

1983

Linda M. Olson v. Kenneth Olson : Brief of Appellant Linda M. Olson

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

LINDA M. OLSON,	:	
	:	
Plaintiff and	:	
Appellant,	:	
	:	
vs.	:	Supreme Court No. 19280
	:	
KENNETH OLSON,	:	
	:	
Defendant and	:	
Respondent.	:	

**BRIEF OF APPELLANT
LINDA M. OLSON**

Appeal from the Third Judicial District Court
of Salt Lake County, Honorable David B. Dee, Judge

JOHN G. MARSHALL
525 East 300 South
Suite 102
Salt Lake City, Utah 84102

Attorney for Appellant

Mary Lou Godbe
313 Kearns Bldg.
Salt Lake City, Utah 84101

Attorney for Respondent

FILED

AUG 26 1983

Clark, Supreme Court, Utah ✓

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JOHN G. MARSHALL
525 East 300 South
Suite 102
Salt Lake City, Utah 84102

Attorney for Appellant

Mary Lou Godbe
318 Kearns Bldg.
Salt Lake City, Utah 84101

Attorney for Respondent

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**BRIEF OF APPELLANT
LINDA M. OLSON**

NATURE OF THE CASE

This is an action for a divorce in which the appellant also sought a property settlement, child support and alimony.

DISPOSITION IN LOWER COURT

On May 13, 1983, the lower court entered a decree of divorce in which it granted a divorce to plaintiff (appellant herein) and ordered a property settlement, and awarded plaintiff child support (for three minor children) in the sum of \$200.00 per child, per month and alimony in the amount of \$1,600.00 per month payable only for two years after which alimony should cease.

RELIEF SOUGHT ON APPEAL

The appellant Linda M. Olson seeks reversal of the decree as to the property settlement and the alimony decreed, but not from the entry of the decree of divorce.

STATEMENT OF FACTS

Appellant and defendant were married on December 21, 1960, approximately six months after plaintiff graduated from high school. At that time plaintiff was eighteen years old. Six children have been born as issue of the marriage. As of the date of the decree of divorce, three children were emancipated and three children (ages 16, 11 and 3 years) resided with the plaintiff, who was awarded custody of the said three minor children. The parties separated approximately two years before the trial when defendant went on a trip and didn't return to the home of the parties. When appellant called him, defendant said he was not returning home. (R. 85.) The evidence does not disclose any other basis for the separation of the parties, which resulted in the divorce.

At the time of the marriage, plaintiff was employed by Utah Power and Light doing typing work. She worked at that employment for approximately six months after the marriage at which time she quit her employment because she was five months pregnant. (R. 81.)

Thereafter she was a full-time homemaker who bore and raised the six children of the parties and provided a home for the defendant and their children. (R. 82.)

As a consequence, plaintiff has never been gainfully employed in any substantial sense in the labor market (except for part-time, minimum wage jobs since the filing of the complaint herein), and she has no training which would suit her for gainful employment at the time of the entry of the decree. (R. 81-83.)

On the other hand, the defendant during the course of the marriage worked and supported the family. At the time of the trial herein he had formed his own consulting company, known as Richards — Olson Associates, which is a Utah corporation. (R. 106.) The business of the defendant, either personally or through his corporation consists of personal services in consulting primarily to a variety of governmental organizations on organizational matters, such as the evaluation of state governments and state government organizations, the operations of governor's offices and other activities related to state governments generally. For example between 1979 and 1981, the defendant had a contract with the Department of State and the State of Utah to evaluate the impact of the MX Missile System at one time planned to be located in Utah. (R. 104-106.)

Defendant testified that the typical manner of conducting the business was to enter into consulting contracts on either a short-term (two to three months) or a long-term (one year to eighteen months) basis. (R. 104.) The defendant's testimony indicated that he had been able to build the business to the point where it was developing substantial income at the time of the trial of this matter. While the testimony of defendant showed that his income fluctuated somewhat depending upon the contracts in force at any given time,

the court found that defendant produced a gross income in 1980 in the amount of \$76,485.00 and in 1981 in the amount of \$62,603.00 (R. 60). The defendant also testified that at the time of the trial his salary annualized (based upon the first part of the year) would figure out to "something like \$67,000.00 per year." (R. 106.) This approximates the court's finding to the effect that in 1982 defendant had produced a gross income in the amount of \$57,000.00 to the time of trial (Oct. 4, 1982) and that he believed he would obtain another contract which he was negotiating at that time, which would produce income to defendant in the amount of \$3,500.00 per month (R. 60.) over the remaining three months of 1982. This would produce an additional income of \$10,500.00, or a total of \$67,500.00 for 1982.

Plaintiff testified that she had filed a financial declaration with the court prior to the time of the trial which showed that the average living expenses of the family for the last years prior to the separation amounted to \$5,500.00 per month. (R. 85.) She testified that she felt she needed \$4,200.00 per month to maintain the household as it had been maintained, taking into account the expenses of herself and three minor children residing at home. (R. 87.) The financial declaration filed by defendant showed his monthly living expense to be \$2,837.00 (R. 115.).

In its decree of divorce, the lower court ordered among other things:

- a) That defendant should pay to plaintiff as alimony the sum of \$1,600.00 per month, which should continue for only two years, after which alimony should cease.
- b) That defendant should pay to plaintiff for the care and maintenance of the minor children of the parties \$200.00 per child, which

support would terminate as to each child as that child reaches the age of eighteen and graduates from high school with his or her class.

The decree of divorce also ordered a division of property accumulated during the marriage, which will be stated in more detail below.

STATEMENT OF POINTS ON APPEAL

POINT ONE. THE PROPERTY SETTLEMENT DECREED FAILED TO TAKE INTO CONSIDERATION THE VALUE OF THE EARNING ABILITY OF THE DEFENDANT, OR IF THE SAME WAS CONSIDERED, THE DECREE WAS ARBITRARY AND CAPRICIOUS AND GROSSLY INADEQUATE IN THE AMOUNT AWARDED TO PLAINTIFF.

POINT TWO. THE TRIAL COURT ABUSED ITS DISCRETION WITH RESPECT TO THE AWARD OF ALIMONY AS TO THE AMOUNT AND THE DURATION OF THE AWARD.

ARGUMENT

POINT ONE

THE PROPERTY SETTLEMENT DECREED FAILED TO TAKE INTO CONSIDERATION THE VALUE OF THE EARNING ABILITY OF THE DEFENDANT, OR IF THE SAME WAS CONSIDERED, THE DECREE WAS ARBITRARY AND CAPRICIOUS AND GROSSLY INADEQUATE IN THE AMOUNT AWARDED TO PLAINTIFF.

The trial court awarded appellant the use of the family home until the first of the following occurrences:

- a. The oldest child attains the age of 18, or
- b. Until the home is sold, or
- c. Until plaintiff remarries or cohabits with a man to whom she is not married.

Upon the happening of the first of the above events, the home was ordered to be sold and the proceeds of the sale divided equally between the parties.

The trial court divided the property between the parties as follows:

To plaintiff (appellant):

- a. One-half the equity in the family home upon sale (no value specified).
- b. Her personal effects and jewelry (no value specified).
- c. Furniture, fixtures and appliances located at the family home (no value specified).
- d. 1977 Chevrolet automobile

To defendant (respondent):

- a. One-half the equity in the family home upon sale (no value specified).
- b. His personal effects (no value specified).
- c. Membership in the Sports Mall (having a value of \$1,200.00).
- d. 1980 Buick Skylark automobile
- e. The professional consulting business.
- f. The retirement account (having a value of \$15,359.00).

With respect to the value of the home, the appellant estimated it to be worth approximately \$170,000.00 less a mortgage on the premises in the amount of \$33,000.00 leaving a net equity of \$137,000.00. She apparently formed her opinion based on a valuation given her by a realtor. (R. 17.) Respondent on the other hand testified that in his opinion, the value of the home was \$235,000.00 less a mortgage of approximately \$29,000.00 which would leave a net equity of \$206,000.00. According to his testimony he based his opinion on "watching comparable sales in the area during the time when the real estate market was moving." (R. 118.) However, he also admitted that the time when real estate was moving was approximately two years before

the time of the trial, that he had been living outside the State of Utah for the year prior to the trial, and that he was not aware of any sales of real estate in the neighborhood where the family home is located during that year. (R. 128.)

With respect to the furniture, furnishings and equipment located in the family home, the respondent testified that in his opinion the value was \$20,000.00. (R. 122-123.) However, on cross examination he testified that that was his estimate of the amount it would take to replace the furniture for insurance purposes. (R. 127.) This, of course, does not indicate anything about the age and present condition of the furniture, and it is not the standard for determining its value (which is what a willing buyer would pay to a willing seller). He also stated that the furniture would not yield very much if it were sold, as for example at a garage sale. (R. 128.) Furthermore, there is evidence that not all the furniture, fixtures and appliances were awarded to plaintiff. (See R. 25 where defendant proposed "Each party should be awarded the household furnishings . . . now in his or her possession.") It is respectfully submitted that the award of the furniture was based upon the needs of the family and that any actual value of these items was immaterial.

It is clear that the item of most substantial value which the parties had accumulated during their marriage, apart from the home, was the consulting business, which the trial court awarded entirely to the respondent without determining its value.

The evidence with respect to the business of the defendant (as summarized in the Statement of Facts, above) indicates that, while at the

time of the trial the defendant had no signed contracts, he believed he would obtain a contract which he was then negotiating (R. 105) and that the average earnings of the business over the last three years was \$68,862.67 per year. (R. 110-112.)

The average earnings of the defendant for the prior three year period gives a fairly accurate indication of the defendant's earning ability. However, it is clear from the remarks at the trial court at the conclusion of the trial, that the defendant's earning ability was not taken into account by the trial court in determining the property settlement decreed.

In summary, the court stated as follows:

"In order for you to survive and your wife to survive you're going to have to sell your house and live on that money and both of you rent and do away with all of the things which you've now enjoyed while you were married. There is no way you can maintain two households at the same level you maintained one on your present producing-free income unless you get a business contract.

* * * * *

"I don't think I'm willing to speculate with your wife's life and your children's lives of you getting a big contract. It looks the only way we can get this worked out is to sell that house." (R. 129-130).

Therefore, the trial court ordered that the family home be sold in a maximum of two years (i.e., when the oldest child reaches eighteen years of age) and the proceeds divided equally among the parties, apparently for the purpose of providing them with a resource to live on. However, the court also awarded to the defendant the full interest in the business and the retirement account which had been built up during the course of the marriage.

Economists view the family as a decision-making unit which allocates its available resources for the mutual good of the family unit, by joint decision.

See Krauskopf Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor of Human Capital, 28 Kan. L. Rev. 379,386 (1980).

Traditionally, after marriage, couples choose to have wives devote full or part-time to housekeeping and child-care activities, while they also choose to have husbands devote their full time to employment in the labor market. As a consequence over the years of a typical marriage, the husband increases his skills in income-producing activities and training, and also acquires seniority rights and pension benefits, while the wife increases her ability and skill in homemaking and nurturing activities, but sacrifices the training, experience and seniority benefits which she would need if she were required to provide for her own support.

The traditional division of labor does benefit the family unit, however, by maximizing the husband's earning capacity. The wife's work at home frees the husband to concentrate on his market work and the acquisition of property for the family. This results in married men having higher lifetime earnings and longer, healthier lives than unmarried men. See Landes, Economics of Alimony, 7 J. Legal Stud. 35, 40 (1978). However, this allocation of labor significantly reduces the ability of wives to generate income, should they be required to do so because of their lack of participation, training and enhancement of skills in income-producing activities.

These factors have direct application to the case at bar. The facts of this case show that the parties married shortly after the wife graduated from high school and before she was able to develop any job skills. Upon the marriage the parties allocated the human capital of this new family unit in

the traditional pattern, with the result that for the next twenty-two years the wife devoted her full-time activity to homemaking and nurturing activities and the husband devoted his full-time activities to earning a living, which in the case at bar enhanced his skills to the point where he became a counselor to governors and other governmental entities, and developed a business with an income-producing capacity averaging over \$68,000.00 per year for the most recent three-year period prior to the time of the trial. Under these circumstances, it is grossly inequitable to terminate this marriage without taking into account the wife's right to receive a fair and equitable share of this earning capacity, which she helped produce, in a division of the property accumulated by the parties during the marriage.

The Utah Supreme Court has recognized a wife's right to receive a fair and equitable share of such financial benefits. In the case of Savage vs. Savage, 658 P.2d 1201 (1983) the facts were somewhat similar to the facts in the case at bar. In that case the parties were married about twenty years. However, unlike the present case, the wife in the Savage case had some earning ability in that she had a college degree and had taught school for two years after the marriage. Thereafter she was a full-time homemaker and caretaker for the three children of the parties. Even though the husband had been occupied during the full term of the marriage (and even before the marriage) in a business owned by his family, the court awarded the wife 40% of the stock in that business which had been accumulated by the parties during their marriage. The husband objected to this property settlement. On appeal the Supreme Court of Utah stated:

"In view of the 20-year length of this marriage, and the fact that both parties devoted full-time efforts throughout that period to the ends of the marriage, we see no abuse of discretion in the 40%/60% split fashioned by the trial court. Virtually the entire present value of the corporations was developed during the marriage and, while it is true that the plaintiff took no responsibility for the business, it was her assumption of the domestic burdens which made possible the defendant's full-time participation in the business. She is therefore entitled to a fair and equitable share of the financial benefits accumulated by virtue of their joint efforts in the marriage."

The case of Dahlberg vs. Dahlberg, 77 Ut. 157, 292 Pac. 214, also recognized the right of a wife to share in the property acquired during the marriage. The case involved a divorce of parties who had been married twenty-seven years. Four children had been born as issue of the marriage, two of whom were living with the wife at the time of the divorce. The trial court had awarded the wife approximately one-third of the value of the property acquired by the parties during the marriage and she contended that she should have received one-half. In its decision the Utah Supreme Court stated as follows:

"It is the contention of the plaintiff that, in view that the parties had been married and lived together for more than a quarter of a century, reared a family, acquired all of the property possessed by them through their joint efforts, that all of the real estate and personal property possessed by them, though held in the name of the defendant, was just as much her property as that of her husband. . . . an equitable division of the property required that she be awarded at least one-half of the value of the joint property;

"In opposition to that it is the contention of the defendant that as a general rule in divorce cases only about one-third of the husband's property is awarded to the wife;

* * * * *

"We think the rule contended for by the plaintiff is the correct rule and is in line with the later cases from this jurisdiction. Of course, the rights and equities of both parties

are to be considered, but, whatever doubt there may be concerning the matter, it ought to be resolved against the guilty party whose faults and wrongs and breaches of the marital relation destroyed the home and forced or brought about the separation.

"In Decker vs. Decker supra, the court said "It is also a rule of equity in such cases that the wife shall not be put in a worse condition by reason of her marriage, the dissolution of which has been caused by her husband's willful misconduct. Equity and good conscience require that the husband shall not profit by his own wrong, . . . and also that a fair division shall be made taking into consideration the relative wants, circumstances and necessities of each, of the property accumulated by their joint efforts and savings.' "

The supreme court concluded that under the facts cited above the interest of the plaintiff in "the whole of the property" accumulated through their joint efforts was equal to that of the husband and modified the decree accordingly.

In the case at bar it is clear that the court would have to award the ownership of the business accumulated by the parties to the defendant, because the business, in essence, consists of his training and experience and demonstrated earning capacity, together with a pension account which had been accumulated in his name.

However, it is also equally clear that the trial court could, and should, have awarded to the plaintiff a share of the value of that business, equal to the interest which she helped to create. While no evidence was introduced at the time of the trial in the nature of an appraisal of the value of the business awarded to plaintiff, the facts indicated by the average earning capacity of the business would lend themselves to a mathematical computation of the value of the business.

For example, defendant was 45 years old at the time of the trial and in apparent good health. If his income were to continue at the same average rate until he reached age 65, over that period his business would produce a total income of \$1,377,253.40. There are standard accounting tables for determining the present value of a stream of future income. Assuming a rate of return at 10% per annum (the legal interest rate), the present value of that total income would be \$586,266.73, and one-half of that amount would be \$293,133.37.

There are many factors, not presently foreseeable which could operate to diminish that value, such as the possibility of future ill health, so that it may not be reasonable to award appellant that full amount as being one-half the value of the business. However, it should be clear that there is a substantial value in the business which the court should have divided.

There are a variety of methods which the court could have adopted in dividing this asset, other than a lump sum cash award. For example, the court could have awarded appellant a fixed percentage of the annual income of the business (up to a gross annual income of the business of \$68,826.67). This would fairly compensate appellant for the value of the business that was jointly developed to the date of the divorce, and leave any future growth to defendant. This is similar to the result decided upon in the Savage case, supra. In the Savage case, supra, the majority noted and the dissent urged that whenever possible continued interaction by reason of joint ownership by divorced spouses in a closely held enterprise should be avoided, so that this may not be the most preferred method of resolving the matter. Another

reasonable alternative would be to fix a value of the business to be awarded to appellant, and permit defendant to pay it in installments. A more practical solution would be to award the appellant the full equity in the family home of the parties as an offset for the value of the business, which should have been awarded to appellant. Or the court could adopt any combination of the foregoing or other alternatives.

POINT TWO

THE TRIAL COURT ABUSED ITS DISCRETION WITH RESPECT TO THE AWARD OF ALIMONY AS TO THE AMOUNT AND THE DURATION OF THE AWARD.

As noted in the Statement of Facts the trial court awarded the plaintiff \$1,600.00 per month as alimony, but limited the award of alimony to two years. In its original memorandum decision the court ordered the plaintiff to pay alimony in the sum of \$1,600.00 per month, but put no limit on the time the alimony was to be paid. (R. 51.) Subsequently on November 9, 1982, counsel for plaintiff and defendant appeared before the trial judge. A record was kept of the proceedings, in which the trial court indicated that the purpose of the hearing was for the court to explain the order it had heretofore entered and to handle an objection by the defendant that he could not pay what the court had ordered.

In the course of the proceeding, the court indicated that it would be willing to consider that the alimony be for a limited period of time although neither party had raised the point. Counsel for defendant suggested a ten year term and the court responded "that's too long". Thereafter the court

stated "I would cut the alimony off in two years. She's got to get out so she can start retraining herself." Subsequently the court stated:

"I think she's got to get out and take care of herself. She just cannot sit back and get \$1,600.00 a month from this fellow and do nothing to help support herself. Society doesn't tolerate that from any of us. That's why we are all employed. And she has just the same obligations to take care of herself as we all have." (R. 139-140.)

Thereafter the court entered its order limiting the payment of alimony (at the rate of \$1,600.00 per month) to a period of two years from the date of the entry of the decree.

In the case at bar it is clear from the comments of the trial judge that he did not take into consideration the husband's earning ability or the realistic limitations on the wife's earning capacity, in determining the alimony to be awarded to the wife. Rather, it appears that he disregarded these important factors and focused, instead, upon the actual earnings of the husband at the time the decree was entered in deciding the amount which was to be awarded as alimony and the length of time it was to be paid.

Prior to the trial appellant had filed a financial declaration with the court which showed that the average living expenses of the family during the three years preceding the separation amounted to \$5,500.00 per month. (R. 18). At the trial she testified that this information was based upon checks showing the actual amount of the expenses for some years prior to the separation, which the defendant had thrown out at the time of their separation and which she had retrieved and categorized, and also upon her costs experienced during the separation and some projected increases. (R. 86.) She testified however that she felt she needed \$4,200.00 per month to maintain the household

... had been maintained, taking into account the expenses of herself and three minor children residing at home. (R. 87.) The financial declaration filed by defendant showed his monthly living expense to be \$2,837.00 (R. 24, 115).

The evidence showed that during the two years that the parties were separated before the trial, the defendant paid directly to the plaintiff \$1,200.00 per month for her support and the support of the minor children who were living at home, and that in addition he also paid directly the bills and other expenses of the appellant and the children (R. 85). The defendant confirmed this and testified that his experience was that it cost \$800.00 to \$1,000.00 per month to maintain the home (which he identified as principal, interest, taxes and insurance on the home), which he had also been paying in addition to the bills and in addition to the \$1,200.00 per month which he paid to the plaintiff (R. 119-120).

The amount awarded by the trial court for the support of the appellant and the children (\$1,600.00 per month alimony together with \$200.00 per month per child for three children — or a total of \$600.00 for child support — which totals \$2,200.00 per month) is a fair approximation of the amount that the defendant testified he was actually paying directly to the appellant and toward the expenses of maintaining the home during the separation, but would not include the other amounts defendant was paying during the separation.

In the case of English vs. English, 565 P.2d 409 (Ut. 1977) this court stated:

" . . . the court stated that the most important function of alimony is to provide support for the wife as nearly as possible at the standard of living she enjoyed during marriage and to prevent the wife from becoming a public charge. The court observed that criteria considered in determining a reasonable award for support and maintenance include the financial conditions and needs of the wife, the ability of the wife to produce a sufficient income for herself, and the ability of the husband to provide support."

If in making this award, the trial court took into consideration the needs of the plaintiff and the minor children for support, and the ability of the husband to pay for their support, and the ability of the wife to contribute to her own support, it failed to clarify the matter anywhere in the findings of fact, conclusions of law or Judgment.

The average earnings of the defendant for the three years preceding the entry of the decree (defendant's historic earning ability) amounted to more than \$5,500.00 per month. If that factor was properly considered by the trial court, there would not appear to be any reason in the evidence to justify an award of alimony and child support so far below what the appellant estimated would be necessary for her support, so far below what the husband had already been paying during the separation, and particularly so far below what the evidence demonstrated would be necessary to maintain her and the children as nearly as possible to the standard of living they enjoyed during the marriage. Although the findings don't indicate which income level the alimony was based on, it would appear that the court was basing the amount ordered on the

amount defendant was earning at the time of trial, rather than on defendant's historic earning ability, contrary to the holdings of this court in Westenskow vs. Westenskow, 562 P.2d 1246 (Ut. 1977), and English vs. English, supra. For the protection of both parties (in the event a need should arise to request a modification based upon a change of circumstances) this matter should be clarified.

Furthermore, the termination of alimony at an arbitrarily selected date was, in the circumstances of this case, a clear abuse of discretion on the part of the trial court. In the English case, supra, the court held that one of the most important functions of alimony is to prevent the wife from becoming a public charge, and that the criteria to be considered in determining a reasonable award should include among other things the ability of the wife to produce a sufficient income for herself. The evidence in this case indicated that the appellant, a forty year old woman with no formal job training or work experience, had no realistic ability to provide any meaningful income for herself. Furthermore, at the time of the hearing there were three minor children living with her at home, the youngest of which was three years old. To terminate alimony under these conditions would clearly indicate that within two years the wife would almost certainly become a public charge.

In the case of MacLean vs. MacLean, 523 P.2d 862 (Ut. 1974), the evidence showed that the wife had not been employed for 20 years and was in ill health (although the trial court found that she was capable of gainful employment). As an inducement to the wife to seek gainful employment the trial court had ordered an annual diminution in alimony payments. On appeal

this court eliminated the provision which would diminish the alimony upon the ground that there was great uncertainty that the wife was capable of securing employment. The opinion of the court stated:

"We deem it best that the changes in alimony either downward or upward should be left to future determinations by the court under its continuing jurisdiction."

In the case of Savage vs. Savage, 658 P.2d 1201 (Ut. 1983), speaking on the issue of alimony, the Utah Supreme Court stated:

"We have already noted that the parties and their children enjoyed a very high standard of living during the marriage. One of the chief functions of an alimony award is to permit the parties to maintain as much as possible the same standards after the dissolution of the marriage as those enjoyed during the marriage. . . . where the marriage is of long duration and the earning capacity of one spouse greatly exceeds that of the other, as here, it is appropriate to order alimony and child support at a level which will insure that the supported spouse and children may maintain a standard of living not unduly disproportionate to that which they would have enjoyed had the marriage continued."

In the Savage case the parties were married twenty years, whereas in the case at bar the parties were married twenty-two years. In the case at bar as in the Savage case the earning capacity of one spouse (the husband) greatly exceeds that of the other spouse (the wife). It should also be noted in passing that the Utah Supreme Court cited as support for the proposition last quoted above the case of Steinbrenner vs. Steinbrenner, 60 Or. App. 106, 652 P.2d 845 (1982). In that case the Oregon Supreme Court actually stated as follows:

"Where a marriage is of long duration and the earning capacity of one spouse greatly exceeds that of the other, permanent spousal support is warranted. . . ." (Emphasis added.)

In view of the great differences in the earning capacity of the parties in this case, it is respectfully submitted that it is a gross abuse of discretion for the trial judge to arbitrarily limit the payment of alimony for a period of two years following the entry of the decree when there is no indication in the evidence that within that two year period the appellant will be able to increase her earning capacity in any meaningful way. In fact, the only reasonable anticipation at the time of the trial would be that she would not be able to increase her earning capacity in any meaningful way within two years because of the following factors:

1. Having married at age eighteen and having devoted herself for the twenty-two years of the marriage to homemaking and nurturing activities, which are activities outside the labor market and which produce no skills which would suit her for employment, all factors militate against her being able within two years to develop any marketable skills. Furthermore she will enter the job market at the age of approximately forty-two, when there are greatly reduced opportunities for employment.
2. The parties have a minor child which at the time of the trial was three years old. The award of custody of that child to the plaintiff imposes upon her the duty to care for that child. The needs of that child would prevent the plaintiff from exerting her efforts in the next two years to gain skills which would adapt her for meaningful employment.
3. The plaintiff testified that her health at the time of the trial would make it very difficult for her to hold gainful employment and at the same time meet her responsibilities to her children (R. 91-92). In his testimony the respondent recognized the impairment of the health of the appellant and stated that he was concerned about it and that she was not coping well with the situation. (R. 128).

In this regard it should be noted that when the trial judge first suggested in the post-trial hearing that the alimony should be paid for a limited

time only, counsel for defendant suggested that alimony be paid for a term of ten years. (R. 138). This corresponds exactly with the suggestion of the husband in his financial declaration to the effect that "alimony should be awarded for a period of ten years or until plaintiff remarries or cohabits, whichever occurs earlier." (R. 25).

Since there was nothing in the evidence to indicate that something might happen with two years from the time of trial which would substantially increase the ability of the plaintiff to provide for herself, but rather all of the evidence indicated that no such event would occur, it was a gross abuse of discretion on the part of the trial court to limit the payment of alimony to a two year period. Equity indicates that the award of alimony should have been made permanent or at least indefinite as to its term. This would not operate unfairly as to the interests of the defendant because under Utah law the court retains continuing jurisdiction to make subsequent changes with respect to support and maintenance of the parties as shall be reasonable and necessary (Sec. 30-3-5 U.C.A.). If something should in fact materialize (whether in two years or thereafter) which would increase the earning capacity of the plaintiff or decrease her necessity or decrease his ability to pay the defendant could always move the court for an order modifying the amount of alimony awarded based upon the change of circumstance.

CONCLUSION

Based upon the foregoing it is respectfully submitted that the trial court grossly abused its discretion:

1. In failing to make a division of the business awarded to the defendant, represented by the earning capacity which was developed during the course of the marriage by reason of the joint efforts of the parties, and

2. In failing to give proper weight to defendant's historic earning ability and the standard of living of the parties and the needs of the appellant and the children of the parties in determining the amount of alimony to be awarded, and

3. In failing to order the defendant to pay alimony on a permanent basis or at least on an indefinite basis, pending a change of circumstances of the parties.

It is respectfully further submitted that this court should enter an order modifying the decree of the trial court as the interests of justice and equity require.

Respectfully submitted

MARSHALL & WILLIS

John G. Marshall

CERTIFICATE OF SERVICE

I herewith certify that on this 26th day of August, 1983, I served two copies of appellant's brief upon Mary Lou Godbe, Esq., 318 Kearns Bldg., Salt Lake City, Utah 84101 by mail.
