1974

Dixie S. Cox v. Mervyn K. Cox : Reply Brief of Defendant-Cross Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

DIXIE S. COX,
Plaintiff and Appellant,

v.

MERVYN K. COX,
Defendant and Cross Appellant.

Case

REPLY BRIEF OF DEFENDANT-CROSS

APPEAL FROM JUDG
JUDICIAL
DISTRICT COURT OF
HONORABLE J. HARLAN

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IN THE SUPREME COURT OF THE STATE OF UTAH

DIXIE S. COX,
Plaintiff and Appellant,
v.
MERVYN K. COX,
Defendant and Cross Appellant.

Case No. 13242

REPLY BRIEF OF DEFENDANT-CROSS APPELLANT

NATURE OF THE CASE

This is a divorce action wherein Plaintiff-Appellant hereinafter referred to as Plaintiff, alleged mental cruelty and asked for custody of the four minor children, a reasonable division of the property, child support, alimony and attorney fees. Defendant and Cross Appellant, hereinafter referred to as Defendant, filed a counterclaim for divorce on the grounds of cruelty and asked for custody of the children, that a trust be provided for the children in lieu of some other provision of support and that Plaintiff be awarded no alimony.

DISPOSITION IN THE LOWER COURT

The lower court granted the divorce to the Defendant Mervyn K. Cox, Cross Appellant. The court initially awarded custody of the four minor children to the Defend-

ant but thereafter modified its decision and granted custody to Plaintiff Dixie S. Cox who was the original Appellant in this action.

After changing its decision to grant custody of the children to Plaintiff, the court also ordered Defendant to pay to the Plaintiff the sum of FIVE HUNDRED DOLLARS ($500.00) per month as child support. It granted to Plaintiff a total cash payment in the nature of alimony and property settlement in the amount of $65,000.00, to be reduced by $5,000.00 if paid within six months, which was done.

RELIEF SOUGHT ON APPEAL

Defendant and Cross Appellant seeks a reversal of the lower court's modified decision regarding child custody. Plaintiff and Appellant seeks a modification of the property division, child support payments and alimony.

STATEMENT OF FACTS

The following facts in addition to those already contained in Defendant's first brief on file herein and in addition to Plaintiff's Statement of Facts relative to the property division appear pertinent to the matter before the Court.

On February 9, 1973, after having reviewed the evidence and memoranda filed by respective counsel, the lower court awarded a cash amount of $65,000.00 to the Plaintiff to be reduced to $60,000.00 if paid within six months. The court further ordered Defendant to pay

Plaintiff $1,000.00 per month beginning from the date of the order to assist her in moving from the state and establishing her home. (R. 114-115)

Pursuant to the order of the court, Defendant subsequently paid during the six-month period which followed the court's ruling, the amount of $1,000.00 per month.

Thereafter, in final compliance with the court order, Defendant paid the remaining $54,000.00 as a cash settlement to Plaintiff which, together with the $6,000.00 already paid, satisfied the judgment and resulted in a reduction of the property settlement award from $65,000.00 to $60,000.00. Defendant delivered his personal check in the amount of $54,000.00 to Plaintiff on August 8, 1973, several days prior to the expiration of the six-month period, and Plaintiff accepted Defendant's check at that time.

When, on February 18, 1974, the court made an order to have the $54,000.00 check placed in escrow, the check had already been delivered to Plaintiff seven months previous. Plaintiff thereafter cashed the check in spite of the court order and in full satisfaction of the judgment.

After having considered the evidence and proposed findings pertaining to property division submitted by respective counsel, the court in its memorandum decision dated December 14, 1973, further amplified and expounded on its ruling of February 9, 1973, for the express purpose and "to the end that any abuse of discretion be avoided or that any mistake or error with respect to the lump sum alimony award and property settlement" which had been

previously "made by the court might be corrected, modified or amended" and for the purpose of indicating to the parties the basis upon which the award and division was made. (R. 201) The court further found the net assets belonging to the parties and subject to division and distribution to be the sum of $209,743.00 which the court rounded to $210,000.00.

In arriving at its total award of $69,500.00 (Mem. Dec. R. 203), the court utilized the recapitulation of assets submitted by Plaintiff and Defendant. Plaintiff's valuation of the properties totaled $290,120.00 (R. 266), while Defendant's recapitulation and valuation totaled $164,787.00, after deducting general debts and obligations owing by the Defendant in addition to those owing on the properties. Plaintiff's brief only makes reference to Plaintiff's recapitulation but fails to recognize the testimony and evidence adduced by Defendant. In addition the cross examination of Plaintiff's appraisal witness disclosed that his valuations of the properties under consideration were inflated and in some instances without adequate foundation or basis. (Tr. 188, 191, 193, 194, 201) The court also heard testimony regarding the remaining debts and obligations owing on the properties, which the court ordered Defendant to assume, as well as testimony regarding Defendant's annual after-tax income and reduction in Defendant's practice due to the arrival of several new orthodontists in the area, (R. 417-418, R. 353-359, Exs. D-3, D-4, D-5) The court had before it a statement of Defendant's debts and commitments totaling $20,100.00 in addition to those debts and obligations relating to property. (R. 261)

With regard to valuation of the properties, the court also had the benefit of the 1973 Utah State Tax Commission valuation of which the court took judicial notice during its hearing on November 16, 1973. (R. 200, 241) The State Tax Commission valued the parties' interest in the properties as follows: The Bentley and Sullivan farm, $36,210.00; Syphus farm, $18,469.00; home, $63,297.00; Kolob property, $1,507.00; Pine Valley lot, $2,830.00; Kemp Korner property, $79,843.00; carwash, $7,328.00. (Based on a factor of 5 times the assessed valuation.)

At the conclusion of its memorandum decision, the court referred to the figures it had used in arriving at its award: (R. 204)

> "They [the figures used] were and are an assistance to the trial court in testing the award in fact made by the court and which decision the court is not persuaded or constrained to alter, amend or change in any respect. This includes the motion by the Plaintiff to award her an in-kind distribution consistent with the net value held by the parties in the Bentley and Sullivan farm. Under the facts of this case, the court is persuaded that the interests of the paries, including their present and future equanimity, dictates an immediate, clean and total division of interests and equities and a cauterization thereof by legal fiat."

In addition to the foregoing facts regarding property division and alimony Defendant further supplements his statement with the following facts pertaining to custody.

Notwithstanding Plaintiff's representation in her brief to the contrary, the record contains numerous references which would indicate immoral conduct on her part in the presence of the children. Defendant refers the

Court to pages 6, 7 and 8 of his first brief wherein this conduct is described. (Tr. 93, 94, 98-99, 101, 204, 291-296, 315) Plaintiff admitted that the man with whom she associated was a married man at the time of their intimacies. (Tr. 111) This is the same man with whom Plaintiff kept company in the presence of her children on numerous occasions.

The immoral conduct of Plaintiff and considerable time spent away from the home and children resulted in neglect of the children. (Tr. 65, 101, 110, 129, 282, 284, 301, 313, 322, 336, 345, 346, 348, 393, 423)

Plaintiff's ten-day absence from the children in June of 1972 was not by mutual agreement with Defendant. (Tr. 436) Defendant, to the contrary, tried to persuade Plaintiff to stay home with the children. Defendant was unaware that Plaintiff would be gone for a ten-day period. (Tr. 436)

Plaintiff's statement of facts makes reference to testimony of Plaintiff's 15-year-old sister who claimed some impropriety on the part of Defendant toward her; however, Defendant denied having had any such contact with her. (Tr. 461) The only time Defendant ever danced with Plaintiff's sister was when Plaintiff was teaching dance to a man in the kitchen of the Cox home and her sister came into the living room and asked Defendant to dance with her. Nothing improper took place. (Tr. 461) On another occasion Plaintiff's sister kissed Defendant on the cheek at the dinner table in front of the family and thanked him for straightening her teeth. (Tr. 461)

Plaintiff also makes reference to a former employee of Defendant and suggests that there may have been an improper relationship between Defendant and that employee; however, Plaintiff's own citations to the record clearly indicate that there is no substance to that suggestion. (Tr. 438, 439, 451)

In its oral ruling on February 9, 1973, the court found as follows:

> "Now, the court finds that in the course of the testimony Mrs. Cox, Dixie S. Cox, testified that as soon as this divorce was completed it was her intention and desire to leave Washington County and to move to Boise, Idaho, for the purpose, as soon as legally possible, of marrying a man by the name of Hamilton. The court finds on the proof, without any specific finding of any gross impropriety, although in the judgment of this court the evidence may support and does support poor judgment in having Mr. Hamilton associated as close as he was, to say the least, but the court's concern about taking those children from Washington County in the immediate future and taking them to Boise, Idaho, and in a short period of time introduce them into a new home, Mrs. Cox having testified that she intended to marry this Mr. Hamilton; and the court having further some concern as to the propriety and judgment of some of the actions that the court heard testimony on concerning Mr. Hamilton and the position that he placed the Plaintiff in, the court is going to order that until the month of August, 1973, that the Defendant and Counter-Claimant in this case have the care, custody and control of the minor children; the court finding that to be in the best interest of those children until it makes a further determination as to the stability in your life and as to the fact situations with respect to your plans, Mrs. Cox."

The matter of custody was not considered again until October 5, 1973, at which time the court awarded custody of the four minor children to the Plaintiff without hearing any testimony or making any statement or finding regarding any change of circumstances on which to predicate awarding custody to the Plaintiff, particularly since the court had previously found that it was in the best interests of the children to award custody to their father. The court had also found that Plaintiff had manifested poor judgment and impropriety and lack of stability in her life. Counsel for Defendant argued at that time before the court that there had been no change whatever in the nature or character of the family situation from that depicted to the court at the time it rendered is prior decision and that change of custody would be totally unwarranted and manifestly against the vital interests of the four small children. (Tr. 21)

ARGUMENT

POINT I

PLAINTIFF'S APPEAL FROM THE PROPERTY SETTLEMENT PROVISIONS OF THE DIVORCE JUDGMENT IS PRECLUDED BECAUSE THAT JUDGMENT HAS BEEN SATISFIED IN FULL AND PLAINTIFF HAS ACCEPTED THE BENEFITS THEREUNDER.

The overwhelming weight of authority is to the effect that a party having recognized the validity of a judgment and decree of divorce rendered by the court in a divorce action by accepting the favorable provisions thereof, financial and/or marital, accruing to him thereunder, in the absence of fraud, is estopped from question-

ing the validity of such judgment or decree from and after the acceptance of such benefit or benefits. Here follows a list of some of the relatively recent decisions representing a sampling from various jurisdictions where the general rule is followed: *Sidebottom v. Sidebottom,* 233 N.E.2d 667 (1968); *Bulpitt v. Bulpitt,* 107 Cal.App.2d 550, 237 P.2d 539 (1951); *Peters v. Peters,* 175 Kan. 422, 263 P.2d 1019 (1953); *Spratt v. Spratt,* 140 Minn. 510, 166 N.W. 769, appeal dismissed 140 Minn. 512, 167 N.W. 735 (1918); *Gerbig v. Gerbig,* 60 Nev. 292, 108 P.2d 317 (1940); *Jackson v. Jackson,* 248 Iowa 1365, 85 N.W.2d 590 (1957); *Mason v. Forrest,* 332 S.W.2d 634 (1959); *Larabee v. Larabee,* 128 Neb. 560, 259 N.W. 520 (1935); *Swallers v. Swallers,* 89 Cal.App.2d 458, 201 P.2d 23 (1948); *Moffett v. Moffett,* 142 Kan. 9, 45 P.2d 579 (1935); *Isenhart v. Isenhart,* 207 Or. 365, 296 P.2d 927 (1956); *Clark v. Clark,* 362 S.W.2d 655 (1962); *Murray v. Murray,* 38 Wash.2d 269, 229 P.2d 309 (1951); *Potter v. Potter,* 46 Wash.2d 526, 282 P.2d 1052 (1955).

This Court has followed the general rule that where a judgment is voluntarily paid and accepted, the right to appeal is waived. In the case of *Jensen v. Eddy,* 30 Utah 2d 154, 514 P.2d 1142 (1973), the court held as follows:

> "We are in agreement with the general rule that if a judgment is voluntarily paid, which is accepted, and a judgment satisfied, the controversy has become moot and the right to appeal is waived. This is baesd upon the reasoning that when a controversy has come to rest, the litigation should cease." at 156

While in the *Jensen* case the court recognized an exception to the general rule that acceptance of an amount

pertaining to a separate and distinct claim does not waive right to appeal, this case clearly does not come within that exception.

In the present case the judgment and cause of action regarding division of property are one and the same. The lower court took into account all of the property of the parties and considered several factors which it enumerated in determining what it thought was an equitable division of the property.

Another exception to the general rule not applicable to the present case, was noted by the court in the case of *Sierra Nevada Mill Company v. Keith O'Brien Company,* 48 Utah 12, 156 Pac. 943 (1916). This is not a situation where the amount found in favor of the plaintiff was due her in any event. There was and is a controversy over what amount, if any, she should be awarded.

At no time has Defendant in this case admitted that the amount awarded Plaintiff was due her in any event. There is no stipulation or agreement between the parties which agrees on the amount finally awarded or which recognizes said amount as due, except as the court ordered. It is clear from the record that Defendant controverted Plaintiff's valuation of property in several significant respects. In fact, there is approximately $127,314.00 difference between Plaintiff's and Defendant's valuation of the property to be divided. If the court had followed Defendant's appraisal, its determination of total valuation would have been $45,213.00 less than it actually found, and would have correspondingly reduced the amount awarded to Plaintiff.

That such a controversy over valuation and equitable division of the property existed in the present case is evident in the record. The question now before this Court regarding property division is not merely whether Plaintiff is entitled to a greater or additional sum than awarded her by the lower court but also includes the question whether equity and fairness demand that Plaintiff's award be reduced and whether the lower court abused its discretion in awarding such an amount.

Further, it is not necessary for Defendant to cross-appeal from the judgment to invoke the rule. The court in the *Sierra* case faced this argument squarely and held as follows:

> "But it is said the defendant has prosecuted no cross appeal. That is not essential to the making of cross-assignments in defense and in support of, and merely to hold, the judgment appealed from. What is attacked by the party appealing may, as to him, be defended and held by cross-assignments without cross-appeal." at 20-21

Of particular interest and application to the present case is the court's conclusion in the *Sierra Nevada case:*

> *We think the case within the general rule that a litigant is not permitted to accept the fruits of a judgment and still prosecute an appeal from it. Here the plaintiff voluntarily took advantage not only of a part of a judgment in its favor, but of the whole of it, and accepted payment in full thereof and satisfied and discharged the whole of the judgment. All of the issues and matters and things presented, both by the complaint and counterclaim were merged in, and were determined by the judgment. There is no doubt of that.* And when the

> plaintiff voluntarily accepted full payment of the judgment, not of a part, but of the whole of it, and satisfied and discharged it, not in part, but the whole thereof, it likewise satisfied and discharged everything that was merged in, and that was determined and adjudicated by the judgment. The views herein expressed and the conclusions reached are supported by the numerous cases noted and cited in McKain v. Mullen, 65 W.Va. 558, 64 S.E. 829, 29 L.R.A. (N.S.) 1." at 21-22 (Emphasis added)

The fact that Defendant complied with the lower court's order and judgment with respect to the division of property does not admit that the Plaintiff is so absolutely and unquestionably entitled to the benefits and advanages awarded by the judgment that her right to accept them and keep them cannot possibly be affected by the appeal. Quite to the contrary, Defendant argued in the court below and continues to assert before this Court that he Plaintiff should not have been awarded the amount granted to her by the lower court. Defendant was under an obligation to pay the judgment within six months or be saddled with an additional $5,000 obligation.

POINT II

EVEN IF THE COURT ALLOWS PLAINTIFF'S APPEAL, MODIFICATION OF THE PROPERTY AND ALIMONY AWARD, IF ANY, SHOULD RESULT IN A REDUCED AWARD WHICH WOULD BE IN HARMONY WITH THE EQUITIES OF THIS PARTICULAR CASE.

This Court in the case of *Sorensen v. Sorensen,* 14 Utah 2d 24, 376 P.2d 547 (1963), held with regard to its duty to sustain the trial court's division of property.

> "Unless there is manifest injustice and inequity or a clear abuse of discretion, this court will not substitute its judgment for that of the trial court." at 26

Although the lump sum award as ordered by the court was paid by Defendant in compliance with the court order and voluntarily accepted by Plaintiff as heretofore discussed, Defendant has always taken the position that the award pertaining to property division was excessive and inequitable in light of the attendant circumstances and facts so that if it is to be modified, such modification should result in a reduced award.

In suggesting that the award be increased above one-third of the assets, which plaintiff recognizes as being the general rule in divorce matters, Plaintiff relies on the cases of *Woolley v. Woolley, Lundgreen v. Lundgreen, Tremayne v. Tremayne and Pinion v. Pinion.* For example, in the case of *Woolley v. Woolley,* 113 Utah 391, 195 P.2d 743 (1949), the court granted the divorce to the husband and awarded property along the following guidelines:

> "While a wife is ordinarily granted a divorce for mental cruelty on less provocation than a husband, there may be facts and circumstances appearing to the trial court to present a stronger case for the husband." at 393.
>
> * * *
>
> "In determining generally what a wife is entitled to *when a divorce decree has been granted to the husband,* we have considered one-third as being a fair proportion. This is a relative amount which must, of necessity, vary with the facts of the particular case." at 395 (Emphasis added)

In the case of *Dahlberg v. Dahlberg,* 77 Utah 157, 292 Pac. 214 (1930), the court observed the following:

> "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 fault and wrongs and breaches of the marital relation destroyed the home and forced or brought about the separation."* at 163 (Emphasis added)

In the *Lundgreen* case there was no discussion of a one-third division. That case by no means supports Plaintiff's argument. The court merely held that in addition to the furniture plaintiff had prior to the marriage and her personal articles acquired since the marriage, she should be awarded one-half of the enhanced value of the house after deducting the original purchase price. The record was silent as to the present market value of the house, but it was purchased in 1943 for $395.00. The case was decided only three years later in 1947. There is considerable question as to how much the property would have increased in value over that short period of time and consequently how much would be due the wife as her one-half of the enhanced value after deducting the original purchase value. In the *Lundgreen* case divorce was granted to the husband.

In the cases of *Tremayne v. Tremayne,* 116 Utah 483, 211 P.2d 452 (1949), and *Pinion v. Pinion,* 92 Utah 255, 67 P.2d 265 (1937), divorce was awarded to the wife. There were special circumstances not present in the instant case which were taken into consideration by the court as discussed in Plaintiff's brief.

By arguing that the purpose of the court in dividing property is to permit the parties to reconstruct their lives, Plaintiff seems to imply that it is the Court's duty in this case to divide the property so that Plainiff, regardless of her conduct, may reconstruct her life with her new husband in such a way as to maintain indefinitely the same standard of living she enjoyed with the husband she wronged. This argument is certainly contrary to the court's pronouncements in the *Woolley* case and *Dahlberg* case, supra.

Plaintiff cites the case of *Wilson v. Wilson,* 5 Utah 2d 79, 296 P.2d 977 (1956). In that case, however, the court held that:

> "The court's responsibility is to endeavor to provide a just and equitable adjustment of their economic resources so that the parties can reconstruct their lives on a happy and useful basis. In doing so it is necessary for the court to consider, ***in addition to the relative guilt or innocence of the parties,*** an appraisal of all of the attendant factors and circumstances. . . ." at 83 (Emphasis added)

In the *Wilson* case the court also took into consideration the "dimmed prospects of a favorable marriage and life companionship" for the wife. Obviously, that is not a consideration before the Court in this Case. Again, in the *Wilson* case divorce was granted to the wife and the lower court based its determination in part on the fact that the husband had fallen in love with another woman.

It is easy to see why the court chose to modify the property award in the case of ***Bullen v. Bullen,*** 71 Utah 63, 262 Pac. 292 (1928), cited by Plaintiff. There the prop-

erty awarded the wife had a value of $600.00 as compared to the husband's $20,000.00. In other words, the wife received 1/33rd of the total property of the parties.

Plaintiff also relies on the case of *Ring v. Ring,* 29 Utah 2d 436, 511 P.2d 155 (1973), in support of her argument. In that case the parties, both physicians, had entered into a stipulation where it was obvious to the court that they had agreed that $800.00 was reasonable and necessary to support the family unit and that the apportionment between alimony and child support had been motivated by tax considerations. The court held that it was improper for the lower court to reduce the alimony since the parties clearly intended some of the alimony to be used for child support. In that case the husband was paying $66.66 monthly per child as child support compared to $125.00 monthly per child in the present case. Here the child support award is such that it may well be used by the Plaintiff and her new husband to support the entire family unit.

In the case of *Weaver v. Weaver,* 21 Utah 2d 166, 442 P.2d 928 (1968), cited by Plaintiff, special distinguishing factors which may have justified an equal division of property included the following: (1) the parties had been married 30 years as compared to 11 in the present case; (2) the divorce was awarded to the wife; (3) the wife was totally disabled at the time of the divorce; (4) the wife was not awarded any alimony and she was directed to pay her own attorneys fee and cost.

Plaintiff *incorrectly* states that the facts in the present case indicate that the parties have accumulated $292,-

101.00 since their marriage. The court found that the total value was $210,000.00, which is more than Defendant's evidence showed it to be.

Defendant's appraisal of net worth, including the stipulation as to value at trial which form part of the record (R. 259-261) (Tr. 147, 148, 209, 212, 403, 405, 406, 409, 413, 412, 414, 415) totals $164,787.00 after deducting general debts and obligations of $20,100.00 owing by Defendant other than balance owing on properties. There is a difference of $127,314.00 between Plaintiff's and Defendant's valuations after deducting general debts and obligations owing by Defendant other than the balances owing on properties.

The principal differences in property valuations between Plaintiff and Defendant concern the Bentley and Sullivan farm, the Syphus farm and the home. Respective valuations of the parties' interest in these properties are as follows: (R. 259-261; Plaintiff's Brief 7-8)

Property	Defendant's Valuation	Plaintiff's Valuation
Bentley and Sullivan farm	$ 52,000.00	$104,000.00
Syphus farm	40,000.00	60,500.00
Home	65,100.00	74,500.00
	$157,100.00	$239,000.00
Less Defendant's share of indebtedness in Bentley and Sullivan farm	-37,166.00	-38,000.00
Less Defendant's share of indebtedness in Syphus farm	-34,717.00	-34,717.00
Total	$ 85,217.00	$166,283.00

In the November 16, 1973, hearing (R. 200,241) which was apparently unreported [minute entry reflects fact that parties were heard at length regarding property settlement, R. 241], the court took judicial notice of the recent State Tax Commission adjusted appraisal value which was completed in 1973 on these same properties showing total values of properties for agricultural use and market value. The court noted that the Tax Commission appraisal values are a matter of public record. They reflect the following: [5 times assessed valuation]

Property	State Tax Commission 1973 Valuation
Bentley and Sullivan farm	$ 36,210.00
Syphus farm	18,468.00
Home	63,297.00
Total valuation	$117,975.00
Less Defendant's share of indebtedness according to Defendant	-71,883.00
Net valuation	$ 46,092.00

With respect to these three properties, Defendant's valuation is actually $39,125.00 over that of the 1973 Tax Commission valuation, while Plaintiff's valuation is $121,025.00 over that of the Tax Commission.

We further call attention to the following admission made by Plaintiff's witness as to his appraisals and valuations:

(1) That he did not have any comparable sales upon which to base his opinion of value with regard to the Bentley and Sullivan farm insofar as other farmlands in the immediate area were concerned. (Tr. 188)

(2) That it was possible that one of his comparables was purchased by Bloomington at a premium price in order for Bloomington to acquire the property it needed. (Tr. 191)

(3) That one of his comparables was property sold near the campus of Dixie College which is zoned for multiple housing. (Tr. 194)

(4) That he had appreciated the Syphus property by $61,000.00 even though it had been acquired less than a year prior to the divorce proceedings (Tr. 193)

(5) That the reason he appreciated the Syphus farm to that degree was that it was within the city limits; however, he admitted that at the time the Coxes purchased the property it is possible that it was already within the city limit. (Tr. 196)

(6) That he was unable to find a home of the size and characteristics of the Cox home as a comparable. (Tr. 201)

(7) That if the properties were to be sold, after title insurance and real estate commissions were deducted, the profit would be substantially reduced. (Tr. 197, 205, 219)

Another item concerns the Convertible Bond. In the Record at page 260 the Bond is valued at $1,000.00. Apparently there is an error in the transcript of Defendant's testimony which mistakenly recorded the amount of $8,000.00 rather than $1,000.00. (Tr. 414)

All matters were ruled upon and concluded at the October 5, 1973, hearing except the issue with respect to the court's lump sum alimony award to the Plaintiff and property distribution between the parties. The court ruled with regard to alimony and property division on November 16, 1973, and enumerated the following criteria as the basis of its decision: (Mem. Dec. R. 200-201)

> "There values, in the judgment of the court, must be tested in the light of the respective positions of the parties and determine therefrom whether or not they meet the test of fairness and equal treatment under the standards set down by the cases in the State of Utah [cases cited] and any particular facts and circumstances in this case. To that end, the court considered the additional facts and circumstances in this particular lawsuit:
>
> "1. Consideration of the assets or equity in real property and improvements with large encumbrances remaining to be paid.
>
> "2. The Plaintiff testified and reiterated that she intended to move away from Washington County, Utah, the location of the property and improvements, and to the State of Idaho and to enter into a new marriage contract as soon as legally possible.
>
> "3. The court considered a cash value of Plaintiff's share in the net worth of the parties as opposed to a division in kind.
>
> "4. *The court considered the burden upon the Defendant and his earning ability in paying to the Plaintiff a present day cash award, supporting the children belonging to the parties, and servicing the debts on the property.*
>
> [The court hereafter tested the award as made against the compilation of net assets as determined by the Plaintiff and Defendant respectively and

thereby concluded that the award made by the court was comparable.]" (Mem. Dec. R. 203) (Emphasis added)

The Defendant testified at trial that the Bentley-Sullivan farm contained about 43 acres when purchased and that approximately three acres were washed down the river by flood. He also testified that only about 20 to 21 acres of the farm could be irregated and that almost all of the property was wasteland. (Tr. 407)

The Court also considered the fact that Defendant's practice has been substantially curtailed with the recent location of several new orthodontists in the area. (R. 417-418) When the parties first moved to St. George, there were no other orthodontists practicing between Provo and Las Vegas. (R. 417)

Defendant's annual after-tax income during the three years prior to the divorce was $15,100.00. (Exhibits D-3, D-4, D-5; R. 353-359) Out of that income he is now required to make payments toward considerable debts and obligations, as well as $500.00 a month payments for child support.

It is Defendant's position that on the basis of the value of the property as submitted by Defendant and the 1973 Utah State Tax Commission valuation, the lower court should have awarded Plaintiff less property settle- and/or less support money for the children. Moreover, in other jurisdictions, courts have awarded the innocent spouse more than the normal share in cases of extreme mental cruelty or adultery. *Dallman v. Dallman,* 164 Cal.2d 815, 331 P.2d 245 (1958).

In view of the conduct of the Plaintiff in this case, it seems grossly unfair for the court to award her in excess of one-third of the property and to leave the innocent spouse under an extreme financial burden. By so doing, the court appears to reward and condone such misconduct.

In making its determination of property value and subsequent award, the court below should have given greater weight and consideration to the following:

(1) The admissions of Plaintiff's witness which were evidence of his inflated appraisals.

(2) The State Tax Commission appraisal of which the court took judicial notice and which was considerably less than appraisals of both parties.

(3) The wrongs and breaches of the marital relation committed by Plaintiff which destroyed the home and forced or brought about the separation.

(4) The hardship to Defendant in paying a lump sum payment in addition to being left with responsibility of servicing the debts on the properties and child support.

POINT III

IT WAS AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO REVERSE ITS ORIGINAL CUSTODY ORDER WITHOUT A SPECIFIC FINDING THAT THE REVERSAL WAS JUSTIFIED BY A CHANGE OF CIRCUMSTANCES.

In addition to the matters discussed by Defendants in his initial brief, we submit there was no basis for the court reversing its initial order as to custody of the minor children.

The court made specific findings in its ruling on February 9, 1973, at which time it awarded the divorce to Defendant, as well as custody of the four minor children. (R. 113-14) The subsequent change of custody without a showing of change of circumstances was clearly an abuse of discretion. The court specifically found on the proof supported by the evidence presented that the Plaintiff had exercised poor judgment in having Mr. Hamilton associated as close as he was. The court further expressed concern as to the propriety and judgment of some of the actions that the court heard testimony on concerning Mr. Hamilton and the position he had placed the Plaintiff in. The court also expressed concern about the fact that the Plaintiff planned to take the children from Washington County in the immediate future to Boise, Idaho, and to introduce them into a new home and that she planned to marry this Mr. Hamilton.

After finding it in the best interest of the children to award custody to their father upon the above stated considerations, it was encumbent upon the court to require a showing of change of circumstances which would justify a change of custody before that change was made.

This Court held in the case of *Crofts v. Crofts,* 21 Utah 2d 332, 445 P.2d 701 (1968), as follows:

> "[T]he finality of a judgment must be respected in order to insure the rights of parties. Section 30-3-5, U.C.A., 1953, provides:
>
> " '* * * Such subsequent changes or new orders may be made by the court with respect to the disposal of the children or the distribution of property as shall be reasonable and proper.'
>
> "This, however, requires some good cause based upon a change of circumstances for modifying the decree and cannot be done by interpreting the language thereof." at 334-335.

Counsel for Plaintiff specifically stated to the court at the October hearing when order as to custdy was reversed that Plaintiff's testimony would show that her circumstances had not changed with regard to her intention to move. (Tr. 18) No further representation as to change of circumstances was made by Plaintiff's counsel and no showing of change of circumstances was required by the court. Counsel for Defendant, on the other hand, took the following position:

> "Now, it is our position, your Honor, that there is not one scintilla of evidence in the record or before this court to show any change of circumstance, which I am sure was anticipated and toward which the court directed the character of its judgment back in February of this year. . . . I think the record is clear and replete with evidence which shows that the total best interest of those children is to remain with their father and if at some time in the future the mother establishes a home some place where she can show at that time a home life and home situation which is condusive to the best interest of the children, she, as in all cases of this kind, has the right to petition the court for a modification of he decree.

SUMMARY

We respectfully submit that if the judgment of the lower court regarding property division, alimony and child support is modified, such modification should result in a reduced award.

The children should be returned to the custody of their father consistent with the original order of the trial court.

Respectfully submitted,

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