1983

Rainer F. Huck v. Patricia Ann Huck : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

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RAINER F. HUCK,

Plaintiff-Appellant,

vs. Case No. 19180

PATRICIA ANN HUCK,

Defendant-Respondent.

- -

BRIEF OF APPELLANT

- -

Appeal from the Judgment of the
Third Judicial District Court, Salt Lake County
Honorable James S. Sawaya

- -

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NATURE OF THE CASE

This is a divorce action between Plaintiff and Defendant in which the parties originally asked for a judicial determination regarding property rights, alimony, child support, and child custody. The sole issues on appeal, however, concern the property distribution, award of temporary alimony, and attorneys' fees.

DISPOSITION IN LOWER COURT

The original Complaint was filed by Plaintiff against Defendant in April of 1979. The court file will reflect numerous events which occurred from that time until the filing of this appeal. These events included a dispute as to which party should live in the residence, an effort by Defendant to disqualify Plaintiff's attorney, several hearings concerning

child support and custody, two pre-trial efforts to segregate property before trial, and finally, a two-day trial before the Honorable James S. Sawaya involving some ten witnesses and numerous exhibits.

The lower court rendered a Memorandum Decision in April of 1981. (R. 397-398). The Findings of Fact and Conclusions of Law in accordance with the decision were entered in June of 1982. In April of 1983 Plaintiff's Motion to Alter or Amend the Findings was denied.

Plaintiff now appeals from the judgment entered against him and the Findings of Fact and Conclusions of Law in support thereof.

RELIEF SOUGHT ON APPEAL

Plaintiff-Appellant seeks reversal of the lower court's judgment in the following particulars: vacation of any award for temporary alimony, vacation of any award for temporary attorneys' fees, and modification of the property distribution.

STATEMENT OF FACTS

The present appeal before this Court is truly unique. After reviewing numerous divorce actions decided by this Court it is not an exaggeration to say that the present case involves elements, both factual and legal, which have never been previously litigated. The attorneys for both parties, together with the lower court judges, all have acknowledged the difficulty in solving and dealing with the unique facts in this case and the unusual legal issues involved.

For this reason, Appellant will attempt to eliminate those facts which are not related to issues relevant to this appeal. For example, while the question of child custody, visitation, and child support were hotly contested in the lower court, Appellant believes that the lower court did not abuse its discretion in making these awards. Therefore, even though Appellant feels strongly about the child related issues, the evidence relating to these issues will not be discussed herein.

The heart of this appeal concerns the validity of a pre-nuptial agreement, the circumstances surrounding the marriage and the acquisition of certain real estate by Plaintiff, and the ability of Defendant to support herself after the separation of the parties and during the pendency of the divorce. Thus, a history of the marriage of the parties, their relationship during the marriage, and the financial ability of each party after separation are all relevant to this appeal.

Appellant recognizes that this Court has the power under the Utah Constitution to completely review all of the evidence de novo in spite of the lower court's findings. However, Appellant is also aware that this Court will defer to the lower court's decision unless there is clear abuse or misapplication of the law. Stone v. Stone, 431 P.2d 802 (Utah 1967). For this reason, and for the convenience of the court, Plaintiff shall state these facts most favorably to the defendant-wife. When there is a factual dispute in which the court's decision is subject to dispute, Appellant shall state such contrary evidence in brackets. It is hoped that by using this method this Court will

be able to quickly review all of the evidence that was available to the lower court in making its decision and will be able to determine quickly whether the lower court ignored substantial evidence in support of the arguments raised by Plaintiff.

EVENTS PRIOR TO MARRIAGE RELATING TO PLAINTIFF

Plaintiff Rainer Huck (hereinafter Rainer) entered the University of Utah in 1964 and obtained a B.S. degree in 1968. (Tr. 441). In 1968 he entered a graduate program in electrical engineering. By 1971 he had completed most of his classwork and was working on a dissertation entitled "Critical Re-examination of the Special Theory of Relativity." (Tr. 443).

This thesis was submitted by the engineering department to the physics department for its comments. The physics department rejected the theory proffered by Mr. Huck and rejected the paper. (Tr. 445).

Nevertheless, Mr. Huck believed that the theory known as the "Reciprocal System Theory" had great scientific promise and felt that it was worthy of a lifetime career goal. He knew, however, based upon his experience with the physics department that it would be very difficult for him to obtain any funding to do this type of work through conventional sources. He therefore decided to endeavor to establish an independent fund for himself so that he could continue his research independently. (Tr. 445-446).

In 1974 Mr. Huck obtained his Ph.D. degree from the University of Utah in electrical engineering by submitting a

completely unrelated dissertation to the one previously rejected by the physics department.

In 1971 he purchased his own home at 1195 South Windsor Street. He purchased the home with his own funds and from money lent to him by his father. (Tr. 443).

In 1972, as part of his plan to develop rental properties, he purchased another property at Lindon Avenue. This property was jointly owned between Mr. Huck and his close personal friend, Craig S. Cook, who was his trial counsel and is now his appellate counsel. (Tr. 448). Prior to his marriage he purchased the following additional houses for rental property: 923 South 4th East (jointly with Mr. Cook); 837 Menlow Avenue (jointly with Mr. Cook); 1161 Bueno Avenue (jointly with Mr. Cook); 227-229 Iowa Street (jointly with Mr. Cook); 334 Stanton Avenue, 633 Grand Street; 1127 Milton Avenue.

During this period of time Mr. Huck was continually reading and researching concerning the scientific theory he wished to advance but was also putting in a great deal of time with the rental properties. He was instrumental in founding the "New Science Advocates" which was an organization dedicated to the study and evaluation of the Reciprocal System. He became treasurer of that organization. (Tr. 473).

PRE-MARITAL RELATION OF THE PARTIES

In 1972 he met his future wife Patricia Huck (hereinafter Pat) at a party given by Stan Secor. Throughout 1973 and 1974 he began dating her more frequently perhaps two or three times

a week. At that time Pat was working in the Ph.D. program in biology and had been there since 1970. (Tr. 448-449).

As they continued to date there were substantial problems and personality differences causing a lot of arguments. (Tr. 450). During the latter part of 1974 the parties had a discussi in which Pat said she was leaving Salt Lake when she completed her Ph.D. degree which would be in about six months. They agreed that they would continue dating until that time. (Tr. 453, 662). For the two years they had been dating the parties had had a sexual relationship and Pat had used contraception to prevent pregnancy. Shortly after the conversation in the middle of December, however, she became pregnant. (Tr. 663).

In 1975 Rainer was 28 and had never been married. Pat was 33 and was a widow from a prior marriage. (Tr. 348). In January of 1975 Pat informed Rainer that she was pregnant. At that point in time marriage was discussed in great detail but Rainer felt the problems were still inevitable and that a marriage would not be advisable. (Tr. 454). As stated by Pat, Rainer did not want to marry her. (Tr. 663).

Pat went to Rainer's parents and told them about the situation. She asked them to try to convince Rainer to marry her. (Tr. 455). She stated she thought that his mother would like to have grandchildren and would encourage the marriage. (Tr. 664

A great deal of discussion occurred during the early months of 1975 as to the alternatives which were available. Rainer suggested that Pat obtain an abortion since he did not believe that a child should be brought into a situation where the partie

were doomed to be unhappy. (Tr. 454, 613). Pat did not want an abortion and was happy to be pregnant. She told Rainer that she wanted to have a child and intended on having a child. (Tr. 613).

[Rainer testified that Pat repeatedly told him that if he did not marry her she was going to commit suicide. She began leaving her valuable possessions on his doorstep on a daily basis saying that she would not need them any more. (Tr. 455). Pat denied ever threatening suicide or ever leaving possessions on his doorstep. (Tr. 663)].

THE SIGNING OF THE PRE-MARITAL AGREEMENT

Sometime in February or early March of 1975 Rainer agreed to marry her. He told her, however, that under these circumstances he thought they should have a prenuptial agreement. (Tr. 457). [Mr. Huck contended that he informed her of this pre-nuptial agreement almost a month before the marriage. (Tr. 457).] Mrs. Huck contended that she was not given the document until three or four days prior to the marriage. (Tr. 614).

The pre-nuptial agreement was prepared by Mr. Huck's attorney, Craig Cook. He asked her to take it to her attorney, Wally Sandack, so that he could examine it, counsel her, and execute his signature. Mr. Sandack advised her not to sign the document nor to marry Mr. Huck. He refused to sign the document himself. (Tr. 458; 615).

She returned the document to Rainer at which time he had it modified so as not to require any signature of either counsel. (Tr. 459).

Each party listed the assets which they were bringing into the marriage. A list of all the properties previously acquired by Rainer was attached to the prenuptial agreement including an additional notation of "cash and personal property" worth $15,000. It is stated in paragraph 2 that Pat brought into the marriage property worth approximately $1,000. [Mr. Huck testified that Pat supplied this $1,000 figure. (Tr. 461).] Pat testified that this figure was inserted by her husband and Mr. Cook and that since she believed she did not have adequate counsel they could go ahead and put in anything they wanted to. (Tr. 665).

The prenuptial agreement was signed on April 9, 1975 before a notary public. This was one day prior to the marriage which interestingly enough was performed by Judge Sawaya who also presided over the divorce trial.

EVENTS DURING THE MARRIAGE

Sophie Huck was born on September 21, 1975. (Tr. 467).

While this issue was contested below, for purposes of this appeal it will be assumed that Pat Huck performed the necessary duties as a housewife and mother. It should also be noted that from the time of the marriage up until July of 1978 Pat was actively pursuing her attempt to obtain a Ph.D. degree. As part of this program she was appointed a teaching assistant and taught every other quarter. She received a tax-free stipend of $375 a month during this period. (Tr. 615-616). Except for an additional $40 a month she received from a California invest-

ment, her sole independent income was limited to the governmental stipend. (Tr. 625; R. 113).

Rainer obtained the majority of his income from the rental houses which he had purchased prior to the marriage. (Tr. 475). He spent substantial time fixing up and dealing with the rentals. (Tr. 636).

Rainer testified that within the first week or two of the marriage the two parties had a conversation regarding property and finance. Pat said she wanted to keep her money separate and that he should likewise keep his separate. She wanted to divide the costs of living as equally as possible. (Tr. 464). He testified that he did not feel this was a good way to run a marriage but that if she wanted to do it that way there was no other alternative. (Tr. 465). Pat admitted that she felt hostile during the early part of the marriage because of a number of things including the prenuptial agreement. (Tr. 666).

The evidence shows that Pat maintained her maiden name at the University of Utah. Under this unusual marriage arrangement each party maintained their own separate checking and savings accounts. All rental money he received went strictly into his account. All money that she received from the University went into her account. (Tr. 471).

Under the agreement Rainer was to provide the house and pay the taxes and utilities with the exception of the electric bill which Pat agreed to pay. She agreed to pay the majority of the food, to maintain medical insurance on the family, and to provide the costs of her own automobile. (Tr. 472, 619).

In addition, she paid for the hospital and doctor costs involved with the birth of her daughter and for any babysitting fees. (Tr. 616-617). [Rainer testified that it was Pat's position that she did not want him to have anything to do with either the child or the expenses with respect to the child as was expressed in paragraph 4 of the prenuptial agreement. (Tr. 544).

The question of Pat's involvement in the marriage with the rental properties will be discussed in the legal argument concerning estoppel. Appellant believes that there was overwhelming evidence that she expressed repeatedly her desire to have no interest in any acquired properties and, in fact, refused to assist him in any way in this venture. More importantly, however Appellant shall state facts which show that he relied upon her representations during the course of the marriage on the mistaken belief that by assisting her and the child during her education she would make no claim against any betterment he may have made in the acquisition of new properties.

During the first year of the marriage, 1975, additional properties were acquired by Rainer. A property located at 629 Harmony Court was purchased on June 9, 1975. $3,000 was put down to acquire that house and the money was withdrawn from Rainer's savings account of premarital funds. (Tr. 507; Ex. 5).

In August of 1975 a duplex was purchased at 942-46 Harvard Avenue. The down payment for this property also came from Plaintiff's premarital funds which were withdrawn from a savings account. (Ex. 5, Ex. 6).

In 1976 an additional house was jointly purchased with Craig Cook utilizing premarital funds as Plaintiff's share of the down payment. This house was located at 860 Parkway Avenue. (R. 94, Ex. 5, Ex. 6). In addition, Plaintiff purchased two other houses in 1976 with money obtained from the rental income of the other properties. These houses were located at 215 Iowa Street and 848 Green Street (which was again purchased with Mr. Cook). (R. 93-94; Tr. 520).

In 1977 three additional properties were purchased. In September of 1977 a house at 653 Egli Court was purchased jointly with Mr. Cook. The money used by Rainer as his portion of the down payment was also withdrawn from his savings account which contained premarital funds. (Ex. 5, Ex. 6, Ex. 32).

During that same month a property located at 224 Iowa Street was purchased jointly with defendant Pat Huck. His share of the down payment was obtained on a loan from his father, Herman Huck. (Tr. 521; Ex. 5). Her share was obtained from an investment she sold in California. (Tr. 672-673). As will be discussed infra, while all of the other properties were solely in the name of Rainer Huck, the 224 Iowa Street property was in the names of both Rainer Huck and Patricia Huck, as tenants in common. (Ex. 5).

The final house that was acquired during the marriage was located at 639 Grand Street and was purchased in December of 1977. The money for this house was financed entirely by Plaintiff's father who received a mortgage and a note. (Tr. 509-510).

Once these houses were obtained they were all self-sustaining

in that they provided sufficient income to pay any encumbrances and expenses. (Tr. 509, 519).

In 1975 Mr. Huck added a garage to the back of the Windsor Street property with money lent to him by his father. (Tr. 466). In the summer of 1976 Mr. Huck and his father began building an addition to the Windsor Street property. The actual labor for the addition was performed by Mr. Huck, his father, and a few contractors. Approximately $12,000 was spent on the addition excluding the labor of Mr. Huck and his father. This money was withdrawn from Mr. Huck's separate account where the majority was funded by premarital rental properties. (Tr. 599-601, Ex. 13). Pat believed that all of the money for this addition came from Rainer's father. She did not contribute her separate funds for the project. (Tr. 680).

In 1977 Rainer testified that he experienced a frequent wave of telephone calls in which when he answered the caller would hang up. The relationship in 1977 was not good. The parties were not getting along very well and were living fairly separate existences. (Tr. 480). In the early part of 1978 because of these persistent telephone calls Mr. Huck fabricated a machine which would record all incoming and outgoing telephone calls in the Huck household automatically. The device was kept in Mr. Huck's electronic lab on the main floor of the house. (Tr. 483-485).

During cross-examination of Pat several of these conversations with Stan Secor were read into the record. (Tr. 649-660). One particular conversation which occurred in April of

1978 will be discussed infra as to Plaintiff's claim of estoppel.

In July of 1978 Pat took her qualifying Ph.D. exams and failed them. She was subsequently terminated from the Ph.D. program. (Tr. 490). In July of 1978 she began working full time at the University of Utah Blood Bank. (Tr. 494-495). Her gross monthly salary at the University of Utah at that time was $1,080. (R. 113).

Prior to Pat's failure of the examination and her employment with the University of Utah Hospital she retained attorney A. Wally Sandack to represent her in a divorce proceeding. On April 21, 1978 a letter was sent to Rainer advising him that his wife was planning on commencing a divorce proceeding and requesting that he be permitted to discuss financial matters, disposition of property and other items with Mr. Huck's attorney. (Plaintiff's Ex. 3). Rainer and Mr. Cook went to Mr. Sandack's office for the meeting and were informed that he wanted to know exactly what assets Mr. Huck had including his present income. (Tr. 489).

Pat Huck testified that the only reason she went to Sandack in 1978 was to see if he could persuade Rainer to seek counseling. According to Pat, Sandack's idea was that since it was obvious her husband was so concerned with financial matters that by making it appear that the divorce was going to cost him more than keeping her around that maybe he would reconsider counseling. (Tr. 686-687). [Rainer testified that Pat stated to him that she was going to sue for divorce but that later after the letter was sent she stated she acted too hastily and wanted to wait for

the divorce until her exams had been taken. He agreed to wait until the summer of 1978 in order to allow her to study.] In the summer of 1978 Pat seemed very distraught by the outcome of the exams and therefore Rainer did not wish to add to her problems by talking about a divorce. (Tr. 488-490).

In October of 1978 Pat was diagnosed as having cancer in one breast which required surgery. Her cancer was found to be non-evasive and she recovered quite rapidly. (Tr. 491).

EVENTS OCCURRING AFTER FILING OF DIVORCE

On April 23, 1979 Rainer initiated this divorce action. (R. 2-4). At the same time Rainer requested that he be awarded possession of the house during the pendency of the divorce. (R. 5-6).

A hearing was held on May 3, 1979 before the Honorable Homer Wilkinson. Defendant's attorney requested that Rainer be ordered to leave the house and allow Pat to remain there. (Tr. 841). Judge Homer Wilkinson awarded possession of the Windsor Street house to Rainer. He also awarded $250 per month for the use of the defendant during the pendency of the action. (Tr. 853-857; R. 27-28).

Subsequently on October 15, 1979, a hearing was held before the Honorable Christine Durham. While the hearing centered around visitation of the minor child, the court also allocated the $250 which had previously been ordered by Judge Wilkinson with $175 as child support and $75 for temporary alimony. The court noted that whether this alimony amount would be credited

to Mr. Huck would depend upon whether the prenuptial agreement was held valid and binding and whether it would have a retroactive effect to the pending action. (Tr. 829-830). Judge Durham refused to award attorneys' fees to either party since both of the parties were employed and earning income. (Tr. 832; R. 133-134).

Subsequently, a motion was filed by Defendant to disqualify Plaintiff's attorney Craig S. Cook from representing him in the lower court. Depositions of Mr. Cook and Rainer were taken by Defendant's counsel. The question was submitted to the Honorable Kenneth Rigtrup. Concurrently, Defendant requested that she be allowed to change her residence to California on the basis that her family resided there and that she had substantial career opportunity available in Los Angeles. (R. 179-180).

On June 24, 1980 Judge Rigtrup granted Defendant's motion to change residence and denied Defendant's motion to disqualify counsel. In addition, he entered an extensive pretrial order as to the issues remaining to be decided at trial. (R. 261-265). The court ordered that all property acquired prior to the marriage would be awarded to Rainer and would not be subject to division as a marital asset of the marriage with the exception of the 1195 Windsor Street residence which would be at issue because of the improvements. The court ordered that the parties provide each other with information regarding those properties which were acquired after the marriage.

Subsequently, on June 24, 1980 Judge Rigtrup awarded Plaintiff $250 attorneys' fees for his efforts in opposing the

efforts of Defendant to disqualify his attorney. (Tr. 326).

The trial was commenced on September 5, 1980 before Judge James S. Sawaya . A full day of testimony was taken. The trial was reconvened on December 19, 1980 before Judge Sawaya. During the trial Pat submitted an exhibit showing her gross monthly income from salary and wages to be $1,505. This was based upon a thirty hour work week. (Ex. 16; Tr. 625). In comparison, Rainer testified that his gross income during this same period of time was $14,300. (Tr. 791; Ex. 30).

Subsequent to the trial memoranda were filed by both parties in support of their respective positions. (R. 364-396; 399-409). On April 22, 1981 the lower court issued a Memorandum Decision awarding Pat Huck 224 Iowa Street (the property held jointly with Rainer Huck); 629 Harmony Court; and 215 Iowa Street. She was also awarded $3,000 as attorneys' fees. (R. 397-398).

On June 17, 1982 the lower court executed Findings of Fact and Conclusions of Law in accordance with the Memorandum Opinion but which also contained additional awards. (R. 410-417). While the court denied Defendant's claim for alimony, the court found "defendant was in need of temporary alimony and support and continues to need said temporary alimony and support until the real properties and any incomes derived therefrom have been delivered and transferred to her as of the date of this Court's Memorandum Decision in April of 1981." (R. 413).

The court further found that Defendant was coerced into executing the prenuptial agreement dated April 9, 1975 "in that she was already pregnant and had made arrangements for her

marriage prior to being requested to executed said document." The court noted that Plaintiff had not been prejudiced by the finding of the court concerning the invalidity of the prenuptial agreement.

On June 28, 1982 a Motion to Alter or Amend the Findings was filed by Plaintiff. (R. 423-425).

A hearing was held on April 7, 1983 at which time the lower court denied Plaintiff's motion to amend the decree. (R. 430). This appeal was filed on May 4, 1983. (R. 4).

ARGUMENT

A review of the file in the district court shows that many issues were raised by both parties throughout the proceedings. While plaintiff Rainer Huck does not necessarily agree with some of the other rulings made by the various district judges, he believes that these decisions were within the reasonable discretion of the judges and therefore does not contest them.

However, Plaintiff does contest three specific decisions made by the lower court concerning the following areas: (1) the finding that the prenuptial agreement was invalid thereby allowing the imposition of temporary alimony in favor of Pat; (2) the award of attorneys' fees in favor of Pat in spite of the failure of Pat to produce any evidence that she was unable to pay her own fees; and (3) the distribution to Pat of the houses located at 629 Harmony Street and 215 Iowa Street since the funds of Plaintiff used to purchase one house were pre-marital and Pat by her conduct throughout the marriage is equitably

estopped from now asserting any claim in these houses.

These arguments will now be discussed.

POINT I.

THE LOWER COURT ERRED IN INVALIDATING THE PRENUPTIAL AGREEMENT AND IN AWARDING TEMPORARY ALIMONY TO PAT.

The lower court in its Findings of Fact stated the following:

> 9. The Court finds the defendant was coerced into executing the prenuptial agreement dated April 9, 1975 in that she was already pregnant and had made arrangements for her marriage prior to being requested to execute said document. The court further finds that in either case, the plaintiff has not been prejudiced by a finding of this Court concerning the invalidity of said prenuptial agreement and that each and every aspect in the prenuptial agreement has been met and plaintiff has received remuneration for property brought into the marriage and defendant was in need of alimony and support for the benefit of herself and her minor child during the course of this action.

In its Conclusions of Law the court stated:

> The court concludes that the prenuptial agreement, dated April 9, 1975 should be void and of no effect against the defendant. However, in making this conclusion, it is recognized by the court that the plaintiff is not and has not been prejudiced by such a finding. (R. 414, 417).

The Findings of the court are in error. First, there is no reason that the prenuptial agreement between the parties should be considered void. Second, the failure to honor the prenuptial agreement has indeed prejudiced Mr. Huck.

Even if it is assumed that the testimony of Pat is correct as to the circumstances surrounding the prenuptial agreement there is still no basis for voiding it. Mrs. Huck

stated that the substance of the premarital agreement was presented several days before they were married. Four days at the most. She admitted that she sought legal counsel with respect to the document but that Mr. Sandack said he would not personally sign the agreement nor would he advise her to marry Rainer. Nevertheless, she then took it back to Rainer who had it modified so that it would not require the attorneys' signatures. (Tr. 614-615).

At the time the premarital agreement was presented, according to Pat, arrangements for the wedding had been made. Her parents were coming in from California and the printed invitations had been sent out. She stated that nobody knew she was pregnant except her husband and his parents. (Tr. 615). She testified on cross-examination that Rainer would not have married her had she not signed the agreement. She stated it almost kept her from marrying him since she was very disappointed and insulted that he would require her to sign it. (Tr. 666). She admitted further that the prenuptial agreement specifically waived all alimony. (Tr. 685).

There is no question that Rainer did not want to enter into this marriage. He did not believe the prospects of a successful marriage were good nor did he feel that a child should be brought into this type of situation. For many weeks he told her he did not think it wise to get married. (Tr. 454). He also verified that he would not have married her unless she agreed to sign the prenuptial agreement. (Tr. 540).

The prenuptial agreement was signed on April 9, 1975, one

day before the marriage took place. It was signed before a notary public.

The finding that the prenuptial agreement was void because of coercion by Mr. Huck is both factually and legally in error. While it is certainly true that Pat was pressured into signing the prenuptial agreement before Rainer would agree to marry her, it is equally true that Rainer was pressured by Pat to enter into a marriage in the first place. In other words, there was pressure from both parties against each other and if the prenuptial agreement is void becuase of coercion then the marriage itself should also be void.

The finding by the lower court is even contrary to the statements made by the court during the trial. The court in discussing the argument that Pat was coerced into signing the prenuptial agreement stated:

> They are both over 21, I take it when they got married or at least of legal age and certainly entered into this agreement or this marriage and agreement with their eyes open, obviously. (R. 452).

Even Defendant's counsel did not seriously oppose the validity of the prenuptial agreement during trial. During examination of Rainer by his counsel as to the circumstances surrounding the prenuptial agreement Mr. Sandack objected to that line of questioning and stated:

> Again, the prenuptial agreement is in. We agree that it may be valid. I don't see any necessity of going on with this any further. (Tr. 459). See also, Tr. 450-451.

While there are no Utah cases directly on point, prenuptial or antenuptial agreements entered into by two competent parties

are valid and enforceable and, in fact, favored by law. Clark, Law of Domestic Relations, §1.9, p. 27).

The prenuptial agreement entered into in this case (Ex. 1) is a legally binding contract between the two parties. At the time the contract was entered into Pat Huck was 33 years old and Rainer 28 years old. Both had consulted their attorneys prior to executing their signature and, in fact, Pat's attorney advised her against signing it. The standard for voiding a prenuptial agreement is no different than any other contract. In order to show legal coercion, the evidence must be clear, precise, and indubitable and must be shwon with clear and convincing evidence. Kelley v. Salt Lake Transportation Co., 116 P.2d 383 (Utah 1941); In re Swan Estate v. Walker Bank & Trust Co., 293 P.2d 682 (Utah 1956).

The Colorado Court of Appeals in Matter of Estate of Lewin, 595 P.2d 1055 (Colo. App. 1979) upheld the validity of a prenuptial agreement after one of the parties was deceased and after it was being attacked by the surviving spouse. In that case the surviving wife argued that an antenuptial agreement was invalid since her husband failed to list all of his assets in the document and that she was prevented from retaining outside counsel. The Colorado Appellate Court held that neither a listing of assets of the husband nor independent counsel was necessary to validate a prenuptial agreement. (Here, of course, Rainer both listed his premarital assets in the agreement itself and Pat was counseled by her own attorney before electing to sign it.)

The court stated, "The primary imquiry is whether the parties entered into the agreement with full knowledge of it consequences." Id. at 1058.

The lower court's finding that because invitations had been sent out and because the wedding had been planned is legally insufficient to amount to "coercion" to invalidate a written agreement. The evidence is crystal clear that even assuming that Pat had only four days to review the documents (as opposed to Mr. Huck's testimony that she had over thirty days) that there was ample time for her to knowingly make a decision whether to sign the document. The fact that she went to her attorney who specifically advised her against it but nonetheless signed it anyway shows that she knowingly and consciously executed the document on her own free will.

Since the prenuptial agreement in this case was clearly valid it next remains to determine whether Mr. Huck was prejudic by a finding of its invalidity. Paragraph 6 of the prenuptial agreement states:

> In the event of divorce or separation, Pat specifically waives any alimony or separate maintenance support provided that she is capable of self support at such time. (Ex. 1).

In the May 3, 1979 hearing before the Honorable Homer Wilkinson the court ordered that Rainer pay to Pat $250 for the use of her and the child during the pendency of the action. (Tr. 853-857).

On October 15, 1979 the Honorable Christine Durham allocated this amount with $175 going as child support and $75

going for alimony. Judge Durham noted that whether Rainer should receive a credit for the temporary alimony paid to Pat would depend on whether at trial the prenuptial agreement was found to be valid and binding and whether it would have a retroactive effect. (Tr. 830).

Rainer paid Pat $75 from May of 1979 through May of 1981 specifically as temporary alimony. This amount of $1,800 was never credited to him in the judgment of the court. Thus, he sustained $1,800 of "prejudice" by the finding of the invalidity of the prenuptial agreement.

Pat argues that in any event she was not capable of self support at the time and therefore even if the prenuptial agreement was valid the waiver of alimony did not apply. This argument again flies against the evidence. In the summer of 1979, when Pat separated from Rainer, her total gross income was $1,140 a month. This did not include the $250 which was being paid to her by Rainer under the court's order. Thus, her total gross was $1,390. (R. 113). In 1980 after moving to California her gross income including her salary at the University of California Hospital (32 hours a week) plus her contract payment, and her child support and temporary alimony award amounted to $1,795. (Ex. 16, Tr. 707).

The trial court should have objectively viewed whether Pat was capable of "self support" and her self serving statements that she could not have provided for herself without the additional $75 alimony should have been completely discarded. (Tr. 702, 628).

Certainly, a gross income of $1,700 a month qualifies a person as self-supporting. The fact that she chose to only work 32 hours a week and is living on Balboa Island in a beach house at $650 a month (Tr. 707) does not detract from this conclusion. It is elementary that a person's expenses are unlimited depending upon the style of living they wish to invoke.

The lower court specifically awarded no permanent alimony to Pat finding that she was currently employed and capable of providing for her own support. (R. 412). This conclusion by itself further supports Mr. Huck's contention that the evidence is undisputed that during the entire time of the separation Pat was capable of self support and therefore the provisions of the prenuptial agreement did not obstruct the waiver to which she had previously agreed. A credit for $1,800 should therefore be awarded to Rainer.

In addition, since the court chose to ignore the prenuptial agreement it is possible that the court considered Rainer's Windsor Street residence as an asset of the marriage which was subject to division. Since the court did not describe the division process of property, this case should be remanded (in the event Point III is rejected by this Court) to determine if the division of property was wrongfully decided.

POINT II.

THE LOWER COURT ABUSED ITS DISCRETION IN AWARDING $2,750 TO DEFENDANT AS ATTORNEYS' FEES.

In its Findings of Fact the Court stated, "The Court finds that Defendant was required to retain the services of an attorney not only to defend the action brought by Plaintiff, but to prosecute her own counterclaim." (R. 414, Finding No. 10).

In the Conclusion of Law the Court stated, "That the plaintiff should be ordered to pay to Defendant for the use and benefit of her attorneys the net sum of $2,750 plus costs, all prior awards for temporary attorneys' fees from or to Defendant being merged herein." (R. 417, Conclusion No. 9).

The record is barren as to any reason why Plaintiff should pay attorneys' fees incurred by his former wife. The only testimony concerning attorneys' fees was offered by Pat and by her attorney. She stated she was forced to obtain the services of Mr. Sandack who was charging $50 or $60 an hour which she believed was fair and reasonable. She also stated that he had incurred in excess of 150 hours which she also felt was reasonable. (Tr. 637).

Mr. Sandack took the stand and stated that he expended 150 hours in the case and believed that $60 per hour was reasonable. Mr. Sandack admitted on cross examination that approximately 35 hours of this time involved an attempt to evict Mr. Huck from his house on Windsor Street which was rejected by the lower court. (Tr. 736-737).

Except for the above cited evidence, there was no other testimony or exhibits offered in support of an attorneys' fee award. It was Defendant's burden to prove that she was unable to pay for her own attorneys' fees and that it was therefore

necessary to place her obligation upon Rainer. As stated by the Court of Appeals in Washington:

> In determining whether attorneys' fees should be awarded, the needs of the requesting party should be balanced against the other party's ability to pay. In considering the record before us, we find that the wife has not shown an inability to pay. In re Marriage of Young, 569 P.2d 70 (Wash. App. 1977).

This Court has established a similar standard. In Adams v. Adams, 593 P.2d 147 (Utah 1979) this Court upheld the denial of attorneys' fees to a wife who was "working and earning money" and where the record "does not disclose any necessity on the part of plaintiff for such an award or her inability to pay her own attorneys' fees." Id. at 149.

In Kerr v. Kerr, 610 P.2d 1380 (Utah 1980) this Court held that the award of attorneys' fees must rest on a basis of evidence of need and reasonableness. This Court remanded a lower court's award of attorneys' fees with the following statement:

> At no point in the proceedings was any evidence addressed to whether or not plaintiff would be unable to cover the costs of litigation; indeed, no suggestion was made by her that she would not be in a better position than defendant, in light of the substantial property settlement, to furnish counsel with compensation. Id. at 1384.

Without burdening this Court with a repetition of the income of the parties as has been discussed previously, the evidence shows that Pat in 1979 and 1980 had a higher gross income than did Rainer. The figures previously listed do not take into account the additional income which inures to her benefit from the income of the three houses awarded to her by the lower court. Nor does it take into account the asset value of these houses.

If this Court affirms the award of the Harmony Court and 215 Iowa Street to the defendant she will have an increase of her net income of approximately $400 to $500 a month (resulting in a net loss of this amount to Rainer). In addition, the value of these houses based upon the 1980 appraisal by Defendant's own appraiser is in excess of $54,000.

Even if this Court reverses the award of the Harmony Court and 215 Iowa Streets to Defendant and merely affirms the award of the 224 Iowa Street property Pat would still be receiving a net gain of some $250 a month to her income with an asset valued by her appraiser at $31,400.

The lower court failed to make sufficient findings to justify an award of attorneys' fees. While it is true that Defendant was required to retain the services of an attorney to defend the action brought by Plaintiff and to prosecute her own counterclaim, it is equally true that Plaintiff was required to retain the services of an attorney for the same reasons. This finding hardly satisfies the requirement established by this Court that she is unable to pay her own attorneys' fees.

District Court Judge Durham in a hearing for visitation, refused to award attorneys' fees to the defendant since both parties were gainfully employed and were earning sufficient income. (Tr. 832). This conclusion is correct based upon the evidence now before this Court.

In addition, it is impossible to know what basis the lower court awarded any attorneys' fees since the defendant requested $9,000 in her testimony. Again, a quotation from the Kerr case

is appropriate:

> Neither does the evidence reflect any attempt to characterize the requested award as reasonable. Testimony regarding the necessity of the number of house dedicated, the reasonableness of the rate charged in light of the difficulty of the case, and the result accomplished, and the rates commonly charged for divorce actions in the community is conspicuously absent. 610 P.2d at 1384-1385.

Plaintiff Rainer Huck contended that much of the attorneys' fees generated in this case was caused by the actions of defendant and her attorney. First, Defendant failed to leave the residence on Windsor Street at Plaintiff's request even though the house had belonged to Plaintiff prior to the marriage and even though she had specifically waived any interest in it in the premarital agreement. Three separate hearings were required to finally have Mrs. Huck vacate the premises.

Second, in the beginning of the litigation Pat made a claim as to all property which was owned by her husband regardless of when it was acquired and regardless of the prenuptial agreement. It was therefore necessary to conduct discovery as to premarital assets as well as post-marital assets until the time that Judge Rigtrup in August of 1980 segregated the premarital properties from dispute. (R. 261).

Finally, a substantial amount of time occurred because of the defendant's motion to disqualify Plaintiff's attorney. While Mr. Sandack stated that he did not include this time in his hours, the fact remains that Plaintiff's attorney was required to invest substantial time in defense of this motion which was much greater than the $250 awarded as attorneys' fees by Judge Rigtrup.

In fact, Judge Rigtrup in his Minute Order dated June 24, 1980 correctly characterized this litigation:

> The court recognizes that more time and effort may have been expended in these efforts, but concludes that based on the circumstances of the respective parties and considering the antagonism and feelings generated in this case between the parties over this issue as well as other issues, that much unnecessary time has been invested in this case which may not be fully recognized in the award of fees reckoned on a purely economic basis. (R. 326).

For these reasons, therefore, the lower court's award of $2,750 to Defendant as attorneys' fees should be vacated.

POINT III.

THE LOWER COURT COMMITTED PREJUDICIAL ERROR IN AWARDING DEFENDANT WIFE THE PROPERTIES LOCATED AT 629 HARMONY COURT AND 215 IOWA STREET.

In formulating the distribution of property in a marriage the court must endeavor to provide a just and equitable adjustment of economic resources so that the parties might reconstruct their lives on a happy and useful basis. Searle v. Searle, 522 P.2d 697 (Utah 1974). The same factors which are examined in the award of alimony are also examined in the distribution of property. MacDonald v. MacDonald, 236 P.2d 1066 (Utah 1951).

This Court has recognized fifteen separate factors to be utilized in the division of property. Applying these factors to the instant case reveals the following:

> 1. The social position and standard of living of each before marriage. Defendant Pat Huck had been married, was a widow, a graduate student, and was living on an income of $300 a month at the time of the marriage. Plaintiff Rainer Huck had not been married, had acquired several properties, and was living at the Windsor Street residence which had been completely paid off.

2. The respective ages of the parties. Mr. Huck was 28 at the time of the marriage while Mrs. Huck was 33.

3. What each may have given up for the marriage. Neither party gave up anything for the marriage since each pursued their own independent career.

4. What money or property each brought into the marriage. Defendant had a $4,500 mortgage credit and $8,000 cash from the settlement of the estate of her deceased husband. Rainer had all or half interest in nine rental properties plus $15,000 in cash or personal belongings.

5. The relative ability, training and education of the parties. Pat had a master's degree and was a certified medical technologist with several years work experience prior to the marriage. She was a Ph.D. candidate from 1970 through 1978. Rainer had a B.S. degree in electrical engineering and obtained a Ph.D. in electrical engineering.

6. The physical and mental health of the parties. At the time of the marriage both parties were in good physical and mental health.

7. The time of duration of the marriage. The time of the marriage to the time of the separation was almost exactly four years. From the time of the marriage until Pat's lawyer sent Rainer a letter stating that a divorce was being litigated was three years. (Ex. 3P).

8. The present income of the parties and the property acquired during the marriage and owned either jointly or by each now. Pat grossed approximately $17,000 in 1979 excluding child support payments. Her gross income in 1980 was in excess of $18,000 and involved a 32-hour work week. Pat retained all of her personal property including most of the furniture from the house. She has presently been awarded three additional properties with a rental income of approximately $500 a month. Rainer grossed $14,000 in 1979, had substantially the same income in 1980 and receives all of his income from the rental houses which he owned prior to the marriage or acquired during the marriage.

9. How it was acquired and the efforts of each in doing so. It is undisputed that all of the houses, with the exception of 224 Iowa Street, were acquired solely by Rainer in his own name. It is also undisputed that Rainer did all the physical work of restoration and maintenance in the properties. Except for the 224 Iowa

Street, all of the down payments used to purchase these properties came from Rainer's premarital funds, from funds advanced by his partner, or from funds lent to him by his father. The only dispute in the record is whether Pat assisted in the rental of these properties during the marriage.

10. Children reared, their present ages, and obligations to them or help which may in some instances be expected. There is one female child of this marriage who is now eight years old, in good health with normal needs.

11. The present mental and physical health of the parties. Pat is presently in good health and was in good health at the time of the hearing. Rainer is presently in good health.

12. The present age and life expectancy of the parties. Pat is 42 years old with a life expectancy of approximately 30 years. Rainer is 37 years old with a life expectancy of approximately 31 years.

13. The happiness and pleasure, or lack of it, experienced during marriage. It is generally conceded by both parties that the marriage was unhappy from its inception and the parties agreed that were it not for the pregnancy of Pat no marriage would have occurred.

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. No such care was given in this case.

15. The present standard of living and needs of each including the cost of living. At the time of trial the defendant was living in California on Balboa Island at a monthly rent of $650. Plaintiff is not aware of the present monthly rent she is now paying. A review of the exhibits offered by Defendant shows that after the marriage her standard of living is as high if not higher than when she was living with Plaintiff. Her cost of living is higher because of the area in which she has herself chosen to move. Plaintiff, on the other hand, maintains the same standard of living he had prior to the marriage and at the time of the marriage with the exception that he has incurred loans for payment of real estate taxes which have depleted his expendible income per month.

This Court in the MacDonald case also stated the standard for review. This Court stated:

> It is true, as plaintiff maintains, that this Court has announced the doctrine that in divorce cases it will weigh the evidence and may substitute its judgment for that of the trial court. Nevertheless, this Court should not do so lightly, nor merely because its judgment may differ from that of the trial court. We adhere to the qualifications set forth in the more recent expressions of this Court: that the judgment will not be disturbed unless the evidence clearly perponderates against the findings of the trial court; or there has been a plain abuse of discretion; or where a manifest injustice or inequity is wrought. Id. at 1068. (Citations in original opinion omitted).

Plaintiff contends that applying all of these standards to the instant case shows that the lower court abused its discretion or committed manifest injustice or inequity by awarding to Defendant the rental houses located on Harmony Court and 215 Iowa Street.

This contention is based upon two separate arguments. First, as pertaining specifically to the Harmony Court property the evidence is undisputed that Mr. Huck purchased this property with his premarital funds and that the house was there after self-supporting. Second, as to all properties including Harmony Court and 215 Iowa Street the conduct of Defendant estops her from now making any claim to an interest in them. These arguments will now be discussed.

A. Because of the Source of Funds Used to Acquire the Rental Property at 629 Harmony Court was Premarital Funds the Lower Court Committed Error in Awarding it to Defendant.

The property at 629 Harmony Court was purchased on June 9, 1975 by Rainer at the purchase price of $11,000. It was therefore purchased two months after the marriage. $3,000 was

utilized as the down payment. This money was withdrawn from Plaintiff's savings account which contained premarital funds. (Tr. 507, Ex. 5, Ex. 6).

After the Harmony Court property was acquired it became self-sustaining in that the rental income paid for any mortgage payments and other expenses required to maintain the property. (Tr. 519).

The fact that Rainer utilized his premarital savings to purchase a house rather than keeping the funds in a bank account should have had no effect upon the distribution of this asset to Plaintiff. In other words, the asset existed through no effort on Plaintiff's part and she should not now be rewarded by his prudent investment.

The New Jersey Supreme Court stated the applicable rule of tracing premarital assets as follows:

> Clearly, any property owned by a husband or wife at the time of marriage will remain the separate property of such spouse and in the event of divorce will not qualify as an asset eligible for distribution. We also hold that if such property, owned at the time of the marriage, later increases in value, such increment enjoys a like immunity. Furthermore, the income or other usufruct derived from such property, as well as any asset for which the original property may be exchanged or into which it, or the proceeds of its sale, may be traceable, shall similarly be considered the separate property of the particular spouse. Painter v. Painter, 320 A.2d 484 (N.J. 1974) (Emphasis added).

Likewise the Supreme Court of Main in Young v. Young, 329 A.2d 386 (Me. 1974) held that furniture which was purchased with premarital money was exempt from marital distribution as long as the furniture was traceable and could be attributable to the premarital funds.

The Supreme Court of Colorado in Gaskie v. Gaskie, 534 P.2d 629 (Colo. 1975) reversed the findings of a lower court which awarded a portion of a ranch which had previously been owned by the wife prior to marriage. The lower court considered the increased value of the ranch in distributing various other marital assets to the husband. The Supreme Court of Colorado reversed the lower court's determination and noted that the evidence showed the following:

> (1) Since reaching the age of majority, she personally managed the ranch and all dealings have been done in her name alone.
>
> (2) Her intent was that the ranch remain her separate property and its title to her alone.
>
> (3) The ranch under her management showed a profit and was never in danger of loss to a mortgage foreclosure or tax sale and her husband's contributions were never used to prevent the loss of the property.
>
> (4) All financing was solely in her name and with her funds including full payment of the mortgage.
>
> (5) All proceeds from the condemnation were kept in a separate ranch account.
>
> (6) Only she was involved in the complicated legal affairs of the ranch.
>
> (7) A quiet title action to the property was prosecuted in her name alone.
>
> (8) The husband's pattern of non-involvement in the ranch was attested to by disinterested third party witnesses.

The court then made the following statement:

> In summary, five volumes of evidence, and even considering it in the best possible light for Jonn Gaskie, compels our conclusion that his efforts did not contribute to enhancing the value of the wife's property. He made occasional and minute contribu-

> tions, which we will not allow to turn into a bonanza. For any participation in the management of this land, the husband was adequately compensated by the income or benefits received therefrom. Larrabee v. Larrabee, 31 Colo. App. 493, 504 P.2d 358 (1972).
>
> It is manifestly against the weight of the evidence to conclude that through the parties course of dealings with the ranch it somehow lost its separate identity as the wife's sole property and merged into a family asset. Nor can we conclude that through the husband's efforts and earning capacity the wife was able to retain the ranch, whereas without him she would have lost it. Therefore we hold it a matter of law that the wife's ranch property, its apputenant water rights, and the condemnation proceeds shall not be included in the marital estate to be shared by John Gaskie. Id. at 632. (Emphasis added).

Just as in Gaskie, Rainer purchased and maintained the Harmony Court property with no type of assistance from Pat. He received no benefit to this property in any way by being married.

This Court has also recognized that equity will require that each party to a divorce action recover the separate property he or she brought into the marriage. In Preston v. Preston, 646 P.2d 705 (Utah 1982) this Court reversed an order in which the lower court abused its discretion in failing to credit a husband for out-of-pocket expenses he utilized in purchasing a recreational cabin when the money came from the sale of assets he had owned prior to the marriage.

The lower court in awarding Mrs. Huck the Harmony Street property when no effort on her part contributed to its initial acquisition or its continued maintenance. As is obvious from the record, this marriage occurred only because of the pregnancy of the plaintiff and was sustained as a matter of convenience

to both parties. From 1975 through 1978 Pat Huck continued as a full time graduate student pursuing her own independent career.

It is obvious that had Rainer retained a 9 to 5 job, Pat could not now make a claim for the premarital savings account had he elected to merely keep it in the bank. The fact that he chose to use this money to purchase an asset which was also income producing should not be considered since to do so penalize him for the prudent use of his own assets.

As stated by Judge Durham "A trial court considers many factors in making a property settlement in a divorce action, but the settlement should not be such that one party is damaged or punished." Warren v. Warren, 655 P.2d 684, 689 (Utah 1982 (Durham, J. dissenting).

B. The Evidence Introduced at Trial Clearly Preponderates in Favor of Plaintiff's Assertion that Defendant Should be Estopped from Making Any Claim as to the Rental Properties Purchased After Marriage.

The facts in this case are clearly unique. The parties uniformly agree that Rainer did not wish to marry Pat and did so only upon her extreme pressure and upon his desire to financially assist her while she was attending graduate school and raising a young child.

The circumstances surrounding the signing of the prenuptial agreement from the testimony of defendant herself clearly illustrate the animosity and explosive circumstances surrounding the marriage.

It was the contention of Rainer throughout the trial that Pat had represented to him prior to marriage and during the course of the marriage that if he would marry her, help support her during her education, and help assist in the raising of the child, that she would make no financial claim against any assets he acquired during the marriage. Plaintiff argued to the lower court that his support of Pat and the child enabling her to attend graduate school for some three and a half years together with the award of the jointly owned 224 Iowa Street property and the requirement of child support was adequate compensation for a four-year marriage of convenience.

The lower court in awarding the property at 629 Harmony Court and 215 Iowa Street rejected this estoppel argument thereby giving to Pat, according to her own appraiser, additional property worth over $54,000.

To reject Plaintiff's argument of estoppel the lower court had to disregard the following evidence:

(1) The testimony of Plaintiff Rainer Huck;

(2) The testimony of his parents Erna and Herman Huck;

(3) The complete uniqueness which the parties treated the joint purchase of 224 Iowa Street;

(4) The tape recorded admissions made by Pat to Stan Secor as to her statements throughout the marriage to Rainer.

While it is true that the testimony of Rainer and his parents can be disregarded as self-serving, this evidence

together with the undisputed evidence as to the Iowa Street acquisition and the tape recorded admissions of Pat clearly show that the elements of estoppel are present and that the lower court erred in failing to apply this doctrine.

This Court in Hunter v. Hunter, 669 P.2d 430 (Utah 1983) made the following observations concerning doctrine of estoppel in divorce cases. This Court stated:

> Estoppel is a doctrine which precludes parties from asserting their rights when their actions or conduct render it inequitable to allow them to assert those rights.
>
> The doctrine of estoppel has been set forth by this Court as follows:
>
> > The doctrine of estoppel has application when one, by his actions, representations, or conduct, or by his silence when he ought to speak, induces another to believe certain facts exist and such other relies thereon to his detriment. Leaver v. Grose, Utah, 610 P.2d 1362, 1364 (1980) (Citations omitted). . . .
>
> The common element of the doctrines of waiver and estoppel is the requirement of action or conduct by the person against whom the doctrines are asserted. Id. at 430.

In a case involving a claim of estoppel as to payment of alimony, this Court stated the requirements which must be shown:

> In order to prevail on his theory of estoppel, plaintiff must prove that defendant, by her representations or actions led plaintiff to believe he need not pay alimony or child support, and that plaintiff, in reliance on said representations, changed his position to his detriment. In such a case, enforcement of the decree creates a hardship and an injustice to plaintiff, and defendant would be estopped to deny her own misrepresentations, and estopped from claiming unpaid support. Ross v. Ross, 592 P.2d 600 (Utah 1979).

There is no question but that the doctrine of estoppel is applicable to this case. The evidence is overwhelming that

Pat repeatedly told the plaintiff that she would make no claim for any properties he acquired during the marriage. It should be borne in mind that the houses which were purchased by Rainer were all in condition which required substantial renovation. Rainer, therefore, had to expend a considerable amount of his labor as well as his money in making these properties a rentable investment.

It would have been foolhardy for Rainer to spend substantial amounts of time, labor, and money on these properties in a marriage which was admittedly never happy while his wife attended the University of Utah seeking a professional degree for her own betterment. Had not Rainer believed that she would not be making a claim as to the asset value of these properties after they were renovated.

The following evidence clearly and decisively shows that Rainer's claim of Pat's representations are correct and that the lower court completely ignored the overwhelming evidence in the record. The following is a synopsis of this evidence.

1. Testimony of Plaintiff.

(a) Rainer testified that Pat pleaded with him to give her a try. She told him that she could make a good wife for him and assist him in his career goals so they could work together harmoniously. She told him that if the marriage did not work out at least the child would have a good start. She told him the alternative was for her to commit suicide. (Tr. 455). It was agreed prior to the marriage that should the marriage end in divorce she would make no claims as to the pre-existing

properties in any way. (Tr. 462).

(b) Within the first week or two of the marriage Pat told him that because of the prenuptial agreement she would have nothing to do with any of the properties listed there and wanted nothing to do with any of his rental activities. She told him she would keep all of her money and her income to herself and that he should do the same.

(c) It is undisputed that separate accounts were maintained by both parties and that a division of expenses was maintained by both parties. Although Pat claimed that Rainer had written checks on the joint checking account she failed to produce a single check in which this had occurred.

(d) All of the properties purchased in 1975, 1976 and 1977 were purchased in Rainer's own name or in conjunction with his partner Craig Cook. None of the documents relating to the title, liens, or encumbrances in any way show the name of Pat Huck. (Ex. 23).

(e) In 1976 Pat announced she was very unhappy in the marriage and that she intended to get a divorce as soon as she completed her education. (Tr. 468). She said she wanted to continue the present arrangement because it would be much easier for her to continue her education and that she could perform her research and teach her classes without having to worry about having her own household. (Tr. 469).

(f) In 1977 the state of the marriage was the same. Pat frequently expressed her intent to obtain a divorce. The marriage was in a process of moving apart and there were problems

in many areas that were solved by doing less and less together. Pat was still engaged in her shool work at the time and was working at sporatic hours. (Tr. 476).

(g) In 1977 Pat became unhappy because she saw Rainer doing quite well with the rental properties and wanted to participate. This was around June of 1977. She told him she would be willing to do the necessary work that was required if he would buy a property with her. They subsequently bought the 224 Iowa Street property together which will be discussed infra. (Tr. 477-478).

(h) In April of 1978 Rainer received a letter from Wally Sandack informing him that his wife was going to obtain a divorce and seeking Rainer's presence to discuss the division of property. After confronting Pat about his meeting with Sandack, and informing her that she was breaking their previous agreement, she denied this and said she would stand by the previous agreement and would not attempt to acquire any of his assets. She asked him to wait until her examinations were over in July before discussing divorce further. (Tr. 490). Pat specifically and frequently said she wanted nothing to do with the rental places. When occasionally a renter would bring his rent over in person she would complain about the "scuzzy" tenants coming into the house. She would also complain about the phones ringing during vacancies. (Tr. 580).

(i) On rebuttal, Rainer testified that while his wife stated on her examination that she always considered half of the properties to be hers, that this was not what was told to him during the course of the marriage. (Tr. 778).

(j) As he acquired each property she continued to make the same representations that she was not interested in them and wanted nothing to do with them. Rainer stated he relied upon these representations in his continuation of acquiring and renovating these properties. (Tr. 779).

(k) Rainer testified that had she not made these statements he would have done things differently. He would either have asked for a new agreement after the marriage or would have required her to sign a quit claim deed at the time each property was purchased. (Tr. 780).

2. Testimony of Erna and Herman Huck.

(a) Erna Huck, Rainer's mother, stated that about one year after the marriage Pat said she couldn't get along with Rainer and it was better that they separate. She told her that she wouldn't need anything from Rainer and that she would finish her school and go her separate way. (Tr. 766). Erna Huck testified that throughout the marriage Pat would periodically say that she could not stand to be married any longer and wanted a separation. (Tr. 767).

(b) During the time that she made these statements about getting out of the marriage Erna Huck was astounded how easily Pat would make them. She was not mad or upset during the conversations and just said that she had her profession and didn't need anything from anybody. (Tr. 773).

(c) Herman Huck, Rainer's father, stated that after Pat and Rainer were married for about a year she suddenly told him, to

his astonishment, that she wanted a divorce. She told him they were not getting along very well and that she wanted a divorce. She said it would be good if the marriage did not last any longer and that she could find another husband and Rainer could find another wife. (Tr. 753). She told Mr. Huck that she was going to finish her schooling and that she had a profession of her own and didn't need Rainer to support her. She said she could do that herself and that she didn't wany anything from him. She said that since she didn't bring anything into the marriage she wasn't expecting anything out of it. (Tr. 754).

3. The Joint Purchase of the 224 Iowa Street Property.

(a) In 1977 Pat and Rainer Huck purchased a property located at 224 Iowa Street. Pat paid approximately $6,600 as part of the down payment. Rainer received his half from his father, a debt for which he is still liable. (Tr. 478).

(b) The title to this particular house was listed as "Rainer Huck and Pat Huck, tenants in common." (Ex. 5). Only on this house of all the houses acquired during the marriage did Rainer keep a separate ledger as to the expenses incurred in order that Pat, as an equal partner, would share the expenses and benefits from the profits. (Ex. 20). On October 27, 1977 a check was written from Rainer to Pat with the notation "224 to 10/27/77." This was an amount owing to her as reflected by the books. (Ex. 19, Tr. 784).

(c) Periodic accounting payments for the property were made to Pat on October 27, 1977, December 12, 1977, January 28, 1978, February 28, 1978, March 28, 1978, and December 26, 1978. (Ex. 25)

(d) Pat denied that the Iowa Street property was any different from any of the others. She could not explain, however why Iowa Street was the only one held jointly and why she had specifically paid $7,000 in cash to the seller of that house. (Tr. 669-673).

(e) Pat was completely unable to explain why Rainer would give her money on a regular basis as to the 224 Iowa Street property and not the others. She also admitted that the list of expenses which he kept was showed to her as her share of the profits from the property. (Tr. 715).

(f) Pat admitted that she did actual physical work at the 224 Iowa Street property but did not perform any other labor at any of the other rental houses. (Tr. 674). She claims she did this because when they bought it it was in bad shape and needed to be fixed. However, she admitted that all the houses that Rainer bought were also in bad shape but she did not assist in their repair. (Tr. 674-675).

4. Tape Recorded Admissions of Pat.

(a) During several telephone conversations which were recorded by Rainer, Pat told Stan Secor, Rainer's real estate agent, that she represented to Rainer throughout the marriage that she was making no claim on his property and that the Iowa Street property was a joint partnership. These pertinent conversations verbatim are as follows:

> Like I always told Rainer before, if this didn't work out, which there was a good chance it wouldn't, that I would just walk with what I had but he pisses me off so bad today you know . . ." (Tr. 659).

> Yeah, well, I don't know. I think, you know, considering that I thought that I would be satisfied with nothing, you know, anything I get would be something, you know. Buy my lawyer said he thought Rainer would be responsible until I finish school and everything that he would have to support me and Sophie. (Tr. 660).
>
> So anyway I told him I'll pay you. Don't you think that's fair? I mean, I told him what do you want me to do? What can I do? I asked if there is something I can do, and he said no, and I said if you hate me doing it so much, pay a plumber. Well, you can have all my profits for the rest of the year and he is just hassling me about it, you know. What can I do? (Tr. 675). (Emphasis added).

Pat did not deny the substance of these conversations which occurred in April of 1978. They fully support the testimony of Rainer, his parents, and the documentation as to the Iowa Street property that Pat repeatedly told him that she was making no claim on any of his property and that only the 224 Iowa Street property was considered by her as a partnership.

Plaintiff fully agrees with the principle that it is proper for a wife to receive half of the rewards of the joint marriage effort. However, the evidence in this case is patently clear that there was never any joint effort made by Rainer and Pat. Rather, each person pursued their own independent pursuits: he renovating rental properties for the purpose of supplying an income for his scientific research and she attending the University to obtain a graduate degree.

The error in the trial court's ruling is even more apparent if it were assumed that Pat had in fact obtained a Ph.D. in 1978 and was now making a salary of $60,000 a year. It is doubtful that any court would award Rainer any property settlement on the

theory that he assisted her in obtaining her education and therefore is entitled to some of the proceeds of her labor. It is equally incredulous that she should expect to share in his labors in the acquisition of these rental properties.

This marriage is unique. It did not involve youngsters who shared their early days together and helped each other in acquiring assets. The marriage did not involve parties who stayed together for 20 or 30 years in building and maintaining a family and property. Rather, this was a strained marriage to say the least where each party conducted their lives, as much as possible, on an individual basis. There was no joint effort, there was no joint sacrifice, and there should, therefore, be no joint division.

The lower court clearly abused its discretion and ignored the clear preponderance of the evidence in awarding Pat the house located at Harmony Court and 215 Iowa Street.

CONCLUSION

Appellant appreciates the difficulty of any court in partitioning the assets of a married couple after the failure of the marriage. Appellant also acknowledges that the distribution made by the trial court would be fair and equitable to another couple with normal circumstances of marriage.

However, the facts and circumstances of this marriage are far from normal. The decision to become married was hardly a joyous event for either party. After marriage, each party more or less pursued their own lives--he renovating rental

properties and performing scientific research; she pursuing her Ph.D. and later working as a lab technician. The finances of each party were separately maintained, the expenses divided, and their activities were individual.

The only joint bond of the parties was their daughter Sophie. Both Rainer and Pat helped and contributed to her early development. Because of Sophie, Rainer does not bemoan this marriage in any way. He only seeks a fair award based on the facts of the marriage and not based upon a normal, traditional marriage where both parties were true partners.

The prenuptial agreement was a binding legal document and must be enforced. The evidence shows that, at the time of separation, Pat was capable of "self support." The award of $1,800 temporary alimony should be vacated.

There is likewise no evidence that Pat is unable to pay her own attorney fees especially if the present profit distribution is upheld. This award of $2750 should also be vacated.

Finally, the distribution of the Harmony and 215 Iowa Street property to Pat is improper since Rainer's premarital funds purchased the one house and Pat should be equitably estopped from making any claims as to any rental house separately acquired by Rainer. The award should be vacated.

Respectfully submitted,

By Craig S. Cook
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Attorney for Plaintiff-Appellant

CERTIFICATE OF MAILING

I hereby certify that two copies of the foregoing Brief of Appellant were mailed, postage prepaid, to Roger D. Sandack, Attorney for Defendant-Respondent, 370 East 500 South, Salt Lake City, Utah 84111 this 6th day of December, 1983.

Craig Cook