1986

Rosemary Wiscombe v. J. William Wiscombe : Reply Brief

Utah Supreme Court

Aaron Alma Nelson; attorney for respondent.
Gordon A. Madsen, Robert C. Cummings; attorneys for appellant.

IN THE SUPREME COURT OF THE STATE OF UTAH

ROSEMARY WISCOMBE, :

Plaintiff/Respondent, :

vs. : Case No. 20333

J. WILLIAM WISCOMBE : 860081-CA

Defendant/Appellant. :

REPLY BRIEF

APPEAL FROM A JUDGMENT OF THE THIRD JUDICIAL
DISTRICT COURT IN AND FOR SALT LAKE COUNTY
HONORABLE J. DENNIS FREDERICK, JUDGE

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IN THE SUPREME COURT OF THE STATE OF UTAH

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Appellant is obliged to point out matters both fact and law, stated in respondents brief which are misleading, nonfactual, or both.

Beginning in respondent's Satement of Facts he alleges appellant "misrepresents the fact with no support in the record and introduces material for the first time on appeal which was not a part of any record before the trial court." He then indicates what the "true facts" are. His first stated fact is that at the time of the divorce "the parties owned real property having a value of $780,200.00 based on estimates and appraisals provided by William (R. 85-91)." (Respondent's Brief P. 3-4) Those "estimates and

appraisals" were pencilled notes of the defendant attached to his affidavit of income expenses and needs, etc. No appraisals as such are in the record. In arriving at the $780,000 respondent totally ignores the statements of debts relating to those properties also a part of those same estimates or exhibits. The indebtedness totals $542,800. (R. 88) Moreover those same exhibits demonstrate that the home was acquired in 1977, the Evanston property acquired in 1973 and the Midvale property acquired in 1978 and that based on the acquisition costs as opposed to supposed market value appraisal estimates after attributing the respective indebtedness chargeable against each unit that there was a positive equity of $17,132 in the Evanston parcel, a negative balance in the Midvale property of $4,242 and a value in the home of $10,450. The net value therefore as to the two rental units is $12,890 as opposed to the $10,450 in the home awarded to plaintiff (R. 89, 90 and 91). Plaintiff/ Respondent attempts to suggest with the isolated figure of $780,000 that the property settlement was outlandishly disproportionate. In fact that division was stipulated to by the parties openly as to who was to receive what property and who was to pay what debts.

Respondent next cites the divorce decree claiming that the residence given to the plaintiff/respondent had a

value of approximately "110,000" and cites the record at page 100 and 101. There is no stated value in that reference in those paragraphs of the decree but only an itemization of the mortgages against the property together with the language directing the defendant/appelant to pay the first mortgage and the plaintiff/respondent to pay the second mortgage. Going back, however, to the estimates earlier alluded to (furnished by the defendant) the real equity in that property was either the $10,450 noted above or $125,000 based on the defendant's estimate as to the fair market value. Perhaps respondent was rather relying on his client's resale of the residence for $110,000 as asserted in her Answers to Interrogatories (Addendum to Appellant's Brief, p. 4)(Respondent's ambivalence about those Answers to Interrogatories will be treated more fully hereinafter). The decree further provided in paragraph 8 (R. 117 and 118) that the defendant pay the plaintiff the additional sum of $5,000 "as additional distribution of the parties' real property" within six months from the date of decree which in fact the defendant did pay and is acknowledged by receipt and partial satisfaction dated 27 April 1982 (R. 130).

Repsondent then continues William (plaintiff/ appellant) was ordered to pay the first mortgage on the residence having a balance of approximately $52,800 and

continues "the decree specifically stated that this was a property settlement and that Rosemary (plaintiff/ respondent) would be entitled to only $1 per year as alimony" citing the record at page 118. That citation makes no such specific allegation that this was a "property settlement" but rather as the decree itself provides it was an assignment of debt just as the second mortgage debt on the residence was assigned to the plaintiff and other debts of the marriage as well as the outstanding indebtedness on the rental properties awarded to the defendant were respectively disposed of. Counsel for respondent thereafter continually refers to this payment of mortgage as a "property settlement." There is no language in the decree so characterizing it.

Respondent then cites her Answers to Interrogatories as authority to assert that plaintiff/ respondent sold the family residence for a "small downpayment" and specifically states "the buyers did not assume the mortgage on the property and Rosemary (plaintiff/respondent) is still liable for those payments." Those answers are found in the Addendum to Appellant's Brief, pages 3-6, as follows:

"Question 4(e): Was the said home conveyed to buyer by Uniform Real Estate Contract, deed and mortgage or trust deed?

"Answer: Uniform Real Estate Contract.

"Question 4(f): Was there any escrow account established for the payment of the underlying mortgages?

"Answer: Yes.

"Question 4(g): What arrangements were made with regard to those mortgages and payment therefore?

"Answer: Escrow agent makes payment to Deseret Federal Savings and Loan. [At this point it should be observed that the first mortgage and second mortgage on the family residence were in favor of Deseret Federal Savings and Loan as spelled out in the divorce decree. Paragraph 3 (R. 116)]

"Question 4(i): What notice of sale did you give to the lending institutions holding the mortgages?

"Answer: None.

"Question 4(j): Who has made the payments on both mortgages from that date to the present.

"Answer: Alder-Wallace, Inc., as escrow agent for Rosemary T. Siggard."

From the foregoing it is apparent that the payments from the buyer of the property go directly to pay the mortgage payments through the escrow agent and that no notice of sale was furnished by plaintiff/respondent to the lending institution when she resold the home. While it is probably true that plaintiff/respondent is still signed on the original first and second mortgages on that property for that matter so also is the defendant/appellant. The truth of the matter is that plaintiff/respondent's buyer has from the time of the purchase of the property, September 5, 1981, been the party actually making the payments and he does so because

he is obligated to do so. Defendant/appellant attached to his addendum a copy of the actual real estate contract between plaintiff/respondent and Mr. Jose N. Roco to further corroborate those Answers to Interrogatories and as noted in our intitial brief there is substantial language in that contract assuming the mortgages and holding the plaintiff/respondent harmless from those obligations. Plaintiff/respondent wishes to have those documents stricken because they never "became a part of the record" below and that is essentially appellant's point. We never have had an evidentiary hearing. Judge Frederick has never permitted us to produce that evidence to impeach the mere profers presented by counsel for plaintiff/respondent before Commissioner Peuler. What plaintiff/respondent succeeded in keeping out below he wishes to keep this Court from noticing on appeal.

It is perhaps appropriate at this point to consider respondent's motion to strike (point 3 of respondent's brief) the affidavit of Sandra N. Peuler which he also claims was unsigned and outside the record. On that matter his memory is apparently short. The original of that affidavit is indeed a part of the record but not the record in the District Court but rather the record of pleadings in this Court attached to appellant's Motion for Summary

Disposition heretofore filed in this appeal. It is found as an exhibit or attachment to said Motion. Respondent's counsel further argues that the Peuler affidavit is unsigned and unacknowledged which with regard to the copy in appellant's Addendum is true. We accordingly attach as an Addendum to this Reply Brief a xerox copy of the original that is a part of the record before this Court showing it to be both signed and indeed acknowledged.

Returning to respondent's statement of "true" facts he next asserts that his client took the downpayment received on the sale of the home in Holladay to purchase a condominium in St. George and cites her Answers to Interrogatories. A reference again to those Answers shows that she received $30,000 down from the sale of the home, the purchase price for the condominium was $79,000, and that plaintiff/ respondent paid $1,000 down on the purchase of that St. George condominium. So contrary to her counsel's assertion that she used "the downpayment" to buy the St. George condominium she actually used one-thirtieth (1/30) of the downpayment on such purchase (addendum to appellant's brief pages 4, 5 and 6).

Respondent next asserts that his client was "forced" to lose her condominium in St. George because of non-payment by appellant. Both parties agree that when

plaintiff/respondent sold the Holladay home and moved to St. George defendant/ appellant continued to pay her the sum of $600 a month as extra money by way of additional support (and not the $578 per month required by the decree to be applied on the first mortgage) through June of 1983 and that he then reduced the extra supplemental payment to $300 a month through November, 1983 (R. 116 and 237). In her Answers to Interrogatories plaintiff/respondent admits that she remarried May 18, 1983 and moved to her new husband's home which was purchased at the time of the marriage (Addendum to appellant's brief, page 7). She was then asked what efforts were made to refinance the contract on the sale of the home in Salt Lake to get her full equity out. She answered none. She was asked if any efforts were made to refinance the equity in the condominium, and again answered no. She was asked what was the status of the foreclosure on her St. George condominium and replied "none. Quit-claim deed was given to original seller, Nixon and Nixon, Inc." (Addendum to appellant's brief, 7 and 8). In short, contrary to her counsel's assertion of being <u>forced</u> to sell she did in fact remarry, repurchase a new home, deed back to her condominium seller the condominium and made no efforts to do any refinancing of either the condominium or her contract on the Salt Lake home. In short, the claim that non-payment by

defendant/appellant caused the loss of the condominium simply is not true.

Respondent then says "William's attorney did not say at any time in the hearing before Commissioner Peuler that he does not accept the Commissioner's recommendations or that he desired a further hearing before the District Court." He then quotes that part of the record before Commissioner Peuler in which she announces who the judge would be to consider any further hearing, to wit Judge Frederick, and makes reference to the Commissioner's own minute entry which says "Deft did not accept recommendation." (R. 241 and R. 137) By quoting those very items respondent is acknowledging that the Commissioner at least was aware and received communication from defense counsel that the recommendation was not accepted and the Commissioner indicated to counsel who the judge would be before whom further proceedings would be had. Such an announcement would be needless or superfluous if counsel had been silent or had assented to her recommendations. In sum therefore, even though the transcript of the hearing before Commissioner Peuler is incomplete on its face as earlier noted in our original brief such of the record as is available corroborates appellant's rather than respondent's position on this point. Moreover, the affidavit of Commissioner Peuler

would appear conclusive on the matter as follows:

> Such notice or communication of disagreement or nonconcurrence has never been required by Commissioner Peuler to be submitted in writing. Frequently the nonconcurrence was announced in open court at the time the recommended order was announced, in which case such nonconcurrence would be noted in the minute entry for that date. Such a disagreement or nonconcurrence on the part of the defendant in the case of Wiscombe v. Wiscombe was made by counsel in open court and so noted on Commissioner Peuler's minute entry in that matter dated August 9, 1984, a copy of which is annexed hereto as Exhibit A. (Emphasis added)(Addendum to appellant's brief page 10)

Finally, in his Statement of Facts section counsel for plaintiff/respondent says "William's attorney did not claim in those objections (referring to the objections to the judgment submitted to Judge Frederick) that he gave oral notice to the Court and Rosemary's attorney that he would not accept the Commissioner's recommendation and he made no such claim until appeal to the Supreme Court." (He cites the record pages 151 to 155 which is Defendant's Objections to [Judge Frederick's] Proposed Order.) Perhaps he did not read the following language on page 152: "The Record discloses that a Minute Entry Summary of the proferred evidence and proposed recommendations of Commissioner Peuler of August 9, 1984, was in the file together with the Entry of the Notation that the undersigned counsel for plaintiff did not accept or consent to those recommendations, all on the face of the

document." (Emphasis added)(R. 152) Indeed counsel for plaintiff/ appellant objected on the basis that he had refused to accept the Commissioner's recommendation ab initio and that refusal so appears on her minute entry. (Addendum to Appellant's Brief, P. 11, 22).

Point 1. RESPONDENT'S POINT 1 MISCONSTRUES RULE 8(d) OF THE DISTRICT COURT'S RULES OF PRACTICE.

In his point one, counsel for respondent imposes a requirement on Rule 8(d) of the Third District Court Rules that is simply not there. In this matter when argued in front of Judge Frederick, counsel for plaintiff/respondent contended that Rule 8(d) required that a Notice of Refusal to Consent to the Commissioner's Recommendation had to be in writing served on opposing counsel as has already been treated in appellent's original brief. When the Motion for Summary Disposition was submitted to this Court respondent's counsel retreated from that position and complained only that he had not received actual notice of the refusal. Now in his brief he is taking the new tack that he got no actual copy of the minute entry of Commissioner Peuler, therefore somehow was unaware of what happened in open court in front of Judge Peuler and therefore got no actual notice of plaintiff's counsel's refusal to consent to the Proposed Order until some fourteen days later when the Notice of the hearing in front

of Judge Frederick was sent to him. This superimposes on Rule 8(d) a requirement that written notice of the Commissioner's recommendation is required to be served on Counsel. Such an assertion flies directly in the face of Commissioner Peuler's own affidavit as to what the usage in her courtroom was both prior to and following the adoption of Rule 8(d) as detailed in our original brief. It also thoroughly impeaches respondent's counsel's assertions that the undersigned now admit no written notice was given and that we are now making claim for the first time on appeal of oral notification. Commissioner Peuler received oral notification in open court, that matter was raised in front of Judge Frederick in the objections to judgment (R. 152) and has been reiterated both in the Motion for Summary Disposition and in the original brief on appeal.

Respondent's repeatedly stating that the "transcript" bears no record of the undersigned's refusal to accept the Commissioner's recommendation (when that "transcript" is obviously incomplete on its face) simply won't wash in view of Commissioner Peuler's affidavit saying that the undersigned did in fact so notify the Court in open court at the time. Moreover it is further controverted by the Commissioner's own minute entry. Finally, the only rational explanation as to why the Commissioner would

identify Judge Frederick as the judge to hear further proceedings would have to be grounded on a basis of nonconsent. There would need to be no notice to counsel as to whom the Judge was to be, if in fact her recommendations had been accepted. No wonder, of course, that counsel for respondent wished to have the Peuler affidavit stricken. No wonder as well that he tries to explain away the minute entry with the phrase "It is unknown why this notation is in the record", but then volunteers, "it did not result from any statement in open court by William's attorney." (Respondent's Brief p. 13) and just baldly asserts no such statement was made in front of Rosemary or Rosemary's attorney. We don't fault respondent for his memory as to what did or didn't take place but we do affirmatively assert that it is not for him to claim that what is in the record didn't in fact happen. That goes beyond the simple matter of memory. With regard to the transcription of the tape there isn't just the issue of its being prematurely being "turned off"but also there are statements in that transcript that show that the transcriber was unable to determine what was being said and therefore repeatedly inserted the words (inaudible) or (unaudible) and we once again reassert that on its face therefore, a reading of the transcript shows it to be incomplete.

Furthermore, it should be noted that Rule 8(d) of

the Rules of Practice provides that a party objecting to the recommendation of the Commissioner "shall, within five (5) days of entry of the Commissioner's recommendation, provide notice to the commissioner's office and opposing counsel that the recommended order is not acceptable." (Emphasis added)

Rule 58A(c) provides that the judgment is "entered" when the same "is signed and filed." The aforesaid Minute Entry was filed, but never signed by Commissioner Peuler and therefore was never entered. Therefore, the five-day period never began to run, certainly not before appellant requested in writing a hearing before Judge Frederick and served a copy on respondent.

The Rules of Practice do not supersede the Utah Rules of Civil Procedure (see Rule 2.1 of Rules of Practice). By enacting the Rules of Practice, there was no intention, we believe, to deprive a litigant of any substantial right granted him by the Utah Rules of Civil Procedure. In hearings, under the Utah Rules of Civil Procedure, a number of safeguards are built in to prevent just the very kind of problem that has given rise to this appeal. Further, under the Utah Rules of Civil Procedure, written orders, judgments and decrees must be served under Rule 2.9 of the Rules of Practice and litigants have a clear opportunity to know the exact text of the order being entered against them and are

given knowledge as to when an order will be entered. This was not observed in this case.

Furthermore, in proceedings before the Court, litigants are granted ten days (not five) to file a motion for a new trial, to modify or amend a judgment or other related relief. The procedure before the Commissioner should not be more restrictive. To the extent procedure before the Commissioner is more restrictive or harsh than that which prevails before a judge it is invalid as being in opposition to the Utah Rules of Civil Procedure, and furthermore is a result that was never intended, and the procedure before the Commissioner should not be interpreted to even bring about such a result in the first place.

We respectfully submit that the procedure adopted for the use of a commissioner in the district courts was intended to simplify handling of domestic relations matters. It was not intended to deprive litigants of any of the rights afforded them under the Utah Rules of Civil Procedure, nor to become a trap to litigants. The Rules of Practice themselves provide that strict compliance can be waived in the discretion of the court to prevent manifest injustice. See Rule 15.5 of Rules of Practice.

We respectfully submit that Commissioner Peuler has adopted a reasonable procedure for conducting her affairs as

set out in her Affidavit and that the defendant fully complied therewith. The plaintiff on the other hand is asking for an erroneous, but in any case very strict interpretation of said Rule 8(d), and if it is to be "strictly" interpreted, then defendant is entitled to have the word "entry" "strictly" defined as noted above, and accordingly the Commissioner's Recommendations have never been "entered" within the meaning of the Utah Rules of Civil Procedure, and the five day period never did begin to run.

Point 2. RESPONDENT'S POINT II MISSTATES THE IMPACT OF DISCOVERY FOLLOWING THE COMMISSIONER'S HEARING AS IT RELATES TO ACTUAL NOTICE.

Respondent's attorney says in point two of his brief, "William's attorney does not claim that the Answers to Interrogatories contained any notice that he would not accept the recommendations of the Commissioner." (Respondent's Brief page 14) Perhaps counsel meant to say that the Interrogatories themselves have nothing in their express verbiage saying this is notice of nonconcurrence. Otherwise the sentence is meaningless. In any event, it is clear that discovery itself would be fruitless if defendant/ appellant had consented to the Commissioner's recommendations, and the act of pursuing discovery itself constituted notice.

Nevertheless, respondent goes on to argue that the Interrogatories "are not part of the record and they should not be considered by this Court" (Respondent's Brief pages 14 and 15). He cites no authority to claim discovery responses are not part of the court records nor does he quarrel with the fact that the appropriate certificates were filed with the District Court showing the Interrogatories had been served and the Answers had in turn been served (Addendum to Appellant's Brief pages 21 and 25). Respondent cites no law in making that remarkable statement and one wonders for what purposes the Answers to Interrogatories do form a part of the record since he cites those very Answers to Interrogatories in his Brief at pages 4 and 5. Are they a part of the record for his purposes but not for the appellant's?

The assertion made by respondent's counsel that Answers to Interrogatories herein are "not part of the record" arises we suppose from the recent change in the Rules of Procedure that provide that counsel serve Requests for Admissions and Interrogatories and Answers thereto on parties and file only with the Clerk of the Court a certificate indicating such were served somehow now means technically they are not part of the "record." The absurdity of that argument, however, is manifest in the situation where if a Request for Admission is admitted or denied in documents

served on counsel the receiving party cannot rely thereon because somehow the original response has not been filed with the clerk and hence is not a part of the "record" and is therefore not an admitted fact or for that matter a denied fact. Indeed the Request for Admission is a meaningless gesture. By the same token Responses to Interrogatories would be equally meaningless and there would, of course, be no need for them to be executed, acknowledged or sworn to by appropriate corporate officers if addressed to such an entity or otherwise because none of the material found therein is chargeable against the party so responding since they are not technically part of the "record". It would make such answers equivalent to depositions and require some further procedural requirement that they have to be filed and "published" like depositions before becoming part of the record. Since there is nothing in the rules providing for publishing of Answers to Interrogatories or Responses to Requests for Admissions, counsel's statement has effectively wiped out the usefulness of Interrogatories and Requests for Admissions as a discovery device. The undersigned maintains this Court will reject such a narrow interpretation.

Counsel for respondent then makes the curious argument that since the Courts in domestic relations matters retain continuing jurisdiction, the mere filing of

Interrogatories is no indication that a recommendation of a Commissioner is not accepted. It apparently makes no difference to him therefore that the clear import of all of the questions making up the body of those Interrogatories relates exclusively and solely to the facts involved with the matter on which the Commissioner has ruled. Curious it is that discovery pertaining to the Commissioner's ruling and the facts presented to her somehow must be construed as ongoing investigation for some future Order to Show Cause. Such an interpretation stretches credulity.

Point 3. RESPONDENT'S MOTION TO STRIKE IS UNWARRANTED

Respondent's brief quarrels with the "unsigned affidavit" of Commissioner Peuler as referred to earlier in this brief. As noted above, the original signed affidavit is already a part of the record in this court and a copy is attached hereto, and does in fact reflect the appropriate usage and interpretation of Rule 8(d) of the Third District Court Rules of Practice and is therefore highly germane and ligitimately a matter for consideration by this Court.

Moreover, the Real Estate Documents attached in the addendum of our principal brief were there for this Court's convenience and were corroborated by a recorded Notice of Contract. Respondent did not want the trial court to see the

contract of sale (Addendum pages 13-16) and does not want this Court to see the same, because it points out rather clearly that the buyer of respondent/defendant's Holladay home did in fact assume the mortgages payments and executed a hold harmless agreement with plaintiff/respondent indemnifying her in the payment of both mortgages. Admittedly that contract is not a part of the record below solely and only because Judge Frederick refused to permit appellant to go forward with evidence. It is placed as an addendum to the brief here to show this Court that a legitimate issue of fact going to the heart of this controversy could have and should have been allowed to be raised in the Court below. Of course that document completely discredits respondent's repeated assertions that his client alone is liable on that mortgage, so his reluctance to have it before this Court is understandable.

The aforementioned Uniform Real Estate Contract is particularly pivotal in view of what Commissioner Peuler herself says regarding whether or not plaintiff/respondent had been relieved from paying the mortgage obligation:

> "THE COURT: I think that perhaps if she had sold the home outright and relieved herself of that mortgage obligation, I might be persuaded that the outcome may be different; but it is my belief that as long as she is obligated on these mortgage payments then he should continue to comply with the requirements of the divorce decree . . . " (Emphasis added)(R. 238 and 239).

Point 4. JUDGE FREDERICK'S ORDER DOES NOT CONFORM TO COMMISSIONER PEULER'S RECOMMENDATIONS.

Respondent indicates, and the record indeed discloses, after the hearing in front of Judge Frederick he ex parte filed an affidavit claiming $1,400 in attorney's fees and submitted an Order as to form to Commissioner Peuler, leaving the attorney's fees amount blank and asking the commissioner to fill in what she chose to award by way of an attorney's fee as indicated in his letter of October 15, filed with the Clerk of the court October 19, 1984, (R.146). What his argument neglects to say is that there is nothing in the transcript of the proceedings before Commissioner Peuler that shows attorney's fees were even alluded to by way of profer, demand, or otherwise and they were not. Moreover there being no hearing in front of Judge Frederick on the issue of attorney's fees counsel is now proposing to suggest that this Court should affirm a decree based upon the Commissioner filling in the amount following the hearing in front of Judge Frederick based solely upon his self-serving affidavit filed after the hearing in front of Judge Frederick largely because he asked for $1,400 and only got $150. He is asking this Court to ratify his doing indirectly what he failed to do and probably wouldn't have succeeded in doing directly.

Far more serious, however, in Point 4, counsel for

respondent asserts that the Order is in conformity with the Commissioner's recommendations with regard to a purported mortgage on the Evanston property and cites a part of the Commissioner's holding in that regard which on its face indicated that the Commissioner, while leaning in the direction requested by Counsel for respondent, indicated she didn't have sufficient facts before her to modify the decree. Commissioner Peuler stated as follows: "And if the plaintiff feels there is sufficient equity there to protect, I think at that point, she is probably going to have to come in and ask that the decree be modified." (R. 239) That statement by itself implies that the Commissioner anticipated further hearing either before herself or Judge Frederick. But the matter was broached again later by counsel for respondent as follows:

> "MR. NELSON: My only question, Your Honor, would be as to the mortgage. It's by his own refusal to obey the Courts degree [sic] that she's in the position she is in now. It seems to me that we shouldn't be having to ask the Court to modify the decree when he's the one who made it impossible to live by.
>
> THE COURT: Well, I guess the real problem that I have with that right now is that I don't know what the liability was on that rental property at the time the parties entered into this agreement, and I certainly don't know what the liability is now, so I don't know what changes it would be.
>
> MR. NELSON: You're absolutely right. I apologize for that. You're absolutely right.

THE COURT: And I think -- well, what I was going to say, is that I think it's going to take some further action before the Court can make a determination.

MR. NELSON: I think you're right." (R. 240)

With regard to that substitute mortgage on the Evanston property the undersigned argued to the Commissioner that if indeed that substitute mortgage was to cover respondent's equity in her home and guarantee that the plaintiff/appellant pay the first mortgage on her home that with the sale of the home and the assuming of the mortgage thereon by her buyer there would no longer need to be security to guarantee payment of the mortgage since a third person had assumed it. (R. 236) The Commissioner, of course, did not accept that argument, did not choose to view the facts as appellant/defendant argued them, partly because she did not have the Uniform Real Estate Contract referred to above before her.

At any event, for counsel to argue as he does at Point 4 that the Commissioner was prepared to recommend that a mortgage on the Evanston property justifying his putting such an express paragraph in the Order that he had Judge Frederick sign (paragraph 2, R. 148, 149) is simply not supported by the record of the proceedings in front of Commissioner Peuler.

Respondent finally argued that the Commissioner's

ambivalence as we have just noted above was whether the property to be mortgaged was Evanston property or Midvale property but he cites nothing in the record to demonstrate that and indeed there is no discussion along those lines to be found. It is further significant, that in his letter of transmittal to Commissioner Peuler (R. 146) counsel for respondent does not point out that he has put in a new paragraph requiring the execution of a mortgage on Evanston property. He refers rather, only to his Affidavit for Attorney's Fees and a blank in the paragraph for her to fill in the dollar amount. In short he turns the language of the Commissioner's recommendation: "Defendant is obligated to do what the divorce decree required him to do." (R. 137) into "Defendant is hereby ordered to deliver to plaintiff a mortgage or trust deed on the real property awarded to defendant at 1201 Sage, Evanston, Wyoming, and the amount of the first mortgage on plaintiff's house, 4612 Belmour Way, Salt Lake City, Utah, as required by the original decree of divorce." And he does that in spite of the foregoing language of the Commissioner indicating her unwillingness so to do for lack of sufficient facts.

Point 5. THE JUDGMENT WAS NOT CORRECT ON THE MERITS.

Without reviewing again respondent's inaccurate account of the "true facts" which are not true at all (which

plaintiff purportedly summarizes in Point 5), the truth is this matter never has been heard on the merits. We believe that the established facts show that the payments to which plaintiff was given a judgment by the lower court were in their nature alimony not property settlement. Nevertheless if any doubt exists on the true nature of the payment, defendant was entitled to an evidentiary hearing on that question.

CONCLUSION

For the foregoing reasons together with those advanced in the original Brief of appellant the judgment of the District Court should be reversed, and the case should be remanded for a full evidentiary hearing on the merits before the District Court.

Respectfully submitted,

_____
GORDON A. MADSEN
ROBERT C. CUMMINGS
Attorneys for Respondent/
Appellant

CERTIFICATE OF SERVICE

I hereby certify that I hand-delivered four copies of the foregoing Reply Brief of Defendant-Appellant J. William Wiscombe to Aaron Alma Nelson, attorney for Plaintiff-Respondent, 1300 Continental Bank Building, Salt Lake City, Utah 84101 this _____ day of January, 1985.

_____
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IN THE SUPREME COURT OF THE STATE OF UTAH

ROSEMARY WISCOMBE, Plaintiff, vs. J. WILLIAM WISCOMBE Defendant.	)	AFFIDAVIT OF COMMISSIONER SANDRA PEULER Case No. 20333

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

Sandra Peuler, having been duly sworn upon her oath, deposes and says:

1. That she is over the age of 21 years, competent and makes this affidavit upon personal knowledge.

2. That she is the Domestic Relations Commissioner for the Third Judicial District Court and was acting as such on the 9th day of August, 1984.

3. That the usage in her courtroom, both before and since the adoption of Rules of Procedure for the Third District Court, and particularly as it relates to Rule 8(d), was and is that if a party in a domestic relations matter did not agree or

concur with the said Commissioner's recommended order, the party could so inform the Court at the time; or should such party wish additional time for deliberation before deciding, could do so at any time within five (5) days from the date of the hearing. Such notice or communication of disagreement or nonconcurrence has never been required by Commissioner Peuler to be submitted in writing. Frequently the nonconcurrence was announced in open court at the time the recommended order was announced, in which case such nonconcurrence would be noted in the minute entry for that date. Such a disagreement or nonconcurrence on the part of the defendant in the case of Wiscombe v. Wiscombe was made by counsel in open court and so noted on Commissioner Peuler's minute entry in that matter dated August 9, 1984, copy of which is annexed hereto as Exhibit A.

Sandra N. Peuler
SANDRA PEULER, COMMISSIONER

Subscribed and sworn to before me this 14th day of December, 1984.

Notary Public
Residing at: Salt Lake City, Utah

My Commission Expires:
11-11-87

RULES OF PRACTICE

RULE 2.1. UTAH RULES OF CIVIL PROCEDURE

These rules shall govern the practice and procedure in the District Courts and Circuit Courts of the State of Utah in all matters not specifically covered by the Utah Rules of Civil Procedure.

RULE 2.9. WRITTEN ORDERS, JUDGMENTS, AND DECREES

(a) In all rulings by a court, counsel for the party or parties obtaining the ruling shall within fifteen (15) days, or within shorter time as the court may direct, file with the court a proposed order, judgment or decree in conformity with the ruling.

(b) Copies of the proposed Findings, Judgments, and/or Orders shall be served on opposing counsel before being presented to the court for signature unless the court otherwise orders. Notice of objections thereto shall be submitted to the court and counsel within five (5) days after service.

(c) Stipulated settlements and dismissals shall be reduced to writing and presented to the court for signature within fifteen (15) days of the settlement and dismissal.

Rule 15.5 EXCEPTION

(a) All Court rules of practice and administrative orders effecting procedure and practice in force and existing prior to the effective date of these rules are vacated.

(b) Courts deeming it necessary to re-enact prior court rules or develop rules supplemental to these rules shall do so by administrative order in accordance with Rule 11.1 and Rule 11.2.

(c) Strict compliance with the foregoing rules may be waived by the court, in its discretion, in order to prevent manifest injustice.