1983

Rebecca Sims Lord v. David George Lord : Brief of Appellant

IN THE SUPREME COURT

OF THE

STATE OF UTAH

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Rebecca Sims Lord, *

Plaintiff - Respondent, *

vs. * Case No. ~~18395~~ 19167

David George Lord, *

Defendant - Appellant. *

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BRIEF OF APPELLANT

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On appeal from a decision in the District Court of Washington County, State of Utah.

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IN THE SUPREME COURT OF THE STATE OF UTAH

REBECCA SIMS LORD, Plaintiff/Respondent, vs. DAVID GEORGE LORD, Defendant/Appelant.	Case No. 19167

BRIEF OF APPELANT

STATEMENT OF THE NATURE OF THE CASE

This case involves a divorce action instituted by Respondent, Rebecca Sims Lord, in the District Court of the Fifth Judicial District Court, in and for Washington County, State of Utah, on June 22, 1981.

DISPOSITION IN THE LOWER COURT

On May 28, 1982, the Honorable J. Harlan Burns, presiding as Judge of the Fifth Judicial District Court, in and for Washington County, after trial entered Judgment of divorce in this action, reserving Judgment pertaining to distribution of property for a later trial. On January 31, 1983, the Honorable J. Harlan Burns, entered a Supplemental Decree and Judgment pertaining to Distribution of Property.

RELIEF SOUGHT ON APPEAL

Appellant David George Lord seeks to have this Court reverse certain findings and the Judgment of the lower Court, and specifically to find and declare that:

1. The lower Court erred in ruling the Quit Claim deed dated October 23, 1977 and filed in 1979 pertaining to the marital house executed by the Plaintiff is a nullity and was wrongfully recorded and shall have no

effect at law or in equity and Plaintiff/Respondent is entitled to an equitable lien in the amount of $23,500 against the marital home.

2. The lower Court erred in granting Plaintiff/Respondent the sum of $5,023.75 to equitably reimburse her for her monetary contribution to the business.

3. The lower Court erred in not granting Defendant/Appellant's Motion for Change of Venue after bifurcating the divorce action into a trial for divorce and a trial for property settlement.

4. The lower Court erred in granting Plaintiff/Respondent attorneys fees in the sum of $9,000.

5. The lower Court erred in not granting Defendant/Appellant's Motion for Trial Continuance and holding the trial in his absence.

STATEMENT OF FACTS

Defendant married the Plaintiff on the 11th day of ~~February~~ Jan 8 1973 in Elko, Elko County, Nevada. The marriage survived twelve (12) years and there were no children born as issue of the marriage. Up until May of 1974 Defendant worked fulltime as a police officer for Salt Lake City, Utah and managed his part time sole proprietorship business of Accident Investigation and Cause Analysis he established in the mid sixties. In May of 1974 Defendant resigned as an employee of the State of Utah and withdrew from the State Retirement Fund those monies that were due and owing to him for retirement purposes and expanded his Accident Investigation and Cause Analysis business to a fulltime business. Defendant then hired the Plaintiff to keep books, to perform secretarial services, to do billings and etc. Plaintiff had free access to the company checking account and paid herself for the work she was supposed to do. Although she paid herself with amounts of money from the company, she refused to help conduct the business of the company and Defendant had to hire outside secretarial help to perform the tasks that had been assigned to the Plain

tiff. The business ran into financial difficulties and the Plaintiff gave Defendant a gift of $6,000 to help the business over rough times. After twenty-two (22) months the marriage became rocky and replete with turmoil, resulting in eleven separations by the Plaintiff from the Defendant beginning in October of 1974 culminating in the eleventh and final separation in October of 1979. During all of the separations the Plaintiff returned to her hometown of St. George, Utah and lived with her mother with the exception of the final separation wherein in May of 1981 Plaintiff after a prolonged love affair while still being married moved in with a St. George police officer, Dennis Rogers.

In October of 1977, Defendant realized that eventually the marriage would end in divorce regardless of his efforts to keep the marriage together. Defendant knew that if the marriage did culminate in divorce that Plaintiff would return to her hometown of St. George, Utah leaving their marital home which is located at 8950 Alpen Way, Sandy, Utah. It was Defendant's desire to retain the marital home and therefore proposed to Plaintiff that he would buy her half interest in the home if she would sell it to him. Plaintiff agreed and a bargain was struck that in return for her one-half interest in the marital home the Defendant would purchase a brand new 1977 Toyota Celica automobile valued at $9,000 in return for that half interest. The $9,000 exceeded Plaintiff's one-half equity interest in the marital home. Defendant purchased the 1977 automobile and paid all monies out of his own pocket and gave Plaintiff a title free and clear to the automobile (page 141, 142, Volume I). In return the Plaintiff executed a Quit Claim deed to Defendant conveying her interest in the marital home which was properly executed and duly recorded with the Salt Lake County Recorder's office (page 14, Volume I).

On the day of the final separation the Defendant told Plaintiff she could have any or all of the marital property of the parties. The Plaintiff

removed herself, her personal belongings, bedroom set; everything out of the kitchen including, but not limited to silverware; dishes; pots; pans; food processor; blender; electric fry pan; microwave oven; three volumes of cookbooks; all utensils; the racks out of the kitchen drawers; clock radio; living room couch; a check from the Defendant for $1,000; took with her without Defendant's knowledge a Chevron creditcard, a Conoco creditcard; personal pictures of Defendant and moved them to St. George, subsequently charging gas for friends automobiles

Plaintiff unknown to Defendant moved in with Dennis Rogers after a lengthy courtship, in May 1981 and filed for divorce on June 22, 1981 wherein she asked that the marital home be sold and the proceeds be split equally between them; that she be given the Toyota that was already in her name; wanted additional marital property from the house; one-half of the business; wanted the $6,000 back; attorneys fees; temporary alimony in the amount of $300 per month and a Restraining Order to keep Defendant away from her whom she hadn't seen in nine months. Plaintiff filed for divorce in the District Court of Washington County in St. George, Utah which is approximately 300 miles south of Salt Lake City (page 1, Volume I).

Defendant answered Plaintiff's Complaint and Counterclaimed against the Plaintiff for divorce on the grounds of adultery and desertion as well as contravened her allegations (page 7, Volume I).

Plaintiff moved for a Temporary Restraining Order and Order to Show Cause to be held on Wednesday, the 9th day of September, 1981 at the hour of 10:00 A.M. in the Washington County Courthouse (page 6, Volume I). Defendant properly filed a Motion for Continuance on the grounds that the Defendant had been Subpoenaed to appear in another matter in Los Angeles, California and that Defendant had submitted Interrogatories (page 20, Volume I) and Requests for Admissions (page 16, Volume I) which he needed the answers thereto in order to prefer to the Court matters of proof in behalf of the Defendant to defend at the Order to Show Cause Hearing. Defendant's counsel talked to, by telephone,

Plaintiff's counsel about the Continuance in which Plaintiff's counsel agreed to the Continuance which was memorialized by letter (page 75, Volume I). On the date of the Hearing Plaintiff's counsel appeared in Court where Judge Robert F. Owens of the Circuit Court ~~was~~ sitting as Judge Pro-Tempore heard Plaintiff's counsel's objection to the Continuance and the Court's Order was that Defendant having failed to appear and make arrangements for counsel to appear for this Hearing, went ahead and granted the Temporary Restraining Order and granted Plaintiff $300 per month as Temporary Support pending Hearing on its merits (Minute Order between page 43 and 44, Volume I). Defendant's counsel's Motion for a Continuance. (page 51 and 52, Volume I).

Plaintiff's counsel made the following Motions and Notice of Hearings:

1. Request for Entry on Land (page 68, Volume I).

2. Notice of Taking Deposition of Defendant (Between page 69 and 70, Volume I).

3. Motion for Entry on Land and Notice of Hearing for October 14, 1981 (page 110, Volume I).

4. Motion to Amend Complaint and Notice of Hearing for October 14, 1981 (page 112, Volume I).

5. Notice of Hearing on Defendant's Motion for Protective Order Against Taking Defendant's Deposition in St. George on October 14, 1981 (page 100, Volume I).

Defendant's counsel made the following Motions, Objections and Notice of Hearings:

1. Objection to Court's Order granting Plaintiff's Temporary Restraining Order and Order to Show Cause and Notice of Hearing for October 14, 1981 (page 70, 73, Volume I).

2. Notice of Objection to Plaintiff's Interrogatories and Request for Production of Documents (page 78, Volume I). Motion for Protective Order on Limitation of Discovery (page 79, Volume I) and Notice of Hearing for Oct-

ober 13, 1981 (page 83, Volume I).

3. Objection to Request For Entry on Land (page 89, Volume I).

4. Objection to Taking Defendant's Deposition in St. George and Motion for Protective Order (page 86, Volume I).

5. Motion to Compell Discovery and Notice of Hearing for October 14, 1981 (page 114, 116, Volume I).

On the 13th day of October, 1981, Defendant and counsel were in St. George for the aforementioned hearings. While walking toward the Courthouse in St. George the Defendant was stopped by the Plaintiff who stated that it had never been her desire to pursue the divorce this far and just wanted to get out of the marriage. Defendant told Plaintiff to go back and tell her counsel this. Which she did and the aforementioned hearings scheduled for October 13 and 14, 1981 were Continued without date by Stipulation of the Parties (Minute Order on Continuation without date between page 122 and 123, Volume I).

Plaintiff's counsel Noticed up a Hearing for February 9, 1982 for a Motion to Compel Entry on Land (page 125, Volume 1). Defendant Countermotioned (page 127, Volume I). The Honorable J. Harlan Burns granted Plaintiff's Motion (page 132, Volume I). Defendant then objected to the Court's Order (page 134, Volume I). Defendant then timely appealed the Court Order to the Utah Supreme Court. (page 174, Volume I). The appeal was filed with the Supreme Court (page 180, Volume I).

Subsequent to the appeal and prior to the Supreme Court remanding the appeal to the District Court for further proceedings on June 6, 1982 (page 268, Volume 1), Plaintiff Motions the Court for injunctions for an Order refusing to allow Defendant to oppose Plaintiff's claims pertaining to the ownership and value of the house at 8950 Alpen Way, Sandy, Utah. (page 141, Volume I). Plaintiff Noticed up the Hearing for March 8, 1982.

The Honorable Maurice D. Jones sitting as Judge Pro-Tempore granted Plaintiff's Motion (Minute Order between page 157 and 158, Volume I). Plaintiff's counsel then prepared the Order which states that Plaintiff has a vested one-half equity interest in the house and that the Quit Claim deed was recorded without Plaintiff's consent which appears to be contrary to Court Order (page 159, Volume I).

On the 29th day of April, 1982, Defendant made a Motion for Cursory Hearing to fully determine Plaintiff's entitlement to a divorce from the Defendant with the Court reserving all questions as to support, property division and other matters prayed for in Plaintiff's Complaint to be heard later (page 181, Volume I).

The Court granted the Motion to Bifurcate (Minute Order between pages 186 and 187, Volume I), and the divorce trial came on before the Honorable J. Harlan Burns on May 28, 1982.

Plaintiff came to Court five (5) months pregnant wherein the Court granted the Defendant a Divorce from the Plaintiff on the grounds of adultery and the Court granted the Plaintiff a Divorce from the Defendant on the grounds of Mental Cruelty (Minute Order between pages 266 and 267, Volume I).

Subsequent to the divorce trial Defendant Motioned the Court for a Change of Venue on the property matters. The real property of the parties is located in Salt Lake County and there was a Quit Claim deed in dispute (page 87, Volume II). The Court denied Defendant's Motion for Change of Venue on October 21, 1982 (page 123, Volume II).

Defendant filed a Protective Notice of Appeal (between pages 122 and 123, Volume II).

Defendant could not appeal the Denial of Change of Venue until January 15, 1983 (page 139 and 140, Volume II) because the Court failed to make a Minute Order in its records on October 21, 1982 and did not make any Minute Order in its records until January 11, 1983 (Minute Order between pages 139

and 140, Volume II) after Defendant's counsel wrote the Court requesting a Minute Entry be made or Defendant be granted another Hearing in the Motion for Change of Venue. The Court signed Defendant's Order denying Change of Venue on January 11, 1983 (page 125, Volume II).

On the afternoon of January 18, 1983, Anthony Thurber, Attorney at Law and witness for the Plaintiff called Defendant's lawyer's office and stated that he heard an appeal had been made and wanted to know if it was true. On affirmation he stated that it should stop the trial scheduled for the next day and therefore he would not appear in St. George.

There had been correspondence between counsel on Mr. Thurber testifying against Defendant. (Letters found between pages 130 and 131, Volume II).

To protect Defendant's interest his counsel sent a Motion for Continuance on January 18, 1983 by Greyhound Bus to be delivered by taxi to the Court on the day of scheduled trial. (Motion not in records sent to the Supreme Court).

The trial was held on January 19, 1983; Anthony Thurber appeared and testified; and Defendant's Motion for Continuance was denied.

Defendant appealed.

ARGUMENT

I.

THE LOWER COURT ERRED IN RULING THE QUIT CLAIM DEED DATED OCTOBER 23, 1977 AND FILED IN 1979 PERTAINING TO THE MARITAL HOUSE EXECUTED BY THE PLAINTIFF IS A NULLITY AND WAS WRONGFULLY RECORDED AND SHALL HAVE NO EFFECT AT LAW OR IN EQUITY AND PLAINTIFF/APPELLANT IS ENTITLED TO AN EQUITABLE LIEN IN THE AMOUNT OF $23,500 AGAINST THE MARITAL HOME.

Pursuant to Section 30-2-3 U.C.A. (1953 as amended) Conveyances between husband and wife, "A conveyance, transfer or lien executed by either husband or wife to or in favor of the other shall be valid to the same extent as between other persons." "Conveyances by one spouse to the other of

an interest held by the entireties have usually been upheld, the statutes generally authorizing conveyances between husband and wife being construed to include such interests." The necessary assent or joinder of the other spouse has been held to be supplied by the act of accepting the conveyance. 8 ALR 2d 634 Section 1. Consent and approval of the wife to the conveyance in the case at bar was indicated by the fact that she signed the deed, the deed was acknowledged and the husband subsequently took charge of the property and later recorded the deed, she thereby consenting to the termination of the entirety. The payment of consideration i.e. Toyota Celica, delivery, and recording of the deed is said to constitute such joint action and mutual assent as were required to destroy the estate. The Court adding that to require the formal joinder of the wife (husband in this case) in conveying to herself would be "wholely unnecessary" 8 ALR 2d 638. A deed by a wife to her husband of her interest in land held by them by entirety was held in ELSON v. ELSON 245 Mich 205, [illegible] NW 176 (1928) to be affective to convey to him all her interest in the land, the Court saying that although the concurrence of both spouses was required to sell, encumber or defeat in any way an estate by the entireties where one spouse deeded directly to the other, both did act, one by giving, and the other be accepting the deed. The Court said that the situation was analagous to the release by a wife of her inchoate right of dower by a deed directly to her husband which had ~~been~~ uniformly been held as valid 8 ALR 2d 638.

In JONES v. LEWIS 243 Nc 259 90 SE 2d 547 (Nc 1955) "A conveyance from one spouse to the other of an interest in an estate held by the entirety is valid as an estoppel when the requirements of law are complied with in the execution thereof." In the case at bar the Defendant has complied with statutory requirements as to validation of instruments purporting to convey property of a married woman to wit: the Quit Claim deed, Plaintiff not being lacking in capacity to execute such an instrument, therefore such instru-

ment is free from detective execution. In the case at bar the dates of the purchase installment agreement to wit: October 7, 1977, and the date of Quit Claim deed, October 23, 1977, should not be considered by this Court as being merely coincidental in light of the rocky relationship of the parties concerned. In many jurisdictions the woman purporting to convey transfer of property may disavow or dissafirm the conveyance, however her right to do so is subject, in some jurisdictions, to certain conditions as the "restoration of the consideration received." 41 AmJur 2d Section 72, page 154. In the case at bar the restoration of consideration has not been received. No evidence was presented at the trial Court which would proffer the Toyota Celica as being a gift to the Plaintiff.

The law presumes that a wife in conveying property to her husband intends her act shall have the affect that it purports to have on its face and that she parts with all interest in the property conveyed. The trial Court erred in not honoring Plaintiff's and the Defendant's desire to work out their own settlement as to an equitable distribution of property in anticipation of separation and or divorce. Further the trial judge should have made a determination as to the property settlement or conveyance with respect to the date of the conveyance, and number of separations to that date. The trial Court's decision encourages litigation by disavowing the rights of spouses to make their own settlement, only to have a Court make some other determination at a later date, regardless of nuptual agreements that have been earlier agreed upon. This further encourages litigation by discouraging attempts to reconcile differences and pursue agreements between spouses; this being clearly against public policy.

Pursuant to LAND v. LAND 605 P2d (Ut 1980) "Equity is not available to reinstate rights and privileges voluntarily contracted away simply because one has come to regret the bargain made." "Where possible, the underlying intent of a contract is to be gleaned from the language of the instrument itself

In the case at bar the Court should uphold the validity of the Quit Claim deed as yielding to the demands of modern life.

In WOODWARD v. WOODWARD 656 P2d 431 (Ut 1982) the Supreme Court states "whether resources subject to distribution in divorce proceedings does not turn on whether a spouse can presently use or control or whether resource can be given present dollar value: essential criterion is whether a right to the benefit or asset has accrued in whole or in part during the marriage and to the extent that right has so accrued it is subject to equitable distribution." In light of the numerous (11) separations of the litigants; in light of the fact that Defendant made all payments from his sole and separate assets with regard to the marital home ~~Defendant~~ Plaintiff clearly should not be awarded any rights therein.

In DEROSE v. DEROSE 19 Ut 2D 77, 79, 426 P2d 221, 222 (1967). "While the determination of the trial Court is given defference and not disturbed lightly, changes should be made if that seems essential to the accomplishment of the desired objective of the decree, that is to make such an arrangement of the property and economic resources of the parties that they will have the best possible opportunity to reconstruct their lives on a happy and useful basis for themselves," free from the burden of manifest injustice.

Pursuant to GRAMME v. GRAMME 587 P2d 144 (Ut 1979) "In the distribution of marital property there was no fixed rule or formula, thus trial Court's responsibility is to endeavor to provide a just and equitable adjustment of parties economic resources so that parties might reconstruct their lives on a happy and useful basis." § 30-3-5 UCA 1953 (As Amended)

The Supreme Court of the State of Utah should consider the award of one-half interest in the home located at 8950 Alpen Way, Sandy, Utah a manifest injustice in that the trial Court did not consider all relevent factors in the making of such distribution including the financial and personal situation of the Plaintiff, i.e. the number of separations, being pregnant by a-

mother man during the marriage to Defendant etc.

Should the Supreme Court of the State of Utah in its equity choose to set aside the Quit Claim deed and proceed with a division of marital assets, Defendant would cite CLAUSEN v. CLAUSEN, Supreme Court of the State of Utah Case No. 17864 filed December 5, 1983. Although the factual situation in CLAUSEN v. CLAUSEN is somewhat different than in the case at bar the time since the filing of this action has been roughly the same. Throughout this extended litigation pursuing her life and since the decree of divorce her marriage in St. George. Throughout this ongoing litigation Plaintiff has contributed nothing to the marital estate while the Defendant has made the monthly payments etc. on the home in Salt Lake County thereby increasing his equity. Any award of any interest in the marital home would allow her to profit from an investment which the Defendant made with his "separate" funds. It would now be unfair "to declare she had an interest in the present value in the house and perhaps force him to sell the residence to pay her an interest of the equity."

Both parties agree that while the property settlement is not binding upon the trial Court in a divorce action such agreement should be respected and given considerable weight in the Court's determination of an equitable division citing JACKSON v. JACKSON, Ut 617 P2d 338 (Ut 1980); KLEIN v. KLEIN, 534 P2d 472 (Ut 1975); MADSEN v. MADSEN 2 Ut. 2d 423,276 P2d 917 (1954). The Court in its consideration of this case should not award any interest in the marital home to the Plaintiff due to (1) the existance of the acknowledged Quit Claim deed, (2) the increase in equity in the marital home was soley due to the Defendant's outlay of his own assets, (3) in the instant case a contract existed between Plaintiff and Defendant. There was obviously an offer of an automobile for one-half of the equity in the marital home, at that time (Offer) (the automobile being worth more than the half interest of the equity in the home at that time). The offer was accepted and the consideration (auto

mobile) passed from Defendant/Appellant to Plaintiff/Respondent. The return of the consideration not having been returned to Defendant. See 41 AmJur 2d. Section 142 "Avoidance or Disaffirmance." Page 154.

II.

THE LOWER COURT ERRED IN GRANTING PLAINTIFF/RESPONDENT THE SUM OF $5,023.75 TO EQUITABLY REIMBURSE HER FOR HER MONETARY CONTRIBUTION TO THE BUSINESS.

The lower Court erred in granting Plaintiff/Respondent the sum of $5,023.75 to equitable reimburse her for her monetary contribution to the business. In LOVE v. OLSEN 645 P2d 861 (Col. CA Div 1, 1982) the Court stated that "wife's financial contribution to marriage was a gift rather than a loan where there was no note executed, no interest agreed to or paid, and no other testimony that the aprties intended the contribution to be paid."

41 AmJur 2d, Section 87 - Presumption of gift to husband. "Some authorities follow the rule that a husband's receipt and use of the property or money of his wife with her knowledge and consent does not establish between them the relation of debtor and creditor, or give rise to a trust or a presumption of trust for her use. On the contrary, it gives rise to a presumption of gift from her to him, to be used for the benefit of either or both of them at his discretion, and the wife must prove any trust or promise by the husband to repay her.

III.

THE LOWER COURT ERRED IN NOT GRANTING DEFENDANT/APPELANT'S MOTION FOR CHANGE OF VENUE AFTER BIFURCATING THE DIVORCE ACTION INTO A TRIAL FOR DIVORCE AND A TRIAL FOR PROPERTY SETTLEMENT.

The lower Court erred in not granting Defendant/Appellant's Motion for Change of Venue after bifurcating the divorce action. Pursuant to Section 78-13-1(2) U.C.A. (1953 as amended) - Actions respecting real property. "Actions for the following causes must be tried in the county in which the subject of

the action, or some part thereof, is situated, subject to the power of the Court to change the place of trial as provided in this Code: (2) For the partition of real property. Pursuant to Section 78-13-7 U.C.A. "All Other Actions - in all other cases the action must be tried in the county in which the cause of action arises or in the county in which any Defendant resides at the commencement of the action . . . " Mr. Lord at no time resided with his spouse in Washington County, however did reside in Salt Lake County during the course of the marriage. The "cause of action: thereby arose in Salt Lake County leaving jurisdiction in Salt Lake County. SCHRAM-JOHNSON DRUGS v. COX 79 U. 276, 9 P2d 399 (Ut 1932) "If cause of action arose only in county of Defendant's residence his privilege to have place of trial changed to that county cannot be defeated by a sham or frivolous pleading . . . "

Pursuant to Section 78-13-9(3) U.C.A. (1953 as amended) - Grounds. "The Court may on Motion change the place of trial in the following cases: when the convenience of witnesses and the ends of Justice would be promoted by the change."

IV.

THE LOWER COURT ERRED IN GRANTING PLAINTIFF/RESPONDENT ATTORNEYS FEES IN THE SUM OF $9,000.

Under Point IV - The Court erred in awarding Plaintiff/Respondent attorneys fees in the amount of $9,000. The decision to award or not to award attorneys fees is within the allowable range of the trial Court's discretion. ADAMS v. ADAMS, 593 P2d, 147, 149 (Ut 1979). In KERR v. KERR, #17441, a 1981 Utah Supreme Court case held that the Court should take evidence as to comparative incomes and separate estates of the parties. This is the normal basis on which attorneys fees are allowed or not allowed by the trial Court.

In the case at bar the Plaintiff has had a prolonged love affair with, lived with and became pregnant by another man while still married to the De-

fendant. Therefore, the question arises "why should the Defendant be required to pay the attorneys fees of an adultrous Plaintiff, in a divorce action, so she can marry the man who alienated her affections and got her pregnant?" To require the Defendant to pay those attorneys fees in this case would result in an unjust enrichment for the Plaintiff.

There is clearly an alienation of affection by a Third Party of the Plaintiff from the Defendant. In the case of WILSON v. OLROYD, ~~342~~ 267 P.2d ~~94~~ 259 (Ut 1954) the Court affirmed the use of the following jury instructions:

> "So long as the married status continues between a husband and wife, the law presumes that there is a possibility of reconciliation even though they have been estranged or have had marital differences."

The Court further stated that the true meaning of the jury instruction:

> "It is therefore wrongful and unlawful for another man to court or make love to a married woman or to willfully encourage her to give up her affection, if any, for her husband. If this were not so any person could, with impunity make love to a married woman where there has been friction or estrangement; such is not the law.

In this case it is not equitable for the law to require the cuckold Defendant to pay the attorneys fees of an adultrous Plaintiff who wants to get divorced so she can marry the man who alienated her affection and made her pregnant.

Under Section 30-3-5 U.C.A. (1953 as amended) denies alimony to any former spouse when it established that the former spouse is residing with a person of the opposite sex and the association or relationship between them is with sexual contact. Therefore it would follow that the same rationale and logic would hold true in this case in the awarding of attorneys fees.

V.

THE LOWER COURT ERRED IN NOT GRANTING DEFENDANT/APPELLANT'S MOTION FOR TRIAL CONTINUANCE AND HOLDING THE TRIAL IN HIS ABSENCE.

Point V - The trial Court erred in bringing the case at bar to Judgment in light of the circumstances of the case.

The matter was scheduled for the second trial on January 19, 1983 to decide matters of property prior to that date the Defendant had filed a Motion for Change of Venue which was denied by the above-entitled Court on October 21, 1982. Defendant and his counsel were present at that Hearing which was heard in the Judge's chambers. Subsequent to that Hearing the Defendant filed a Protective Notice of Appeal indicating that he wanted to appeal the decision of the denial of Change of Venue because it had a bearing on the outcome of the case. In the interim, the Defendant's counsel discovered that no notation had been made in the Minute Entry by the Judge, Denying Change of Venue. Defendant's Counsel wrote a letter to the Court stating that in order for the records to go up to the Supreme Court it was necessary that a Minute Entry be made on the Minute Order as well as an Order signed by the Judge denying the change of venue. That if the Judge was not going to make a Minute Entry as to the denial then the Defendant requested that he be granted another Hearing on the Motion to Change Venue so that it could be properly entered into the Court's records or otherwise the Court should make said entry in its records. The Court, finally, on January 11, 1983 signed the Order that Defendant's Motion for Change of Venue had been denied.

The Defendant at that time then appealed the Order of the Court and checked with the Court on January 18, 1983 to determine if the appeal had been received and was being processed and the Court so indicated in the affirmative. However, the Court did not process Defendant's appeal to the Utah Supreme Court until January 24, 1983. Two days subsequent to that date,

the Court then signed a purported Order written by Plaintiff's attorney stating that the ruling denying the Motion for Change of Venue was interlocutory only and thereby not appealable.

Once a District Court has submitted a matter to the Utah Supreme Court on appeal, all further proceedings in the lower Court come to a standstill until it is either ruled upon by the Supreme Court or remanded to the lower Court for further action. Even if the ruling denying Change of Venue is interlocutory in nature, once that matter has been submitted to the Utah Supreme Court, the only alternative avenue which opposing counsel has open to him is to raise the issue at the Supreme Court for the purpose of having the appeal denied, and even in that instance the District Court is without power to proceed further until the Supreme Court rules.

Overlaid with the fact that the key witness for the Plaintiff called defense counsel the night before the trial in question and stated that because the appeal had been made he would not make an apearance in Court the following day also helped to mislead Defendant and his counsel that the trial was not going to go forward the next day.

In GONZALES v. HARRIS, 542 P2d 842 (Colo 1975) "Attendance of the litigant is necessary for a fair presentation of the case and thus absence of the litigant constitutes a good reason for a Continuance." Trial Court's legitimate concern for prevention of delay should not prejudice the essential rights of parties by forcing them to go to trial without being able to fairly present the case. Particularly, when actions on the part of the Court has prejudiced the litigant's case by not making lawful entries in its records as to the outcome of a particular Hearing. In light of the Court's knowledge of the appeal being processed and the fact that a late entry was made in its records as to the denial of the Motion for Change of Venue, particularly when that matter, has an outcome on the bearing of the case, the Court should not have proceeded with the trial. Considering that four judges have participated

in this matter, the trial court at [illegible] as to its understanding of the case and therefore we have a form over substance dicotomy as to procedure.

As in RYFFEUL v. RYFFEUL 630 P2d 369 (Al 198[illegible]) "Absent compelling circumstances to the contrary party to a proceeding such as hearing in a divorce case has the right to be present regardless of whether he is in a position to affect the outcome of the proceeding." Litigants should have the protection of their "day in Court." JOHNSON v. JOHNSON 544 P2d 65 (Al 1975).

CONCLUSION

The Supreme Court of the State of Utah should reverse or in the alternative remand for further proceedings the trial Court's ruling that the Quit Claim deed dated October 23, 1977 and filed in 1979 pertaining to the marital house and executed by the Plaintiff is a nullity and was wrongfully recorded shall have no affect at law or inequity and Plaintiff/Respondent is entitled to an equitable lien in the amount of $23,500 against the marital home.

The Supreme Court of the State of Utah should reverse or in the alternative remand proceedings the ruling of the lower Court granting the Plaintiff/Respondent the sum of $5,023.75 as reimbursement for her monetary contribution to the business of Defendant/Appelant David George Lord.

The Supreme Court of the State of Utah should find that the lower Court erred in not granting Defendant/Appellant's Motion for change of venue after bifurcating the divorce action into a trial for divorce and a trial for property settlement.

The Supreme Court of the State of Utah should reverse or remand to the lower Court for further proceedings the lower Court's ruling in granting Plaintiff/Respondent attorneys fees in the sum of $9,000.

The Supreme Court of the State of Utah should find that the trial Court erred in not granting Defendant/Appellant's Motion for Trial Contin-

dance and holding the trial in his absence.

Respectfully submitted this 15th day of January, 1984.

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CERTIFICATE OF MAILING

I hereby certify I mailed a true and correct copy of the foregoing Brief of Appellant via U. S. Mail, postage prepaid this 16 day of January, 1984 to the following:

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