

1983

## **Susan Race v. Robert Wayne Race : Brief of Appellant**

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IN THE SUPREME COURT  
OF THE  
STATE OF UTAH

---

SUSAN RACE,

Plaintiff/Appellant

Case No. 19146

-vs-

ROBERT WAYNE RACE,

Defendant/Respondent.

---

AN APPEAL FROM THE FINAL SUPPLEMENTAL  
ORDER AND JUDGMENT TO DECREE OF DIVORCE  
AND THE AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW  
AND AMENDED DECREE OF DIVORCE  
IN THE THIRD JUDICIAL DISTRICT IN AND FOR  
SALT LAKE COUNTY, STATE OF UTAH,  
THE HONORABLE BRYANT H. CROFT, JUDGE PRESIDING

---

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Clerk, Supreme Court, Utah

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TABLE OF CONTENTS

TABLE OF CONTENTS . . . . .	3
NATURE OF THE CASE . . . . .	6
DISPOSITION IN LOWER COURT . . . . .	7
RELIEF SOUGHT ON APPEAL . . . . .	7
STATEMENT OF FACTS . . . . .	10
ARGUMENT	

Point I.

THE TRIAL COURT'S DECISION AS TO THE DIVISION OF AND CONSIDERATION OF THE PROCEEDS FROM THE SALE OF THE REAL PROPERTY OF THE PARTIES WAS A MISAPPLICA- TION OF THE LAW AND AN ABUSE OF DISCRETION . . . .	16
---	----

(A)

THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO RECOGNIZE WHAT DEBTS THE RESPONDENT WAS DISCHARGING IN HIS FEDERAL BANKRUPTCY PROCEEDING, AND IN SUSTAINING THE RESPONDENT'S OBJECTIONS TO APPELLANT'S INTERROGATORIES WITH RESPECT TO RESPONDENT'S BANKRUPTCY . . . . .	16
--	----

(B)

IT WAS AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO FAIL TO RECOGNIZE APPELLANT'S INTEREST IN THE REAL PROPERTY AND FAILING TO GRANT A HOMESTEAD EXEMPTION IN HER FAVOR . . . . .	23
---	----

(C)

THE TRIAL COURT MISUNDERSTOOD OR MIS- APPLIED THE LAW WITH REGARD TO THE REAL PROPERTY OWNED IN JOINT TENANCY BY THE PARTIES, TO THE SUBSTANTIAL PREJUDICE OF THE APPELLANT . . . . .	24
---	----

(D)

THE EVIDENCE IN THE INSTANT CASE INDICATES THAT THE PROPERTY SETTLEMENT WAS INEQUITABLE AND THAT THERE WAS A POSSIBILITY OF FRAUD ON THE APPELLANT AND THE COURT, AND THAT IT WAS AN ABUSE OF JUDICIAL DISCRETION FOR THE TRIAL COURT TO FAIL TO RECOGNIZE THE POSSIBLE FRAUD AND INEQUITIES . . . . . 26

(E)

THE DIVORCE DECREE AND SUPPLEMENTAL DECREE OF DIVORCE, AND THE PROPERTY SETTLEMENT CONTAINED THEREIN IS INEQUITABLE AND PUNISHES THE APPELLANT . . . . . 27

Point II.

THE DECISION OF THE TRIAL COURT WITH REGARD TO VISITATION AND CHILD SUPPORT, IS NOT IN THE BEST INTEREST OF THE CHILDREN, AND CONSTITUTES AN ABUSE OF DISCRETION . . . . . 30

(A)

THE TRIAL COURT ABUSED ITS DISCRETION IN MAKING THE RESPONDENT'S CHILD SUPPORT OBLIGATIONS CONTINGENT UPON HIS VISITATION WITH THE MINOR CHILDREN . . . . . 30

(B)

THE TRIAL COURT ABUSED ITS DISCRETION IN ORDERING THAT VISITATION BE ESTABLISHED BETWEEN THE RESPONDENT AND THE MINOR CHILDREN OF THE PARTIES AS SOON AS POSSIBLE, AND ORDERING PRIMARY CHILDREN'S HOSPITAL TO INTEGRATE THE RESPONDENT INTO THERAPY OF THE MINOR CHILDREN . . . . . 32

Point III.

THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING THE  
CONTEMPT OF THE APPELLANT TO REMAIN IN THE COURT RECORD . . . 35

CONCLUSION . . . . . 36

AUTHORITIES CITED

CASES

<u>Boyce v. Boyce</u> 609 P.2d 928 (Ut.,1980) . . . . .	27
<u>Despain v. Despain</u> 610 P.2d 1302 (Ut.,1980) . . . . .	31
<u>Earl v. Earl</u> 17 Utah 2d 156, 406 P.2d 302 (1965) . . . . .	30
<u>English v. English</u> 565 P.2d 400 (Ut.,1977) . . . . .	30
<u>McDonald v. McDonald</u> 236 P.2d 1066 (Ut.,1951) . . . . .	25
<u>Reed v. Reed</u> 594 P.2d 871 (Ut.,1979) . . . . .	29
<u>State In Interest of K.D.S.,</u> 578 P.2d 9, (Ut.,1978) . . . . .	33
<u>Turner v. Turner</u> 649 P.2d 6 (Ut.,1982) . . . . .	25, 28
<u>Wilson v. Wilson</u> 296 P.2d 977 (Ut.,1956) . . . . .	30

STATUTES

Utah Rules of Civil Procedure (1953, as amended)

Section 30-3-5 . . . . .	28
Section 30-3-10 . . . . .	30
Section 78-3-(a)-35 . . . . .	33
Section 78-23-3 . . . . .	24
Section 78-43-3 . . . . .	31
Exhibit 1 - Chapter XIII 11(b) Debts Unsecured Attachment "B" . . . . .	39
Exhibit 2 - pps 1 and 2 - Affidavit of Trustee, Arna Drake . . . . .	40, 41

I N T H E S U P R E M E C O U R T  
O F T H E  
S T A T E O F U T A H

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SUSAN RACE,

Plaintiff/Appellant,

Case No. 19146

-vs-

ROBERT WAYNE RACE,

Defendant/Respondent.

---

BRIEF OF APPELLANT

---

I.

NATURE OF THE CASE

This is a divorce action, filed on or about August 1, 1980, from which the appellant appeals the final Supplemental Order and Judgment to Decree of Divorce, dated March 16, 1983, which made part of said order, the Amended Findings of Fact and Conclusions of Law and Amended Decree of Divorce, previously entered by the court on December 14, 1981.



the division of property of the parties, thereby materially prejudicing the appellant.

G. That the Divorce Decree and the property settlement contained therein is inequitable.

#### IV.

#### STATEMENT OF FACTS

Appellant and respondent were husband and wife, having been married on the 21st day of February, 1973. At the time of the marriage, appellant had two minor children, namely Tamara, born August 28, 1965, and Jeffrey, born November 13, 1970, a third child having died on January 4, 1973. The parties gave birth to a child, Sharon, on September 17, 1973. Subsequent to the marriage, the respondent adopted the aforementioned minor children, Tamara and Jeffrey.

A Complaint for Divorce was filed by the appellant on or about August 1, 1980 and the parties separated on or about January 1, 1981, at which time the respondent moved from the residence of the parties. Subsequently, the respondent was charged by the state of Utah with the crime of incest against the eldest daughter of the parties, Tamara, in criminal number 81 CRS 109, for which said crime, respondent served ninety (90) days in the Salt Lake County Jail in 1982. The minor child, Tamara, was

placed in the custody of the Juvenile Court for the State of Utah, case no. 343584.

In March, 1981, as a result of the appellant's discovery of the incestuous relationship between respondent and the minor child, Tamara, and the appellant's fears that respondent had taken sexual liberties with another minor child, Sharon, appellant moved with the minor children from the home of the parties to the state of California. See, Transcript of Trial (10-1-81) pages 3-5.

A hearing was held on the 30th day of April, 1981, before the Honorable G. Hal Taylor, at which time the trial court awarded temporary child support to the appellant in the sum of \$500.00 per month, and ordered that a child custody evaluation and visitation evaluation be performed on the parties. Various further hearings were held by the court, which resulted in the appellant obtaining a judgment against the respondent for temporary child support arrearages in the sum of \$1,500.00, and which resulted in the appellant being held in contempt of the lower court for her failure to appear and bring the children before the trial court.

The first trial in the above matter came before the court on October 1, 1981, the Honorable Bryant H. Croft, Judge presiding. At this time, the appellant was residing in the state of Washington with the minor children, and, due to her fears with

regard to the children, the appellant did not appear at the trial, but was represented by counsel, Lynn P. Heward. The respondent appeared in person and was represented by counsel, Jimi Mitsunaga.

The issues of child custody, support, division of property and division of debts were in issue at the time of the first trial on the matter. In chambers, prior to trial, appellant's counsel moved the trial court to admit and rule on several Affidavits in his possession, which were made by persons that were outside of the state of Utah and unable to attend the trial. See, Transcript of Trial, (10-1-81) page 1, lines 18-22. These Affidavits were ruled inadmissible by the trial court, the lower court stating that it would not accept the Affidavits as evidence in the case to prove the allegations of her (appellant's) Complaint, nor would the court accept hearsay evidence that was not properly admissible under the rules. See, Transcript of Trial, (10-1-81) page 2, lines 15-19. These Affidavits were supportive of the appellant's reasons for removing the children from the state of Utah and the appellant's reluctance to return to the state, and went to the issues of child custody, visitation, support and property division.

The respondent was called by appellant's counsel, and was questioned as to what funds each party brought into the marriage

and contributed to the purchase of the real property of the parties, see, Transcript of Trial, (10-1-81) pages 18-21, the debts incurred by the parties during the marriage and the respondent's filing of a Chapter XIII bankruptcy, see Transcript of Trial, (10-1-81) page 55, lines 12-25, pages 60-63. In addition, appellant called Dr. Lynn Anderson of the Division of Family Services, to testify with regard to the respondent's incestuous relations with his daughter, Tamara, see Transcript of Trial, (10-1-81) page 33, lines 4-7, her opinion with regard to visitation, see Transcript of Trial, (10-1-81), page 38, lines 12-15, and appellant's fitness as a parent to the children, see Transcript of Trial (10-1-81) page 38, lines 19-24.

After consideration of the evidence, a divorce was granted to each party, as contained in the amended Decree of Divorce. The trial court again ordered that a custody evaluation be performed in Utah and in the state of Washington where the appellant was residing, but reserved any final ruling with regard to custody, visitation, or child support. In addition, the court reaffirmed the appellant's judgment against the respondent for \$1,500.00 for child support arrearages, and granted appellant an additional judgment in the sum of \$166.67 for child support arrearages, but stayed execution on the same, pending the scheduling of a visitation program. As child support had been abated by a prior court order on August 10, 1981, the trial court

continued this order, ordering that the respondent parents should cease from the date of the trial, 2014, visitation was accomplished between the respondent and the minor children of the parties. As to the custody of the minor child, Juliana, the court found that she was under the jurisdiction of the Juvenile Court and made no ruling. The trial court, in addition, awarded the respondent, as his sole and separate property, the possession, ownership, and title to the real property of the parties located at 9653 South 2720 East in Sandy, Utah, said award being subject to the condition that the house be sold in a reasonable arm's length transaction, that the first mortgage and cost of sale be paid and deducted, and that the debts of the marriage, which respondent purported to be those listed in the respondent's, then titled, Chapter XIII bankruptcy proceedings, be paid in full. The balance remaining was to be divided equally between the parties, the appellant's share to be deposited with the court pending further order of the court. Further, the court temporarily awarded the personal property of the parties as it was situated, to the party having possession of the same, reserving the right to make readjustment and redistribution. The appellant was held responsible for his attorney's attorney's fees, to which an award was made, and approved the attorney's fees, to which an award was made, to the extent that the trial court awarded.

Subsequent to the trial, the respondent filed a motion for a

February 16, 1982; August 12, 1982; September 27, 1982; and finally on February 4, 1983, at which time the trial court made its final orders with regard to some of the unresolved matters within the divorce action. Said final orders are contained in the Supplemental Findings of Fact and Conclusions of Law and the Supplemental Order and Decree of Divorce, dated March 16, 1983. At the time of the final hearing on the matter, all parties were present and were represented by counsel, and the matters of child custody, visitation, child support, division of personal property, marital debts, contempt, distribution and/or redistribution of the proceeds of the equity from the sale of the home of the parties, and the issue of the homestead exemption previously raised by appellant's counsel, Lynn P. Howard, were argued. In addition, the court had in its possession a child custody evaluation submitted by Ken Hansen, Assistant Director of the South Valley Social Services for the state of Utah, dated January 4, 1983. Appellant was awarded the custody of the minor children of the parties, Jeffrey and Sharon, and the court withheld any ruling as to the custody, visitation, or support of the minor child, Tamara, as she was under the jurisdiction of the Juvenile Court. No visitation was ordered by the trial court. However, the court ordered the minor children of the parties, Jeffrey and Sharon, who had previously been placed in therapy by the Juvenile Court, continue with therapy through Primary

Children's Hospital and that a reasonable visitation should be integrated into that therapy when circumstances became appropriate in the opinion of the professionals at said institution. In addition, the respondent was not ordered to pay any child support until a visitation program had been developed between the respondent and the minor children, at which time the respondent was ordered to pay the sum of \$50.00 per month, per child. The trial court refused to hear any argument with regard to the question of whether the debts listed in the respondent's bankruptcy schedule, which were ordered to be paid from the sale of the home, were marital debts or personal debts, or whether said obligations had been reimbursed to respondent from various health insurance companies or respondent's employer. In addition, the court refused to hear any further argument with regard to the division of the proceeds or equity from the sale of the home or the question of granting a homestead exemption in favor of the appellant. After having previously ordered that appellant could submit Interrogatories to the respondent for the purpose of determining the nature of the debts listed in respondent's bankruptcy, the court upheld the respondent's objections to said Interrogatories, holding that respondent needn't answer the same.

V.

ARGUMENT

Point I.

THE TRIAL COURT'S DECISION AS TO THE  
DIVISION OF AND CONSIDERATION OF THE  
PROCEEDS FROM THE SALE OF THE REAL PROPERTY  
OF THE PARTIES WAS A MISAPPLICATION OF THE  
LAW AND AN ABUSE OF DISCRETION

(A)

THE TRIAL COURT ABUSED ITS  
DISCRETION IN FAILING TO RECOGNIZE  
WHAT DEBTS THE RESPONDENT WAS DIS-  
CHARGING IN HIS FEDERAL BANKRUPTCY  
PROCEEDING, AND IN SUSTAINING THE  
RESPONDENT'S OBJECTIONS TO APPELLANT'S  
INTERROGATORIES WITH RESPECT TO  
RESPONDENT'S BANKRUPTCY

Subsequent to the initiation of the above divorce action,  
the respondent filed a Chapter XIII Bankruptcy in the Federal  
Bankruptcy Court. That bankruptcy proceeding was later converted  
into a Chapter VII Bankruptcy prior to the final divorce herein.  
At the first trial on the matter on October 1, 1981, the trial  
court ordered that the real property of the parties be awarded  
solely to the respondent, and that the respondent receive all  
title and possession thereto. While the lower court did make  
that award contingent upon certain dispositions of the funds, as  
previously indicated, sole title was awarded to respondent, who



was, at that time, still in a Chapter XIII Bankruptcy. After the respondent converted the Chapter XIII Bankruptcy to a Chapter VII Bankruptcy, the Federal Bankruptcy Court, Anna Drake as Trustee, took possession of the real property of the parties and sold the same. As the trial court had awarded title in the respondent, the appellant had absolutely no input nor impact on the sale, the property going into the hands of the Bankruptcy Court, nor any right to a homestead exemption in the Bankruptcy Court. As far as the Bankruptcy Court and the Trustee in Bankruptcy were concerned, the appellant had no interest in the home at the time, due to the District Court's prior order awarding title to respondent. Obviously, this was not the case, nor was it the intention of the trial court. However, this turn of events placed the appellant in an inequitable position, which could be alleviated only by a further order of the trial court and not through the Federal Bankruptcy Court. Unfortunately, and to the appellant's prejudice, the trial court failed to recognize this issue.

At the initial trial on the matter, the respondent testified that all of the debts listed in the bankruptcy list of creditors were marital debts, and testified that all of the debts listed in his financial declaration, submitted to the court, were the same as those listed on the bankruptcy list of creditors. See Transcript of Trial, (10-1-81) page 61, line 22, through page 62,

line 16, and page 63, lines 13-16. Appellant would ask this Court, as it has asked the trial court, to take notice that the debts listed on the financial declaration submitted by the respondent, and the debts listed on the respondent's bankruptcy list of creditors, are not identical. See, Defendant's Financial Declaration, Attachment "B", Unsecured Debts, designated as Exhibit 1, and incorporated herein by reference, and see Memorandum of Points and Authorities relevant to the homestead exemption, dated April 16, 1982, page 2, paragraph 10. There are various creditors listed on the respondent's Chapter XIII list of creditors that were not listed on respondent's financial declaration. At various times during the trial and the many hearings before the Honorable Judge Croft, the trial court and the appellant inquired into the nature of the debts listed by the respondent in his bankruptcy proceeding. In fact, the trial court ordered that further evidence should be had into the nature of the debts, and that Interrogatories be submitted to discover whether the particular debts listed were marital, individual, or debts which occurred after the separation of the parties. In addition, there was evidence to the effect that many of the debts which had been listed on the bankruptcy schedule had been debts for which the respondent had been reimbursed, having been paid to the respondent by insurance companies and respondent's employer,

but which remained unpaid by the respondent, the respondent keeping the money and not satisfying those obligations. After Interrogatories were submitted by the appellant through her first counsel, Lynn P. Heward, and again through her second counsel, Kellie F. Williams, with regard to the status, existence of, and payments of those debts, no answers were forthcoming from the respondent. The trial court, in the final hearing on February 4, 1983, washed its hands of the matter by stating that the matter had been decided, and that the Interrogatories need not be answered. Again, this order came after the trial court had specifically ordered respondent's counsel to furnish the court with respondent's bankruptcy schedule and an audit to the court by respective counsel as to the origin and/or payment of those debts. See, Transcript of Hearing (8-12-82) page 11, line 25 through page 12, line 8, and pages 14-15, and Transcript of Hearing (9-27-82) page 13, lines 6-25, and page 14, lines 1-5. While on the one hand the trial court had recommended and ordered that inquiries be made into the origin of those debts and stated that "I would say though that if Mr. Race, after the court proceedings, went out, and even after the separation, went out and incurred some additional obligations that had nothing to do with the marriage relationship, and then included those debts in his schedules, that they should not be considered for the purposes of determining how much, if anything, is going to be

left over to be divided" [from the equity in the real property]. See Transcript of Hearing (8-12-22) page 11, lines 13-20. In addition, the court stated that ". . . other than the payment of the debts that were outstanding at the time of the separation, Mrs. Hunter should not have to be liable for her share of any remainder of Mr. Race's debts that were not considered to be or could not be considered debts of the marriage." See Transcript of Hearing (8-12-82) page 10, line 22 through page 11, line 2. As previously stated, each time appellant attempted to discover the status of those debts, through Interrogatories and Motions to Compel, respondent refused to cooperate, and in the end, trial court, still being uninformed as to the status of those debts, and not having any further evidence, found that the matter had been decided, and that the appellant had no recourse. See Transcript of Hearing (2-4-83) page 8, lines 23-24.

The home of the parties was sold by the Trustee in Bankruptcy for the sum of \$110,000.00, the net amount owing to the Trustee being \$28,915.48, together with interest at the rate of 7% per annum, payable at the rate of \$192.37 per month for ten years with a balloon payment of \$24,810.00 due June 20, 1992. See, Affidavit of Anna W. Drake dated February 5, 1983. The actual claims filed by the respondent totalled \$14,994.01, and the Trustee anticipates administrative claims in the sum of \$5,000.00, reducing the proceeds from the sale of the home to,

approximately, \$8,921.39. Said proceeds and possible equity to be divided between the parties, but being unavailable to the parties until the balloon payment is made on June 20, 1992, and all creditors are paid.

The result of the confusion, misunderstanding, and the failure of the appellant and the trial court to discover the status of the debts of respondent, when they were incurred, and whether or not they were reimbursed to respondent, prejudiced the appellant materially. The appellant's share in the equity of the home, if any becomes available, has been reduced inequitably and unjustly. The trial court could have alleviated the injustice of the property division by recognizing that a portion of the proceeds from the sale of the home was not the respondent's, but solely the property of the appellant, and could have created a deference in the appellant entitling her to immediate payment by the bankruptcy court of any amount found to be hers solely. As the court had ordered that the home was titled solely in the respondent, however, and that all of respondent's creditors had to be paid, the appellant remains without recourse. Again, at the time of the final hearing, the court was informed that, by his order, a deference could be created in the appellant in the eyes of the bankruptcy court. The trial court refused to do so, in a blatant abuse of discretion. While in the prior hearing held on August 12, 1982, the court had stated ". . .the amount of

money [from the sale of the home] would seem to me ought to be used to pay off the obligations that the couple owed at the time of their separation. Whether or not Mr. Race has other obligations included in his schedules, I don't know." See Transcript of Hearing (8-12-82) page 8, lines 20-24. The trial court still did not know at the final hearing on February 4, 1983, when it stated that the matter had been decided.

Presently, the Trustee in Bankruptcy, Anna Drake, is holding, and will not disperse any funds in The Matter of Robert Wayne Race, No. 81-01923, until the present divorce appeal has been determined by the court. See, Affidavit of Trustee, Anna Drake, incorporated herein by reference and designated as Exhibit 2. The matter of the debts listed by the respondent in his bankruptcy schedule, and the decision as to any deference to be given to appellant is not a moot point, only one which the trial court refused to decide. The trial court's order, if carried out, would rob appellant of her share of the equity in the home, to satisfy the separate and individual debts of respondent.

(B)

IT WAS AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO FAIL TO RECOGNIZE APPELLANT'S INTEREST IN THE REAL PROPERTY AND FAILING TO GRANT A HOMESTEAD EXEMPTION IN HER FAVOR.

As previously stated, the trial court's decision to give sole possession, title and ownership of the real property of the parties to the respondent, resulted in the appellant being unable to file a homestead exemption with the Federal Bankruptcy Court. The Bankruptcy Court refused to recognize any interest in the appellant, due to the fact that title was in the respondent's name solely. The only recourse which appellant had was through the trial court, which refused to grant her any relief. While appellant had requested that relief, and filed a Motion and Statement of Points and Authorities relevant to the homestead exemption, the court refused, time and again, to address the issue, until the last hearing in February, 1983, at which time the trial court stated that no homestead exemption would be awarded. Again, this effectively precludes the appellant from receiving any proceeds from the sale of the real property of the parties, despite the fact that appellant's funds brought into the marriage were used for the down payment on the home, despite the fact that the respondent, on March 9, 1981, was ordered by the court, to make complete payment of principal, interest, tax and insurance on the residence, and failed to do so, resulting in the

property going into the bankruptcy court, and despite the fact that respondent refused to comply with appellant's Request for Production of Documents dated January 7, 1982, requesting documentation of said debts, and respondent's refusal to answer appellant's Interrogatories with regard to said debts submitted to respondent on October 21, 1982. Sec.78-23-3 (5 of the Utah Code Annotated, 1953, as amended) provides as follows:

When a homestead is conveyed by the owner of a property, the conveyance shall not subject property to any liens to which it would not be subject in the hands of the owners; and proceeds of any sale, to the amount of the exemption existing at the time of the sale, shall be exempt from levy, execution, or other process for one year after the receipt of the proceeds by the person entitled to the exemption.

The appellant, in the instant case, was entitled to an exemption, and it was an abuse of the trial court's discretion to refuse her the same, after it had taken the property out of her name and out of her hands.

(C)

THE TRIAL COURT MISUNDERSTOOD OR MIS-APPLIED THE LAW WITH REGARD TO THE REAL PROPERTY OWNED IN JOINT TENANCY BY THE PARTIES, TO THE SUBSTANTIAL PREJUDICE OF THE APPELLANT.

In the first trial on the matter and in subsequent hearings,



testimony was given and argument was made as to which of the parties paid the down payment on the real property. See, Transcript of Trial, Testimony of Respondent (10-1-81), pages 19-21, Argument of Counsel, Transcript of Hearing (2-4-83) page 4, lines 11-17, and the custody evaluation, submitted by Ken Hansen, Assistant Director of the South Valley Social Services, dated January 4, 1983, Robert Race, page 3. Evidence existed which revealed that it was appellant's funds, which she brought into the marriage which were used to make the down payment on the home of the parties, said funds coming from a settlement in a medical malpractice action brought after the death of her minor child, Sandra. However, the trial court stated, in no uncertain terms, "I am not concerned about who paid for the house in this sort of situation. These people were married for seven or eight years before the separation occurred." See, Transcript of Trial (10-1-81) page 77, lines 18-19. While the Utah Supreme Court has recognized that a trial court may take many factors into consideration in the division of property in a marital dissolution, this Court has repeatedly recognized that two important factors to consider are, what each party has given up for the marriage, and what money or property each party brings into the marriage, particularly in cases such as this, where the marriage was of relatively short duration. See, Turner v. Turner, 649 P.2d 6, (Ut.,1982); McDonald v. McDonald, 236 P.2d

1066 (Ut.,1951). The impact upon the appellant of this judicial misapplication and misunderstanding of the law is substantial. This factor, as well as the trial court's misunderstanding of the homestead exemption in the bankruptcy court, and its failure to consider what debts were being discharged in the Bankruptcy Court, reduced the resulting equity, if any, with which the parties would have to divide; the inequitable result being that the appellant received absolutely nothing from the sale of the residence of the parties, notwithstanding the important monetary contribution which she made toward the purchase of the property, and notwithstanding the fact that the bankruptcy was initiated and pursued solely by the respondent.

(D)

THE EVIDENCE IN THE INSTANT CASE INDICATES THAT THE PROPERTY SETTLEMENT WAS INEQUITABLE, AND THAT THERE WAS A POSSIBILITY OF FRAUD ON THE APPELLANT AND THE COURT, AND THAT IT WAS AN ABUSE OF JUDICIAL DISCRETION FOR THE TRIAL COURT TO FAIL TO RECOGNIZE THE POSSIBLE FRAUD AND INEQUITIES.

The trial court was put on notice early in the divorce proceedings that there was a major issue to be addressed with regard to the creditors listed in the respondent's Chapter XIII Bankruptcy, and whether they were actually marital debts, or whether respondent had been reimbursed for those debts. The

respondent testified in court that the debts listed on his financial statement, which he submitted to the court, and that the creditors listed on his Chapter XIII schedules were identical. See Transcript of hearing (10-1-81) page 63, lines 13-16. A review of those documents and appellant's statement of points and authorities relevant to the homestead exemption, reveals that there was a major discrepancy, in that several creditors are listed on the Chapter XIII schedule which were not listed on the financial statement submitted by the respondent. This, coupled with the failure of the trial court to consider the monies which went to the purchase of the real property, denied the appellant a judgment based on accurate information and full disclosure relative to the merits of her position. This possibility of fraud and this misapplication of law thwarted the process of justice in the instant case, and in fairness and good conscience, the judgment should not stand. See, Boyce v. Boyce, 609 P.2d 928 Utah(1980), in which the court found that the possibility of fraud and the inopportunity on the part of the appellant to evaluate the information concerning the defendant's financial status was "inequitable and an affront to our judicial system," the court concluding that the trial judge had abused his discretion in failing to grant appellant's motion to set aside the judgment. Ibid., at p.930.

(E)

THE DIVORCE DECREE AND SUPPLEMENTAL  
DECREE OF DIVORCE, AND THE PROPERTY  
SETTLEMENT CONTAINED THEREIN IS INEQUIT-  
ABLE AND PUNISHES THE APPELLANT.

The Utah Supreme Court requires that the trial court make an equitable disposition of marital property, "so that the parties may readjust their lives to the new situation as well as possible." See Turner v. Turner, 649 P.2d 6, (Utah Code Annotated, Sec.30-3-5 (1953, as amended)). Due to the likelihood of fraud on the appellant and the court, the failure on the part of the trial court to allow appellant discovery of the respondent's creditors, and the other issues which appellant has previously discussed, the appellant was dealt an inequitable settlement in a proceeding whose nature is equity. The time span of the divorce action resulted in changes which had to be reconsidered by the trial judge in order to make a final order on each of the attendant divorce issues. The piecemeal decision-making which occurred in this case resulted in confusion, inequities, and a failure to account for those on-going changes, in particular, the status of the real property and the respondent's bankruptcy proceeding.

The appellant submits that the trial court's property distribution was improperly influenced by the trial court's hostility toward the appellant. Due to the reason aforementioned and appellant's fears with regard to her children's safety, the appellant was not available at the time of the first trial on the matter. She did, however, appear before the court, first on August 12, 1982, and several times thereafter. At various times during the proceedings the trial court expressed its discontent with the appellant. See Transcript of Hearing (2-26-82), pages 87-90, in which the trial court, after being appraised of the respondent's incestuous relations, and the possibility of other incestuous acts, threatened the appellant with the prospect of his awarding custody of the children to the respondent. This attitude came about due to appellant's reluctance to allow visitation between the minor children and the respondent. This judicial attitude seemed to carry over into the questions concerning the division of property and division of the equity from the sale of the real property. The trial court even refused appellant's request that her maiden name be restored. See, Transcript of Hearing (2-26-82) p.96 lines 6-14.

In Reed v. Reed, 594 P.2d 871 (Utah 1979), this Court held that while the trial court may exercise broad discretion and consider many factors in making a property distribution, the purpose of the settlement should not be to punish the parties.

See, also, English v. English, 565 P.2d 400 (Utah 1977) and Wilson v. Wilson, 296 P.2d 977 (Utah 1956). In the instant case, the appellant's property settlement is highly inequitable, and serves to punish the appellant rather than allow her to readjust her life to the new situation.

Point II.

THE DECISION OF THE TRIAL COURT WITH  
REGARD TO VISITATION AND CHILD SUPPORT,  
IS NOT IN THE BEST INTEREST OF THE CHILDREN,  
AND CONSTITUTES AN ABUSE OF DISCRETION.

(A)

THE TRIAL COURT ABUSED ITS DISCRETION  
IN MAKING THE RESPONDENT'S CHILD  
SUPPORT OBLIGATIONS CONTINGENT UPON  
HIS VISITATION WITH THE MINOR CHILDREN.

It has often been expressed by this Court and the Legislature that in child support and visitation matters the trial court must consider the best interest of the children. "The right of a child to support is a paramount right which it possesses quite apart from any consideration relating to the conduct of the parties." Earl v. Earl, 17 Utah 2d 156, 406 P.2d 302 (1965), at 303; Utah Code Annotated, Sec. 30-3-10 (1953, as

amended). Utah law also provides that "every man shall support his child." Utah Code Annotated, Sec. 78-43-3 (1953, as amended). This statute is unqualified and requires support regardless of whether or not the non-custodial parent is exercising visitation with the children.

While it is true that this court has allowed support payments be conditioned upon visitation, it has done so only with reluctance. See, Despain v. Despain, 610 P.2d 1302 (Utah, 1980). Appellant submits that such an order is appropriate only in instances in which the custodial parent is purposely and unreasonably withholding visitation and is independently wealthy and able to support the children without assistance. Such are not the circumstances of the instant case. The parties' children have not received support from the respondent since August 1, 1981, even when specifically ordered by the court. The record reflects that after the appellant returned to Utah, she attempted to allow visitation on a supervised basis, which visitation was withdrawn voluntarily by the respondent. See, custody evaluation of Ken Hansen, Assistant Director, South Valley Social Services, Race v. Race, p.4.

Far from being in the best interests of the minor children to this action, the orders of the trial court which condition the appellant's receipt of any child support upon the respondent

visiting with the minor children of the parties, are damaging and act as punishment. Simultaneously, the trial court ordered that the appellant's judgment for child support arrearages in the sum of \$1,666.67 be stayed and execution on the same be stayed until visitation was established between respondent and the minor children, Sharon and Jeffrey. The needs of the children being the primary concern, ordering support conditioned on visitation, and staying execution on previously-awarded judgments is counter to the best interests of the children and in direct contradiction of both legislative and judicial intent.

(B)

THE TRIAL COURT ABUSED ITS DISCRETION  
IN ORDERING THAT VISITATION BE ESTABLISHED  
BETWEEN THE RESPONDENT AND THE MINOR CHILDREN  
OF THE PARTIES AS SOON AS POSSIBLE, AND  
ORDERING PRIMARY CHILDREN'S HOSPITAL TO  
INTEGRATE THE RESPONDENT INTO THERAPY OF  
THE MINOR CHILDREN.

At the time when the trial court entered its final order on February 4, 1983, the court had in its possession a child custody evaluation which had been accomplished and submitted by the Division of Family Services for the state of Utah. Within said evaluation, the evaluators recommended that the children not be allowed to visit the respondent in the near future, giving their observations and basis for the recommendations within said



report. The trial court was aware, also, that the respondent had been charged and served a term of imprisonment for the offense of incest with his minor daughter, Tamara, and that there was a possibility of other incestuous acts on the part of respondent with the minor child, Sharon. In addition, prior to the first trial on the matter, in chambers, the trial court was tendered Affidavits and reports of events and discussions involving the minor children of the parties, which had been prepared and submitted by persons living out of the state of Utah, and unavailable for trial. However, as previously discussed in the Statement of Facts, the court found these Affidavits and reports to be hearsay and refused their admission.

Due to the highly equitable nature of proceedings involving minor children, the Utah Supreme Court has stated that the trial court is granted much more latitude in the admission of evidence in such proceedings. See, *State in the Interest of K.D.S.*, 578 P.2d 9 (Utah 1978). In addition, while the pertinent statute is within the chapter of Juvenile Courts, Sec. 78-3(a)-35, certainly indicates a legislative intent with regard to the admission of evidence in proceedings involving children. That section states:

"For the purpose of determining proper disposition of the child, and for the purpose of establishing the fact of neglect or dependency,

written reports and other material relating to the child's mental, physical and social history and condition, may be received in evidence, and may be considered by the court along with the other evidence . . ."

The affidavits which the trial court found to be inadmissible, appellant submits, would have been valuable to the trial court on the issue of custody and visitation. Nevertheless, after considering all of the evidence, and without personally observing the minor children, the trial court ordered that the minor children of the parties, Jeffrey and Sharon, continue with therapy through Primary Children's Hospital, and that said hospital should integrate the respondent into the children's therapy when the circumstances were deemed appropriate in the opinion of the professionals. There, the court indicated a number of times its desire that visitation be established as soon as possible. This order is in direct contradiction to the recommendations made by Utah Social Services in the custody evaluation, the history of the respondent, and the information which the trial court had before it. The foregoing facts, together with the apparent reluctance of the trial court to confront the incest issue, and its physical as well as psychological effect on the minor children of the parties, resulted in an order which does not serve the best interests of the minor children, Jeffrey and Sharon, and is an abuse of discretion.

Point III.

THE TRIAL COURT ABUSED ITS DISCRETION IN  
ALLOWING THE CONTEMPT OF THE APPELLANT  
TO REMAIN IN THE COURT RECORD.

As evidenced throughout the transcripts of the various trials and hearings in the above matter, the trial court was disgruntled with the appellant, and the appellant's actions. Admittedly, it would have been in the best interests of the appellant, had she appeared personally at the first trial in this matter. However, the protection of her children and her fears of injury to them were paramount at that time. With the confirmed evidence of incest before the court, and the possibility of other incestuous acts, the court stated ". . .she certainly has been totally uncooperative, and she is still in trouble with this court and going to be in further trouble if we don't get this thing resolved and the court orders [with regard to visitation] complied with." See, Transcript of Hearing (2-26-82) page 90, lines 10-13. The court further stating, "she may have to sit out ten days in jail to find out what that contempt of court means." See, Transcript of Trial (2-26-82) page 91, lines 3-4. And, with no evidence before the court, the trial court made unsubstantiated statements with regard to the appellant poisoning the minor child's mind with regard to her father. See,

Transcript of Trial (2-26-82) page 90, lines 21-25. As stated earlier, the court continually threatened the appellant with the statement that if she did not cooperate with regard to visitation, he would give custody of the minor children to the respondent. See, Transcript of Hearing (2-26-82) pages 87-89.

After the trial court found the appellant in contempt, the appellant appeared before the trial court numerous times and attempted to establish supervised visitation between the children and respondent, which was voluntarily stopped by the respondent. These acts, as well as the appellant's understandable parental concern, certainly purged appellant of any earlier contempt of court.

#### CONCLUSION

In conclusion , the property settlement in the instant case is wholly inequitable, based upon a misapplication of the law of marital property settlement, and a total ignorance as to the respondent's financial status, debts, and bankruptcy proceeding. Due to the possible fraud on the part of the respondent, the piecemeal decision-making, and the failure to account for ongoing changes in the status of the real property of the parties and the respondent's bankruptcy proceeding, the appellant has been

prejudiced, substantially and unfairly.

The trial court's final orders with regard to the issues of child support and visitation are contraindicated by all of the evidence presented to the court. Due to that evidence of incest, the respondent's voluntary cessation of visitation, and the needs of the minor children, the orders linking child support to visitation and ordering visitation as soon as possible are not in the best interests of the minor children, and, therefore, an abuse of discretion.

In addition, to allow the contempt of the appellant to remain in the court record, after numerous attempts on her part to purge herself of that court order, and after the court was presented with substantial justification for the acts of the appellant in her failure to appear before the trial court with the minor children, punishes the appellant, and is an abuse of discretion.

While the trial court is presented with a difficult and disturbing decision in any contested divorce dissolution, it is an abuse of discretion for the trial court, in the instant case, to fail to recognize the incest present in this matter, and its attendant affects upon the children and the parties; it is an abuse of discretion to fail to recognize what property the parties brought into the marriage and who contributed what to the

purchase of the real property of the parties; it is an abuse of discretion to make an award of property or division of equity in real property when there is no knowledge as to what debts are being paid from the proceeds of the sale of the home of the parties; and it is an abuse of discretion to fail to grant child support to the minor children of the parties when it is the acts of the respondent which initially created the problems and dilemma confronting the appellant and the minor children.

The foregoing arguments presented by appellant and the Transcript on file herein, demonstrate that the appellant is entitled to a reversal of the judgment below and a determination of the attendant issues. If this Court fails to act in appellant's favor, she will be precluded from any money award, deference, or exemption from the sale of the real property of the parties and she will be precluded from receiving child support from the respondent. The lower court orders, if upheld, will serve to satisfy the separate and individual debts, needs and omissions of the respondent while serving to punish the minor children and the appellant.

Respectfully submitted,



KELLIE F. WILLIAMS  
Attorney for Appellant

## ATTACHMENT "B"

CHAPTER XIII  
11 (b) - DEBTS UNSECURED

<u>CREDITORS NAME &amp; ADDRESS</u>	<u>CONSIDERATION FOR DEBT</u>	
Mountain View Pediatrics	Medical expense.	\$ 1
Fares J. Arguello, M.D.	Medical expense.	2
Crowther, Hobson & Associates	Medical expense.	
Orthopedic Surger & Fracture Group	Medical expense.	
Royal E. Haines	Medical expense.	
Lawrence F. Reichmann, MD	Medical expense.	
Cottonwood Hospital	Medical expense.	
Southwood Physical Therapy	Medical expense.	
David A. Kimball, M.D.	Medical expense.	
Dr. Joe D. Miles	Medical expense.	
East 39th Radiology Clinic	Medical expense.	
Mount Olympus Radiology	Medical expense.	
Copper Mountain Mental Health	Medical expense.	
Salt Lake Clinic	Medical expense.	4
Grant & Grant	Medical expense.	
David G. Christensen, DDS	Medical expense.	
Sears	Open account.	
Lerners	Open account.	
Colletts	Open account.	
J.C. Penneys	Open account.	
American Family Publishers	Open account.	
Western Airlines -		
Commercial Collections	Open account.	5
Home Credit Corporation	Open account.	7
Tracy Collins Bankcard	Bank card.	6
Zions First National Bank	Mastercharge card.	1,
First Security Check Protection	Bank Card.	5
Walker Bank	Bank Card.	8
Sinclair Gas	Gas charge card.	
GC Services (Union oil)	Gas charge card.	9
Van Ru Credit Corporation (Arco Oil)	Gas charge card.	
Texaco Oil Company	Gas charge card.	8
Arnovitz, Smith & Nielson	Diners club.	1,0
B.R. Parkinson	Household Finance Company	1,4
Interlake Thrift	Personal loan.	8
Fotes Service	Services.	
David C. Anderson	Services.	
Mountain Fuel Supply Company	Fuel services.	4
Utah Power & Light	Light services.	
TOTAL UNSECURED DEBTS = \$13,913.48		

ADDRESSES TO THE ABOVE LISTED CREDITORS ARE LISTED ON THE MATRIX ATTACHED HERETO.

PAGE 11 OF 11

KELLIE F. WILLIAMS  
Attorney for Petitioner  
SUSAN RACE HUNTER  
CORPORON & WILLIAMS  
142 East 200 South, Ste 300  
Salt Lake City, Utah 84111  
(801) 328-1162

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IN THE UNITED STATES BANKRUPTCY COURT, FOR THE  
DISTRICT OF UTAH,                      CENTRAL DIVISION.

---

IN THE MATTER OF  
ROBERT WAYNE RACE.

AFFIDAVIT OF TRUSTEE,  
ANNA DRAKE.

NO. 81-01923

---

STATE OF UTAH                      )  
  : ss.  
COUNTY OF SALT LAKE            )

COMES NOW, ANNA DRAKE, as Trustee in Bankruptcy, and deposes and states as follows:

1. That she has been and is the Trustee in Bankruptcy in the above-entitled matter.

2. That she will not disburse any funds in this case until the Bankrupt's divorce appeal, Case No. 19146, has been determined by the Supreme Court of Utah.

DATED this 11<sup>th</sup> day of July, 1983.

Anna W. Drake  
ANNA DRAKE



SUBSCRIBED AND SWORN to before me this 11 day of July, 1983.

*Dale M. Keller*

NOTARY PUBLIC, Residing in  
Salt Lake County, Utah.

My Commission Expires:

6-8-86

CERTIFICATE OF SERVICE

MAILED a copy of the foregoing APPELLANT'S BRIEF as follows:

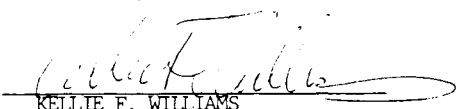
JIMI MITSUNAGA, ESQ.  
731 East South Temple  
Salt Lake City, Utah

84021

Two copies

LYNN P. HEWARD  
Former Attorney for  
Plaintiff and Appellant  
1174 East 2700 South  
Salt Lake City, Utah 84106

this 10th day of November, 1983.

  
KELLIE F. WILLIAMS  
Attorney for Appellant