

1968

Ernestine B. Harrison v. Jack M. Harrison : Respondent's Brief On Appeal

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IN THE SUPREME COURT OF THE STATE OF UTAH

BERNESTINE B. HARRISON,
Plaintiff and Respondent,

vs.

JACK M. HARRISON,
Defendant and Appellant.

Case No.
11370

Respondent's Brief on Appeal

Appeal from a Judgment of the
Third District Court of Salt Lake County
Hon. Joseph G. Jeppson, Judge

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FILED

DEC 23 1968

Clerk, Supreme Court, Utah

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STATEMENT OF THE KIND OF CASE

This was an action by plaintiff to alter and amend the provisions of a Divorce Decree. The motion of plaintiff was based upon a fraud committed by defendant upon the Court, or in the alternative, was based upon a substantial change of circumstances of the parties since the time of the divorce (R-98). In addition, plaintiff sought judgment for arrearages under the original Decree (R-104). In addition, plaintiff had caused to be issued a Writ of Garnishment upon Valley Bank & Trust Company under an existing judgment (R-109). Defendant claimed that the garnishment was improper because it had been levied against partnership funds; this matter was also before the Court and disposed of at the hearing.

DISPOSITION IN THE LOWER COURT

The case was tried on June 19, 1968, in the District Court of Salt Lake County before the Honorable Joseph G. Jeppson, District Judge. The Court found that defendant had misrepresented his income at the time of the original divorce hearing in December of 1966; had concealed a certain bank account in the sum of Nine Thousand Seven Hundred Twenty Nine Dollars And No/100 (\$9,729.00); was delinquent under the Decree; and that the garnishment against Valley Bank & Trust Company was proper (R-114). The following relief was granted to plaintiff:

- (a) Child support was increased from Three Hundred Dollars (\$300.00) to Four Hundred Dollars (\$400.00) per month.
- (b) Alimony was increased from Seventy-Five Dollars (\$75.00) per month to Five Hundred Dollars (\$500.00) per month.
- (c) An equity in a home at 1670 Merribee Way, Salt Lake City, which had previously been awarded one-half to the defendant was awarded to plaintiff.
- (d) Plaintiff was awarded judgment for Four Thousand Eight Hundred Sixty-Four Dollars And 50/100 (\$4,864.50) together with interest, representing one-half of the concealed bank account.
- (e) Plaintiff was awarded judgment for Three Hundred, Seventy-Five Dollars (\$375.00) representing unpaid alimony and child support for the month of June, 1968.

- (f) Plaintiff was awarded Four Hundred Twenty Dollars (\$420.00) representing the unpaid amount of an obligation at American Savings & Loan Association which defendant had been ordered to pay under the terms of the original Decree.
- (g) Plaintiff was awarded One Thousand Dollars (\$1,000.00) attorney's fees plus costs.
- (h) Defendant was ordered to pay to Kenneth Rigtrup, plaintiff's former attorney, any amounts earned in the divorce case in excess of the amount previously awarded. No definite amount was awarded, however, and this was left for determination by the Court in the future.
- (i) The Court found that there was a balance of One Thousand Seventy-Five Dollars (\$1,075.00) plus costs of the prior action due plaintiff under a prior judgment; determined that the Writ of Garnishment against Valley Bank & Trust Company was proper; and awarded a garnishee judgment against Valley Bank & Trust Company for the Eleven Hundred Seventy Two Dollars And 40/100 (\$1,172.40), being the amount due.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks that the judgment of the trial court be affirmed.

STATEMENT OF FACTS

Appellant, in his brief, has made a lengthy statement of facts but has omitted to mention the numerous facts and evidence which support the findings and judg-

ment of the trial court. For this reason, plaintiff desires to make her own statement of those facts relevant to this appeal.

Plaintiff and defendant were married June 26, 1954, (R-67) and divorced on March 10, 1967, (R-80). There were five (5) children born as issue of the marriage (R-67). The original divorce hearing was heard in a contested hearing before the Honorable Aldon J. Anderson on November 22, 1966, and after several continuances, was heard to conclusion on December 15, 1966 (R-66). At the conclusion of the divorce trial, the Court found that the defendant had treated plaintiff cruelly, causing her great mental and physical strain and emotional distress, particularly by reason of his association with one, Lorraine Woodland (R-67). The Court then granted plaintiff a divorce, granted plaintiff alimony of Seventy-Five Dollars (\$75.00) per month, granted plaintiff child support of Three Hundred Dollars (\$300.00) per month, provided for visitation of the children, and made a division and distribution of the property of the parties (R-75). The particular finding upon which the provisions of the Decree relating to alimony, child support and property distribution were based is Finding No. 6 (R-68) which provides as follows:

“Defendant is self-employed, being a partner in Jack M. Harrison & Associates, a data processing and accounting systems business, and has a net income of approximately Six Hundred Dollars (\$600.00) per month.”

It is the above finding that plaintiff attacks in this proceeding as being entirely untrue and being based upon the concealment and the false and fraudulent testimony of the defendant. The defendant, Jack M. Harrison, acknowledged that he had testified in the divorce trial concerning his income, and that he did not think there was any other testimony at the trial concerning his income other than his own (R-155).

Plaintiff demonstrated in this proceeding by clear and convincing evidence that the Jack M. Harrison & Associates alleged partnership was not a bona fide partnership at all, but had been set up prior to the divorce hearing as a device to conceal income. Plaintiff further demonstrated that defendant's income was greatly in excess of the amount represented to the Court and, further, that it has substantially increased since the time of the trial.

A. *Facts Demonstrating the Fraudulent Nature of the Partnership*

Evidence produced by the plaintiff to show the fraudulent nature of the partnership was as follows:

1. The partnership agreement was executed at approximately the same time as the divorce action. The record on appeal does not show the original divorce Complaint; however, the Amended Complaint was filed June 2, 1966, (R-6). The partnership agreement was made on April 15, 1966 (Exhibit P-2).

2. Prior to the formation of the partnership, the defendant operated the same business at the same location as an individual proprietorship (R-158). He had been in business at the same location for about three and one-half years prior to the date of trial (R-158).

3. The defendant testified that at the time of the divorce trial, the partners in the business were himself, his stepfather, Hoyt Pope, and his brother, Dwayne Harrison (R-156); that at the time of the hearing herein, the partners were himself, his mother and his stepfather (R-156).

4. The defendant further testified that Dwayne Harrison never made any capital contributions to the partnership (R-161). Also, his stepfather, Hoyt Pope, never made any capital contributions, except that very recently, he made a capital contribution of Two Thousand Dollars (\$2,000.00) and then withdrew Three Thousand Dollars (\$3,000.00) (R-159, 161).

5. The only person who made capital contributions to the partnership was the defendant. These contributions consisted of all of the physical assets, accounts receivable, and accounts payable of his existing business. Thereafter, the business continued doing business in the same manner as it had before (R-158).

6. The defendant's stepfather, Hoyt Pope, whom he claims to be a partner, is a resident of Longmont, Colorado, and has never resided in Utah since the partnership was formed. The partnership has done no business in Colorado (R-159).

7. The defendant's stepfather, Hoyt Pope, is a welder by trade. He has no background in data processing. He has not graduated from high school (R-297).

8. Dwayne Harrison, whom the defendant claimed to be a partner at the time of the divorce hearing, never made any capital contributions to the partnership (R-161). The defendant did not recognize Dwayne as being a partner at the time of the hearing to amend the Decree (R-162, 218). Dwayne worked in the business during the year 1967, but has since been replaced by a Five Hundred Dollar (\$500.00) per month female employee (R-255).

9. In June of 1967, the defendant made an application to Valley Bank & Trust Company for a loan to finance the construction of a commercial building. On the loan application, he listed himself as "owner" of Jack M. Harrison Associates (Exhibit P-12). On this exhibit, he also listed himself as being the applicant for the loan. The defendant further acknowledged in his testimony that the information on the application was correct (R-210).

10. The defendant was requested to furnish a Profit and Loss Statement for the year 1966 at the time he made an application for the loan at Valley Bank & Trust Company. Such a statement was furnished, and the same showed the net income from Harrison & Associates for the year 1966 to be Eighteen Thousand Seventy-Six Dollars And 67/100 (\$18,076.67) (Exhibit P-10). This exact amount of Eighteen Thousand Seventy-Six Dollars

And 67/100 (\$18,076.67) was shown on the defendant's 1966 personal tax return as income received from partnerships (Exhibit P-11). A partnership tax return was filed for 1966 showing a partnership income of Seven Thousand Sixty-Three Dollars And 04/100 (\$7,063.04) (Exhibit P-23). This does not include the salary paid to the defendant. The entire profit from the partnership was shown on Schedule K of the partnership return to have been taken by the defendant. The other partners as listed did not receive credit for any of the partnership income. The tax returns for the year 1966 were prepared and dated prior to the time plaintiff filed her action to alter and amend the Divorce Decree.

11. Tax returns for the year 1967 were prepared by the defendants after this action was filed and after depositions were taken herein (Exhibits P-3 and P-4; R-168). In the partnership return, almost all of the ordinary income was credited to the defendant's stepfather. The entire amount credited to him, however, has remained undistributed (R-199).

12. Almost all of the defendant's personal expenses are charged to the partnership and charged off as a business expense. Facts demonstrating this in detail are set forth and documented beginning at page 12, supra.

13. The defendant's former attorney, John Elwood Dennett, was called by plaintiff as a witness in the case and testified as to conversations he had with the defendant following the time he lost his license to practice law. In these conversations, Jack Harrison stated that

he had a "paper partnership" and that it was set up in the middle of a divorce action because, "I didn't want her to be able to get into my assets." (R-271, 272). He further testified that the defendant said the partnership later developed into a real partnership between himself and Dwayne, but that his stepfather, Mr. Pope, was always a paper partner from the time the partnership was created (R-272).

14. Mr. Byron Stubbs, an attorney at law and member of the Utah State Bar, testified concerning conversations that took place at a meeting which he attended and which took place on February 12, 1968. Mr. Stubbs was representing Dwayne Harrison at the meeting. Present at the meeting were Jack Harrison, his stepfather, Mr. Pope, his mother and Jerry Hansen, attorney at law, representing Jack Harrison (R-287). Mr. Stubbs testified that Jack Harrison told him in substance that Dwayne had no interest in the partnership (R-287). Jack further advised him as follows:

"Jack informed me that the partnership, which Dwayne furnished me with a copy of the partnership agreement, was merely a paper partnership, and Mr. Pope indicated to me that it was a paper partnership; in response to a question, I asked him if he ever had put \$2,000.00 into the partnership; he indicated, no, he had not, and the only other — the real interest in the conversation was that Jack told me that Dwayne had been in some trouble in Denver, and that Jack had bailed him out, and even had to pay Dwayne's way to Salt Lake City to become an employee." (R-288)

15. The defendant testified that he has no personal checking account and that all of his personal expenses are handled on a company check (R-194).

16. The defendant further testified that he is the only person authorized to sign company checks (R-163). The so-called partnership bank account is set up in the name of "Jack Harrison doing business as Harrison & Associates" (R-257).

B. *Facts Demonstrating the Income of the Defendant*

There was some conflicting evidence concerning the income of the defendant. The evidence consisted as follows:

The defendant's loan application to Valley Bank & Trust Company filed in June of 1967 stated his income to be Eighteen Thousand Dollars (\$18,000.00) per year (Exhibit P-12).

The Profit and Loss Statement for the year 1966 furnished to Valley Bank & Trust Company showed an income of Eighteen Thousand Seventy-Six Dollars And 67/100 (\$18,076.67) (Exhibit P-10).

The defendant claimed on his 1966 personal tax return, income from partnerships in the amount of Eighteen Thousand Seventy-Six Dollars And 67/100 (\$18,076.67) (Exhibit P-11). This return shows a claimed loss from the sale of stock which the defendant testified was disallowed by the Internal Revenue Service.

A Profit and Loss Statement furnished by the defendant to Valley Bank & Trust Company for the period, January 1, 1967, through May 31, 1967, showed a net profit of Twenty One Thousand Six Hundred Eighty One Dollars And 88/100 (\$21,681.88) for that period of time (Exhibit P-9).

The defendant testified that the income from the business for the year 1967 was either Thirty Six Thousand Dollars (\$36,000.00) or Thirty Five Thousand Dollars (\$35,000.00) (R-168, 207).

The defendant told John Elwood Dennett, his former attorney, that he had a gross income in 1966 of over Forty Five Thousand Dollars (\$45,000.00) and that he was able to net two-thirds of the gross as net income for the year 1966 (R-266). He further told Dennett that his gross for 1967 was Ninety Six Thousand Dollars (\$96,000.00) and that his expenses were a lesser percentage than the year before (R-268). He stated that his net for 1967 would be just a little under Seventy Thousand Dollars (\$70,000.00) and asked Mr. Dennett to suggest ways of escaping taxes (R-268). The defendant further stated that he expected to double his income in 1968, although this statement was made at a time after certain hostilities had developed (R-269).

Even if the Court were to entirely disregard the testimony of Mr. Dennett and accept the statement of the defendant that the income from the partnership for 1967 was Thirty Five Thousand Dollars (\$35,000.00), the evidence clearly demonstrates that such figure is a

starting point only. The Thirty Five Thousand Dollars (\$35,000.00) was arrived at by taking the net profit for 1967 as shown on the tax return and adding the payments to partners (R-207). However, in arriving at the net profit, there were numerous items claimed as business expense which actually represented personal expenditures of the defendant. An example of these are as follows:

- (a) The defendant admitted that all of the advertising and promotion expense was routed through his pocket. All of the checks charged to advertising and promotion were made payable to Valley Bank & Trust Company; the procedure was for the defendant to cash these checks and then use the cash as he saw fit. This amounted to the sum of Seventeen Hundred Thirty Three Dollars (\$1,733.00) in 1967 (R-173).
- (b) All of the defendant's gas and oil expenditures are charged off as a business expense. The business owned a 1962 Cadillac, a camper and a 1956 Chevrolet. The automobiles were operated by the defendant, although the 1956 Chevrolet was not used last year. The defendant considered these automobiles as business cars; these expenses amounted to Fourteen Hundred Nineteen Dollars And 54/100 (\$1,419.54) in 1967. (R-174; also Exhibit P-6, page 2).
- (c) All repairs to the automobiles are charged as a business expense. These expenses amounted to Six Hundred Forty One Dollars And 14/100 (\$641.14) in 1967. (R-175; also Exhibit P-6, page 2).

- (d) Insurance, including all of the defendant's car insurance is charged as business expense. This amounted to Seven Hundred Sixty Three Dollars And 93/100 (\$763.93) in 1967. (R-176; also Exhibit P-6, page 3).
- (e) A substantial portion of the rent on the defendant's personal apartment was charged as a business expense. The amount so expensed was Seven Hundred Twenty Dollars (\$720.00) in 1967. (R-177; also Exhibit P-6, page 4, note entries showing checks payable to Twin Palms Apartments).
- (f) The defendant testified that a portion of his power and telephone bills were charged as business expense (R-80). Exhibit P-6 is a general ledger for the business for the year 1967. Account No. 950 was the defendant, Jack M. Harrison's personal drawing account. The defendant testified that the portion of his utilities charged to him personally should appear under Account No. 950 (R-181). An examination of Account No. 950 shows no payments to any utility companies (Exhibit P-6, page 14). Thus all of the defendant's utilities were charged to the company as a business expense, although it cannot be determined from the ledger the exact amount attributable to defendant personally (Exhibit P-6, page 10).
- (g) Account No. 274 (Exhibit P-6, page 7) which is contract labor (R-178) shows payments of Seven Hundred Seventy Four Dollars And 50/100 (\$774.50) to Lorraine Woodland. This is the same Lorraine Woodland referred to in the Findings of Fact of the original divorce action as being the person with whom defendant was keeping company (R-179).

- (h) During the year 1967, the company purchased the truck and camper from Hinckley's at a cost of Four Thousand Seven Hundred Dollars (\$4,700.00). This was purchased with company funds and is being depreciated as a business expense. The defendant claims that this was purchased as a delivery truck, although the camper is permanently mounted and has never been off the truck. Also, there is no sign on the truck indicating it to be a company truck, and the only items ever delivered anywhere are paper supplies. (R-183 to 185, 205).

The above all represent items which plaintiff was able to uncover in the hearing. There are numerous items in the general ledger posted in such accounts as "Cost of Goods Sold," "Labor," and "Contract Labor" which plaintiff had no way of determining whether they are legitimate.

In addition to the above, there are other indications from the evidence that the income from the business is more than was admitted by the defendant. During the year 1967, the business paid approximately Thirty Five Thousand Dollars (\$35,000.00) in cash towards a new building. This amount was in addition to the Twenty Seven Thousand Dollars (\$27,000.00) borrowed from Valley Bank & Trust Company. The cost of the building was Fifty Three Thousand Dollars (\$53,000.00) (R-204). This did not include the land cost of Four Thousand Five Hundred Dollars (\$4,500.00) (R-204). The net amount disbursed by Valley Bank & Trust Company under the loan was Twenty Four Thousand Six Hundred Forty

Three Dollars And 27/100 (\$24,643.27) (R-211). There were no other loans made to finance the building (R-213). No additional amounts are owing (R-215). The loan at Valley Bank & Trust Company is being paid off over a ten (10) year period of time and is not delinquent (R-210, 215). The building was constructed during the summer of 1967 (R-205). The building has been appraised at Sixty Two Thousand Dollars (\$62,000.00) (R-215).

In addition to the large cash payments made on the building during 1967, the defendant made loans during 1967 of almost Six Thousand Dollars (\$6,000.00) (R-181; also Exhibit P-6, page 11). One of the entries shows a loan to Lorraine Woodland, his girlfriend, in the amount of Two Thousand Two Hundred Fifty Dollars (\$2,250.00).

C. Facts Demonstrating That the Income of Defendant has not dropped in 1968

The defendant testified generally that his income was down and his expenses were up for the year 1968. No records were produced for the year 1968, and the defendant testified that none were available (R-215, 216).

The plaintiff called an officer of Valley Bank & Trust Company to testify concerning the gross bank deposits in the company's checking account for 1968. The records from the bank indicated that the deposits from January 1 through May of 1968 were Forty Nine Thousand Thirty-Four Dollars And 93/100 (\$49,034.93). This is

more than one-half of what defendant acknowledged to be his gross receipts in 1967 (\$96,116.39; R-164), yet covers a period of only five (5) months.

The defendant also told his former attorney, Mr. Dennett, that he expected to double the business in 1968 (R-270).

D. *Facts Demonstrating That the Defendant Concealed a Bank Account at the Time of the Original Divorce Action*

Plaintiff introduced evidence showing the manipulation of various savings accounts at Murray First Thrift & Loan Company. Exhibit P-15 shows an account and ledger sheet showing a savings account in the name of Jack M. Harrison in the amount of Three Thousand Ninety Four Dollars And 19/100 (\$3,094.19). This entire account was withdrawn on August 18, 1966. This was three months prior to the time the trial was held in the divorce case. On the same day, August 18, 1966, a new account was opened at Murray First Thrift in the name of Jack M. Harrison & Associates (Exhibit P-16). The initial deposit was Four Thousand Five Hundred Ninety Four Dollars And 19/100 (\$4,594.19), and other deposits were later added. On November 28, 1966, a withdrawal was posted to the ledger of this account. The amount of the withdrawal was Nine Thousand Seven Hundred Twenty Nine Dollars (\$9,729.00), which consisted of all of the money in the account.

The above withdrawal of Nine Thousand Seven Hundred Twenty Nine Dollars (\$9,729.00) was compared to a new account in the name of Keith C. Hawkes which was opened at Murray First Thrift on November 22, 1966 (Exhibit P-18). The date that the Keith C. Hawkes account was opened was the very day that the divorce trial started. The amount of the initial deposit in the Keith C. Hawkes account correlated exactly to the amount withdrawn from the account of Jack M. Harrison & Associates which was Nine Thousand Seven Hundred Twenty Nine Dollars (\$9,729.00).

On July 3, 1967, after the divorce trial was over, the Keith Hawkes account was closed with a withdrawal of Ten Thousand Fifty Two Dollars And 32/100 (\$10,052.32) (Exhibit P-18). There had been no additional deposits to this account other than interest entries.

In the meantime, another account had been opened at Murray First Thrift in the name of Harrison & Associates (Exhibit P-17). On the very day that Keith Hawkes closed his account (July 3, 1967), a deposit was made to the Harrison & Associates account in the amount of Ten Thousand One Hundred Twenty One Dollars And 91/100 (\$10,121.91).

Keith C. Hawkes was called as a witness by the plaintiff. He admitted that he had received the money from Jack Harrison, but claimed it was a loan to purchase a restaurant in Jackson, Wyoming (R-187). He stated that the money was never withdrawn from Murray First Thrift because the restaurant deal fell through

(R-188). There was no written instrument or note ever made up, and the note was strictly oral (R-189). No interest was ever paid other than the interest that had accrued at Murray First Thrift (R-190).

The plaintiff, Mrs. Harrison, testified that she had no knowledge of the account of Jack M. Harrison & Associates in the amount of Nine Thousand Seven Hundred Twenty Nine Dollars (\$9,729.00) that existed on the day the divorce trial commenced. (R-282). She did not learn of this account until "yesterday." R-182).

The Findings of Fact in the original divorce action listed in detail all of the assets of the parties. The findings refer to family savings of Sixteen Hundred Dollars (R-68) of which plaintiff was awarded the sum of Eight Hundred Dollars (\$800.00) (R-71, 78).

ARGUMENT

POINT I

THE FINDINGS AND JUDGMENT OF THE TRIAL COURT WERE FULLY SUPPORTED BY THE EVIDENCE.

Plaintiff's Motion to Alter and Amend the Judgment was made on the ground of fraud committed upon the Court, or in the alternative, upon a substantial change of circumstances. The trial court made a finding of both fraud and change of circumstances (R-115). The evidence supports both findings, either of which would support the judgment of the trial court.

As to the change of circumstances, the evidence of defendant's income in 1967 and 1968 as set forth in detail in the statement of facts herein clearly shows that he is making substantially more than the Six Hundred Dollars (\$600.00) per month which the Court found to be his income at the time of the original divorce action. Section 30-3-5, *Utah Code Annotated, 1953* provides that "subsequent changes or new orders may be made by the Court with respect to the disposal of children or the distribution of property as shall be reasonable and proper." This Court has recently reaffirmed that under the above statute, the Court retains jurisdiction of the parties to modify the decree with respect to the distribution of property, especially where the parties voluntarily litigate a matter over which the Court has jurisdiction. *Bott -vs- Bott*, 20 Utah 2d 329 437 P. 2d 684. The controlling principle has been stated that a decree of divorce may be modified if it is alleged, proved, and the trial court finds that the circumstances upon which it was based have undergone a substantial change. *Gale -vs- Gale*, 123 Utah 277, 258 P. 2d 986; *Osmus -vs- Osmus*, 114 Utah 216, 198 P. 2d 233. This Court has also held that the modification of a decree is within the latitude of discretion reposed in the trial court with respect to which his judgment should not be interfered with unless there is shown some injustice or inequity as to indicate a clear abuse of that discretion. *Jorgensen -vs- Jorgensen*, 17 Utah 2d 159, 406 P.2d 304.

As to the fraud, the leading Utah case appears to be *Haner -vs- Haner*, 13 Utah 2d 299, 373 P.2d 577. There the Court stated as follows:

“It is sometimes said that when a judgment is attacked collaterally on the ground that it was obtained by fraud or deceit it will be set aside only for extrinsic fraud. But we are in accord with the indications in the Restatement of Judgments that this is too limited. It seems more realistic to say that when it appears that the processes of justice have been so completely thwarted or distorted as to persuade the court that in fairness and good conscience the judgment should not be permitted to stand, relief should be granted. However, inasmuch as the plaintiff here seems to be relying on the ground of fraud, there is a distinction which it is necessary to point to. In order to justify granting relief, the alleged wrong would have to be of the type characterized as extrinsic fraud: that is, fraud based on conduct or activities outside of the court proceedings themselves; and which is designed and has the effect of depriving the other party of the opportunity to present his claim or defense. This type of fraud, which is regarded as a fraud not only upon the opponent, but upon the court itself, can be accomplished in a number of ways, such as making false statements or representations to the other party or to witnesses to prevent them from contesting the issues; or by that means or otherwise preventing the attendance of the parties or witnesses; or by destroying or secreting evidence; so that a fair trial of the issues is effectively prevented.”

The evidence here consists of the type of thing referred to in the above language. The plaintiff proved by clear and convincing evidence that defendant had taken affirmative steps before coming to court to conceal and secrete the evidence. He transferred and concealed a substantial bank account that was unknown to the plaintiff and

set up a fraudulent partnership to conceal his income. These activities were in addition to defendant's perjured testimony regarding his income. Such actions on the part of defendant were designed and had the effect of depriving plaintiff of the opportunity to litigate the issues in the divorce action, and a fair trial was effectively prevented.

A. The Provisions of the Amended Decree Relating to Alimony and Support were Reasonable

The trial court awarded plaintiff Four Hundred Dollars (\$400.00) per month child support and Five Hundred Dollars (\$500.00) alimony. This amounted to Nine Hundred Dollars (\$900.00) per month or Ten Thousand Eight Hundred Dollars (\$10,800.00) per year.

If the Court believed the statements made by the defendant, Jack Harrison, to his former attorney that he netted just under Seventy Thousand Dollars (\$70,000.00) in 1967 and expected to double his income in 1968, then the above award would be considered very nominal.

If the Court believed that the income from the business for 1967 was Thirty Six Thousand Dollars (\$36,000.00) as was testified by the defendant, and further believed from the overwhelming evidence that the partnership was a sham and the entire income belonged to the defendant, still the award would be somewhat modest.

If the Court believed the defendant's income to be Eighteen Thousand Dollars (\$18,000.00) per year as he represented to Valley Bank & Trust Company, and as appeared on his 1966 tax return, the award would still be in line with what is reasonable. Especially is this true where, as here, it was shown that nearly all of the defendant's personal needs are paid for by the company. These include his automobile, gas and oil, repairs, insurance, rent on apartment, utilities, etc. These benefits would add the equivalent of several thousand dollars per year to the defendant's income.

There is substantial evidence to justify the award of the trial court. Certainly the plaintiff and the five (5) minor children of the parties are entitled to live in accordance with the same standard of living as the defendant, particularly where, as here, the guilt for the break-up of the marriage was found to have rested on the defendant. See *Wilson -vs- Wilson*, 5 Utah 2d 79, 296 P.2d 977.

B. The Provision of the Amended Decree Awarding the Home to Plaintiff was Reasonable

Under the original Decree of Divorce, it was ordered that the home of the parties be sold and the proceeds divided between them (R-77). This provision would be very understandable when considered in light of the findings that the total income of the defendant was Six Hundred Dollars (\$600.00) per month. Obviously, if Six Hundred dollars (\$600.00) per month had to be divided between two (2) households, the parties simply could not

have afforded to keep the house upon which the mortgage payments were One Hundred Seventy Dollars (\$170.00) per month. These considerations, however, no longer exist, and there is no reason to remove plaintiff and the children from their established home.

Plaintiff testified in this action that she had resided at the home for five and one-half ($5\frac{1}{2}$) years (R-293); that the children were well established in their respective schools (R-293); that the children are active in church (R-293); and that the children have many friends in the neighborhood and participate in Little League Baseball and other neighborhood activities (R-294).

This Court has stated on many occasions that the primary concern in a divorce action should be the interests of the children. Any divorce between parents causes to a greater or lesser extent feelings of insecurity on the part of minor children. It is a difficult adjustment for them to make. Plaintiff contends that unless it is absolutely necessary, it would be unfair to deprive the children of the security they receive from their home, their neighborhood, their school, their church, and their friends.

It was further made clear by the evidence that defendant has a commercial building in which there is an equity of over Thirty Five Thousand Dollars (\$35,000.00). This is in addition to the other business assets of the defendant. Plaintiff has made no claim to any of these business assets, and it is only equitable and fair that she be awarded the home.

C. *The Provision of the Amended Decree Awarding Plaintiff Judgment for One-Half of the Concealed Bank Account was Reasonable*

The evidence as set forth in the within statement of facts demonstrated beyond question that the defendant concealed a bank account in the amount of Nine Thousand Seven Hundred Twenty Nine Dollars (\$9,729.00). It was only fair that plaintiff be awarded one-half of this amount. This was also in keeping with the original decree which awarded one-half of the family savings of Sixteen Hundred Dollars (\$1,600.00) to the plaintiff.

D. *The Provision of the Amended Decree Ordering Defendant to Pay to Plaintiff's Former Attorney Any Additional Fees Earned by Him in the Divorce Case was Reasonable*

During the course of the trial herein, it was brought to the attention of the Court that plaintiff owed her former attorney additional amounts for services rendered in the divorce case (R-145 to 149). The Court ordered that these amounts be paid by the defendant. It is true that plaintiff had not petitioned the Court for this relief. However, in the case of *Jorgensen -vs- Jorgensen*, 17 Utah 2d 159, 406 P.2d 304, this Court rejected the contention of an appellant that the trial court had erred where the trial court made an increase in alimony when the plaintiff had not petitioned for such increase. The only concern seemed to be the wisdom and propriety of the trial court's action.

In any event, this provision can be of no concern to the defendant at this time inasmuch as no amount was fixed, and the matter was left to be determined in a further hearing. (R-113).

POINT II

THE COURT COMMITTED NO ERROR IN AWARDING PLAINTIFF A GARNISHEE JUDGMENT AGAINST VALLEY BANK & TRUST COMPANY

Unrelated to plaintiff's Petition for Modification of the Decree was a matter concerning an existing garnishment which the Court considered at the trial. The Writ of Garnishment was served upon Valley Bank & Trust Company and the Bank answered indicating that it was indebted to Jack M. Harrison by reason of a checking account with a balance of Two Thousand One Hundred Dollars And 87/100 (\$2,100.87) (R-109). The garnishment was issued against unpaid arrearages and attorney's fees awarded in the original Decree of Divorce. There was no dispute concerning the amount owing (R-110, 249), the only question being whether the money in the checking account belonged to the defendant. As has been demonstrated herein and discussed at length, it was clearly shown from the evidence that the alleged partnership was nothing more than a fraudulent scheme to conceal the assets of the defendant. Section 25-1-25, *Utah Code Annotated, 1953*, gives a creditor the right to disregard a fraudulent conveyance and attach and levy execution upon the property conveyed. The Court was correct in awarding a garnishee judgment.

POINT III

PLAINTIFF IS ENTITLED TO AN AWARD OF ADDITIONAL ATTORNEY'S FEES FOR THIS AP- PEAL

The award of attorney's fees by the trial court covered only those services rendered to plaintiff at the trial. Plaintiff seeks that this court in rendering its decision herein affirmatively order that the trial court award additional attorney's fees to cover reasonable amounts incurred by plaintiff in connection with this appeal.

CONCLUSION

The evidence in this case fully supports the judgment of the trial court, and there is nothing in the record to show any prejudice or abuse of discretion on the part of the trial judge. The Amended Judgment and Decree was fair and equitable in all respects, and there is no reason for this Court to interfere with the Decree. The trial court listened to three days of testimony and had all of the parties and witnesses before it. There is no reason to believe that the result would be any different if a new trial were ordered. Respondent respectfully submits that the judgment of the trial court be affirmed.

Respectfully submitted,

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