1984

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

IN THE SUPREME COURT OF THE

STATE OF UTAH

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

BRIEF OF RESPONDENT

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

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BRIEF OF RESPONDENT

STATEMENT OF THE KIND OF CASE

This is an action for divorce brought by Plaintiff-Appellant, Betty M. Gardner, against Defendant-Respondent, William James Gardner, III.

DISPOSITION IN LOWER COURT

The District Court of Weber County, the Honorable Ronald O. Hyde presiding, sitting without a jury, granted a Decree of Divorce to Plaintiff-Appellant, hereinafter referred to as the "Wife". Although Defendant-Respondent, hereinafter referred to as the "Husband", filed an Answer and Counterclaim in these proceedings, he presented no grounds for divorce at the trial, although it was represented on his behalf that the case was "not all one-sided" (T. 168).

The family home, farm, and equipment were to be sold and the funds received therefrom were divided equally

between the parties. Additionally, Wife was awarded the 1980 Volkswagon, substantially all of the household furniture and furnishings in the family home, one-third of the proceeds of the contract for the sale of the old Ogden Clinic building, one-half of a $4,310.00 certificate of deposit at E. F. Hutton, one-half of the proceeds from the sale of boats and other vehicles, one-half of the proceeds from the sale of horses and paraphernalia, and her ski equipment and personal effects. Husband was awarded a 1981 Subaru automobile, two-thirds of the proceeds from the contract for the sale of the old Ogden Clinic building, one-half of the E. F. Hutton certificate of deposit, the household furniture and furnishings in his apartment, one-half of the proceeds from the sale of the boats and other vehicles, his ski equipment and personal effects, and his medical and business assets, including his retirement funds.

Wife was awarded $1,200.00 per month alimony, to continue until Husband's retirement, at which time the alimony was to be reduced to $600.00 per month. The trial court stated its intent that the alimony should be paid from income from Husband's medical practice until he retires, and from his retirement income after retirement, and should Husband predecease Wife so that alimony terminates. Wife was to have a claim against Husband's estate in the sum of $50,000.00, with Husband to select the method of securing

claim through the alternatives set forth in the Utah case of Dogu v. Dogu, 652 P2d 1308 (1982).

The Court made no award of attorney's fees, indicating that the funds Wife received from the contract on the old Ogden Clinic building, and her share of the E. F. Hutton money certificate would be available for her use as attorney's fees.

RELIEF SOUGHT ON APPEAL

Husband (Respondent) seeks an affirmation of the trial court's judgment.

STATEMENT OF FACTS

Appellant's Statement of Facts does not set forth fully or accurately the evidence which has a bearing on the issues on appeal.

The parties were married to each other on April 14, 1950 (T. 167). No children were born as issue of the marriage, but the parties adopted two children, both of whom are now adults (T. 168). Each party filed a divorce complaint against the other, and the two cases were consolidated (R. 12). Husband is a general and vascular surgeon and was 55 years of age at the time of the trial (T. 469). Wife was 52 years of age at the time trial (T. 216). Neither of the adopted children presently reside at home (T. 203), and Husband is still the sole source of support for the 19-year old daughter to whom he gives in excess of $300.00 per month

plus tuition and books while she attends Utah State University at Logan, Utah (T. 470). Husband intends to continue supporting said daughter through college (T. 471).

Although Husband did not present grounds for divorce he represented that the case is "not one-sided" (T. 168), and his complaints against Wife are set forth in his answers to interrogatories (R. 57-58) wherein he indicated that problems of communication arose, each developed different interests (he as President of the Utah Medical Association and she as a horse fancier), Wife withdrew physically from him, causing the marital relationship to deteriorate, and Wife informed Husband she planned to leave him as soon as their daughter finished college.

Husband was a Senior in college at the time of the marriage (T. 170), being three months short of graduation (T. 495).

Although Wife claims to have worked while Husband was in medical school and training, Husband also worked during this period, doing such things as waiting on tables, construction work cutting lines for a gas company, working as a mail carrier (T. 205 and 496), working for Campbell Soup Company (T. 205), participating for pay in R.O.T.C. (T. 497), submitting to experiments in the Dermatology Department for pay while in medical school (T. 497), and donating blood for money as often as he was permitted (T. 497). His parents

paid for all of his tuition through medical school (T. 171 and 495). Husband also received money from the G.I. Bill that assisted through graduate work (T. 495).

Wife is in good health (T. 177) but states she does not want to go to work (T. 177) and that she wants to direct her attention solely to philanthropic activity without producing any sort of income (T. 219). She is, however, capable of employment, having developed good secretarial skills as the secretary to a college president and as a very competent executive secretary to a hospital administrator (T. 207 and 208).

Husband's health is generally good (T. 471), although he has recently had two separate operations in connection with the removal of a kidney stone, has had a number of injuries, including fractures of the leg and skull, has had an episode of high blood pressure, and has a non-toxic goiter for which he takes medication and which causes some concern because of the greater likelihood of malignancy (T. 472).

The present assets of the parties include the following:

(a) A six-bedroom home, with garages for four cars, a barn, and other outbuildings situated on approximately 21 acres of land near Huntsville, Utah (T. 154, 215-216). Also included are several

horses, tack and farm equipment appraised at approximately $18,575.00 (T. 476). There is a mortgage on the real property of $20,803.00 (T. 182) with monthly payments of $229.00 (Plaintiff's Exhibit No. 2). Several appraisals were made of the real estate reflecting net value between $246,000.00 and $280,000.00 (R. 105). The court ordered that the home, farm, and equipment be sold and that the proceeds be divided equally between the parties (R. 110).

(b) Household furniture and furnishings in the family home which Husband testified are worth $25,000.00 and are insured for $53,000.00 (T. 485) and which Wife testified are worth $13,710.00 (Plaintiff's Exhibit 3 through page 5 thereof). This was awarded to Wife.

(c) Household furniture in Husband's possession which he testified has a value of $2,500.00, and which the court awarded to him (Defendant's Exhibit 13).

(d) A 1980 Volkswagon which each of the parties valued at $4,500.00 (Plaintiff's Exhibit 3 and Defendant's Exhibit 13). This was awarded to wife.

(e) A 1981 Subaru automobile which Husband

valued at $6,000.00 but against which there is a debt owing to the OGDEN CLINIC PROFIT SHARING PLAN of $7,436.00 (T. 245). This was awarded to Husband.

(f) Boat, motors, canoe, and other motor vehicles which Wife testified have a value of $5,374.00 (Plaintiff's Exhibit 3) and which Husband testified have a value of $5,074.00 (Defendant's Exhibit 13). These were ordered sold and the proceeds divided equally between the parties.

(g) A certificate of deposit at E. F. Hutton with a value of $4,610.00 (T. 519). This was awarded half to each of the parties.

(h) Ski equipment owned by each party with a value of $300.00 each. Each was awarded his own.

(i) Assets in connection with Husband's medical practice consist of the following:

1. 100 shares of stock in the OGDEN CLINIC PROFESSIONAL CORPORATION which the Administrator of the Clinic and the CPA for the Clinic both testified have a total value of $100.00 (T. 254 and T. 407). The said professional corporation is made up of 24 physicians (T. 254) and the only assets of the corporation are the accounts receivable

and the bank account (T. 406). The liabilities consist of rent, employees and physician salaries, and the contributions made by the corporation to the physicians' profit sharing plan (T. 406). The corporation has no other physical assets (T. 406). Both the Clinic administrator and the CPA for the Clinic also testified that other doctors have recently left the Clinic and have been entitled to take nothing with them other than the value of their stock of $100.00 (T. 258 and 407). Husband would be entitled to nothing more if he left the Clinic (T. 258-59 and 407). Wife's attorney conceded that "there is no argument with regard to the $100.00 stock that the doctor owns in the OGDEN CLINIC PROFESSIONAL CORPORATION (T. 438).

2. OGDEN CLINIC INVESTMENT COMPANY. This is a general partnership made up of the same physicians that are shareholders in the OGDEN CLINIC PROFESSIONAL CORPORATION (T. 410). Its assets consist of the Clinic building, the land immediately under the building, the parking lot, and the medical equipment used by the physicians (T. 410). Its liabilities

consist of the mortgage on the building and real property and the notes owing for the purchase of equipment (T. 410). The net worth of Husband in this entity, as carried on its books, is a minus $11,304.00 (T. 261 and 412 and Defendant's Exhibit 3). None of the partners has ever had a draw from this partnership and they have had to subsidize it several times in the past ten years (T. 416). There is a buy-out provision in the partnership agreement which governs the amount each physician would receive should he withdraw from the partnership (T. 262) and under that provision, two doctors who recently left each received $3,726.26 for their interest (T. 263) and the CPA for the partnership testified that this was determined to be the value of each partner's interest shortly before the trial (T. 416 and Defendant's Exhibit 5).

3. An interest in OLD POST ROAD DEVELOPMENT COMPANY. This is a partnership made up of part of the Ogden Clinic physicians and the former Clinic Administrator (T. 264). It owns commercial property adjacent to the

Ogden Clinic building (T. 264). The most recent records of this entity show the book value of Husband's equity to be $441.00 (Defendant's Administrator and the CPA for this entity testified that the market value of Husband's equity is a maximum of $12,500.00 (T. 267 and 425), but the said CPA testified that she would not buy anybody's interest in this investment due to the poor economic situation and the fact that if the tenant of the building (Carriage House Furniture Store) cannot make the rental of $7,500.00 per month, the individual partners are going to have to make a mortgage payment of that amount (T. 424). Since the trial, the tenant has, in fact, defaulted on its lease and the partners are having to make the monthly mortgage payment.

4. A promissory note to Husband from the old OGDEN CLINIC BUILDING CORPORATION. This represents Husband's share of the building previously occupied by Ogden Clinic (T. 246). The balance owing on said note is $16,325.00, with payments being made to Husband of $192.55 per month, with interest at 12 per cent per

cent per annum (T. 246-247). The CPA for the Clinic testified that this note will be worth less than $16,000.00 if interest rates go up (T. 419). Husband testified that he would be willing to sell this asset "in a flash" for $16,000.00 (T. 490). The trial court granted one-third of this note to Wife and two-thirds to Husband (R. 111).

5. An interest in the OGDEN CLINIC PENSION AND PROFIT SHARING PLAN, also known as the OGDEN CLINIC RETIREMENT TRUST. The books of the trust reflect that as of December 31, 1981, Husband's share was $101,285.25 (T. 241 and 426), and that he has a loan against this account for the purchase of an automobile, with a balance of $7,436.00 (T. 245 and 430). Husband must actually retire or terminate his employment in order to be entitled to anything under the plan (T. 268), and the normal retirement age anticipated by the plan is age 65, which is 10 years away for Husband (T. 268 and 269). Under the plan, the trustees have the option to direct that a retiring physician will be paid over a period of time, rather than in

a lump sum (T. 269 and 427). One-third of the plan is non-income producing (T. 427 and 447). Doctors who have retired or terminated have asked for their funds, but due to problems in the plan, have not been paid (T. 429). The Clinic Administrator testified that the recent market value of the assets of the plan are below what the carrying value is on the books (T. 271) and that the value of the plan has actually been depreciating (T. 272). The CPA for the Ogden Clinic testified that in view of the fact that Husband will not be entitled to any of the funds until his retirement in 10 years, and that at that time the trustees may elect to pay his share out over a period of many years, the present value of Husband's interest in the retirement trust is approximately $40,969.00 (T. 432).

6. Additional retirement benefits from Ogden Clinic. The by-laws of the Clinic set out a formula which provides that upon retirement, a physician is entitled to receive as additional retirement benefits a sum equivalent to four months of the average salary he received during his last two years of employment

with the Clinic (T. 392). This asset is highly speculative (T. 429 and 493), inasmuch as a physician is not entitled to receive it if he practices medicine within an area of 30 miles of the Ogden Clinic (T. 393), and the asset is completely unfunded (T. 493 and 434). This asset is even more speculative because of legal complications wherein the by-laws of the Clinic regarding this asset conflict with the by-laws of the PENSION AND PROFIT SHARING PLAN, and there are attempts to resolve this being made by attorneys for the Clinic and Retirement Trust (T. 435). Nothing has ever been paid out under this provision to any physicians who have retired or terminated their employment with the Ogden Clinic (T. 436). Husband has placed no value on this item because of its speculative nature (T. 438).

The trial court concluded that the medical assets and retirement of Husband are basically futuristic and will have to be utilized at retirement (R. 97-98 and R. 105). These assets were awarded to Husband, with the exception that Wife was awarded one-third of the account from the sale of

the old Ogden Clinic building (R. 111).

Husband's 1981 income was $70,728.00 (T. 408), or an average of $5,894.00 per month, and the estimate of his CPA that his 1982 income would probably be between $70,000.00 to $80,000.00 (T. 409) was based upon the fact that two doctors had recently left the Clinic, leaving approximately $200,000.00 in accounts receivable to be disbursed to the remaining doctors, which would account for as much as a $10,000.00 increase in each of their salaries for the year 1982, but this would be a one-time increase (T. 409).

Wife was awarded $1,200.00 per month alimony to continue until Husband's retirement, at which time it was reduced to $600.00 per month, with it being the intent of the trial court that the alimony should be paid from the income from defendant's medical practice until he retires and from retirement income after retirement, and should Husband predecease Wife so that alimony terminates, Wife should have a claim against Husband's estate in the sum of $50,000.00, with that claim being secured by Husband through the alternatives set forth in the Utah case of Dogu v. Dogu, 652 P2d 1308, as would best serve Husband's tax position (R. 112).

ARGUMENT

POINT I

THE TRIAL COURT TOOK INTO CONSIDERATION ALL PERTINENT CIRCUMSTANCES AND MADE AN EQUITABLE DIVISION OF THE MARITAL ESTATE

In the Utah case of Turner v. Turner, 649 P2d 6 (1982), this court stated:

> "Although this Court may weigh the evidence and substitute its judgment for that of the trial court in divorce actions, Hendricks v. Hendricks, 91 Utah 553, 63 P2d 277 (1936), this Court will not do so lightly merely because its judgment may differ from that of the trial judge, MacDonald v. MacDonald, Supra. See McCrary v. McCrary, Utah, 599 P2d 1248 (1979). A trial court's apportionment of marital property will not be disturbed unless it works such a manifest injustice or inequity as to indicate a clear abuse of discretion Kerr v. Kerr, Utah, 610 P2d 1380 (1980); Naylor v. Naylor, Utah, 563 P2d 184 (1977)."

The Wife has not established such a manifest injustice or inequity as to indicate a clear abuse of discretion in this case. The trial court correctly found that the "parties primary asset is their home, farm and equipment in the valley" (R. 97), and that "one thing that is evident is the assets of the parties cannot be divided so that the plaintiff can stay in the family home" (R. 97). This is reasonable in view of the fact that both of the children have now left home and the 53-year old Wife does not need, and cannot practically use and maintain, a six-bedroom home with garages for four vehicles, a barn, outbuildings, farm equipment, several horses which she does not ride, and 21 acres of land. The

division by the Court gives each of the parties one-half of their "primary asset" so that each has substantial assets with which to begin anew. Based on Wife's own evidence, she leaves the marriage with assets in excess of $150,000.00 in value. Husband values those same assets at in excess of $180,000.00.

It was appropriate for the trial court to order that wife be permitted to remain in the home until it is sold and make the mortgage payment of $229.00 per month, together with taxes and insurance from the $1,200.00 per month alimony she receives. The real property was, in fact, sold within a few months after the granting of the divorce, so that Wife was responsible for those expenses for only a short time.

Wife brought no assets into the marriage, and with the exception of the medical assets and retirement benefits which will be discussed hereafter, she is leaving the marriage with over one-half of the marital assets.

POINT II

THE AWARD OF ALIMONY AND DISPOSITION OF MEDICAL ASSETS AND RETIREMENT FUNDS MADE BY THE TRIAL COURT WAS FAIR AND EQUITABLE

This case is remarkably similar to the Utah case of Dogu v. Dogu, 652 P2d 1308 (1982), which case was tried by the same District Court Judge and by the same attorneys handling this appeal. That case also involved a marriage of

lengthy duration (24 years) between a physician and his unemployed spouse, in which the trial court made an essentially equal division of the parties' property, excluding the Husband's medical assets (a professional corporation) and his retirement funds of $86,730.00, both of which were awarded to him. Dr. Dogu's income was $108,675.00 the year prior to the divorce and the trial court awarded alimony of $1,500.00 per month, which was reduced to $750.00 per month at the time of the doctor's retirement. The alimony award of $1,200.00 per month in the present case, based upon Husband's income the year prior to the divorce of $70,728.00, which is to be reduced to $600.00 per month upon retirement, is fair and equitable when compared to the alimony award in the Dogu case. This is particularly true in view of the fact that wife in this case filed an affidavit in an order to show cause proceeding setting forth her total monthly living expenses at $1,648.00 (T. 6) of which $125.00 was attributable to farm animal care and $100.00 to farm maintenance, both of which expenses no longer exist, and $300.00 which she claimed was attributable to child tuition and school expenses, all of which were at the time, and now are, being paid by Husband (T. 470). After deducting these expenses which are no longer applicable ($525.00) from Wife's stated needs of $1,648.00, her actual needs are $1,123.00 per month. Should she desire, she is free to supplement this income by

obtaining employment. Considering her state of good health and her prior experience as a competent executive secretary, she should be able to do so without great difficulty. Such an option was recognized by this Court in the case of Warren v. Warren, 655 P2d 684, Utah (1982) where upon termination of a 27-year marriage, the Husband, with a $40,000.00 per year income, was ordered to pay $400.00 per month alimony for a period of four years when the alimony terminated. This Court pointed out, on page 688, that "plaintiff is free to supplement this income by accepting full-time or part-time employment." With her substantial assets and $1,200.00 per month alimony, Wife in the present case was treated far more equitably than was the wife in the Warren case.

Wife's position in her appeal brief that Husband's alleged fault in this marriage should be a factor considered by the Court in setting alimony and determining distribution of property, is erroneous. In the case of Jesperson v. Jesperson, 610 P2d 326, Utah, (1980), this Court ruled that the trial court improperly considered marital misconduct in making the property division. On page 328, the Court stated:

> "We have previously held that a trial court must consider many factors in making a property settlement in the divorce proceeding, but the purpose of the settlement should not be to impose punishment on either party." (citing Read v. Read, Utah, 594 P2d 871 (1979).

In the case of English v. English, Utah, 565 P2d 409 (1977), this Court stated, at page 411:

> "The purpose of alimony is to provide support for the wife and not to inflice punitive damages on the husband. Alimony is not intended as a penalty against the husband nor a reward to the wife."

The award of the medical assets and retirement benefits to Husband was proper and was consistent with the Court's holding in the Dogu case (Supra). Wife proposed that these assets be awarded to Husband in her proposed division of assets (Plaintiff's Exhibit 19), but she carried them at grossly over-inflated values. Her accountant testified that in his opinion the value of Husband's interest in OLD POST ROAD DEVELOPMENT COMPANY was $16,777.00 (T. 371), notwithstanding the testimony of the Clinic Administrator that the Clinic was at that very time undertaking the purchase of a partnership interest two-fifths the size of Husband's for $5,000.00, making the value of Husband's interest $12,500.00 (T. 266).

An even more gross error was made by Wife's accountant in valuing Husband's interest in OGDEN CLINIC INVESTMENT COMPANY at $34,041.00 (T. 373). He went on to state that under the partnership agreement Husband (wouldn't be able to get that value today) (T. 373). The fact is that there is a buy-out provision in the partnership agreement which clearly determines the value of a partner's interest (T. 262) and the testimony of the Clinic's Administrator was that under

the formula, two doctors who had just recently left the Clinic were each paid $3,726.26 for their interest, clearly establishing the market value of each partnership interest.

Wife's accountant attempted to value the retirement trust at $119,921.00 by interpolating an 18.4 per cent increase in the fund over the previous year. His reasoning was:

> "Not knowing what the valuation is going to be at the end of December of this year, I felt maybe the 18.4 per cent increase might be fair in 1982." (T. 374) (emphasis added)

The testimony of the Clinic's CPA and its Administrator was much more realistic in pointing out that even the book value of Husband's interest in the retirement plan ($101,285.00) was not the present market value thereof in view of the fact that it is not payable for 10 years and even then, the trustees could extend the pay-out over several years after retirement (T. 269 and T. 432). Wife also failed to take into account that there is a debt of almost $8,000.00 against the retirement fund for the purchase of Husband's automobile. A far more accurate figure of $40,969.00 was given by the CPA for the Clinic as the present value of Husband's interest in the retirement plan (T. 432).

The supplementary retirement provision in the Clinic By-Laws has been previously discussed herein, and due to its speculative nature, legal complications involved

herewith, and the fact that none of the doctors who have previously left the Clinic were even paid under this provision, is appropriately valued as zero.

A final example of erroneous testimony by Wife's accountant was given regarding the value of the Ogden Clinic building note which has an unpaid balance of approximately $16,329.00. Wife's accountant placed a present market value on said note of $34,650.00 on the basis that that is the amount with interest that would be paid out on the note over its lifetime (T. 395). He finally admitted on cross-examination that neither he nor anyone else in their right mind would pay that price for it, however (T. 396). Obviously it is not worth more than its face amount, and not even that if interest rates go up.

The value of the medical assets set forth in Defendant's Exhibit 18 of $73,874.00 was established by the testimony of the CPA for the Ogden Clinic and the Clinic's Administrator and are far more realistic than the value of $231,942.00 placed by Wife's accountant on the same assets. The trial court was correct in finding that the medical assets and retirement are "futuristic" in nature and will be utilized at retirement. This was similar to the situation in the Dogu case (Supra) wherein a fixed amount was in the retirement fund, which would be available for use by the Husband in paying the alimony after retirement. The concern

of the Supreme Court in the Dogu case was that there was no provision for the protection of the wife in the event the husband died, thereby terminating the alimony. The court stated, however, at page 1310 as follows:

> "If the decree had been drawn so that this marital asset [his retirement funds] would assure payment of alimony in all events, it would be well within the bounds of discretion on the facts of this case."

The same trial judge was keenly aware of such a potential deficiency in the present case and corrected it by providing that in the event of Husband's death, Wife will have a claim against his estate in the sum of $50,000.00. This will be payable to Wife whether Husband dies before or after retirement and Husband may select the method of securing this claim through the alternatives set forth in the Dogu case.

The holding of the case of Woodward v. Woodward, Utah, 565 P2d 431 (1982) cited by Wife is not applicable in this case. That case contemplated a regular and consistent setting aside of a certain amount of each of Husband's monthly paychecks for retirement, and therefore lends itself to the application of a formula based upon the number of years husband was married to wife accruing retirement benefits in relation to the total number of years husband would have accrued such benefits by the time he actually retires. Such a formula is not appropriate in the present case where the amount going into the retirement fund in any given year

depends upon many factors, including the success of the clinic and its need to use income for other expenses.

The decision of the trial court to reduce the alimony to $600.00 per month at the time of retirement was appropriate and based upon his sound reasoning that by the time of retirement the home should be sold (which has already occurred) and the Wife should have liquid assets; Husband's income will materially decrease; and Wife will also receive social security benefits (R. 99).

POINT III

AN EQUITABLE DISTRIBUTION OF THE ASSETS DOES NOT REQUIRE AN AWARD TO WIFE OF HUSBAND'S PROSPECTIVE EARNINGS.

Although in the trial of this case, Wife made no claim to, nor presented any evidence in support of, an award of the prospective earnings of Husband, her Point II now makes such a claim. She now contends, as an apparent afterthought, that she has a property interest in the medical degree and business of the doctor which gives her a claim to his prospective earnings.

It should first be pointed out that the majority of cases considering the question of whether the professional degree constitutes marital property, involve marriages of short duration where the wife works to put a husband through school and shortly after graduation, before the degree has generated any improvement in their standard of living, the

husband leaves the wife, with no assets to be divided except the professional degree. Had the monies earned by the wife been used for the acquisition of physical assets, rather than invested in the degree, there would, of course, have been assets to be divided.

The present case is quite different, however, in that the medical degree which was acquired with considerable toil and sacrifice by Husband and his parents, as well as the contribution of Wife, has produced a substantial harvest, the benefits of which Wife has enjoyed for some 25 years since she terminated employment in 1958. This affluence has made possible a very nice lifestyle (T. 213), a great deal of entertaining (T. 183), the owning of a "magnificant home" in east Ogden (T. 183), and the ultimate acquisition of a country estate in Ogden Valley (T. 215). She now leaves the marriage, sharing in a very sizeable estate, and receiving $1,200.00 per month alimony, which is far more than is awarded to the wife in most divorce situations. She has long since been more than compensated for her share of the contribution to the acquisition of the medical degree.

The cases cited by Wife do not support her claim to a property interest in the medical degree and business of Husband. The Colorado case of In Re Marriage of Nichols, 606 P2d 1314 (1979) cited by Wife, holds that good will associated with the private practice of a dentist may be

considered marital property, subject to division where the value thereof is established by the testimony of an expert. In the present case, Husband does not have his own private practice which could be sold or transferred to another, but rather he is a member of a professional clinic where he would be prohibited from transferring his practice. Upon withdrawing from the Clinic, he would not even be entitled to his accounts receivable, let alone any element of good will. Wife has in no way attempted to produce any evidence as to the value of any alleged good will.

The Kansas case she cites of Williams v. Williams, 548 P2d 794 (1976) has no applicability. It merely states certain criteria followed in Kansas in determining the question of alimony, and holds that under Kansas law the relative fault of the parties and the gravity of their transgressions will be considered in determining the extent of alimony. This is not the law in Utah, as evidenced by the Jesperson and English cases hereinbefore cited.

The Oklahoma case of Colvert v. Colvert, 568 P2d 623 (1977) cited by Wife is easily distinguished from the present case. That case involved a marriage of approximately seven years and at the time of the divorce, the Husband was less than six months from graduation from medical school. Wife had been the principal breadwinner during the last five years of the marriage and the total income she produced

during the marriage was several times greater than that produced by the husband. Recognizing this, the Oklahoma Court gave her a lump sum alimony award of $35,000.00, payable in monthly installments. In the present case, the total income produced during the marriage by Husband is many, many times greater than that produced during the same period by Wife. Furthermore, the divorce took place some 25 years after the Wife last worked and after Husband had, through his own personal efforts and sacrifice, accumulated a very substantial estate in which Wife is now sharing. The Wife in Colvert had no such estate in which to share.

The Arizona case of In Re Marriage of Goldstein, 583 P2d 1343 (1978) cited by Wife does not support her present claim. That case merely held that the accounts receivable of the professional corporation owned by the physician husband can appropriately be treated as a marital asset and need not be reduced by an overhead allowance. This is contrary to the holding in the Utah case of Dogu v. Dogu (Supra) wherein this Court found no abuse of discretion in the trial court's determination that the accounts receivable of Dr. Dogu's professional corporation do not constitute a marital asset, but rather "represent deferred income from which Respondent may meet his ongoing alimony and child support obligation to Appellant". (See page 1309 of decision).

The case of Kerr v. Kerr, Utah, 610 P2d 1380 (1980) cited by Wife held that it was not an abuse of discretion by the trial court in awarding 45 per cent of the marital estate to husband and 55 per cent to wife (based on wife's valuations) where there had been a lengthy marriage and wife had worked while husband was in dental school, but one of the significant factors considered by the court in making such an award was that the wife had contributed $15,000 of her own funds to the acquisition of marital assets.

Wife cites the Arizona case of Mori v. Mori, 603 P2d 85 (1979) for the proposition that accounts receivable of the husband's professional corporation constituted marital assets. That issue has already been discussed previously. Of greater significance is the fact that in the Mori case, husband was earning $5,000.00 per month from his law practice and his wife was awarded $1,000.00 per month maintenance for one year. She did not dispute the amount of the maintenance, but argued that it was an abuse of discretion for the maintenance to be terminated in one year. The Arizona Supreme Court agreed and held that where the wife was 52 years of age and had been married for almost 25 years, with no previous employment record other than teaching for six months in 1950 while her husband was in law school, the $1,000.00 per month maintenance order should

continue for a period of three years and then terminate. A comparison of the Mori support order with the present case where Wife was awarded $1,200.00 per month alimony until Husband's retirement and then $600.00 per month permanently thereafter, shows the very adequate nature of the alimony award in the present case.

Of particular significance regarding Wife's claim that she has a property interest in the medical degree of Husband, is the Colorado case of In Re Marriage of Anne P. Graham, 574 P2d 75 (1978) where the wife argued that inasmuch as she contributed 70 per cent of the financial support which was used for family expenses and for her husband's education in obtaining a Bachelor of Science Degree in Engineering and Physics and a Masters Decree in Business Administration during their six-year marriage, she acquired a property right in his degree. The Colorado Supreme Court disagreed and stated as follows:

> "An educational degree, such as an M.B.A., is simply not encompassed even by the broad views of the concept of 'property.' It does not have an exchange value or any objective transferable value on an open market. It is personal to the holder. It terminates on death of the holder and is not inheritable. It cannot be assigned, sold, transferred, conveyed or pledged. An advanced degree is a cumulative product of many years of previous education, combined with diligence and hard work. It may not be acquired by the mere expenditure of money. It is simply an intellectual achievement that may potentially assist in the future acquisition of property. In our view, it has none of the attributes of property in the usual sense of that term."

The Colorado Court went on to state:

> "Our interpretation is in accord with cases in other jurisdictions. We have been unable to find any decision, even in community property states, which appears to have held that an education of one spouse is marital property to be divided on dissolution. This contention was dismissed in Todd v. Todd, 272 Cal.App.2d 786, 78 Cal. Rptr. 131 (Ct.App.), where it was held that a law degree is not a community property asset capable of division, partly because it 'cannot have monetary value placed upon it.' Similarly, it has been recently held that a person's earning capacity, even where enhanced by a law degree financed by the other spouse, 'should not be recognized as a separate, particular item of property.' Stern v. Stern, 66 N.J. 340, 331 A.2d 257."

POINT IV

WIFE IS NOT ENTITLED TO AWARD OF ADDITIONAL ATTORNEY'S FEES

In the RELIEF SOUGHT ON APPEAL section of Wife's brief, she states she is seeking an award of attorney's fees, but said brief cites no evidence in support of the need for such fees, nor does it present any legal argument in support of such an award.

Wife presented no evidence at trial to establish a need for attorney's fees and there was no testimony by her attorney as to the number of hours that had been spent on the case, or any indication of an hourly rate charged. In the case of Warren v. Warren, (Supra) the Utah Supreme Court stated as follows:

> "Plaintiff offered no evidence at trial to show the nature or amount of any attorney's fees incurred in litigating the present action or any need for court-ordered assistance in the payment of such fees. Utah law clearly requires presentation of such evidence in order to support an attorney fee award. The trial court therefore properly denied plaintiff's request for such fees."

Although the trial court did not make an award of attorney's fees as such, he did consider that matter and made a specific finding that Wife could use her share of the E. F. Hutton money certificate and her share of the proceeds from the sale of the old Ogden Clinic building to assist in paying her attorney's fees (R. 111). He no doubt recognized that she was receiving a very substantial property award in addition.

As stated in the case of Kerr v. Kerr, Utah, (Supra):

> "The decision to make such an award [referring to attorney's fees], together with the amount thereof, rests primarily with the sound discretion of the trial court."

The trial court did not abuse its discretion regarding Wife's attorney's fees in this case.

CONCLUSION

The trial court was correct in finding that the principal asset of the parties was their country estate, consisting of an expensive six-bedroom home, barn and outbuildings, equipment, boats, horses and acreage, and that the only practical way to divide this asset was to direct that it be sold and the proceeds be divided equally between the parties. The court also correctly awarded the medical assets and retirement to Husband, finding that they are futuristic in nature. The court correctly recognized that these assets are necessary for Husband to produce the income with which he pays the alimony of $1,200.00 per month until retirement, and that they, along with the retirement benefits to which Husband will be entitled should he survive his retirement date, will be utilized to pay the permanent alimony of $600.00 per month after retirement. The court appropriately made provision for the contingency that Husband might predecease Wife, by providing that she will be entitled to a claim against his estate of $50,000.00 in such event.

It was not an abuse of discretion by the trial court in failing to grant Wife a property interest in Husband's medical degree and his prospective earnings, inasmuch as such request by Wife was never made at the trial, and circumstances of this case would not so warrant in any event. The refusal

of the trial court to award attorney's fees [illegible], in view of appropriate provision having been made otherwise, is not an abuse of discretion by the court.

The judgment and decree of the trial court should therefore be affirmed.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that on this 10th day of May, 1984, I mailed two true and correct copies of the above and foregoing Brief of Defendant-Respondent, by placing the same in the United States Mail, postage prepaid and addressed to the following:

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