

1986

# Helen Naranjo v. Jose L. Naranjo : Brief of Appellant

Utah Court of Appeals

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HELEN NARANJO,  
Plaintiff and  
Respondent.  
vs.  
JOSE L. NARANJO,  
Defendant and  
Appellant.

APPEAL FROM BENCH TRIAL IN  
SALT LAKE COUNTY DISTRICT COURT,  
JUDGE J. DENNIS FREDERICK

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534-1035

FILED

SEP 19 1985

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IN THE SUPREME COURT OF THE STATE OF UTAH

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|                  |   |                             |
|------------------|---|-----------------------------|
| HELEN NARANJO,   | ) |                             |
|                  | ) |                             |
| Plaintiff and    | ) |                             |
| Respondent.      | ) | Supreme Court No. 20716     |
|                  | ) |                             |
| vs.              | ) | District Court No. D83-3755 |
|                  | ) |                             |
| JOSE L. NARANJO, | ) |                             |
|                  | ) |                             |
| Defendant and    | ) |                             |
| Appellant.       | ) |                             |

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APPELLANT'S BRIEF

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APPEAL FROM BENCH TRIAL IN  
SALT LAKE COUNTY DISTRICT COURT,  
JUDGE J. DENNIS FREDERICK

---

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STATEMENT OF ISSUES PRESENTED

1. Whether the trial court erred by giving one party an equal share in the proceeds of a personal injury judgment received by the other.
2. Whether the trial court erred in sharing equally a traceable home equity owned by one of the parties prior to their marriage.
3. Whether the trial court erred in awarding to one party occupancy, not ownership which was split equally, of a home needed by the other for maintenance of a business, when the marriage was childless, neither had a greater residential need for the home than the other, occupancy of the home gave the party who received it no advantage on monthly expenses, and relocating the business will cause a substantial monthly expense and time loss to the evicted party.
4. Whether the court erred in awarding alimony over one-half of the husband's disposable monthly income when the wife was unemployed but in good health and capable of working, had worked before, and, while the



parties had been married 16 years, the marriage had been childless.

5. Whether the court erred by splitting equally between the parties a major investment made in a highly speculative stock by the wife over the husband's objections, by not telling him she had bought it, putting it solely in her name, yet using the other party's personal assets to do so, when there were sufficient assets that the party making such speculative investment could have received it in its entirety, with its potential of gain or loss, and the other party given offsetting conservative assets.
6. Whether the trial court doesn't have the duty, when circumstances justify it, to look to the future effect of a decree, when later proceedings pursuant to 30-3-5, Utah Code Annotated, to modify the decree will be ineffective to correct the flaws and waste of assets inherent in the decree, and whether the reviewing court has the power to modify such a decree.

## STATEMENT OF THE CASE

### NATURE OF THE CASE:

This is a divorce action.

### PROCEEDINGS AND DISPOSITION IN LOWER COURT:

The case was tried before Judge J. Dennis Frederick on November 16, 1984. He entered judgment February 25, 1985. Defendant's Motion to Alter or Amend the Judgment was denied by Judge Frederick on April 24, 1985.

### STATEMENT OF FACTS

The trial court's Findings of Fact, Conclusions of Law, and Decree of Divorce are attached as Addendum 1. Its Bench Ruling is attached as Addendum 3.

The parties married December 4, 1968. Plaintiff filed for divorce, in 1983. They continued to reside in their Magna, Utah, home until trial, plaintiff upstairs and defendant downstairs.

At the time the case was tried on November 16, 1984, plaintiff was 59 years old and defendant 51 years old.

During the 15 years they lived together, the parties had no children. Each had been married before. Defendant has never had children. Plaintiff had five children by previous marriages whom defendant helped raise.

At the time of trial, all of plaintiff's children were adult, married and lived away from the parties.

In the allocation of assets made by the trial judge, he essentially followed the asset list and values of plaintiff's Exhibit 5 with some correction of figures as he announced from the bench. The end result was the following distribution of assets (also attached as Annex 6).

# COURT'S AWARD

| <u>TO WIFE</u>  |   | <u>TO HUSBAND</u> |                              |
|-----------------|---|-------------------|------------------------------|
| \$31,411        | 1/2 present home (Magna)                    | \$31,411          | 1/2 present home, Magna      |
| \$17,835        | Accounts receivable                         | 4,200             | Accounts Receivable          |
| 1,000           | 2 burial lots                               | 1,000             | 2 burial lots                |
| 3,000           | household furniture                         | 8,000             | Kenworth truck               |
| 1,800           | 1978 Chrysler                               | 1,000             | Tires                        |
| 100             | 1953 Chevrolet pickup                       | 1,000             | Tools                        |
| 37,900          | Wightman-Clark contract (yield \$375/month) | 300               | Honda 360                    |
| 2,000           | Brighton Bank account                       | 200               | 1949 Inter. Pickup           |
| 16,200          | 1/2 National Military                       | 1,000             | Boat and trailer             |
|                 |   | 3,000             | 1974 Ford Pickup with camper |
|                 |   | 4,500             | 1977 Trailmobile Trailer     |
|                 |   | 31,998            | Savings                      |
|                 |   | 6,400             | Savings                      |
|                 |   | 400               | Savings                      |
|                 |   | 7,400             | Savings                      |
|                 |   | 16,200            | 1/2 National Military        |
|                 |   |                   | Underwriter's stock          |
| <hr/> \$111,846 |   | <hr/> \$118,009   |                              |

Alimony - \$800/month

Magna Home - 1/2 equity to wife. She to pay husband his 1/2 equity, fixed at \$31,411, when plaintiff remarries or five years, whichever comes sooner.

#### HUSBAND'S INCOME

Mr. Naranjo's income as a self-employed truck driver was covered for several years. His gross income, after business expenses, and before taxes, is as follows on a monthly basis:

\$1408.75 - 1982 Tax returns (Ex. 4)

\$1315.00 - 1983 Tax returns (Ex. 3)

\$2324.59 - Year prior to trial, November, 1983, through October,

1984 (Defendant's Ex. 18)

\$1889.00 - Defendant's income, April, 1984, through June, 1984

(Plaintiff's Ex. 7).

This is also reproduced on Addendum 6.

Plaintiff had worked before the marriage, (R. 173, L. 16-21) and intermittently during the marriage at a number of different jobs such as grocery checker, clerk, receptionist and cashier. (R. 193, L 4-10). Her last job paid \$150 gross per week for part-time work. (R. 178, L. 5-19).

At the time of trial, plaintiff was not employed, having quit her last job and would take a new job when she could find "a good job". (R. 187, L 23-24). She had worked during the marriage when she chose to. (R. 193, L 18-21). In the five years prior to the divorce she had worked only about one-fourth of the time. (R 193, L 11-13). The trial court properly found she was "capable of employment". (Findings, paragraph 5, Add. 1 P. 2).

Defendant is an American of Mexican ancestry. Growing up, he worked as a farm laborer. After service in the Army, he

became a truck driver working for wages. (R. 212, L 6-11)

During their marriage, defendant purchased a long haul diesel tractor and a flat bed trailer, and worked self employed as a long-haul lease driver.

When the parties were first married, they lived in a home in Kearns defendant had been purchasing.

After defendant became self-employed, and had his tractor and trailer to house, and he being a diesel mechanic able to do maintenance and routine work on the vehicles, (R. 224, L 25-225, L 9) they moved into a home in Magna, Utah, which was on a 1-1/2 acre lot. (Ex. 14)

On the Magna lot, working together, but essentially with defendant's money, (R. 180, L 11-18; R. 200, L 22-201, L 6) they built a garage large enough to house both the tractor and the trailer. Defendant equipped the garage with trucking gear such as spare tires and cargo chains, and tools and materials to service the vehicles. (R. 224, L25-R.225, L9).

The garage was larger than the home. (R. 223, L 22-R. 226, L 15; Ex. 11, 12, 13).

A current realtor's appraisal on the home was received in evidence. (Ex. 14) The realtor commented on the lot containing a small well-kept home, but resale of the lot being complicated by the large commercial garage on the same property.

Defendant testified that by having the garage at home he could work after runs and on weekends maintaining his equipment

and that he would not be able to make ends meet without that facility. (R. 223, L 25-225, L 9).

In 1980, defendant sustained a severe injury. While a load of pipe he had delivered was being unloaded at a refinery in Colorado, a 40-foot long pipe was dropped by the crane carrying it, bounced and smashed defendant's left knee.

His lawsuit against the refinery for negligence in its handling of the pipe yielded him a \$150,000 jury verdict in 1982. This was reduced to \$120,000 by the jury finding that he had 20% comparative negligence. To settle the case rather than endure an appeal, defendant agreed to a cash settlement of \$110,000 which the refinery paid. (Ex. 8, 25)

The jury verdict following Colorado procedure, was a single figure verdict, not broken down into general and special damages. (Ex. 8)

Exhibit 25 includes an accounting letter of June 8, 1982, to defendant from his attorney itemizing distribution of the \$110,000. This is attached as Addendum 4.

After deducting costs, attorney fees, and reimbursement of \$18,000 to the Utah State Insurance Fund for Workmen's Compensation benefits defendant had received, defendant received a net of \$61,459.45.

Other than nine months off work to recuperate from the knee injury (R. 205, L 2-5) and its incident operations, defendant had continued to, and now does, drive his truck.

A letter from defendant's attending physician, Dr. Johnathan Horne concerning defendant's knee (Ex. 22; attached as Addendum 5), stated that his days as a truck driver were numbered, and while he might work indefinitely, the knee was deteriorating and he might be able to drive only two more years.

Defendant testified that the knee was steadily becoming more painful, that the continual operation of the truck's clutch, which is harder to operate than a passenger car's, was constantly painful to him, but that even so he was working extra hours to make ends meet, and he would continue to drive as long as he could stand the pain. (R. 203, L 6-204, L 1; R. 213, L 25-R 214, L 24; R. 227, L 24-R. 231, L9; R. 223, L 1-25; R. 235, L 11-25).

Defendant put \$50,000 of the award in thrift certificates. The other \$11,459.45 he shared with plaintiff. (R. 219, L 9-14).

In putting the \$50,000 into thrift certificates, defendant put it in his name and plaintiff's, but for the purpose of meeting his future medical needs and reduced earning capacity. He knew he would not receive future Workman's Compensation nor Teanster's benefits. (Addendum 4, paragraph 1; U.C.A. 35-1-62(3), R. 212, L 25-213, L 24; R. 216, L 17-R. 217, L 3).

Plaintiff acknowledged that she knew that the savings certificates represented defendant's personal injury proceeds (R. 196, L 5-R. 197, L 15). Nevertheless, without his knowledge, (R. 189, L 14-23) plaintiff went to their safety deposit box, took

\$30,000 of the thrift certificates, which with accumulated interest totaled \$32,400, and used this to purchase 64,800 shares of National Military Underwriters. (R. 182, 18-23; R. 196, L 17-21). She had first asked him to buy it and he refused to allow use of his award for that purpose (R. 196, L 17-197, L 16).

The district court case number D83-3755 indicates that plaintiff filed for divorce in 1983. She purchased this stock in 1984 (R. 182, L 18-25).

Plaintiff put the shares in her name alone (R. 183, L 1-7).

She asked at trial that the stock be awarded to her in its entirety (R. 202, L 22-24). She worked for National Military Underwriters when she bought the stock and, at trial, thought it would be profitable (R. 197, L 20-R. 198, L 6).

As indicated in Annex 6 and Exhibits 3, 4, 7 and 18, defendant's income fluctuated as he was self-employed without a regular paycheck. The highest figure of his earnings is that submitted by himself on Exhibit 18 for the year prior to trial, November 1983 through October 1984. This totaled \$27,895.08 for the year, \$2,324.59 per month on the average, before taxes.

Defendant did not have a regular paycheck with itemized deductions. His taxes for 1984 were not prepared in November of that year when the case was tried. Accordingly, his net income has to be approximated.



In his counsel's court experience deducting net from gross income is a fairly common procedure. This is not submitted as law, but as experience for ordinary income brackets. In that situation the judge or commissioner usually takes 30-35% off the gross to arrive at the net, to cover the three variables-FICA, federal tax and state tax. Applied to defendant's monthly gross of \$2,324.59, this approximation yields a net income of \$1,510.98 to \$1,627.21 per month as the maximum earnings his work history shows.

Plaintiff testified in regard to alimony, that defendant "can afford \$1,000 real easy" (R. 187, L 13-24).

Defendant testified that notwithstanding his leg pain he worked nine hours a day, five to six days a week (R. 221, L 1-24), that he had priced a new truck which would be easier for his knee (R. 209, L15-23), that if he could afford to pay out \$1,000 a month, he would have bought the new truck (R. 233, L 11-15) and would work less hours (R. 233, L 16-18), and that the reason for his working such long hours was to make ends meet (R. 233, L 19-21).

The final matter concerning the parties' finances to be touched on is the equity in the home in Kearns, plaintiff owned at the time of their marriage. He purchased it in 1958 or 1959 (R. 227, L 21-228, L 3), he made improvements before their marriage and made a small downpayment of about \$500 or \$600 (R. 228, L 6-18). Further improvements were made after he married plaintiff.

When they sold the first home, the Kearns home, they sold it on contract for \$41,000 in 1974, paying off the \$7,800 first mortgage balance, and carrying the contract entirely themselves as an investment, The buyers defaulted, renegotiated and, at trial owed a balance of \$37,900 payable at \$375 per month at 15% interest and a balloon payment of the balance due in two years. Defendant's equity is intact in this balance (R. 181, L19-R. 182, L 4-R. 187, L 7-11).

Using the later date of purchase 1959, defendant owned the home nine years before his marriage to plaintiff in 1968, and sold it six years later in 1974. This equity was \$33,200 based on \$41,000 sale price and \$7,800 mortgage balance.

It is impossible to determine the amount of equity defendant had in the home at the time he married plaintiff. However, there are enough figures to work from, damages being formulated on the best rational base.

Over 15 years ownership a \$33,200 equity break down to a growth of \$2,213 per year. For the six years of ownership during the marriage this would total \$13,280. One-half of that, giving plaintiff a full share, would be \$6,640. This leaves an equity interest in defendant of \$26,560. If the view is taken that equity growth during marriage is totally a shared asset, even though the home was in defendant's name alone, his equity would be \$19,917, based on nine years ownership prior to the marriage.

## SUMMARY OF ARGUMENTS

The trial court's decree erred in (a) awarding alimony without a proper basis, (b) sharing defendant's traceable premarital asset, his equity in the Kearns' home, on the basis that "when parties marry, they agree to--and, in this case did, pool their respective assets," (c) sharing one party's personal injury award with the other without basis, (d) forcing one party to share a major, speculative investment made secretly by the other while the divorce was pending, (e) requiring defendant to vacate the home with its garage which constitutes a financial loss without justification, and (f) the decree sets up a situation that will cause present and future economic loss which is not remediable under Utah Code Annotated, Section 30-3-5, so that to protect the parties the decree should be restructured, preferably by the reviewing court.

## ARGUMENT

### POINT I.

#### THE COURT ERRED IN SHARING EQUALLY BETWEEN THE PARTIES, DEFENDANT'S PERSONAL INJURY AWARD.

The facts are stated at pages 7-8 of the Statement of Facts.

Izatt v. Izatt, Utah, 627 P.2d 49 (1981), recognizes

that, Utah not being a community property state, injured parties own their personal injury awards as separate, non-marital assets. This rule accords with law from other jurisdictions such as Amato v. Amato, 434 A.2d 639, (N.J. 1981); Rickman v. Rickman, 605 P.2d 909 (Az 1980); Burgh v. Burgh, 608 P.2d 329 (Az 1980); Luxton v. Luxton, 648 P.2d (N.M. 1982) and Brown v. Brown, 675 P.2d 1207 (Wash. 1984).

If the other party wishes to put on evidence that some part of the award should be shared, such as based on the family incurring debts due to the injury as was the fact situation in Izatt, supra, it is the burden of proof of that party to present such evidence as to justify those coming out of the separate property of the other.

Plaintiff introduced no evidence of any kind to show any existing debts which had to be reimbursed from defendant's fund. She could not. There were no marital debts except for the mortgage on the Magna home. (Findings, Paragraph 18, Add. 1, P. 6)

The trial judge stated in his bench ruling:

"Now, I recognize counsel there is some disparity in the calculation of the respective awards. However, it is my view that taking into account the personal injury award, because I am unable--the evidence does not establish what portion of that represented, if any, lost wages vs. pain and suffering that the plaintiff, by virtue of any award is sharing in that award." (Add. 3. P 5)

The court repeated its mistaken expression that the burden of proof was on the defendant at paragraph 16 of its Findings of Fact in which the court stated:

'16. The Court finds that defendant was awarded a judgment for injuries, in the original amount of \$110,000 in June, 1982. Of this, \$18,000 was paid to the Utah State Insurance Fund to reimburse lost income and medical expenses received by the defendant, and after costs and fees, defendant received net cash of \$61,459. The Court finds defendant did not meet his burden of showing the amount of this award attributable to special damages, which the Court determines to be joint marital property as lost income, and accordingly, the Court finds the whole \$61,459 to be joint property; \$60,000 of this money was put in joint saving certificates, two \$20,000 certificates and two \$10,000 certificates. The Court took into consideration the possibility that defendant may require future surgery in awarding him the majority of the income producing assets of the marriage, but specifically finds that defendant's possible need for surgery is speculative." [Emphasis added] (Add. 1, P. 5)

In so ruling the trial court made errors of law.

1. The burden is on the uninjured party to show a basis for sharing in the award. The court reversed that burden.

2. The court erred on the facts, as the evidence proved that there was no lost income nor medical expense attributable to the injury.

"The money received is the legal substitute for pain, suffering and the mental and physical disabilities incurred.

It is a right, peculiar to the injured person, to seek to be restored, or made whole, as he was before the injury.

The only damages truly shared are those discussed earlier, the diminution of the marital estate by loss of past wages or expenditure of money for medical expenses. Any other apportionment is unfair distribution." Amato v. Amato, supra, at 434 A.2d 642, 643.

It should be noted that in Amato the uninjured spouse had consortium rights. The rationale applies regardless though and is the same used in Izatt, supra, where, with the total recovery being \$97,000, the Utah court held "the fact that the \$97,000 belongs to defendant is not to be doubted." 627 P.2d at 51.

In the case at bar the trial judge made the finding that the award because proof hadn't been established as to distinction between general and special damages. This is punitive. Some part of the award had to be general damages. Rather than making effort to distinguish them, or requesting such evidence of counsel, the court simply forfeited the award from defendant's ownership without a factual basis.

In doing so the trial court exceeded Izatt which made no distinction between general and special damages, but rather limited the uninjured spouse to recovery based on proof of actual pecuniary loss to the family unit as result of the injury.

As plaintiff presented no such evidence the sharing of the personal injury award should be reversed and it be restored entirely to defendant.

In any event, a careful analysis of the evidence shows that the trial court erred on the facts. The evidence is fully adequate to indicate that there was no financial loss to the family as a result of the injury.

Special damages are essentially those for wage loss and medical expense.

Defendant lost nine months off work due to the injury. (R. 203, L 2-5).

The accounting letter, Addendum 4, on defendant's personal injury award states the necessary facts.

Workmen's Compensation paid defendant \$25,000 in wage loss and medical expense. Workmen's Compensation covered all medical expense. U.C.A. 35-1-81, (Add. 6, P. 4). So there was no unmet medical expense. What about wage loss?

U.C.A. 35-1-65 (Add. 6, P. 3) provides that two-thirds of the injured workmen's wage is to be reimbursed by Workmen's Compensation for wages in defendant's income range.

As defendant's highest income at any time in his known work history was \$2,324.59 per month, that would be an income loss over the nine months of \$20,921.31. The unreimbursed one-third of this would be \$6,973.77.

The \$6,973.77 is not an unreimbursed loss to the family. Defendant put \$11,459.45 of his award, leaving the \$50,000 that he put in thrift certificates, directly into the joint funds for himself and plaintiff. This exceeds the special damage loss by \$4,485.68.

Thus, the trial judge's statement that the special damages were not determined and were not reimbursed is simply without foundation in the evidence. The only thing the evidence doesn't show is any existing debt attributable to defendant's injury. The Izatt threshold is not crossed.

While the trial judge is given wide latitude of deference to his findings of fact, they still must be supported by the record, English v. English, Utah, 565 P.2d 411.

It should be noted that the trial court made no finding that the remaining \$50,000 of the personal injury award became joint property by the defendant putting it into savings in his name and plaintiff's. The trial judge did so only on the basis that, as he couldn't distinguish general from special damages, the whole was shared (Findings, Paragraph 16, Add. 1, P. 5). This ruling is correct as the money was entirely traceable to that award as the trial judge specifically found, and there was no evidence of any kind that he shared it with plaintiff, but rather that he was saving it against the future sequela incident to his injured knee (R. 196, L 5-21; R. 217, L 9-23; R. 218, L 1-11).



ARGUMENT

POINT II.

THE COURT'S AWARD TO PLAINTIFF OF \$800  
PER MONTH PERMANENT ALIMONY SHOULD BE  
REDUCED, OR ELIMINATED, AS IT IS CONTRARY  
TO THE EVIDENCE, CONTRARY TO LAW, AND IN  
THE LONG RUN DOES NOT SERVE PLAINTIFF.

The facts are stated at pages 4, 5, 7 and 10.

In English v. English, Utah, 565 P.2d 411 (1977), a three factor test was enunciated to determine the appropriateness of an alimony award. The elements were:

1. The wife's financial condition and economic needs;
2. The wife's ability to contribute financially;
3. The husband's ability to provide.

In the recent cases of Olsen v. Olsen, 15 UT Adv. Rep. 8, and Jones v. Jones, Utah, 700 P.2d 1072, the English, supra, formula has been approved and given further definition, and the reviewing court has further enunciated its own prerogatives on appeal as being that the court must have adequate findings of fact on each point of the formula, that the customary deference to the findings is not given if they do not cover the necessary factual groundwork and that if the decree is inadequate or short-sighted, that the court can make findings of fact on its own. Penington v. Penington, 16 UT Adv. Rep. 5. Boals v. Boals, Utah, 664 P.2d 1191 (1983); DeRose v. DeRose, 19 U.2d 77, 79, 426 P.2d 221, 222 (1967);

Dogu v. Dogu, Utah, 652 P.2d 1308 (1982); and Beals v. Beals, Utah, 682 P.2d 862 (1984).

Plaintiff's financial declaration indicated that her monthly expenses were \$1,098.13, a figure she stood on at trial. (Plaintiff's Ex. 6; R. 188, L 5-10). This meets the first element of English, supra, particularly as the trial court made no finding as to any other sum she needed.

Sorensen v. Sorensen, 18 U.2d 102, 417 P.2d 118 (1966).

Graziano v. Graziano, 7 U.2d 181, 321 P.2d 931 (1958).

The court's award gave her \$17,835 in accounts receivable, \$16,200 in National Military Underwriters stock (whatever its value), \$2,000 in savings, and the Wightman-Clark contract on the parties' Kearns home which paid \$375 per month.

The trial court did not determine the monthly financial benefit plaintiff would receive from these assets. They have to be at least the \$375 from the Wightman-Clark contract. Deducting that from her \$1,100 (\$1,098.13) monthly expense that she has, leaves a monthly financial need on her part of \$725.

We turn to the second element of the English test-plaintiff's ability to provide for herself.

In the court's findings of fact, it stated:

"5. Plaintiff is 59 years of age, has ulcers but otherwise is in good health, is not presently employed, but is capable of employment. She has worked during the year 1984, and gave no reason for being unemployed at the time of trial." (Annex 1, page 2)

Plaintiff admitted that at her last employment she had earned \$150 per week, for National Military Underwriters, and that this was only part time employment. She wouldn't commit to how many hours she worked. (R.178, L 5-19) This works out to \$650 per month. If she worked 25 hours per week, projected to a 40-hour week, she would earn \$1,040 per month.

Plaintiff also testified that she would take employment when she could "find a good job." (R. 187, L 23-24). Could she not take a lesser job while looking for a better?

The trial court entirely overlooked the second part of the English formula--the ability of the wife to contribute to her own needs. Lacking this finding, it has no basis to determine the amount of alimony she needs to supplement her income from her own work and investments.

In regard to the third part of the English formula, the husband's ability to provide, the court in its findings of fact, paragraph 6 (Annex 1, page 2) acknowledged receipt of the letter of Dr. Horne concerning defendant's knee but stated that because Dr. Horne couldn't be certain as to when defendant would be unable to drive a truck, that the matter was speculative and the court would not make allowance for it. In the court's bench ruling it stated:

"This court can't predict what will happen in the future with regard to the employability of either party. It must content itself with the circumstances as they now exist. But, of course, as counsel are aware, this court maintains continuing jurisdiction to modify

any order that it enters with regard to circumstances that may develop in the future if they meet the test of material or substantial change in circumstances."  
(Add. 3, Page 2)

The court had evidence in two forms before it in regard to defendant's future employability.

It was the testimony of defendant that each time he drove his truck, he was in pain and didn't know how long he could continue. (R. 203, L 2-R. 204, L 1; R. 222, L 1-R. 223, L 9; R. 233, L 19-25).

The other form of evidence is Dr. Horne's letter.

Dr. Horne summarized his findings by stating:

"I believe he probably will be able to continue working for 5 or 10 years, but his condition may deteriorate rapidly, and it may be only another 2 to 5 years.

His functional ability is already impaired and will continue to become more impaired in the next few years to come. At the present time, he cannot perform vigorous activity. He can sit in the truck, push the clutch and reasonably function in that capacity, but he cannot walk more than a few blocks without discomfort increasing." (Add. 5)

The probability that defendant's work will be reduced in the foreseeable future is too great for the court to "content itself with the circumstances as they now exist."

With the variations in defendant's income, as shown on Addendum 6, it would have been appropriate for the trial court to make a finding as to that income so as to measure

defendant's ability to provide. A review of a self-employed person's history of earnings and a finding as to present ability to provide is proper, in fact required, by the trial court. Jones v. Jones, Utah, 8Ut.Adv.Rep. 14 (1985); Olson v. Olson, supra; English v. English, supra. Rather than doing so, the court simply stated in Findings of Fact:

"7. Based on the length of the marriage and the disparity in the parties' earning capacity, the court finds it reasonable that defendant pay to plaintiff the sum of \$800 per month as alimony." (Add. 1, P. 2)

In addition to the court's failing to follow the law as established in English and its successor cases, there are two other very serious flaws in the award of alimony.

The purpose of alimony is not to punish one party nor reward another. English, supra at 411. Plaintiff does not need to work in order to meet her monthly needs. If she does, her alimony will almost certainly be reduced. She doesn't work.

It is a matter of her having an adequate income through her labor, or through defendant's.

At the same time, defendant has to work, overtime, while in pain. (R. 221, L 1-25). This is punitive.

The other flaw of the present decree is that in the long run the award of alimony hurts both parties, plaintiff as well as defendant.

A trial court has an obligation to take a long-sighted view of the terms of a divorce decree, as seeking relief in

contempt or under 30-3-5 are not a panacea in all cases.

As an example in Beals v. Beals, supra, the reviewing court approved the trial judge's giving a wife an extraordinarily large property settlement rather than alimony. In affirming, the court held that the trial judge properly, in view of the husband's refusal to comply with the previous support orders of the court, could anticipate future difficulty in the payment of support or alimony, and the alternative of an award of extra property in lieu thereof was justified, as that could serve as future alimony.

In Dogu v. Dogu, supra, the husband's uncertain state of health justified remand to have the trial court secure the wife's alimony in the event she survived the husband. The probabilities in that case are similar to this case.

If the trial court doesn't consider the future, its decree can be restructured on appeal.

"While the determinations of the trial court are given deference and not disturbed lightly, changes should be made if that seems essential to the accomplishment of the desired objectives of the decree: that is, to make such an arrangement of the property and economic resources of the parties that they will have the best possible opportunity to reconstruct their lives on a happy and useful basis for themselves and their children. This is such a case." DeRose v. DeRose, supra.

Defendant seeks such relief here.

While the trial court properly stated that it could not find when defendant would be unable to drive a truck, a person

doesn't get \$150,000 for an injured knee unless that knee is severely injured.

The court's award of \$800 per month alimony requires defendant to consume assets that he could otherwise conserve for his future days of reduced income. As he works overtime to "make ends meet" (R. 233, L 11-25), his driving future can be extended if he could reduce his working hours and rest his knee. At the same time the award does not serve plaintiff.

Social Security is not based on the amount of alimony one has received.

Social Security is based on one's average earnings. If plaintiff spends the next years unemployed, then two things will happen. One is certain, one probable.

First, defendant will obtain a reduction in alimony when he is unable to drive a truck.

Second, plaintiff, 59 when the decree was entered, will be unable to obtain Social Security in any adequate sum. This is a limited future asset, but should be seized as it pays each month for life. She has been awarded substantial but not unlimited assets. She will have to draw on them when she can't work. When these are exhausted she may become a public charge, or live very frugally to avoid exhausting them. This does not serve her, defendant, nor the public.

This presents a clear, probable future situation that cannot be remedied by resort to the court under U.C.A. 30-3-5

(Add. 2), for relief based on a change of circumstance. The probable circumstances are that neither party will be capable of producing substantial income, and neither party will have adequate resources to fall back on. U.C.A. 30-3-5 will be useless as an equitable tool. It will be closing the barn door after.

Plaintiff does not have all the earning years in the world left ahead of her. It makes it all the more imperative, she being in good health, other than ulcers, and employable, that she earn as much as she can while she can.

It is equally imperative, that defendant be allowed to reduce his working hours and to conserve as many assets as he can to protect his future. While he is 51, his leg can be fairly stated as being much older, and his ability to earn, depends on him being physically capable, as he has no earning expertise in his entire history other than that based on physical work. (R. 212, L 5-11).

The generality offered by the trial court in its Bench Ruling that the court "maintains continuing jurisdiction to modify any order that it enters with regard to circumstances that may develop in the future..." (Add. 3, P. 2) tends both parties towards an impoverished old age. What help does "continuing jurisdiction" realistically offer?

There is no better time for the parties to work as much as they can than now. In fact, there is no other time.



In Gale v. Gale, 123 U 277, 278, 258 P.2d 986, 987, (1953) Justice Crockett observed that the problem with divorce is that "when one blanket is cut to fit two beds, it seldom will cover them both." His opinion went on to point out that the obligation of the court is to tailor its cutting so as to cover both beds as well as possible.

Defendant submits that plaintiff has little, if any, need for alimony at the present time. On the other hand she might very well need substantial alimony in the future if there is any condition where she cannot work while the defendant still can.

While defendant, to protect his own future, thinks he has offered defendant enough assets (See Argument Point VI) to meet her future needs, and certainly a far better position than when she married him, as he seeks equity, he must be prepared to do equity, so offers alimony in the sum of \$100 per month, with the knowledge that it can be increased in the future.

Basis for the \$100 per month alimony is that this adds not only to the \$375 per month that plaintiff can obtain from the Wightman-Clark contract but also her accounts receivable another \$32,400 he proposes she receive from the National Military Underwriters' stock. To this is added her own ability to earn. This should well place plaintiff in a position where she will be able to save some hundreds of dollars per month if she remains at her present level of expenditure.

A final thought. On the above figures, plaintiff's \$800 per month alimony is about one-half of defendant's maximum disposable income. The thought though is that now that the trial court has required defendant to vacate the home, with his vehicles and equipment, his disposable income has to become greatly reduced by obtaining comparable storage space and comparable service facilities, or paying for servicing. This leaves the decree's effect as being that plaintiff is now receiving more than half of defendant's disposable income for a childless 16-year marriage.

#### ARGUMENT

#### POINT III

#### THE TRIAL COURT ERRED IN NOT AWARDING TO DEFENDANT HIS PREMARITAL ASSET OF A HOME EQUITY

In its Bench Ruling the trial court stated:

"It is this court's view that when parties marry, they agree to--and, in this case, did pool their respective assets in an effort to better their marriage. To attempt to reconstruct each item attributed throughout the course of the marriage as well as the items brought into the marriage by the parties, in the court's view would not be productive or fruitful."  
(Annex 3, page 2, L. 9-15)

Does marriage "pool" assets?

Defendant's equity in the home he owned at the time of the parties' marriage was traceable. The facts are covered in

the Statement of Facts at pages 10 & 11.

In Preston v. Preston, Utah 646 P.2d 705 (1982), the trial court's sharing of a real property interest was reversed on the principle that each party should receive the real or personal property he or she brought to the marriage. There, the parties had an equity of \$18,000 in a cabin built during the marriage. \$9,000 of that was traceable to assets the husband had prior to the marriage. The court directed that spouse should receive credit for that \$9,000.

Judicial opinions have social implications.

If the trial court's ruling that parties "pool their assets" by marriage receives general application, middle-aged people, those with considerable assets, and those with limited assets such as divorced women raising children whose only financial asset is the home in which the children live, would all be reluctant to remarry.

The court's Findings of Fact are entirely silent as to any factual basis for the court determining that the parties had merged their premarital assets. The parties had not sought recovery of personal assets each brought into the marriage, such as their minor savings, furniture and vehicles. Through the 16 years of the marriage these consumables had been merged and consumed.

Defendant's home equity was not.

Defendant's equity is preserved untouched, like a fly in amber, in the \$37,900 balance still owed on the purchase of that Kearns home, the Wightman-Clark contract.

As indicated in Exhibit 23, the letter from Wightman-Clark's attorneys, the balance remains so large because the buyers have had financial difficulty. At any rate the equity is traceable, whether defendant be given that asset, or some other offsetting asset.

The question is with the evidence before the trial court is there an adequate basis to determine the amount of defendant's equity?

Uncertainty in damages is not a bar to their recovery, as if they are not awarded, there is as much an injustice, as if they are awarded too generously. Rather, if there is a rational basis for making the determination, even though uncertain, and being an approximation, it is better than making no determination at all, and is acceptable as a matter of law. Terry v. Panek, Utah, 631 P.2d 896 (1981); Gould v. Mountain States Telephone & Telegraph Co., 6 U.2d 197, 309 P.2d 902 (1957); Winsness v. M.J. Conoco Distributors, Utah, 593 P.2d 1303 (1979); Cook Associates, Inc., v. Warnick, Utah, 664 P.2d 1161, 1166 (1983).

Using the single approximation that equity growth in the home was constant through the years of its ownership, a

rational figure of \$19,917, as worked out in the Findings of Fact at page 11, is appropriate.

This method of computing the equity growth, damages as it were, is imperfect, but it is a rational method and the best available under the circumstances.

As the trial court made no effort to determine the equity shares of plaintiff and defendant in the Kearns home, rather relying in lieu of Findings, that by marriage the parties "pool their respective assets," the court's treating the entire home equity as a joint asset is clearly error and not subject to favorable review by the court, but rather the reviewing court should it make its independent finding of fact based on the above figures, or should remand to the trial court for findings by the court. DeRose v. DeRose, supra, Dogu v. Dogu, supra, Beals v. Beals, supra.

#### ARGUMENT

#### POINT IV

#### PLAINTIFF SHOULD RECEIVE THE ENTIRE \$32,400 INVESTMENT IN NATIONAL MILITARY UNDERWRITERS, AND DEFENDANT RECEIVE OTHER ASSETS

The court divided equally between the parties, \$16,200 each, the investment plaintiff had made of \$32,400 in National Military Underwriters.

The facts are stated in the Statement of Facts at pages 7-9.

The reason that plaintiff made the investment is that she testified that during 1983 and 1984 she worked as secretary-receptionist for Ben Kirsling, that National Military Underwriters was his company, she was very familiar with it, had respect for Mr. Kirsling and felt his company had great prospects for gain as an investment. (R. 178, L 5-12; R. 196, L 24-R. 198, L 6).

Why should the court allocate this investment equally between the parties? If the stock had made her rich, being in her name alone, it seems that she had no intent of sharing it with defendant. She still hopes it will be profitable. (R. 197, L 20-R. 198, L6). It is of course a speculative investment, but a gamble she willingly made. The problem is that she used his money, not hers.

On defendant's part, there is no testimony in the trascript that he spends lavishly. Rather, as above indicated, he works overtime trying to make ends meet and is very concerned about his future due to his knee problems. He was unwilling to speculate. That is why he put the personal injury award into rock solid thrift certificates.

Plaintiff has made her choice. She said that she gave herself a "prior distribution" of her share of the estate by buying the National Military Underwriters stock. (R. 189, L 11-16). During trial she asked the court for all this stock. (R. 202, L 22-24). Fine. There is no reason the trial court

should interfere with the choice that she has made, nor force half the choice on defendant.

Defendant prays she be given all this stock, and he an offsetting asset-preferably from her equity in the Magna home and garage.

#### ARGUMENT

##### POINT V

DEFENDANT SHOULD HAVE BEEN AWARDED  
OCCUPANCY AND OWNERSHIP OF THE PARTIES'  
HOME IN MAGNA WITH PLAINTIFF BEING  
GIVEN OFFSETTING ASSETS FOR HER EQUITY.

Defendant entered the marriage owning a home. He leaves without a home.

Plaintiff entered the marriage without a home. She leaves with a home.

The facts are stated more fully in the Statement of Facts at pages 6, 7 and 10.

The home in Magna is on a 1-1/2 acre lot. Defendant built a garage there big enough to hold in one bay his 40-foot trailer and in another bay his tall diesel tractor. The garage is larger than the modest home, (R. 223, L 22-24) and as shown in Exhibits 11, 12 and 13, photographs of the home and garage.

Defendant testified that he needs the garage to work profitably and testified at length about all the work that he does on his truck and trailer at home, doing most of the work

and maintenance necessary, and that he works on the equipment between each run and the next. (R. 223, L 22-R. 224, L 12).

Having the garage at the home has the added advantage of time and convenience to defendant. His truck is always there to work on and he can go directly from home to the road.

Again applying the analogy made by Justice Crockett in Gale, supra, when the parties have mature years, an uncertain future, and limited assets, as the parties do here, it is prudent to cut the blanket in such a way as to conserve assets.

The garage should not stand empty, a waste of commercial space, while defendant goes out and pays to rent that very same space and servicing facility.

The trial court made no finding of fact, nor comment in its Bench Ruling, as to why it awarded plaintiff a five-year occupancy of the home. This arbitrary order, standing on no enunciated factual basis, is not entitled to deference on appeal, so review should be based simply on the record. Dogu v. Dogu, supra.

A second persuasive reason to award defendant the home is that he has a larger equity in it than plaintiff.

Defendant's proposed property distribution will be that among major assets plaintiff receive the \$32,400 in the National Military Underwriters stock, and the \$37,900 in the Wightman-Clark contract. With that allowed plaintiff, he can properly be awarded the entire equity in the Magna home.



There is another very important factor to be considered in regard to the award of the home. This is similar to the problem inherent in Argument Point II on the waste of assets.

Here the court directed plaintiff to pay defendant his one-half equity, \$31,411.00 in five years, or sooner if she remarried. (Findings Paragraph 10, Add. 1, page 3)

How is plaintiff to pay the money in five years? She'll have to dispose of the Wightman/Clark Contract proceeds, \$37,900, or sell the home. Neither is a good solution. If she disposes of her other assets to buy out defendant's equity, she leaves herself in the house, but cash poor. If she sells the home, it should have been awarded to defendant in the first place, to avoid his wasting money on similar space for the five intervening years.

Defendant did not vacate the home. He lived there, in the basement, until trial so that neither party has acquired a superior possessory interest based on long, sole, occupancy. (R. 178A, L 7-14).

It should be noted that on Exhibit 6, Plaintiff's Monthly Expense Statement, she has expenses directly related to the home totaling \$554.13. These include \$200 per month payments on the mortgage (with a \$12,000 balance this will not be paid off in the next five years), \$52.97 a month taxes, \$11.16 insurance, \$50 maintenance and utilities of \$240 a month.

For \$554 a month, particularly because the house is so small (Ex. 14), plaintiff could rent a comparable apartment.

If plaintiff were young and raising children, the situation would be different. She is not. If not yet, soon, maintaining the home's 1-1/2 acre lot will be a burden for her.

This issue comes within the concepts previously argued of conservation of assets, and a decree that is designed to serve long-range interests. Dogu v. Dogu, supra.

#### ARGUMENT

#### POINT VI

#### THE REVIEWING COURT SHOULD REDISTRIBUTE THE ASSETS

Where it is clear that the trial court has not based its decision on express findings of fact so as to guide the reviewing court, those findings are not entitled to deference. DeRose v. DeRose, supra, Boals v. Boals, supra, Pennington v. Pennington, supra.

When the ruling of the trial court fails to accomplish the essential objectives of the decree of divorce, that is to arrange the property and economic resources of the parties to their best advantage for their future life, it is the prerogative of the reviewing court to make findings to accomplish these goals. Dogu v. Dogu, supra.

This is something the reviewing court does with

reluctance, but due here to the parties' ages, the amount of litigation that has gone on, their limited resources, the clarity of the issues, and the fact that defendant proposes to plaintiff more than her share of assets, defendant submits the following as a restructured decree for approval by the court.

Defendant accepts the valuations made by the trial court.

The trial court found the parties' assets to total \$229,855, and awarded \$111,846 of this to plaintiff and \$118,009 to defendant.

Defendant is entitled to \$50,000, his personal injury award, and \$19,920 for the equity in the Kearns home. This totals \$69,920 in separate assets. He waives interest on the \$32,400 that plaintiff wrongfully appropriated from him.

Deducting this from the total assets of \$229,855 leaves a joint marital estate of \$159,935.

The figures are laid out in Addendum 6. Defendant proposes plaintiff receive the following:

|              |                         |
|--------------|-------------------------|
| \$ 17,835.00 | Account Receivable      |
| 1,000.00     | 2 burial plots          |
| 1,500.00     | 1/2 household furniture |
| 1,800.00     | 1978 Chrysler           |
| 100.00       | 1953 Chevrolet pickup   |
| 37,900.00    | Wightman-Clark contract |
| 32,400.00    | All National Military   |
|              | Underwriters stock      |
| <hr/>        |                         |
| \$ 92,535.00 |                         |

This totals to plaintiff \$92,535.00 leaving to plaintiff, from the joint marital estate, \$67,400.

It puts plaintiff in a cash position where she can invest or draw earnings as she sees fit. .

It puts defendant in the position where he has the house and garage to operate his business.

Defendant does ask for one-half the household furniture. The trial court awarded it all to her without a finding (Add. 6).

While defendant would be pleased to be relieved from his offer of alimony of \$100 per month as plaintiff has no present need for it, he proposes alimony as in his Argument, Point II.

The difference between this proposal and the court's decree is that it will better conserve assets, and enhance income production, during the next important, limited, years.

#### CONCLUSION

Defendant prays that his proposed distribution be accepted by the court.


That failing, he prays award to him of his equity in the Kearns home, the \$50,000 personal injury award with interest until delivered, 1/2 the household furnishings, occupancy of the Magna home and garage, reduction or elimination of alimony and for an equal distribution of the other assets.

As the third alternative, defendant prays that the judgment of the trial court be reversed as to one or all of the above points and the matter remanded. This is a third choice, as defendant would prefer to end litigation.

Defendant submits to the consideration of the court the award of fees and costs in view of plaintiff's handling of his personal injury award fund.

DATED September 19, 1985.

Respectfully submitted,

  
\_\_\_\_\_  
SAMUEL KING

MAILING CERTIFICATE

This is to certify that four true and correct copies of the foregoing were mailed to Kathryn Schuler Denholm, attorney for plaintiff/respondent, 660 South 200 East, Suite 100, Salt Lake City, Utah 84111, U. S. Mail, postage prepaid, September 19, 1985.

  
\_\_\_\_\_  
SAMUEL KING

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Telephone: 534-1035

FEB 12 1985

IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY  
STATE OF UTAH

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|                  |   |                      |
|------------------|---|----------------------|
| HELEN NARANJO,   | * | FINDINGS OF FACT AND |
| Plaintiff,       | * | CONCLUSIONS OF LAW   |
| -vs-             | * |                      |
| JOSE L. NARANJO, | * | Civil No. D83-3755   |
| Defendant.       | * |                      |

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This matter came for trial before the Honorable Dennis Frederick on the 16th day of November, 1984. Plaintiff appeared with counsel, Kathryn Schuler Denholm; Defendant appeared with counsel, Sam King, the Court having received testimony and exhibits, the matter having been argued and submitted, the Court being fully advised now makes the following Findings of Fact:

1. Plaintiff and defendant are each actual and bonafide residents of Salt Lake County, Utah and have been such for more than three months immediately proceeding the filing of the complaint in this action.

2. The parties are husband and wife having been married on December 4, 1968 at Summit County, Utah.

3. There are no children of the marriage and none are expected.

4. Each of the parties has caused the other great emotional suffering and distress and each is entitled to a Decree of Divorce from the other.

5. Plaintiff is 59 years of age, has ulcers but is otherwise in good health, is not presently employed, but is capable of employment. She has worked during the year 1984, and gave no reason for being unemployed at the time of trial. Defendant is a long-line truck driver who owns his own diesel tractor truck and a flat-bed trailer. His gross income in the 12 months prior to trial, November, 1983, through October, 1984, was \$75,522 and his net income was \$27,905, his business expenses consisting mainly of fuel, tires, parts, repairs and maintenance.

6. A letter from Dr. Jonathon Horne dated November 5, 1984, was received in evidence, Exhibit 22, which stated that defendant has an injured left knee which will require first arthroscopic debridement and may require arthroplasty or total knee replacement in the future, but the letter is not specific as to when these procedures will occur and, as to the arthroplasty, whether it will ever occur. Accordingly, the present findings of the court cannot include present consideration of his physical problem.

7. Based upon the length of the marriage and the disparity in the parties' earning capacity, the Court finds it is reasonable that defendant pay to plaintiff the sum of \$800 per month as alimony.

8. The parties have acquired a home located at 7593



West 3500 South, Magna, Utah, having a fair market value at the time of trial of \$75,000, subject to a first mortgage. The equity based thereon is determined by the court to be \$62,242.

9. The home of the parties includes an oversize garage built and used by the parties for storage and maintenance of defendants diesel tractor and trailer. No testimony was elicited as to the reasonable rental value of equivalent accommodations.

10. It is reasonable that plaintiff be awarded use and possession of the home subject to the mortgage obligation thereon and a lien in favor of the defendant in the sum of \$31,121. Defendant's lien shall be payable upon the first of the following contingencies:

- a. Plaintiff's remarriage;
- b. Plaintiff's cohabitation in the home with a man not her husband;
- c. Plaintiff's sale of the home, subject to a first right of refusal in the defendant;
- d. Plaintiff ceases to occupy the home as her principal residence or;
- e. The expiration of five years from the date of entry of the Decree in this case.

No interest shall accrue on the defendant's equity interest in the home pending the expiration of any of the above contingencies.

11. The parties hold a real estate contract from

Wightman-Clark with a balance due them of \$37,900. This should be awarded to plaintiff, together with all funds paid prior to trial and held by plaintiff at the time of trial.

12. The parties have loaned \$17,800 to plaintiff's children and their husbands and \$4,2300 to defendant's business associates.

13. It is further reasonable that plaintiff be awarded one half the stock in United Military Underwriters and that she have the stock reissued as separate certificates deliverable to herself and to the defendant, all household furnishings and effects now in the home of the parties, the 1978 Chrysler automobile, the 1953 Chevrolet truck, the right to collect loans to her children and their families in the approximate amount of \$17,800, two burial lots at Memorial Estated, approximately \$9,835 held in a savings account and consisting of proceeds of the Whiteman Clark contract received prior to the date of the trial, all life and cancer poicies in her name subject to payment of premiums and her personal effects and property.

14. It is reasonable that defendant be awarded time certificates: #146732128 and #146013271, savings accounts: #143009199, #063003065 and #143000977, all interest in his business as a trucker including his diesel tractor, flatbed trailer, tools and equipment, his retirement plan if any, the 1957 Mitchell boat with trailer, 1949 International pickup, Honda motorcycle, 1974 Ford pickup with camper, his persoal belongings and effects, trailmobile trailer and

approximately \$4,200 loaned to his business associated and friends.

15. It is reasonable that defendant be ordered of vacate the home of the parties and remove his equipment therefrom within a reasonable but prompt time, not later than December 1, 1984.

16. The Court finds that defendant was awarded a judgment for injuries, in the original amount of \$110,000 in June, 1982. Of this, \$18,000 was paid to the Utah State Insurance Fund to reimburse lost income and medical expenses received by the defendant, and after costs and fees, defendant received net cash of \$61,459. The Court finds defendant did not meet his burden of showing the amount of this award attributable to special damages, which the Court determines to be joint marital property as lost income, and accordingly, the Court finds the whole \$61,459 to be joint property; \$60,000 of this money was put in joint saving certificates, two \$20,000 certificates and two \$10,000 certificates. The Court took into consideration the possibility that defendant may require future surgery in awarding him the majority of the income producing assets of the marriage, but specifically finds that defendant's possible need for surgery is speculative.

17. The Court finds that, because there are no children of the marriage, and as a result of other circumstances testified to by the parties, the Decree of Divorce to be entered herein should be made final upon entry.

18. There are no debts of the marriage; each of the parties should hold the other harmless of any obligations separately incurred by him or her.

Whereupon, the Court having made its Findings of Fact now makes the following:

#### CONCLUSIONS OF LAW

1. Each of the parties should be awarded a Decree of Divorce from the other upon the grounds of mental cruelty the same to become final upon entry.

2. Defendant should be ordered to pay the plaintiff the sum of \$800 per month as alimony.

3. Plaintiff should be awarded the home located at 7593 West 3500 South, Magna, Utah, together with all equity therein subject to the mortgage obligation thereon and a lien in favor of the defendant in the sum of \$31,121. Defendant's lien should be payable upon the first of the following contingencies:

a. Plaintiff's remarriage;

b. Plaintiff's cohabitation in the home with a man not her husband;

c. Plaintiff's sale of the home subject to the first right of refusal in the defendant;

d. Plaintiff ceases to occupy the home as her principal residence or;

e. The expiration of five years from the date of entry of the Decree in this case. No interest shall accrue on the defendant's equity interest in the home pending the

expiration of any of the above contingencies.

4. Plaintiff should be awarded all proceeds of the real estate contract with Whiteman Clark said contract having a balance of approximately \$37,900 including sums collected and held in savings at the time of trial and all future proceeds of said contract.

5. Plaintiff should be awarded one-half the stock in United Military Underwriters and have the balance of the stock reissued as a separate certificate deliverable to the defendant. It is further reasonable that plaintiff be awarded all household furnishings and effects now in her possession, the 1978 Chrysler automobile, the 1953 Chevrolet truck, the right to collect loans to her children and their families in the approximate amount of \$17,800, two burial lots at Memorial Estates, all life and cancer policies in her name subject to payment of premiums and her personal effects and property.

6. The defendant should be awarded time certificates: #146732128 and #146013271, savings accounts: #143009199, #063003065 and #143000977, all interest in his business as a trucker including his diesel tractor, flatbed trailer, tools and equipment, his retirement plan if any, the 1957 Mitchell boat with trailer, 1949 International pickup, Honda motorcycle, 1974 Ford pickup with camper, his personal belongings and effects, trailmobile trailer and approximately \$4,200 loaned to his business associates and friends.

7. Defendant should be ordered to vacate the home of the parties and remove his equipment therefrom within a reasonable but prompt time not later than December 1, 1984.

8. The Court concludes as a matter of law that the net proceeds of defendant's personal injury action is a joint asset of the marriage.

9. Each of the parties should be ordered to pay the debts separately incurred by him or her and hold the other harmless thereon.

DATED this 25<sup>th</sup> day of February, 1985.

By the Court:

W. Dennis Fredrick  
Judge

Judge Frederick

KATHRYN SCHULER DENHOLM 0866  
Attorney for Plaintiff  
660 South 200 East, Suite 100  
Salt Lake City, Utah 84111  
Telephone: 534-1035

IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY  
STATE OF UTAH

---

|                  |   |                    |
|------------------|---|--------------------|
| HELEN NARANJO,   | * |                    |
| Plaintiff,       | * | DECREE OF DIVORCE  |
| - vs -           | * |                    |
| JOSE L. NARANJO, | * | Civil No. D83-3755 |
| Defendant,       | * |                    |

---

This matter came for trial before the Honorable Dennis Frederick on the 16th day of November, 1984. Plaintiff appeared with counsel, Kathryn Schuler Denholm; Defendant appeared with counsel, Sam King, the Court having received testimony and exhibits, the matter having been argued and submitted, the Court being fully advised, more than 90 days having elapsed since the filing of this action, having made its Findings of Fact and Conclusions of Law now therefore it is hereby ORDERED ADJUDGED AND DECREED:

1. Each of the parties is awarded a Decree of Divorce from the other upon the grounds of mental cruelty, the same to become final upon entry.

2. Defendant is ordered to pay the Plaintiff the sum of \$800 per month as alimony.

3. Plaintiff is awarded the home located at 7593 West 3500 South, Magna, Utah together with all equity therein subject to the mortgage obligation thereon and a lien in favor of the Defendant in the sum of \$31,121. Defendant's lien is payable upon the first of the following contingencies:

- a. Plaintiff's remarriage;
- b. Plaintiff's cohabitation in the home with a man not her husband;
- c. Plaintiff's sale of the home subject to the first right of refusal in the Defendant;
- d. Plaintiff ceases to occupy the home as her principal residence or;
- e. The expiration of five years from the date of entry of the Decree in this case

No interest shall accrue on the Defendant's equity interest in the home pending the expiration of any of the above contingencies.

4. Plaintiff is awarded all proceeds of the real estate contract with Whiteman Clark, said contract having a balance of approximately \$37,900; including both sums collected and held in savings at the time of trial and all future proceeds of said contract.

5. Plaintiff is awarded one-half the stock in United Military Underwriters. She is directed to have balance of the stock reissued as a separate certificate, and deliver the same to the Defendant. It is further ordered that



Plaintiff be awarded all household furnishings and effects now in her possession, the 1978 Chrysler automobile, the 1953 Chevrolet truck, the right to collect loans to her children and their families in the approximate amount of \$17,800, two burial lots at memorial Estates, all life and cancer policies in her name subject to payment of premiums and her personal effects and property.

6. The Defendant is awarded time certificates: #146732128 and #146013271, savings accounts: #143009199, #063003065 and #143000977, all interest in his business as a trucker including his diesel tractor, flatbed trailer, tools and equipment, his retirement plan if any, the 1957 Mitchell boat with trailer, 1949 International pickup, Honda motorcycle, 1974 Ford pickup with camper, his personal belongings and effects, trailmobile trailer and approximately \$4,200 loaned to his business associates and friends.

7. Each of the parties is ordered to pay the debts separately incurred by him or her and hold the other harmless thereon.

DATED this 25<sup>th</sup> day of February, 1985.

By the Court:

121 J. Dennis Frederick  
Judge Frederick

Approved as to form:

---

Sam King

Attorney for Defendant

Disposition of property - Maintenance and health care of parties and children - court to have continuing jurisdiction - Custody and visitation - Termination of alimony.

(1) When a decree of divorce is rendered, the court may include in it such orders in relation to the children, property and parties, and children, as may be equitable. The court shall include in every decree of divorce an order assigning responsibility for the payment of reasonable and necessary medical and dental expenses of the dependent children. If coverage is available at a reasonable cost, the court may also include an order requiring the purchase and maintenance of appropriate health, hospital, and dental care insurance for those children. The court shall have continuing jurisdiction to make such subsequent changes or new orders with respect to the support and maintenance of the parties, the custody of the children and their support, maintenance, and health and dental care, or the distribution of the property as shall be reasonable and necessary. Visitation rights of parents, grandparents, and other relatives shall take into consideration the welfare of the child.

(2) Unless a decree of divorce specifically provides otherwise, any order of the court that a party pay alimony to a former spouse shall automatically terminate upon the remarriage of that former spouse, unless that marriage is annulled and found to be void ab initio, in which case alimony shall resume, providing that the party paying alimony be made a party to the action of annulment and that party's rights are determined.

(3) Any order of the court that a party pay alimony to a former spouse shall be terminated upon application of that party establishing that the former spouse is residing with a person of the opposite sex, unless it is further established by the person receiving alimony that the relationship or association between them is without any sexual contact.

35-1-62 Utah Code Annotated:

Injuries or death caused by wrongful acts of third parties--Remedies of employee--Rights of employer or insurance carrier in cause of action--Maintenance of action--Disbursement of proceeds of recovery.--

When any injury or death for which compensation is payable under this title shall have been caused by the wrongful act or neglect of another person not in the same employment, the injured employee, or in case of death his dependents, may claim compensation and the injured employee or his heirs or personal representative may also have an action for damages against such third person. If compensation is claimed and the employer or insurance carrier becomes obligated to pay compensation, the employer or insurance carrier shall become trustee of the cause of action either in its own name or in the name of the injured employee, or his heirs or the personal representative of the deceased, provided the employer or carrier may not settle and release the cause of action without the consent of the commission.

...

(3) The balance shall be paid to the injured employee or his heirs in case of death, to be applied to reduce or satisfy in full any obligation thereafter accruing against the person liable for compensation.

35-1-65. Utah Code Annotated:

Temporary disability--Amount of payments--"State average weekly wage" defined.--(1) In case of temporary disability, the employee shall receive  $66 \frac{2}{3}\%$  of his average weekly wages at the time of the injury so long as such disability is total, but not more than a maximum of  $66 \frac{2}{3}\%$  of the state average weekly wage at the time of the injury per week and not less than a minimum of \$35 per week plus \$5 for a dependent wife and \$5 for each dependent minor child under the age of eighteen years, up to a maximum of four such dependent minor children, but not to exceed  $66 \frac{2}{3}\%$  of the state average weekly wage at the time of the injury per week. In no case shall such compensation benefits exceed 312 weeks at the rate of  $66 \frac{2}{3}\%$  of the state average weekly wage at the time of the injury over a period of eight years from the date of the injury.

(2) The "state average weekly wage" as referred to in chapters 1 and 2 of this Title shall be determined by the commission as follows: on or before June 1 of each year, the total wages reported on contribution reports to the department of employment security under the commission for the preceding calendar year shall be divided by the average monthly number of insured workers determined by dividing the total insured workers reported for the preceding year by twelve. The average annual wage thus obtained shall be divided by 52, and the average weekly wage thus determined rounded to the nearest dollar. The state average weekly wage as so determined shall be used as the basis for computing the maximum compensation rate for injuries or disabilities arising from occupational disease which occurred during the twelve-month period commencing July 1 following the June 1 determination, and any death resulting therefrom.

35-1-81. Utah Code Annotated:

Awards--Medical, nursing, hospital and burial expenses--  
Artificial limb or eye--Artificial appliances.--In  
addition to the compensation provided for this title  
the employer or insurance carrier, or the commission  
of finance out of the state insurance fund, shall in  
ordinary cases also be required to pay such reasonable  
sum for medical, nurse and hospital services, and for  
medicines, and for such artificial means and appliances  
as may be necessary to treat the patient as in the  
judgment of the industrial commission may be just,  
and in case death results from the injury, it shall  
also require the employer or insurance carrier, or the  
commission of finance out of the state insurance fund,  
to pay the burial expenses, in ordinary cases not  
exceeding the sum of \$1,000. [Emphasis added]

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

---

HELEN NARANJO, :  
PLAINTIFF, :  
VS. : CASE NO. D-83-3755  
JOSE J. NARANJO, :  
DEFENDANT. :

---

BEFORE THE HONORABLE J. DENNIS FREDERICK, JUDGE

COURT'S RULING

NOVEMBER 16, 1984

APPEARANCES:

FOR THE PLAINTIFF: KATHRYN SCHULER DENHOLM  
660 SOUTH 200 EAST  
SUITE 100  
SALT LAKE CITY, UTAH 84111

FOR THE DEFENDANT: SAMUEL KING  
2120 SOUTH 1300 EAST  
SALT LAKE CITY, UTAH 84111

---



**Rocky Mountain  
Reporting Service**

712 Newhouse Building  
10 Exchange Place  
Salt Lake City, Utah 84111  
Phone (801) 531-0256

Susan K. Hellberg, C.S.R., R.P.R.  
License #190

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1 LOTS ARE TO BE DIVIDED EQUALLY, EACH PARTY GETTING TWO LOTS.  
2 THE STOCK IN NMU IS TO BE DIVIDED EQUALLY, EACH PARTY TO  
3 OBTAIN 32,400 SHARES.

4 THE ACCOUNTS RECEIVABLE AS SET FORTH IN EXHIBIT 5  
5 ARE DIVIDED AS FOLLOWS: \$9,835 TO THE PLAINTIFF, \$8,000 TO  
6 THE PLAINTIFF, \$1,000 TO THE DEFENDANT, AND \$3,200 TO THE  
7 DEFENDANT. THE HOME IN THIS CASE IS AWARDED TO THE PLAINTIFF  
8 FOR HER USE SUBJECT TO MAINTAINING THE MORTGAGE PAYMENTS AND  
9 THE EXPENSES INCIDENT TO THE OPERATING OF THE HOME AND THAT  
10 THEY BE KEPT CURRENT SUBJECT, HOWEVER, TO A LIEN ON THE  
11 EQUITY IN THE HOME TO THE DEFENDANT IN THE SUM OF \$31,121.  
12 I HAVE MADE THIS DETERMINATION BASED UPON EXHIBIT 14 THAT THE  
13 HOME HAS A PRESENT MARKET VALUE OF \$75,000 LESS THE MORTGAGE  
14 BALANCE OF \$12,178, THE RESULTING FIGURE I HAVE DIVIDED BY  
15 2.

16 THE LIEN OF THE DEFENDANT IS TO BE PAID TO HIM AT  
17 THE EARLIER OF THE FOLLOWING EVENTS: ONE, THE REMARRIAGE OF  
18 THE PLAINTIFF OR CO-HABITATION WITH A MEMBER OF THE OPPOSITE  
19 SEX WITHOUT THE BENEFIT OF MARRIAGE. TWO, THE PLAINTIFF  
20 EITHER SELLS THE HOME OR NO LONGER USES IT AS HER PRIMARY  
21 RESIDENCE, OR FIVE YEARS, WHICHEVER OCCURS SOONER. IN THE  
22 EVENT THE PLAINTIFF DETERMINES TO SELL THE HOME, THE  
23 DEFENDANT IS GIVEN THE RIGHT OF FIRST REFUSAL TO BUY THE  
24 HOME FOR THE SUM OFFERED AS RECEIVED BY THE PLAINTIFF  
25 APPLYING, OF COURSE, HIS LIEN INTEREST TOWARD THE PURCHASE

1 PRICE, WHICH LIEN INTEREST WILL ACCRUE NO INTEREST.

2 THE PERSONAL PROPERTY OF EACH OF THE PARTIES IS  
3 AWARDED TO THEM. THE HOUSEHOLD FURNITURE IN THE HOME IS  
4 AWARDED TO THE PLAINTIFF ON WHICH I PLACE A VALUE OF \$3,000.  
5 THE DEFENDANT IS AWARDED HIS RETIREMENT, WHATEVER THAT MAY  
6 BE, FREE AND CLEAR OF ANY CLAIM OF THE PLAINTIFF. THE  
7 LIFE AND CANCER INSURANCE POLICIES ARE AWARDED TO THE  
8 RESPECTIVE PARTIES SUBJECT TO THE OBLIGATION IF THEY WISH  
9 TO KEEP THEM IN EFFECT TO PAY THE PREMIUMS THEREON.

10 THE FOLLOWING ITEMS ARE AWARDED TO THE PLAINTIFF  
11 AS HER SOLE AND SEPARATE PROPERTY: THE FAMILY DEBTS AS I  
12 HAVE PREVIOUSLY OUTLINED THEM IN THE AMOUNT OF \$17,835; THE  
13 CHRYSLER AUTOMOBILE, VALUE \$1,800; THE HOUSEHOLD FURNITURE  
14 AS I HAVE INDICATED IN THE VALUE OF \$3,000; THE '53 CHEVROLET  
15 PICKUP WITH A VALUE OF \$100; THE WHITEMAN CLARK NOTE OF A  
16 VALUE OF \$37,900, WHICH I ANTICIPATE WILL BE PAID AT A MONTHLY  
17 RATE OF \$375 PURSUANT TO MR. SCHOENHALS' LETTER, WHICH  
18 ITEMS, ACCORDING TO MY CALCULATIONS, TOTAL THE SUM OF  
19 \$60,635.

20 THE FOLLOWING ITEMS ARE AWARDED TO THE DEFENDANT  
21 FREE AND CLEAR OF ANY CLAIM OF THE PLAINTIFF: DEBTS IN THE  
22 SUM OF \$4,200 THAT I HAVE PREVIOUSLY REFERRED TO; THE  
23 KENWORTH TRUCK WITH A VALUE OF \$8,000; THE TIRES AND TOOLS  
24 WITH A VALUE OF \$2,000; THE HONDA 360, VALUE \$300; THE  
25 INTERNATIONAL PICKUP, VALUE \$200; THE BOAT AND TRAILER,

1 VALUE \$1,000; THE FORD PICKUP AND CAMPER, \$3,000; AND THE  
2 TRAILMOBILE TRAILER, \$4,500; THE ZIONS BANK CERTIFICATES OF  
3 DEPOSIT IN THE AMOUNT OF \$31,998; THE SAVINGS CERTIFICATE  
4 IDENTIFIED IN EXHIBIT 17 IN THE AMOUNT OF \$6,400; THE SAVINGS  
5 CERTIFICATE IN THE AMOUNT OF \$400, LIKEWISE IDENTIFIED IN  
6 EXHIBIT 17, AND THE SAVINGS CERTIFICATE IN THE AMOUNT OF  
7 \$7,400 IDENTIFIED IN THE SAME EXHIBIT, WHICH ITEMS TOTAL  
8 \$67,598.

9 THE CONTINUING USE OF THE GARAGE BY THE DEFENDANT,  
10 IN THIS COURT'S VIEW, IS NOT A FEASIBLE, WORKABLE ARRANGE-  
11 MENT. ACCORDINGLY, THE DEFENDANT IS DIRECTED TO MOVE OUT OF  
12 HOME AS SOON AS IS PRACTICABLE AND REMOVE HIS BELONGINGS  
13 FROM THERE. THE DEFENDANT IS IN ADDITION ORDERED TO PAY  
14 ALIMONY TO THE PLAINTIFF IN THE SUM OF \$800 PER MONTH. EACH  
15 PARTY IS DIRECTED TO PAY THEIR OWN ATTORNEY'S FEES AND COSTS.

16 NOW, I RECOGNIZE, COUNSEL, THAT THERE IS SOME  
17 DISPARITY IN THE CALCULATION OF THE RESPECTIVE AWARDS. HOW-  
18 EVER, IT IS MY VIEW THAT TAKING INTO ACCOUNT THE PERSONAL  
19 INJURY AWARD, BECAUSE I AM UNABLE--THE EVIDENCE HAS NOT  
20 ESTABLISHED WHAT PORTION OF THAT REPRESENTED, IF ANY, LOST  
21 WAGES VERSUS PAIN AND SUFFERING THAT THE PLAINTIFF, BY  
22 VIRTUE OF ANY AWARD, IS SHARING IN THAT AWARD. BUT AT THE  
23 SAME TIME, I HAVE ATTEMPTED TO DISTRIBUTE THE PROPERTY AS  
24 EQUALLY AS I AM ABLE IN LIGHT OF THE FIGURES AND THE EVIDENCE  
25 THAT I HAVE BEEN PRESENTED. AS I STATED AT THE OUTSET, THIS

1 COURT WILL MAINTAIN CONTINUING JURISDICTION IN THE EVENT  
2 THERE IS A SUBSTANTIAL CHANGE IN THE MATERIAL CIRCUMSTANCES  
3 OF THE PARTIES AND CERTAINLY WILL RECONSIDER, IF NECESSARY,  
4 ANY FACTUAL CIRCUMSTANCE THAT CAUSES SUCH A CHANGE.

5 MR. KING, I WILL ASK YOU TO PREPARE THE FINDINGS  
6 OF FACT, CONCLUSIONS OF LAW, AND DECREE, SUBMIT THEM TO  
7 MS. DENHOLM PURSUANT TO RULE 4 FOR APPROVAL.

8 NOW, ARE THERE ANY QUESTIONS?

9 MR. KING: I HAVE ONE, YOUR HONOR. YOU REFERRED TO  
10 A \$31,000 SAVINGS CERTIFICATE, AND UNLESS YOU HAVE COMBINED  
11 OTHER CERTIFICATES, I'M NOT AWARE OF ANY SUCH CERTIFICATE.

12 THE COURT: EXCUSE ME, MR. KING. EXHIBIT 21  
13 REPRESENTED PHOTOCOPIES OF TWO CERTIFICATES OF DEPOSIT OF  
14 ZIONS FIRST NATIONAL BANK, ONE IN THE AMOUNT OF \$10,000, AND  
15 THE OTHER IN THE AMOUNT OF \$21,000, ALMOST \$22,000. AM I  
16 TO UNDERSTAND THAT THAT'S THE TOTAL SAVINGS BETWEEN THE  
17 PARTIES?

18 MR. KING: IT'S NOT THE TOTAL SAVINGS; IT'S THE  
19 ONLY CERTIFICATES.

20 THE COURT: YOU REFER IN YOUR ASSET COLUMN ON  
21 EXHIBIT 16 TO SAVINGS CERTIFICATES, THREE SEPARATE SAVINGS  
22 CERTIFICATES IN THE AMOUNTS OF SIXTY-FOUR HUNDRED, FOUR  
23 HUNDRED, AND SEVENTY-FOUR HUNDRED DOLLARS, AND IN ADDITION,  
24 YOU REFER IN EXHIBIT 16 TO TIME CERTIFICATES IN THE AMOUNT  
25 OF \$12,000 AS WELL AS \$24,000. NOW, BASED UPON THAT, IT IS

1 MY VIEW THAT THERE WERE A TOTAL OF FIVE SEPARATE CERTIFI-  
2 CATES OR SAVINGS ACCOUNTS. IS THAT NOT CORRECT?

3 MR. KING: COUNSEL, HAVE I GOT THESE MISDESIG-  
4 NATED? THE SIXTY-FOUR HUNDRED, THE FOUR HUNDRED, AND  
5 SEVENTY-FOUR HUNDRED ARE SAVINGS ACCOUNTS?

6 MS. DENHOLM: I THINK THEY LOOK TO BE MORE CON-  
7 SISTENT WITH SAVINGS ACCOUNTS THAN SAVINGS CERTIFICATES.

8 MR. KING: THE TOTAL IS SAVINGS ASSETS.

9 THE COURT: WHAT I INTEND BY MY RULING IS THAT THE  
10 ZIONS CD'S ARE AWARDED TO THE DEFENDANT, AND IN ADDITION,  
11 THOSE ITEMS, SIXTY-FOUR HUNDRED, FOUR HUNDRED AND SEVENTY-  
12 FOUR HUNDRED ARE LIKEWISE AWARDED TO THE DEFENDANT.

13 MS. DENHOLM: NOW, DOES THAT INCLUDE THE SAVINGS?

14 THE COURT: THE BRIGHTON BANK CHECKING ACCOUNT IS  
15 AWARDED TO THE PLAINTIFF, AND THAT LISTED ON EXHIBIT 16 IS  
16 \$2,600.

17 MS. DENHOLM: YOUR HONOR, WOULD THE PROCEEDS FROM  
18 THE NOTE THAT ARE NOW HELD IN A SAVINGS ACCOUNT, THEN, BE  
19 AWARDED TO THE PLAINTIFF AS INTEREST IN THAT NOTE?

20 THE COURT: THAT IS CORRECT.

21 NOW, ANY FURTHER QUESTIONS? VERY WELL. COURT  
22 WILL BE IN RECESS.

23 MR. KING: HOW LONG WOULD MR. NARANJO HAVE TO  
24 VACATE THE HOME?

25 THE COURT: HOW LONG DOES HE NEED?

1           MR. NARANJO: I HAVE NO IDEA. I AM GOING TO HAVE  
2 TO FIND A PLACE TO PUT ALL MY STUFF.

3           THE COURT: WELL, WHAT I WOULD SUGGEST, MR.  
4 KING, IT APPEARS TO ME THAT COUNSEL HAS BEEN ABLE TO WORK  
5 AMICABLY IN THIS CASE, AND CERTAINLY I WOULD HOPE THAT THAT  
6 CONTINUES. CERTAINLY YOU NEED A REASONABLE TIME TO FIND  
7 ANOTHER LOCATION TO MOVE YOUR EQUIPMENT AND TOOLS. THE  
8 PRINCIPAL CONCERN IS TO HAVE YOU MOVE AND GET ANOTHER LOCA-  
9 TION AND THEN REMOVE YOUR ITEMS AND TOOLS AND SO ON THAT GO  
10 WITH THE TRUCK AS SOON AS YOU ARE ABLE. MY NOTION WOULD BE  
11 THAT THAT CAN PROBABLY BE ACCOMPLISHED WITHIN A MATTER OF A  
12 COUPLE OF WEEKS.

13           MS. DENHOLM: I WOULD THINK SO.

14           THE COURT: THAT IS, AT LEAST, YOUR MOVE. SO FAR  
15 AS THE TRUCK IS CONCERNED, IF IT REQUIRES A LONGER TIME,  
16 THEN I WOULD SUGGEST YOU DISCUSS IT WITH COUNSEL AND SEE  
17 IF YOU CANNOT AGREE UPON A TIME WHEREBY HE WILL BE MOVED  
18 OUT.

19           MR. KING: DOES THE COURT INCLUDE IN THIS ORDER  
20 THAT SHE SHOULD HAVE THAT CERTIFICATE ON UNITED MILITARY  
21 UNDERWRITERS REISSUED IN BOTH NAMES?

22           THE COURT: THAT IS CORRECT. I AM DIRECTING THAT  
23 BOTH PARTIES DO WHAT IS NECESSARY TO MAKE THE DISTRIBUTION  
24 THAT I HAVE RULED, AND THAT WOULD REQUIRE THE NECESSITY OF  
25 THE ISSUANCE OF SEPARATE CERTIFICATES FOR THEIR STOCK

SAMUEL KING  
ATTORNEY AT LAW  
301 GUMP & AYERS BUILDING  
2120 SOUTH 300 EAST  
SALT LAKE CITY, UTAH 84106  
TELEPHONE (801) 486-3751

June 8, 1982

Mr. Jose Naranjo  
7593 West 3500 South  
Magna, Utah 84044

Dear Jose:

Following is my accounting to you of disbursement of the verdict against Gary Energy:

|                     |                                      |
|---------------------|--------------------------------------|
| \$110,000.00        | Gross settlement                     |
| <u>1,608.65</u>     | Costs as per ledger                  |
| \$108,391.35        |                                      |
| <u>18,000.00</u>    | State Insurance Fund                 |
| \$ 90,391.35        | Net settlement                       |
| <u>30,130.45</u>    | Attorney fees, 1/3 of net settlement |
| \$ 60,260.90        | Net to you                           |
| <u>1,198.55</u>     | Refund of costs paid by you          |
| <u>\$ 61,459.45</u> | Total due you                        |

The settlement with the State Insurance Fund is as per statute on what your future benefits are, which are none until you have used up your share of the settlement, your share being \$60,260.90.

However, as the settlement is a reduction of the initial amount of the \$120,000 verdict plus interest and costs, I got the State to come down from the approximately \$25,000 they have paid out so far to a total of \$18,000. That difference of approximately \$7,000 goes to you to increase your cash in hand.

In my opinion, your entire recovery of \$60,260.90 is not subject to taxes, representing only a partial reimbursement to you of pain, suffering and disability you received from the accident.

My check to you for \$61,459.45 is enclosed.

As you know, the State authorized me to act to recover the benefits you have received. The State will be paying me and Bill Prakken a fee from the \$18,000. That is entirely separate from the fees you pay us and is not in any way chargeable against you.

If wish you the best of luck and hope that in the future I can find some other people to work with as fine as you.

Sincerely,

SAMUEL KING  
SK/has  
Enclosure

Addendum 4

NOV - 8 1984

JONATHAN H. HORNE, M.D.

5770 South 250 East #110  
Murray, Utah 84107  
Telephone (801) 266-3399

November 5, 1984

Orthopedic Surgery & Fractures  
Joint Arthroscopy/Microsurgery  
Herniated Disc Injections  
Arthritis  
Thermography

Fellow  
American Academy of Orthopedic Surgery  
Western Orthopedic Association  
International Arthroscopic Association  
Diplomate  
American Board of Orthopedic Surgery

Mr. Samuel King  
Attorney-At-Law  
Samuel King & Associates  
301 Gump & Ayers Building  
2120 South 1300 East  
Salt Lake City, Utah 84106

Dear Mr. King:

Re: Jose Naranjo

You requested the answers to some questions regarding your client and my patient, Jose Naranjo.

Evaluation of his knee was performed. He has some limitation of motion. He has motion only to 130 degrees, 10 degrees poorer than he had two years ago. X-rays demonstrate arthritic changes of the joint, along the medial and lateral femoral condyles, some narrowing of the joint-space, but as of yet, not enough to require arthroplasty procedures or total knee replacements.

The patient has complaint mainly, of pain in the morning when he arises which improves during the day with activity, and pain with weather changes. These are typical signs of post-traumatic degenerative arthritis.

His knee problems are directly attributable to the truck accident in question. His knee will not improve from this time forward, but will slowly deteriorate.

Whether he will need an arthroplasty or total knee procedure, major debridement of the joint within the next five to ten years is conjectural, but with the deterioration of his condition the last two years, the amount of arthritis that is demonstrated on the x-ray, I believe that he will probably need some type of debridement such as an arthroscopic debridement of the joint the next five years. I believe that he will probably need a total knee replacement or major arthroplasty in 10-15 years.

I believe he probably will be able to continue working for five or ten years, but his condition may deteriorate rapidly, and it may be only another two to five years.



1 OWNERSHIP IN NMU COMPANY.

2 COURT IS NOW IN RECESS.

3 (PROCEEDINGS CONCLUDED.)

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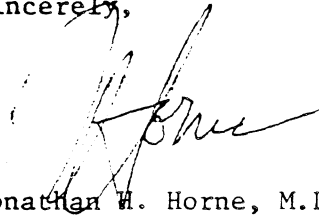
Mr. Samuel King  
Attorney-At-Law

His function ability is already impaired and will continue to become more impaired in the next few years to come. At the present time, he cannot perform vigorous activity. He can sit in the truck, push the clutch and reasonably function in that capacity, but he cannot walk more than a few blocks without discomfort increasing.

I feel that the probability of requiring a debridement of the joint such as by an arthroscopy or synovectomy, debridement of loose cartilage and/or arthritic spurs is 80 to 100 percent in the next five to ten years. He may require more than one.

The probability of requiring either a fusion or a total knee arthroplasty, I believe, is higher than 15 percent. I believe that the probability is 50 percent in the next ten to fifteen years.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Jonathan W. Horne', written over a faint, larger signature.

Jonathan W. Horne, M.D.

JHH:pr

COURT'S AWARD

| <u>TO WIFE</u>  | <u>TO HUSBAND</u>                     |
|---|---------------------------------------|
| \$31,411 1/2 present home (Magna)                     | \$31,411 1/2 present home,<br>Magna   |
| \$17,835 Accounts receivable                          | 4,200 Accounts Receivable             |
| 1,000 2 burial lots                                   | 1,000 2 burial lots                   |
| 3,000 household furniture                             | 8,000 Kenworth truck                  |
| 1,800 1978 Chrysler                                   | 1,000 Tires                           |
| 100 1953 Chevrolet pickup                             | 1,000 Tools                           |
| 37,900 Wightman-Clark contract<br>(yield \$375/month) | 300 Honda 360                         |
| 2,000 Brighton Bank account                           | 200 1949 Inter. Pickup                |
| 16,200 1/2 National Military                          | 1,000 Boat and trailer                |
|   | 3,000 1974 Ford Pickup with<br>camper |
|   | 4,500 1977 Trailmobile<br>Trailer     |
|   | \$31,998 Savings                      |
|   | 6,400 Savings                         |
|   | 400 Savings                           |
|   | 7,400 Savings                         |
|   | 16,200 1/2 National Military          |
|   | Underwriter's stock                   |
| <hr/> \$111,846                                       | <hr/> \$118,009                       |

Alimony - \$800/month

Magna Home - 1/2 equity to wife. She to pay husband 1/2 equity, fixed at \$31,411, when plaintiff remarries or five years, whichever sooner.

DEFENDANT'S INCOME AFTER BUSINESS  
EXPENSES AND BEFORE TAXES PER MONTH

Mr. Naranjo's income as a self-employed truck driver was covered for several years. The gross income, after business expenses and before taxes is as follows on a monthly basis:

\$1408.75 - 1982 Tax returns (Ex. 4)

\$1315.00 - 1983 Tax returns (Ex. 3)

\$2324.59 - Year prior to trial, November, 1983, through October, 1984 (Defendant's Ex. 18)

\$1889.00 - Defendant's income, April, 1984, through June, 1984 (Plaintiff's Ex. 7).