1984

Kathryn Myrna Newmeyer v. Jeddy Paul Newmeyer : Brief of Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

KATHRYN MYRNA NEWMEYER, Plaintiff-Respondent, vs. JEDDY PAUL NEWMEYER, Defendant-Appellant.	)	Case No. 19183

BRIEF OF RESPONDENT

Appeal from the Judgment of the Third District Court
in and for Salt Lake County, State of Utah
Honorable Jay E. Banks

DAVID A. McPHIE
147 North Second West
Salt Lake City, Utah 84103

Attorney for Plaintiff-Respondent

GLEN M. RICHMAN
50 West Broadway, Fourth Floor
Salt Lake City, Utah 84111

Attorney for Defendant-Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

KATHRYN MYRNA NEWMEYER, Plaintiff-Respondent, vs. JEDDY PAUL NEWMEYER, Defendant-Appellant.	)	Case No. 19183

BRIEF OF RESPONDENT

Appeal from the Judgment of the Third District Court
in and for Salt Lake County, State of Utah
Honorable Jay E. Banks

DAVID A. McPHIE
147 North Second West
Salt Lake City, Utah 84103

Attorney for Plaintiff-Respondent

GLEN M. RICHMAN
50 West Broadway, Fourth Floor
Salt Lake City, Utah 84111

Attorney for Defendant-Appellant

TABLE OF CONTENTS

CASES CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

KATHRYN MYRNA NEWMEYER, Plaintiff-Respondent, vs. JEDDY PAUL NEWMEYER, Defendant-Appellant.	)	BRIEF OF RESPONDENT Case No. 19183

NATURE OF CASE

This is a divorce case. The defendant-appellant, hereinafter referred to as defendant, seeks review of the district court's decisions concerning the property distribution, alimony, and attorney's fees.

DISPOSITION IN LOWER COURT

This case was tried on February 28th, 1983, in the Third Judicial District Court in Salt Lake County, State of Utah, before the Honorable Jay E. Banks. After trial, a divorce was granted to the plaintiff.

The trial court awarded the plaintiff the parties' former marital abode. The defendant was awarded an equitable lien against said home in the amount of Thirty Two Thousand Six

Hundred Six Dollars ($32,606.00). The plaintiff was awarded the care, custody and control of the parties' minor child, CAROLYN, and Two Hundred Dollars per month child support. The plaintiff was also awarded One Dollar ($1.00) per year as alimony, a 1973 Ford Maverick automobile, and her Seventeen Thousand Dollar ($17,000.00) personal savings account. Additionally the plaintiff was awarded the income tax deduction for the support of the minor child, CAROLYN, for tax year 1982, a permanent injunction, enjoining the defendant from having contact with her at any time, at any place, or in any manner, except for purposes of arranging visitation, and attorney's fees in the amount of One Thousand Four Hundred Twenty Three Dollars ($1,423.00).

The defendant was awarded an equitable lien in the parties' real estate in the amount of Thirty Two Thousand Six Hundred Six Dollars ($32,606.00), a 1971 Ford Maverick automobile, his share of the parties' personal property which had been previously divided between them and was stipulated to at the outset of trial, along with Seven Thousand Dollars ($7,000.00) in his savings account and his pension and profit sharing plan, free and clear of any claim of the plaintiff. The defendant was also awarded the tax deduction for the support of the parties'

daughter, CAROLYN, for the tax year 1983 and subsequent years. The defendant was ordered to maintain his health insurance on the parties' minor child. The parties had no marital debt at the time of trial.

RELIEF SOUGHT ON APPEAL

The plaintiff respondent, Kathryn Myrna Newmeyer, hereinafter referred to as plaintiff, believing that this matter was fully, openly and fairly decided at trial, requests that this court affirm the decision of the trial court below in all particulars.

STATEMENT OF FACTS

The parties were married on the 26th day of December, 1962. They have one minor female child who was approximately twelve years of age at the time of trial. The parties bought three homes during their marriage. The first home, located at 382 Vitas Avenue in Salt Lake County, was purchased six months after their marriage for Ten Thousand Six Hundred Forty Five Dollars ($10,645.00) (Tr. at 19). The plaintiff paid Five Thousand Five

Hundred Dollars ($5,500.00) of the down payment on said home (Tr. at 20), the defendant and his father together, paid One Thousand Five Hundred Dollars ($1,500.00) of the down payment (Tr. at 20), leaving a balance owing of Three Thousand Six Hundred Forty Five Dollars ($3,645.00). (There is a dispute in the testimony concerning these amounts. To the best of his recollection, the defendant claims he and his father put down Two Thousand Dollars on the Vitas Avenue home, and that the plaintiff only put down Twenty One Hundred Dollars) (Tr. at 205). Both parties worked at the time and contributed equally to the Sixty Four Dollar ($64.00) per month payments due on the remaining Three Thousand Six Hundred Forty Five Dollar ($3,645.00) balance until paid (Tr. at 20 and 21). There is also a dispute in the testimony on this point. The defendant claims he made multiple principal payments on the first house (as much as four or five times the principal amount) on occasion (Tr. at 206). Even if true, this is not significant in contrast with the total contributions by the parties and total equities involved as is outlined below.

The parties lived in the Vitas home approximately seven years (Tr. at 21) when they moved to 3924 South 10th East, in Salt Lake County (Tr. at 21). The purchase price of this house

was Twenty One Thousand Five Hundred Dollars ($21,500.00) (Tr. at 21). The transaction for the acquisition of the 10th East home was in the nature of a trade (Tr. at 21). The parties herein traded up and the seller of the 10th East home traded down, but the seller received cash compensation from the parties herein to make up for the difference between the value of the two homes. Within three months of the trade on the 10th East property, the plaintiff received Five Thousand Five Hundred Dollars ($5,500.00) from her brother (Tr. at 22). Three Thousand Dollars ($3,000.00) of said Five Thousand Five Hundred Dollars ($5,500.00) received by the plaintiff from her brother was paid by the plaintiff on the house to the party with whom they had traded, and within one (1) year the plaintiff additionally paid another Five Thousand Five Hundred Dollars ($5,500.00) to that same party. Said Five Thousand Five Hundred Dollars ($5,500.00) was received by the plaintiff out of the closing of her mother's estate, her mother having then recently died (Tr. at 23).The parties subsequently made four payments of One Hundred Twenty Three Dollars ($123.00) completing payment for the house on 10th East (Tr. at 24).

The parties lived in the 10th East home for about eight years, when they moved to 7442 Fortuna Drive, Salt Lake County (Tr. at 23). The purchase price of the Fortuna home was One Hundred Eight Thousand Dollars ($108,000.00) (Tr. at 24). The parties got Fifty Four Thousand Three Hundred Seventy Two Dollars and Eighteen Cents ($54,372.18) out of the sale of the 10th East home, which amount was applied toward the purchase price of the Fortuna home (Tr. at 25). The money used to pay the difference between the purchase price of One Hundred Eight Thousand Dollars ($108,000.00) on the Fortuna home and the Fifty Four Thousand Three Hundred Seventy Two Dollars and Eighteen Cents ($54,372.18) received from the sale of the 10th East home came from three (3) sources:

1. Eighteen Thousand Eight Hundred Dollars and Seventy Six Cents ($18,800.76) came from the plaintiff. This money was received by the plaintiff as part of her share of the estate of her father who had recently died, (Tr. at 25);

2. The plaintiff withdrew Twenty Seven Thousand Dollars ($27,000.00) from her own personal savings account, which was separate from the defendant's, which $27,000.00 was made up of amounts she had been previously given by her brother from her late father's estate, and monies which she had received from the estate of her father, and had [illegible]

earlier, and additional monies which she had earned while employed during the marriage and placed in the bank as savings, (Tr. at 25); and,

3. The defendant paid Five Thousand One Hundred Twenty Nine Dollars and Fifty Five Cents ($5,129.55) from his savings account (Tr. at 26).

The plaintiff thus invested additional cash of approximately Forty Seven Thousand Dollars ($47,000.00) in the Fortuna home at the time of closing (Tr. at 27).

The parties lived in the Fortuna home from 1979 until they became separated in 1982. Trial in this matter was held in February of 1983.

There is contradictory testimony in the transcript concerning the defendant's new cash outlay on the Fortuna home which was purchased in 1979, (the third house listed on page 9). The plaintiff testified that the defendant paid at closing only Five Thousand One Hundred Twenty Nine Dollars and Fifty Five Cents ($5,129.55) in new money on the Fortuna home. (Tr. at 26). However, the defendant, although he admitted not being able to remember, said he thought he had contributed a total of about Twelve Thousand Dollars ($12,000.00) towards the Fortuna purchase (Tr. at 127), (defendant's statement of fact on this point is in error). It is clear from the transcript when taken

as a whole, however, that the defendant was mistaken about the Twelve Thousand Dollar ($12,000.00) amount. Apparently the purchasers of the Newmeyer's home on 10th East (second home) did not have enough down-payment money to qualify for financing. (Tr. at 135). It appears from the testimony (Tr. at 136), that the real price the parties wanted for the house was Fifty Two Thousand Dollars ($52,000.00). The defendant lent the purchasers Five Thousand Four Hundred Dollars ($5,400.00), and then raised the price of the home to Fifty Seven Thousand Four Hundred Dollars ($57,400.00). The purchasers then had a sufficient down-payment to qualify for a loan and purchased the home. The Newmeyers were not out anything because that same money loaned was given back to them at closing, minus the costs of sale and real estate commissions. In any event the Newmeyers netted out of the sale Fifty Four Thousand Three Hundred Seventy Two Dollars and Eighteen Cents ($54,372.18) (Tr. at 25), when in fact they would have agreed to sell the house for Fifty Two Thousand Dollars ($52,000.00) to a buyer who could have qualified on his own. The defendant's real cash contribution towards the purchase of the Fortuna home was probably something more than the Five Thousand One Hundred Twenty Nine Dollars ($5,129.00), listed on page 11, source (3), but was not further explained at trial.

The plaintiff and defendant both had experts testify at the time of trial concerning the value of the home. The testimony by each expert was based on a personal examination of the Fortuna home and premises and written appraisals which had been prepared shortly before trial. The plaintiff's appraiser, Mr. Paul Lund, testified that the home was worth One Hundred Twelve Thousand Dollars ($112,000.00) (Tr. at 51). The defendant's appraiser, Mr. Blankenship, testified that the home was worth One Hundred Twenty Two Thousand Dollars ($122,000.00) (Tr. at 50). Close examination of the transcript reveals that Three Thousand Six Hundred Dollars ($3,600.00) of the difference between the two (2) appraisals ($112,000 vs. $122,000), is a difference of opinion as to the value of an additional recreational vehicle garage which had been built behind the house. The defendant's appraiser testified that this garage was of significant value because most people looking for a home in the area of the parties' home would want a garage for recreational vehicles. The plaintiff's appraiser did not agree and valued the garage as a storage area only.

The plaintiff had approximately Seventeen Thousand Dollars ($17,000.00) in her personal savings account at the time of trial. However, in contradiction to the facts as stated by the

defendant in his brief, only Four Thousand Dollars ($4,000.00) of said Seventeen Thousand Dollars ($17,000.00) in her savings was from her parents' estates, the remaining Thirteen Thousand Dollars ($13,000.00) was from monies earned by her at work and put in savings during the marriage (Tr. at 37). The plaintiff did not get credit for the inheritance money twice as claimed by the defendant in Point II of his Brief. The defendant had Seven Thousand Dollars ($7,000.00) in his savings at the time of trial (Tr. at 37). The value of the defendant's retirement account (awarded to him) was unknown at trial, however, the defendant had been working at Utah Transit Authority under the retirement plan for 12 or 13 years (Tr. at 126).

The parties kept their finances separate throughout the entirety of the marriage (Tr. at 38). The defendant worked full time during the marriage (Tr. at 121, 122, 124). The plaintiff worked during much of the marriage, and full time since 1975 (Tr. at 39, 40).

ARGUMENT

POINT I. STANDARD OF REVIEW.

The defendant cites various cases in support of two well known propositions of law. The first is that this court may review both questions of fact as well as questions of law. Hansen vs. Hansen, 537 P.2d 491 (Utah, 1975). The second is that although the trial courts findings, judgments and decisions, especially in a divorce case, are looked upon with favor on review by the Supreme Court, they are subject to review, and the exercise of the trial court's discretion is not without limitation. DeRose vs. DeRose, 19 Utah 2d 77, 426 P.2d 221 (1967). This Court has ruled on many occassions that it will defer to the judgment findings and decrees of the district court, however, where there is a clear abuse of discretion on the part of the trial court, or where the findings of fact are not supported by the preponderance of the evidence, this Court may substitute it's judgment for that of the lower court, and may alter or amend the decision of the lower court or may remand the matter for further proceedings as appropriate. Christensen

vs. Christensen, 21 Utah 2d 261, 444 P.2d 511 (1968), Graziano vs. Graziano, 7 Utah 2d 187, 321 P.2d 931 (1958), Hansen vs. Hansen, 537 p.2d 491 (Utah, 1975), Watson vs. Watson, 561 P.2d 1072 (Utah 1977).

With these two propositions of law the plaintiff does not disagree.

The trial court was not arbitrary or capricious , nor did it abuse it's discretion. A review of the evidence demonstrates that the preponderance of the evidence supports the property distribution made by the court, especially as to the parties' relative equitable interests in the real estate acquired by them during their marriage.

POINT II. THE EVIDENCE SUPPORTS THE LOWER COURTS DISTRIBUTION OF PROPERTY, INCLUDING THE DISTRIBUTION OF EQUITY IN THE PARTIES' FORMER MARITAL ABODE.

The parties' home located at 3242 Fortuna Drive, Salt Lake County, was awarded to the plaintiff. She resides there with her minor child, Carolyn. There is no mortgage on the

home. The court found the value of said home to be One Hundred Seventeen Thousand Dollars ($117,000.00), the defendant was awarded an equitable lien in the amount of Thirty Two Thousand Six Hundred Six Dollars ($32,606.00).

A. The District Court Was Within The Limits Of It's Discretion In Finding The Fortuna Home To Be Worth $117,000.00.

As is recited in the Facts portion of this Brief, both plaintiff and defendant produced expert witnesses at the time of trial (Tr. at 2, 48). These gentlemen were both qualified as fee appraisers of real estate. Again as is indicated in the facts, the plaintiff's appraiser submitted a written appraisal, which he testified in support of, that the parties' marital abode at that time was worth One Hundred Twelve Thousand Dollars ($112,000.00). The defendant's expert, testified that that same house was worth One Hundred Twenty Two Thousand Dollars ($122,000.00). Both written appraisals were admitted in evidence by the court. The largest single discrepancy between the two appraisals, as is detailed above, was as to the value of a second recreational vehicle garage.

When the court published it's findings concerning the critical issues subsequent to trial it indicated that it found

the value of the home to be One Hundred Seventeen Thousand Dollars ($117,000.00). Defendant complains on appeal that said finding as to value of the home by the court below is "a mere compromise", and "does not represent an exercise of discretion, but is an arbitrary and capricious act of the trial court." The plaintiff disagrees. The court did not at the time of publishing it's Findings of Fact and Conclusions of Law, or at any other time, indicate it's reasons, or the mental processes gone through in arriving at the value it found for the home. The plaintiff assumes that the court simply split the difference. The lower court may well have done, but if so, only after having listened to the testimony of the experts in support of their written appaisals, and having observed their demeanor, and their ability to explain their different conclusions, and having weighed the relative weight to assign to each appraisal.

Neither party, nor counsel, has any information or knowledge as to why Judge Banks valued the Fortuna home at One Hundred Seventeen Thousand Dollars ($117,000.00), but assuming that he did his job correctly as the finder of fact, and weighed the evidence presented by both appraisers, and assigned the appropriate weight to give to that evidence in his mind, neither counsel for the defendant-appellant or plaintiff-respondent can

say from the transcript, or from any other source, that the decision by Judge Banks was arbitrary or capricious, or an abuse of discretion.

The assertion by the defendant that the trial court must accept completely the testimony of either one appraiser or the other, and totally discount the opinion of one or the other, is clearly not correct. The District Court may, and in many cases obviously does, compromise, and correctly so in making findings in these matters.

B. The District Court Was Within The Limits Of It's Discretion In Awarding The Defendant A Lien In the Amount Of $32,606.00

The defendant-appellant recites at some length on pages 9, 10 and 11 the arithmatic process it supposes the trial court went through in arriving at the equitable lien figure awarded to the defendant.

The Findings of Fact and Conclusions of Law along with a decree, approved by defendant's counsel were signed by Judge Banks. No more detail was given by the court concerning the court's calculations, or the manner or method by which the court determined what the defendant's equitable lien should be, than

is revealed in those approved and published Findings of Fact and Conclusions of Law. All theories as to the arithmatic process discussed on pages 9, 10 and 11 of the defendant's brief are merely speculation.

A review of the testimony as it is outlined in the transcript is helpful in demonstrating that the court's decision was clearly within the discretionary limits enjoyed by the district court in deciding these matters, and that the award of an equitable lien to the defendant in the amount of Thirty Two Thousand Six Hundred Six Dollars ($32,606.00) was not an abuse of discretion, nor an error of law.

Without restating the facts portion of this brief, the relevant evidence concerning the real estate is outlined and summarized on the charts appearing below. These charts have been prepared from the statement of facts above, and are supported by the transcript. References to the transcript page numbers may be found in the statement of facts portion of this brief.

Parties first home
Purchased in 1962
6 months after marriage
Purchase price - $10,645.00

382 VITAS AVENUE

Plaintiff put down	$ 5,500.00
Defendant put down	1,500.00
TOTAL down payment	$ 7,000.00
Purchase price	$10,645.00
LESS down payment	7,000.00
Amount left to be paid in payments	$ 3,645.00

$3,645.00 to be paid off in $64.00 per month payments. Both parties contributed.

Vitas home traded on home at 3924 South 10th East in approximately 1969.

Parties second home
Purchased approximately 1969
3924 South 1000 East
Purchase Price - $21,500

3924 South 10th East

Parties gave Vitas home in trade	$	11,950.00
Plaintiff's contribution from inherited land from father		3,500.00
Plaintiff's contribution from mother's estate		5,500.00
TOTAL down payment in form of trade and new cash by plaintiff	$	20,950.00
PURCHASE PRICE	$	21,500.00
LESS down payment		20,950.00
Amount to be paid as payments	$	550.00

Second home on 10th East sold in 1979, moved to 3242 Fortuna

Parties third home
Purchased in 1979
Purchase price - $108,000.00

The home purchased outright at closing.
Never any debt owed by parties thereon.

3242 Fortuna

Actual net amount received by parties from sale of 10th East home	$	54,375.18
New cash amount contributed by plaintiff from her father's estate, mother's estate and personal savings account		46,117.98
Actual amount new cash contributed by defendant from his savings account		5,129.55
TOTAL	$	105,619.71

Difference between purchase price of $108,000.00 and $105,619.71 was never explained at trial

	Plaintiff's Total Cash Contributions		Defendant's Total Cash Contributions	
PROPERTY				
Vitas Home	$ 5,500.00	from savings prior to marriage	$ 1,500.00	from savings account
10th East	5,000.00	sale of real estate with brother - given by father	-0-	
	3,500.00	from mother's estate		
Fortuna	46,117.98	from father's estate, mother's estate and monies earned working	5,129.55	from his savings account
			PLUS whatever amount should be credited to defendant for lending purchaser of 10th East home $5,400.00.	
TOTALS	$ 60,117.98		$ 6,629.55 plus ?	

Plaintiff's total contribution towards purchase was almost exactly nine (9) time as great as the defendants.

$46,000.00 of the plaintiff's total $60,000.00 contribution, all of which came from private, separate sources (mostly her parents' estates) came within three (3) years of separation and four (4) years of final divorce.

Plaintiff total contribution	$ 60,117.98
Defendant total contribution *	6,629.55
	$ 66,747.53

*credits nothing to defendant for lending purchasers of second home $5,400.00

Court's findings as to value of Fortuna property at time of trial	$ 117,000.00
LESS cash contributions of parties	66,747.53
TOTAL equity due to appreciation in all three homes	$ 50,252.57

One half of $50,252.47 equals $25,126.24

Plaintiff's contribution	60,117.98
one-half total equity	25,126.24
	85,244.22
Defendant's contribution	6,629.55
one-half total equity	25,126.24
	31,755.79

Defendant's equitable lien is in the amount of $32,606.00

A review of evidence outlined above clearly demonstrates that the lien amount awarded by the court below was squarely within the limits of it's decision making discretion and supported by the evidence.

There is slight disagreement in the testimony of the two parties concerning the amounts each contributed toward the purchase of the various houses. No one knows how credible or incredible Judge Banks found the parties' respective testimony on these points. Certainly the plaintiff appeared to be more certain in her testimony (compare plaintiff's testimony Tr. at 19-27 with defendant's testimony Tr. at 121, 135-136). In any event the discrepancies in the testimony, even if resolved in the defendant's favor, make an insignificant difference. Even if the district court had believed the defendant's total contribution was in the amount of Ten Thousand Dollars ($10,000.00), (which it apparently did not), the plaintiff still contributed six times as much money from separate sources as did the defendant.

Virtually all of the plaintiff's contributions were from her sole and separate estate, and the vast majority of her contributions came within three (3) years of separation and four (4) years of final divorce. We have no way of knowing how the

court below divided the equity in the Fortuna home based on appreciation of all three homes, but it appears Judge Banks divided it equally. The defendant it appears in being awarded a Thirty Two Thousand Six Hundred Six Dollar ($32,606.00) lien is being allowed to share equally in the equity due to appreciation when he had invested only between one-seventh and one-tenth of the total monies invested by the parties.

The court below heard testimony concerning property taxes paid by plaintiff, income taxes paid by defendant, defendant's arrearages in temporary child support, and unpaid bills left by the defendant at the time of the parties' separation. All of these matters were considered by the court and adjustments made in the defendant's equitable lien to compensate for them. (See paragraphs 7 and 8 of the Findings of Fact.)

The defendant further complains in his brief that the court's published findings as to the parties' respective shares in the home were inadequate. The defendant, however, approved the findings of fact and conclusions of law published by the court previous to them being signed. The court clearly stated what it found concerning the defendant's equitable lien in the home, and on all other matters, (see Findings of Fact, paragraphs

7 and 8). The court was under no duty to state which testimony it found more credible or the arithmatic process it used in determining the defendant's lien.

This court stated in 1977 in the case of Pearson v. Pearson, 561 P.2d 1080 that "findings of fact and conclusions of law will support a judgment even though they are very general if they follow the allegation of the pleadings in most respects." The findings of fact and conclusions of law in this case follow the pleadings and give significant detail as to what the court found.

C. The Court's Ten Day Delay In Ruling Did Not Prejudice Either Party.

The trial in this matter was held on the 28th day of February, 1983. The trial began at nine o'clock a.m., and it took all day. At the conclusion of trial, the court indicated that it would not rule at that time, but that counsel would be informed as to when a ruling would be available. Ten days later, on March 10, 1983, counsel for plaintiff and defendant appeared at Judge Jay Banks chambers to receive the ruling in this matter. At that time Judge Banks referred to his notes and

published it's findings of fact, conclusions of law and decree of divorce in the matter.

The defendant complains in his brief, at the bottom of page 8 thereof, that "the court's delay in ruling resulted in a serious prejudice to the appellant".

There is no other reference to the delayed ruling in the defendant's brief, and not a shred of evidence is available to support such a proposition. Although the defendant claims that the court did not rule until some three weeks subsequent to the trial, in fact the ruling was ten days later, which includes one weekend. (Eight working days.) It is equally reasonable to believe that the additional time taken by the court permitted it to make a more thoughtful decision.

POINT III. THE TRIAL COURT IS NOT BOUND BY PROPOSALS MADE IN PLEADINGS WHEN THE SAME ARE ARGUED AND SUBMITTED FOR DECISION AT THE TIME OF TRIAL.

The defendant states on page 15 of his brief, under Point IV thereof, that the court committed error in awarding the plaintiff the tax deduction for the support of the parties'

minor child for calendar year 1982. The plaintiff had in her complaint offered the defendant, without exception, the deduction for said minor child for income tax purposes, (both State and Federal). The defedant argues that the plaintiff having made no motion to amend the pleadings at the time of trial to award the plaintiff the tax deduction for calendar year 1982, the court was powerless to do so, and committed error in granting said deduction to the plaintiff for the tax year that had then just passed.

The trial in this matter was held in February, 1983. During the majority of the previous year the parties had been separated (Tr. at 14).

The plaintiff paid the majority of the expense for the support of the minor child during the year in which the parties were separated, (1982), (Tr. at 41 and 42), in that the child lived with her. The defendant contributed to the child support only minimally during this period. The defendant did pay pursuant to court order One Hundred Twenty Five Dollars ($125.00) per month as temporary child support from July 20, 1982, to the time of trial in February, 1983. At trial, however, the plaintiff was awarded child support in the amount of Two Hundred Dollars ($200.00) per month.

To assume, however, that this is the reason for the court's decision is speculation on the part of the plaintiff.

The facts are simply that having considered all the evidence, and having the issue of the award of this claim for deduction before it at the time of trial, and having received no stipulation from the parties concerning the matter which the court had approved, the lower court ruled as it did, and there is no basis to amend that decision. In doing so the court committed no error. Rule 15 (b) of the Utah Rules of Civil Procedure provides that,

> "When issues not raised by the pleading are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendments of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues." [Emphasis added]

POINT IV. THE INHERITANCES RECEIVED BY THE PLAINTIFF DURING THE COURSE OF THE PARTIES' MARRIAGE, DID NOT BECOME PART OF THE MARITAL ESTATE.

It is a clearly established point of law, that monies received by a woman in a marriage as an inheritance or gift are separate monies which are not merged into the marital estate. Article 22, Section 2, Utah State Constitution, Section 30-2-1, Utah Code Annotated, (1953, as amended).

The monies received by Kathryn Newmeyer from her parents' estates, are, were at the time received, and remained her personal, separate assets. All of the monies invested by the plaintiff in the purchase of the parties' three homes, except the Five Thousand Five Hundred Dollars ($5,500.00) originally put down by the plaintiff on the Vitas Avenue home, came from private, separate sources, which were not part of the marital estate.

The defendant's father was living at the time and he shall have whatever right is provided by him in his will, or through the laws of intestacy, to an inheritance from his estate. To allow the defendant to share in the monies received by the plaintiff from her parents estates at the time of divorce,

and then to subsequently allow the defendant to receive any inheritance he may receive from his parents estate, free from any claim of the plaintiff, would be fundamentally unfair. The trial court did not commit error in treating the plaintiff's private monies from inheritance which were invested in the parties real estate as her sole and separate funds.

POINT V. THE AWARD OF ONE DOLLAR PER YEAR TO THE PLAINTIFF AS ALIMONY WAS APPROPRIATE.

In arguing that the plaintiff should not have been awarded one dollar ($1.00) per year alimony, the defendant cites the cases of Carter vs. Carter, 563 P.2d 177, and MacDonald vs. MacDonald, 236 P.2d 1066, 120 Utah 573. These cases, as they pertain to the instant case, stand for two major propositions. The first is that all things should be taken into consideration in awarding alimony, and the second that the wife's need for alimony is a part of the consideration, along with the husband's needs, both parties income, and both parties relative future earning capacity.

With these propositions of law, we agree. Defendant refers many times in his brief to the fact that the plaintiff had been employed during a far smaller portion of the total period of the marriage than had the defendant. The testimony at the time of trial (Tr. at 123 and 124) was that the defendant has been almost continually employed during the marriage and has some trade skills as a mechanic, among others. The plaintiff, on the other hand, has never developed skills which have enabled her to make much more than minimum wage. The defendant has, at all times during the course of the marriage, (for which their is evidence concerning income), earned more money, and had a greater earning capacity than the plaintiff, and certainly did at the time of trial. The district court did not abuse it's discretion in awarding Mrs. Newmeyer alimony in the amount of One Dollar ($1.00) per year in terminating a marriage of approximately twenty (20) years. Judge Banks' decision is supported by the preponderance of the evidence as to the parties relative income, needs and earning capacity.

POINT VI. THE AWARD OF ATTORNEY'S FEES BY THE COURT BELOW WAS SUPPORTED BY THE EVIDENCE. THE PLAINTIFF SHOULD BE AWARDED FEES FOR DEFENDING THIS APPEAL.

Defendant asserts that there was no evidence at the time of trial in support of the attorney's fees awarded the plaintiff. The defendant correctly states in his brief concerning the award of attorney's fees that "the only mention of attorney's fees during the entire time of the trial was that the plaintiff had paid the sum of Fourteen Hundred Twenty Two Dollars ($1,422.00)". (Tr. at 47 lines 11 through 13).

Defendant cites a case recently decided by this court, namely Delatore vs. Delatore, Utah Supreme Court, decided 21st day of February, 1984, case no. 18625 (Green Sheets). Counsel for the plaintiff has examined the Delatore case, and would concede the issue but for the following points. In Delatore this court in dealing with the attorney's fees issue stated that,

> "The defendant complains that it was error for the trial court to award the plaintiff One Thousand Dollars ($1,000.00) attorney's fees, because the record is devoid of any evidence of testimony that it was a reasonable amount. We agree. The only reference in the record to attorney's fees, which has been cited to us by the plaintiff

> were statements made by her counsel in his opening statement and in his closing argument that he was requesting Fifteen Hundred Dollars ($1,500.00). Those statements were insufficient."

This Court goes on to explain in Delatore that,

> "This Court has consistantly held that an attorney's fees may not be awarded where there is nothing in the record to sustain the award either by way of evidence, or by stipulation of the parties, as to how the court may fix it".

It seems to the plaintiff, Mrs. Newmeyer, that the real question ought to be, whether or not the court had a basis for determining the amount of time expended by her counsel, and what a reasonable fee for that amount of time spent would be.

There was evidence before the court at the time of trial as to the amount of time which had been expended by plaintiff's counsel on her behalf. That evidence was before the court in the form of pleadings and other documents in the court's file. Judge Banks of the Third Judicial District Court has been on the bench many years. He has tried many divorce cases. The plaintiff feels that it is safe to say that the trial court below is familiar with the process by which cases are filed, brought to the point of being at issue, pretried by the

court's commissioner, and finally set for trial and tried resulting in a decision.

The district court's file indicated at the time of trial that summons and complaint had been prepared, filed and served, that discovery in the form of a deposition had been done, that a Request for Trial Setting had been filed. The district court's file further showed that both parties had appeared at a pretrial before the court commissioner. The record further reflected that the matter had not been settled at pretrial and that a trial date had been set. The court at the time it made it's ruling was aware that both parties had appeared at trial and that roughly six (6) hours had been spent in trial.

An interesting question arises. Who knows better, or is more familiar with what is a reasonable rate for an attorney to bill his time at, the attorney or a district court judge? Certainly not any individual attorney. Lawyers commonly take the stand and testify concerning the amount of time they have spent on cases, and that a reasonable rate in their opinion is blank number of dollars per hour. Most attorney's have no basis upon which to so testify, in that they have no real way of knowing what others charge. The district court judge, on the other hand, hearing attorney's testify quite often as to

what they charge is in a unique position, in contrast to anyone else, to know how one attorney's fees compare to anothers, and what a reasonable hourly rate in the legal community is.

At the time of trial Mrs. Newmeyer testified that she had already paid Fourteen Hundred Twenty Two Dollars ($1,422.00) in attorney's fees. It seems to the plaintiff that Judge Banks, having tried many divorce cases, and knowing what attorney work must have been involved from the court's file, and from having been at the trial himself, was in a unique position to be able to determine the reasonableness of the attorney's fee Mrs. Newmeyer testified she had actually paid.

If plaintiff's counsel had testified in detail at trial that he had spend thirty five (35) hours on the case, and that he billed his time at One Hundred Dollars ($100.00) per hour, would the court have awarded the plaintiff Three Thousand Five Hundred Dollars ($3,500.00). We do not know. However, it seems unlikely. Why does it seem unlikely? Because the Judge seeing the court's file, and based on it's experience would have believed such a fee to be excessive. Why should there be a double standard? Judge Banks at the time of trial had evidence before him in the form of the court's file and oral evidence

from the plaintiff herself which if believed supports his decision as to attorney's fees.

The plaintiff further requests that this matter be remanded to the district court for the purpose of determining attorney's fees to be awarded the plaintiff incurred in defending against this appeal.

In a case recently decided by this court, namely; Carter v. Carter, 584 P2d 904, 906 (Utah 1978), the lower court had, on the husband's petition to modify a decree of divorce, partially granted said petition, and lowered alimony from Three Hundred Fifty Dollars ($350.00) per month to One Hundred Dollars ($100.00) per month. The husband appealed, claiming the trial court should have totally eliminated the alimony. The wife-respondent on appeal defended against a further reduction, and requested of the court that she be awarded her costs of court and attorney's fees in defending against her husband's appeal. In Carter the court in granting the wife respondent costs and attorney's fees on appeal stated,

> "However inasmuch as the plaintiff (husband) was unwilling to abide by the trial court's judgment, and that she has been put to the necessity of defending this appeal, the plaintiff (husband) should have to bear the cost thereof, including reasonable attorney's

> fees for her counsel. We agree with the reasonableness and propriety of her request. Therefore the case is remanded for the purpose of determining and awarding her such attorney's fees. . ."

In this case the defendant husband appeals the trial court's decision concerning equity in the parties' home when the evidence directly supports the findings of the trial court. The defendant seeks to terminate alimony of One Dollar ($1.00) per year to plaintiff after a twenty (20) year marriage. The defendant herein has refused to accept the lower courts judgment, when it was obviously reasonable, and thereby causing the plaintiff to incur additional fees to defend the lower court judgment. Plaintiff feels that defendant's appeal is frivolous and that she should be awarded her fees on appeal.

CONCLUSION

The district court has very broad limits set on it's discretionary powers, especially in a divorce case. Only where there is clear error of law, or abuse of discretion, should, or will this court intervene.

Judge Banks of the Third District Court made no errors of law in rendering his decision in the court below. The preponderance of the evidence supports the trial court's findings as to the value of the parties' home and the parties' respective equitable interests therein.

The trial made adjustments to the equitable lien awarded the defendant to adjust for various small inequities in the division of personal property, taxes paid by one party, bills paid by another, et cetera. The lower court and published findings of fact and conclusions of law approved by the defendant as to substance and form and which meet statutory and common law requirements.

The trial court was free to decide all issues raised in the pleadings, and which remained at issue at the time of trial, including the issue of which party should be awarded the deduction for support of the parties' minor child.

The trial court correctly concluded that the money invested by the plaintiff in the parties' various homes remained her sole and separate property for purposes of computing the parties respective financial contributions in purchasing their various homes.

The award of alimony to the plaintiff in the amount of One Dollar ($1.00) per year, after twenty years of marriage, when she has less earning power, and had always made less money, is clearly fair.

The plaintiff's award of attorney's fees at trial was supported by her own testimony, the court's observation and the court's file. The plaintiff in any event should be awarded her attorney's fees in defending against this appeal.

This Court should review the evidence and affirm the decision below in all particulars. This Court should additionally remand this matter to the district court for the purpose of taking evidence as to appropriate attorney's fees to be awarded the plaintiff incurred in defending against this appeal.

RESPECTFULLY SUBMITTED this 12th day of April, 1984.

David A. McPhie, Esq.
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of April, 1984, I hand-delivered two (2) copies of the foregoing Brief of Respondent to Glen M. Richman, attorney for Appellant at 50 West Broadway, Fourth Floor, Salt Lake City, Utah 84111.

Edward A. Moore