

1990

# John Ben Maxfield v. : Brief of Appellee

Utah Supreme Court

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UTAH SUPREME COURT  
BRIEF

IN THE SUPREME COURT OF THE  
STATE OF UTAH

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In the Matter of the Estate	)	
	)	
of	)	Case No. 900533
	)	
JOHN BEN MAXFIELD,	)	
	)	(Priority No. 16)
Deceased.	)	
	)	

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BRIEF OF APPELLEE LOUISE A. MAXFIELD

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On appeal from a final Order and from the  
Findings of Fact and Conclusions of Law  
of the Second Judicial District Court of  
Weber County, State of Utah  
The Honorable David E. Roth,  
District Court Judge Presiding

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UTAH

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In the Matter of the Estate	)	
	)	Case No. 900533
of	)	
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Deceased.	)	

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BRIEF OF APPELLEE LOUISE A. MAXFIELD

JURISDICTION

This Court has jurisdiction over this case under Utah Code Ann. § 78-2-2(3)(j) (1987).

ISSUES PRESENTED FOR REVIEW

1. Did the trial court err in finding that Louise A. Maxfield contributed one-half of the sums deposited in the joint accounts, within the meaning of Utah Code Ann. § 75-6-103(1) (1978)? Appellant has the burden of marshaling all of the evidence supporting the finding and of demonstrating that, even if viewed in the light most favorable to the trial court, the evidence is legally insufficient to support the findings. Doelle v. Bradley, 784 P.2d 1176, 1178 (Utah 1989); Jensen v. Brown, 639 P.2d 150, 152 (Utah 1981).

2. Did the trial court err in finding that the bulk of the property brought into the marriage by John Ben Maxfield lost its character as separate property and became marital property to which he and Louise A. Maxfield each contributed

one-half? Appellant has the burden of marshaling all the evidence supporting the finding and of demonstrating that, even if viewed in the light most favorable to the trial court, the evidence is legally insufficient to support the findings. Doelle v. Bradley, 784 P.2d 1176, 1178 (Utah 1989); Jensen v. Brown, 639 P.2d 150, 152 (Utah 1981).

#### DETERMINATIVE STATUTES

Utah Code Ann. § 75-6-103. Ownership during lifetime.--(1) A joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent.

Utah Code Ann. § 75-2-202(2)(b). All values included in the augmented estate are presumed to be marital property. The presumption of marital property is overcome by a showing that the property to which these values is not marital property as defined in subsection (2)(a) of this section.

#### STATEMENT OF THE CASE

##### A. Nature of the Case.

This is an appeal from an Order of the lower court (R. 187) and from Findings of Fact and Conclusions of Law (R. 181), by which the court held that appellee Louise A. Maxfield owned one-half of the sums that had been on deposit in joint accounts at the time she withdrew the sums therefrom.

B. Disposition of the Case Below.

The action was commenced following the death of John Ben Maxfield by the filing of an Application for Informal Probate of Will and Informal Appointment of Personal Representative (R. 1) to which appellee objected (R. 6). Thereafter, appellee filed a Motion to File Amended Pleading and to Bifurcate the Issues to be Heard at the Time of Trial (R. 36), which was granted (R. 47). Appellee filed an Amended Objection to Application for Informal Probate and Petition for Determination if there are Assets Comprising an Estate and Petition for Formal Probate and Appointment of Personal Representative. (R. 38.)

Trial was held on June 11, 1990, following which the trial court made findings of fact and conclusions of law from the bench. (Tr. 233-38, 293-97.) The Court entered its written Findings of Fact and Conclusions of Law on October 11, 1990, (R. 181, 186) from which appellant appealed. Although appellee filed a cross-appeal, she has determined not to pursue the cross-appeal, as explained below.

STATEMENT OF FACTS

Appellant John Ben Maxfield ("Ben") and Louise A. Maxfield ("Louise") were married in September of 1961. (Tr. 9.) Each was approximately fifty years old at the time. Ben had two children from a prior marriage, Ben J. Maxfield and Joy Thornock.



Louise had three children from a prior marriage, Alice Coffman, Karen Wall, and Stanton LeSieur.

At the time of the marriage, Louise owned a home located at 474 16th Street in Ogden, Utah and approximately \$1,200 in a checking account. (Tr. 9, 235-36.) Louise's home served as the marital domicile until November of 1986 (Tr. 102) when Ben's health required that he be placed in a rest home setting. (Tr. 89-91.)

At the time of his marriage to Louise in 1961, Ben owned a farm in Harrisville, Utah, a small tract of residential property in Harrisville, and stock in the Hisfield Gravel Company. He also had a checking account containing approximately \$500. (Tr. 9.) Ben also had rights to a contract worth approximately \$8,000 from the sale of property located at 368 Collins, (Lot 1, Block 1, El Rancho) Ogden, Utah to George H. and Donna G. Eastman. (Ex. 11p and 23d.) Because Ben owed approximately the same amount on the property to Ray Westly and Joyce Elaine Moss (Ex. 23d), however, the Eastman Contract apparently was worthless.

Through their 28 year marriage, the monies, affairs, business, and lives of Louise and Ben were extensively intermingled and they jointly participated in the mutual support and care for one another. Louise worked at C.C. Anderson (Bon March) until 1971. (Tr. 16, 22.) All the money that she earned

went into joint accounts with Ben. (Tr. 16.) Similarly, appellants admit that Ben also pooled his earnings with Louise in the joint checking and joint savings accounts and the joint certificates of deposit. (Appellants' brief, at 4.) Ben and Louise also participated in numerous transactions whereby they purchased, improved, or sold real estate. The proceeds from all these sales were placed in their joint accounts. (Tr. 15). In later years, rather than deposit her Social Security check in the joint accounts, Louise simply would cash it to buy groceries. (Tr. 71, 128.) The couple filed joint income tax returns every year since 1961. (Tr. 15.)

The Maxfield's real estate transactions can be divided into three groups:

- (1) Sales of the Harrisville residential property that had been brought into the marriage by Ben and improved during the marriage by Ben and Louise.
- (2) Sales of real property conveyed to both Louise and Ben during the marriage from Hisfield Gravel Company.
- (3) The resale of miscellaneous parcels of real estate that had been jointly acquired during the marriage.

1. The Harrisville property

The Harrisville residential property owned by Ben prior to his marriage was converted into commingled marital property through subsequent transactions. A portion was sold to Grant Z. and Annie Stephens on January 26, 1962 (Ex. 57d) for \$11,000, which was deposited in the Maxfield's joint account. (Tr. 15.) The Maxfields then jointly mortgaged the remaining Harrisville residential property to purchase property in Plain City, Utah, in the amount of \$16,900. Louise signed the mortgage on this property and was obligated for the repayment of the loan. (Ex. 8p, 9p, 10p, and 16p.)

Louise also helped improve the Harrisville residential property during the marriage by painting it. (Tr. 101, 102.) When the remaining Harrisville residential property was sold in three parcels to Eggleston, Edwards, and Nye (Ex. 9p, 10p, 57d), the three warranty deeds listed the grantors as J.B. Maxfield and Louise Maxfield, husband and wife, and were signed by both Ben and Louise. Again, all proceeds from these sales were placed in the couple's joint accounts. (Tr. 15.) These three sales occurred over a 5 year period between 1964 and 1969.

In their brief, appellants refer to sales of the Harrisville property to George L. and Karlene Knight (Ex. 57d) and to Vernon E. and Bonnie Lee Moss (Ex. 57d) from the Harrisville residential property brought by Ben to the marriage.

These sales, however, both occurred prior to the marriage. No evidence was presented at trial to indicate what Ben did with the proceeds of the sales. There was no evidence that the proceeds were either placed into the joint accounts with Louise or brought into the marriage as Ben's separate property.

2. Hisfield Gravel Company.

Ben's interest in Hisfield Gravel Company was also converted to marital property. On March 16, 1967, Ben and Louise executed an agreement for the dissolution of Hisfield Gravel. (Ex. 15p, 53p.) By this agreement, Ben and Louise assumed all obligations, debts, benefits, and rights of Hisfield Gravel Company under an October 20, 1961, contract between Hisfield Gravel Company and Security Title Company of Ogden. Hisfield Gravel Company in return conveyed to both Ben and Louise 67.3 acres of land in the Rolling Hills subdivision and Lots 15, 16 and 17 of the Rolling Hills Addition. The warranty deed from Hisfield Gravel Company conveyed the property to Ben and Louise as joint tenants with full rights of survivorship. (Ex. 54p.) Louise also participated in the dissolution meetings of Hisfield Gravel. (Tr. 108.)

Louise and Ben thereafter jointly sold this property. They sold the three Rolling Hills Addition lots to Dale W. and Linda Stoker, Huffman and Fiet, and Steve C. and Glenda L. Packer under warranty deeds that listed both Ben and Louise as the

sellers. These sales occurred during the period of July 1967 to November of 1970. These three sales generated a total of \$11,350, which was deposited in the couple's joint accounts. (Tr. 15, Ex. 56d.)

Louise and Ben also sold 64.87 acres of the Rolling Hills subdivision that they had received from Hisfield Gravel to Fife Equipment and Investment Company ("Fife") on June 1, 1973 for \$80,000. The purchase agreement with Fife specifically identified Ben and Louise as owners of the property (Ex. 56d), and the warranty deed showed both Ben and Louise as grantors. (Ex. 56d.) As with the money from the sales of the other properties, the \$80,000 was deposited in Louise and Ben's joint accounts. (Tr. 15.)

Hisfield Gravel conveyed a small 40 foot by 53 foot parcel of property located at 2071 Lane, Ogden, Utah to Ben in September of 1963. (Ex. 14p.) This property was then mortgaged by both Ben and Louise in the amount of \$5,000. Under the terms of the mortgage, Louise was obligated to repay the loan. (Ex. 14p.) When the Maxfields sold the property to Richard and Ethel Lou Sobers, the warranty deed identified Ben and Louise as grantors of the property. (Ex. 14p.) The proceeds of the sale were placed in Ben and Louise's joint accounts. (Tr. 15.)

3. Miscellaneous properties.

In their brief, appellants improperly suggest that the property identified as Lot 1, Block 1, El Rancho, Ogden City, (sold to George H. and Donna G. Eastman) provided money that was deposited in the joint account. (Appellants' brief, at 11.) To the contrary, the property was sold prior to the marriage<sup>1</sup> and, as discussed above, in essence was sold for the amount owing on the property and provided no funds for Ben and Louise. (Ex. 23d. )

Finally, between January 1962 and June 1975, Ben and Louise jointly acquired and resold several parcels of real estate. They purchased the property located at 453 Harrisville Road in 1962 from Hellwell and later resold it to Sevy, earning a \$3,500 profit. (Ex. 7p and 20d. ) In 1964, Ben and Louise purchased property in Plain City, Utah, mortgaged it, and then resold it in four different transactions between April of 1964 and August of 1967. (Ex. 8p, 21d. ) These transactions brought at least \$9,200 in profit. Finally, the Maxfields purchased property at 458 16th Street from Campkin in 1975 and resold it to Bice for a \$4,000 profit. (Tr. 99, 22d. ) The total proceeds from the sales of these jointly acquired parcels of real estate amounted to \$43,700. (See Appellant's Brief at 13. ) These

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<sup>1</sup>In their brief, appellants state that the sale occurred on March 1, 1960, which was well before Ben's marriage to Louise in September, 1961. (Appellants' brief, at 11. )

proceeds were deposited in Louise and Ben's joint accounts. (Tr. 15.)

Louise participated in these transactions and worked to improve the properties. (Tr. 25-26, 101.) It is important to note that the proceeds from the sales of these properties apparently were placed in the same joint accounts as all other real estate transactions. (Tr. 15.) The Maxfields also paid for their living expenses through the funds contained in these joint accounts. (Tr. 128, Ex. 25d.) Appellants concede that these properties were jointly acquired. (Appellant's brief, at 12-13.)

Louise took an active role in managing and protecting the couple's property. (Tr. 107, 118-19.) During the early years of the marriage, both Louise and Ben managed the checkbook. (Tr. 107.) In 1970, Ben began to have health problems caused by his drinking (Tr. 107) and in 1978, Louise took exclusive control of the couple's checking account because Ben was spending from three to five hundred dollars a month on alcohol. (Tr. 118-19.) Louise played an integral role in managing and protecting the couple's joint finances during this time.

In 1985, Ben and Louise conveyed their interest in the marital home to Louise and her three children. (Ex. 45d.)<sup>2</sup> At

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<sup>2</sup>In their brief, appellants do not challenge the lower court's finding that the home deeded to Louise and her three children was non-marital property. (Finding of Fact No. 4.)

the same time, the farm in Harrisville owned by Ben prior to the marriage was deeded to Ben and his children. (Tr. 87-88.)

During the 25 year period between 1961 and 1986 the Maxfields continued to live from the funds placed in their joint checking and savings accounts. They also placed certain of these funds in joint certificates of deposit. As of November 25, 1986, the couple's joint accounts were as follows:

<u>Account Number</u>	<u>Joint Owners</u>	<u>Amount</u>
Checking Account 121 477 4	J. B. Maxfield or Louise A. Maxfield	\$ 14,178.18
Savings Account 0109-8233	J. B. Maxfield or Louise A. Maxfield	10,372.71
CD 30247	J. B. Maxfield or Louise A. Maxfield or Joy Thornock	66,677.21
CD 32104	Louise A. Maxfield or J. B. Maxfield or Stanton LeSieur	72,489.02
CD 32911	Louise A. Maxfield or J. B. Maxfield or Joy Thornock	9,097.11
CD 34244	J. B. Maxfield or Louise A. Maxfield or Ben J. Maxfield	63,215.00
CD 34245	J. B. Maxfield or Louise A. Maxfield	37,804.37

As appellants acknowledge, there is no evidence that any party other than J. B. Maxfield and Louise A. Maxfield ever contributed funds to the said accounts. (Appellant's brief at 5.)



During November of 1986, Ben's physical health deteriorated to the point that Louise was unable to care for him. Their medical doctor told Louise that Ben would need to be put in a rest home. (Tr. 91-93.) Louise believed Ben was suffering from a deterioration of the brain. (Tr. 89.) When she informed Ben's children<sup>3</sup> that Ben was to be put into a rest home, the children physically removed Ben from Louise's home and took him home with them. Ben's children soon discovered that they also could not care for him. (Tr. 93.) Ben stayed with Joy Thornock for 10 days and Ben J. Maxfield ("Benny") for two weeks. He was then placed into a rest home. (Tr. 93.)

During this time period, Benny asked Louise about the status of the couple's finances. (Tr. 156.) Benny had borrowed \$11,000.00 from the couple in August of 1986. (Tr. 166.) Louise described her relationship with Ben's children as "very distant" during this period. (Tr. 114.) Louise believed that after Ben's children removed Ben from the home, they would take all the marital funds on deposit in the joint accounts, depriving her of any means of support. (Tr. 115, 131.)

Louise consulted her attorney who advised her to remove the money in the joint accounts to prevent Ben's children from taking the money. (Tr. 54.) Louise then removed the funds and

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<sup>3</sup>These were Ben's children from his previous marriage, Ben J. Maxfield and Joy Thornock, who are the appellants in the present case.

placed a total of \$150,000.00 in five P.O.D. accounts, each in the amount of \$30,000.00. The five P.O.D. designees were Ben's children and Louise's children. Louise placed the remaining funds in a joint account with her three children to take care of Ben and her for the rest of their lives. (Tr. 53.) She in fact used the money from this joint account to provide for herself and to pay for Ben's rest home care. (Tr. 131.)

On February 13, 1987, Louise executed a trust agreement to take care of both herself and Ben. She transferred the funds that she had withdrawn in November of 1986 to the trust. Thereafter, Ben joined his children in a suit for conversion against Louise based on her withdrawal of the funds in the joint accounts. (Tr. 267-70.) Ben also filed for divorce (Tr. 269) and prepared a trust under which Louise would receive only \$600.00 a month. (R. 5; Ex. 43d.) On May 18, 1987, the Maxfields entered into a stipulation whereby the conversion suit was dismissed, a special conservatorship account was established at the Bank of Utah to care for Ben and Louise to the exclusion of their children, and the determination of property distribution issues was relegated to the divorce action. (Ex. 2p.)

At the trial of the divorce action, the court in that case found Ben incompetent and refused to grant the divorce. (Ex. 3p.) The court in the divorce case also modified the stipulation and order to allow the special conservator

arrangement to continue until further order by the court but specifically declared that the holding of the funds by the special conservator was not a final determination of the ownership of said funds. (Ex. 3p.) Ben Maxfield passed away on December 3, 1989. (R. 1.) Appellants filed this probate action the following day. (R. 4.)

#### SUMMARY OF ARGUMENT

The appellants have wholly failed to meet their burden in attacking the trial court's finding of fact that the bulk of the property Ben brought into the marriage lost its separate character and became marital property. Substantial evidence presented at trial indicated that Louise augmented, maintained and protected the property both before and after the property was sold and the proceeds were placed in joint accounts. The evidence further showed that Ben inextricably commingled the property with both Louise's property and other marital property during most of their 28 year marriage. Finally, the evidence indicated that Ben intended to contribute the bulk of his property to the marital estate.

Case law dealing with the definition of marital property in divorce actions should apply to this case in interpreting Utah Code Ann. § 75-6-103(1) (1978). The facts of this case are closely analagous to those requiring an equitable division of property in divorce cases. In addition, public

policy considerations favor a construction of Section 75-6-103(1) based on the equitable rules provided in domestic law.

The definition of marital property contained in the elective share provisions of Utah's Uniform Probate Code, Utah Code Ann. § 75-2-202(a) and (b), is not applicable to the instant action. Louise has not elected to pursue her statutory elective share and, therefore, the narrow definition of marital property for that limited purpose has little relevance to the present case. However, even assuming, arguendo, that the elective share definition applies, appellants failed to overcome the presumption of marital property contained in the statute. Utah Code Ann. § 75-2-202(2)(b). Accordingly, the trial court's finding of fact and decision below should be affirmed.

#### ARGUMENT

##### I.

THE TRIAL COURT PROPERLY FOUND THAT  
LOUISE MAXFIELD OWNED ONE-HALF OF THE  
SUMS HELD IN THE JOINT ACCOUNTS.

##### A. Scope of Review.

In Finding of Fact No. 2, the trial court found that "the bulk of the property brought into the marriage by John Ben Maxfield lost its character as separate property and became marital property to which each contributed one-half (1/2)." (R. 182.) Appellants seek to overturn this finding.

This Court recently reiterated the standard of review applicable to an appeal of the trial court's findings of fact in Doelle v. Bradley, 784 P.2d 1176 (Utah 1989). There, the court stated:

To successfully attack findings of fact, an appellant must first marshal all the evidence supporting the findings and then demonstrate that, even if viewed in the light most favorable to the trial court, the evidence is legally insufficient to support the findings. And the legal sufficiency of the evidence is determined under civil procedure rule 52(a), which provides: "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." A trial court's factual finding is deemed "clearly erroneous" only if it is against the clear weight of the evidence.

Id. at 1178 (citations omitted). See Jensen v. Brown, 639 P.2d 150, 152 (Utah 1981) (the same standard applies to equity cases).

In the instant case, appellants have not complied with this rule. In their brief, they made no attempt to marshal the evidence in support of the trial court's finding nor do they demonstrate that the evidence supporting the finding is insufficient even if viewed in the light most favorable to the trial court. Appellant's brief presents the evidence in a light most favorable to their own position and largely ignores the contrary evidence. Accordingly, Judge Roth's findings should not be disturbed.

B. Appellants have not met their burden in showing that the sums on deposit in the joint accounts were not contributed equally by the parties.

Utah Code Ann. § 75-6-103(1) (1978) provides:

A joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent.

Appellants assert that the transfer of funds from the joint accounts by Louise in November of 1986 terminated any joint tenancy in those funds. This assertion implicitly admits that the relative interests of Ben and Louise in the sums then on deposit in the joint accounts were segregated in November of 1986 according to their "contributions" to the accounts. The determination of who owned what portion of the sums withdrawn from the joint accounts must be made as of the date on which Louise withdrew the funds.

Under Section 75-6-103(1), Louise was entitled to ownership of the amounts that she was responsible for contributing to the joint accounts. Appellants take the simplistic view that because Ben brought some property with him into the marriage from which cash proceeds were generated, his estate is entitled to all of the money in the accounts except for the \$9,500 earned by Louise during her marriage to Ben and half of the profits on the jointly-acquired property. This view is contrary to Utah law regarding the scope of marital property. As

the Utah Court of Appeals recently noted, "Marital property is ordinarily all property acquired during marriage, and it 'encompasses all of the assets of every nature possessed by the parties, whenever obtained and from whatever source derived.'" Dunn v. Dunn, 802 P.2d 1314, 1317-18 (Utah App. 1990) (quoting Gardner v. Gardner, 748 P.2d 1076, 1079 (Utah 1988)).

Appellants would have this Court ignore the significant efforts made by Louise during her 28 year marriage to conserve the assets she and her husband had accumulated. They would have this Court overlook the substantial role that Louise played in her marriage partnership with her husband. The Court in Dunn also specifically indicated that the view now taken by appellants is incorrect. The Court stated:

The lower court's approach to marital property distribution is troublesome as it suggests a weighing only of each partner's financial contribution to the marriage. Such an analysis ignores contributions of love, encouragement, and companionship, which elude monetary valuation. Such an analysis also gives short shrift to spouses who contribute homemaking skills and child care.

Id. at 1322. In the instant case, Ben and Louise conducted their lives as a partnership in every sense. They jointly participated in all matters affecting their assets on deposit. They pooled their efforts and their resources together over a period of nearly 28 years. It was from the joint accounts that they drew the money on which they lived during that long period of time.

Therefore, according to the rationale of Dunn, all of the proceeds in the joint accounts had become marital property.

Having considered all of the evidence, the lower court found itself unable to determine who had contributed what specific amounts to the joint accounts. At the conclusion of the trial, the lower court made the following oral findings from the bench:

During some 27 years of marriage prior to the separation, these parties bought and sold property, and they made investments. It is my opinion based on the evidence that the bulk of the property that J.B. Maxfield had lost its character as separate property and became marital property through these transactions.

This is not a simple case of a person owning property prior to a marriage, keeping that in his own name, and exchanging that for something else. This is a case where there were numerous transactions. Property was placed in joint tenancy. It was turned over several times. And I find that the bulk of the property lost its character as separate property.

Therefore, as it applies to the accounts, I find that each contributed one half. Finding anything different would have to be simple speculation on my part as to what percentage each contributed at that point.

(Tr. 236.)

The trial court's finding must be upheld unless appellants can show that it is against the clear weight of evidence. As noted above, appellants have not marshaled all of



the evidence in support of the court's finding. They did not summarize the "numerous transactions" referred to by the court. They made no effort to describe all of the evidence of the couple's investments, of the various sales transactions in which they were involved. Without having that evidence summarized before it, this Court cannot overturn the lower court's finding of fact that Louise and Ben each contributed one-half of the sums into the joint accounts.

The finding of the lower court that the property Ben brought with him into the marriage "lost its character as separate property and became marital property to which each contributed one-half" (Finding of Fact No. 2) is consistent with the manner in which Utah courts divide property owned by a husband and wife in divorce cases. Divorce cases provide the best analogy to the facts of the present case since both Ben and Louise were living in November of 1986, when Louise withdrew the money from the joint accounts. The Utah cases dealing with the division of marital property in divorce cases provide helpful guidance in determining how to apportion ownership of a joint account under Section 75-6-103(1) as between a husband and wife.

In contesting the trial court's finding of fact, appellants assert that the property brought by Ben into the marriage did not lose its character as separate property by being placed into joint tenancy through various sales and purchases.

(Appellants' brief, at 21.) Although "premarital property, gifts, and inheritances may be viewed as separate property, and in appropriate circumstances, equity will require that each party retain the separate property brought to the marriage," Burke v. Burke, 753 P.2d 133, 135 (Utah 1987), there are exceptions, as the Court of Appeals noted in Burt v. Burt, 799 P.2d 1166 (Utah App. 1990):

[S]uch property may appropriately be considered part of the marital estate, subject to division, when the other spouse has by his or her efforts augmented, maintained, or protected the inherited or donated property . . . where the parties have inextricably commingled the property with marital property so that it has lost its separate character, . . . or where the recipient spouse has contributed all or part of the property to the marital estate.

Id. at 1169 (citations omitted). See Mortenson v. Mortenson, 760 P.2d 304, 308 (Utah 1988).

In the present case each of these exceptions is satisfied. First, Louise augmented, maintained or protected virtually all of the separate property brought into the marriage by Ben as well as the funds in the joint accounts. She painted and improved the Harrisville residential properties. (Tr. 101-102.) She attended and participated in the dissolution meetings of Hisfield Gravel Company and entered into an agreement accepting certain obligations and responsibilities concerning the dissolution. (Tr. 108, Ex. 15p.) She signed the mortgage

document on the small parcel of property deeded solely to Ben by Hisfield Gravel Company as well as the mortgage document on the Harrisville residential properties. (Ex. 8p, 9p, 10p, 16p, 14p.)

Appellants completely ignore the significance of Louise's signing mortgages in connection with these properties. The fact that she placed her good name and credit at risk along with her husband is strong evidence that Louise and Ben were acting together for their mutual interests and that the proceeds from the sales of the properties had, in their minds, lost their character as separate property.

She helped manage the couple's books from the outset of the marriage and took sole control of the joint checking account in 1978 to protect their assets during the time that Ben was suffering from a drinking problem. (Tr. 107, 118-19.) She added her own earnings to the joint accounts from 1961 to 1971, the time period when most of the real estate transactions transpired. (Tr. 16.) She participated in the purchases and sales of the jointly acquired properties and the proceeds from those transactions were placed into the joint accounts. (Tr. 15, 26, 101.) She signed warranty deeds to the purchasers of the property. (Ex. 7p, 8p, 9p, 10p, 12p, 14p, 15p, 16p, 19d, 20d, 21d, 22d, 56d, 57d).

The weight of the evidence supports the lower court's finding that the bulk of the property brought into the marriage

by Ben lost its character as separate property and became marital property. There is ample evidence that Louise helped to augment, maintain, or protect both the joint accounts and the real property parcels prior to their sale.

Second, the property Ben brought to the marriage was thereafter inextricably commingled with the marital property and lost its separate character. As noted above, Louise's paychecks, Ben's paychecks, the proceeds from the sales of the jointly acquired property, the proceeds from the Hisfield Gravel property, and the proceeds from the Harrisville residential properties were all placed in the same joint accounts. The couple's living expenses were also paid out of these accounts. The real estate was acquired and sold in numerous transactions over a long time period. Indeed, not only were these properties inextricably commingled, they were inextricably commingled during most of their 28 year marriage.

It should be emphasized that the Hisfield Gravel property was deeded to both Ben and Louise. (Ex. 54p.) This court has held that a party attacking the validity of a written instrument such as a deed must do so by clear and convincing evidence. Baker v. Pattee, 684 P.2d 632, 634, (Utah 1984); Barlow Soc. v. Commercial Sec. Bank, 723 P.2d 398, 400 (Utah 1986). No evidence whatsoever was presented at trial that indicated Hisfield Gravel did not intend to convey the real

estate to both Ben and Louise, and appellants did not argue the issue. The proceeds from the sales of that property clearly constituted marital property when such funds were placed into the joint accounts.

Finally, Ben appears to have contributed the property at issue to the marital estate. The farm property, however, was treated differently, having been deeded specifically to Ben and his children. The couple treated Louise's home in the same fashion, which was deeded to her and her three children from her prior marriage. The trial court was impressed with this evidence:

I find it significant that the farm was treated separately, and that Louise Maxfield's home was treated separately. That leads me to believe that it was the intention of the parties that that property remain separate and that the other property be joint comingled [sic] marital property.

(Tr. 236-37.)

Appellants have pointed to no contrary evidence of the parties' intent. Their whole case consists of a mere recitation of evidence that Ben owned some property prior to his marriage which he sold after his marriage. Appellants again overlook the fact that the proceeds from the sales of all of the properties were placed into joint accounts where they were available for use by the Maxfields. They ignore the fact that those proceeds were thereafter used for the mutual support of both Ben and Louise.

They presented no evidence at trial that prior to November of 1986 Ben ever intended that any of the funds should not become part of the marital estate or that they not be owned mutually by he and his wife.

In light of the many years that the funds were kept in joint tenancy, used for the joint support of Ben and Louise, and commingled with marital funds, an obvious inference is raised that Ben contributed the property to the marital estate. There was ample evidence to support the court's finding that the bulk of Ben's property lost its character as separate property and became marital property. As the trial court found, the separate treatment of Ben's farm and Louise's home is significant. Everything else was intended to be owned in common, without treating it as separate property.

In short, because the amounts in the joint accounts became marital property and part of the marital estate, equitable considerations dictate that they were "contributed" equally by Ben and Louise within the meaning of Utah Code Ann. § 75-6-103(1). The substantial weight of the evidence presented at trial supported the trial court's conclusion that the property brought by Ben to the marriage lost its separate character and was subject to an equitable division by the court according to the criteria expressed in Burt.

This case could have a substantial impact on divorce cases, where money on deposit in joint accounts frequently must be divided. Courts generally divide such funds based on principles of equity and fairness to the parties. If this Court holds, as appellants would have it hold, that Section 75-6-103(1) requires an exacting calculation as to who deposited what specific amounts in joint accounts without regard to the factors discussed in Burt and other cases, it will tie the hands of divorce courts and will leave many spouses without an equitable share of such funds.

Many domestic cases involve long-term marriages where money was pooled and used for the common support of a husband and wife over many years. Not unusually in those cases, one spouse generates the income while the other spouse lends support at home. Courts have not hesitated in such cases to award the spouse providing support at home a fair share of marital property, without regard to the specific source of the income. See Dunn v. Dunn, 802 P.2d 1314, 1322 (Utah App. 1990). If appellants prevail in this case, courts sitting in divorce cases throughout the State of Utah will be constrained to apply Section 75-6-103(1) in a way that may treat some spouses unfairly.

Other public policy considerations also favor the application of divorce law to the instant action. No valid reason exists to define marital property differently where a

marriage ends as a result of death rather than divorce (unless, unlike the present case, the elective share is at issue). Ben's children should not be entitled to a larger share of the marital estate merely because Ben became incapacitated prior to the divorce hearing and died. His children's interest in the marital property certainly is no greater than Ben's interest would have been if the divorce had been completed. A spouse's interest in marital property should not depend on the avenue the other spouse takes in leaving the marriage.

The reasonable approach is the one taken by Judge Roth in the present case. He considered more than the fact that Ben may have owned certain property before his marriage. His finding that that property lost its character as separate property was founded on substantial evidence and is consistent with how divorce courts throughout the State apply equitable principles in dividing assets. The lower court's Order should be affirmed.

C. The Elective Share Statute Does Not Apply.

Appellants assert that the definition of marital property for the purpose of computing the elective share in Utah Code Ann. § 75-2-202(2)(a) applies to this action. Their reliance on that section is mistaken. That statute expressly applies only for the limited purpose of determining the augmented estate to calculate the elective share. Louise simply has not made any claim against Ben's estate based on her elective share.



Appellants erroneously imply that Louise's objection to the informal probate of Ben's will contained an election to claim her elective share. (Appellants' brief at 23). The objection merely requested that a "determination be made of marital property and/or other properties which would be subject to the statutory spouse allowances and marital shares." (R. 41). Louise made this request to enable her to determine the extent of Ben's estate and allow her to make a knowledgeable choice regarding her options. The request cannot be construed as an election to take her elective share. Therefore, the elective share provisions, including the definition of marital property, are not relevant to the issues before the court.

Moreover, the determination of marital property under the Uniform Probate Code applies where a person has died. Although Ben Maxfield has admittedly died, the issue in the present case focuses not on his assets at the time of his death, but on how much of the money in the joint accounts he owned in November, 1986, when Louise withdrew the money from those accounts. Both Ben and Louise were living at the time. The more reasonable approach favors the principles used in domestic cases, which guide Utah Courts when they are called upon to divide property and assets, including money on deposit in joint accounts, owned by living spouses.

Finally, the elective share statute provides that all values included in the augmented estate are presumed to be marital property. Utah Code Ann. § 75-2-202(2)(b). The appellants failed to overcome this presumption in the proceedings below because, as the trial court found, Louise and Ben extensively commingled their assets throughout most of thier 28 year marriage. There was substantial evidence to support this finding of fact. Therefore, even assuming, arguendo, that the definition of marital property for purposes of computing the elective share as contained in Section 75-2-202(2)(a) were to apply to this case, the statutory presumption of marital property contained in Section 75-2-202(2)(b) fully supports Judge Roth's ruling.

## II.

### APPELLANTS DO NOT CONTEST THE COURT'S RULING AWARDING CERTAIN PROPERTY TO LOUISE MAXFIELD.

In addition to the money withdrawn from the joint accounts, the lower court awarded certain other property to Louise. Specifically, the court held that Louise was entitled to half of the acreage added to the farm property after the marriage and to her residence acquired prior to the marriage. (R. 185.) Appellants have not attacked this portion of the Court's order, which should be affirmed.

### III.

#### APPELLEE HAS MOVED FOR THE DISMISSAL OF HER CROSS-APPEAL.

Louise A. Maxfield has moved this Court for an order dismissing her cross-appeal, pursuant to Rule 37(b), Utah Rules of Appellate Procedure. Accordingly, she will not brief the issues set forth in her docketing statement and does not intend to pursue her cross-appeal.<sup>4</sup>

#### CONCLUSION

Under Utah Code Ann. § 75-6-103(1), the trial court was required to make a determination who had contributed what amount as between Louise and Ben Maxfield. Judge Roth found that each had contributed one-half, even though Ben had brought some property into the marriage. The lower court's finding that the bulk of Ben's property had lost its character as separate property was well-supported by the evidence. Appellants failed to marshal the evidence in support of the finding and to show

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<sup>4</sup>Louise A. Maxfield's present counsel did not participate in the trial of this case and were thus not completely familiar with the facts and issues involved at the time of the filing of the Notice of Cross-appeal. Having since become fully advised regarding the facts and the legal questions involved, counsel have been able to consult with Louise A. Maxfield regarding the matter. She has accordingly determined not to pursue her cross-appeal and has moved for its dismissal.

that it was against the clear weight of the evidence. Having failed in that burden, the lower court's order must be affirmed.

DATED this 3 day of May, 1991.

VAN COTT, BAGLEY, CORNWALL & MCCARTHY

By

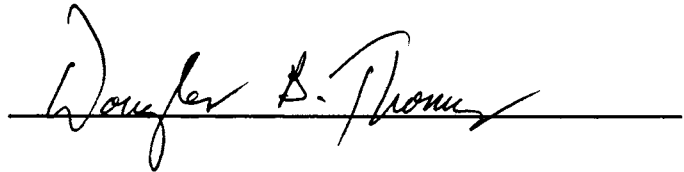


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CERTIFICATE OF MAILING

I hereby certify that I caused a true and correct copy  
of the within and foregoing Appellee's Brief to be mailed,  
postage prepaid, this 3 day of May, 1991, to the following:

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A handwritten signature in cursive script, reading "Douglas B. Thomas", is written over a horizontal line.