

1994

# Michael J. Godfrey v. Maria Oliva Godfrey : Brief of Appellee

Utah Court of Appeals

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UTAH COURT OF APPEALS  
BRIEF

DOCKET NO.

940167

IN THE UTAH COURT OF APPEALS  
STATE OF UTAH

MICHAEL J. GODFREY,  
Plaintiff/Appellee,

vs.

MARIA OLIVA GODFREY,  
Defendant/Appellant.

94-0167-CA

Case No. 94-0167-CA

Priority No. 15

APPELLEE'S BRIEF

APPEAL BY DEFENDANT OF THE SUPPLEMENTAL DECREE OF DIVORCE ENTERED  
IN THE FIRST JUDICIAL DISTRICT COURT OF BOX ELDER COUNTY, THE  
HONORABLE JOHN F. WAHLQUIST, DISTRICT JUDGE.

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FILED  
Utah Court of Appeals

SEP 19 1994

Marilyn M. Branch  
Clerk of the Court

**IN THE UTAH COURT OF APPEALS  
STATE OF UTAH**

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MICHAEL J. GODFREY, Plaintiff/Appellee,	)	
	)	
	)	Case No. 930764-CA
vs.	)	
	)	Priority No. 15
MARIA OLIVA GODFREY,	)	
Defendant/Appellant.	)	

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**APPELLEE'S BRIEF**

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APPEAL BY DEFENDANT OF THE SUPPLEMENTAL DECREE OF DIVORCE ENTERED  
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**IN THE UTAH COURT OF APPEALS  
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MICHAEL J. GODFREY, )  
Plaintiff/Appellee, )  
 ) Case No. 930764-CA  
vs. )  
 ) Priority No. 15  
MARIA OLIVA GODFREY, )  
Defendant/Appellant. )

## APPELLEE'S BRIEF

## STATEMENT OF JURISDICTION

This appeal is from a final supplemental divorce decree of the District Court for Box Elder County, State of Utah. This court has jurisdiction over this appeal pursuant to 1953 Utah Code Ann., Title 78-2a-3(2)(h).

## ISSUES PRESENTED AND STANDARD OF REVIEW

- 1. DID THE TRIAL COURT ERR IN VALUING THE STOCK AT \$100 PER SHARE RATHER THAN AT \$65,000 FOR TWO HUNDRED SHARES?**
- 2. DID THE TRIAL COURT ERR IN FAILING TO EQUALLY DIVIDE THE PARTIES INCOME BY ITS AWARD OF \$650 PER MONTH PERMANENT ALIMONY?**
- 3. DID THE TRIAL COURT ERR BY INCREASING ALIMONY TO OFFSET THE VALUE OF THE STOCK?**

**4. DID THE TRIAL COURT FAIL TO AWARD ADEQUATE ATTORNEY FEES TO THE DEFENDANT?**

Standard of Review, issues 1-4:

The trial court has considerable discretion to determine alimony and property distribution in divorce cases and will be upheld on appeal unless a clear and prejudicial abuse of discretion is demonstrated.

Finding of fact are subject to the clearly erroneous standard of review. *Bingham v. Bingham*, 872 P.2d. 1065 (Ut. App. - 1994); *Howell v. Howell*, 806 P.2d. 1209 (Ut. App. -1991).

**5. DID THE TRIAL COURT ERR IN DECLINING JURISDICTION TO RULE ON THE EXISTENCE OF MARITAL DEBTS TO THIRD PERSONS NOT PARTIES TO THE SUIT?**

Standard of Review:

Conclusions of law are reviewed for correctness and given no special deference on appeal. *Bingham*, supra.

DETERMINATIVE PROVISIONS

Rule 201, Utah Rules of Evidence, Judicial Notice:

**Rule 201. Judicial notice of adjudicative facts.**

(a) **Scope of rule.** This rule governs only judicial notice of adjudicative facts.

(b) **Kinds of facts.** A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) **When discretionary.** A court may take judicial notice, whether requested or not.



(d) **When mandatory.** A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) **Opportunity to be heard.** A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) **Time of taking notice.** Judicial notice may be taken at any stage of the proceeding.

(g) **Instructing jury.** In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

Rule 701, Utah Rules of Evidence, Opinion Testimony by Lay Witnesses:

**Rule 701. Opinion testimony by lay witnesses.**

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

**STATEMENT OF THE CASE AND COURSE OF PROCEEDING BELOW**

This is a divorce action following a 22 year marriage of the parties. The divorce was filed in December, 1990 and a trial thereon was conducted in October, 1991. A retired District Judge, the Honorable John F. Wahlquist, presided at the trial.

Following a one day trial the court issued its ruling from the bench on the issues of custody, visitation, support, property division, allocation of debts, alimony and attorney's fees. Subsequently, Ms. Godfrey filed her appeal with this Court as Case No. 920029-CA concerning her pre-trial Motion for Continuance, alimony, allocation of debts, and the award of stock.

This Court affirmed the denial of the motion for continuance, vacated the ruling concerning the marital debt, the valuation of the stock, and the alimony award, and also remanded for a revaluation of the nursing home stock in accordance with the evidence in the record and for further findings and conclusions in support of the alimony award. This Court filed its Decision on May 21, 1993.

On remand, and after the hearing, Supplemental Findings of Act and Conclusions of Law, and a Supplemental Decree of Divorce, were signed February 18, 1994.

Ms. Godfrey filed her Notice of Appeal on February 15, 1994, which was entered by the Clerk of the Trial Court on the same date.

#### STATEMENT OF FACTS

Numbers in parenthesis are references to numbered pages in volume II of the case record on file by the District Court and part of the record on appeal herein.

1. The plaintiff and defendant were married at an early age. The plaintiff was employed for a time as an enlisted member of the Air Force. The defendant was a citizen of Mexico, living in California, employed at minimum wage jobs such as fast food outlets, et cetera. (517)

2. The plaintiff's parents owned a nursing/rest home in Box Elder County. It is the Court's understanding that this was a small business compared with its present status. The earlier

nursing home business was probably conducted in what might be regarded as a large house. The plaintiff's parents desired to expand their operation. This would take additional attention and effort. The plaintiff's parents extracted a promise from the plaintiff and defendant that if one of the parents died, the plaintiff and the defendant would come to Brigham City to be employed in the business. At the time of the death of the plaintiff's mother, the plaintiff was a bread route salesman employed in California. The defendant was a housewife/mother employed part time at a minimum wage job. The plaintiff and the defendant were purchasing a home and the plaintiff's earnings were in the neighborhood of \$30,000 a year. (517)

3. When the plaintiff and defendant returned to Brigham City, the plaintiff began employment under the direction of his father at the nursing home at a wage lower than the plaintiff and the defendant had anticipated. The defendant was also employed at the nursing home as a maid, kitchen worker and/or laundry worker for a time. She also had small children so her employment was on a part-time basis. Within a year she found employment as an animal control officer for Brigham City and has been so employed for the past thirteen or fourteen years. (517)

4. 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. (517 - 518)

5. The trial court is faced with some forceful problems in the marriage of the plaintiff and the defendant that caused divorce. The parties are incompatible. The divorce is necessary. (518)

6. The plaintiff's father clearly treated both the real estate and the management of the corporation as a family business. Each child was to receive his share of the real estate and his share of the management of the corporation regardless of whether they worked for the father or not. He did this strictly because each was his child. The plaintiff's testimony indicates that it was he, not his wife, that dealt with the father. The plaintiff indicates that the father made numerous loans to the plaintiff from time to time. The real estate is still in the father's estate waiting to be distributed. The stock in the management corporation remains equally distributed among the five children. The plaintiff took his shares, not because he or his wife worked in the business, but because he was one of his father's children. The stock was as clearly inherited as was the real estate that remains in the father's estate and was not intended to be marketable outside of the family. (518-519)

7. The father installed in the articles of incorporation a first right of refusal for the remaining stockholders to buy out any a person he wished to sell their stock for a taken price of one dollar per share or \$200.00 for any one child. The Court has concluded that the "right to buy

out the other children's stock for a token" is not enforceable in law as against one of the children who becomes involved in a divorce. (519)

8. The plaintiff was eventually promoted to manager (administrator). It was clearly the plaintiff's father's intent to treat all the children fairly. Each was to have an equal share in the business, just as they held in the real estate, regardless of whether or not they worked in the business. If any one of them wanted out the others would take his or her share for a token. As plaintiff's father died, the plaintiff was the manager (administrator) even though there was an older son, Jerry Godfrey, who was capable. At first the nursing home was sufficiently profitable to pay all rents on the real estate. The corporation showed a profit. The financial statements for the last five years of the corporation are in evidence. For the first four years the corporation made a profit and the plaintiff enjoyed an annual bonus, but the last year before the trial the business lost substantially and the plaintiff received no bonus. The plaintiff was the only witness who attempted to analyze the books and point out the reason for the recent loss. He explained that their "census" was down, or that they had fewer patients. The Court noted that the amount of revenue received in the last year was not grossly below earlier revenues, but this can easily be accounted for by the giving of more expensive and better care to each patient. During the last years, the plaintiff attempted to establish two new nursing homes. One to be established in Idaho and one to be established in Utah. The nursing homes failed. Plaintiff was forced to take out personal bankruptcy, and both establishments were liquidated. If the stock is to be evaluated at the time of trial, the court is forced to assume that any person bidding on the stock would know that the business had not made money in its last year and that the management was the same as that of two other nursing homes that had recently failed. But there was an additional reason why

this stock would be worthless, or nearly worthless at a general auction. The defendant called an expert witness who purported to appraise the plaintiff's share of the stock. The witness purported to fix the value of the stock by first stating that he could find no evidence where shares in a management corporation were sold. He stated that in every instance where a nursing home was sold, both the real estate and the management rights were sold together so that the purchaser could look forward to a perpetual right to run the business or at least a long lease. All of the defendant's expert testimony lumps together the real estate and the business goodwill, et cetera. The fault in this case is that the corporation's lease expires in 1995, leaving only three-and-a-half (3 1/2) years to go. The corporation can sell only the right to run the business at that location, and limited personal property such as the software, until 1995. At most the purchaser of the corporation's stock would be buying the right to run the business for three years. The last year the business was conducted it suffered serious losses. The Court has concluded that if the corporation were to be dissolved and the equity divided, there would be little to distribute. However, the appellate court has returned this case with the direction that the trial court must fix a value on this stock within the values suggested by some of the evidence that was offered. The Court has looked for other evidence. The Court has examined the rest of the evidence, which is primarily the profit and loss statements. The plaintiff himself did list this stock on a financial application for a loan as having a value of \$17,00.00. The Court notes that this was a few years back, so that the corporation had more time to run a business and at that time that the nursing home was showing a profit. The Court recognizes that at the time the plaintiff made the statement he was trying to raise money for things such as the other two failing nursing homes. The defendant's witness would have suggested that you simply have someone appraise the real

estate and subtract that from the total sale of the combined business, but certainly no bank official to which the loan application was directed would fail to see that he real estate was also locked into the lease. It would be virtually impossible to divide the real estate from the management value. However, the defense expert never separated the two except in showing a value of a corporation with a three (3) year lease. That is not profitable. (519 - 520 - 521)

9. It is true that the trial court did not struggle seriously with this problem of stock value at the time of the trial because the court considered that he father's gift of the stock in equal shares to each child was in effect an early distribution of an inheritance, which is not regarded in Utah as marital property. The trial court is now to assume that the appellate court has implidly rejected the finding that this is not marital property. The Court is looking for some evidence to make a calculation of the present value of the stock. There is in evidence some "profit and loss statements" and "book calculations" which were made by the corporation's accountant as to value. The court has studied these. Most of the furniture is owned by the real estate owners. But there are some things that are actually owned by the corporation such as the software used in the computers in the office and the accounts receivable owed by dead or transferred patients. The problem with this evidence is that the bookkeeper seems to assume that because the real estate owners and the management owners are currently the same people the lease will be extended. There is no effort to depreciate the basic value, which is the lease, but from these records the Court can assume, setting aside goodwill evidence, that each of the thousand shares must be worth twenty to fifty dollars (\$20.00 to \$50.00). Because of additional evidence, stipulated to by the attorneys, the Court finds that the plaintiff has bought one of his brother's stock interest for a hundred dollars (\$100.00) a share and that the plaintiff's motive for doing so

was to protect his job, et cetera; and that it was a leveraged buy out with no interest, but it is evidence of value. The Court will accept it at this time and value the stock at one hundred dollars (\$100.00) per share. In an effort not to totally waste whatever value is there, the stock cannot be split so as to give the defendant wife ten percent (10%) ownership. The Court therefore orders that the plaintiff be awarded the stock and that the defendant's alimony be increased to offset it. (521 - 522)

10. The appellate court reversed the trial court's findings that there was a mortgage on the home awarded to the wife. It is the appellate court's conclusion that the plaintiff's testimony cannot alone sustain this mortgage. The plaintiff had testified that he borrowed the money from his father to buy the house. Part of the reason the Court believe the plaintiff is that the Court cannot find any other place the plaintiff could have obtained the money. In the defendant's testimony she said, "At first we made payments on the mortgage, but lately never." The Court assumed that originally there was a mortgage, even if only verbal between the father and the son. Because there is not written agreement, the Court cannot calculate the balance owed, or even if this oral agreement is enforceable as a mortgage. The father's estate was not a party to this lawsuit and the plaintiff himself seems to now take the position that the debt was forgiven, but was to count as part of his inheritance. What the Court ordered was that the party receiving real estate would have to run the legal risk that a mortgage might be enforced against them. The plaintiff certainly did not repay his father during the period of the bankruptcy, but the father may have forgiven the debt. (523)

11. The appellate court has required additional findings on the issue of alimony. The Court has directly call 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. (523)

12. To attempt to perpetuate this couple's living standard as it was before this divorce would be to continue a nightmare. Since the couple arrived in Utah, virtually penniless, in about 1977, they have been in the process of acquiring two homes in Box Elder County and some commercial land, and not one but two time-share condos. They have maintained five horses, some dogs, some cats, some fish and some birds. The defendant testified that food for the pets required three hundred and fifty (\$350.00) per month. They have traveled extensively in the United States and abroad, including, Mexico, Alaska, Hawaii and South America. They have accumulated jewelry worth thousands of dollars. They have a gun collection. He drives a Mercedes and she drives a four wheel drive truck. Both their son and daughter drive vehicles the couple has furnished. The defendant testified that in the winter time it costs three hundred dollars (\$300.00) per month for snow removal to get in and out of their home. Their solution to the problem of having a credit card reach the maximum limit seems to be to obtain new credit cards from another company. 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. 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. (523 - 524)

13. In this case the wife, the defendant, has been an animal control officer for approximately fourteen (14) years. She earns approximately \$23,000.00 per year plus the normal employment benefits such as health benefits, retirement rights and other state benefits. Her hourly rate would be less, but she has to standby for weekends for something in excess of a thousand dollars (\$1,000.00). This puts her ahead of the majority of single women in Box Elder County. She complains of two things about her job. first, her work requires her to kill about 80 innocent animals per week. Second, she is required to handle live and dead dogs larger than 70 pounds. She has faced these problems continuously in the past. She was also in here (Divorce Decree) awarded the family house, which has no recorded mortgages, and other real estate and other assets such as one of the time-share condos, et cetera. The defendant is granted the right to use a vehicle owned by the city on a limited basis. (524 - 525)

14. The Court believed that the plaintiff works long hours. For the past five years the husband has earned about \$45,000 per year and received some income from his inheritance, in addition to wages he is currently enjoying the right to use a Mercedes that is owned by his employer, and that his auto insurance and auto expenses are paid by the employer. If plaintiff pays his wife \$650 per month that would leave him with about \$37,00 per year. The plaintiff will have to pay off the Ogden condo where he lives. He will be entitled to have the condo and pay off other debts. His future is very precarious. (525)

15. The Court ordered that alimony be set at \$650.00 per month on a permanent basis, or until further order of the Court. (525)

16. The Court ordered that the plaintiff contribute \$400.00 towards attorney fees of the defendant. (526)

17. The Court found that the stock of the plaintiff is appropriately valued, based upon the information set forth in the Findings of Fact, as a matter of law at One Hundred dollars (\$100.00) per share. (526)

18. The Court found that the plaintiff should be awarded the stock so as not to totally waste whatever value there is in the stock. (526)

19. The Court found that defendant's alimony should be increased to offset the stock awarded to the plaintiff. (526)

20. The Court found that it is appropriate to set the defendant's alimony at the sum of Six Hundred and Fifty dollars (\$650.00) per month. Alimony should be set on a permanent basis or until further order of the Court and is retroactive to the date of the original Divorce Decree. (526)

21. The Court found that it does not have jurisdiction over matters other than this Divorce Decree and as such was silent as to any mortgages or encumbrances on property distributed pursuant to the Divorce Decree. (526)

#### SUMMARY OF ARGUMENT

The defendant (appellant herein) is at no risk of being a public charge as a result of this divorce action. She is employed and has been over a period of fourteen (14) years. Her employment income is better than that of most similarly situated women, and she is a person of property having received a residence and parcels of real estate pursuant to the Decree of Divorce.

She was never disadvantaged economically by her marriage, giving up practically nothing career-wise as a wife. No special kind of compensation is needed for any sacrifice in furthering her husband's career or lack thereof.

The standard of living enjoyed during the marriage was fought with deficit revenues and was, at times, artificial and unsustainable.

The plaintiff (appellee herein) is not so much an independent businessman with a successful business, but an employee of a corporation in which he holds a very minor interest. 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.

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. Moreover, considering the considerable property division, the appellant's income, and the less than rosy prospects for the appellee, the award of attorney fees is fair.

If anything, the award of alimony is excessive. Two Hundred dollars (\$200.00) per month would be more realistic.

## ARGUMENT

### POINT I

THERE IS A DUTY TO SEEK AND ACCEPT APPROPRIATE EMPLOYMENT. ALIMONY IS NOT TO BE AWARDED SIMPLY TO HELP EQUALIZE THE INCOME OF THE PARTIES

In *Jones v. Jones*, 700 P.2d. 1072, (Ut. - 1985) the Utah Supreme court articulated three factors that must be considered in fixing a reasonable alimony award, one of which is the ability of the wife to produce a sufficient income for herself.

Mrs. Godfrey works, albeit she probably works hard, for Brigham City Corporation as an animal control officer. It is honest work and she has worked at it for an extended period of time. There is no indication in the evidence that she is unable to pursue her employment.

The Court is attempting to give the defendant monies above and beyond her earnings that would give her a living standard commensurate with her position in the community.

However, the defendant suggests that it is indeed hard work. Dead dogs can weigh up to 70 pounds. On the other hand, at the nursing home, dead weight patients can weigh up to 200 pounds. She has done both kinds of work, and her present work is suitable employment. If she is obliged to continue working after the divorce, she is no different than most.

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.

## POINT II

### THE SPOUSE'S DEMONSTRATED NEED FOR SUPPORT MUST CONSTITUTE THE MAXIMUM PERMISSIBLE ALIMONY AWARD

Another factor under *Jones v. Jones*, supra, in fixing a reasonable alimony award is the financial conditions and needs of the wife. at p. 1075.

Financial conditions are quite positive. She has enjoyed steady employment throughout the marriage and at a salary that is quite good in the area where she resides. She has received a generous property division in the divorce decree, receiving parcels of property in including a residence in excess of any other division in the decree, and the divorce shifts debt responsibility to the husband in dramatic fashion.

The decree further provides for permanent alimony of \$650.00 per month. (Record, 526)

She argues that the proper measure of need is whatever standard of living she had or aspired to at the time of the divorce proceedings. However, the court should not award defendant more than her established needs require. *Bingham v. Bingham*, 874 P.2d. 1065, (Ut. App. - 1994) p. 1068.

Trial courts have discretion to determine the standard of living which existed during the marriage after consideration of all relevant facts and equitable principles. *Howell v. Howell*, 806 P.2d. 1029 (Ut. App. - 1991).

Determining standard of living is a "fact sensitive, subjective task" (*Howell*, p. 1212) and defined as a "minimum of necessities, comforts or luxuries that is essential to maintaining a person in customary or proper states or circumstances." (*Howell*, p. 1211). The trial court found that "to attempt to perpetuate this couples living standard as it was before this divorce would be to continue a nightmare." Further, "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. It is clear to the court that the parties lived beyond their means." The alimony award should attempt to give the appellant a living standard commensurate with her position in the community.

This does not mean that the two incomes of the separated parties are to be equalized through the device of granting alimony not based on need. Mrs. Godfrey is not reentering the employment market. Expenses do not include rent or a mortgage payment. There are no children at home, and this is not life in the big city.

This is not a situation of granting a special kind of alimony not based on need where the Court understands that a spouse has been disadvantaged economically while supporting the other

in some learned profession as in case cited by the appellant. {See: *Dunn v. Dunn*, 802 P.2d. 1314, (Ut. App. - 1990), *Martinez v. Martinez*, 818 P.2d. 538, (Ut. - 1991), and *Gardner v. Gardner*, 748 P.2d. 1076, (Ut. - 1988), cases of extensive medical educations and practices.}

### POINT III

#### THE FINANCIAL NEEDS OF THE PAYOR SPOUSE ARE EQUALLY IMPORTANT WITH LEVEL OF INCOME IN DETERMINING ABILITY TO PROVIDE SUPPORT

The last of the three factors that must be considered under *Jones*, supra, in fixing a reasonable alimony award is the ability of the husband to provide support.

The appellant makes a point of safely assuming that the appellee is employed as the "Director" of a successful nursing home, receives a salary, profits and benefits in excess of his requirements and that he can be expected to maintain this happy happenstance for the next Twenty-three years until he reaches age 65.

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 appellee's ability to provide support requires consideration of his reasonable needs. He has no residence rent free and payment clear. The automobile provided by his employer is tied to his ability to produce any support at all. His standard of living is also tied to a level commensurate to his position in the community for him to provide any support at all. His employer is small in an industry of large, even huge, organizations. The employer does not own the property where it does business, but has a lease due to expire in a very short time. Alternative uses by, or a greater compensation to, the owners is possible. The nursing home does not always have an operating profit. In fact, the possibility can be remote. Mr. Godfrey's future is very precarious.

An income in excess of \$30,000 per year may enable the defendant to prosper, but an income of \$37,000 per year is unlikely to allow the plaintiff to maintain the status quo. These are the realities of their circumstances.

The defendant argues that faced with the threat of incarceration in the county jail, the plaintiff has come up with \$1,200 per month. That should not surprise anyone, but it does nothing to maintain the status quo or produce income. The plaintiff's ability to provide support at some excessive level above need is non-existent.

#### POINT IV

THE VALUATION OF \$20,000 PLACED ON CORPORATE STOCK IS WITHIN A RANGE OF VALUES ESTABLISHED BY ALL OF THE TESTIMONY IN THE CASE

The trial court should have valued the stock within the range of values established by all of the testimony. *Godfrey v. Godfrey*, 854 P.2d. 585, (Ut. App. - 1993).

Mrs. Godfrey provided expert testimony that placed the value at \$65,000 with a range between \$54,000 and \$78,000. Mr. Godfrey had valued his interest at \$17,000 in a personal financial statement. Audited financial statement of the corporation would place a one-fifth (1/5) interest at \$14,130. The court's valuation of \$100 per share, or \$20,000 for 200 shares, is based upon the evidence and not an abuse of discretion. (Record, 519)

#### POINT V

REBUTTAL EVIDENCE IS INTENDED TO REBUT, MODIFY OR EXPLAIN, OR OTHERWISE MINIMIZE OR NULLIFY THE EFFECT OF THE OPPONENTS EVIDENCE

Rule 701 of the *Utah Rules of Evidence* limits the opinion testimony of a witness not qualified as an expert by the court. Mr. Godfrey's testimony in rebuttal of the defendant's case on the valuation of stock is rationally based on his perception of the accounting records of the



business and on realities of life within the closely held family corporation. It is helpful to a clear understanding to the determination of a fact in issue.

Rule 201 of the *Utah Rules of Evidence* provides for judicial notice of adjudicative facts.

The trial court head noted that Brigham City, Utah, is a small place population wise. It is not within a large metropolitan area, and a fifty bed nursing home is not on an economic scale of the magnitude to which it is compared by the evaluating witness of the defendant. Moreover, business may be conducted on a parochial level unimagined by large national chains of health care providers.

In one area of appraisal, the witness compares sales of nursing care facilities in Utah County, Utah, at \$30,000 per bed. Utah County is definitely metropolitan and viable facilities in Utah County are not fifty beds. The witness further notes that Hillhaven Corporation purchased a chain of six facilities in Kentucky at \$25,900 per bed. Hillhaven also purchased a chain of six nursing homes in Wisconsin, Virginia and Alabama for \$35,100 per bed. Hillhaven Corporation is a large national chain of nursing homes headquartered in Tacoma, Washington. (Trial Exhibit #11, p. 5)

By comparison, the fifty bed facility in Brigham City, discounted for minority interests, would produce a 20% interest of \$68,000. The witness further appraises Mr. Godfrey's interest at \$65,000.

All of this is for a facility that did not produce an operating profit in the last year of analysis. A single nursing home cannot fall back on a chain of many other nursing homes to carry itself over the rough times when income comes mostly from fixed reimbursement schedules

of governmental agencies and the expenses come from the market place. The margin between is very thin.

The testimony of Mr. Godfrey was proper rebuttal evidence because its purpose was to minimize the effect of Mr. Cox's testimony and undermine the basis of his conclusions. See: *Randle v. Allen*, 862 P.2d. 1329, (Ut. - 1993) p. 1338. The trial court is not obliged to rank witnesses as good, better, or best. It makes it's own evaluation of credibility. It is not an abuse of discretion to find Mr. Cox's valuation of \$65,000 incredible.

The valuation of \$65,000 has included valuation for the real property occupied by the nursing home corporation on the ground that the same people own both. However, only the nursing home corporation stock has been included in the marital property subject to distribution. If Mr. Godfrey should ever realize the values assigned to the real estate, that will be by inheritance and it will not have been marital property subject to distribution to Mrs. Godfrey in the form of alimony.

There is a further "similar company analysis" with ten large national chains, as to what effect is not clear. (Trial Exhibit #11, Schedule 3) The record shows that Mr. Godfrey is not unmindful as to the possibilities of a multiple operation, but his ventures in that direction had all proven unsuccessful. (Record, 519) He is in no position to sell out as he is one of five family members. It is all well and good to gamble for high stakes unless your stake is your livelihood. The trial court is aware that the ability to pay support at all is tied the operation of the family corporation and the valuation is within the parameters outlined in *Godfrey*, supra.

## POINT VI

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

In *Martinez v. Martinez*, 818 P.2d. 538 (Ut. - 1991), in a concurring opinion, Justice

Zimmerman stated:

The majority opinion also makes it clear 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

*Martinez* at 543.

There can be no doubt that trial judges are empowered to take circumstances into account in making alimony and property division awards.

The trial court found, that "In an effort not to totally waste whatever value is there, the stock cannot be split so as to give the defendant wife ten percent (10%) ownership. The Court therefore orders that the plaintiff be awarded the stock and that the defendant's alimony be increased to offset it." (Record 526) It would not be wise to turn this interest into something negotiable and risk upsetting the purpose of the decree to provide support.

The award of alimony in the divorce decree and in the Supplemental Decree of Divorce, "The court decrees that the defendant is entitled to alimony at the sum of six hundred an fifty dollars (\$650.00) per month. The court further decrees that said alimony is set on a permanent basis, or until further order of this court, and is retroactive to the date of the original Divorce Decree." (Record, 526)

Remarriage in and of itself will have no bearing upon any claimed recoupment of one-half (½) of the value of corporate stock as determined by the court. Unless further ordered

by the court the defendant could be paid \$200 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.

The court justifies this equitable result on the idea that possession of the stock raises Mr. Godfrey's income for his employment by the corporation, and therefore, his ability to pay support. (Record, 526)

This result is well within the court's discretion in fashioning a workable division of property along with an alimony award.

#### POINT VII

IN LIGHT OF SUBSTANTIAL PROPERTY AND ALIMONY AWARDS THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN THE AMOUNT OF THE AWARD FOR ATTORNEY FEES AND COSTS

In light of the defendant's substantial property and alimony awards as entered in the divorce decree and in the supplemental order thereto, this court should not agree that the trial court abused its discretion in the \$400 award of attorney fees and costs. However, if the need to reassess the alimony amount or the claim to corporate stock arises, the trial court should have the opportunity to reassess defendant's need for plaintiff's help in the payment of attorney fees and costs. cf. *Bingham*, Supra, at p. 1069.

#### POINT VIII

THE COURT IS PROPERLY SILENT AS TO ANY MORTGAGES OR ENCUMBRANCES ON PROPERTY DISTRIBUTED PURSUANT TO THE DIVORCE DECREE

The court determined that proper parties for asserting liens upon the two parcels of real estate given to Mrs. Godfrey in the divorce decree were not before the court, and that the court could not assume jurisdiction to determine the existence of a debt. (Record, 526)

In *Godfrey*, supra, the appellate court had vacated any finding of fact as to indebtedness on the properties decreed to Mrs. Godfrey with the question: "Who is entitled to repayment if there is an obligation owed to the father's estate?"

Mr. Godfrey's evidence cannot satisfy the court, and the court determined that it had no jurisdiction.

### CONCLUSION

The trial court examined the three mandatory factors necessary for arriving at a reasonable alimony award. It did not abuse its discretion as to the amount. The supplemental decree of divorce should be affirmed. If remanded, it should be for the purpose of reducing the award to \$200.00 per moth which is more than sufficient to cover any interest the defendant could have in the corporate stock, the last vestige of marital property left to the plaintiff.

DATED this 16<sup>th</sup> day of Sept., 1994.

Respectfully Submitted.

  
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BRUCE W. STRATFORD  
Attorney for Plaintiff/Appellee

### CERTIFICATE OF SERVICE

I hereby certify that I caused to be served, two copies of the foregoing brief, by mailing them to the office of:

Jeff R. Thorne  
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at the above entitled address on this the 16<sup>th</sup> day of Sept., 1994.

  
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BRUCE W. STRATFORD