1983

Betty M. Gardner v. William James Gardner III : Brief of Appellant

IN THE SUPREME COURT OF THE

STATE OF UTAH

BETTY M. GARDNER, Plaintiff and Appellant,	)	
-vs-	)	Case No. 19246
WILLIAM JAMES GARDNER III, Defendant and Respondent.	)	

BRIEF OF APPELLANT

Appeal from the Judgment of the
District Court of Weber County,
State of Utah, THE HONORABLE
RONALD O. HYDE, DISTRICT COURT JUDGE

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Defendant and Respondent.	)	

BRIEF OF APPELLANT

STATEMENT OF THE KIND OF CASE

Plaintiff and Appellant filed a Complaint seeking a Decree of Divorce and Defendant and Respondent filed a Counter-Claim for a Decree of Divorce.

DISPOSITION IN LOWER COURT

Upon a trial held in the lower court, a Decree of Divorce was granted by the Court to the Plaintiff and Appellant (hereinafter referred to as "WIFE"), denying same to the Defendant and Respondent (hereinafter referred to as "DOCTOR") and decreed a division of proceeds from the sale of the home, together with the division of some of the other

assets of the marriage, awarding of alimony to the Wife, making award of the retirement funds together with [illegible] the major business assets of the marriage to the Doctor.

RELIEF SOUGHT ON APPEAL

The Wife seeks reversal of the Judgment of the lower court as to the disposition of the retirement funds, a more equitable decree as to the amount of alimony awarded to the Wife together with a more equitable distribution of the marital estate and an award of attorney fees for the Wife.

STATEMENT OF FACTS

The Wife and Doctor were intermarried on April 14, 1950. (R. 1). At the time of the hearing before the lower court, the Wife and Doctor had been intermarried for thirty-one and one-half (31½) years. (T. 167) Both of the parties were fifty-five (55) years of age, (R. 104), with the Wife being a homemaker, and the Doctor being a partner in the Ogden Clinic as a practicing medical doctor. (R. 55). The Wife worked for an eight (8) year period commencing with the Doctor's four years at medical school and during the Doctor's four years of Interning and Residency. (T. 174) The Doctor contributed what he earned as an Interne and what he earned in Residency, with salary on his internship being $32.00 a month and during his Residency $278.60 per month. (T. 176) The Wife terminated employment in 1958 at the time

of the adoption of their first child. (T. 176) The Wife has no source of income other than from an award of alimony. (R. 104)

The Wife filed an action in divorce, even though she did not desire to terminate the marriage, on the basis of the Doctor's request for termination of the marriage in that he had become involved with another woman, (T. 169) and the Findings of Fact and Conclusions of Law reaffirm the allegation and is the basis for the award of the Decree of Divorce to the Wife only. (T. 169)

The Doctor's retirement is one hundred percent (100%) vested (T. 242), and the amount of the profit-sharing plan of the Doctor as of December 31, 1981, the profits set forth for the Doctor in his retirement plan is in the sum of $101,285.25, which over the previous year evidences an increase in value for the year 1981 of 18.4% in growth of the Doctor's retirement fund for the year 1981 over the year of 1980. (T. 374) The opinion of the Certified Public Account was to the effect that there would be a like increase of 18.4% (T.374) for 1982 and would make the value of the retirement fund of the Doctor at the end of 1982 at $119,921.00 (T.375).

The profit-sharing plan is that of the Ogden Clinic, a Utah Corporation, as set forth in wife's exhibit No. 15,

provides for Corporate contribution to the fund of not more than fifteen percent (15%), except for carry over contributions permitted under the Internal Revenue Code of 1954, and specifically provides "all company contributions of this plan shall be payable solely from the company profits, either current or accumulated" (Pl. Exhibit 15). It further provides that an employee may make an addition to the retirement fund, as of the employee's own discretion.

The Doctor's retirement is one hundred percent (100%) vested in the amounts set aside for his retirement fund as of the date he chooses retirement, (T. 242) and the retirement age is sixty-five (65), but the Doctor may continue to to remain as an employee, for purposes of additional increases in the profit-sharing plan, after the age of sixty-five (65), at the approval of the Board of Directors (Section 6.01 Article 6 Pl. Exhibit 15). A further provision is made in that, "should a member become permanently disabled so he can not perform his usual functions with the company, or other type of work for the company suitable to his abilities, termination of employment because of such disability shall constitute retirement. The interest of any member who retires because of disability, as provided in this section 6.02, shall be fully vested regardless of the length of service performed prior to such retirement."

(Article 6 Section 6.02 Pl. Exhibit 15)

The Doctor upon retirement would receive as an additional retirement, over whatever the funds show as his accumulated retirement funds, four months of average earnings, which if computed as of the time of trial, considering three months of 1980, and twelve (12) months of 1981 and nine (9) months of 1982, would provide to the Doctor an additional retirement cash fund in the amount of $25,196.00 (T. 377)

The Ogden Clinic is the professional corporation of which the Doctor is an equal owner, along with other doctors in said corporation, and receives the monies paid by patients, and also leases the building and equipment for the operation of the business of the Clinic, and is the employer as referenced in Pl. Exhibit 15 which is the retirement profit pension plan. (T. 409-410)

The Ogden Investment Company is a general partnership with the same physicians that are share holders in the professional corporation as its members, and owns all of the real property, the equipment, and is a rental and leasing vehicle for the operation of the professional corporation. It also owns the land immediately under the Ogden Clinic's building, the building itself, and the parking lot, with the Ogden Clinic Corporation leasing from the Ogden Clinic

Investment Company the operational building and its equipment. (T 410)

The Old Post Road development partnership is a general partnership, of which the Doctor is a partner therein. It owns the property of its previous clinic, which has been sold. (T 253) The Doctor holds a note payable to him at age seventy (70) which will have a value for distribution to him in the amount of $34,650.00 which will be paid to the Doctor at age seventy (70).

The valuation of the property owned by Ogden Clinic Investment company, the general partnership, shows the value of a building and premises known as the Carriage House, adjacent to the Ogden Clinic, and the other properties contiguous thereto. (T. 318) The Carriage House building and land are valued at $630,000.00 (T. 318), the other vacant land adjacent to the clinic is valued at $360,000.00, (T. 319) and the Ogden Clinic building and land it utilizes is valued at $2,300,000.00 (T. 319). These values were developed by the appraiser and are used by the Ogden Clinic Investment Company as the basis of its financial statements and position. (T.250) The purpose of the existence of the Ogden Clinic Investment Company is to own and hold in possession the assets used in the operation of the Ogden Clinic Professional Corporation and is basically a tax

seller for the doctors who are the partners in the general partnership (T. 251)

ARGUMENT

POINT I.

THE COURT FAILED TO TAKE INTO CONSIDERATION ALL PERTINENT CIRCUMSTANCES AND ALL ASSETS OF THE MARITAL ESTATE.

The Court in its Memorandum Decision denied to the Wife of thirty-one and one-half (31 ½) years the right to continue to reside in the home, and ordered that the home be sold and the proceeds divided between the Wife and the Doctor. (R. 97) It awarded the Wife $1,200.00 a month alimony, to be reduced to $600.00 upon retirement of the Doctor, awarding to the Doctor all of his medical assets, and all of his retirement fund, including his interest in the Ogden Clinic Corporation and the Ogden Clinic Investment partnership, (R. 99) providing that in the event of the previous demise of the Doctor, that the Wife shall have a claim for $50,000.00 to last her for the remainder of her life as a settlement in full of any alimony rights which she may have. (R.100) The Court further stated that the Doctor may select the method of securing the wife's claim through the alternatives of the Hogu case, which would best fit his tax position. (T.100)

In distributing the $34,600.00 of proceeds which would be payable to the Doctor at age seventy (70), the Court

awarded one-third of the proceeds to the Wife and two-thirds of the proceeds to the Doctor. (T.99)

The Court awarded each of the parties other items of personal property, including a division of the furniture, the farm equipment, (R. 98-99) and upon awarding one-half of a money market certificate with E. F. Hutton worth $4,000.00, the Court awarded the Wife one-half, advising that she may use same to pay her attorney fees as no award will be made for same. Upon the entry of appearance of co-counsel (R. 113-114) the writer did subsequently make a motion for new trial and for reconsideration of the Memorandum Decision, and modification of the Memorandum Decision of the Court, citing to the Court the Utah Supreme Court's ruling in Woodward v. Woodward, 656 P.2d 431 (Nov. 4, 1982).

The basis of the previous finding of the Court in the Dogu case was that the Doctor's retirement gross amount was not known, and that there being speculation as to the exact amount of said retirement justified a denial of participation in retirement funds and pointed out to the Court that in the Dogu v. Dogu case, 656 P. 2d., the distribution of retirement funds, when the court finds that the fund's values are not easily ascertainable, is no longer valid, in that in the Woodward case, Supra, the Court recognized the spouse's prospective right to receive monies as an equitable

marital interest, and that the Court in the Woodward decision expanded the scope of the divorce court's consideration of retirement and pension funds to apply to those funds whose value can not be ascertained at the time of the divorce proceeding.

In the instant case the lower court's basis of a non-award of any retirement funds of the actual retirement monies of the Doctor to the Wife was based upon the allegation by the lower court, wherein the court stated:,

> "It is my intent in awarding to the defendant (Doctor) his medical assets and retirement assets that alimony shall be paid therefrom and that the plaintiff (Wife) shall have a claim thereon as against the defendant estate if he should predecease her" (R. 99-100)

The lower court failed to distinguish between property and support obligations, and did not take into consideration:

1. The eight (8) years during which the Wife worked to allow her Husband to obtain his medical degree and to support him during the period of his Internship and Residency for a period of eight (8) years, during which time the Wife deprived herself of any continuing education, and the opportunity, if she so desired, of not being just a housewife.

2. The assistance given by a dutiful Wife in providing

a home for the Doctor and the care, comfort and [illegible] obligations which she performed during her thirty-one [illegible] one-half (31 ½) years of marriage.

3. The continuing substantial earning position of the Doctor with a current income at the time of the divorce of $70,000.00 to $80,000.00 annually.

4. Benefit to the Doctor of a $100,000.00 life insurance policy, all paid for by the Clinic (T. 272), the lump sum fund, in the present amount of $25,196.00, payable to the Doctor if he should retire, which is in addition to his accumulated retirement fund (T. 377); security of the position of the Doctor, who has been with the Ogden Clinic since July of 1960 (T.519) and who is the incoming president of the Ogden Clinic Professional Corporation for the following year (T. 519); the fact the Doctor's vested retirement fund, as of December 31, 1981 is $101,285.25 and shows a 18.4% increase over the prior year (T. 241, T. 374) and that it is the intent of the administrator of the retirement fund to add 15% annually to the growth of the fund (T. 242).

5. The fact that the Clinic provides to the Doctor a health insurance program of Blue Cross and Blue Shield together with a supplemental long term disability policy with Prairie States Insurance Company which provides a benefit of $1,300.00 per month for short term disability

and provides through Mutual Benefit Life long term disability which would make disability benefit payments to the Doctor of $3,275.00 a month (T. 253).

This court in its determination in Dogu v. Dogu, Supra, rejected the lower court's finding that the court had implicitly divided the retirement funds when it stipulated that the husband should continue to pay alimony upon his retirement, the Court having awarded to the husband the entire retirement fund.

The court in the instant matter made a determination, that it could not specifically determine the amount of the retirement fund, and that the court would give all of the retirement fund to the Doctor to insure payment of alimony to the Wife.

This court determined in the Dogu case that if the Decree had been drawn so the retirement funds could be used to assure the payment of alimony in the event the husband died, that the lower court's decree would have been within the discretion of the court, but determined that in-as-much as it was not so stated in the Dogu case, that this court vacated and remanded that part of the judgment.

In the instant matter before the court, it is even more offensive, in that the Clinic was paying for a life insurance policy on the Doctor in the amount of $100,000.00

which is in addition to his vested retirement fund. The decree provided that the Wife would only receive the sum of $50,000.00 upon the Doctor's death, and in effect holding that the retirement was not a marital asset, but was the sole property of the Doctor.

It is submitted to the Court that this court reversed the findings of Bennett v. Bennett 656 P.2d 432, and broadened the base of Dogu v. Dogu, Supra, in holding in the Woodward case, Supra that the existence of contingencies that precludes the division of the retirement funds, by avoiding the valuation problem, in holding that the duty of the trial court is to divide the marital property equitably, and that the retirement benefits are to be divided in accordance with payments made at the time of distribution to the retiring spouse.

If the fundamental legal principles enunciated by this court in English v. English, 565 P.2d 409, (Utah 1977) appears to be effectuated in the instant matter, the payment to the Wife of $1,200.00 monthly for support, out of the Doctor's current monthly income of $6,795.00 (a recent paycheck as of approximately the time of trial), (T. 229) is to "provide support for the Wife as nearly as possible the standard of living she enjoyed during her marriage, [it] is to prevent the Wife from becoming a public charge", the

the lower court's sense of equity for a Wife of thirty-one and one-half (31 ½) years, who has been tossed aside for a new love of the Doctor, is definitely not in the spirit of the previous findings of this court and is all the more inequitable in that out of the $1,200.00 the Wife was ordered to pay taxes, insurance, and to maintain the property, until such time as the property would be sold.

This court in Pope v.Pope 589 P.2d. 752 (December 15, 1978) made a determination therein, where the parties had been married for more than ten (10) years and had two (2) children, and where the defendant attended college after the marriage to the plaintiff, and obtained a Bachelor's Degree in Engineering and a Master Degree in Business Administration. The plaintiff on the other hand terminated her education to spend her time as a housewife and homemaker. The court in effect awarded to the Wife 65% of the marital property and 35% to the husband. The husband on appeal to this court contended there was an abuse in discretion and an unjust and inequitable distribution of the assets, this court upheld the lower court in stating:

> "He has two college degrees and several years experience in operating his business and thus has a reasonably assured future of earnings and profits from the business activities. Plaintiff, however had, has no college education and was unemployed at time of trial. * * *"

This court in the Pope case also upheld an award of $1,500.00 as and for attorney fees for the Wife even though the pleading was only for $1,000.00.

In contrast to the instant matter before the court, the Doctor has a most substantial practice and most substantial monthly income, together with vast holdings in the Corporation and the two General Partnerships, and not only did the Wife devote eight (8) years in assisting the Doctor to go through medical school, internship and Residency, but has been married to the Doctor and been a homemaker for thirty-one and one-half (31 ½) years, and as to fault, the marriage was destroyed by the extra-marital activities of the Doctor, demanding and necessitating the filing by the Wife of a petition for divorce.

The awarding to the Wife of $1,200.00 a month until the retirement of the Doctor, and then $600.00 a month, in order to allow her to maintain her previous standard of living which she helped forge for the Doctor, and the non-award of attorney fees was clearly not based upon the taking into consideration of the pertinent circumstances and assets of the marital estate.

In Englert v. Englert 576 P.2d. 1274 (February 1978) this court held that the provisions of the Utah Statute 30-3-5 Utah Code Annotated, as Amended in 1957,

which states:

> "When a decree of divorce is made the Court may make such orders in relation to the children, property and parties, and the maintenance of the parties and children, as may be equitable."

This court in interpreting the statute held, that there is no implication of, or hint of limitation in the statute, in that the court will take into consideration all of the pertinent circumstances and stated:

> "It is our opinion that the correct view under our law is that this encompasses all of the assets of every nature possessed by the parties, whenever obtained and from whatever source derived; and that this includes any such pension fund or insurance. These should be given due consideration along with all other assets, income and earnings and the potential earning capacity of the parties, in determining what is the most practical, just and equitable way to serve the best interest and welfare of the parties and their children (Referring to Wilson v. Wilson 5 U.2d 79, 296 P.2d 977)"

It is submitted to this court that the decision of the lower court in the instant matter has not followed the mandate of this court, considering that the Wife has been unemployed and out of the work force, except for the first eight (8) years of the marriage of thirty-one and one-half (31 ½) years; has a right to maintain herself in the manner to which she has lived for past twenty-five (25) years, and is undoubtedly not the party causative of the termination of the marriage.

POINT II

AN EQUITABLE DISTRIBUTION OF THE ASSETS CAN BE MADE ONLY BY AN AWARD TO THE WIFE OF THE PROSPECTIVE EARNINGS OF THE DOCTOR.

It is submitted to the court, that the circumstances in this case perfectly exemplifies the principle that the Wife has a property interest, both legally and equitably, in the medical degree and business of the Doctor. It is abundantly clear that the Wife substantially assisted the Doctor to be able to obtain his medical degree and go through Internship and Residency, and that the Doctor's ability to earn from $70,000.00 to $80,000.00 a year or more, from the Doctor's medical practice, is a direct and proximate result of the support of the Wife in the education of the Doctor and in the total thirty-one and one-half (31 ½) years services which she rendered to him socially, morally and physically, and in the raising and nurturing of their two adopted children, was as fundamental to the marital partnership as the Doctor's practice of medicine.

It is submitted to the court that to deal with the matter before the court fully only by a division of the meager assets of real and personal property, as against the retirement rights and proprietary interest of the Doctor in the Ogden Clinic Corporation, the Ogden Clinic Investment

Company and the Old Post Road partnership, can not be resolved by an award of $1,200.00 a month alimony.

It is submitted to the Court that the Doctor at fifty-five (55) has found himself a new mate and as such will continue to possess all of the proprietary interest which he has in his medical business assets and in his profession, including the substantial earning power which he has as a medical Doctor, and leaving to the Wife at age fifty-five (55), alimony which is to be terminated if she should remarry, is hardly a proper tool for the restructuring of the life of the Wife.

The Wife has no particular skills after having been unemployed for some twenty-three and one-half (23 ½) years and if she should seek to restructure her life by marriage she will forfeit, for the benefit of the Doctor, all of her rights to any continued monthly support while the great sacrifice which she made in assisting the Doctor through his educational and development process as a Doctor, then the Doctor's acquiring all of the property interests which he has in his business shall be used by the Doctor for his own personal comfort and luxury and for that of his new spouse.

In Re marriage of Nichols, 606 P.2d 1314, the Colorado Court of Appeals, Division Three (December 6, 1979), there was a marriage of twenty-five and one-half (25 ½) years,

wherein the husband was a dentist with a successful practice. Expert witnesses testified that the husband's dental practice was worth between $29,000.00 and $31,000.00, which included the valuation of good will in the practice as an intangible asset, the Court stated, that as long as the husband continues to practice the value of his professional good will, generated by his skill, effort and reputation, will continue to inhere in the practice after dissolution, even as it did during the marriage, in that the husband will continue to reap the returns on the professional good will associated with his dental practice. The court thereupon held that in a division of marital property the value of good will incidental to the husband's practice is an asset acquired during the marriage and must be considered as marital property.

The court also held that the award of alimony which compelled the Wife to invade her separate property in order to support herself was as a matter of law an abuse of discretion.

In Williams v. Williams 548 P. 2d. 794 Supreme Court of Kansas (April 1976) the court held it is the duty of the court to take into account, upon rendering judgment in divorce matter and in making its division and award:

1. The relative fault of the parties in determining

the alimony award.

2. That the gravity of the parties transgression will warrant a larger award.

3. That in addition to fault, in considering fixing alimony other matters should be considered:

(a) The age of the parties.

(b) Their present and prospective earning capacities.

(c) The length of the marriage.

(d) The property owned by the parties.

(e) The time, source and manner of acquisition of property.

(f) The family ties and obligations.

(g) The parties overall financial situation.

While the lower court is vested with wide discretion in adjusting the financial obligations of the parties it is submitted that discretion should be disturbed where there is a showing of clear abuse.

In Colvert v. Colvert 569 P.2d 623, the Supreme Court of Oklahoma (May 17, 1977), the wife was granted a Divorce by reason of fault of the husband based on incompatibility and ordered the division of personal property and awarded the wife alimony and child support. The husband who, at the

time of the Divorce was six (6) months away from obtaining his MD Degree, while the wife was the principle bread winner for the family while the husband was in medical school. The Court awarded alimony as a property division in the amount of $35,000.00 payable in monthly installments on an increasing scale, based upon the husband's earning capacity, both present and future.

The Court held in the Colvert case, that the family unit made an investment not in the personal or real property, but in the husband's professional education as a doctor, which effort was enhanced and made possible by the wife becoming the principle support for the family, through her own education, profession and work.

The Oklahoma Court stated, that alimony is not limited to the value or amount of the husband's property. His earning capacity, present and future is an element that may be considered in fixing the amount.

In the instant matter before the court, the Court stated that the retirement funds could not be ascertained and that the business assets were essential to the payment of alimony to the Wife, and the Court awarded $1,200.00 monthly to the Wife out of the Doctor's pay which was at the last payday $6,795.00, and was ascertained as being between $70,000.00 and $80,000.00 annually, the Court stating that

it was necessary to leave all of the business assets to the Doctor so that the alimony to the Wife could be paid out of the present business assets and income, the lower court further divided the note due and owing to the Doctor from the sale of the old clinic, wherein the Court awarded only one-third of the note to the Wife upon its future payment and two-thirds to the Doctor.

In the marriage of Goldstein, 582 P.2d. 1343, 120 Ariz. 23, Supreme Court of Arizona (September 1978), the husband appealed from the Decree of the lower Court challenging the court's valuation of certain assets of the professional corporation awarded to the husband in the decree. The court evaluated the worth of the corporation without deduction of overhead expense from the amounts in the corporation's accounts receivable and in its checking account, and these assets together with a pension and profit-sharing plan were considered by the court without reduction of any tax liabilities, and considered in the award to the wife.

The Supreme Court of Arizona agreed with the lower court holding that the accounts receivable were a valuable asset which arose from the husband's efforts during the marriage, and must be considered as an asset on the husbands side of the ledger in apportioning the property of the marriage.

The court held that there should be no deduction for expenses in that the past overhead which generated the assets would be reflected in the present value of the Corporation and to then subtract future overhead expenses would amount in essence to a double deduction from the same assets. The court further held that in making an award of the pension and profit-sharing plan, that the tax liability should be considered, in that the trial court is not required to speculate or to consider a tax consequence in the absence of proof that a taxable event has occurred during the marriage, or will occur in connection with the division of the community property. The Arizona court did take into consideration the accounts receivable of the professional corporation, as well as the pension and profit-sharing retirement rights of the husband, and all of the assets as well as the considering of the present and prospective income of the husband in making an award to the spouse.

In Kerr v. Kerr, 610 P.2d. 1380, Supreme Court of Utah (April 1980), the lower court awarded a greater portion of the marital property to the wife than to the husband. Awarding to the wife full ownership of the home and lot which was valued in excess of $102,000.00, together with the household furniture and furnishings, which were stated to

have a value of additional $50,000.00, while the court awarded to the husband notes and contracts which he had purchased as investments in a development corporation.

The parties in the Kerr case, had been married for thirty-one (31) years, and the wife worked and provided substantial financial support to the marriage. The defendant attended dental school during the time that the wife was the principal bread winner for the family, and the wife had not been gainfully employed outside the home since the birth of their first child, and had kept and maintained the home of the parties and cared for their children. The issue on appeal before the Utah Supreme Court was the equity of the distribution of the assets.

This court in its upholding of the lower court found that where the wife had not been gainfully employed outside the home for nearly twenty-two (22) years, where the husband had a well established profession netting him an excess of $40,000.00 a year, and the husbands earnings and degree was acquired due to the wife's willingness to work while the husband attended school, that the award to the wife of a greater portion of the marital property than to the husband was not an abuse of discretion, including the awarding of attorney fees.

In Mori v. Mori, 603 P.2d. 85, 124 Ariz. 193 (November

5, 1979) the Supreme Court of Arizona held that the [illegible] receivable of a husband's professional law corporation constituted marital assets and were to be included in the distribution of marital assets between the husband and the wife. The court also upheld an award to the wife of $15,000.00 in attorney fees.

In Frishkoff v. Frishkoff, 45 Or.P.App. 1033, 610 P.2d. 871 (1980) the court held that the contributions of the spouse as a homemaker shall be considered as a contribution to the acquisition of marital assets.

CONCLUSION

It is submitted to this Honorable Court that the award by the Court to the Doctor of all of his interest in the Professional Corporation, and the two Profession Partnerships, together will all of his retirement, profit-sharing funds and lump sum wage separation benefit, which will be paid to the Doctor at time of his retirement; the award of two-thirds of a promissory note payable to the Doctor at age seventy (70), worth $34,000.00 with only one-third to the Wife; the forcing of the sale of the home and division of all of the non-professional and private assets of the Wife and Doctor relating to the home, the furniture and other items of personal property; an award of one-half of a $4,000.00 E.F. Hutton certificate supposedly dividing up the

... so that the Wife could have money for attorney fees instead of directing the Doctor to pay the Wife's attorney's fee, based upon the thirty-one and one-half (31 ½) years of marriage, and the fact that the Wife has been out of the labor market for more than twenty-three (23) years, with no particular skill for future earnings; the failure to award to the Wife any part of the substantial and vested retirement plan of the Doctor, upon the basis that even though the Doctor has a well established practice, that his last monthly paycheck at time of trial was in the amount of $6,700.00, the award to the Wife of $1,200.00 monthly from which what is to be subtracted, taxes, insurance and maintenance of the home until sold, constitutes an abuse of discretion. The business of the Doctor should be considered as a marital asset made possible and developed during the thirty-one and one-half (31 ½) year marriage to the Wife, as well as by the Wife's employment for eight (8) years while the Doctor was acquiring his degree, and is the basis for the earning power which the Doctor now has presently and prospectively. The Wife is entitled to a substantial ownership in the business, its good will and accounts receivable, and if not given outright, a reasonable percentage of the future earnings to be derived from the medical business of the Doctor, should be at least a reasonable

consideration of the assets presently and prospectively, a division of the assets in such a manner that where the party at fault may remarry and not lose any of the benefits of all of the vast assets and future earning power which he has, while the Wife if she should in the future decide to remarry, would forfeit to the Doctor, for the benefit of himself and his future spouse, all of the benefits of the present and prospective assets of the medical practice of the party who is at fault and causative of the divorce. This court should reverse the decree of the lower court as to the division of all of the assets and remand it for further hearing as to the division of assets together with the mandate of this Court as to what the lower court should consider in regards to same.

RESPECTFULLY SUBMITTED this 9 day of December, 1983.

VLAHOS, PERKINS & SHARP

BY _____

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 4 day of December, 1983, I mailed a true and correct copy of the above and foregoing Appellant's Brief, by placing same in the United States Mail, postage prepaid and addressed to the following:

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SECRETARY