

1983

## **Monte Ray Higley v. Geraldine Wright Higley : Brief of Appellant**

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc2](https://digitalcommons.law.byu.edu/uofu_sc2)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors. Darrell G. Renstrom; Attorney for Defendant-Appellant

---

### **Recommended Citation**

Brief of Appellant, *Higley v. Higley*, No. 18970 (1983).  
[https://digitalcommons.law.byu.edu/uofu\\_sc2/4493](https://digitalcommons.law.byu.edu/uofu_sc2/4493)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

IN THE SUPREME COURT  
OF  
THE STATE OF UTAH

---

MONTE RAY HIGLEY, :

Plaintiff and Respondent, :

vs. :

No. 18970

GERALDINE WRIGHT HIGLEY, :

Defendant and Appellant. :

---

BRIEF OF APPELLANT

---

DARRELL G. RENSTROM  
2640 Washington Boulevard  
Ogden, Utah 84401

C. GERALD PARKER  
2610 Washington Boulevard  
Ogden, Utah 84401

Attorney for Defendant/Appellant Attorney for Plaintiff/Respondent

**FILED**

APR 6 1963

18970

**Clk, Supreme Court, Utah**

IN THE SUPREME COURT  
OF  
THE STATE OF UTAH

---

NOELLE RAY HIGLEY, :

Plaintiff and Respondent, :

vs. :

No. 18970

GERALDINE WRIGHT HIGLEY, :

Defendant and Appellant. :

---

BRIEF OF APPELLANT

---

DARRELL G. RENSTROM  
2640 Washington Boulevard  
Ogden, Utah 84401

C. GERALD PARKER  
2610 Washington Boulevard  
Ogden, Utah 84401

Attorney for Defendant/Appellant    Attorney for Plaintiff/Respondent

AUTHORITY AND CASES CITED

Mullins vs. Mullins, 26 Utah (2d) 82, 485 P. 2d 663 . . . . .	9
Hendricks vs. Hendricks, 123, U 178, 257 P. 2d 366 . . . . .	9
Curry vs. Curry, 7 Utah 2d 198, 321 P. 2d 939 . . . . .	10
Utah Code Annotated 30-3-1 . . . . .	10
Utah Code Annotated 76-7-103 . . . . .	11
Gramme vs. Gramme, Utah 587 P. 2d 144 (1979) . . . . .	11
Stevenson vs. Stevenson, Utah Supreme Court No. 17640 Green Sheets, August 30, 1982 . . . . .	12

TABLE OF CONTENTS

NATURE OF THE CASE . . . . .	1
DISPOSITION IN LOWER COURT . . . . .	2
RELIEF SOUGHT ON APPEAL . . . . .	3
COMMENTS BY DEFENDANT/APPELLANT'S COUNSEL . . . . .	2
QUESTIONS OF LAW . . . . .	3
QUESTION OF LAW #1	
WAS THE COURT JUSTIFIED IN AWARDING THE PLAINTIFF/ RESPONDENT A DIVORCE BASED UPON HIS COMPLAINT WHEN THE COURT MADE NO FINDING THAT DEFENDANT/ APPELLANT'S WRONGS WERE EQUAL TO OR EXCEEDED THE PLAINTIFF/RESPONDENT'S WRONGS, AND WHERE THE COURT SPECIFICALLY FINDS THAT THE REAL CAUSE OF THE DIVORCE WAS THE DEFENDANT/APPELLANT'S REACTION TO PLAINTIFF/RESPONDENT'S CLANDESTINE ACTIVITY WITH A PARAMOUR? . . . . .	5
QUESTION OF LAW #2	
HAS THE TRIAL COURT ABUSED ITS DISCRETION AND EXCEEDED THE LIMITS OR ICNORED THE GUIDELINES SET IN GRAMME v GRAMME? . . . . .	3
STATEMENT OF FACTS . . . . .	3
ADDRESSING THE FIRST QUESTION OF LAW	
SHOULD PLAINTIFF/RESPONDENT'S GRANT OF DIVORCE AGAINST DEFENDANT/APPELLANT BE SET ASIDE? . . . . .	5
ADDRESSING THE SECOND QUESTION OF LAW	
HAS TRIAL COURT ABUSED ITS DISCRETIONARY AUTHORITY? . . . . .	4
SUMMARY AND RELIEF SOUGHT . . . . .	1-

IN THE SUPREME COURT  
OF  
THE STATE OF UTAH

---

MONTE RAY HIGLEY, :  
Plaintiff and Respondent, :  
vs. :  
GERALDINE WRIGHT HIGLEY, :  
Defendant and Appellant. :

---

BRIEF OF APPELLANT

---

NATURE OF THE CASE

The Appellant appeals from a decision and order of Decree of Divorce made by the Honorable John F. Wahlquist of the Second Judicial District Court of Weber County, State of Utah, wherein said Court granted divorces both to the Plaintiff and the Defendant on their Complaint and Counterclaim, and further made an order of division of the assets of said parties and awarding alimony, to which the Defendant/Appellant takes umbrage and exception.

DISPOSITION OF LOWER COURT

On the 11th day of January, 1983, the Honorable Judge John F. Wahlquist convened Court in the above entitled matter and the issues of said matter were tried to the Court, and on the same day the Court rendered its judgment granting divorces to the Plaintiff/Respondent on his Complaint and to the Defendant/Appellant on her Counterclaim and further dividing assets of said parties and awarding alimony.

RELIEF SOUGHT ON APPEAL

The Defendant/Appellant herein seeks an order from the Supreme Court nullifying the divorce granted to the Plaintiff/Respondent on his Complaint on the grounds of insufficiency of evidence, failure of the Court to make proper Findings of Fact, and further requests the Court to review the division of assets and other awards made by the Court as to their fairness and equity and to determine if they are consistent with the parameters previously set by this Court.

COMMENTS BY DEFENDANT/APPELLANT'S COUNSEL

Defendant/Appellant's Counsel, in appealing this case to the Supreme Court of this State, does so with some trepidation and embarrassment, knowing full well of this Court's present workload and, perhaps, the effort of some attorneys to use this Court in divorce matters without just reason and cause.

The governing law in this case is well known to Defendant/Appellant's Counsel, and the law is not at issue, but whether or not the Court has abused its discretion in applying the law.

#### QUESTIONS OF LAW

1. WAS THE COURT JUSTIFIED IN AWARDING THE PLAINTIFF/RESPONDENT A DIVORCE BASED UPON HIS COMPLAINT WHEN THE COURT MADE NO FINDING THAT DEFENDANT/APPELLANT'S WRONGS WERE EQUAL TO OR EXCEEDED THE PLAINTIFF/RESPONDENT'S WRONGS, AND WHERE THE COURT SPECIFICALLY FINDS THAT THE REAL CAUSE OF THE DIVORCE WAS THE DEFENDANT/APPELLANT'S RE-ACTION TO PLAINTIFF/RESPONDENT'S CLAUDESTINE ACTIVITY WITH A PARLOUR?

2. HAS THE TRIAL COURT ABUSED ITS DISCRETION AND EXCEEDED THE LIMITS OR IGNORED THE GUIDELINES SET IN GRAME vs. GRAME?

#### STATEMENT OF FACTS

The Plaintiff/Respondent and Defendant/Appellant intermarried on the 12th day of June, 1953, in the Salt Lake City LDS Temple, and that as a result of said marriage, the parties have had five children, all of whom are now adults with the two younger ones, both boys, ages 21 and 19, still living with their mother and working part-time and going to college.



That the parties had a happy marriage until approximately one and one-half (1 1/2) years prior to trial when the husband's attitude changed toward his wife, which was coincidental to his working with a 37 year-old divorced woman who began working under his tutelage at Hill Air Force Base.

That during the 39 years of marriage, the parties enjoyed a good, modest, but happy family life consistent with the teachings taught by their LDS faith, and raising their family, enjoying hobbies associated with their children, including building and racing cars, junior horse posse, snow mobiling, motorcycling, camping, boating, playing cards and dancing.

In addition thereto, the Plaintiff/Respondent and Defendant Appellant and children literally built a welding business and building to house it, which the parties intended for their sons, consisting of many tools and equipment, and which was a successful aside for the Plaintiff/Respondent and his sons, and provided an additional family income of about \$10,000 per year.

That the Plaintiff/Respondent through his work at Hill Air Force Base has an annual income of about \$25,000 per year, in addition to the \$10,000 earned at the family business, for a total of about \$35,000 per year. The Defendant/Appellant has no income and very little work history aside from small odd jobs on a seasonal basis and is in extremely poor health and need of an operation.

That the Plaintiff/Respondent through his work has built up a substantial retirement and has available to him health and accident insurance, which the Defendant/Appellant has been, and continues to be, dependent upon.

That when the Defendant/Appellant began to sense trouble in her marriage, she began to investigate and discovered her husband was seeing, dating and staying with his co-worker on a regular basis, denying all the time that he was, notwithstanding the fact he was seen with her by workers, friends and his own children at social and sporting events.

On one occasion the Defendant/Appellant found and observed her husband staying all night with the paramour. This was achieved by Defendant/Appellant spending the night outside the paramour's home and observing her husband exit in the morning in a change of clothes; and, notwithstanding all of this evidence, Plaintiff/Respondent repeatedly lied to the Defendant/Appellant and the Court, that no boyfriend/girlfriend relationship existed. Even though he now admits he is interested in her and she has gone with him to consult with his divorce attorney.

The Court, in making its award, has left the Defendant/Appellant with a \$100.00 per month income (alimony), no health insurance, poor health, little work experience, and an order to sell the family home she has always known, and divide the proceeds with the Plaintiff/Respondent, while the Plaintiff/

Respondent is left with the earning capacity of \$60,000 per year, a good retirement, good health, good health and accident insurance, and a partner who should adequately provide him with and for his needs he might demand.

The equity and fairness is non-existent in this case.

ADDRESSING THE FIRST QUESTION OF LAW

The Court has granted the Plaintiff/Respondent a divorce based upon his testimony alone (pages 19 through 23 of Reporter's transcript) wherein Plaintiff/Respondent says his grounds are as follows:

She favored her family over his (page 19 line 12).

Discouraged the children from his family (page 19 line 25).

She was domineering and the boss (page 20 line 5).

She had a saying regarding her maiden name of Wright (page 20 line 15).

She did not have sex with him enough (even though admitted; ill) (page 21 line 18).

The Defendant/Respondent was hit and had his shirt torn off him (page 23 line 23).

Defendant/Appellant fed him a dried hamburger for lunch one day (page 23 line 4).

Error is assessed as follows:

A. The Court failed to make any Findings of Fact to support Plaintiff/Respondent's evidence in support of Plaintiff/Respondent's Complaint for divorce.

The Plaintiff/Respondent's evidence is unsupported by any corroborating testimony by any other witnesses and is not

consistent with the Findings of Fact made by the Court, which and the following, and only the following:

"That each party has treated the other cruelly, causing mental distress and anguish. Defendant's cruel treatment of the Plaintiff included the fact that whenever she had to make a decision between him and one of his children, she immediately made it in favor of the child. She let the romance slide and did not make a normal effort to make a go of the mating relationship of the romance. This caused him to reach the decision that he would fill some corner of his empty life by a clandestine romance." (Emphasis added.)

There is no evidence in the record that Defendant/Appellant ever favored her children at his expense, nor did Plaintiff/Respondent ever complain that she did. That finding is the Court's created creature.

The other finding awarding the Plaintiff/Respondent a divorce appears to be that "she let the marriage slide and did not make a normal effort to make a go of the mating relationship".

Presumably the Court is talking about sex. This author, even as he grows older, does not minimize the importance of this facet in a marriage, but by Plaintiff/Respondent's own admission, any disinterest came during a period of time she indicated she was sick and in need of surgery, as did her own testimony, and was no greater than his own disinterest at times.

B. The Court found the real cause of the divorce was due to Defendant/Appellant's reaction to her husband's adultery. The Court, in making its Findings of Fact, does not rely on Plaintiff/Respondent's evidence or claimed grounds, but states as follows:

"Plaintiff's cruel treatment consisted of his decision to have a girlfriend that might be considered a paramour in a relationship outside of the marriage. He never intended that this would break up his family, but when Defendant discovered what had happened, it became an intolerable thing for her and what actually caused this divorce was her reaction to the discovery of this clandestine activity." (Emphasis added).

In effect, the Court has found the real cause of the divorce to be the Defendant/Appellant's intolerance towards her husband's adultery and her reaction to it.

The grounds laid in evidence by Plaintiff/Respondent are not the grounds used by the Court in granting the divorce and the Court in finding the real cause of the divorce (Plaintiff/Respondent's adultery) has used this, in effect against Defendant/Appellant because she objected. This is, to say the least, chauvenistic, unfounded, unfair and makes mockery of the law.

The Trial Court seems to excuse the Plaintiff/Respondent's adultery on the basis that a lot of men at Hill Air Force Base, and around, commit adultery (see page 4 line 9 of Court's Bench Ruling).

"He reached a decision that a lot of men make at Hill Field, and around; and that is, he would try to fill some corner of his empty life by a clandestine romance and activities."

C. The Court makes no Finding of Fact the Defendant/Appellant's faults were equal to or greater than the faults of Plaintiff/Respondent.

This Court has held in *Mullins v Mullins*, 26 U (2d) 171, 180 P. 2d 663, that marriages may be dissolved by granting a divorce to each party, however, this is not without limitation in that the Court must find that each party was equally at fault. The Findings of Fact by the Court in the present case makes no such finding.

*Hendricks v Hendricks* 123, U 178, 257 P. 2d 366, established a second principal of law by stating:

"Where reciprocal claims rest upon various acts and omissions alleged to constitute cruelty to the other, and neither party is accused of the commission of a felony, adultery or any other heinous offense, the trial court would best perform its function in the administration of justice by determining which party was least at fault and grant a divorce and adjust their rights." (Emphasis added).

Is there any doubt whose wrongs are greater?

The Trial Court herein appears to excuse the Plaintiff/Respondent's adultery, as opposed to Defendant/Appellant's acts of minutia.

In all due respect, this author cannot believe that anyone reading the trial record herein could conclude that the Defendant/Appellant's acts exceeded the Plaintiff/Respondent's acts; nor has the Trial Court given us the benefit of any Findings of Fact that one party's act exceeded the other's, nor did the Trial Court find they were equal one to the other.

D. Great mental distress must exist to satisfy legal grounds.

Curry v Curry 7 P. (2d) 198, 321 P. 2d 939, enunciated the following principal of law:

"There must exist grounds for a divorce sufficient to satisfy the requirement specifying cruelty to the extent of causing great mental distress."

It is respectfully submitted that in the present case, the Plaintiff/Respondent's evidence falls short of the requirement of the Curry case. In sum total, the Trial Court justifies Plaintiff/Respondent's adultery and pities him against Defendant/Appellant's acts of minutia.

This Appellate Court should vacate the Trial Court's award of divorce for Plaintiff/Respondent, and permit a divorce to Defendant/Appellant on her Counterclaim only.

Utah State Law, relevant to divorce, makes adultery a specific ground for divorce, as follows:

30-3-1...and the court may decree a dissolution of the marriage contract between the plaintiff and defendant in all cases where the plaintiff or defendant shall have been an actual and bona fide resident of this state and of the county where the action is brought or as to members of the armed forces of the United States who are not legal residents of this state, where the plaintiff shall have been stationed in this state under military orders, for three months next prior to the commencement of the action for any of the following causes: ... (2) Adultery committed by the defendant subsequent to marriage.

The legislature of this state has never made a marriage partner's reaction to her spouse's "paramour relationship", a ground for divorce. Quite to the contrary, the legislature has treated such a relationship as a grievous criminal wrong as follows:

76-7-103. Adultery.--(1) A married person commits adultery when he voluntarily has sexual intercourse with a person other than his spouse. (2) Adultery is a class A misdemeanor.

The court in its Findings of Fact uses the word "paramour", which is defined by Webster's New Collegiate Dictionary as "an illicit lover" or "mistress".

How then can the Trial Court grant a divorce to Plaintiff/Respondent on his Counterclaim when his acts have been defined by the legislature as both a grievous civil and criminal wrong?

In the absence of any finding by the Trial Court that the wrongful acts of Plaintiff/Respondent and Defendant/Appellant are equal, this Appellate Court is left to determine if the record shows that Plaintiff/Respondent and Defendant/Appellant's wrongs against one another are in juxtaposition. Defendant/Appellant suggests they are not. Adultery vs. Reaction to it.

#### ADDRESSING THE SECOND QUESTION OF LAW

Gramme v Gramme, Utah 587 P. 2d 144 (1979) said the following:

Important criteria in determining a reasonable award for support and maintenance are the financial conditions and needs of the wife, considering her station in life; her ability to produce sufficient income for herself; and the ability of the husband to provide support.



and enunciated a familiar principle that to the effect that alimony is purposed on maintaining the accustomed way of life of a deserving spouse based on need and duty and to avoid necessitous public welfare assistance. A principle reaffirmed in *Stevenson v Stevenson*, Utah Supreme Court 52-17640 Green Sheets, August 30, 1982, and other cases.

#### THE HEALTH OF EACH PARTY

There is nothing in the record to suggest that the Plaintiff Respondent is anything but a healthy individual. Contrasted the Defendant/Appellant's health as follows:

- 1972 - an operation for pyloric gastrectomy and hiatal hernia removing 3/4 of stomach. (See Trial Record, page 118, line 5 through 25.)
- 1973 - hysterectomy due to hemorrhaging and potassium shock. (See Trial Record, page 120, lines 15 through 24.)
- 1975 - operation to remove blockage and rebuilding outlet to stomach. (See Trial Record, page 119, lines 16 through 25 and page 120, lines 1 through 5.)
- 1975 - 18 days later another operation for intestinal blockage. (See Trial Record, page 120, line 7 through 14.)
- Present Time - in need of surgery for blockage and to rebuild outlet to stomach. (See Trial Record, page 120, line 25, and page 121, lines 1 through 15.)
- Present Dietary problems cause Defendant/Appellant to limit herself to liquid diet. (See Trial Record, page 121, lines 16 through 21), and in need of medicine she can't afford. (See Trial Record, page 123, lines 2 through 14.)

Future - The Defendant/Appellant may have to have a series of operations. (See Court Record, page 122, lines 3 through 10.)

#### MEDICAL INSURANCE OF EACH PARTY

The Plaintiff/Respondent is an employee of Hill Air Force Base with medical insurance available to him, however the Defendant/Appellant upon a divorce being granted, will be without medical insurance. (See Trial Record, page 160, lines 7 through 25, and page 161, lines 1 through 19; and see Trial Record, page 68, lines 11 through 25, and page 69, lines 1 through 7.)

#### INCOME OF EACH PARTY

The Plaintiff/Respondent is employed at Hill Air Force Base, earning at the time of trial, a gross amount just under \$25,000 per year (See Trial Record, page 60, lines 10 through 18 );and an additional amount of about \$9,000 per year from rebuilding cars (See Trial Record, page 116, lines 2 through 15 ); as opposed to Defendant/Appellant who has no income and very little work experience (See Trial Record, page 116, lines 15 through 25, and page 117, lines 1 through 8 ).

#### RETIREMENT BENEFITS OF EACH PARTY

The Plaintiff/Respondent has been employed at Hill Air Force Base since 1966 (See Trial Record, page 48, lines 5 through 9); and has only 11 years to go to retirement (See Trial Record, page 66, lines 19 through 25, and page 67, lines 1 through 12);

and presently has \$16,000 in his retirement account (See Trial Record, page 65, line 4); while the Defendant/Appellant has no retirement benefits at all (See Trial Record, page 67, line 2, and page 68, lines 1 through 10).

#### WORK HISTORY OF EACH PARTY

Plaintiff/Respondent has been employed since 1966 as a welder at Hill Air Force Base and self-employed as a rebuilder of cars; as compared to Defendant/Appellant's very limited work experience, primarily seasonal farm work (See Trial Record, page 68, lines 5 through 7, and page 116, lines 22 through 25, and page 117, lines 1 through 3).

#### THE ASSETS

The home, shop or garage, 2 water shares and surrounding ground (valued by Plaintiff/Respondent at \$69,500, see Trial Record, page 27, lines 8 through 10; and valued by the Defendant/Appellant at \$50,000 - \$55,000, see Trial Record, page 128, lines 6 through 25, and page 129, lines 1 through 25, and page 130, lines 1 through 20); subject to a \$7,300 mortgage (See Trial Record, page 29, lines 3 through 10).

Household furnishings, valued by Plaintiff/Respondent at \$5,000 (See Trial Record, page 31, lines 6 through 9) and valued by Defendant/Appellant at \$600 (See Defendant/Appellant's Exhibit).

Plaintiff/Respondent's retirement fund, \$16,000 (See Trial Record, page 97, line 15, and page 133, lines 2 through 5).

Garage and shop, business tools and scrap, valued by Plaintiff/Respondent at \$5,625; and \$39,216 by Defendant/Appellant (See respective Exhibits).

Vehicles, valued by Plaintiff/Respondent at \$1,800; and Defendant/Respondent at \$2,950 (See respective Exhibits).

#### THE DEBTS

Exclusive of mortgage on home, at time of trial, \$2,090 by count of Plaintiff/Respondent; and \$1,689 by count of Defendant/Appellant (See respective Exhibits).

#### THE AWARD AND DIVISION

A. The Plaintiff/Respondent continues to enjoy good medical insurance while Defendant/Appellant, even though ill and in need of an operation and perhaps a series of operations, is left without insurance when the divorce becomes final.

B. The Plaintiff/Respondent will continue to enjoy an annual employment income of nearly \$25,000 per year, with another potential of \$9,000 per year; while Defendant/Appellant is left with no job and no income, other than \$100 per month alimony to be given 3 years after the divorce becomes final; while in the meantime, the Plaintiff/Respondent gets no income other than the right to live in the family home.

C. The Defendant/Appellant shall receive one-half of 1. years of Plaintiff's post-nuptial's earned income, the amount of which is unknown, and cannot be considered income until Plaintiff/Respondent's retirement.

D. The Plaintiff/Respondent gets one-half the value of the home after \$6,000 is first given to Defendant/Appellant, and she gets the balance.

#### SUMMARY

After 30 years of marriage, the Defendant/Appellant at 47 years of age, is left with ill health, no medical insurance, no job with minimum work experience, no home in 3 years. She will receive some well used household furniture, \$100 a month alimony in three years, use of the home for three years, and other minor items, and roughly half the assets.

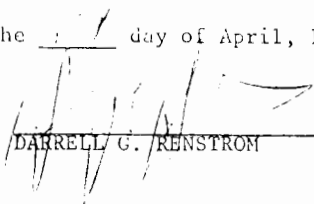
The Plaintiff/Respondent goes on to his paramour, in good health, a good job, a \$34,000 plus annual income, a good retirement, good medical insurance, and roughly half the assets. It is not fair or equitable.

#### RELIEF SOUGHT

1. The granting of an award of divorce to the Plaintiff/Respondent on his Complaint be vacated based on his grievous wrongs towards the Defendant/Appellant which far exceeds her wrongs towards Plaintiff/Respondent.

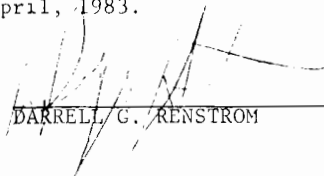
2. That the Appellate Court order a grant of alimony to Defendant/Appellant consistent with her basic needs, medical insurance, and the equity in the family home, and other relief deemed just and proper.

RESPECTFULLY SUBMITTED the \_\_\_\_\_ day of April, 1983.

  
\_\_\_\_\_  
DARRELL G. RENSTROM

Certificate of Mailing

I certify that a true and correct copy of the above and foregoing was mailed to Plaintiff/Respondent's Attorney, C. Gerald Parker, at 2610 Washington Boulevard, Ogden, Utah 84401, this \_\_\_\_\_ day of April, 1983.

  
\_\_\_\_\_  
DARRELL G. RENSTROM