'S BRIEF ON APPEAL

STATEMENT OF KIND OF CASE

This is an action for divorce in which there were contested issues involving the division of marital assets and alimony.

DISPOSITION IN LOWER COURT

After hearing the evidence offered by the respective parties, the Trial Court made a division of the assets and fixed the amount of alimony to be awarded the defendant-wife.

RELIEF SOUGHT ON APPEAL

Respondent believes that the Decree of the Trial Court was fair and equitable, and seeks to have the Decree affirmed on appeal.

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STATEMENT OF FACTS

Plaintiff and defendant were married to each other on September 1, 1946, a period of some 35 years (R-66,82). They are the parents of four children, all of whom have reached their legal majority (R-67,82). They have two grandchildren (R-82,178). The husband is 59 years old (R-77) and the wife is 55 years old (R-85).

The husband is employed in a top management position as controller for Utah Copper Division of Kennecott Minerals Company. He has been employed by Kennecott for 34 years, and has been controller for 10 years (R-67,68). He is the Chief Financial Officer of the Company and describes his job as a very responsible position (R-83).

Mr. Stump's gross salary at the time of trial was $62,000.00 per year or $5,166.67 per month (R-83,84). This figure does not include year end bonuses (R-84). Bonuses are determined at the end of the year and usually paid in February of the next year (R-85). In 1981, Mr. Stump received a $10,000.00 bonus for the year 1980; in 1980, he received a $6,000.00 bonus for 1979 (R-86). He testified that it was "very doubtful" that he would receive a bonus for 1981 (R-81); however, this self serving statement is inconsistent with his past history, at least for the prior two years. In his 34 years at Kennecott, he has never experienced any salary decrease. Any change in salary has been an upward change

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(R-85).

In addition to his salary and bonuses, Mr. Stump receives many fringe benefits from his employment. These include a liberal expense account that covers such things as club dues, business travel, entertainment of out of town guests and local travel in his own vehicle (R-87,163). In connection with the expense account, the Company advances $1,000.00 per month, which he must then account for in expenses (R-165). Additional fringe benefits also include Company contributions to a savings plan (R-115), health care and disability protection programs (R-122), retirement benefits (R-121), and insurance benefits (R-122).

The defendant-wife has made her career at home. She has not had outside employment during the period of the marriage and in fact her husband has insisted that she not go to work (R-79). Her plans over the course of the marriage have never included a future employment (R-88). She was unemployed at the time of the trial (R-179). She has no source of income except from her husband (R-180). Upon divorce, she will be deprived of her husband's fringe benefits (R-123). Her work experience is limited to a job in a savings and loan company which she held 35 years ago (R-89), and non-paying civic jobs which she held in a small Arizona town (R-87). She has had no job training (R-179). She has had no college or university training except for a few recent non-vocational classes taken at the

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University of Utah (R-179). Her inquiries into employment opportunities have not met with any success (R-180). She is physically in good health (R-79), but had a mental breakdown resulting from the divorce and was hospitalized for 3½ weeks during part of the time that these proceedings were pending (R-190). When she moved to Utah in 1980, she had no knowledge that her husband intended to file for a divorce (R-183). She has since moved to Alameda, California in order to live near her family and relatives (R-178). She has no immediate plans to work (R-179), but desires to enroll and receive some kind of training at Alameda Community College (R-180). Her long range work plans are simply uncertain (R-180).

Plaintiff-husband acknowledges that over the period of the marriage, defendant has been a good mother, kept a neat, clean home, and has never been unfaithful to him (R-129). The only specific grounds for divorce are that ten years ago she complained that "the kids were not doing their fair share"; that on occasion she would not go with him to the Elk's Club; that she drank wine; and that on occasions fell asleep watching TV instead of coming to bed with him (R-68,69,129). On the other hand, the plaintiff has been flagrantly unfaithful to the defendant and has been openly living with a one Ellen Jensen during the past year (R-109,129). The evidence also showed that plaintiff had been paying for a $500.00 per month apartment

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for himself, Ellen Jensen and her parents (R-132,133); that he paid all of the utilities in addition to the rent (R-133); that he has taken Ellen Jensen on expensive trips (R-134); that he has bought her expensive presents (R-137,142,144); that he bought a freezer and made large meat purchases from Ellen's relatives to feed himself and her family (R-140); that he has paid her medical and hospital expenses (R-146); and that he has given her cash from time to time (R-145).

The amount spent by the plaintiff on Ellen Jensen, or otherwise unaccounted for, was in sharp dispute between the parties. What was not in dispute, however, was the fact that although the plaintiff had had a long history of high earnings, there was a relative small marital estate available for distribution. The trial court, after hearing all of the evidence, accepted defendant's version of the facts and made the following finding (R-46):

> "The Court is convinced that plaintiff has dissipated assets for his own purposes and has generally made no attempt to preserve the marital assets for distribution. He has had control of substantial funds which he has used at his discretion and has not sufficiently or convincingly accounted for said funds. These facts, together with the minimal liquid assets currently available for distribution, and the huge disparity in the parties earning capacity (which will affect their

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respective ability to build up an estate sufficient to provide support after retirement) require that most of the assets be distributed to the defendant, and that most of the debts separately incurred by plaintiff (for which he received the consideration) go to him".

Based upon the above Finding, the Court proceeded to award defendant a majority of assets and made the following allocation:

<u>To the plaintiff</u>

(a) The cash in his checking account (approximately $295.64).

(b) All of the Paradox stock (worth approximately $3,000.00).

(c) His 1981 Pontiac automobile, subject to all indebtedness thereon.

(d) The 1981 Kennecott Copper Corporation mortgage differential (having a value of approximately $316.80).

(e) The State Farm homeowners rebate ($163.40).

(f) The note receivable for the sale of his 1978 Chevrolet automobile (2,700.00).

(g) The Bel-Style furniture leased by him.

(h) One-half of the approximately $14,207.00 presently vested in the Kennecott savings plan at the time it is distributed.

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(i) All of the liabilities to the following named creditors:

1. Girard Bank.
2. First Interstate Bank of Arizona.
3. Kennecott Copper - R.A.Y. Credit Union.
4. Kennecott Copper - CitiBank.
5. Gas credit card accounts.
6. Sears.
7. Ambassador Club.
8. Utilities owing at Casino Way.
9. Redman Van and Storage.
10. Montgomery Ward.
11. American Express.
12. J. C. Penney.

<u>To the defendant</u>

(a) The Utah tax refund ($658.55).

(b) The $20,997.81 cash in escrow from the sale of the parties' residence.

(c) The 50 shares of ASARCO stock ($2,031.25).

(d) 1977 Chrysler automobile.

(e) Furniture and furnishings from home.

(f) The paintings given to her in the course of the marriage.

(g) One-half of the approximately $14,207.00 presently vested in plaintiff's Kennecott savings and investment plan at the time it is distributed.

In addition to the above, the Court awarded defendant alimony in the amount of $1,800.00 per month, one-half of the vested benefits under plaintiff's retirement plan, and some life

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insurance benefits not in dispute (R-49).

ARGUMENT

POINT I

THE DISTRIBUTION OF PROPERTY BY THE TRIAL COURT WAS FAIR AND EQUITABLE

It was the wife's position in this case that during the period of the separation of the parties, there was a large amount of cash under the control of the husband that was not accounted for. The trial court so found in its Finding No. 8 (R-46). Thus, the award of property to the wife was not disproportionate when an adjustment is made for the cash shortages. Evidence of the cash shortages was follows:

According to the 1980 tax return, the parties had a gross income in 1980 of $79,318.74.[1] They paid federal and state taxes of $20,787.11. In September of 1980, the husband started to pay to wife under an order for temporary support (R-21) the condominium fees and mortgage (which according to appellant's brief at page 3 was $840.00 per month), plus $400.00 per month in cash, making a total of $1240.00 per month. Prior to September, he provided her some support, but

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[1] The tax return is included as a part of the evidence but apparently was not given an exhibit number. It was used and referred to throughout the trial without objection (See e.g. R-84).

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acknowledged that he never paid her anything in excess of what was ordered under the temporary support order (R-104). Giving him the benefit of the doubt, and assuming that he paid his wife $1240.00 for the entire year, the total expenditures on her behalf for 1980 would have been $14,880.00.

The husband's living expenses for the same period according to his own exhibit (Exhibit 1-P) was $18,192.00.[2] Thus, for the year 1980, we summarize as follows:

Income		$79,319.84
Less:		
Taxes	$20,787.11	
Wife's living expenses	14,880.00	
Husband's living expenses	18,192.00	- 53,859.11
Unaccounted for in 1980		$25,460.73

For the year 1981 up to the date of trial (August 7, 1981), the figures were as follows:

Salary (7 months)	$36,166.69
Bonus received	10,000.00

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2 This figure takes at face value the amount plaintiff claims in his exhibit as living expenses, less the support paid to wife (accounted for in her figures), and the monthly payments to Girrard Bank and GMAC which were not incurred during 1980.

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Sale of Kennecott Stock (R-100)		$ 3,658.00
Total Income for 7 months		$49,824.63

From the above, the following expenses should be deducted:

Taxes (including $2,500.00 on bonus)	$11,313.00	
Wife's living expenses	8,680.00	
Husband's living expenses	10,612.00	30,605.00

In substracting the expenses from the income for the first seven months of 1981, there is an additional $19,219.63 that is missing.

The total amount unaccounted for during this 19 month period in 1980 and 1981 was $44,680.36. This is in addition to large amounts that the plaintiff claims to have borrowed during the same period and for which he likewise cannot sufficiently account.[3] Typical of the plaintiff's explanation for the loss of funds was the following dialogue taken from page 105 of the record:

> "Q: What about the $10,000.00 dividend that you received in the spring of this year (1981)? What happened to that money?
>
> A: I just spent it.
>
> Q: Just blown?
>
> A. Just blown it."

Only one of two conclusions can be made from the above facts.

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[3] See discussion of debts beginning on page 13 supra.

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Either the husband has spent large sums of money for his own purposes, or he still has it. Either way, it should not be to the prejudice of the wife.

In light of the above, the wife urged the trial court to award her the first $40,000.00 of assets before making any further division. She sought in closing argument the entire proceeds from the sale of the parties' equity in the condominium of $20,997.81, and the entire amount of the Kennecott Savings & Investment Plan of $14,209.00, which were the only two assets of any substantial value. The Court found that the husband had not sufficiently and convincingly accounted for the loss of funds, but nevertheless awarded defendant only one-half of the Kennecott Savings & Investment Plan. The bulk of the remaining assets were awarded to her. In addition to the problem of the missing funds, the Court cited the minimal liquid assets available for distribution and huge disparity in the parties' earning capacity as additional reasons for making an unequal division of the few remaining assets over which the Court had control.

Throughout the trial, the defendant insisted that he had only spent $2,000.00 of the marital assets on his girl friend, Ellen Jensen (R-134). The Court was not obligated

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to believe this testimony,[4] which was also in direct conflict with his own specific figures.[5] Further, it would be irrelevant whether the missing funds were spent on Ellen, or for any other purpose.

Plaintiff further argues in his brief that he was awarded a negative property distribution of $13,117.10. This is totally absurd, and results from a manipulation and distortion of figures on the part of plaintiff for the purposes of the trial. The principal deceptive figure used by plaintiff in making his argument is the obligation figure of $38,271.88 which he claims the Court ordered him to

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[4] It is the perogative of the trial judge to judge the credibility of witnesses, and in case of conflict the Supreme Court should assume that the trial court believed the evidence which supports her findings. Stone v. Stone, 19 Utah 2d 378; 431 P. 2d 802.

[5] Expenditures that were acknowledged were as follows: $500.00 per month rent on an apartment for one year (R-132); utilities in apartment (R-132); pleasure trips to San Francisco and El Paso costing approximately $4,000.00 (R-136); purchase of ten speed bike for $115.49 (R-137); purchase of dress for $72.45 (R-137); $650.00 for purchase of meat for Ellen, plaintiff and Ellen's parents (R-140); $140.00 for a lighter (R-142); cash spending money in amounts of $300.00, $300.00, $150.00 and $200.00 (R-145); $50.00 for a portrait (R-144); $650.00 for the purchase of a dress and robes (R-144); hospital and medical expenses of which the amount was not shown (R-146). All of these expenses were in the year 1980. Defendant did not go into specific expenditures for the year 1981, as the plaintiff's check records for 1981 had not been available prior to trial (R-148,150).

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assume [6]. That figure includes numerous items of highly questionable validity. They are as follows:

1. It includes $12,048.96 as being the balance due on a new 1981 Pontiac Grand Prix which the plaintiff purchased approximately one month before the trial (R-95). A large portion of the debt is nothing more than future precomputed interest which has been added to the purchase price (R-99). Certainly the wife should not be chargeable for this item.

2. It includes $11,579.75 as the claimed balance owing to Girrard Bank. Plaintiff's financial statement of September 1, 1980 [7] showed a liability to Girrard Bank of only $450.00. Thus, during the time this action was pending (the complaint having been filed in June, 1980), the liability to Girrard Bank increased by $11,139.75. This amount is not accounted for by the plaintiff and is in addition to the $44,680.36 in other income not accounted for as explained on page 10, supra.

3. It includes $3,968.00 owing to Kennecott Copper Corporation which likewise did not appear in the September 1, 1980 financial statement. Although the plaintiff's explanation

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6 A breakdown of the $38,271.88 figure is shown on Exhibit 2P.

7 See Appendix to Appellant's Brief.

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of this item is somewhat confusing, it appears to be merely a negative charge against plaintiff's expense account for which he has not yet submitted his expense vouchers (R-162).

4. It includes $3,200.00 in attorney's fees owing by the husband for services in connection with this divorce (R-166). Since the wife has an equivalent attorney's fee (R-193) that is not shown in plaintiff's exhibit, her distribution would likewise be reduced by a proportionate amount. The husband was not ordered by the Court to pay wife's attorney's fees in this action (R-49).

5. It includes $1,631.45 owing to First Interstate Bank. This represents a loss on the purchase and sale of Kennecott stock (R-160). This stock was purchased on margin in approximately September, 1980 without the knowledge or consent of wife (R-128). If plaintiff desires to speculate with the assets of the marriage during the period of time that a divorce is pending and when contested claims are being made against marital assets, it should be at his own risk.

6. It includes an obligation to CitiBank of $1,409.27 which is simply a credit card account that likewise was not in existence at the time of the September 1, 1980 financial statement. Nor were the other credit card and department store accounts in existence at that time. It also includes Ambassador Club charges which would reasonably be chargeable to plaintiff's

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expense account.

In addition to the distorted obligation figure used by the plaintiff in making his argument, there are other disputed figures that, to a lesser degree, make the property division more equal than plaintiff would like it to appear. For example, the furniture awarded to wife is claimed by plaintiff to have a value of $7,500.00; however, the wife did not consider it to be worth that much (R-182) and the Court in its findings did not attempt to fix any value. Also, the Paradox stock awarded to the husband was valued by him at only $3,000.00, when in fact the actual investment in the stock (most of which was purchased as late as March, 1981 without wife's knowledge or consent) was $5,000.00 (R-151,153). Also included in the award to the wife were two paintings that the husband had given to her as birthday and anniversary presents (R-156). They were arbitrarily valued by husband at $4,000.00, yet they cost $2,650.00 (R-78).

An evaluation of all of the above compels the conclusion that the Court was fair and equitable in the making of the property distribution. If anything, the award favored the husband, as defendant believes that she should have been awarded the entire Kennecott Savings & Investment Plan of $14,207.00 rather than only one-half of it.

§30-3-5 Utah Code Annotated provides that "when a decree

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of divorce is made, the Court may make such orders in relation to the ... property ... as may be equitable". The Utah Supreme Court has consistently held that the trial court has considerable latitude in making a division of property. It is stated in English v. English (Utah 1977), 565 P.2d 409, as follows:

> "The trial court, in a divorce action, has considerable latitude of discretion in adjusting financial and property interests. A party appealing therefrom has the burden to prove there was a misunderstanding or misapplication of the law resulting in substantial and prejudicial error; or the evidence clearly preponderated against the findings; or such a serious inequity has resulted as to manifest a clear abuse of discretion".

See also Berry v. Berry (Utah 1981), 635 P.2d 68, where the Court states:

> "There is no fixed formula which a trial judge must follow in making a division of properties. Cox v. Cox, Utah, 532 P.2d 994 (1975). It is the prerogative of the court to make whatever disposition of property it deems fair, equitable and necessary for the protection and welfare of the parties. Hamilton v. Hamilton, Utah 562 P.2d 235 (1977). Its division will not be disturbed on appeal unless the record shows that there has been an abuse of discretion. Jesperson v. Jesperson, Utah 610 P.2d 326 (1980)."

There is nothing in the record of the instant case which would even remotely show an abuse of discretion on the part of the trial court. Appellant claims that the trial judge took a punitive approach, yet there is not a single reference to any comment made by the trial court, or anything done by her during the trial to support such a claim. The trial judge

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did not consider the fault of either party in making the property division, but based it upon the plaintiff's failure to account for assets, the minimal assets available for distribution, and the huge disparity between the parties respective earning capacity (R-39,46). These findings, as in any case, are entitled to the usual presumptions of credibility.

Appellant has made a point in his brief to the effect that the property division should be in accordance with the "community property" laws of the State of Arizona. There was no Arizona property in this marriage. The condominium from which proceeds were derived was located in Salt Lake City, Utah. Neither party claimed to be resident of Arizona and in fact plaintiff testified that he was a bona fide resident of Salt Lake County, Utah (R-66). And further, even if Arizona law were to apply, the Court would still have the power to order a division and disposition of the community property of the parties. Proffit v. Proffit, 105 Ariz. 222; 462 P.2d 391. In Arizona, the Court is not required to divide the community property equally, but equitably, and, in making apportionment, can consider excessive or abnormal expenditures as well as destruction, concealment or fraudulent disposition of community property. Kosidlo v. Kosidlo, 125 Ariz. 32; 607 P.2d 15.

The division of property by the trial court should be affirmed.

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POINT II

THE AWARD OF ALIMONY BY THE TRIAL COURT WAS FAIR AND EQUITABLE

Respondent has no quarrel with the cases cited in appellant's brief to the effect that alimony is not intended for the purpose of inflicting punishment. Indeed, respondent agrees wholeheartedly with the appellant's leading case of English v. English (Utah 1977), 565 P.2d 409, wherein it is stated:

> "...the 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. ...(the) criteria considered in determining a reasonable award for support and maintenance include the financial conditions and needs of the wife, the ability of the wife to produce a sufficient income for herself; and the ability of the husband to provide support".

In English, the Court reduced the alimony award because the evidence clearly showed that with the wife's separate income, she only needed an additional $1500.00 per month for the support of the entire family.

In applying the standard announced in English, the trial court in the instant case made the following findings (R-46):

> "6. Defendant has not been employed outside the home for approximately 35 years and has no degrees, skills, training or experience of any kind which would permit her to either earn substantial amounts or to build any kind of security comparable to plaintiff's before she reaches retirement age.
>
> 7. Defendant needs $1800.00 per month in alimony to provide for her care and support, which amount is within the ability of plaintiff to pay".

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Evidence in support of the above findings included the testimony of the wife that in order to maintain something close to her standard of living she would need $1,922.00 per month (R-181; Exhibit 11-D). While it is true that some of her monthly needs were estimated (she never having previously had the experience of maintaining a separate household) there was never any serious claim that her estimates were out of line or not made in good faith. They were also approximately the same as the expense figures used by Mr. Stump in showing his own monthly needs (Exhibit 1-P).

Appellant argues that the alimony is excessive and unfair. He urges that his "take home" pay, as shown by Exhibit 1-P, is only $2,679.44 per month, and that it is unreasonable to award defendant $1,800.00 of that amount. The problem with appellant's argument is that the figure he represents as being "take home" pay is again manipulated and distorted. To arrive at said figure, he has deducted the following amounts from his gross income:

1. $1,569.83 in federal and state taxes. This is completely out of line as any alimony payments can now be deducted from gross income and will reduce his tax obligation considerably.

2. $310.00 for contributions to a savings and investment plan. This is strictly voluntary.

3. $343.00 in FICA, when in fact FICA only applies to the first $29,000.00 of income.

4. $17.95 to United Fund voluntary contributions.

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5. $180.00 in accounts payable to the Credit Union and to Kennecott, which amounts, if valid, are of a temporary nature.

Inasmuch as the husband's "take home" figures are entirely without credibility, the Court should look to the undisputed gross figures. The husband's undisputed gross earnings per year, excluding bonuses, are $62,000.00. If he pays defendant $1,800.00 per month (or $21,600.00 per year), it still leaves him $40,400.00 to live on. This amount is almost double what defendant will receive. The $21,600.00 paid to the wife will be completely tax deductible by the husband, and each of the parties can then pay their own taxes on their respective amounts. Plaintiff, in addition to the $40,400.00, will still have his $1,000.00 per month expense account, out of which he gets some benefit, plus the entire amount of his bonuses should he receive them.

When the above figures are looked upon objectively, it would appear that if anyone has been short changed, it is the wife, not the husband. The plaintiff's income is such that defendant should not have had her requested alimony cut from $1,922.00 to $1,800.00 per month. In any event, the Court's finding that $1,800.00 per month is within the ability of plaintiff to pay, is clearly supported by the evidence.

Appellant recites at page 13 of his brief that the trial court found that the wife was capable of being employed and

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earning $700.00 to $800.00 per month. This statement is absolutely false. The husband argued to the trial court that a reasonable alimony figure would be $700.00 per month. In commenting upon this argument, the Court in its Memorandum Decision stated that even if defendant were to be able to earn an additional $700.00 to $800.00 per month, the suggested alimony figure of $700.00 would still be unconscionable under the circumstances (R-39). There is no finding anywhere of any ability on the part of the defendant to earn anything, and the alimony award is "based upon the present financial circumstances of the parties" (R-49).

The award of alimony by the trial court should be affirmed.

POINT III

THE AWARD OF ONE-HALF OF VESTED BENEFITS UNDER THE RETIREMENT PLAN WAS FAIR AND EQUITABLE

One of the assets of the marriage was a fully vested, but unmatured retirement plan at Kennecott Minerals (Exhibit 4-P; R-120-122). The vested rights under this plan were such that if plaintiff never worked another day in his life he would be entitled to receive $1,757.00[8] per month beginning at retirement

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[8] Exhibit 4-P showed the vested portion of the retirement plan to be $1,592.00 per month; however, the exhibit only computed the benefit as of June 1980. After 6 years (retirement age) the benefit would be $2,608.00 per month and the monthly benefit was thus increasing $170.16 per year. In computing the current vested monthly benefit, the trial court correctly added an additional year of vesting to the amount shown on Exhibit 4-P, since the trial took place in August, 1981.

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age of 65; or if he continues to work until age 65, his retirement benefits will increase to $2,608.00 per month.

Inasmuch as the retirement benefits were earned as a part of plaintiff's employment compensation, and inasmuch as the entire vested portion had accumulated during the marriage, the Court awarded one-half of the vested benefits to the wife. She will get her portion only if and when the benefits are actually received. If the benefits never mature because of the husband's premature death, she gets nothing. She gets no part of any increase in benefits resulting from the husband's continued employment. No attempt was made to put a present value on the retirement benefits, as it was not considered in weighing the other property distribution; rather it was considered as a separate item of marital property and divided equally.

The approach taken by the trial court has found support and approval in many recent cases from other jurisdictions. Perhaps the leading case is In Re Marriage of Brown (California 1976), 544 P.2d 561. In a comprehensive opinion, the Court reasoned that non-vested retirements were property subject to division in dissolution proceedings; that such benefits are not gratuities flowing from the employer's beneficence, but rather part of the consideration earned by the employee, a form of deferred compensation for services rendered; that the employee's right to such benefits is a contractual right derived

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from the employment contract; and the fact that such right is contingent upon future events does not degrade it into a mere expectancy. The Court further noted that in recent times pension benefits have become an increasingly significant part of the consideration earned by the employee and that in many instances may be the single most important asset of the marital community, and that a property division which excludes this important asset from consideration would be highly inequitable. In determining the way in which pension benefits should be divided, the Court then stated as follows:

> "In dividing nonvested pension rights as community property, the court must take account of the possibility that death or termination of employment may destroy those rights before they mature. In some cases, the trial court may be able to evaluate this risk in determining the present value of those rights. (Authorities cited).
>
> But if the Court concludes that because of uncertainties affecting the vesting or maturation of the pension that it should not attempt to divide the present value of pension rights, it can instead award each spouse an appropriate portion of each pension payment as it is paid. This method of dividing the community interest in the pension renders it unnecessary for the Court to compute the present value of the pension rights, and divides equally the risk that the pension will fail to vest. (Authorities cited)."

Another leading case taking the above approach is In Re Marriage of Hunt (Ill. 1979), 397 N.E.2d 511. In quoting in part from Brown, supra, the Illinois Court states as follows:

> "In those instances where it is difficult to place a present value on the pension or profit sharing

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> interests due to uncertainties regarding vesting or maturation, or when the present value can be ascertained by the type, or lack, of other marital property makes it impractical or impossible to award sufficient offsetting marital property to the non-employee spouse, then the trial court in its discretion may award each spouse an appropriate percentage of the pension paid 'if, as and when' the pension becomes payable. (Authorities cited).
>
> The marital interest in each payment will be a fraction of that payment, the numerator of the fraction being the number of years (or months) of marriage during which benefits were being accumulated, the denominator being the total number of years (or months) during which benefits were accumulated prior to when paid. The trial court, when using this method of allocation, will retain jurisdiction and award the non-employee spouse some percentage of the marital interest in each payment. (Authorities cited).
>
> Placing a present value on a non-vested pension or profit sharing interest requires a court to take into account the possibility that death or termination of employment may destroy the interest. Thus, this second method of allocating the interest seems particularly appropriate if the interest has not vested, because it 'divides the risk that the pension will fail to vest' ".

Other courts adopting the "if, as and when" approach are Weir v. Weir (N.J. 1980), 413 A.2d 638; Cearley v. Cearley (Texas 1976) 544 S.W.2d 661; Shill v. Shill (Idaho 1979) 599 P.2d 1004. See also In Re Marriage of Tjernlund (Ore. 1976), 557 P.2d 61, affirming award to wife of $100.00 per month from retirement funds of husband if he chooses to receive monthly benefits, or a lump sum of a stated amount should he choose a lump sum distribution of his retirement account.

Appellant has urged that the disposition of the vested

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retirement benefits is in direct conflict with the pronouncement of this Court in Bennett v. Bennett (Utah 1980), 607 P.2d 841. Bennett was a three to two decision involving one member of the present court on each side of the decision. It held that under the circumstances of that case, a government retirement fund of the husband having no present value could not be considered as an asset of the marriage.

Respondent isn't quite sure how far the holding in Bennett was meant to apply, or how it is to be reconciled with other Utah cases.[9] If it is construed narrowly to mean that the court should not attempt to place a value and use said value as a significant predicate in the division of other assets, then it can be easily distinguished. If on the other hand, it means that an unmatured vested plan cannot under any circumstances be considered as an asset of the marriage for distribution, then it is patently unfair, contrary to reality, inconsistent with the case law generally, and should be overruled.

In the case at hand, the vested retirement benefit has been accumulating for some 35 years. During this period, the marriage has been operating as a partnership with each of the marriage

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[9] Two cases prior to Bennett held that retirement plans were properly taken into consideration in the dividing of marital assets. Englert v. Englert (Utah 1978), 576 P.2d 1274; Ehninger v. Ehninger (Utah 1977), 579 P.2d 1104. In a post Bennett case, Fletcher v. Fletcher (Utah 1980), 615 P.2d 1218, the court considered retirement benefits, although the exact nature of the retirement plan was not explained in the opinion.

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partners assuming different roles. The husband's role has been that of a bread winner on the job. The wife's role has been in the home.[10] Is the court now going to exercise its wisdom as to which of these respective contributions is the most valuable? And, unless the court does so, is there any rhyme or reason as to why the accumulated employment benefits should not belong equally to the two marriage partners? To simply say that the benefits have no present worth is a fiction of the greatest magnitude, and would work a great injustice upon the wife. It is true that the present worth may be difficult to determine, but there is no reason to even determine the exact value where the court makes an equal division as it did here.

In the recent case of Robert C.S. v. Barbara J.S. (Del. 1981) 434 A.2d 383, the court in a well reasoned decision noted that the trend in the law was to reject any distinction between pension benefits on the basis of vesting. See also Linson v. Linson (Hawaii 1980) 618 P.2d 748. In the instant case, the Court doesn't have to go that far, as the pension benefits awarded by the trial court were 100% vested. The division of the vested retirement benefits should be affirmed.

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[10] It may be argued from common knowledge that this role may be much more difficult and time consuming where a family is involved. We have grown up with the expression: "A man works from sun to sun but a woman's work is never done".

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POINT IV

RESPONDENT IS ENTITLED TO AN AWARD OF ATTORNEY'S FEES ON APPEAL

Because of the fact that the wife was awarded cash assets, the trial court concluded that she should pay her own attorney's fees (R-48). This finding, however, was only intended to apply to the trial in the District Court and does not extend to the appeal. Inasmuch as respondent has now been required to defend an unmeritorious appeal, she should be awarded attorney's fees for the appeal.

In Fletcher v. Fletcher, (Utah 1980) 615 P.2d 1218, the Court held that in a divorce case, there are a number of factors to be considered in determining whether attorney's fees should be awarded on appeal, and that the issue of attorney's fees should be remanded to the trial court for determination as to whether an award should be made, and if so, the amount thereof.

There is no necessity to file a cross appeal in order to be awarded attorney's fees on appeal. Coates v. American Economy Insurance Company (Utah 1981), 627 P.2d 92.

The matter of attorney's fees should be remanded to the trial court for determination.

CONCLUSION

There is no evidence whatsoever that the trial court made any punitive considerations whatsoever in the fashioning of the decree. The decree was fair and equitable, and if anything,

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favored the husband.

The decision of the trial court should be affirmed and the matter remanded solely for the purpose of fixing the attorney's fee to be awarded respondent on appeal.

Respectfully submitted,

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WEST & BROWN
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RWB

Nov # 1

William Bailey Stump,
Plaintiff and Appellant,

v.

Boneta Lou Stump,
Defendant and Respondent.

Bench Memorandum

No. 18036

****

STATEMENT OF THE CASE:

Following entry of a divorce decree, husband challenges the property distribution of the marital estate and the award of alimony.

ISSUES:

1. Was the division of property equitable?

2. Given the needs of the wife and the earning of the husband, was the alimony award equitable? (Husband seeks to reduce the $1800/month award to $900/month.)

3. Did the court properly consider and divide husband's retirement benefits?

4. Is wife entitled to attorney fees on appeal?

STATEMENT OF FACTS:

The parties were married in Phoenix, Arizona in 1946. The parties had four children, all of whom have reached majority. Husband has worked for Kennecott since shortly after the marriage and for the past 10 years has been controller of the company. In February, 1980, husband was transferred from Arizona to Utah. Wife remained in Arizona until June, 1980, at which time the family home was sold. The proceeds of that sale were used to purchase a condominium in Utah that summer (1980).

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It appears that during the period the parties were separated, husband found himself a girlfriend, (Ellen Jensen) and the parties filed for divorce. In September, 1980, wife obtained an order for temporary support whereby husband was required to pay a total of $1240/month (including condo payments). Pending trial of the divorce action the condominium was sold, netting the parties $20,997.81, which was held in escrow.

At trial (in August, 1981) it was established that husband's salary was $62,000 per year. He also usually received bonuses ($6,000 in 1979, $10,000 in 1980), although that depended on corporate profits. He has an expense account with the company and other benefits. Wife is not presently employed and has no special job skills.

Husband claims expenses of $2,457/month while wife claims $1,922/month. There is evidence that during the pending divorce, husband lavished gifts upon Ellen Jensen, although he disputes it. The court found that husband had "dissipated assets for his own purposes and has generally made no attempt to preserve the marital assets for distribution." The court therefore awarded most of the assets to the wife as follows:

(Please continue to next page.)

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Husband		Wife	
Cash	$ 295.64	*Tax Refund.	$ 658.55
Stock (Paradox). . . .	3,000.00	*Cash from Condo . . .	20,997.81
1981 Pontiac	9,325.44	*Stock (Asarco). . . .	2,031.25
Mortgage Differential	316.80	1977 Chrysler	3,675.00
Insurance Rebate . . .	163.40	Furniture	7,500.00
Note Receivable . . .	2,700.00	Paintings	4,000.00
Furniture	2,250.00	*1/2 Kennecott Savings	7,103.50
1/2 Kennecott Savings	7,103.00		

Note: The items marked "*" are those which husband says should be awarded to him.

The court ordered that husband was to be liable for approximately $38,000 in debts, most of which were incurred separately by him. The court also awarded wife alimony in the amount of $1,800/month plus one-half of husband's vested retirement benefits when husband reaches age 65 ($875/month).

SUMMARY OF ARGUMENTS:

1. Property

Husband first says that most of the marital assets were acquired in Arizona (a community property state) and that an equal division is the only equitable division. He seeks all or most of the items marked * above, claiming that any other division constitutes an abuse of discretion, particularly when he is strapped with all of the debt. He concedes that the division was made because the court found that he had dissipated the assets, but claims that there is no basis in the evidence for such finding.

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Wife points out that there was a large amount of cash under husband's control which was never accounted for. She does this by totalling his expenses, her expenses, and taxes and subtracts these total expenses from total income. She says the discrepancy in 1980 was $25,460 and in 1981 $19,219. She alleges that either husband still has the money or he spent it for his own purposes. The trial judge obviously bought that argument when she found "he has had control of substantial funds which he has used at his discretion and has not sufficiently or convincingly accounted for said funds." Husband concedes that he spent $2,000 on his girlfriend, but there is evidence that he spent much more.

Both parties cite cases to establish what constitutes an abuse of discretion in the division of marital property. Husband says there is obvious bias here and that in such a case the appellate court may interpose its own judgment. Jorgenson v. Jorgenson, Utah, 599 P.2d 510 (1979). Wife says that there is evidence to support what the trial court did and therefore this Court will be hard-pressed to upset the award. See English v. English, Utah, 565 P.2d 409 (1977) and Berry v. Berry, Utah 635 P.2d 68 (1981).

2. Alimony

The parties seem to agree that alimony is to be based on the needs of the wife and the ability of the husband to pay. See English v. English, supra. Husband says that this standard was not employed, but rather the trial court is trying to punish him. Based on monthly take home pay of $2,679.44,

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husband says he will get $1,779 and she will get $2,500 after adjustments are made for taxes and her potential employment. He says that when matched against respective projected expenses, she will have a surplus and he a deficit. He wants the award reduced to $900.

Wife points out that the trial court made specific findings as to the elements required in English for a support award. She says husband has manipulated the figures. She says that using $62,000/year as a basis, she will get $21,600 gross and he will get $40,400 gross. She also says that the award is based on the present circumstances and that at present, she has no employment.

3. Retirement Benefits

One exhibit showed that if husband were to retire in June 1980 he would be entitled to $1,592 per month, effective on his 65th birthday. If husband were to work 6 more years (until he was 65), the monthly benefit would be $2,608.00. The trial court extrapolated and held that as of the date of the decree, husband's vested retirement was $1,757.00 per month. The court ordered that when (and if) husband retires, wife is entitled to half of his vested retirement as of the date of the divorce, or about $875.

Husband says that this is contrary to Bennett v. Bennett, Utah, 607 P.2d 841 (1980) in that the benefits had no present value. Wife seems to agree that Bennett might be subject to that interpretation and if so, Bennett should be overruled. She says that alternatively Bennett may be narrowly construed to

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mean that an estimate of retirement benefit value may not be used in the division of other assets. (She cites here Englert v. Englert, Utah, 576 P.2d 1274 (1978).) She contends that she has worked just as hard as husband for the retirement benefits and that it would be unfair to deny them to her. (Citing several other jurisdictions.) She points out that she will get her share only "if and when" husband reaches the age of 65 and starts to draw retirement benefits.

4. Attorney Fees

Wife says that although she was required to pay her own fees below, she is entitled to them on appeal because she has been required to defend an "unmeritorious appeal." See Fletcher v. Fletcher, Utah, 615 P.2d 1218 (1980).

RECOMMENDATION:

The Court will have to decide whether there has been an abuse of discretion in the alimony and property awards. As to the retirement benefits, other cases this Court has decided may be of little help, because here they have been treated separate from other property. There is no merit for the claim for attorney fees.

QUESTIONS:

None.

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