

1992

Kathryn Tuck Coats v. Peter M. Coats : Brief of Appellant

Utah Court of Appeals

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Craig S. Cook; attorney for appellant.

Craig M. Peterson; Attorney for appellee.

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IN THE UTAH COURT OF APPEALS

KATHRYN TUCK COATS,

Plaintiff, Appellee,
and Cross Appellant,

vs.

Case No. 920588-CA
Category No. 15

PETER M. COATS,

Defendant, Appellant,
and Cross Appellee.

BRIEF OF APPELLANT

Appeal from the Judgment of the
Third Judicial District Court, Salt Lake County
Honorable Homer F. Wilkinson

CRAIG M. PETERSON
426 South 500 East
Salt Lake City, Utah 84102

Attorney for Appellee

CRAIG S. COOK
3645 East 3100 South
Salt Lake City, Utah 84109

Attorney for Appellant

UTAH COURT OF APPEALS
BRIEF

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BRIEF OF APPELLANT

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JURISDICTION OF THE COURT

Jurisdiction of this matter is conferred by Section
78-2(a)-3(2)(i), U.C.A.

STATEMENT OF ISSUES PRESENTED

1. Did the lower court err in its determination that approximately \$148,000 of promissory notes executed by the defendant to various third parties constituted marital property subject to division even though the funds for such loans came from an account the court determined to be separate and even though all of the notes were executed after the parties had been legally divorced? The appellate standard of review for this issue is whether the lower court's Findings of Fact are contrary to the clear preponderance of the evidence or that the trial court has abused its discretion in making the award. An appellate court will disturb a trial court's findings if the

appellate court reaches the definite and firm conviction that mistakes have been made. Dunn v. Dunn, 802 P.2d 1314 (Utah App. 1990). It is incumbent upon a trial court to first divide separate property from marital property before making any division of assets. Burt v. Burt, 799 P.2d 1166 (Utah App. 1990); Dunn v. Dunn, 802 P.2d 1314 (Utah App. 1990).

2. Did the lower court err in failing to allow the full value of a debt Defendant incurred in his business operation to be deducted from the division of marital assets? Specifically, did the court err in concluding in its Findings that Defendant was indebted to his mother for only \$270,000 rather than \$410,000 as shown by the undisputed evidence. The standard of appellate review for this issue is whether the lower court's Findings of Fact are contrary to the clear preponderance of the evidence or that the trial court has abused its discretion in making the award. An appellate court will disturb a trial court's findings if the appellate court reaches the definite and firm conviction that mistakes have been made. Berger v. Berger, 713 P.2d 695 (Utah 1985); Morgan v. Morgan, 795 P.2d 684 (Utah App. 1990); Naranjo v. Naranjo, 751 P.2d 1144 (Utah App. 1988).

3. Did the lower court err in finding that \$57,000 would be included as an asset of Defendant in the marital division even though the court acknowledged that such award was completely arbitrary and was not based upon any evidence as to the actual amount that Defendant received in a real estate transaction. The appellate standard of review for this issue is

whether the lower court's Findings of Fact are contrary to the clear preponderance of the evidence or that the trial court has abused its discretion in making the award. An appellate court will disturb a trial court's findings if the appellate court reaches the definite and firm conviction that mistakes have been made. Dunn v. Dunn, 802 P.2d 1314 (Utah App. 1990).

4. Does the Decree of Divorce fail to properly credit Defendant for \$4,300 awarded by the Court to Defendant as value for a boat which Plaintiff converted from the marital assets? The appellate standard of review for this issue is whether the lower court's Findings of Fact are contrary to the clear preponderance of the evidence or that the trial court has abused its discretion in making the award. An appellate court will disturb a trial court's findings if the appellate court reaches the definite and firm conviction that mistakes have been made. Dunn v. Dunn, 802 P.2d 1314 (Utah App. 1990).

APPLICABLE STATUTES

Section 30-3-5, U.C.A. Disposition of Property.

1. When a Decree of Divorce is entered, the court may include in it equitable orders relating to the children, property, debts or obligations and parties.

* * *

3. The court has continuing jurisdiction to make subsequent changes or new orders for the support and maintenance of the parties, the custody of the children and their support, maintenance, health, and dental care, or the distribution of the property and obligations for debts as is reasonable and necessary.

STATEMENT OF THE CASE

This is an appeal from a Supplemental Judgment of Divorce

entered by the Honorable Homer F. Wilkinson. The sole issue of this appeal is whether the lower court erred in making its award of property to the respective parties.

COURSE OF PROCEEDINGS

In December of 1990, Plaintiff filed her Complaint for Divorce. (R. 6). On February 26, 1991 a Decree of Divorce was entered as to the marriage of the parties. All remaining issues were reserved for further consideration by the court. (R. 82-85).

A trial was held before the Honorable Homer F. Wilkinson on June 4, 11, 12, 15 and 16 of 1992. Judge Wilkinson ruled from the bench as to the various matters being contested by the parties. (R. 484-517).

Subsequently, on August 4, 1992 the Court signed and executed the Findings of Fact and Conclusions of Law and Supplemental Decree of Divorce prepared by Plaintiff's counsel. (R. 362-94; 395-403).

On September 1, 1992 Defendant filed his Notice of Appeal. (R. 429). On September 14, 1992 Plaintiff filed a Notice of Cross Appeal. (R. 430).

On November 4, 1992 this Court on its own motion consolidated the two appeals into Case No. 920588-CA.

STATEMENT OF FACTS

The litigation in the lower court was extensive and required approximately five days of trial. Numerous issues concerning the custody and visitation of children, alimony, distribution of assets, and requests for contempt, were

litigated below. The complexity of this divorce proceeding is best illustrated by the over thirty-page Findings of Fact and Conclusions of Law which were required to be entered as to the numerous issues being litigated.

Fortunately, however, for purposes of Defendant's appeal only several issues of controversy now remain. All of these areas focus upon the award of property and assets by the lower court. While Defendant does not necessarily agree with the Court's decision concerning other matters, Defendant realizes that the lower court is vested with a large amount of discretion and that such discretion will not be disturbed on appeal in most instances. On the other hand, those matters which are now being raised on this appeal by Defendant concern errors of property division where mistakes or inconsistency have occurred. With this in mind, therefore, the Statement of Facts will be utilized only to give this Court a thumbnail sketch of the present controversy on appeal. The actual "marshalling of the evidence" will be deferred to the individual sections of argument contained infra in this brief. See Crouse v. Crouse, 817 P.2d 836, 838 (Utah App. 1991).

The parties were married on August 26, 1978 in Virginia. During the course of the marriage the parties had three children, two boys and a girl, ranging in present age from 13 to 7. During the marriage Plaintiff maintained the household and the children while Defendant participated in various business ventures including real estate sales and development. The income made by the defendant from these ventures paid a large

portion of the family expenses each year.

In addition, however, Defendant had inherited a substantial amount of blue chip stock from his grandparents. A plan going back several generations had been devised for tax purposes whereas the family inheritance would be passed on by skipping one generation. Thus, Defendant received his inheritance from his grandparents whereas Defendant's children were to receive their inheritance from Defendant's parents.

Prior to the inception of the marriage Defendant maintained an account at Kidder-Peabody in which the inherited stock was placed. The value of the stock appreciated on its own through the years of the marriage. In addition, in 1986 over \$260,000 of stock was placed into the Kidder-Peabody account when a personal holding company opened by Defendant's grandfather required liquidation. It was undisputed that all of this stock and the account itself was solely in the name of the defendant Peter Coats.

During the course of the marriage Defendant utilized this account in several ways. On some occasions he would directly draw money out of the account specifically for family expenses such as homes, cars, and other necessities. He frequently used the dividend income from the account to supplement the extensive lifestyle enjoyed by the parties. He also frequently margined the account so that he could borrow funds for his real estate ventures.

After the marriage had been officially terminated by the lower court, Defendant found that he could significantly

increase his real estate commissions if he would lend home owners amounts of money to allow them to purchase new homes pending the sale of their old home. Accordingly, after the divorce was finalized he lent approximately \$148,000 drawn from the Kidder-Peabody margin account to a number of third parties and received trust notes in return. A more complete discussion concerning the Kidder-Peabody account will be made during the Argument portion of this brief.

During the course of the marriage the parties acquired numerous assets in the form of real estate, personal property, and receivables. At the same time, however, numerous liabilities were also incurred in the form of loans, mortgages, and credit consumption. In order for the defendant, for example, to develop the Brandon Canyon properties, it was necessary for him to borrow approximately \$400,000 from his mother, Isabel Coats. A complete discussion as to this transaction and the ruling of the lower court will also be contained infra in the Argument portion of this brief.

The Brandon Canyon development was principally undertaken by the defendant because he was unable to sell several of the lots which he had purchased. A great deal of testimony was heard by the lower court concerning the profitability of this development. The ruling of the lower court in its ultimate evaluation of this property as an asset will also be discussed in the Argument portion of this brief.

At the conclusion of the trial the lower court made numerous awards and divisions. Essentially, the custody of the

children was given to the plaintiff subject to specific visitation rights of the defendant. The valuation of child support and alimony was dependent upon the determination as to the defendant's annual income. Because of the complexities of the business income as well as the use of assets in order to maintain high lifestyle (which all parties agreed was beyond their means), a heated controversy was present during the trial as to this income determination. The defendant maintained his actual average income would be in the \$60,000 to \$70,000 range, whereas the plaintiff maintained that the income level was well over \$130,000. The lower court adopted the majority of Plaintiff's position and ruled that Defendant would be charged with an annual income of \$120,000 for purposes of determining child support and alimony. Accordingly, the Court ordered Defendant to pay approximately \$2,000 per month as child support and \$2,000 a month as alimony for a ten-year period.

The Court was still faced with the monumental task of dividing the assets and liabilities of the parties. The Court determined, for example, that the Kidder-Peabody account would be considered to be the sole property of the defendant. On the other hand, specific draws of principle which had been used for family purposes such as houses and cars were deemed to be marital assets. The Court evaluated numerous items of personal property, real estate, and other assets and obligations and concluded that the defendant owed Plaintiff approximately \$144,000 in order to equalize a division of the marital estate.

SUMMARY OF ARGUMENT

1. The issue as to the status of the Kidder-Peabody account was highly controversial. Plaintiff attempted to show that this account was part of the marital assets even though it had been funded entirely from inheritance solely in the name of the defendant. Defendant, on the other hand, claimed that this account was solely his except for those assets where he had removed money from the account and converted them into clearly marital assets. The lower court found in favor of the defendant and ruled that the Kidder-Peabody account should not be considered part of the marital estate. At the same time, however, the court ruled that approximately \$1485,000 worth of notes were a marital asset to be charged against the account of the defendant. These notes were all executed after the parties had been divorced, were made by the defendant for business purposes to generate commission income, were all taken from the Kidder-Peabody account, and all notes required payment directly back into such account. Thus, had Defendant allowed this money to stay in the Kidder-Peabody account it would not have been charged as a marital asset against him. The wrongful inclusion of these notes resulted to Defendant's detriment of some \$58,000 in the marital balancing equities.

2. The lower court recognized that Defendant was forced to borrow money from his mother in order to have sufficient funds to develop Brandon Canyon. This development was considered a marital asset by the Court and Defendant was credited with its value. The lower court, however, while recognizing a legitimate

debt existed to Defendant's mother, awarded him only a liability of \$270,000 even though the undisputed evidence shows that the principal balance actually owing as of the time of the accounting cutoff was approximately \$400,000 with another \$10,000 in accrued interest. The lower court declined to recognize this increased amount on the erroneous assumption that a contradiction of testimony had occurred between Defendant's mother and Defendant's accountants when no such contradiction in fact existed.

3. One of the other contested items of the trial was the value of the Brandon Canyon development. Defendant basically claimed that the development was a severe loss and that if anything he had lost money because of it. Plaintiff, on the other hand, claimed that the development was a success and that Defendant should be credited with the development as an asset. Ultimately, Defendant (assuming that he would be able to claim the liabilities on Brandon Canyon) testified that its asset value would be approximately \$320,000. The Court adopted Defendant's evaluation of Brandon Canyon. However, the court also awarded an addition \$57,300 against the defendant as an arbitrary figure amounting to one-third of the value of the Lot 16 home which had been sold between the time of the last accounting and the time of the court decision. This decision admitted by the court to be arbitrary failed to allow Defendant to show any additional liability that was incurred during this same time period in order to complete the construction of the house. Thus, the decision of the court as to this additional

\$57,300 was not based upon any reliable evidence in the record and must either be vacated or remanded for a correct valuation to be made.

4. After extensive testimony concerning the value of a jointly-owned boat, the lower court concluded that the boat had a value of \$4,300 which should be attributed to the plaintiff as an asset since she obtained the funds from the boat when she sold it during the marriage. In spite of the Court's finding and order, the plaintiff was never assessed with this \$4,300 asset and therefore the overall award seeking to equalize the marital estate is an error.

ARGUMENT

The defendant in this action recognizes the standard of appellate review which is applicable to appeals involving divorce decrees. This Court in Dunn v. Dunn, 802 P.2d 1314 (Utah App. 1990) summarized the various standards of review as follows:

In a divorce proceeding, "determining and assigning values to marital property is a matter for the trial court and this Court will not disturb those determinations absent a showing of clear abuse of discretion. To permit appellate review of the property distribution, the distribution must be based upon adequate factual findings and must be in accordance with the standards set by this state's appellate courts. We will not disturb a trial court's findings unless they are clearly erroneous, that is, against the clear weight of evidence, or unless we reach a definite and firm conviction that a mistake has been made. Id. at 1317. (Citations omitted).

As noted earlier, the issues in this divorce were hotly contested by both parties. A review of the trial testimony and the exhibits reveal numerous instances of dispute and disagreement. Both parties extensively utilized accountants in

attempting to persuade the court that their method of evaluation was correct. Numerous experts testified for both sides as to the value of property, assets, or even liabilities. Defendant readily admits that this was not an easy case for either the attorneys, the parties, or the court.

Because the lower court necessarily had to exercise its discretion in many instances, both parties were necessarily unhappy about some rulings, and pleased with others. For example, Plaintiff won a complete victory in the determination by the lower court of Defendant's average income in setting the amount of child support and alimony. On the other hand, Defendant won several victories in the valuation of personal property and in the court's denial of certain obligations that Plaintiff was seeking Defendant to pay.

Defendant believes that this appeal, therefore, does not center upon matters of discretion in which the court had latitude to decide in either direction. Instead, this appeal focuses upon the methods utilized by the court in making its awards after the discretionary decisions had already been made.

POINT I

THE LOWER COURT ERRED IN DETERMINING THAT APPROXIMATELY \$148,000 IN TRUST DEED NOTES WERE PART OF THE MARITAL ESTATE SUBJECT TO DIVISION WHEN SUCH NOTES CAME FROM NON-MARITAL FUNDS OF THE KIDDER-PEABODY ACCOUNT, WERE ALL ISSUED AFTER THE PARTIES WERE DIVORCED, AND WERE ALL PAYABLE BACK INTO THE KIDDER-PEABODY FUND.

As noted earlier in this brief, the status of Defendant's Kidder-Peabody account was a highly disputed issue. It was

undisputed, however, that this account existed prior to the marriage, that it was listed solely in Defendant's own name, and that all of the stock funding such account had been obtained through inheritance from Defendant's grandparents. For example, Plaintiff testified as follows:

Q. (By Mr. Larew): Peter received gifts from his parents and grandparents during your marriage; is that right?

A. We all did.

Q. Was any stock put in your name from Peter's parents?

A. No.

Q. Was stock put in Peter's name from his parents?

A. Yes.

Q. What about from his grandparents? Did they put stock in Peter's name?

A. I apologize. This stock came from Peter's grandparents, not his parents.

Q. Which stock are you referring to? Is that all the stock Peter received?

A. That's how their family has it set up, yes.

Q. All stock that Peter got during your marriage was from Peter's grandparents?

A. Generally, yes. (Tr. 805).

Extensive testimony was offered as to those matters which were contested. For example, Plaintiff's accountant testified that the Kidder-Peabody account was used on a daily basis by the defendant and could not be considered a separate asset of the defendant. (Tr. 560-63; 1547-49). Plaintiff testified that Defendant always represented during the marriage that the money from the Kidder-Peabody accounts always belonged to both of

them. (Tr. 759-62).

On the other hand, Defendant testified that this account was solely his property obtained from his grandparents and that his wife never had access to either the underlying stock or to the account itself. (Tr. 906-11). Defendant acknowledged that whenever he utilized assets from the account for non-business expenses that that money then became a marital asset. He recognized, for example, that \$30,000 from the account was used for the purchase of a home in Colorado, \$58,000 for the purchase of the Pepperwood home as well as additional amounts to buy automobiles and other family purposes. (Tr. 854-56).

The question of whether the Kidder-Peabody account would be considered marital property or separate property required Plaintiff to submit proposals based upon both alternatives. For example, Exhibit 90 is a proposed marital asset division including the asset of \$411,000 for the Kidder-Peabody securities as well as a liability of \$228,000 owing to the Kidder-Peabody margin account. Exhibit 91 was prepared by Plaintiff to show the "Marital Asset Division Without Kidder-Peabody." See also Plaintiff's Exhibits 97 and 98 for a similar treatment of assets and liabilities.

In making its decision, the lower court attempted to follow the directions of this Court when this Court stated:

[T]he Court should first properly categorize the parties' property as part of the marital estate or as the separate property of one or the other. Each party is presumed to be entitled to all of his or her separate property and 50 percent of the marital property. Burt v. Burt, 799 P.2d 1166, 1172 (Utah App. 1990); Dunn v. Dunn, 802 P.2d 1314, 1323 (Utah App. 1990).

The Court ruled that the Kidder-Peabody account could not be considered marital property. In the bench ruling the Court stated:

Now the Court recognizes that there is the Kidder-Peabody stock which the defendant--the defendant drew on during their marriage. It may have been part--I'm sure it was part of it--and the Court does find, however, that the corpus of that stock is the defendant's, and would remain with the defendant, and the liabilities attached to it, and that the plaintiff would have no right on that; but that was certainly used throughout the marriage, the Court would find, as far as generating income, as far as what the defendant used with his time to promote the various subdivisions or sale of real estate which he did generate. (Tr. 509).

In addition, the Court chose to base its award upon Plaintiff's Exhibit 91 which was the marital assets division proposed by the plaintiff "without Kidder-Peabody". (Tr. 494).

The decision of the lower court is fully supportable based upon the fact that the Kidder-Peabody account was both premarital property and was funded entirely by inheritance directly to the defendant. See Mortensen v. Mortensen, 760 P.2d 304, 308 (Utah 1988); Dunn v. Dunn, 802 P.2d 1314 (Utah App. 1990); Burt v. Burt, 799 P.2d 1166 (Utah App. 1990); Osguthorpe v. Osguthorpe, 804 P.2d 530 (Utah App. 1990).

Thus, under the Court's ruling any stock or other asset maintained in the Kidder-Peabody account at the time the divorce was final in February of 1991 would properly be considered the separate property of the defendant. Plaintiff may not agree with the ruling of the Court but can certainly not disagree with its elementary concept.

The problem facing this Court on appeal is simply that the lower court, while recognizing that the Kidder-Peabody account was separate property, failed to afford the same status to other assets which were converted from the Kidder-Peabody account. As a result of this error approximately \$148,000 of receivable notes were included in the marital division with Defendant being charged with possession of the assets.

During the last portion of the marriage Defendant utilized the Kidder-Peabody account for the purpose of making what he termed as "bridge loans". For example, if a client had found a home that they wished to purchase but could not purchase a new home until they sold their old home, then Defendant would utilize the bridge loan concept. He would take a trust deed note on the old home for the amount of equity existing thereby enabling the client to purchase the new home. When the old home sold, he would then be repaid immediately. This method of using the margin ability of the Kidder-Peabody account allowed him to often make two commissions from the purchase of the new home and the sale of the old home. (Tr. 914-15). During the marriage, while most of the money was returned to the Kidder-Peabody account after the sales had occurred, some of it would be utilized for family expenses. In that instance, the money which did not go back into the Kidder-Peabody account clearly became a marital asset which was later considered by the lower court in the overall division of assets.

After the parties were legally divorced, Defendant continued to use the bridge loan system in order to generate

business for his real estate brokerage. Contained in the Appendix of this Brief is an exhibit entitled "Peter Coats Post-Divorce Notes Receivable." This exhibit is a summary of Defendant's Exhibit 78 which was admitted by the lower court. Defendant's Exhibit 78 consisted of the original note as well as supporting documents from the Kidder-Peabody account and the closing of the various real estate transactions. The attached exhibit herein shows that approximately \$148,000 was loaned, after the divorce was final, from the Kidder-Peabody account directly to third parties to facilitate the real estate transactions. Attached to this exhibit are the trust deed notes which were contained in Exhibit 78 and which show that each note is made payable specifically to the "Peter Coats Kidder Account."

The lower court refused to eliminate these notes receivables as part of the marital estate and instead decided to discount them 20% because of their collectibility difficulties. (Tr. 502, Findings of Fact, pp. 16-17). As such, therefore, the Court utilized these ten post-divorce notes in computing the assets and liabilities of the parties. See Exhibit C of the Findings of Fact and Conclusions of Law, R. 393-94. The effect of the inclusion of these post-divorce notes from the Kidder-Peabody account was to increase the marital assets effectively by \$116,192 after the 20% discount was calculated. Because Defendant was given credit for having these assets, he was effectively penalized \$58,964 for having converted the stock margin into notes receivable.

This Court in Burt v. Burt, 799 P.2d 1166 (Utah App. 1990) dealt with the contention that once the form of inherited property has been changed it loses its separate property status. This Court stated:

Even though defendant's inheritance is readily traceable and has not been co-mingled, plaintiff argues that defendant's inherited funds have substantially changed in form--they were received as cash but have become stocks, bonds and real estate--therefore they should be considered part of the marital estate.

Plaintiff relies on Mortensen, wherein the Court stated that property which had lost its "identity through co-mingling or exchanges" could properly be considered part of the marital estate. 760 P.2d at 308.

We disagree with Plaintiff's reading of Mortensen. The thrust of Mortensen is not whether the mere form of property is changed, but whether it has lost its "identity" as separate property. Id. The separate character of the defendant's inheritance has been maintained in segregated accounts and portfolios and the home she purchased. Conversion from one investment medium to another does not, by itself, destroy the integrity of segregation.

To accept Plaintiff's view of Mortensen would unreasonably discourage the prudent investment of inherited funds. In order to preserve the property's separate character, the donee or heir would be required to maintain the property in the same physical form in which it was received, be it securities, real estate, or cash. The law does not require such economic absurdity. Id. at 1169. (Emphasis added).

In summary, the decision of the lower court is inconsistent and cannot be sustained. Since the lower court clearly found the Kidder-Peabody account to be the separate property of the defendant it was incumbent upon the lower court to also find the trust deed notes specifically derived from that account and specifically payable back to that account to be Defendant's

separate property. To have included these notes in the marital estate allowed the plaintiff to receive credit for one-half of their value. Such result cannot be sustained. This Court, therefore, should remand this matter and require the lower court to make the mathematical correction of the equities necessary to correct this error.

POINT II

THE LOWER COURT ERRED IN FAILING TO
RECOGNIZE THE FULL AMOUNT OF DEBT
THAT DEFENDANT OWED TO HIS MOTHER
ISABEL COATS.

Defendant maintained that in order to develop the Brandon Canyon properties, it was necessary for him to borrow some \$400,000 from his mother, Isabel Coats. Plaintiff, on the other hand, took the position that there was no debt owed by Defendant and that the entire transaction was manufactured after the divorce proceeding began. As an example, during the cross examination of Isabel Coats by Plaintiff's attorney, the following accusations were made:

Q. (By Mr. Peterson): Isn't it true, I want to ask this question to you in a straight-forward fashion, isn't it true that this note was manufactured by Peter Coats after the commencement of these proceedings and sent to you at a date long after Kathryn Coats commenced these proceedings for divorce?

A. No.

Q. So you received then that note in its original form on a date sometime in early 1990?

A. Yes.

* * *

Q. I'm going to ask you the question one more time. This note in fact was manufactured by Peter and sent to you long after these divorce proceedings began,

wasn't it?

A. No.

Q. Didn't Peter indicate to you that as a result of the pretrial in front of the court, and the assertion that there was no evidence documenting the \$400,000 in liability to you, that you would have to have a note, and he sent you this note?

A. No. (Tr. 988-90).

Throughout the first few days of the trial Plaintiff refused to recognize any debt owing to Isabel Coats. See, for example, Plaintiff's Exhibits 6, 8, 13, and 31. On the other hand, even Plaintiff's accountant acknowledged that he was aware of Defendant's \$400,000 claim concerning the note to Peter's mother and acknowledged that if there was such a valid note then Defendant should be given a liability deduction on his side of the accounting. (Tr. 624). In addition, Plaintiff's witness, David Evans, testified that he also had learned of the lien of Mrs. Coats for \$400,000 and in fact a property search owned by Peter Coats revealed a \$400,000 trust deed note. (Tr. 1084; Exhibit 57).

Defendant's mother Isabel Coats testified that Exhibit 50 was an original note dated January 26, 1990 which allowed her son to borrow up to \$400,000 for his development business. She emphatically stated that the promissory note was a bona fide loan upon which she expected payment. She maintained that she obtained money for these loans by borrowing on her own Kidder-Peabody margin account. (Tr. 980-87).

Because of the claims asserted by Plaintiff and her attorney at trial, the entire testimony of Isabel Coats is

included in the appendix to this brief. Contrary to the assertions of the plaintiff, Mrs. Coats at no time stated the exact amount that was owing on the note. Instead, she testified as to the validity of the note and as to the method by which the funds were obtained from her brokerage house. There is nothing in the testimony to state that Exhibit 50 and its accompanying letters of authorization constituted the entire amount of the draws. (Tr. 974-1000).

Defendant's balance sheets prepared prior to Isabel's testimony consistently recognized a debt of \$401,000 to Isabel Coats together with accrued interest of \$10,025. (Defendant's Exhibits 58 and 59). Apparently, after listening to the testimony of Isabel Coats, Plaintiff and her attorney decided to abandon the claim that no valid debt existed. Instead, Plaintiff now asserted in various exhibits that the actual debt owing was \$270,000 which was the total of the written authorizations attached to the promissory note contained in Defendant's Exhibit 50. See Plaintiff's Exhibits 65, 90, 91, 97 and 98.

Defendant, as the debtor, testified concerning the existence of the note contained in Exhibit 50. Defendant clearly testified that he did not know the amount owing to his mother and relied entirely upon his accountants for that information. (Tr. 1056-57).

Subsequently, Melody J. Rasmussen, a CPA assisting Defendant in his case, testified as to the loan between Peter and his mother. Plaintiff's attorney strenuously objected on

the grounds that such testimony would contradict the direct testimony of Mrs. Coats and also directly contradict Exhibit 50 containing the note and various letters written concerning the note.

The Court overruled these objections and held that Ms. Rasmussen's testimony was relevant and also allowed the introduction of Exhibit 72 into evidence. This exhibit contained numerous letters and accountings from Mrs. Coats together with an accounting of the various draws made by Peter. In addition, copies of checks which Peter claimed to be interest payments on the loans were contained in Exhibit 72.

Ms. Rasmussen testified that as of April 30, 1992, there was \$401,000 owing on the note and \$10,025 of accrued interest owing. (Tr. 1379). Because of the nature of this issue, the entire testimony of Melody Rasmussen is also included in the Appendix to this Brief together with a copy of Exhibit 72. (Tr. 1374-90).

In closing argument Plaintiff's attorney contended that the testimony of Ms. Rasmussen and the accompanying exhibits were in direct contradiction to the testimony of Mrs. Coats who he claimed stated that the entire amount of the loan was \$270,000 as represented by Exhibit 50. (Tr. 1244-46). Of course, at this time neither Plaintiff's counsel nor the Court had the benefit of a transcript of Mrs. Coats' exact testimony.

During the closing argument of Defendant's counsel, the Court was concerned about the accusations made by Plaintiff's counsel as to the contradiction of testimony. The following

dialogue occurred:

MR. LAREW: The liabilities for Isabel Coats I think counsel misrepresents. On her testimony, she didn't testify those letters constituted the entire record of her loans to Mr. Coats. These were merely representative. Those did represent her request to her brother. She never said they were all of them and that there weren't any others.

THE COURT: Why didn't she testify further, then, as to what they were? Why didn't she give further testimony, then, as to--you say she didn't testify that was all of it: why didn't she give testimony as to what they all were?

MR. LAREW: Frankly, we didn't think to ask if those were representative. She testified some time she would call on the telephone and they would be doing that. There was no paper transaction.

THE COURT: And I recall she was going to leave town, and somebody made a request to get her in so she could get on out, and it seems like to me her testimony would be quite important to that issue.

MR. LAREW: Frankly, Your Honor, we thought that sufficed. We had the promissory notes. She testified it was \$400,000, up to \$400,000. We have her computation, her handwritten computation showing that that went to--at one point it was \$399,996, something like that, in a couple of places. Additionally, Your Honor, we got introduced into evidence Mr. Coats' payments to her of interest, and if those payments of interest are computed, it computes out to what we have said it is. That did--in fact he did owe her the amount of \$400,000 as of the time when it indicates he owed that much, and the interest was paid.

We've got that testimony backward and forward, and frankly I didn't know we would have to hammer it with every single one, because she didn't have the paper transaction for every single one. Our purpose was to establish that the loan had been made, and then with other documents establish what it had gotten up to. And I think we have done that, at least by implication. We have got secondary support for all of our allegations that we made regarding that bona fide note, bona fide obligation.

She testified that she never gives stock for a loan, doesn't give cash or gifts in large amounts, it just came out that she borrowed against her own stock

in order to provide cash for Mr. Coats to do this, gave him cash and expected to be repaid cash.

* * *

I think that is good evidence. There was in fact a note owed and interest was paid. It was identified as a note. It wasn't something generated after the fact, his interest payments go back for more than a year. (Tr. 1278-81).

The lower court adopted the position of Plaintiff's attorney and completely discounted the testimony of the accountant and the accompanying documents. The Court stated:

Isabel Coats--of course there's been a lot said of this. The Court has to determine what is most believable, what was the best testimony, and I question counsel on what the CPA yesterday testified to as far as the accounting, and the court is not persuaded that she--and I'm not stating--well, I believe she is stating it truthfully for the information that she had, and the Court is not making any accusations as far as any information being generated, except that the Court cannot reconcile in its mind if there was an obligation of \$411,025 that when the mother was here and on the stand, that that would not have been brought out, especially when they said she had to leave and they wanted to get her on. So what I'm saying is I'm adopting \$270,000 as the note due Isabel Coats. (Tr. 499-500).

The Findings of Fact and Conclusions of Law is an even stronger statement as to the reason the lower court refused to recognize the increased liability. Finding No. 14(k)(2) states the following:

The Court finds the liability owed to Isabel Coats to be \$270,000. There was conflicting evidence presented to the Court as to the amount of liability owed to Isabel Coats. Isabel Coats testified to the Court and stated that Defendant's Exhibit D-50 showed all of the obligations owed by the defendant to her. The total amount of the notes which make up Defendant's Exhibit D-50 is \$270,000. While the defendant's certified public accountant testified on the amount of the notes and stated that the outstanding balance was \$411,025, that amount was never verified by Isabel Coats, and the Court cannot

reconcile in its mind the difference between the amount testified to by the certified public accountant and the amount testified to by Defendant's mother, who is the creditor on the note.

The Court finds that the most credible evidence is that of the creditor and that if she were owed more than \$270,000, that testimony certainly would have been presented to the Court. That is especially true in the mind of the Court when the defendant placed Isabel Coats on the stand out of time to be able to get her testimony in regarding the liability and the amount owed to her by the defendant. Accordingly, the Court specifically finds that the preponderance of the evidence is that the outstanding note owed to Isabel Coats is in the amount of \$270,000. (Findings of Fact, pp. 17-18). (Emphasis added).

It is apparent that the lower court rejected Defendant's claim of \$411,000 on the assumption that the testimony of Mrs. Coats directly contradicted the testimony of the accountant. As noted earlier, however, a review of the transcript of Mrs. Coats' testimony shows no such contradiction. Mrs. Coats never stated the amount that was owing to her and never stated that all of the letters attached to the promissory note contained in Exhibit 50 were the entire sum due and owing to her by her son. It is clear from reading the transcript that Mrs. Coats did not state any figure whatsoever except as to the \$400,000 note itself. Thus, the specific finding by the lower court of the contradiction in testimony is clearly erroneous.

In addition, Defendant as the debtor was entitled to present evidence as to what he claimed was owing to his mother. Independent of her testimony he also relied upon the accountants to verify his claim. For this reason, therefore, the testimony of Ms. Rasmussen not only supplemented that of Isabel Coats as the creditor but also constituted the testimony of Defendant as

the debtor.

Again, this issue is similar to the previous one. The lower court obviously had a great deal of discretion in deciding whether to believe that a valid debt existed or did not exist. Had the Court ruled against such a debt it is unlikely that this Court would ever disturb the lower court's discretionary decision based upon the conflicting testimony of the witnesses. However, once the lower court made a decision as to which way it would proceed, it was incumbent upon the Court to find the correct amount owing under the Isabel Coats note. The Court incorrectly assumed that there was conflicting testimony presented in the case and that the Court had to decide which version of the amount it was to believe. It is clear, however, that no such contradiction existed and the Court erred in concluding that it was required to make such a decision.

In reality, Defendant's evidence is consistent that a note was executed by Defendant to his mother for up to \$400,000, that various draws were made by his mother from her Kidder-Peabody account throughout the two year period in order to finance Defendant's building projects, and that the interest payments made by the defendant as evidenced by checks in the record are completely consistent with the amounts claimed to be owing both by the accountant and by the letters of Defendant's mother contained in Exhibit 72.

For these reasons, therefore, the Court erred in awarding only a \$270,000 debt to the defendant and this Court should remand for correction to the proper amount in order to equalize

the accounting of the marital estate.

POINT III

THE LOWER COURT ERRED IN ARBITRARILY
CHARGING DEFENDANT WITH A MARITAL ASSET
VALUE OF \$57,300 FOR THE BRANDON CANYON
DEVELOPMENT WHEN SUCH FINDING WAS NOT
BASED UPON ANY EVIDENCE.

It is undisputed that during the course of the marriage Defendant undertook a real estate development project known as Brandon Canyon. This project came about after defendant had been persuaded to purchase land in this subdivision area for the purpose of resale and development. Because of the terrain and other economic factors, he was unable to sell several of these construction lots. In conjunction with others, therefore, he began a project where he would finance and sell the completed houses once they had been constructed. (Tr. 1055-58).

As with almost every asset and liability at issue in this divorce action, the parties had diverse views as to the success or failure of the Brandon Canyon development. Plaintiff attempted to prove through various expert witnesses that the Brandon Canyon property development was a successful financial venture and severely disagreed with the costs of development claimed by Defendant. On the other hand, Defendant and his witnesses maintained that because of extreme difficulty in the terrain of the development, costs were much higher than anticipated and that very little profit would ever be made.

Defendant principally obtained financing for the Brandon Canyon project from his mother, Isabel Coats, in an amount that he claimed to be approximately \$400,000 but which Plaintiff

claimed to be \$270,000. This initial money funded the project to the completion of some houses but was insufficient to complete others. It was therefore necessary to obtain additional money from other sources or to wait until the sale of some of the properties before others could be completed.

Plaintiff's Exhibit 91 computed the Brandon Canyon assets to be approximately \$560,000 based upon the projected sales price of lots 15, 16 and 17 together with a trust deed note on lot 28 and the value of an undeveloped lot, no. 4. As to the liability aspect of the Brandon Canyon development, Plaintiff recognized only \$270,000 as the Isabel Coats promissory note thereby showing an assert over liability value of \$290,000.

Defendant strongly contested this evaluation. He argued that the amount shown as assets in Plaintiff's Exhibit 91 represented completed houses. In fact, however, the houses were not complete and would require additional funding before they could in fact be sold for the prices projected by the plaintiff. For this reason, Defendant attempted to value the properties as of April 30, 1992 so that both the asset value and the liability value could be computed at the same time.

Defendant offered Exhibit 99 which was entitled "Brandon Canyon Detail April 30, 1992." This exhibit showed that the combined asset value of Lots 4, 15, 16, 17, 23, and 28 was \$319,117 based upon the actual money that had been expended as to each lot.

Shortly before trial the house on Lot 16 was sold for \$171,900. Exhibit 99 valued lot 16 at \$105,517 as of April 30,

1992. As of that date, however, the house was certainly not in a sellable condition and it required Defendant to expend an additional amount of money during the next five-week period in order to complete and finish the home. Neither the plaintiff (Tr. 1574, 1583) nor the defendant (Tr. 1595-97) were aware of what the actual construction costs were to complete the Lot 16 house.

Thus, at the close of the case the positions of the parties were as follows: Plaintiff maintained that the asset value of Brandon Canyon was the projected sale of all the lots totaling \$591,000 with a recognized liability to Isabel Coats of \$270,000. Plaintiff acknowledged that all the the houses were not in fact sold or complete and that additional construction costs of an unknown amount would be required before sale could be completed.

Defendant, on the other hand, evaluated the asset of Brandon Canyon at \$319,000 as of April 30, 1992 with a recognized liability of \$410,000 owing to Isabel Coats. Since Lot 16 was already evaluated at that date, Defendant took the position that any subsequent sale was immaterial since it would require a concurrent adjustment of liabilities as well.

The Court adopted the value of Brandon Canyon proposed by the defendant but, in addition, added an additional \$57,000 of value based upon the sale of Lot 16. The Court stated in the bench ruling:

Brandon Canyon has been somewhat of a headache to the Court. I guess I have to indicate to you that I'm still not thoroughly convinced as to what is taking place as far as Brandon Canyon assets are

concerned. I'm going to talk for a few minutes on this.

The Court, from the exhibits and testimony, was somewhat persuaded that \$319,117 is probably the value of Brandon Canyon, except for the fact of the defendant taking the stand and testifying as to the value of certain lots, and particularly saying that Lot 16 has already been sold for \$171,900.

If Brandon Canyon has a value of \$319,000 and as they develop more and finish it and put more money into it, and sell homes, they would start to get money out of it. And that's fine. The Court would take that.

But why does Lot 16, which has been sold, really now is out of Brandon Canyon, and I have no basis for taking that lot out and subtracting a value from the \$319,000.

So what I'm saying is that the evidence is still conflicting to this Court as far as what is taking place. I shouldn't say--well, "taking place" or what the value of Brandon Canyon really is.

And I don't know that I can sit here and hear testimony from the defendant and from the accountants on Brandon Canyon and from each party that comes and still come back with the amounts which they had.

So the Court is going to do this; and I'll admit this is an arbitrary situation. The Court is going to place a value on Brandon Canyon of \$319,117 plus one-third of \$171,900 or the value that Lot 16 sold for. And that's the way the Court is going to treat that in there. (Tr. 498-99). (Emphasis added). See also Finding of Fact 14(i)(2).

The Court clearly acknowledged that the decision to add the additional \$57,000 was arbitrary. Again, Defendant recognizes that this case provided many difficult decisions in valuation of assets and does not blame the court for attempting to reach a fair valuation. However, there is simply no evidentiary support for the method utilized by the lower court and therefore Defendant cannot be legally charged with an additional \$57,000 in marital assets based upon the existing record.

As noted earlier, Defendant recognized that the value of Lot 16 was \$105,517. This amount was computed in the total \$319,000 figure used by the Court. It is undisputed that the property was in fact sold for \$172,000. The decision of the Court, however, fails to recognize the unknown liabilities incurred in order to complete Lot 16. There is simply no evidence in the record as to what additional money was required in order to bring a property which had \$105,000 in costs invested in it as of April 30, 1992 to a market value of \$172,000 in June of 1992.

The present decision concludes that Defendant essentially made \$57,000 from the sale of Lot 16. This "profit" was then utilized by the Court as a marital asset in computing what equities existed between the parties. As a practical matter, therefore, Plaintiff received almost \$30,000 in an adjusted judgment because of this arbitrary one-third calculation utilized the Court.

There are two options available to remedy this situation. The first is to simply vacate the \$57,000 award of the lower court and value the properties as of April 30, 1992 as was done by the defendant. Under this theory the subsequent sale is irrelevant as is any subsequent construction costs of development.

The second option is to remand this matter to the lower court so that Defendant may produce evidence as to the liability which was incurred in order to sell this house at the \$172,000 purchase price. If for example, Defendant shows an additional

\$55,000 was expended in order to make the house marketable, then Plaintiff would be entitled to an asset value of \$12,000 which would be the difference between the sales price and the actual cost of construction. Defendant would have no objection to including any profit as an asset as long as he has had the opportunity to produce evidence of actual cost liabilities to offset the sales price that was received as the asset.

Under either option, however, this Court should exercise its appellate authority and require an adjustment be made to this clearly erroneous calculation made by the lower court.

POINT IV

ALTHOUGH THE COURT ORDERED DEFENDANT
TO BE GIVEN A CREDIT OF \$4,300 FOR
PLAINTIFF'S SALE OF THE FAMILY BOAT,
NO SUCH CREDIT WAS EVER GIVEN IN THE
ACTUAL ACCOUNTING.

During the course of the marriage, the parties purchased a boat which they used for recreational purposes. After the separation Plaintiff took possession of the boat and ultimately sold it to meet family needs. The Court found that the plaintiff received \$4,300 from the sale of the boat and also found this to be the best value to be attributed to it. (Tr. 496-97).

The Court gave the parties two options as to how to handle this credit. Either Plaintiff could be charged with a liability of \$4,300 as to the marital accounting or, Defendant could subtract \$4,300 from the amount that he was obligated to pay Plaintiff in order to avoid contempt of court. (Tr. 503-05).

In fact, however, Defendant paid the full amount of support

arrearage with no deduction for the boat but did not receive any credit for the boat in the marital accounting. (See Schedule C to Findings of Fact and Conclusions of Law). For this reason, therefore, an adjustment should be made in the equities now owing between the parties.

CONCLUSION

This was a complex divorce case requiring tremendous effort on the part of all involved. The lower court did a commendable job in sorting out the various claims and disputes. The sheer volume of problems being confronted may have allowed these few to slip through the crack.

It is apparent that once the court determined that the Kidder account was the separate property of Defendant, any use of those funds after the divorce was final could not be deemed a marital asset no matter what form the asset became. This wrongful inclusion requires appellate correction.

The failure to recognize the full amount of the Isabel Coats note resulted from a perceived conflict in testimony. With the present advantage of a trial transcript, it can be readily seen that no conflict existed and that the preponderance of evidence showed an obligation of \$410,000. This error too requires correction.

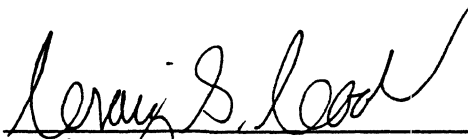
The arbitrary award of \$57,000 to Plaintiff as a result of the Lot 16 sale cannot be sustained. While Defendant understands the frustration of the Court in dealing with Brandon Canyon, there must nevertheless be some rationale in making awards of assets. Here, there was no logical reason to

arbitrarily take 1/3 of the sales price and award it to Plaintiff. A correction or remand is therefore required.

The \$4,300 error as to the boat is minor, but still requires an adjustment in order to meet the order of the Court.

Defendant asks this Court to grant the relief requested.

DATED this 12th day of June, 1993.



Craig S. Cook
Attorney for Defendant

MAILING CERTIFICATE

I hereby certify that I mailed a ^{two}~~true~~ and correct ^{copies}~~copy~~ of the foregoing Brief of Appellant to Craig M. Peterson, Attorney for Appellee, 426 South 500 East, Salt Lake City, Utah 84102 this 12th day of June, 1993.

