

1987

# Wilcock v. Wilcock : Petition for Rehearing

Utah Court of Appeals

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Stephen R. Bailey; attorney for respondent.

Joan Wilcock Dunkley; pro se.

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## Recommended Citation

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**BRIEF**

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APPEAL IN THE UTAH COURT OF APPEALS

10

CKET NO. 870069-CA

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Fred J. Wilcock

Plaintiff/Respondent

-vs-

Court Of Appeals

Joan Wilcock

Case no. 870069-CA

Defendant/Appellant

146

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PETITION FOR REHEARING

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Joan Wilcock Dunkley, pro-se  
acting as counsel in  
own behalf.

Stephen R. Bailey,

Attorney for Respondent/Plaintiff

**RECEIVED**  
NOV 17 1987  
870069-CA  
COURT OF APPEALS

The Utah Court of Appeals is hereby petitioned to re-hear the Appeal made by Joan Wilcock Dunkley. Said Court's decision was filed on November 3, 1987, as written by Judge Judith Billings.

1. The Appeal Court failed to realize that a business partnership was established in 1979, a marriage consummated in 1982, and a termination of the marriage and partnership in 1986. The Court states:

"the parties were married four years," and then states: "During their marriage, the parties began to intermingle their funds in hopes of building a profitable dirt hauling business."

a. The above Court statements are inaccurate and totally misleading because:

(1) The business partnership began in 1979, not 1982.

(2) The business partnership lasted six and one half years, not four years as is inferred by the decision statement concerning comingling of funds. Funds were comingled from June 1979 to January 1986.

(3) The business was a sand and gravel business not a dirt hauling business. The Court's statement, ". . . in hopes of building a profitable dirt hauling business," is completely misleading. The same gravel pit, operated by lease during the partnership (1979 to 1986), continues in operation by Mr. Wilcock's new corporation which purchased it for \$123,000. This kind of operation, which had an income of over \$100,000 in 1985,

can hardly be called a "dirt hauling business".

2. The Court's statement, "Plaintiff was 56 at time of trial, and operated a business, owning equipment worth approximately \$5000 when he married the defendant".

a. The part of the statement concerning age, "Plaintiff was 56 at time of trial is totally wrong. The Plaintiff is five years younger than the Defendant who was 53 at time of trial. This inaccurate statement is extremely damaging in of the Court's decision statement which quotes Burke V. Burke on "fashioning an equitable property division."

b. From Burke V. Burke, "the parties' ages at time of marriage and divorce," should have benefitted the Defendant who is five years older than the Plaintiff - -not the other way around with the Plaintiff being stated as 56 and older than the Defendant. The Plaintiff was 48 years old at the time of trial- - not 56 as erroneously stated by Judge Billings.

3. In the Burke V. Burke, decision cited by Judge Billings, as being used in making the decision, is discussed in detail following the cited statements.

The factors generally to be considered are the amount and kind of property to be divided; whether the property was acquired before or during the marriage; the source of the property; the health of the parties; the parties' standard of living, respective financial conditions, needs, and earning

capacity; the duration of the marriage; the parties' ages at time of marriage and of divorce; what the parties gave up by the marriage; and the necessary relationship the property division has with the amount of alimony and child support to be awarded.

a. The Court did not consider the total, itemized list of equipment that was involved in the operation of the jointly-owned business.

b. The Court did not consider that all but two pieces of the 13 pieces of equipment accumulated were accumulated during the partnership/marriage. While Judge Billings gave the Plaintiff credit for two pieces of extremely old equipment, she failed to give credit to the Defendant for contributions made in accumulating the other 11 pieces of equipment.

c. The Court did not consider payments for equipment purchased directly from the Defendant's paychecks. Without such payments, such equipment could not have been purchased.

d. The health of the parties should have favored the Defendant and not the Plaintiff who is five years younger. Furthermore, the Defendant was employed on a handicap program at Hill AFB. This health condition is a matter of written record and can be easily confirmed. The Defendant's health must be considered poorer than the Plaintiff's.

e. Consideration of the parties standard of living should have favored the Defendant who was receiving \$400 per month alimony prior to the marriage and who has received nothing since the divorce. As stated in the District Court decision, page 135

of the transcript, "She is coming out poorer".

f. Consideration of respective financial conditions, needs, and earning capacity should have favored the Defendant because, "she came out poorer; and furthermore, the Plaintiff, Mr. Wilcock's, financial obligations have been transferred to a new corporation which permits possible default on debts without him being held personally liable. The Defendant has no such escape from her financial obligations. Also, since the Plaintiff was awarded the business equipment his earning capacity has been increased. The Defendant has realized no increase in earning capacity.

g. The duration of the formally established marriage was four years, however, the partnership which built the business was essentially six and one half years (1979 to 1986).

h. The Court's erroneous consideration of age is covered in para. 2 of this petition narrative.

i. The Court's consideration of what the parties gave up by the marriage, should have favored the Defendant who was receiving \$400 per month alimony prior to the marriage. She was awarded \$100 per month alimony by the District Court in January 1987. She has received nothing from the divorce judgement.

j. The District Court made no connection between alimony awarded and the value of equipment accumulated and being used by the Plaintiff.

4. Judges Billings, Davidson, and Jackson, of the Appeal Court, insist on making the same error as did Judge Roth of the District Court. These Judges, in their zeal to support the District

ourt's decision, insist on considering only two of the three appraisals that were presented.

a. The attached appraisal, marked exhibit #9, was used by the Continental Bank and it served as the basis for security on a loan of \$95,000 made to the Plaintiff, Mr. Wilcock's corporation. Also attached, under the exhibit #9, are the Continental Bank documents for the loan made to Mr. Wilcock's corporation. Please note that the Schedule "A" document contains the same equipment items being used as security as does exhibit #9, the appraisal used by the bank. The handscripted numbers in the left margin of Schedule "A" are cross referenced to the items listed on exhibit #9. Clearly, the Continental Bank place a value on the same equipment at a total of \$167,450.

b. In other words, the Continental Bank uses exhibit #9 (\$167,450) to obtain information which is then used in a security agreement supporting a loan of \$95,000. Judge Roth, and now Appeal Court Judges Billings, Davidson, and Jackson ignore the exhibit #9 appraisal but they do use two others that were obtained by Mr. Wilcock, as follows:

(1) Exhibit #3, dated 4 March 86, appraisal value of \$33,000.

(2) Exhibit #9, dated 16 June for loan support, \$167,450.

(3) Exhibit #13, dated 14 August 86, \$32,325.

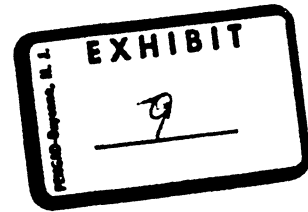
c. Does it seem reasonable that a bank loaning \$95,000 would use equipment for security that according to Judge Roth has no value? On page 135 of the District Court Transcript, Judge Roth stated, "based on the appraisals that seem to have credibility,

there is no value" Does Judge Roth and Appeal Judges consider the appraisal used by the Continental Bank to be lacking credibility? If so, has the Continental Bank been so notified in order that depositors interests can be protected?

*Joan Wilcox Dunkley*



Utah Equipment Appraisal  
1108 S 500 W  
Salt Lake City, Ut 84101



D T L S =  
T S  
7 X 5  
8

Continental Bank  
Ogden, Ut  
Attn: Mr. Thomas Whathell

Dear Mr. Whathell,

This appraisal was secured by Dirt United of Perry, 1Ut., for the purpose of valuing stock in their corporation. As such I have based my valuations on a non forced sale situation (retail). A 10 to 15 percent adjustment should be made if the owner would elect to place equipment on consignment in the event of liquidation. My valuations are based on actual physical inspection of the equipment.

One Sand and Gravel Plant portable includes; 3X8 Double Deck Screen, 18" Kue Ken Single Toggle Jaw, 2 IH 4 cyl. diesel engines, 30' 18" corrugated belt C channel conveyor with uprightd, 8 yd. bin with Grizzly, 25' 24" Feed conveyor with 18" belt, 4½ deck 3' X 10' Screen, 16' 18" Crossover C channel conveyor, all affiliated electric motors and switch gear.

Condition: Excellent /  
Value: 34,500

Portable Welder, Homemade, trailer mounted Hercules gas engine.

Condition: Good 2  
Value: 650

One 50' 18" Stacking Conveyor, self propelled

Condition: Excellent 3  
Value: 12,500

One Catepillar 90 KW Generator Set, s/n 44BH6003, mounted in 30' Van trailer, 5000 hrs

Condition: Excellent 4  
Value: 12,500

One Morgan 50' Stacking conveyor

Condition: Poor 5  
Value; 1,000

One 60' 18" Lattice Conveyor

Condition: Very Good 6  
Value: 2,000

One 8' Slide in Camper

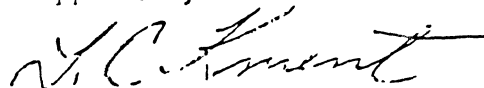
Condition: Very Good 7  
Value: 950

ATTCH #1

One 10 X 50 Star Mobile Home (office)	Condition: Good	8
	Value: 3,000 -	
One 944 A Wheel Traxcavator, s/n43A1777	Condition: Excellent	9
	Value: 8,500 -	
One 1977 IH Hough 100 C Wheel Loader s/n 30941 with scales	Condition: Very Good	10
	Value: 32,500	
One 1973 GMC Dump Truck s/n TJ190DV611687, new body and hoist	Condition: Very Good	11
	Value; 10,500	
One 500 Gallon Fuel Tank with stand	Condition: Excellent	12
	Value: 600	
One 1970 Ford 4X4 pickup	Condition: Good	13
	Value: 1500	
One 1978 White Autocar Dump Truck	Condition: Very Good	14
	Value: 18,500	
One 1978 Case 580C Loader Backhoe	Condition: Good	15
	Value: 16,500	
One 1985 Interstate 3-axle equipment trailer	Condition: Excellent	16
	Value: 6,250	
One 1968 IH Bobtail Dump Truck (diesel)	Condition: Good	17
	Value: 5,500 -	

If you have any questions concerning this appraisal please contact me at 801-973-2432.

Appraisor,



Thomas C. Kment

# CONTINENTAL



AFFILIATE OF MCDRE FINANCIAL GROUP 200 SOUTH MAIN • P.O. BOX 25475 • SALT LAKE CITY, UTAH 84125 • PHONE (801) 534-6

## SAMPLE INTEREST NOTE

Today's Date 6-16-86	Borrower's Name and Full Address, Zip Code DIRT UNITED SAND & GRAVEL INC 3000 South 600 West Perry UTAH 84404
Branch Name OGDEN	

I acknowledge the purpose of this loan primarily for personal, family, or household reasons. Borrower's Initials   
 In this Sample Interest Note, the words, I, me, mine and my mean each and all of those who have signed the  
 primary note.

Officer's Initials

Words such as you, your and yours mean CONTINENTAL BANK.

### THE FOLLOWING DISCLOSURES ARE REQUIRED BY FEDERAL LAW

Amount Financed The amount of credit provided to you or on my behalf.	FINANCE CHARGE The dollar amount the credit will cost me.	Total of Payments The amount I will have paid after I have made all payments as scheduled.	ANNUAL PERCENTAGE RATE The cost of my credit as yearly rate.
95,000.00	\$ 51,050.46	\$ 146,050.46	12.51

Monthly Payment Schedule Will Be	No. of Payments	Amount of Payments	When Payments Are Due
			Beginning August 1, 1986 and each month thereafter until June 1, 1991
1	1	\$ 63,511.35	July 1, 1991

**Additional Information:** See your contract documents for any additional information about nonpayment, default, any required repayment in full before the scheduled date, and prepayment refunds and penalties.

**Prepayment:** If I pay off early I  May  Will Not be entitled to a refund of part of the finance charge.  
 May  Will Not have to pay a penalty.

**CHECK the box if applicable to this transaction.**

**Variable Rate:** The Annual Percentage Rate may change (increase or decrease) from time to time during the life of my loan based upon movements up or down of the Bank of America's Reference Rate announced by it from time to time ("Reference Rate"). For example, a change in the Reference Rate of one percentage point will result in one percentage point change in the same direction in my interest rate on the date the Reference Rate changes or on the first day of the month following the Reference Rate, whichever date you choose to make the adjustment. My interest rate on this Loan is 4.00 percentage points greater than the Reference Rate, and the Reference Rate currently is 8.50%. Any change in the Reference Rate may take the form of higher or lower payment amounts, or more or less payments of the same amount, or both, depending on the direction of the change. However, in spite of these provisions, I understand that my interest rate in any event will not fall below \_\_\_\_\_% or exceed \_\_\_\_\_% during the life of my loan.

**Late Fees:** For any payment that I do not pay in full within ten days after it is due, I will pay you a late fee not exceeding the greater of \$15.00 or 5% of the past due amount of any such payment.

**Filing Fees: \$**

**Security:** I am giving a security interest in:  The goods or property being purchased.  
 Other (Describe) \_\_\_\_\_

Collateral securing other loans with you may also secure this loan.

**Assumption:** If this loan is secured by a dwelling, I may under certain conditions, let another party assume the remaining balance of the loan on the original terms.

**Demand Obligation:** This obligation is payable on demand. If this  is checked, these disclosures are based on assumed maturity of one year.

**Property Insurance:** I may obtain property insurance from anyone that is acceptable to you. If I get the insurance from you, I will pay \$ \_\_\_\_\_

<input type="checkbox"/> <b>Credit Life Insurance:</b> Credit life insurance and credit disability insurance are not required to obtain credit, and will not be provided unless I sign and agree to pay the additional cost. I agree to pay the additional cost for credit insurance.	Type	Premium	Insured Names
	<input type="checkbox"/> Credit Life		
	<input type="checkbox"/> Credit Disability		I want Credit Disability Insurance for

**SECURITY AGREEMENT**

(Equipment, consumer goods, fixtures, and motor vehicles)

On this 16th day of JUNE, 19 86, DEPT. STORES AND STORES, INC.

hereby agrees with and grants to The Continental Bank & Trust Company, the "Bank", a security interest in the following property:

the following described motor vehicle(s) and all tires, accessories, spare and repair parts, tools, equipment, additions and accessions, thereto:

YEAR MODEL	TRADE NAME NEW <input type="checkbox"/> USED <input type="checkbox"/>	NO CYLS	TYPE OF BODY	MODEL NUMBER	IDEN. OR SERIAL NUMBER

RADIO    AUTOMATIC TRANSMISSION    POWER STEERING    POWER BRAKES    AIR CONDITIONING  

See attached Schedule "A"

and all additions and accessions thereto, herein collectively called the "Collateral", to secure all Debtor's present and future debts, obligations and liabilities of what nature to Bank (the "Obligations"), including the note executed by Debtor to Bank in the amount of \$ 200,000.00 dated June 16, 19 85 and Debtor's obligations hereunder.

Debtor warrants:

- 1. USE — The Collateral is used or bought for use primarily for (check one):  personal, family or household purposes.  business.  farming operations.
- 2. PURCHASE MONEY — If checked here , the Collateral is being acquired by Debtor with the proceeds of a loan from Bank, which proceeds will be used for other purpose and Bank may disburse such proceeds directly to the seller of the Collateral.
- 3. LOCATION OF COLLATERAL — The Collateral will be kept within the State of Utah at the address below Debtor's signature (or, if not, at \_\_\_\_\_) and will not be removed therefrom without Bank's prior written consent.
- 4. MOBILE EQUIPMENT — If any Collateral is equipment normally used in business or farming operations in more than one state, Debtor's chief place of business (if other than the address below Debtor's signature is: \_\_\_\_\_) Debtor will immediately give written notice to Bank of any change in such chief place of business.
- 5. FIXTURES — The Collateral (check one)  is  is not attached or to be attached to real estate. If attached or to be attached to real estate, the legal description of such real estate is: \_\_\_\_\_

and the name of the record owner of such real estate is: \_\_\_\_\_ and the Debtor will furnish Bank with disclaimers signed by all parties having interest in the real estate which are prior to Bank's interest in the Collateral.

- 6. OWNERSHIP — Debtor has or forthwith will acquire, clear title to the Collateral free of all encumbrances and security interests other than this Agreement.
- 7. FILING — There is no financing statement now on file in any public office covering any of the Collateral or any of the proceeds thereof and so long as any of the Obligations remain unpaid or any credit from Bank to Debtor is in use by or available to Debtor, Debtor will not execute a financing statement or security agreement covering the Collateral with anyone other than Bank. Debtor agrees to sign and deliver one or more financing statements or supplements thereto or other instruments as Bank may from time to time require to comply with the Utah Uniform Commercial Code or other applicable law or to preserve, protect and enforce the security interest of Bank and to pay all costs of filing such statement or instruments. Bank is authorized to sign such statements or instruments for Debtor.

THIS AGREEMENT INCLUDES ALL THE PROVISIONS ON THE REVERSE SIDE.

THE CONTINENTAL BANK AND TRUST COMPANY

*[Signature]*

Debtor: *[Signature]*

Debtor: *[Signature]*

Address: 1200 SOUTH 400 WEST SALT LAKE CITY, UTAH

ATTCH # 1B

# CONTINENTAL BANK

## SCHEDULE "A"

1. Portable Welder, Homemade, trailer mounted Hercules gas engine
2. One sand and gravel plant portable includes; 3X8 double deck screen; 18" Kue Ken single toggle jaw, 2 III 4 cyl. diesel engines, 30' 18" corrugated belt C channel conveyor with uprighted, e yd. bin with Grizzly, 25' 24" feed conveyor with 18" belt, 4½ deck 3' X 10' screen, 16' 18" Crossover C channel conveyor, all affiliated electric motors and switch gear.
- 3 - 3. One 50' 18" stacking conveyor, self propelled
- 4 - 4. One caterpillar 90 KW Generator set, s/n 44BH6003, mounted in 30' Van trailer, 5000 hrs.
- 5 - 5. One Morgan 50' stacking conveyor
- 7 - 6. One 8' flide in carper
- 12 - 7. One 500 gallon fuel tank with stand
- 9 - 8. 944 A Wheel Traxcavator, s/n 43A1777

↖  
Cross reference to items shown in  
exhibit #9 of case file.

CERTIFICATE OF MAILING

I hereby certify that I delivered four true and correct copies of the foregoing Petition for Rehearing to the Respondent's Attorney, Stephen R. Bailey, 2554 Washington Blvd. Ogden, Utah 84401 on this 17 day of November 1987.

*Joan Wilcock Dunkley*  
Joan Wilcock Dunkley  
571 Cross Street  
Ogden, Utah 84404

I hereby certify that I delivered an original and seven copies of the foregoing Petition for Rehearing to the UTAH COURT OF APPEALS, 400 Midtown Plaza, 230 South, 500 East, Salt Lake City, Utah 84102, on this 17 day of November 1987.

*Joan Wilcock Dunkley*  
Joan Wilcock Dunkley  
571 Cross Street

Ogden, Utah 84404