

1965

# Russell M. Habbeshaw v. Neta Carol Habbeshaw : Brief of Appellant

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# In the Supreme Court of the State of Utah

RUSSELL M. HABBESHAW,

*Appellant,*

vs.

NETA CAROL HABBESHAW,

*Respondent.*

Case No.

10356

**FILED**

AUG 16 1965

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## BRIEF OF APPELLANT

Clerk, Supreme Court, Utah

Appeal From the Judgment of the Third Judicial  
District Court for Salt Lake County,

Honorable Stewart M. Hanson, Judge

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## BRIEF OF APPELLANT

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### STATEMENT OF THE CASE

This appeal is taken from the property settlement and alimony provisions of a divorce decree. The husband sought a divorce in this action after 28 years of marriage and his wife counterclaimed. During the course of the marriage, the parties jointly acquired real estate, commercial restaurant businesses, and at the time of this action, there was involved fifteen parcels of real estate, the Auerbach's Tearoom restaurant, and plaintiff's other business interests which were unknown to defendant.

The appellant contends that she was not aware of the true value of the property acquired during her

marriage and that it was not until after the trial court entered its decree that she learned the true value or the extent of the property involved; that the trial court had not been correctly advised as to certain material aspects of the subject properties, and that defendant discovered evidence pertaining to the foregoing which she could not with reasonable diligence have discovered and produced at the time of trial herein.

## STATEMENT OF FACTS

Russell M. Habbeshaw, plaintiff, hereinafter referred to as plaintiff, and Neta Carol Habbeshaw, defendant and counterclaimant, hereinafter referred to as defendant, were married March 29, 1936. This was plaintiff's second marriage at the age of 21 and defendant's first at age 16 (R. 117). The parties as issue have four adult children — all of which are married and reside in their own homes, except for the youngest daughter who resides with defendant in what was formerly the family home.

When the parties were first married, defendant was a landlady or caretaker of an apartment house for which the parties received free rent (R. 120). From this humble beginning, and the following 28 years, they enjoyed financial success permitting them to acquire extensive real estate holdings, commenced and operated various restaurants, which were ultimately sold and the proceeds reinvested into new restaurant ventures (R. 48).

Neither party brought money or property into the marriage, but they each contributed time and earnings as their marriage progressed, which permitted the acquisition and the accumulation of real estate hereinafter described.

The real estate acquired, aside from the family home, was rental property located in Salt Lake County, primarily in locations which permitted the future construction of prime rental apartments (See Ex. D 8, appraisal of Maxwell S. Loll, real estate appraiser). However, each respective parcel of real estate, after its initial down payment, was capable of paying itself off, plus taxes and insurance from the rents collected. Plaintiff had the final determination of selecting tenants, making repairs, etc., while defendant relayed messages to her husband concerning prospective tenants (R. 121). Defendant took an active part in the management and operation of Carol's Pastry Shop, where for about a year, some fifteen years ago, she worked from 4:00 a.m. to 4:00 p.m. daily, doing usual bakery work. Defendant's work at the bakery terminated when she became afflicted with a general arthritic condition (R. 118). Her arthritic condition has persisted, and in fact has intensified to the point where defendant cannot seek or perform independent employment (R. 118, 119).

In recent years plaintiff took a tight rein on the parties' business activities, doing as he pleased without intimately advising or informing defendant of his actions. Defendant managed the parties' house-

hold and reared their children and acquiesced in plaintiff's business activities by signing legal documents when presented to her for her signature without questioning plaintiff's motive or objectives, believing plaintiff was acting for their best interests. Years ago the parties owned two cafes located in downtown Salt Lake City, Utah, known as Russell's Cafe and Russell's Cafe No. 2 (R. 48). The parties sold these cafes, and plaintiff received a sum in excess of \$47,000.00, which he used to acquire the Auerbach's Tearoom in Salt Lake City, Utah. The proceeds from the sale of the cafes represented years of joint hard work and efforts between the parties, and defendant believed that she had an ownership interest in the Tearoom (R. 48, 49). Defendant, as her marriage matured, placed increased faith and reliance on her husband's integrity, and did not realize until after the trial court had rendered its decision, that property values, equities, and lot sizes were not fairly represented to the court, nor were they known to the defendant until she commenced an independent search (R. 46, 47, 48 and 49).

At the time of the trial the following parcels of real estate were under purchase contracts by the parties, and the plaintiff testified as to their respective value and indebtedness as follows:

Located in Salt Lake County	Value	Indebtedness	Monthly Payment
2106 So. 22nd E.	\$32,500.00	\$10,500.00	\$186.00
744 E. 8th So.	13,000.00	850.00	60.00
752 E. 8th So.	18,000.00	12,000.00	100.00
416-422 E. 5th So.	40,000.00	21,000.00	1200.00

465 E. 5th So.	20,000.00	7,800.00	132.00
509 E. 8th So.	30,000.00	4,600.00	200.00
2500 So. 9th E.	13,000.00	5,400.00	57.00
553-555-557 E. 9th So.	27,500.00	8,600.00	386.00
561 E. 9th So.	14,000.00	8,000.00	386.00
567 E. 9th So.	13,500.00	7,800.00	100.00
575 E. 9th So.	14,000.00	10,000.00	100.00
866 So. 6th E.	10,000.00	3,400.00	60.00
849 So. 6th E.	11,000.00	10,200.00	178.00
851-865 So. 6th E.	30,000.00	19,000.00	345.00
603 E. 9th So.	17,500.00	10,000.00	132.00
<b>TOTAL</b>	<b>304,000.00</b>	<b>139,150.00</b>	<b>3,336.00</b>

(See Exhibit P. 1)

In addition the parties owned a rental unit located at 3400 South 5th East in which defendant released her interest during the divorce proceeding, so that plaintiff could either sell or borrow money to pay a bill due Arden Dairy. Plaintiff apparently discharged a \$6,600.00 indebtedness from this action (R. 145).

Plaintiff, unknown to defendant, acquired an interest in Carpenter's Boat Camp located on the Strawberry Reservoir, Utah, and in a corporation known as Investment Enterprises (R. 138).

## STATEMENT OF POINTS OF APPEAL

### POINT I

**THE TRIAL COURT ABUSED ITS DISCRETION IN NOT GRANTING DEFENDANT'S MOTION FOR A NEW TRIAL PURSUANT TO RULE 59 (4) U.R.C.P.**

### POINT II

**THE COURT ABUSED ITS DISCRETION IN THE DIVISION OF MARITAL PROPERTY ACQUIRED**

DURING THE MARRIAGE OF THE PARTIES BY AWARDING PLAINTIFF, WHO WAS AT FAULT, PROPERTIES WHOSE VALUES FAR EXCEED THOSE AWARDED TO DEFENDANT AND FIXING ALIMONY.

## ARGUMENT

### POINT I

THE TRIAL COURT ABUSED ITS DISCRETION IN NOT GRANTING DEFENDANTS MOTION FOR A NEW TRIAL PURSUANT TO RULE 59 (4) U.R.C.P.

The sneaky demeanor of plaintiff in this action should have alerted the trial court to the questionable valuations placed on the parties' property by plaintiff.

In his complaint for divorce he alleged the parties entered into the purchase of three homes, namely: A family residence: a residence located at 744 East 8th South, and a duplex located at 752 East 8th South, all in Salt Lake City, Utah (R. 2).

Plaintiff hid from his complaint 12 other parcels of real estate (P. Ex. 1) which the parties acquired in which there were equities totaling \$196,750.00 (Ex. D 8).

Plaintiff entered defendant's default judgment unbeknown to defendant (R. 13), and when he was confronted with his fraud, fraudulent representations, and failure to disclose to the District Court the truth concerning the property of the parties, he voluntarily permitted defendant to file an answer and counterclaim (R. 166; 23).

Defendant did not know of the particulars concerning the property and business acquired until the time of the trial herein. When asked whether plaintiff's testimony omitted or failed (R. 117) to mention anything with respect to the parties' property, she answered, "I think it has been pretty well covered."

However, counsel for plaintiff sought permission of the trial judge to file in writing facts and figures concerning the real property of the parties (R. 168). This memorandum was never filed in the record, and the time the trial judge considered it, it was not clear. In any event, it was before the trial court's Memorandum Decision, dated July 2, 1965, for Mr. Lund's mailing affidavit certifies a copy to Mr. McCullough on ..... June, 1964.

Plaintiff's brief was highly misleading in the following particulars:

1. Page 2, referring to the 752 East 8th South Duplex:

(a) "Value: \$20,000.00." In fact, plaintiff testified, P. Ex. 1, this property's value was \$18,000.00.

(b) "Note: Home is in name of defendant, conditional payments are current. Great value in property as apartment building lot because of lot size, 300 x 175 x 100." In fact, the lot size has a frontage of only 114 feet on 8th South, not 300 feet, and the lot is in fact an odd shape, and value as an apartment site is questionable. See Ex. D 8, page 7.

2. Page 2, referring to the 509 East 8th South property, stated there was a delinquency of 2 months, \$400.00. In fact, the delinquency was \$1200.00 (R. 47).

3. Page 2, referring to the 2500 South 9th East property, reflects no delinquency, when in fact an arrearage in payments existed in the amount of \$326.78 (R. 47). All these properties were awarded defendant.

Defendant had no chance to clarify the above misstatements, which in fact were made after the trial. The trial court clearly abused its discretion in not granting the defendant a new trial, for her affidavit clearly demonstrated that substantial material evidence would be adduced with a reasonable likelihood that it would affect the property division determined and that justice between the parties so required. See **Crellin v. Thomas**, 122 Utah 122, 247 P.2d 264; **Greco v. Gentile**, 88 Utah 255, 53 P.2d 1155; **Bowers v. Grag**, 99 Utah 336, 106 P.2d 765; and **Saltas v. Affleck**, 99 Utah 381, 105 P.2d 176.

## POINT II

THE COURT ABUSED ITS DISCRETION IN THE DIVISION OF MARITAL PROPERTY ACQUIRED DURING THE MARRIAGE OF THE PARTIES BY AWARDING PLAINTIFF, WHO WAS AT FAULT, PROPERTIES WHOSE VALUES FAR EXCEEDED THOSE AWARDED TO DEFENDANT AND FIXING ALIMONY.

We recognize the trial court has broad discretion in determining how the marital property should

be divided. However, the court should examine the factors of each case in light of its peculiar circumstances. In **McDonald v. McDonald**, 120 Utah 573, 236 P.2d 1066, this court reasserted certain factors which might be indicative of reaching a fair and just conclusion in property settlement matters. The first six points stated, and as they apply to the instant case, are as follows:

(1) The social position and standard of living of each before marriage: Here, plaintiff had no property and defendant had no property. Defendant was a landlady and received free rent for the parties. Their social status and standard of living were comparable.

(2) The respective ages of the parties: He was 21 and she was 16.

(3) What each may have given up for the marriage: Nothing significant is shown in this case.

(4) What money or property each brought into the marriage: Neither brought anything. What was gained was through their joint work and efforts.

(5) The physical and mental health of the parties: Both assumed to be good.

(6) The relative ability, training, and education of the parties: Neither had special training or work experience.

The following points control the conditions to be appraised at the time of the divorce, namely:

(7) The time of duration of the marriage: 28 years.

(8) The present income of the parties and the property acquired during marriage and owned either jointly or by each now:

Salt Lake County Located in	Value	Indebtedness	Payment Monthly
2106 So. 22nd E.	\$32,500.00	\$10,500.00	\$186.00
744 E. 8th So.	13,000.00	850.00	60.00
752 E. 8th So.	18,000.00	12,000.00	100.00
416-422 E. 5th So.	40,000.00	21,000.00	1200.00
465 E. 5th So.	20,000.00	7,800.00	132.00
509 E. 8th So.	30,000.00	4,600.00	200.00
2500 So. 9th E.	13,000.00	5,400.00	57.00
553-555-557 E. 9th So.	27,500.00	8,600.00	386.00
561 E. 9th So.	14,000.00	8,000.00	386.00
567 E. 9th So.	13,500.00	7,800.00	100.00
575 E. 9th So.	14,000.00	10,000.00	100.00
866 So. 6th E.	10,000.00	3,400.00	60.00
849 So. 6th E.	11,000.00	10,200.00	178.00
851-865 So. 6th E.	30,000.00	19,000.00	345.00
603 E. 9th So.	17,500.00	10,000.00	132.00
<b>TOTAL</b>	<b>304,000.00</b>	<b>139,150.00</b>	<b>3,336.00</b>

Auerbach's Tearoom—value undeterminable from the record. However, plaintiff has operated the Tearoom for 16 years. The fixtures are paid for, and his net income for 1963 was \$32,344.13 (R. 139). Plaintiff's ownership in Carpenter's Boat Camp and Investment Enterprises is not further considered, for their respective values are not clear in the record.

(9) How it was acquired and the efforts of each in doing so: Here, both parties have continually worked since their marriage in acquiring their

properties and businesses. Apparently, the most successful restaurant, Auerbach's Tearoom was acquired with money earned from prior restaurants, namely: Russell's Cafe and Russell's Cafe No. 2.

(10) Children reared, their present ages, and obligations to them or help which may in some instances be expected: None.

(11) The present mental and physical health of the parties: His is good; her health, due to her arthritic condition, is fair.

(12) The present age and life expectancy of the parties: He is 51, with a life expectancy of about 23 years; she is 46, with a life expectancy of about 32 years.

(13) The happiness and pleasure, or lack of it, experienced during marriage: The record does not disclose any significant facts in this regard.

(14) Any extraordinary sacrifice, devotion, or care which may have been given to the spouse or others, such as mother, father, etc, and obligations to other dependents having a secondary right to support: This factor is not material in this case.

(15) The present standards of living and needs of each, including the cost of living: The assets acquired during the marriage furnish adequate sources of revenue to maintain their present standard of living, provided they are distributed between the parties fairly.

In considering the foregoing points with the record in this action, it is quite clear that an equal division of all real property would be fair and equitable. To achieve this goal, it is necessary to have knowledge of the value of the properties and also to have knowledge of the best use and greatest potential which the properties are capable of producing under proper management. In this regard the appraisal information contained in Exhibit D 8 is controlling, for it is the work product of an independent fee appraiser who is not a party to the action and has no prejudices in favor or against either party. The parties to the action acquired two blocks of property on East 9th South between 5th and 7th East Streets, north of Liberty Park. These two blocks are prime apartment locations, and this is the area where the trial court was unaware of their true value. Plaintiff understated the value of these two parcels of land by \$80,000.00.

The defendant has an arthritic condition that commenced with working at the parties' pastry shop some 15 years ago and has persisted ever since. In fact, Mr. McCullough, at the trial stated, "I notice your fingers are somewhat crippled up. Is this a result of your arthritic condition?" (R. 119). Defendant's arthritis not only precludes her from working for someone else, but it has its detrimental cosmetic effect which would greatly decrease defendant's opportunity for remarriage. However, defendant is not so incapacitated that she can't do her own work and the collection of rents and the rental of apart-

ments is particularly well suited to her in light of her health.

The life expectancy of defendant cannot be lightly regarded when she can reasonably anticipate 32 years of future life. These years should be commensurate with those she enjoyed during her marriage. To afford her this life, it would be necessary to award her one half of the properties acquired during her marriage, taking into consideration their true market value.

Defendant has been awarded alimony in the sum of \$550.00 per month. This is an unfair amount in view of defendant's earning power. The record is clear that his income from the Auerbach's Tearoom alone for the year 1963 was \$32,344.13 (R. 139). It would be reasonable under the rule established, **Bullen v. Bullen**, 71 Utah 63, 262 Pac. 292 and in **Woolley v. Woolley**, 113 Utah 391, 195 P.2d 743, that defendant should receive one third of plaintiff's net income as alimony from the Auerbach's Tearoom.

### CONCLUSION

It is respectfully submitted that under the facts of this case the trial court should have granted defendant's motion for a new trial pursuant to Rule 59 (4) U.C.R.P. and that the court erred in distributing the parties' property and fixing the amount of alimony for defendant.

Respectfully submitted,

**ROBERT W. HUGHES**  
*Attorney for Appellant*