

1994

Michael J. Godfrey v. Maria Oliva Godfrey : Reply Brief

Utah Court of Appeals

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STATE OF UTAH

Defendant/Appellant.

Priority Classification: 15

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OCT 21 1994

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

MICHAEL J. GODFREY,		
		REPLY BRIEF OF APPELLANT
Plaintiff/Appellee,		
		District Court No. 910000015
vs.		
		Court of Appeals No. 940167-CA
MARIA OLIVA GODFREY,		
		Priority Classification: 15
Defendant/Appellant.		

Defendant/Appellant.

Priority Classification: 15

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH

MICHAEL J. GODFREY,

Plaintiff/Appellee,

vs.

MARIA OLIVA GODFREY,

Defendant/Appellant.

|
| REPLY BRIEF OF APPELLANT

|
| District Court No. 910000015

|
| Court of Appeals No. 940167-CA

|
| Priority Classification: 15

REPLY BRIEF OF APPELLANT

DEFENDANT/APPELLANT (hereinafter "Ms. Godfrey") submits the following as her reply brief of appellant herein:

REPLY TO STATEMENT OF FACTS

Mr. Godfrey did not set forth a Statement of Facts based on the evidence contained in the trial record. He referred to no testimony, no exhibits, nor pleadings from this case. Rather, he simply reiterated the Trial Court's *Supplemental Findings of Fact* issued on remand from the prior appeal. He quoted said *Findings* verbatim as though they were facts derived from the evidence. While the *Findings* may constitute the Trial Court's interpretation of the facts in evidence, they nowhere refer to the trial testimony, exhibits, nor pleadings. In addition, the trial evidence contains

no support for some *Findings* made. There is no support either in the testimony, nor exhibits, nor pleadings for some of the *Findings*.

Because of Mr. Godfrey's failure to set forth facts based on the evidence, Ms. Godfrey responds in two fashions: First, she will set forth those portions of the *Findings* for which there is no support in the trial record. Second, she will highlight the portions of the evidence relevant to the two main issues she raised on this appeal: The alimony award, and the valuation and distribution of the marital stock.

Findings for Which There is No Support in the Record

There is no support in the record for the portion of the *Findings* set forth in the *italics* below:

The plaintiff's father at one time placed the nursing home in trust with his five children as equal beneficiaries, one of whom was the plaintiff. The father revoked the trust, and then created a corporation to run the nursing home and gave the corporation a lease for a period of ten years commencing July 1st, 1985. At the time of the trial there was approximately three-and-a-half (3 1/2) years left on the lease. The father created 1,000 shares in the corporation giving each one of his five children 200 shares. The plaintiff received 200 shares as one of the five children. *The Court must be mindful that these acts were done by an elderly Brigham City man. It has become fashionable in later years to treat different children differently in inheritance. The Court is mindful of the general conduct of the community and among people of the father of the plaintiff's age. The word "birthright" was commonly used. Many people regarded it as a sin to favor one child over another, absent serious shortcomings of a child. This man acted twice in accordance with that ancient custom.* (R.517-518)

No testimony, exhibits, nor pleadings contain any support for the *italicized* portion above. Mr. Godfrey's father did not testify at trial. He was deceased at that time. Neither did either party testify as to Mr. Godfrey's father's purpose in creating the trust or the corporation. Nor did they testify as to the father's rationale in giving equal shares of the stock and real estate to each of the five (5) siblings. Neither was

there any evidence submitted as to what was fashionable in the community for persons of Mr. Godfrey's father's age regarding inheritance. None of the exhibits, nor pleadings contain any support for the *italicized* observations imposed on the evidence in the record by the Trial Court's *Findings*.

The trial record is also vacuous concerning the *italicized* portion of the *Findings* below:

In an effort to arrive at a just living standard for the defendant wife is to guided by what conventional wisdom would indicate, that a couple ought to spend after the bankruptcy passes. It is clear to the Court the parties lived beyond their means. This can be noted quickly when one looks at credit card debt, et cetera. The court has made an effort to make the dollars on each side come out exactly even, partly because even though this plaintiff occupies one job, he works long hours and his position and part of his income is directly related to his inheritance. *What the court is attempting to do is to give to the defendant monies above and beyond her earnings that would give her a living standard commensurate with her position in the community.* (R.524)

It should first be noted that the Trial Court considered it appropriate "to arrive at a just living standard for the defendant wife" based on a budgetary situation of bankruptcy. No bankruptcy type budget constraints were imposed on Mr. Godfrey by the Trial Court.

Nowhere does the evidence in the record establish what Ms. Godfrey's "position in the community" was or should be. There was no testimony, nor other support, for what "would give her a living standard commensurate" thereto. Further, this rationale as a basis for alimony, is based entirely on the arbitrary views of the Trial Court on community standards. The Trial Court thereby created its own new alimony standard ignoring this Court's directives as noted by the Trial Court itself:

The appellate court has required additional findings on the issue of alimony. The Court has directly call (sic) the trial court's attention to the need to consider three (3) things. First, their living standard before or at the time of the divorce; second, the wife's ability to provide for her own needs; and third, the husband's ability to provide. (R.523)

The aforesaid factors upon which to base alimony are in accord with a number of prior Utah cases: (*Schindler v. Schindler*, 776 P.2d 84 (Ut. App. 1989); *Boyle v. Boyle*, 735 P.2d 669, 671 (Ut. App. 1987); *Paffel v. Paffel*, 732 P.2d 96 (Utah 1986); *Jones v. Jones*, 700 P.2d 1072, 1075 (Utah 1985); and *English v. English*, 565 P.2d 409, 411-12 (Utah 1977))

The new alimony criteria enunciated by the Trial Court -- a living standard commensurate with community position -- is at odds with the foregoing precedents. When the Trial Court orally announced this new criteria, Ms. Godfrey's counsel contended it was a legally incorrect standard:

Her position in the community is totally irrelevant. It's what her living costs and standards are, I think. Frankly, I don't think there's a shred of evidence in the record what the living standards of the community are. I think what you need to do is say he makes X number and she makes so much and her living costs are this much and he ought to be able to pay this much. (T4:38 L13-20)

In response to Ms. Godfrey's argument the Trial Court stated: "I think all judges have a right to say some things about the community." (T4:40 L17-18) Ms. Godfrey's counsel then lamented: "That may or may not be correct. I don't think there's a bit of evidence to support it." The Trial Court then admitted: "It's my best guess." (T4:40 L19-21)

Highlights of Facts Relevant to Alimony

It is important to recognize that this case involves a long term marriage. The parties were married for nearly twenty-two (22) years. (T3:4 L18-22) Also, there is

a significant disparity between the parties' actual income. Mr. Godfrey enjoyed an average annual income of \$54,931.00 during the five (5) years prior to the divorce. (D-1, contained in prior Brief as Exhibit "E") In addition, Mr. Godfrey has use of a 1990 Mercedes provided by his employer. His employer pays for the insurance, maintenance and fuel costs having a value of \$700.00 per month, or \$8,400.00 per year.

Ms. Godfrey's only income is derived from her work as an Animal control Officer for Brigham City (T3:142 L6-8) Her annual income averaged only \$22,848.00 during the five (5) years prior to the divorce. (T3:107 L6-14) (Exhibit "E", prior Brief)

At the inception of this matter, Mr. Godfrey was ordered by Judge Gunnell to pay \$800.00 per month in temporary alimony (Order dated February 27, 1991, R.74, Paragraph 3) Mr. Godfrey refused to pay alimony as ordered. At an Order to Show Cause hearing held May 21, 1991, Commissioner Allphin awarded judgements of "\$2,000.00 representing alimony arrearage through May, 1991" and "\$1,500.00 as an award of temporary attorney's fees." (R.118, Paragraphs 1 and 2) Mr. Godfrey had willfully refused to pay the alimony ordered while having the ability to do so. Thus, Commissioner Allphin found Mr. Godfrey in contempt and ordered 24 hour jail unless Mr. Godfrey paid the \$3,500.00 in judgments by June 20, 1991. (R.118, Paragraph 4)

Mr. Godfrey belligerently continued refusing to pay. A second Order to Show Cause hearing on his wilful refusal was held on July 22, 1991. At hearing, Judge Pat Brian found Mr. Godfrey in contempt a second time. The twenty-four (24) hour jail sentence previously issued was imposed and the alimony and attorney fee judgments

were updated and set at a total of \$2,710.00 as of the hearing date. (R.175-6)

Mr. Godfrey's conduct during the ensuing four months demonstrates his ability to pay the \$1,250.00 per month in alimony sought by Ms. Godfrey on appeal. Judge Brian's Order required Mr. Godfrey to continue making his \$800.00 per month ongoing payments and simultaneously pay \$677.50 per month during the four months following the hearing to satisfy the \$2,710.00 arrearage. If Mr. Godfrey did not so perform, he faced an additional ten (10) days in jail. (R.175-6)

Mr. Godfrey had the ability to meet his \$1,477.50 per month obligation during the ensuing four (4) months. His doing so shows that when necessary, Mr. Godfrey has the ability to pay even more than the \$1,250.00 per month in alimony being sought by Ms. Godfrey.

Ms. Godfrey supported her alimony request in part by an *Hourly Wage Comparison*. (D-2, contained in prior Brief as Exhibit "F") Her testimony indicates that she needed at least \$1,000.00 per month in alimony (T3:121 L15-19) The *Hourly Wage Comparison* showed that such an award would still leave Mr. Godfrey with more available income than her. The *Comparison* did not include his \$800.00 per month received from his father's estate (R.117, Paragraph 2) nor the \$700.00 per month value of the Mercedes.

Ms. Godfrey demonstrated her reasonable monthly expenses to be \$2,128.00 in excess of her net income. (D-8, contained in prior Brief as Exhibit "G") Her expenses show that with only \$1,000.00 per month in alimony she would have a \$1,128.00 shortfall.

At trial, Ms. Godfrey submitted her *Alimony Request* for \$1,200.00 per month (D-9, contained in prior Brief as Exhibit "H") Said Exhibit demonstrates that even

with \$1,200.00 per month she would still experience a \$928.00 per month shortfall between her income and expenses.

Mr. Godfrey claimed while paying an average of \$1,212.91 in alimony per month during the few months prior to trial, his shortfall was \$1,319.98. (P-2, contained in prior Brief as Exhibit "I") Said Exhibit shows Mr. Godfrey's ability to pay over \$1,200.00 per month in alimony.

Further, it demonstrates that a \$1,200.00 per month award would result in both parties having to reduce their expenses by similar amount. Her shortfall equals \$928.00. His shortfall equals \$1,319.98. The difference between them equals \$391.98. That difference would certainly be more than compensated for, when considering the tax deductions to him and the tax liability to her for \$1,200.00 per month alimony. Thus, the evidence on the parties income and expenses clearly demonstrates that at least a \$1,200.00 per month award is necessary to equalized the parties' standard of living.

Highlights of Facts Relevant to the Nursing Home Stock

It is undisputed that Ms. Godfrey contributed significantly to the nursing home's success by her employment there without compensation for approximately thirteen (13) years. (T3:142 L6-8) She performed numerous duties including working as a nurses aid, a decorator, housekeeper, in the laundry, and transporting patients. She also ran errands, helped prepare banquets, and performed many other tasks for the nursing home. (T3:117 L6 to 118 L18, T3:162 L10-21, T3:169 L9 to 190 L9)

Mr. Vaughn Brent Cox was the only witness called as an expert to value the nursing home stock. The extreme high degree of his expertise for performing such a task is undisputed. He holds both a bachelor's degree in finance and a master's

degree in business administration with an emphasis in finance from the University of Utah. (T3:173 L24 to 174 L2) His knowledge and experience highly qualify him as a neutral expert to fairly value the stock. This is demonstrated by the following:

a) His ongoing continuing education in business valuation as a specialty. (T3:174 L10-13)

b) His certification by the American society of Appraisers as a senior appraiser in business valuation. (T3:174 L10-15, T3:180 L4-18)

c) His past extensive publishing on business evaluation, including both a book and newsletter specializing in valuing family businesses.

d) His extensive university level teaching experience. (T3:179 L15-23)

e) His vast business appraisal experience of over 500 businesses. (T3:197 L13-22)

f) His prior experience as an expert witness in valuing businesses. (T3:197 L13-22)

Mr. Cox used four different earnings based methods in valuing the 200 stock shares. Under the "gross revenue multiplier method" he arrived at a value of \$78,000.00. (T3:188 L7-16) Applying a very common method in valuing nursing homes, the "price per bed method", he concluded the fair market value to be \$68,000.00. (T3:188 L7-16) Using the "operating profit capitalization method" indicated a value of \$54,000.00. (T3:189 L2 to 191 L12) Last, using a commonly employed method in the industry, the "price to earnings ratio method", he valued the stock at \$61,000.00. (T3:191 to 193 L14)

Based on all four of the foregoing methods, Mr. Cox concluded the 200 stock shares had a value in the open market of \$65,000.00

REPLY TO SUMMARY OF ARGUMENT

Mr. Godfrey states that Ms. Godfrey's "employment income is better than that of most similarly situated women...". (Mr. Godfrey's Brief, at the bottom of page 13) This remark relies on the *Findings* made by the Trial Court. As discussed above, there is no evidence in the record to support this. Further, whether or not the statement is true is irrelevant to the issues on appeal. If such a fact were relevant, alimony would be determined by the economic status of women in each particular community. Alimony awards would thus vary between communities throughout Utah even when considered under the same set of facts.

The correct basis for alimony should be a consideration of the requesting spouse's needs and ability, along with the prospective payor spouse's ability to provide. A community economic standard as a basis for alimony is also inappropriately sexist, whereas such a standard is based on gender classification. Such a standard is contrary to Utah law as well as federal law, being discriminatory on the basis of sex.

Mr. Godfrey also contends he "is the administrator of a small fifty (50) bed nursing home in a non metropolitan area which may soon be a home without a home at the expiration of a short life lease on real estate." (Brief, page 14) The Trial court correctly found that Mr. Godfrey and his siblings each owned an equal "share of the real estate and his share of the management corporation". (*Findings*, at the beginning of Paragraph 5(a), at R. 518) At the hearing on remand the Trial Court also noted: "Each was to have an equal share in the business, just as they held in the real estate,..." (T4:13 L12-14) The Trial Court accurately observed that the company bookkeeper maintained the corporate records reflecting "that because the

real estate owners and the management owners are currently the same people the lease will be extended." (Emphasis added) (T4:25 L22-25)

There is no distinction between the real property owners and the owners of the nursing home business. Mr. Godfrey, along with his siblings, own and control both the business and the real property where the business operates. There is no reason to believe the lease, scheduled to expire in 1995, would not be renewed between the business owners and the real property owners, who are the same. They could just as easily prematurely terminate the lease between themselves as they could extend it at their sole discretion. There is no basis to perceive the longevity of the business being in jeopardy on the mere basis of the lease's scheduled expiration date. The only reason the business would not continue to lease the property beyond 1995 would be because the owners of both the business and the real property elected not to do so.

Mr. Godfrey also argues that the "valuation on the corporate stock is reasonable and the method for its distribution and the wife's equity is fair and within the discretion of the trial court." (Brief, page 14) The valuation of the stock made by the Trial Court at only \$20,000.00 was an abuse of discretion -- being clearly erroneous when considering the six factors discussed in Ms. Godfrey's prior Brief on pages 30-38 and amplified below in reply to Mr. Godfrey's Point V.

REPLY TO POINT I

In this point, Mr. Godfrey introduces the first of the three criteria enunciated in *Jones v. Jones*, 700 P.2d 1072 (Utah 1985) and in other cases, used in determining alimony: The ability of the requesting spouse to produce sufficient income for that spouse's needs.

Mr. Godfrey contends there "is no indication in the evidence that [Ms. Godfrey] is unable to pursue her employment". Though Ms. Godfrey may be able to perform her present work now, her testimony reflects it was unlikely that she could do that work very long. (T3:120 L20-25)

Mr. Godfrey's argument employs the same incorrect legal standard for alimony determination as did the Trial Court. Mr. Godfrey suggests the "standard commensurate with her position in the community" (Mr. Godfrey's Brief, page 15, line 5) is the basis for determining the sum of alimony a woman receives. As discussed above, this standard would result in women throughout Utah receiving widely differing awards under the same set of facts. Though divorcing husbands and wives in two different communities where the evidence in the cases may show identical income and expenses, the alimony would vary based on speculation by the Trial Court as to what a woman's financial/economic position in the community should be.

If not determined by what it should be, then perhaps what it is at the time of the divorce. If determined at the time of divorce, the requesting spouse's financial situation at that time would simply be confirmed. It is doubtful that the Trial Court intended this view of its "attempt to give the defendant monies above and beyond her earnings that would give her a living standard commensurate with her position in the community". Thus, it appears the Trial Court invented this new erroneous "community position" standard speculating as to what such should be for Ms. Godfrey. Imposing this erroneous standard was a clear abuse of discretion.

To employ the correct *Jones* criteria for determining alimony, it is useful for the Trial Court to perform some simple mathematical comparisons based on the evidence concerning the parties' income and expenses. Mr. Godfrey concludes his

Point I by stating: "The addition of \$450, the original alimony, is, if anything, excessive where she has an earning capacity of \$23,000 per year and compensatory alimony of \$2,400 per year." Mr. Godfrey fails to support this by the appropriate financial comparisons contained in the evidence.

The monthly financial figures used below are derived from Exhibits D-8, D-9 and P-2, contained in Ms. Godfrey's prior Brief as "G", "H", and "I".

	<u>Ms. Godfrey</u>	<u>Mr. Godfrey</u>
Monthly net take home pay	\$958	\$2,415
Monthly expenses (not including alimony)	-\$3,086	-\$2,522
Monthly shortfall	(\$2,128)	(\$107)
Alimony at \$1,213 as per Exhibit P-2	+\$1,213	-\$1,213
Net shortfall including alimony	(\$915)	(\$1,320)
Income tax adjustment at 20%	-\$243	+\$243
Net shortfall after tax adjustment	(\$1,158)	(\$1,077)
Net disparity (\$1158 - \$1,077) = \$81.00		

The 20% income tax factor shown above is conservative for Mr. Godfrey. Given his actual income, he is likely to save considerably more than \$243.00 per month from the deduction of alimony on his state and federal taxes. As can be seen above, though Ms. Godfrey still ends up with \$81.00 per month more in shortfall than Mr. Godfrey, alimony at \$1,213.00 per month comes close to equalizing the parties' standard of living. The sum of \$1,250.00 per month is a reasonable and necessary amount to equalize the parties post-divorce living standards. An award of \$1,250.00 per month would result in both parties having to reduce their expenses by a near equal amount.

REPLY TO POINT II

Under this point, Mr. Godfrey discusses the second of the three *Jones* factors for alimony determination: The financial conditions and needs of the requesting spouse. Citing *Bingham v. Bingham*, 874 P.2d 1065, 1068 (Utah App. 1994) Mr. Godfrey contends "the court should not award defendant more than her established needs require". (Mr. Godfrey's Brief, at the top of page 16) Ms. Godfrey acknowledges the alimony limitation principle of *Bingham*. Nevertheless, *Bingham* is not applicable to this case.

In this matter Ms. Godfrey's financial need for her to meet her budget equals \$2,128.00. (Prior Brief, Exhibit "G") Ms. Godfrey agrees that even if Mr. Godfrey had the ability to pay in excess of \$2,128.00 alimony per month, the award should not exceed that demonstrated amount of need. Nevertheless, Ms. Godfrey demonstrated that her need far exceeds the \$650.00 per month awarded by the Trial Court. Thus, *Bingham* does not limit alimony in this matter to \$650.00 per month.

Mr. Godfrey next argues that alimony should be apparently based on a different living standard for Ms. Godfrey than for him. He quotes the Trial Court's *Findings* which include the following: "In an effort to arrive at a just living standard for the defendant wife is to be guided by what conventional wisdom would indicate, that a couple ought to spend after the bankruptcy passes." (Emphasis added) Thus, the Trial Court established that Ms. Godfrey's needs should be confined as though in a bankrupt context. Mr. Godfrey's needs were apparently not similarly constrained. An award of \$1,250.00 per month would, to the extent possible, equalize the parties' living standards. The Trial Court only awarded \$650.00 per month. Considering the parties' income and expenses, that award provides Ms. Godfrey with \$600.00 less, and

Mr. Godfrey with \$600.00 more per month, a difference of \$1,200.00 per month.

It was clearly erroneous for the Trial Court to treat Ms. Godfrey's needs as though in bankruptcy while not so treating Mr. Godfrey. The \$650.00 per month award results in Mr. Godfrey having \$1,200.00 more than Ms. Godfrey for his living expenses. Under the current award, Mr. Godfrey, while not being constrained to a bankruptcy type budget by the Trial Court, is provided \$1,200.00 more per month to spend towards his expenses. Such a disparity is patently unfair and inequitable.

Next, Mr. Godfrey argues that it is incorrect "that the two incomes of the separated parties are to be equalized through the device of granting alimony not based on need". (Emphasis added) Nowhere has Mr. Godfrey argued that alimony should not be based on her need. Rather, she has demonstrated that she has a need of \$2,128.00 above her net income to meet her expenses. While that need may exceed Mr. Godfrey's ability to pay, he clearly has the ability to pay \$1,250.00 per month to equalized their living standards.

An alimony award should, to the extent possible, **equalize** the parties' post-divorce living standards. See *Howell v. Howell*, 806 P.2d 1209 (Ut. App. 1991); *Rasband v. Rasband*, 752 P.2d 1331 (Ut. App. 1988); *Naranjo v. Naranjo*, 751 P.2d 1144 (Ut. App. 1988); *Olson v. Olson*, 704 P.2d 546 (Utah 1985); and *Higley v. Higley*, 676 P.2d 379 (Utah 1983). It is certainly possible to equalize the parties' living standards in this matter with alimony at \$1,250.00 per month, which sum would only require Mr. Godfrey to reduce his expenses by an amount similar to Ms. Godfrey.

The present \$650.00 per month award results in Mr. Godfrey retaining 65% of the parties' combined gross income, leaving Ms. Godfrey with only 35%. (See prior Brief at page 15) Thus, the Trial Court's award results in Mr. Godfrey retaining

nearly double the income compared to Ms. Godfrey. The Trial Court abused its discretion in making an award which gives Mr. Godfrey nearly twice the available income as Ms. Godfrey.

REPLY TO POINT III

Under this point Mr. Godfrey addresses the last of the three *Jones* criteria: The ability of the payor spouse to provide support. Mr. Godfrey states the "trial court found that after alimony of \$650 per month he would be left with about \$37,000 per year and stated, 'His future is very precarious.' (Record, 525)" The evidence does not support the Trial Court's finding that "he would be left with about \$37,000 per year". Mr. Godfrey averaged \$54,931.00 annual income from all sources during the five years prior to trial. (D-1, contained in prior Brief as Exhibit "E") That average combined with he \$8,400.00 yearly automobile allowance, yields him \$63,331.00 in gross annual income. Subtracting the Trial Court's new \$7,800.00 award in alimony per year leaves him with \$55,531.00 per year, not \$37,000.00.

Ms. Godfrey's gross annual income, including the new alimony award is only \$30,800.00. Thus, the \$650.00 per month award leaves Mr. Godfrey with \$24,731.00 more than Ms. Godfrey. Obviously, Mr. Godfrey has the ability to pay far more than \$650.00 per month. Paying \$1,250.00 per month would result in Mr. godfrey's future being no more precarious than that of Ms. Godfrey. Both would have equal spending ability and both would need to adjust their budget by a similar amount.

REPLY TO POINT IV

The Trial Court valued the stock at only \$20,000.00. That valuation is based on the purchase by Mr. Godfrey, subsequent to trial but prior to remand, of 200 additional stock shares from a brother. Such a transaction is not "arms-length" and thus is not representative of fair market value. Closely held stock should not be valued based on a transaction which is not "arms-length". (See Welch, "Discovery and Valuation in a Divorce Division Involving a Closely-Held Business or Professional Practice", 7 *Community Property Journal* 102 (1980) and Epstein, "Practice Points: Valuation of Stock in Closely Held Corporations", 5 *Review of Taxation of Individuals* 369 (1981))

The Trial Court's valuation was based on a friendly sale between brothers. The only evidence of what the stock is actually worth in the market was present by Mr. Cox. He valued the stock at \$65,000.00, which sum he concluded based on his range of values from \$54,000.00 to \$78,000.00. Those values included a discount for the minority interest where appropriate. It was an abuse of discretion for the Trial Court to choose a value based on a non "arms-length" transaction rather than choose from the range based on actual fair market value.

REPLY TO POINT V

Mr. Godfrey's testimony on the value of the stock is based solely on his own perception as he states in his Brief. Nevertheless, his testimony is deficient when compared to Mr. Cox's testimony for the following reasons:

- 1) The Trial court erred in assigning the entire weight of testimony in favor of Mr. Godfrey, a lay party witness, while giving no weight whatsoever to Mr. Cox's

neutral expert testimony.

2) The Trial Court erred in basing the stock's value on Mr. Godfrey's unskilled opinion. Mr. Godfrey's opinion has little or no probative value. Also, the Trial Court's \$20,000.00 valuation is based on a sale of 200 other stock shares to Mr. Godfrey from one of his brothers. Such a sale is in no way an "arms length" transaction and lacking necessary neutrality, is not representative of fair market value.

3) The Trial court erred in not accepting Mr. Cox's value as conclusive. No other expert gave an opinion of value other than Mr. Cox. His opinion was not in conflict with other expert testimony. The only other evidence of value was based on Mr. Godfrey's lay testimony. The testimony of Mr. Godfrey, being a party to the action, is intrinsically biased. Proper valuation of the stock required specialized skill and concerned a matter of business appraisal science. The complexities of the minority interest, and the fact that the same individual owners of the real property also own the business, were correctly taken into consideration by Mr. Cox.

4) The Trial Court erred in arbitrarily disregarding and ignoring Mr. Cox's valuation. Mr. Cox's testimony was not impeached in any way. There was no reason for the Trial Court to disregard and ignore Mr. Cox's opinion. It was clearly erroneous for the Trial Court to arbitrarily do so.

5) The Trial Court erred in relying on Mr. Godfrey's testimony which was obtained by leading questions posed by his own counsel. Mr. Godfrey's opinion as to value while being led under his counsel, has little, if any, probative value. It was clearly erroneous for the Trial Court to place its entire weight upon such leading testimony.

6) The Trial Court erred in arriving at the \$20,000.00 value by speculation and conjecture. The Trial Court clearly speculated that the stock would be "worthless, or nearly worthless" simply because the existing lease of the real property was scheduled to expire in 1995. (*Findings*, at last half of R.520) The Trial Court also erred by employing "fair market value" by conjecture. Proper valuation of the stock for property division purposes is that value for which the stock would actually sell in the open market -- fair market value. Both Utah Code Section 59-2-102(7) and IRS Revenue Ruling 59-60 (used for valuing closely held stock) define "fair market value" as the amount at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of the relevant facts.

The Trial Court valued the stock under a forced and compelled selling situation, an inaccurate conjecture of "fair market value". The Trial Court stated the stock would be "nearly worthless at general auction". (R.520) It also, "concluded that if the corporation were to be dissolved and the equity divided, there would be little to distribute." (*Findings*, towards the end of Paragraph 5(c), at R.521) The nursing home was not being dissolved, nor was it being sold at auction. It was a profitable ongoing business. Fair market value is not arrived at by using a liquidation approach. It was clearly erroneous for the Trial Court to speculate and conjecture that a forced auction or liquidation would achieve a sale equating to "fair market value".

Mr. Godfrey was entitled to give his opinion as to the value of the stock. Nevertheless, his testimony is not sufficient to rebut the fair market valuation methods employed by Mr. Cox. Mr. Godfrey argues that Mr. Cox made comparison

of sales in metropolitan areas to the subject nursing home and that this comparison was faulty. Mr. Godfrey refers to the comparable "sales of nursing care facilities in Utah County, Utah, at \$30,000 per bed." He then argues that "Utah County is definitely metropolitan and viable facilities in Utah County are not fifty beds."

Mr. Godfrey cites no evidence in support of Utah County being metropolitan nor that the nursing home facilities sold and compared to the subject home by Mr. Cox were larger than fifty beds. Mr. Cox compared the subject nursing home to the most similar nursing homes available. He used a conservative 1.4 multiplier where the average multiplier is 1.5 - 1.6 for the Gross Revenue Multiplier Method. The price per bed he used for the subject home was only \$25,000. Such sum is less than any of the prices per bed for all comparably sold homes he found. Mr. Cox testified that the nationwide average price per bed is \$33,000 and that the similar homes which had recently sold in Utah county sold for more than \$30,000 per bed. Only when computing value under the Operating Profit Capitalization Method did Mr. Cox use a rate slightly higher than average. He employed a 12% capitalization rate where the average was 10.6%. The average multiplier for publicly traded companies under the Price to Earnings Ratio Method was 23.0. Mr. Cox used a multiplier of only 18.0 in valuing the subject home under this last method. As a whole, Mr. Cox was quite conservative in employing the methods he used to arrive at a fair market value for the stock.

Mr. Godfrey notes that the subject facility "did not produce an operating profit in the last year of analysis." It should not be surprising that the company's profits would decline during the year the parties were going through the divorce. Mr. Godfrey has a great deal of control over the company's financial success. It should

not be astonishing that the company showed less income while the parties disputed its value prior to trial. Mr. Godfrey had an incentive against company earnings during the dispute.

Also, Mr. Cox took the company's last year's earnings prior to trial into consideration when averaging the company's profit over the previous five years. While questioning Mr. Cox, Mr. Godfrey's counsel emphasized the company's lower income during the year just prior to trial. (T3:208 L19 to 209 L22) Mr. Cox responded that it's "not uncommon for a business to have - to show a loss situation for one or two years and still have substantial value". Mr. Cox also provided the following explanation as to why the low income in the last year would not significantly effect the company's fair market value:

The nursing home industry is a somewhat homogeneous industry. What that means is that the operation of a nursing home is not really that much different here in Brigham City than it is in Orem or South Jordan or other cities throughout the country. So the real key to whether a nursing home has value is whether that individual nursing home is successful.

I think if you look at the history of the Godfrey Foothill Retreat, you'll find several years of successful operation. Because of that I think any other company that has experienced an ownership and management of nursing homes could come in and have a pretty good chance of succeeding. (T3:213 L25 to 214 L13)

Mr. Godfrey's testimony as to the stock's value may have intended to rebut, modify or explain, or otherwise minimize Mr. Cox's testimony. Nevertheless, because of the deficiencies discussed above, his testimony should not have been accepted as a basis to value the stock. Only Mr. Cox's testimony provides a fair market valuation based on the applicable principles for performing such a task.

REPLY TO POINT VI

It is true "that the trial court can make such compensating adjustments to both the property division and the alimony award as it deems necessary to make the ultimate decision equitable," as noted by Mr. Godfrey in *Martinez v. Martinez*, 818 P.2d 538 (Utah 1991). Nevertheless, *Martinez* reviewed the single issue of whether the Court of Appeals erred in fashioning a new remedy in divorce cases which it called "equitable restitution" and its decision that such may be awarded in addition to alimony, child support, and property. The Utah Supreme Court decided the creation of the new "equitable restitution" category was error. *Martinez* does not support alimony being increased to offset the value of property such as stock if the result is inequitable. Such an offset in this case clearly results in an ultimate decision which is inequitable. *Martinez* indicates that adjustments between property and alimony must achieve an equitable result.

Offsetting the stock's value by an increase in alimony is inequitable for the following reasons: Ms. Godfrey would clearly lose her alimony, including the \$200.00 increase upon remarriage. Mr. Godfrey argues that "[u]nless further ordered by the court the defendant could be paid \$200.00 per month for the stock interest, and retroactively too, far into the foreseeable future. See Title 30-3-5(5), 1953 *Utah Code Ann.*, as amended." This interpretation is contrary to both the express statutory provision cited and contrary to this Court's interpretation thereof:

Alimony is presumed to terminate upon remarriage of the receiving spouse. Utah Code Ann. §30-3-5(5) (1989) states that "[u]nless a decree of divorce specifically provides otherwise, any order of the court that a party pay alimony to a former spouse automatically terminates upon the remarriage of the former spouse".

Johnson v. Johnson, 855 P.2d 250, 252 (Utah App. 1993)

Nowhere did the Trial Court in this matter grant alimony which would continue beyond the remarriage of Ms. Godfrey. If Ms. Godfrey remarried, her receipt of alimony would automatically terminate. One-half of Mr. Cox's \$65,000 stock value equals \$32,500. Thus, the \$200.00 per month (\$2,400.00 per year) increase in alimony prevents Ms. Godfrey from remarrying for nearly 15 years to realize her \$32,500 fair share. Even at the Trial Court's erroneous \$20,000 value, Mr. Godfrey would not realize her \$10,000 half if she were to remarry within four years of the divorce.

It was inequitable for the Trial Court to raise alimony to offset the stock's value in this matter. In *Lee v. Lee*, 744 P.2d 1378, 1380-81 (Utah App. 1987) this Court made a number of recommendations for dividing the value of stock in a matter such as the instant case. *Lee* suggests that marital assets consisting of stock in a closely held family corporation can be distributed in divorce proceedings by the following means: A cash settlement, division of the stock, awarding offsetting property, or cash payment over time. In addition to erroneous valuation of such stock, *Lee* was also remanded because of an insufficient alimony award. While addressing both stock and alimony issues, nowhere does *Lee* suggest that the value of stock be offset by awarding an increase in alimony above that which is otherwise appropriate.

Both *Argyle v. Argyle*, 688 P.2d 468, 471 (Utah 1984) and *Berry v. Berry*, 635 P.2d at 69-70 (Utah 1981) dealt with the division of family owned stock. Both cases state that a lump sum payment or payments over time are the best methods to achieve an equitable distribution of closely held stock.

Also, any payment in consideration of the stock's value should be separate from alimony in this matter. Such payment should not reduce the alimony otherwise appropriate because the payments are in division of property and should be separate from the alimony award. See *Burt v. Burt*, 799 P.2d 1166 (Utah App. 1990)

REPLY TO POINT VII

At the conclusion of the trial on this matter the Trial Court divided the property between the parties. It did so by having the parties alternately choose first from the real property and then from the personal property while the Court Clerk kept track of the value of each property being awarded. The Trial Court made a concerted effort that the result was equal though it awarded the stock to Mr. Godfrey and assigned it a value of \$0. Aside from the actual value of the stock, both parties received an equal value of property. Considering the stock, Ms. Godfrey received considerably less property than Mr. Godfrey and she has substantially less income with which to pay attorney fees.

Even if she ultimately receives \$1,250 per month in alimony, she would still need to cut her budget by approximately \$1,000.00 per month just to meet her expenses. Ms. Godfrey does not have the ability to pay her attorney fees and has a need for such fees being paid by Mr. Godfrey. He has the ability to pay such fees. (See *Schaumberg v. Schaumberg*, 240 Utah Adv. Rep. 11, 14 (CA filed May 26, 1994) and *Riche v. Riche*, 784 P.2d 465, 470-71 (Utah App. 1989))

Ms. Godfrey is also entitled to attorney's fees and costs based on the result obtained on the prior appeal and on remand. Utah code Section 30-3-3 grants the courts of this State the discretion to award attorney's fees in domestic cases. On

appeal, this Court

. . . usually makes[s] such an award if the requesting party has prevailed on at least some of the issues he or she has raised on appeal, although under the language of Section 30-3-3, we are not absolutely prohibited from making an award to a party who has not prevailed on appeal. (See e.g. *Ostler*, 789 P.2d at 717)

(*Houmont v. Houmont*, 739 P.2d 421, 427 (Utah App. 1990) and *Rappleye v. Rappleye*, 855 P.2d 260, 266-7 (Utah App. 1993)) In the present case, Ms. Godfrey is entitled to again prevail on appeal and as such is entitled to her attorney's fees and costs.

REPLY TO POINT VIII

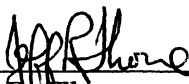
In its prior decision, this Court did not remand for any finding concerning the debts Mr. Godfrey claimed were owed to his father's estate. The decision completely vacated the Trial Court's findings concerning the existence of liens in favor of the estate on the real property awarded to Ms. Godfrey. The Trial Court erred in not conforming to this Court's prior decision when issuing its Supplemental Decree. This Court remanded under the principles of *res judicata* and directed the Trial Court to vacate the finding of real property debt owing to the estate. The Trial Court should be directed to enter an order that no liens are owed to the estate on the real property awarded Ms. Godfrey.

CONCLUSION

The Supplemental Decree should be reversed and remanded on the issue of the real property debt. This Court should reverse the alimony award and based on the evidence, grant permanent alimony to Ms. Godfrey in the sum of \$1,250.00 per month. This Court should also reverse the Trial Court's valuation of the stock at only

\$20,000.00 and it's decision to not award Ms. Godfrey any of its value. This Court should place a value on the stock from the fair market values indicated by Mr. Cox, award Ms. Godfrey with one-half of that value, and remand solely for consideration of the payment method for the award.

Respectfully submitted this 20 day of October, 1994.



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CERTIFICATE OF SERVICE

I hereby certify that on the 20 day of October, 1994, I mailed by U.S. mail, postage prepaid, two copies of the foregoing Brief of Appellant to the following:

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