

1963

Patricia Ann Melville v. Samuel G. Melville : Brief of Appellant

Utah Supreme Court

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**IN THE SUPREME COURT OF
THE STATE OF UTAH**

PATRICIA ANN MELVILLE,

Plaintiff-Respondent

vs.

SAMUEL G. MELVILLE,

Defendant-Appellant.

BRIEF OF APPELLANT

Appeal from the Judgment of the District Court for
Salt Lake County, State of Utah,
Hon. Joseph G. Jeppson, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

PATRICIA ANN MELVILLE,

Plaintiff-Respondent,

vs.

SAMUEL G. MELVILLE,

Defendant-Appellant.

Case No.
9882

BRIEF OF APPELLANT

STATEMENT OF THE KIND OF CASE

This is action by plaintiff against defendant for divorce, child custody, child support, alimony, attorney's fees, and distribution of property, wherein defendant filed a counterclaim for divorce and property settlement.

DISPOSITION IN LOWER COURT

The case was tried to the court. From a judgment awarding plaintiff a divorce, \$50 per month child support money, \$50 per month alimony, awarding plaintiff the automobile, furniture and household furnishings of the

parties (except one 36-piece crystal set and one record cabinet), \$400 attorney's fees, costs, \$597.75 arrears in alimony and child support, and ordering defendant to pay \$65 to the University of Utah and \$14.49 to the Utah Power and Light Company, and dismissing defendant's counterclaim, defendant appeals.

RELIEF SOUGHT ON APPEAL

Defendant seeks to have said judgment reversed and asks for judgment on his counterclaim awarding defendant a divorce, awarding plaintiff custody of the child of the parties, subject to reasonable rights of visitation in defendant, awarding plaintiff \$50 per month child support money, awarding plaintiff no alimony or attorney's fees, ordering defendant to pay \$65 to the University of Utah and \$14.49 to the Utah Power and Light Company, awarding plaintiff judgment for \$597.75 arrears under order pendente lite, and awarding plaintiff the following property, to-wit: one fruitwood cabinet, one pine secretarial, one love seat, one bedroom set, one crystal chandelier, 4 rosewood chairs, one 36-piece set crystal ware, and one-half interest in said automobile.

STATEMENT OF FACTS

In making this statement of facts the numbers in parenthesis refer to the pertinent page numbers of the record.

Plaintiff and defendant each sought a divorce on the grounds of cruelty causing great mental distress (1, 6). In addition, plaintiff originally sought \$100 per year ali-

mony, \$400 attorney fees, the Mercedes automobile, and all of the furniture and household effects of the parties (2). Later plaintiff amended her complaint to ask for \$50 per month alimony (13). Plaintiff testified that she did this because she needed it because of expenses of the child and partly because the case dragged on a bit (63).

In addition to the divorce, defendant sought a one-half interest in said automobile (6), and certain items of furniture, to-wit: one fruitwood record cabinet, one pine secretarial, one love seat, one bedroom set, one crystal chandelier, four rosewood chairs, and one 36-piece set of crystal ware (6).

The trial court awarded plaintiff the divorce on the grounds of mental cruelty, awarded plaintiff custody of said child, subject to reasonable rights of visitation, \$50 per month child support, \$50 per month permanent alimony, all of the 1956 Mercedes automobile, all of the furniture and household furnishings of the parties except for said 36-piece crystal set and a record cabinet which were awarded to defendant, \$400 attorney fees and costs, a judgment for \$597.75 arrears on order pendente lite and ordered defendant to pay bills in the sum of \$79.49 (23, 24).

Plaintiff and defendant were each bona fide and actual residents of Salt Lake County, Utah, for more than three months immediately prior to the commencement of this action (33, 86).

Plaintiff and defendant were married to each other on August 18, 1960, at Salt Lake City, Utah (34); plaintiff and defendant were married to each other less than

one year and nine months at the time this action was commenced (2). After the commencement of this action one child was born as issue of said marriage, to-wit: Michael David (34, 65). Plaintiff was a school teacher at the time of marriage (62), and during the marriage completed the requirements for becoming a librarian (62) and was employed as a librarian at the time of the trial (61). That defendant was unemployed and not attending college at the time of said marriage (34). That defendant resumed his schooling at the University of Utah one month after said marriage (35). That defendant attended the University for five quarters continuing through the Winter Quarter of 1962 (36). At the time of trial defendant required about two semesters to complete his college work (103). That during the marriage, defendant worked at a number of part time and summer jobs, to-wit: Salt Lake County Hospital, Western Trading, Lithograph Co., Nevada Lodge, Cal-Nev Lodge, Clark Lehming, University of Utah, and Menlove, Inc. At these jobs, defendant earned approximately \$1846 (107 to 109). Plaintiff's gross salary as a librarian is \$4200 to \$4298 per year (62). Plaintiff's beginning salary as school teacher was \$3600 per year (62). Plaintiff's take home pay is \$288 per month (56). At the time of the trial defendant was living in Los Angeles, California (86), and was employed by Barker Brothers, Pasadena, California, as a furniture salesman and decorator (99). His take home pay was \$250 per month (100). Plaintiff testified (52 to 55) that her expenses for herself and the child of the parties per month are:

CHILD		PLAINTIFF	
\$ 55.00	Child care	\$ 80.00	Rent
10.00	Doctor bill	2.50	Telephone bill
5.00	Medicine	4.00	Light bill
20.00	Food	10.00	Credit Union
2.50	Vitamins	5.00	Laundry
10.00	Clothing	5.00	Dry cleaning
5.00	Laundry	5.00	Doctor bill
<hr/>		25.00	Food
\$107.50		25.00	Gasoline for automob-
			ile
		30.00	Clothing and cosmet-
			ics, etc.
		5.00	Car insurance
		6.00	Automobile taxes
		30.00	Miscellaneous, includ-
			ing entertainment
		<hr/>	
		\$232.50	

Plaintiff testified that she felt that \$75 is a reasonable amount for child support and that \$50 a month is reasonable for alimony (56).

Defendant testified (101 to 103, 122) that his monthly expenses are:

DEFENDANT	
\$ 60.00	Rent
10.00	Bus travel
80.00	Food and Kitchen equipment
4.10	Laundry
3.00	Dry cleaning
30.00	Clothing
15.00	Medical
<hr/>	
\$202.10	

Defendant also testified that he had a severe sinus condition and that he required a tonsillectomy and surgery on his nose (103). Defendant also testified that he planned to complete his schooling in California at UCLA and that he had no savings for his tuition (103).

The following list sets forth the property belonging to the parties together with its value and source (104 to 106, 47 to 49, 30 to 32, 53 and 133):

PROPERTY	VALUE	SOURCE
36-piece crystal set	\$ 36.00	Purchased by parties and paid for by defendant's parents
Bedroom set	600.00	Gift from defendant's parents
Boston rocker	25.00	Purchased by parties
Table lamp	15.00	Gift from defendant's sister
Kitchen table	15.00	Gift from plaintiff's parents
Two kitchen chairs	10.00	Purchased by the parties
Pottery set	60.00	Gift from various people
China set	60.00	Gift from various people
Refrigerator	50.00	Purchased by the parties
Room divider	15.00	Made by defendant
Love seat	75.00	Obtained by defendant
Two wing back chairs	60.00	Acquired by plaintiff prior to marriage
Inlaid table	60.00	Gift from plaintiff's parents
Oriental rugs	800.00	Gift from plaintiff's parents
Marble topped table	60.00	Purchased by parties
Silver lamp	40.00	Purchased by parties
Upholstered chair	40.00	Gift from plaintiffs' parents
Stereo set	80.00	Acquired by plaintiff before marriage
Cabinet	20.00	Gift from defendant's parents
Pine secretarial	60.00	Gift from defendant's parents
Kitchen utensils, etc.	100.00	Wedding gifts
Carpets and misc. wedding gifts	100.00	
Crystal chandelier	50.00	Defendant traded a painting therefor
Four rosewood chairs	100.00	Purchased by parties
Mercedes automobile	600.00	Acquired by both parties
Total	\$3131.00	

At the time of trial plaintiff was 26 years old (33). At the trial, plaintiff's attorney asked her, "Now, Mrs. Melville, you have alleged that on or about the 29th day of April, 1962, and prior and subsequent thereto, that the defendant has treated you cruelly, causing you great mental distress?" To which plaintiff answered, "Yes." She was then asked, "What are the circumstances that brought about this charge?" (34). Thereafter, plaintiff testified to some difficulties between the parties during the first month of marriage because she came home from work tired, had to prepare dinner, look beautiful, and be ready to go out while defendant was at home all day or with his friends, he not having started school until it started one month later (35); that the parties did not live in happiness and peace during the first year of their marriage because defendant was not pursuing the things he had allegedly told plaintiff he was going to pursue, and because defendant started to smoke several months after marriage which bothered plaintiff very much (36, 37). Plaintiff testified that she smoked once during the marriage and on that occasion told defendant to smoke in the home (37). Plaintiff later testified that she had smoked several times before in college days (61). Plaintiff further testified that defendant commenced to drink alcoholic beverages and that this bothered plaintiff very much (37). Plaintiff testified that she drank once during the marriage (37), and that she did some drinking in college days (60, 61). Plaintiff testified that she seldom accompanied defendant evenings (37), that within the few months before plaintiff filed for divorce, that defendant was out of the house at least four nights a week during a period while defendant was not in school but

was working as an interior decorator (38) where defendant worked perhaps five hours a day (39). This was during a time when the parties were having considerable difficulty together (63), and at a time when plaintiff did not enjoy being with defendant (63, 64). Defendant testified that on these occasions he was working at the Art Department (129). Plaintiff testified that defendant did not provide much money for family use (39, 40), that defendant sought the association of other women in that many times while plaintiff was with defendant he was "directly friendly with some party" and would leave plaintiff and take up conversation with other women and that plaintiff thought defendant had an unusual interest in other women and that defendant talked to plaintiff of other girls, making remarks as to their beauty (40, 41).

Plaintiff was asked, "Did you hear sufficient about your husband's activities that it might be construed as a reputation that he had?" Plaintiff answered "Yes." Defendant objected to this as being immaterial and improper; the court overruled the objection (41). Plaintiff was then allowed to testify over defendant's objection on the same ground that she knew that reputation and that the reputation was that defendant was "very flirtatious" (41, 42). Plaintiff was then asked, "Did your finding out about this reputation that you have testified of, cause you mental concern?" To which plaintiff answered, "Yes, it did, very much," and when asked, "Did it cause you anguish?" plaintiff answered, "Yes, it did." When asked, "Did it cause you to be embarrassed among your friends who also knew of this reputation?" plaintiff answered, "Yes, it did" (42).

Plaintiff further testified that about May 4th or 5th, 1962, on an occasion when defendant had been drinking very heavily, plaintiff attempted to discuss their situation but defendant would not discuss the matter with plaintiff (43, 44). Plaintiff also testified that on an occasion in 1962 defendant refused to stay home from a guitar session when asked to do so by plaintiff, and that defendant had told her that she was to ask him no questions and that defendant told her this was how he was trying to solve his "mental state of mind" (45). Plaintiff also testified that defendant had never requested a divorce from plaintiff (45). During the marriage plaintiff saw a marriage counselor, and defendant had been under psychiatric care (46). Plaintiff testified that defendant had extreme sexual difficulties with plaintiff, and plaintiff felt the therapy recommended by the psychiatrist was disrupting their marriage (47).

A witness, Robert Carmody Pollei, called by plaintiff testified (71, 72) and defendant acknowledged (119) that on one occasion defendant kissed and hugged a Jackie Bigler. Mr. Pollei didn't know whether this occurred before or after May 10, 1962 (79). This divorce action was commenced May 10, 1962 (1). Defendant testified that said incident occurred the last part of May, after the commencement of this action (99), and that he did no dating until after the commencement of this action (99, 135). Mr. Pollei further testified that at about the same time, defendant kept company with Jackie Bigler at an art party (73) and that he wrestled with her (75). Mr. Pollei didn't know whether this art party was before or after the complaint was filed (74). Mr. Pollei also testi-

fied that he saw defendant and said Jackie Bigler together in the absence of plaintiff in a social event perhaps 10 times (76). Mr. Pollei did not testify as to the dates of these occurrences. Defendant testified that he had told his friends, in the presence of plaintiff, that the child they were expecting was a mistake (114). Defendant stated that at the aforesaid art party his head had been on the knee of said Jackie Bigler (118). Defendant admitted that he had been with said Jackie Bigler socially about three times (118), but that he had only dated after the commencement of this action (135).

Defendant testified that just prior to the marriage of the parties they made plans that defendant should continue his schooling without holding a job (88). This arrangement was also testified to by defendant's mother (137), and plaintiff testified she planned to work while defendant finished his education (58). Defendant further testified that after marriage, to his surprise, plaintiff insisted about one month after the marriage that defendant take a job (88). Defendant also testified that the parties were never able to agree on the subject of defendant working in addition to going to school (90), and that it resulted in numerous arguments (90). That as a result of their arguments defendant built up resentment (90), and defendant no longer desired the companionship of plaintiff (90). Defendant testified there was too much friction between the parties and that he could not adjust to the friction and arguments, that defendant developed quite a serious case of ulcers due to the nervous tension he was under (91). That the situation was a great mental strain on defendant (91), and that as a result de-

fendant could no longer contribute his entire self to his work and that a great deal of his problem was nervousness (91). Defendant's attorney asked defendant, "Any other manifestations along those lines? Do you recall anything further?" Defendant answered "No." (91). Thereupon defendant's attorney asked defendant, "Did you suffer sleeplessness?" Plaintiff objected to that question as being leading and the court sustained the objection (92). Defendant testified that he was under pressure in school to put in more time (94), that plaintiff felt that he was putting in too much time (94, 95), that discussion of the subject resulted in argument and that defendant became very non-productive because of them (95), that the parties were not in accord on social activities in connection with the Art Club of which defendant was Vice President (95) and that as a result plaintiff and defendant became more and more estranged (96). Defendant testified that during the marriage from about February to June of 1962 he consulted a psychiatrist because of mental stress and his relationship with his wife (97).

Plaintiff and defendant's mother testified that defendant had been fun-loving (57, 137), and plaintiff testified that towards the end of the marriage defendant was not emotionally stable and in control of himself (59). Plaintiff testified that it was important to her in selecting a husband to have one financially stable (58). Plaintiff testified that she tried "very hard" to get defendant to change some of his ways (63) and defendant's mother testified that plaintiff had told her she married defendant because she thought she could change him (137).

ARGUMENT

POINT 1- THAT THE EVIDENCE DOES NOT SUPPORT THE FOLLOWING PORTION OF THE TRIAL COURT'S FINDING NUMBER 4, TO-WIT: "ON OR ABOUT THE 29TH DAY OF APRIL, 1962, AND PRIOR AND SUBSEQUENT THERETO, DEFENDANT TREATED PLAINTIFF CRUELLY, CAUSING HER GREAT MENTAL DISTRESS," AND THEREFORE THE TRIAL COURT ERRED IN AWARDING PLAINTIFF A DIVORCE ON HER COMPLAINT.

Sec. 30-3-1, U.C.A. 1953, as amended, provides for divorce for various causes. Among other things it permits, in subsection (7), a divorce for "Cruel treatment of the plaintiff by the defendant to the extent of causing . . . great mental distress to the plaintiff." This is the ground upon which plaintiff attempts to obtain a divorce in this case. In order to obtain a divorce under said section, plaintiff must prove two things, to-wit: (1) cruel treatment of plaintiff by defendant, and (2) that such cruel treatment caused great mental distress to plaintiff. This distinction appears to have been clearly recognized in the case of *Stevenson v. Stevenson*, 13 Utah 2d 153, 369 P. 2d 923 (1962).

It thus appears that the law imposes an objective standard and a subjective standard. The determination of what constitutes cruelty will be objectively determined; the court will determine whether certain conduct is cruel, although this determination must always be made in the light of the particular facts. A given act may be cruel in one set of circumstances and not at all cruel in another.

Nonetheless, it is an objective determination. On the other hand the law requires that the cruel act, be it ever so cruel, must have a certain effect upon the plaintiff — it must cause great mental distress. This is subjective in its nature. The effect of given conduct will vary greatly from person to person. See *Stevenson v. Stevenson*, *supra*.

It is undoubtedly true that cruel treatment will not be appreciated by anyone. This the law could safely assume, and a court might be justified in implying or assuming in every case where it found cruelty that the plaintiff did not like it. But simply not liking certain cruel conduct does not mean that it causes great mental distress, and the court cannot assume that it does. Whether certain conduct has caused great mental distress is a question of fact which must be proved.

In the present case the evidence does not disclose that plaintiff suffered great mental distress as the result of any cruelty on the part of defendant.

The only evidence of plaintiff's reaction to any conduct of defendant is found in her testimony in the following instances:

(1) At page 34 of the record, plaintiff was asked, "Now, Mrs. Melville, you have alleged that on or about the 29th day of April, 1962, and prior and subsequent thereto, that the defendant has treated you cruelly, causing you great mental distress?" Plaintiff answered, "Yes." Thus plaintiff has merely affirmed that she made certain allegations. She did not testify that defendant's treatment did in fact cause her great mental distress. Further, plaintiff's complaint is not verified by her oath, so we don't

even have the allegation under oath. Plaintiff has merely stated under oath that she made an allegation. This is not evidence of great mental distress. Alleging is one thing, proving another. Even if the complaint had been verified, any statement therein contained would not be evidence upon which the court could base a finding of great mental distress. Sec. 30-3-4 U.C.A. 1953, as amended, provides in part:

“ . . . No decree of divorce shall be granted upon default, or otherwise, except upon legal evidence taken in the cause . . . ”

The holding of this court in the case of *Treutle v. District Court of Salt Lake County*, 7 Utah 2d 155, 320 P. 2d 666 (1958) would seem to give support to the view that an allegation in a complaint is not evidence.

(2) At page 34 of the record plaintiff was asked, “What are the circumstances that brought about this charge?” This was followed by plaintiff’s testimony with regard to various matters. Here again, testimony concerning circumstances that brought about a *charge* is not proof of great mental distress to plaintiff.

(3) At page 36 of the record plaintiff testified that the parties did not live in happiness and peace during the first year of their marriage. That the parties were not happy or at peace is not proof of great mental distress. When a divorce can be granted because parties are not happy or at peace then as a practical matter anyone can get a divorce at about any time.

(4) At pages 36 and 37 of the record plaintiff testified that it bothered her very much that defendant started

smoking several months after marriage and that defendant commenced to drink alcoholic beverages. Being "bothered very much" is certainly not the equivalent of great mental distress. Even if it were, it is submitted that smoking and drinking do not constitute cruelty in the first place, especially in view of the fact that plaintiff had done some smoking and drinking herself.

(5) Finally, at page 42 of the record plaintiff testified that finding out that defendant had a reputation for being flirtatious caused her very much mental concern, that it caused her anguish and that it caused her embarrassment among her friends. It is conceded that this is probably the equivalent of great mental distress, but it is submitted that having a reputation of being flirtatious is not cruelty. Being flirtatious might be cruel, but having a reputation isn't cruel. Having a reputation isn't even an act, it doesn't constitute conduct on the part of defendant. It is something over which defendant may have no control. Had plaintiff proved that defendant was flirtatious and had she then testified that this caused her great mental distress, we would have a different situation. Further it is submitted that the court erred in allowing testimony as to reputation. This is discussed as Point 4 of the Argument herein. Even if testimony as to reputation is proper, it should only go to corroborate actual testimony of the particular cruel act. It is the act which must be cruel, not the reputation, and it is the act which must cause great mental distress, not the reputation. In this case there is no testimony that plaintiff suffered great mental distress because defendant was flirtatious.

It is submitted that plaintiff did not prove that any conduct of defendant caused her great mental distress.

POINT 2. THE EVIDENCE CLEARLY PREPONDERATES AGAINST THE FINDING OF THE TRIAL COURT THAT: "DEFENDANT SHOULD BE DENIED ANY RECOURSE BY VIRTUE OF HIS COUNTERCLAIM." AND THE TRIAL COURT ERRED IN FAILING TO GRANT DEFENDANT A DIVORCE UPON HIS COUNTERCLAIM AND IN HAVING DISMISSED SAID COUNTERCLAIM. SUCH ACTION IS PLAINLY AN ABUSE OF DISCRETION AND IS MANIFESTLY UNJUST AND INEQUITABLE.

As discussed in Point 1 of this argument, plaintiff failed to establish grounds for divorce. It is submitted that defendant clearly established grounds. The substance of defendant's testimony was that plaintiff's failure almost immediately after their marriage and long before the child entered the picture, to abide by the original agreement of the parties that plaintiff would work while defendant went to school, resulted in arguments between the parties.

This certainly constitutes cruelty, especially when viewed in light of plaintiff's admission as to the importance of finances to her. There is ample testimony that this caused defendant great mental distress.

There can be little doubt that this marriage should be dissolved. Defendant's physical and mental health are at stake. It appears that the parties are unsuited for each other. Finances are important to plaintiff. She has a good job in a stable profession. She belonged to a sorority in college and during the marriage belonged to a bridge club. The secure life seems to be very important to plaintiff.

On the other hand defendant is an artist, and every indication is that financial matters do not have the same importance for him.

This court has held in effect that when it is evident that no good purpose can be served by compelling the parties to remain together a divorce should be granted, assuming of course that proper grounds have been established. See *Wilson v. Wilson*, 5 Utah 2d 79, 296 P. 2d 977 (1956).

This is such a case. Defendant has established grounds and plaintiff has not; the divorce should have been awarded to defendant on his counterclaim.

POINT 3. THE EVIDENCE CLEARLY PREPONDERATES AGAINST THE FINDINGS OF THE TRIAL COURT; THAT A REASONABLE AMOUNT TO BE AWARDED PLAINTIFF AS ALIMONY IS \$50 PER MONTH, THAT IT IS REASONABLE THAT THE MERCEDES AUTOMOBILE, THE FURNITURE AND HOUSEHOLD FURNISHINGS (EXCEPT ONE RECORD CABINET, ONE 36-PIECE CRYSTAL SET, AND DEFENDANT'S PERSONAL WEARING APPAREL) BE AWARDED TO PLAINTIFF, THAT IT IS REASONABLE THAT PLAINTIFF BE AWARDED \$400 ATTORNEY FEES. THAT THE TRIAL COURT PLAINLY ABUSED ITS DISCRETION IN ENTERING JUDGMENT IN ACCORDANCE WITH THE FOREGOING FINDINGS, AND SUCH JUDGMENT IS MANIFESTLY UNJUST AND INEQUITABLE.

In order to determine whether a divorce decree is inequitable, it must be viewed in its entirety, and thus

although viewed alone some parts of the decree are proper, appeal is taken from the entire decree. This view seems to be supported by the case of *Graziano v. Graziano*, 7 Utah 2d 187, 321 P. 2d 931 (1958) where the court held in effect that an attack on a divorce decree is regarded as an attack upon the whole decree.

Defendant concedes that it was proper to grant custody of the child of the parties to plaintiff, subject to reasonable rights of visitation in defendant and to award plaintiff \$50 per month child support money and a judgment for arrears under order pendente lite for \$597.75, and to order defendant to pay said bills in the sum of \$79.49. Defendant submits however that this must be taken into consideration in determining whether the rest of the decree is inequitable as claimed by defendant.

In the case of *Wilson v. Wilson*, *supra*, this court set forth the matters to be considered in adjusting the "economic resources" of the parties; it was there said at page 82:

"When it appeared that the purposes of matrimony had been destroyed to the extent that further living together was intolerable, it was in accordance with the court's duty and prerogative to grant plaintiff a divorce. In doing so it is desirable to avoid perpetuation of the difficulties that brought failure to the marriage. The object to be desired is to minimize animosities and to 'let the dead past bury its dead' insofar as that is possible. The court's responsibility is to endeavor to provide a just and equitable adjustment of their economic resources so that the parties can reconstruct their lives on a happy and useful basis. In doing so it is necessary for the court to consider, in addition to

the relative guilt or innocence of the parties, an appraisal of all of the attendant facts and circumstances: the duration of the marriage; the ages of the parties; their social positions and standards of living; their health; considerations relative to children; the money and property they possess and how it was acquired; their capabilities and training and their present and potential incomes.”

Viewing this case in the light of the foregoing quotation:

RELATIVE GUILT. It appears that in all justice relative guilt or innocence should play a minor role in this case. Only defendant has proved grounds for divorce, but as in most cases there are things to be said in favor of each party as well as against each party. Although the parties are both young in this case and the marriage a short one, ill health (including mental health) appears to have played a very large part in the difficulties between these parties and the following statement in the case of *Martinett v. Martinett*, 8 Utah 2d 202, 331 P. 2d 821 (1958), at page 204 should also apply here:

“In a case such as this, where the parties have spent substantially their adult lives together, and the trouble between them has seemed to come largely from inability to make adjustments to ill health and advancing years, the matter of considering relative guilt or innocence in bringing about the divorce was properly considered by the trial court as minimal insofar as bearing on their property rights.”

DURATION OF MARRIAGE AND AGE OF PARTIES. Plaintiff was 26 years old at the trial. The

parties had been married less than a year and nine months at the time they separated. This is not a case where plaintiff has given away the best years of her life. What has plaintiff lost by the marriage? She increased her professional skills and she has a child — both are gains to plaintiff. She has had an unfortunate experience, perhaps. In the case of *Foreman v. Foreman*, 111 Utah 72, 176 P. 2d 144 (1946) at page 88 this court clearly said “heart balm” is not an issue in a divorce case:

“It would seem from a reading of the above statements that what the court was attempting to do here was compensate Mrs. Foreman for her suffering of the pangs of unrequited love — heart balm — and teach Mr. Foreman a lesson in marriage. Neither task is properly within the issues of a divorce case such as this.”

It is grossly inequitable to award permanent alimony in this case where the parties were married for such a short time, and plaintiff's condition has not materially changed. Plaintiff is 26 years old. If defendant pays her \$50 per month alimony until she is even 70 years old, he will have been required to pay her about \$26,000, and this after less than 2 years of marriage while living together. It is true the plaintiff may remarry, but she may not.

SOCIAL POSITION AND STANDARD OF LIVING. Plaintiff was a college graduate before the marriage, and during the marriage she increased her skills and became a librarian. Plaintiff's beginning salary as a teacher was \$3600 per year; it is now \$4200 or more

per year. The general tenor of her testimony was that defendant was not much help financially during the marriage. It clearly appears that her standard of living won't be hurt by this divorce. In fact she will not have to help defendant with his schooling.

HEALTH. It clearly appears that defendant does not have good physical health. He testified that he had ulcers and other physical problems. In addition, he has emotional problems severe enough toward the end of the marriage to require psychiatric treatment. The court should be especially careful not to impose undue hardship upon defendant in such a case.

CHILDREN. The parties have one child. It is proper that plaintiff have custody, and that defendant pay plaintiff \$50 per month for the support of the child. This of course means an extra financial responsibility upon defendant which must be considered.

POSSESSIONS AND HOW ACQUIRED. The parties had property worth about \$3131. Much of the property was received as gifts. The court awarded property worth \$86 to defendant. The circumstances of this case cannot justify such a one-sided award. Defendant asked for property worth \$941 (of which the largest item was a bedroom set worth \$600, which was gift from defendant's parents) plus a one-half interest in the \$600 automobile. Thus plaintiff asked for property worth about \$1241 — far less than one-half of the property of the parties. Of course the Mercedes would have to be sold, but it would permit each to get a start in purchasing another car, and defendant testified that he needed a car.

TRAINING AND INCOME. The testimony discloses that plaintiff has a good job in a stable profession — a school librarian — and that defendant hasn't even completed his schooling. Plaintiff's net pay is \$288 per month. Defendant testified that his net pay was \$250 per month.

The expenses of plaintiff and the child total \$340 per month — which includes \$30 for miscellaneous items including entertainment. Defendant's expenses are \$202.10 per month. After defendant pays plaintiff \$50 per month child support plaintiff would have \$338 per month which is essentially what she testified she needed *including entertainment*. On the other hand defendant would have only \$200 left which is less than, but essentially, what he testified his expenses were *without entertainment*. If in addition, plaintiff received \$50 per month alimony, plaintiff will have an unwarranted windfall of \$50, and defendant will have \$50 less than he needs. The circumstances of this case do not justify alimony.

In making such an award the trial court was perhaps influenced by the testimony regarding defendant's dating after the divorce action was commenced. This court in the case of *Vrontikis v. Vrontikis*, 11 Utah 2d 305, 358 P. 2d 632 (1961), held at page 306:

“Evidence as to conduct subsequent to the filing of a divorce complaint is inadmissible for the purpose of establishing grounds for divorce, but it admissible as lending weight to and corroborating testimony as to prior acts of ill treatment.”

Thus such testimony can only assist the court in determining whether it will believe testimony of prior acts — it does not change the nature of any such prior act.

The court may also have been influenced by the defendant's statement that the child was a mistake. This undoubtedly meant unexpected. In any case, it is not a ground for divorce, because it was brought out after plaintiff had finished testifying, and there is no evidence at all that it caused plaintiff great mental distress. The child may well have been unexpected by plaintiff also. The only explanation for such an award of alimony in this case is that it is punitive. This court however in the case of *Wilson v. Wilson*, *supra*, stated at page 82 that it is improper to administer "punitive measures in a divorce judgment."

In cases where the evidence clearly preponderates against the findings of the trial court, or where there has been plain abuse of discretion, or where a manifest injustice or inequity is wrought this court can and should change the judgment of the trial court. See *Curry v. Curry*, 7 Utah 2d 198, 321 P. 2d 939 (1958). This is clearly such a case. In view of the foregoing, plaintiff should not be awarded any alimony; defendant should be awarded the property sought by him or its equivalent in value; and finally, defendant should not be required to pay \$400 attorney fees in view of the fact that the evidence shows that plaintiff earns more than defendant and because the divorce should be awarded to defendant.

POINT 4. THE TRIAL COURT ERRED IN OVERRULING DEFENDANT'S OBJECTIONS TO PLAINTIFF'S EVIDENCE.

At the trial (Record page 41) plaintiff was allowed to introduce testimony as to defendant's reputation for being flirtatious over defendant's objection that such testimony was immaterial and improper. Such testimony is of course hearsay and thus incompetent and improper. Further, it is immaterial and irrelevant what defendant's reputation is. The issue in this case is what defendant did or did not do — not what his reputation is. In 17 Am. Jur. Divorce, Sec. 408, it is said in connection with divorce on grounds of adultery:

“ . . . it is well recognized that the character of the wife for chastity is not in issue so as to render admissible against her, in the first instance, evidence of her reputation for unchastity.”

Although we are not here dealing with adultery grounds, the same rule should apply. In addition, the reputation testified to was not even a general one, but rather appears to deal with defendant's reputation among *plaintiff's friends*. The admission of such testimony of reputation constitutes prejudicial error.

CONCLUSION

For the foregoing reasons, the judgment of the trial court should be reversed, and defendant should be award-

ed a divorce on his counterclaim and the other relief sought by defendant on this appeal as hereinbefore set out.

Respectfully submitted,

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