

1986

# Judith A. Koerpel v. Barry Jon Koerpel : Brief of Respondent

Utah Court of Appeals

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UTAH COURT OF APPEALS  
BRIEF

UTAH  
DOCKET NO. 7  
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DOCKET NO. 860194-CA

IN THE SUPREME COURT OF THE STATE OF UTAH

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JUDITH A. KOERPEL,	)	<i>860194-CA</i>
	)	Case No. 860240
Plaintiff-Respondent,	)	
vs.	)	
BARRY JON KOERPEL, M.D.,	)	
	)	Category No. 7
Defendant-Appellant.	)	

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BRIEF OF RESPONDENT

---

Appeal from the Second Judicial District Court of Weber County  
The Honorable David E. Roth, District Court Judge

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JAN 15 1987

COURT OF APPEALS

IN THE SUPREME COURT OF THE STATE OF UTAH

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JUDITH A. KOERPEL,	)	
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## RULES AND STATUTES

Rule 11(e)(2) U.R.A.P.

If the appellant intends to urge an appeal that a finding or an conclusion is unsupported by or is contrary to the evidence, he shall include in the record a transcript of all evidence relevant to such findings or conclusion.

The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 et. seq. and 1056(D)(i)

A Domestic Relations Order meets the requirements of this subparagraph only if such order--(i) does not require a plan to provide a type of form of benefit, or any option not otherwise provided under the plan...

### STATEMENT OF THE CASE

This is a divorce action which was filed by the plaintiff/respondent, hereinafter referred to as the respondent, on October 31, 1984. The parties had been married approximately ten years before the Complaint was filed and had four children of the marriage. The parties entered into a Temporary Stipulation and Agreement which was aifnws on October 30, 1984 and filed with the Court on November 6, 1984. (R. 12) After the Stipulation, the parties filed numerous affidavits and motions with the Court which resulted in the Court entering five separate interim Orders on March 28, 1985; April 18, 1985; May 8, 1985; May 9, 1985; and October 28, 1985. On November 5, 1985 a trial was had on this matter which continued for five days and concluded on November 14, 1985. (81-82, 83-84, and 141) During the trial 25 witnesses were called and 39 exhibits were entered. (R. 177-179, 181-184, 189-194) The Court took the matter under advisement and entered its ruling on November 20, 1985. The transcript of the Court's ruling consists of eight pages. (R. 195, 202-210) A motion for a new trial was filed by the appellant on the 8th day of January, 1986, which motion was denied on March 6, 1986. (R. 226, 288-290) The respondent filed an Order to Show Cause on the 7th day of March, 1986 with a supporting affidavit and both parties filed memoranda pertaining thereto. The Court entered its Findings, Conclusions, and Order on said Order to on the 20th day of May, 1986. (R. 292-294, 328-343, 441-446) A notice of appeal was filed on May 5, 1986, and a request for a transcript was

filed with the Court on May 14, 1986. (R. 428, 437) A transcript was not obtained and provided to this Court.

The appeal of the appellant was from the Decree of Divorce entered by the Court and from the Order of the Court denying the defendant's motion for a new trial. On the 25th day of August, 1986, the appellant filed a motion before the Supreme Court asking to augment the record on appeal by filing a copy of the child custody report made by Dr. McVaugh and a copy of the Barry J. Koerpel Professional Corporation Defined Benefit Plan. This motion was denied by the Supreme Court on September 15, 1986. On the 5th day of November, 1986, the respondent filed a motion to dismiss the appellant's appeal on the basis that a transcript had not been obtained as required by Rule 11 (e)(1) of the Utah Rules of Appellate Procedure. On December 15, 1986, the Supreme Court denied the respondent's motion to dismiss the appeal but ruled that "...the court limits the appellant's issues on appeal to those of law only and does so on the representation of counsel that no issue of fact has been raised...."

#### STATEMENT OF FACTS

The plaintiff/respondent, Judith A. Koerpel, hereinafter referred to as the respondent, married Barry Jon Koerpel, the defendant/appellant, hereinafter referred to as the appellant, on March 1, 1974 in Wisconsin. The parties have four children of this marriage. Two of the children were born before their marriage and were adopted. The other two children were born after the marriage. The oldest child, Kimberly, turned 18 years old on August 5, 1985, prior to the divorce hearing. Melanie



will turn 18 years of age on November 9, 1987. Joshua was five years of age at the time of the divorce hearing in November of 1985 and Bradin was three years of age.

The appellant is a doctor specializing in kidney diseases with a practice in the Weber County area. The respondent was employed part time at the time of the divorce hearing in this matter.

The parties have been involved in a divorce action since the 30th day of October, 1984. Numerous motions, order to show causes and affidavits had been filed by the parties prior to the time this matter came to trial. Those motions primarily involved the financial businesses and affairs of the parties which were numerous. The parties had originally entered into a stipulation on October 30, 1984 and Judge Ronald O. Hyde, in an Order to Show Cause ruling on the 18th of April, 1985, indicated that the parties were in a financial mess that he was not able to resolve with the evidence presently before him and awarded temporary custody of the children to the respondent. (R. 12, 63-67) The respondent attempted to determine the assets of the parties by motions to produce records and depositions of the appellant. The appellant failed to cooperate and to conform to the request. Consequently, the respondent incurred significant cost in subpoenaing records and other information for the trial with the purpose of attempting to determine the financial assets of the appellant. (R. 289)

The trial of this matter took five days, involved 25 separate witnesses, and 39 exhibits. Two psychologists testified

in this matter concerning the custody of the children. Dr. McVaugh, based upon test results, made a mild recommendation in favor of the appellant. (R. 208) Dr. Furlong recommended that the children remain with the respondent. Approximately four other witnesses were called by the respondent to testify as to her ability to care for the children and approximately three witnesses were called by the appellant to support his claim for custody. (R. 177-179, 181-184, 189-195)

Both parties called accountants to testify concerning their assets and liabilities and numerous lay witnesses to testify as to certain aspects of their finances. The respondent's accountant, Roger Nuttall, introduced accounting records identified as Exhibits 17, 18, and 19 and back up material supporting those exhibits identified as Exhibit 23. The appellant's accountant, Tanner/Brunson Company, prepared Exhibits 30 and 31. One of the assets was a Barry J. Koerpel Professional Corporation Defined Benefit Plan. That plan was valued by the Court at \$236,104.00. (R. 203) The appellant represented that the plan contained approximately \$113,770.62 held with Merrill Lynch. In fact, the moneys with Merrill Lynch were not held in the name of the Barry J. Koerpel Professional Corporation Defined Benefit Plan, but was held in the personal name of Dr. Koerpel. At the time of the hearing on the motion for a new trial, the respondent filed with the Court as Exhibit 1, photocopies of a check from Merrill Lynch, Pierce, Fenner, and Smith dated November 7, 1985, made out to Barry J. Koerpel, M.D. in the sum of \$87,881.00. The funds were then deposited with the

Professional Pension Services, Inc. through Utah First Bank sometime thereafter. (R. 406) The appellant also filed with the Court Exhibit 2 which was a record from Merrill Lynch, Pierce, Fenner and Smith indicating that Barry J. Koerpel, M.D. as of October 26, 1985, had \$114,421.85 in his personal account. That a withdrawal in the sum of \$87,881.00 had been made leaving a closing balance as of November 29, 1985 in the sum of \$26,855.42. (R. 407) At the end of the first day of trial in this matter, on November 5, 1985, the District Court Judge entered an order restraining both parties from disposing of any of the assets during the pendency of the trial. (R. 179)

The trial judge took the matter under advisement for a period of six days and entered its order from the bench on November 20, 1985. (R. 195) The Court concluded that the evidence concerning the finances in many cases was not very clear and that the net assets of the parties amounted to \$346,884.00 and that the respondent was entitled to one-half of those assets in the sum of \$173,424.00. The Court also concluded that the appellant was the moving force behind all of the business ventures and that he should inherit the business assets and all business liabilities because he was in a better position to handle the liabilities and assets. The Court also observed that the appellant at all times had the means to determine the actual state of his affairs. The Court awarded to the respondent the household furnishings with an assigned value of \$45,000.00, the automobiles with a value of \$20,900.00, a note receivable with the value of \$9,022.00, and \$100,000.00 from the Merrill Lynch

account. All of the rest of the assets, including those contained in the Defined Benefit Plan and the Professional Corporation were awarded to the appellant along with the liabilities incurred by the parties. (R. 202-207, 211-214)

The Court concluded from the evidence that the respondent should be awarded the care, custody, and control of the minor children subject to rights of visitation in the appellant. The Court considered the moral character of both parents, the emotional stability of the parents, personal vs. surrogate care of the minor children by the parents, the lack of evidence of any drug or alcohol abuse on the part of either party, the religious compatibility of the parties, the financial conditions of the parties, and the importance of keeping siblings together. The Court determined that the controlling factors in this case were the psychological tests which resulted in a mild recommendation for the appellant, the fact that the respondent was the primary care provider during most of the children's lives, and the continuing of the previous custody arrangements where it seems to be working. The Court stated that it felt that the respondent being the primary care provider and the continuation of the previous custody arrangements over weighed the mild recommendation in favor of the appellant by the psychological tests. (R. 207-208, 214-215)

The appellant filed a motion for a new trial on January 9, 1986, asking the Court to grant a new trial or in the alternative to take additional testimony and to amend its Findings of Fact, Conclusions of Law, and Divorce Decree on the grounds that

insufficient evidence existed to justify the Court's decision. (R. 226) Affidavits, memoranda, and argument were presented to the Court on the Motion for New Trial. On March 6, 1986, the Court entered the Findings of Facts, Conclusions of Law, and an Order on the Motion for a New Trial. The Court found that neither of the parties were unfit as parents and that the respondent had been the primary care provider during the marriage and had custody of the children from the time the Divorce Complaint was filed until the hearing. The Court concluded that the information presented at the trial was not sufficient to cause the Court to transfer the custody of the children from the primary care provider. The Court also found that the appellant had failed to cooperate with the plaintiff in her attempt to discover information concerning the property of the parties and that the appellant had ample opportunity to discover the status of his properties and liabilities and to have provided that information at the time of the trial. The Court concluded that there was no basis for excusable error or neglect on the part of the appellant in not knowing the nature and value of the properties he had acquired during the marriage. (R. 288-289)

The appellant appealed from the denial of a motion for a new trial. However, the appellant in his brief does not pursue that appeal and in his Brief states he only appeals the Findings of Facts, Conclusions of Law, and Decree of Divorce entered by Judge Roth.

No evidence was presented at the time of the trial to the effect that a Defined Benefit Plan had been created in accordance

with the Internal Revenue Code as represented by the appellant in his brief under Findings of Facts, Paragraph 2. During the trial, the appellant did not raise the issue of whether or not the Court could award to the respondent part of the Defined Benefit Plan. This issue was addressed for the first time by the Court in an Order to Show Cause filed by the respondent to enforce collection of the \$100,000.00. The appellant claimed the Court could not enforce the order. The Findings of the District Court which are referred to in the appellant's Brief under Statement of Facts, Paragraph 4, are those entered by Judge Roth on May 20, 1986, pursuant to the Order to Show Cause which was filed by the respondent. In that Order the Court stated:

That the Court has considered the argument of the defendant, that the Employment Retirement Security Act (ERISA) prohibits the Court from transferring the money held in the Merrill Lynch money market certificates to the plaintiff because it is not a qualified domestic relations order. The Court has reviewed the law on this matter and finds that the federal act does not prohibit the Court from exercising its personal jurisdiction in ordering him to terminate the plan. The Court finds that the plan can be voluntarily terminated by Dr. Koerpel and that the Court has the authority to hold him in contempt if he fails to terminate the plan and turn over the money as previously ordered.... (R. 442-443)

The appellant did not appeal from the Order on Order to Show Cause, and consequently the issues raised in the Order to Show Cause and the decision of the Court are not properly before this Court for review.

## SUMMARY OF ARGUMENTS

### POINT I

#### THE COURT DID NOT ABUSE ITS DISCRETION IN AWARDING THE RESPONDENT CUSTODY OF THE MINOR CHILDREN

This Court has ruled that the appellant is restricted to arguing issues of law because he failed to provide a transcript of the lower Court's proceedings. It is the respondent's position that the request of the appellant that this Court overturn the lower Court's decision in awarding custody of the children is primarily an issue of fact and may not be pursued at this time in light of the Supreme Court's ruling. The respondent also contends that the lower Court did not abuse its discretion in awarding custody of the minor children to the respondent. That the facts and evidence submitted in the lower Court adequately supported and compelled that decision by the trial judge.

### POINT II

#### THE COURT DID NOT COMMIT ERROR BY INEQUITABLY DIVIDING THE ASSETS AND LIABILITIES OF THE PARTIES

The respondent contends that this issue is one of fact and not one of law. The appellant did not cite any law in his Brief supporting his request that the lower Court's decision concerning the liabilities and assets of the party be overturned. The lower Court received extensive evidence concerning the assets and liabilities of the parties and concluded that the appellant had failed to provide the necessary information in response to depositions and motions for discovery and had failed to adequately inform the Court of his liabilities and assets. The Court awarded to the appellant all assets and liabilities except

for the furniture, vehicles, a contract, and \$100,000.00 cash held with Merrill Lynch. The respondent believes the Court ruling was supported by the evidence and was not an abuse of the Court's discretion.

### POINT III

THE COURT'S ORDER AWARDING THE RESPONDENT \$100,000.00  
OF THE SUM HELD IN THE MERRILL LYNCH MONEY MARKET  
WAS LEGAL AND SHOULD BE SUSTAINED BY THIS COURT

The appellant contends that the Trial Court is prohibited by federal law from awarding \$100,000.00 of the money held in Merrill Lynch Money Market to the respondent. The respondent contends that this issue was not raised during the trial of this matter, but was addressed by the Court in an Order to Show Cause filed thereafter. The appellant has not appealed the Court's ruling in the Order to Show Cause and consequently this matter is not properly before the Court. The respondent also contends that the money held in the Merrill Lynch Money Market account was held in the individual name of the appellant, Dr. Koerpel, and not in the name of the Pension and Profit Sharing Fund. Consequently, the federal law, if applicable, would have no effect upon the lower Court's decision. In the event this Court determines that the federal law is applicable, it does not prohibit the action taken by the Trial Court and cannot interfere with the personal jurisdiction the Court has over the individual and the right of the Trial Court to hold the appellant in contempt if he fails to voluntarily terminate the profit and pension sharing plan in order to withdraw the \$100,000.00.



## ARGUMENT

### POINT I

#### THE COURT DID NOT ABUSE ITS DISCRETION IN AWARDING THE RESPONDENT CUSTODY OF THE MINOR CHILDREN

Rule 11(e)(2) U.R.A.P. states as follows:

If the appellant intends to urge an appeal that a finding or a conclusion is unsupported by or is contrary to the evidence, he shall include in the record a transcript of all evidence relevant to such findings or conclusion.

The appellant in the memorandum filed with this Court in response to the respondent's motion for dismissal stated that he was not claiming that the lower Court had committed error or made a finding unsupported or contrary to evidence. Based upon that representation, this Court ruled that the appellant does not have the right to argue any factual issues to support its appeal. Point II of the appellant's Brief which deals with the custody of the minor children specifically states that the Court abused its discretion in awarding the custody of the children to the respondent. It is the position of the respondent that in light of the Supreme Court's ruling there is no way the appellant can be allowed to continue to pursue this part of his appeal.

The primary focus of the appellant's appeal concerning the custody of the children is that the Court committed error in the weight it placed upon the fact that the respondent had been the primary care provider for the children and that the evidence was not sufficient to move the children from the respondent's care into that of the appellant's. The parties did not make a big issue concerning the oldest minor child, Melanie, who turned 17

during the course of the trial. It was the feeling of the parties that she was old enough to live with whichever parent she elected. The main focus was on the custody of Joshua, who was five years of age, and Bradin, who was three years of age. The testimony given at the trial was undisputed that the respondent had been the primary care provider for these children from their birth until the time of the trial. The Court also considered the fact that these children had been living with the respondent from the beginning of the divorce action in October of 1984 until the time of the trial in November of 1985. The appellant complains that a temporary order of the Court should not have any bearing upon the long term determination of the custody. The appellant overlooks the fact that the parties entered into a temporary stipulation on the date the Divorce Complaint was prepared, October 30, 1984, wherein the appellant voluntarily agreed that the respondent could have the temporary care, custody, and control of the parties four minor children, subject to reasonable rights of visitation. (R. 12) The District Court later affirmed the temporary custody in the respondent. (R. 65)

At the time of the trial, the Court determined from the evidence that the children had been cared for properly and had functioned well during the approximate one year that they had been in the temporary custody of their mother the respondent. The Court found that there was no reason to change the custody from the primary care provider to the appellant and concluded that there was no evidence to demonstrate that the appellant would be a superior parent to the respondent. The Court did find

that there was a mild recommendation by one of the psychiatrists based upon the psychological test administered by Dr. McVaugh, but that that mild recommendation did not over weigh the other considerations. It should be pointed out that a psychiatrist also testified in the trial on behalf of the respondent and recommended that she would be the fit and proper parent to have the permanent care, custody, and control of the minor children. The Court also heard seven other witnesses who testified concerning the fitness of both parents to raise the children. The Court gave due consideration to all of the issues including the moral character of both parents, the emotional stability of the parents, the personal vs. surrogate care of the minor children by the parents, the lack of evidence of any drug or alcohol abuse on the part of either party, the religious compatibility of the parties, the financial condition of the parties, and the importance of keeping the siblings together. (R. 207-209, 214-215) It was only after considering all of these issues that the Court concluded that neither parent was an unfit parent and that the welfare of the children would be best served by leaving them with the mother.

This Court in the case of Wall v. Wall, 700 P.2d 1124 (Utah 1985) stated that where the evidence concerning custody could support an award of the children to either party, the Supreme Court would defer to the judgment of the Trial Court since the Trial Court is in a better position to assess the numerous considerations that must be determined in awarding custody of the children. It is the position of the respondent

that the Trial Court considered all of the relevant issues and there is no basis to support the conclusion that the Trial Court erred or abused its discretion in awarding the children to the respondent.

## POINT II

### THE COURT DID NOT COMMIT ERROR BY INEQUITABLY DIVIDING THE ASSETS AND LIABILITIES OF THE PARTIES

The Court's attention is directed to the introductory remarks under Point I of this Brief which relate to the fact that since the appellant did not obtain a transcript of the proceedings of the lower Court under Rule 11(e)(2) U.R.A.P. the appellant should not be permitted to allege that the findings of the lower Court was unsupported by or contrary to the evidence. Point III of the appellant's Brief claims that the District Court erred by inequitable assigning the business liability to Dr. Koerpel, but does not argue any issue of law.

Numerous witnesses, including two accountants, were called by the parties to testify as to the assets and liabilities incurred by the parties during their marriage. The respondent had made a diligent effort to discover the assets and liabilities of the parties, but had not obtained the cooperation of the respondent. Prior to the trial, the respondent was required to file a motion to compel the appellant to provide this information. (R. 99-101) On October 28, 1985, approximately one week before the trial, the Court entered an order that the parties must appear in the office of the respondent's attorney for deposition. (R. 141) The failure of the appellant to

provide the information previously requested made it necessary for the respondent to subpoena 19 separate parties to produce records at the time of the trial concerning the appellant's financial affairs. (R. 145-176) The failure of the appellant to respond to the reasonable request for production of documents, caused the Court to conclude in its Order denying the appellant's motion for new trial that the appellant had failed to cooperate with the respondent in her attempts to discover information concerning the properties of the parties and that the defendant had ample opportunity to discover the status of his own properties and to have had that information available at the time of the trial. The Court further found that there was no basis for the appellant's contention that there was excusable error or neglect in him not knowing the full nature and value of the properties which he had acquired during the marriage. (R. 289) The fact of the matter is that the appellant claimed to be ignorant concerning the assets of the parties and refused to cooperate in producing the necessary information prior to the time of the trial. Even with the information which had been subpoenaed by the respondent, the Court found that on many of the issues the evidence was not very clear. (R. 206) The Court awarded the business assets and liabilities to the appellant because the appellant was the moving force behind the business ventures, and because

...I think he is in a better position to handle the liabilities. He is in a better position to know what they are. I am also keeping in mind that in my opinion the defendant has at all times had the means to determine the actual state of his affairs.

I am not sure he has done so. In any event, he will be responsible for those now.... (R. 206)

The appellant in his Brief attempts to address the responsibility of the parties concerning the business assets and debts which were accumulated during the marriage. Since the appellant has not produced a transcript, he relies in part upon the affidavits and motions which have been filed prior to the divorce proceedings. It is the position of the respondent that those affidavits and motions cannot be relied upon in an appeal. Each affidavit which was filed by the appellant prior to the trial was opposed by an affidavit of the respondent. An affidavit may be relied upon by the Court in support of a motion if it is unopposed. However, when an affidavit is opposed by a countering affidavit then the Court must take testimony and allow direct and cross examination of the parties in order to determine the facts. There is no evidence before this Court that Judge Roth, the Trial Judge, ever read or considered the affidavits that had been filed over a period of approximately one year in support of motions made prior to the trial. Judge Roth did receive extensive testimony during the trial and based upon the testimony and exhibits entered the property award which is being appealed by the appellant. All the parties who filed affidavits before the Court prior to the trial, were present in Court and presented testimony under oath.

It is the position of the respondent that the Trial Court's decision was adequately supported by the testimony presented at the trial and should be upheld by this Court.

POINT III

THE COURT'S ORDER AWARDING THE RESPONDENT \$100,000.00  
OF THE SUM HELD IN THE MERRILL LYNCH MONEY MARKET  
WAS LEGAL AND SHOULD BE SUSTAINED BY THIS COURT

This Court has ruled that the appellant may not argue issues of fact and is restricted on this appeal to issues of law only. The appellant contends that the Employee Retirement Income Security Act commonly known as ERISA 29 U.S.C. § 1001 et seq. prohibits the Trial Court from requiring the appellant to deliver \$100,000.00 of the cash held with Merrill Lynch to the respondent. The appellant also claims that the Divorce Decree was not a qualified domestic relations order or a QDRO as required in 29 U.S.C. § 1056(D).

The appellant did not raise these issues of the law before Judge Roth during the divorce trial. Reference to Judge Roth's Memorandum Decision which consisted of eight pages will demonstrate that there is not a single reference made to the federal laws nor is there any indication that the Court has been called upon to make a decision as to whether or not the Court has the authority to distribute the assets that are allegedly contained in the Barry J. Koerpel Professional Corporation Defined Benefit Plan. (R. 202-210) Likewise, there is no reference to the federal acts or the ability of the Court to disburse assets allegedly held in the Defined Benefit Plan contained in the Findings of Fact, Conclusions of Law and Divorce Decree which were prepared in this case. (R. 211-222) The record is devoid of any objection filed by the appellant and his counsel to the Findings of Fact, Conclusions of Law and Divorce

Decree prepared in this matter. Had the Trial Court neglected to address an issue which had been introduced during the trial or had counsel for the respondent failed to include that information in the formal Findings, Conclusions, and Decree; the appellant and his counsel would have objected. The first time that the record demonstrates the appellant or his counsel raises the issues of the federal law is in a memorandum submitted in support of the appellant's request for a new trial. Paragraph 3 of that memorandum states that the appellant had contemplated terminating the plan at the time of the trial. (R. 232) That memorandum then makes reference to the federal law concerning defined benefit plans. Nowhere in the memorandum does the appellant contend that the federal issue had been raised during the trial and that the Court failed to give due consideration to it. The memorandum is clear that the issue is being raised for the first time on the motion for a new trial. (R. 232-234) The Trial Court, in its ruling on the motion for a new trial in Paragraph 3 of the Findings, stated that the Court would allow the appellant a hearing to address the issues concerning awarding part of the pension plans to the respondent. (R. 289) The appellant had the responsibility for setting the matter for a hearing. To date a hearing has not been requested on that issue pursuant to the ruling on the motion for a new trial. (R. 289)

The ruling on the motion for a new trial was signed by the Judge Roth on the 6th day of March, 1986. On March 7, 1986 the respondent filed an Order to Show Cause asking in part that the appellant be compelled to deliver the \$100,000.00. In response



to that Order to Show Cause, the appellant raised the issue of the federal acts and whether or not the Court could enforce the provision of the Divorce Decree awarding to the respondent part of the Defined Benefit Plan. A hearing was held on that matter and an Order was entered on May 20, 1986 by Judge Roth. In Paragraph 4 of the Findings, Judge Roth stated:

That the Court has considered the argument of the defendant, that the Employment Retirement Security Act (ERISA) prohibits the Court from transferring the money held in the Merrill Lynch money market certificates to the plaintiff because it is not a qualified domestic relations order. The Court has reviewed the law on this matter and finds that the federal act does not prohibit the Court from exercising its personal jurisdiction in ordering him to terminate the plan. The Court finds that the plan can be voluntarily terminated by Dr. Koerpel and that the Court has the authority to hold him in contempt if he fails to terminate the plan and turn over the money as previously ordered.... (R. 442-443)

The appellant has not appealed to this Court from the ruling of the Court on the respondent's Order to Show Cause dated May 20, 1986. While the appellant in his appeal did indicate he was appealing from the decision on the Motion for New Trial, on Page 1 of his Brief under Statement of Facts, the appellant states that he is only appealing from the Findings of Fact, Conclusions of Law, and Divorce Decree entered by Judge Roth. Based upon the record referred to herein, the respondent contends that the issue of federal law and its impact on Judge Roth's Divorce Decree was not raised before the lower Court and cannot be raised for the first time before this Court.

The appellant has consistently claimed that the approximately \$114,421.00 held in the Merrill Lynch Money Market

Fund belonged to the Dr. Koerpel Professional Corporation Defined Benefit Plan. It should be noted that the Defined Benefit Plan is a plan supposedly created and operated by a professional corporation of Dr. Koerpel. As it turns out, the \$114,421.00 was held in the personal name of Dr. Koerpel. After the Divorce Decree had been entered in this matter and prior to the hearing on the appellant's motion for a new trial, the respondent cause a subpoena to be served upon Merrill Lynch. As a result of that subpoena a copy of a check made out to the appellant was produced which demonstrated that the funds held with Merrill Lynch were held in the individual name of the appellant and not in the name of the Professional Corporation or the Defined Benefit Plan. (R. 406-407) The check demonstrates that on November 1, 1985, a check was made out to Dr. Koerpel, the appellant, in the sum of \$87,881.00 and that check was deposited with Professional Pension Services on the 7th day of November, 1985. The balance of the sum was retained by Merrill Lynch under the name of the appellant, Dr. Koerpel. The transfer of these funds was a direct violation of a restraining order that was issued by the Trial Court on November 5, 1985 restraining the disposal of any assets during the pendency of the trial. The appellant did not disclose the manner in which the funds were held nor that the funds were being transferred during the trial of this matter. In the Order on Order to Show Cause entered on May 20, 1986, referred to by the appellant in his Brief the Court found that at the beginning of the divorce trial in this matter, the appellant held the money with Merrill Lynch Money Market Certificate in his individual

name; that two days after the beginning of the trial, the appellant transferred a substantial part of that money into the Dr. Koerpel Professional Corporation Defined Benefit Plan and that there was a restraining order in effect at that point in time. (R. 442)

The appellant claims that the Trial Court could not legally disburse the assets belonging to the Pension Plan. That Pension Plan was set up by a professional corporation and not by the appellant as an individual. At no time has the appellant demonstrated that the \$114,421.00 was a corporate asset which could be placed in the Pension and Profit Sharing Plan. It is the position of the respondent that the appellant cannot disregard the corporate entity and insist that an asset held in his personal name is in fact a corporate asset and therefore should be part of a corporate pension and profit sharing plan. The appellant contends that he cannot be ordered by the Court to deliver the funds to the respondent and held in contempt of court for failing to do so. The Utah District Court has an inherent power of equity to exercise personal jurisdiction over an individual and to order that individual to conform with a specific Court Order. (Herzog vs. Bramel, (1933) 82 U.216, 23 P.2d 345

The Utah Supreme Court, in the case of Kessimakis vs. Kessimakis, 520 P.2d 1090 (1978), stated as follows:

The Court has the power to find a person in contempt of the authority of the court for disobedience of any lawful judgment, order or process. Disobedience of a valid, lawful order, in proper form and regularly entered in a divorce case, is a contempt of court. On appeal, Dale

claims an absence of the elements of willfulness and ability to pay. The defense of inability to comply with the court order is only effective where the person charges exercises due diligence towards compliance. The trial court specifically found Dale to have refused, failed and neglected to pay the obligations imposed by the earlier judgment, signifying a lack of due diligence. The trial court has considerable discretion in determining the penalty for contempt which decision we are herein inclined to affirm, particularly in view of the fact that Dale has been afforded a means by which he may purge himself of the contempt found.

If this Court were to conclude that the moneys in the Merrill Lynch Money Market account were the property or assets of the Defined Benefit Plan rather than the assets of the appellant, the appellant has the right under the plan and under federal law to voluntarily terminate the plan. (R. 443) The federal law pertaining to Domestic Relations Orders or QDROs as set forth in 29 U.S.C. § 1056 (D) states as follows:

(D) A Domestic Relations Order meets the requirements of this subparagraph only if such order--(i) does not require a plan to provide a type of form of benefit, or any option not otherwise provided under the plan...

The plan involved in this case can be voluntarily terminate by the appellant and the appellant intended to terminate the Plan prior to the Divorce Decree. (R. 232) Consequently, the Court's Order that the appellant withdraw from the Plan \$100,000.00 to pay to the respondent and if necessary terminate the plan, does not violate the federal law and is a qualified Domestic Relations Order.

The United States Court of Appeals, Seventh Circuit, in the case of Savings and Profit Sharing Fund of Sears Employees v. Rudolph G. GAGO, 717 F.2d 1045 (1983) addressed issues similar to

those now before this Court. The lower Federal Court had ruled that a State Domestic Court's Order requiring that the defendant's retirement fund pay his spouse a portion of his retirement was not pre-empted or in conflict with the ERISA Act. The Court of Appeals affirmed that decision. The Court reviewed other Federal cases and concluded that the treatment given by Federal law to military retirement systems and the railroad retirement act was significantly different than a private pension or contribution program. The Court also recognized that Wisconsin was not a community property state, but concluded that since the state treated marital properties substantially the same as did community property states, there should be no distinction in the application of the Federal law to a non community property state. The Court specifically addressed those provisions of the ERISA Act prohibiting assignment or alienation of the benefits of a plan and 29 U.S.C. § 1056(D)(i). The Court concluded that those part of the Federal law did not pre-empt the decisions of a state domestic court. In addressing that issue, the Court stated in part as follows:

Our uncertainty about Congress' actual intent with respect to the impact of section 206 on property division need not lead to an impasse because the Supreme Court has instructed us that when courts face a potential conflict between state domestic relations law and federal law, the strong presumption is that the state domestic relations law is not pre-empted:

'On the rare occasion when state family law has come into conflict with a federal statute, this court has limited review under the Supremacy Clause to a determination whether Congress has "positively required by direct enactment" that state law be pre-empted. A mere conflict in words is not sufficient. State family and family-property law

must do "major damage" to "clear and substantial" federal interests before the Supremacy Clause will demand that state law be overridden.

\* \* \* \* \*

The approach must be practical....The pertinent questions are whether the right as asserted conflicts with the express terms of federal law and whether its consequences sufficiently injure the objectives of the federal program to require nonrecognition.'

Hisquierdo v. Hisquierdo, 439 U.S. 572, 281, 583, 99 S.Ct. 802, 59 L.Ed.2d 1 (1979) (citations omitted). See also McCarty, 453 U.S. 210, 220, 101 S.Ct. 2728, 2735, 69 L.Ed.2d 589 (1981)

. . . .

Since Congress has not spoken to the particular subject before us here and since we perceive no federal interest in ERISA that would require nonrecognition of Wisconsin's property distribution law, we think the presumption that the state domestic relations law is preserved is not rebutted."

The Court recognized that a number of cases existed in which spousal maintenance and child support was not affected by the federal statutes and concluded that there was no distinction to be drawn between spousal maintenance and child support and a division of marital property. The appellant in this case claims that the domestic relations exception to the federal acts did not apply because the plan was not in a pay status. In addressing that issue, the Court stated in part as follows:

"...Were we to address this point, however, we would find that the prerequisite to upholding the domestic relations exception is not strictly that the pension fund be in pay status (i.e., actually paying out benefits). Rather, the distinction is properly whether the beneficiary has a current right to the proceeds of the plan. In the case presently before us, the appellant had only to sign a withdrawal application directed to the fund in order to receive the proceeds of the plan...."

It should be noted that the defined benefit plan we are dealing with in this case is a contribution plan and not a pension plan. Consequently, there is no difficulty with whether or not the benefits are vested nor with whether or not they are in a pay status. The sums in the contribution plan can be withdrawn voluntarily by Dr. Koerpel as was the case in the federal case quoted above. (R. 443) If the Court concludes that the money held with the Merrill Lynch Money Market Fund is a valid asset of the contribution plan, then it seems that the case cited is directly on point and indicates that a state domestic court order is not pre-empted by ERISA or QDRO regulations of federal law. The appellant contends that the 1984 amendment to the ERISA act provided that a domestic relations order may not require a plan to provide any type of form of benefit not otherwise provided for by the plan. If that representation is correct, it does not change the rulings entered by the federal court cited above. The appellant had the right to terminate the plan and intended to terminate the plan prior to the Divorce Decree. (R. 232 & 443) Under any circumstances the federal law cannot prohibit a state court from exercising personal jurisdiction over an individual and finding that individual in contempt of court if he fails to comply with a reasonable order. In this case it is reasonable that the appellant take whatever action is necessary to withdraw the money from the Merrill Lynch account and distribute the money to the respondent as required.

It should also be noted that since the time of the Divorce Decree in this matter the appellant has complied with the order and has distributed to the respondent the \$87,000.00 that was deposited with pension program on November 7, 1985. The respondent has also executed upon the Merrill Lynch account to acquire the additional moneys which were still held in the appellant's name. In essence the appellant is requesting the Court to enter an order that would require that the respondent deliver this money back to the appellant or to his pension and profit sharing program. The appellant elected not to file a supersedeas bond in this matter, and consequently could not prohibit the respondent from proceeding to execute on the judgment.

#### CONCLUSION

The findings of the Trial Court wherein the respondent was awarded the custody of the minor children and the property acquired during the marriage was divided between the parties was amply supported by the evidence and was not contrary to the evidence submitted before the Trial Court. The appellant has been limited to arguing issues of law before this Court. The appellant has not cited any law in support of its contention that the custody and property distribution should be overturned that does not rely upon an argument of fact. The appellant, in his Brief, has contended that the Court committed prejudicial error in its decision, and since a transcript has not been provided may not under Rule 11(e)(2) U.R.A.P. be granted relief by the Supreme Court.



The appellant contends that the Trial Court cannot disburse assets belonging to a defined benefit plan because of the federal ERISA act. The respondent contends that this issue was not raised before the Trial Court in the divorce action, but was subsequently considered by the Trial Judge in an Order on Order to Show Cause. The Order on Order to Show Cause has not been appealed to this Court and the appellant may not raise this issue for the first time on appeal. The respondent also contends that the asset in question was held in the individual name of the appellant and was not an asset held by the Defined Benefit Plan. In the alternative, if the Court determines that the money was part of the Defined Benefit Plan, the Order of the Court did not violate the ERISA act and was a qualified Domestic Relations Order as specified by the federal law. In addition, the federal act cannot deprive the Trial Court of personal jurisdiction over the appellant nor the Court's authority to hold the appellant in contempt if he does not comply with the Court's Order.

The respondent respectfully requests that this Court affirm the decision entered by the Trial Court Judge.

Respectfully submitted this \_\_\_\_ day of January, 1987.

GRIDLEY, ECHARD & WARD

By \_\_\_\_\_  
ROBERT A. ECHARD  
Attorney for Respondent

CERTIFICATE OF MAILING

I hereby certify ~~a~~ <sup>ies</sup> copy of the foregoing Brief was mailed, postage prepaid, this \_\_\_\_\_ day of January, 1987, to Ronald E. Nehring and Robert Wing, Attorneys for Appellant, at Third Floor MONY Plaza, 424 East Fifth South, Salt Lake City, Utah 84111.

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ROBERT A. ECHARD  
Attorney for Respondent

ADDENDUM

Bench Ruling of Judge Roth (R. 202-210)

Findings of Fact, Conclusions of Law, and Order on  
Motion for New Trial (R. 288-290)

Merrill Lynch Check and Financial Statement (R. 406 and 407)

Order on Order to Show Cause dated May 20, 1986 (R. 441-446)

1 THE COURT: For the record, this is Koerpel vs. Koerpel.

2 It has been a hard case. I think think that's any secret.

3 There have been many issues presented, and on many of the issues

4 the evidence is not very clear. There are some issues that I

5 simply cannot resolve.

6 As far as finding fault or blame for failed businesses,

7 I don't think that I can call that one way or the other. There is

8 evidence that both parties were living very well for a time.

9 They were involved in several businesses. The businesses failed

10 because of poor financial and business practices.

11 There has been a suggestion that the defendant caused

12 the failure of some businesses, particularly the Meadows Dialysis

13 Center. The evidence seems to be that he would have nothing

14 to gain by doing that, much to lose. I can't really determine

15 that he is to blame for the failure of the Meadows Dialysis

16 Center by himself. I also think the evidence suggests that

17 the plaintiff's position in that dialysis center was somewhat

18 of an artificial one.

19 If you have copies of Exhibit 17, maybe you could take

20 those and follow through with me, and I can tell you what values

21 I have placed on some of the assets and liabilities.

22 Basically what I have done is I have used the value from

23 the sources that in my opinion were in a better position to

24 know what those values were. I hope I haven't forgotten anything.

25 The top of the list is cash \$1,949.00. NObody disagrees with

1 that figure, so I assume that's accurate, and that is the figure  
2 I am using. On the book value of \$182,121.00 there is no  
3 dispute there. I will adjust that figure for accounts receivable  
4 of \$26,629.00. That's the defendant's figure for accounts  
5 receivable. My thinking there is that due to the age of the  
6 accounts, and quite frankly due to the business practices that  
7 if he collects that much, he will be doing well. The next  
8 figure is \$19,158.00. I am not using that. I am putting zero  
9 there. The total then for the business is \$189,599.

10       Going down to the next item where I have numbers, Franklin  
11 Grove Limited Partnership, find a value of \$20,000.00, based on  
12 the plaintiff's witness's last testimony concerning that.  
13 Research Park Limited partnership, \$6,060.00. The next item,  
14 automobiles, the same as listed. There is no dispute as to that  
15 value. Land, there is no dispute as to that. Medical building,  
16 there is no dispute on that. I am leaving that the same.  
17 Equipment, there is no dispute as to that figure, I am leaving  
18 that the same. The note receivable, \$3,000.00, there is no  
19 dispute as to that either. The Parkwest condominium number 40,  
20 I didn't put a value on it. As I understand it, that asset is  
21 no longer in existence as a condominium. Total \$206,433.00.

22       The pension plan, I am valuing at \$236,104.00. That's the  
23 value that was placed on it by the defendant prior to cutting it  
24 in half for taxes. And there is no information that I have at  
25 this point where I can determine there is going to be a fifty

1 percent tax liability on that, may or may not be.

2 The personal residence I value at \$300,000.00. I am told  
3 that was sold at foreclosure sale. I don't know what result  
4 there was from that. I am not in a position to determine it is  
5 worth more at this time.

6 Household furnishing, \$50,00.00. No dispute there.

7 Property in North Carolina \$15,000.00, and there is  
8 no dispute as to that.

9 10 percent contract receivable, \$9,022.00, there is no  
10 dispute on that.

11 Property on southwell, \$21,300 value, the same on both  
12 of those.

13 Healy property at \$15,520, valued the same on both of  
14 those, so I am not changing that.

15 Iron Blosson Condominium timeshare, zero value.

16 Cash surrender life insurance policies \$4,000.00 is  
17 the same.

18 Total there is \$414,842. Total Assets \$1,048,927.

19 The next page, liabilities. The first three numbers  
20 are the same, \$162,000.00, \$114,481.00, \$35,144.00. There  
21 is no dispute as to those.

22 The note payable, I am applying a value of \$66,000.00  
23 to that.

24 The next item, property taxes are the same. Construction  
25 amount due is the same. The \$991.00 for the electric is the same.

1 Franklin Grove Limited Partnership, the plaintiff has  
2 \$25,000.00 there as a liability. The defendant has zero. I am  
3 taking zero.

4 MR. NEHRING: If I may interrupt, your Honor, I  
5 think if there is going to be an asset, there is going to be a  
6 liability. The only reason ours was zero is we allocated no  
7 asset value to it.

8 THE COURT: It was my understanding on Franklin  
9 Grove that the \$20,000.00 was the net figure. That was  
10 my understanding of the testimony on the final day. Mr.  
11 Nuttal said he had priced it, it was worth \$45,000.00, it would  
12 have the liability against it of \$25,000.00, which gives us  
13 \$20,000.00, which is the figure.

14 \$3,452.00 for tanning beds. The obligation is the same.  
15 The same with the Wisconsin debt. Mortgage payable on the  
16 medical building is the same. All the remaining numbers there  
17 are the same.

18 I have added into that legal fees, total \$53,201.00  
19 And a debt to George Koerpel of \$8,000.00.

20 There is a liability to Humana Med First on the defendant's  
21 list of \$32,337.00. I am disallowing that.

22 I have total liability as \$702,079.00. Net assets  
23 \$346,884.00 Half of that would be \$173,424.00.

24 In determining how to distribute those assets, I have  
25 kept in mind some impressions from the evidence and one of

1 those is that the defendant was in a position where he was  
2 ordered to make payments on the house, and for whatever reason  
3 failed to make payments. And it could be that he was not able  
4 to make the payments. So I will award him the house, plus all  
5 obligations against the house. And he is to hold the plaintiff  
6 harmless from those. And those include the mortgages and the  
7 construction debt.

8 I am also keeping in mind that in my opinion the defendant  
9 was the moving force behind all of the business ventures, so he  
10 will inherit all business assets and all business liabilities.  
11 I think he is in a better position to handle the liabilities.  
12 He is in a better position to know what they are.

13 I am also keeping in mind that in my opinion the  
14 defendant has at all times had the means to determine the  
15 actual state of his affairs. I am not sure he has done so.  
16 In any event, he will be responsible for those now.

17 What I will do with regard to the assets then is award  
18 to the Plaintiff household furnishings with an assigned value of  
19 \$45,000.00, the automobiles, with the exclusion of the one that  
20 the defendant has, with a value of \$20,900.00, note receivable,  
21 ten percent note receivable, the value of \$9,022.00 and  
22 \$100,000.00 from the pension plan.

23 She has some options there. She may take it all in  
24 cash, or she may take a note from McMasters. I believe that's  
25 been valued, discounted value at \$47,000.00. That's the value



1 assigned by the defendant. If she elects to take the note and  
2 cash, she can have that note at her option.

3 I don't know what you are going to do with that plan. If  
4 there is a way to distribute those and make it a non-taxable  
5 event, work it out any way you can.

6 The toughest decision for me was the custody decision.  
7 I have been over Dr. McVaugh's report many times, and I have  
8 gone down through the list of the facts that the Supreme Court  
9 suggests that I consider. Most of those come out as kind of  
10 a wash.

11 They talk about things like keeping siblings together.  
12 I don't see that as a serious factor in this case. Moral character  
13 of both parents, I see that as coming out about even. Emotional  
14 stability of both parents, I see it as roughly even. Whether  
15 they can give personal versus surrogate care. In the past  
16 that's been pretty much even. I think in the future it could  
17 be that Plaintiff in this case is going to be in a better position  
18 to give personal care.

19 No evidence of drug or alcohol abuse on the part of either  
20 party. Religious compatibility does not seem to be a factor.  
21 Step parent status doesn't enter into it. Financial condition  
22 I don't think will be a factor by the time we are finished.

23 What I do consider to be factors are the following:  
24 the fact that the psychological tests and the results favored  
25 the defendant in this case is a definite factor, and is a plus

1 for the defendant in this case. I see it as a--not as a strong  
2 recommendation for one or the other, but a mild recommendation.

3 On the other side of that, on behalf of the plaintiff,  
4 I think that there is evidence that she was the primary care  
5 provider during most of the children's lives. And I think that  
6 there is some value in continuing the previous arrangement  
7 where it seems to be working. Those to me are more important  
8 factors than the results of the psychological tests.

9 I am not satisfied that the evidence shows the defendant  
10 would be a superior parent at all. And I am not satisfied he  
11 will be a superior parent to the extent that I should move the  
12 children from where they are now into his custody. I am  
13 awarding custody to the plaintiff in this case. The defendant  
14 may have visitation every other weekend, 6:00 p.m. Friday to  
15 8:00 p.m. Sunday; alternate holidays, the Father's Day, whether  
16 it falls on his weekend or not. Plaintiff will have Mother's  
17 Day whether it falls on her weekend or not. Have Christmas  
18 visitation 2:00 p.m. Christmas day for three days. Six weeks  
19 in the summer.

20 With regard to child support and alimony, I am not in a  
21 position to determine precisely what the defendant's income is  
22 at this point. For purposes of this, making this decision,  
23 I am assuming his income is \$6,000.00 a month gross. With  
24 that in mind, support will be \$1,170.00 for the children, and  
25 I will award alimony in the amount of \$800.00 per month for

1 an indefinite term, with the understanding that I am going to  
2 keep jurisdiction of this case. And any time during the next  
3 three years, when things stabilize, and when I say when things  
4 stabilize, I am finding that both parties are in a position  
5 of financial instability at the present time, the plaintiff  
6 is going to have to go to work. There is no question about that.  
7 The defendant at this point--well, during the next three years  
8 I think is going to have to decide based upon the outcome of  
9 his other trials, what his income is going to be and what kind  
10 of a future he has financially. So there may be room for  
11 modification on those awards during the next three years.

12 And at any time that there appears to be either evidence  
13 that the situation has stabilized pretty much as it is now, or  
14 that there is a significant change, you can come in without  
15 showing a change of circumstances and have this reviewed.

16 With regard to attorney fees, each pay their own attorney  
17 fees and costs, with the following exception. The defendant  
18 will pay \$3,000.00 towards the plaintiff's costs and attorney  
19 fees due to various delays during the discovery process caused  
20 by the defendant.

21 I believe that's it.

22 MR. ECHARD: You Honor, could I ask for clarification  
23 on a couple of matters?

24 THE COURT: Alright.

25 MR. ECHARD: You indicated the defendant assumed

1 all the businesses and the business liabilities. Does that  
2 include the tanning clinics?

3 THE COURT: EVerything. All businesses, all business  
4 liabilities, they are his responsibility. Anything else?

5 MR. ECHARD: No, your Honor.

6 THE COURT: That means all the assets and that means  
7 that your client signs whatever documents are necessary  
8 transferring that to him.

9 MR. ECHARD: Fine, I have nothing further.

10 THE COURT: Mr. Nehring?

11 MR. NEHRING: No.

12 MR. ECHARD: I assume I prepare the order, your Honor.

13 THE COURT: Yes.

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IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY  
STATE OF UTAH

JUDITH A. KOERPEL,	)	
	)	
Plaintiff,	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW, and
	)	ORDER
vs.	)	
	)	
BARRY JON KOERPEL,	)	
	)	Civil No. 90432
Defendant.	)	
	)	

The defendant's motion for a new trial came on for hearing before the Honorable David E. Roth on the 29th day of January, 1986, at 9:45 a.m. The plaintiff was represented in Court by her attorney, Robert A. Echard, and the defendant was present in Court an represented by his attorney, Ronald Nehring. The Court, having heard argument from the parties and being fully informed in the premises, now makes the following:

FINDINGS OF FACT

1. The Court found at the time of the trial that neither party was unfit and that the plaintiff had been the primary care provider during the marriage and had custody of the children from the time of the Divorce Decree until the time of the hearing. The Court considered all factors presented at the trial and



decided that the information presented was not sufficient to cause the Court to transfer the custody from the primary care provider.

2. The Court finds that the defendant failed to cooperate with the plaintiff in her attempts to discover information concerning the property of the parties. The defendant had ample opportunity to discover the status of his properties and to have had that information available at the time of the trial. The Court finds that there is no basis for excusable error or neglect in not knowing the nature and value of the property which had been acquired during the marriage.

3. The Court will allow the defendant a hearing to address the defendant's issues concerning awarding part of the pension plan sums to the plaintiff. The defendant shall be responsible for setting this matter for a hearing.

4. The defendant is restrained from disposing, transferring, or encumbering any of the funds held in the pension plan program until such time as a hearing can be had on this matter.

#### CONCLUSIONS OF LAW

1. That the defendant's motion for new trial should be denied.

2. That a restraining order should be issued restraining the defendant from disposing of or transferring any assets held under the pension and profit sharing plan until a hearing can be had in this matter.

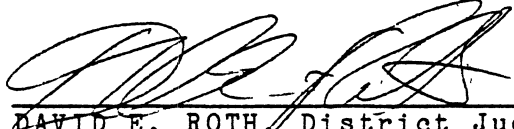
ORDER

1. That the defendant's motion for a new trial is denied.

2. That the defendant is restrained from disposing of or transferring any of the assets held in the Barry J. Koerpel pension or profit sharing plan until further hearing on this matter.

3. That the issue of attorney's fees for the motion for new trial is held in abeyance.

DATED this 6 of March, 1986.

  
DAVID E. ROTH, District Judge

CERTIFICATE OF MAILING

I hereby certify a copy of the foregoing Findings of Fact, Conclusions of Law, and Order was mailed, postage prepaid, this 7<sup>th</sup> day of February, 1986, to Ronald E. Nehring, Esq., 424 East 500 South, Salt Lake City, Utah 84111.

  
SECRETARY

Exhib \_\_\_\_\_  
CASE # 90932  
DATE \_\_\_\_\_

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*Chase Manhattan Bank*

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WEBER CO. GREENSBORO  
RICHARD H. GREENBERG  
40 SE. CV 612

406



Statement of  
Security Account

**Merrill Lynch**  
**Pierce, Fenner & Smith Inc.**  
(Member, Securities Investor Education Fund)

Statement of  
Security Account

ATTLE COMPANY  
E EAST  
8-2213

ACCOUNT # A/E # PAGE # 33 OR ID TELEPHONE #  
421 07444 1645 1 87-0364904 801-531-5111  
MR BARRY J KOEPEL M D  
P O BOX 510980  
SALT LAKE CITY UT 84152-0980  
OFFICE SERVING YOUR ACCOUNT ACCOUNT EXECUTIVE  
PO BOX 2610 BARRY S, TERRY D  
SALT LAKE CITY UT 84110  
PERIOD STARTING PERIOD ENDING TIME BUYING POWER  
OCT 26 1985 NOV 29 1985 CASH

ACCOUNT PORTFOLIO

TOTAL EVALUATION 845,884.74  
OPENING BALANCE 81.05CR  
CLOSING BALANCE 81.05CR  
MARKET VALUE 80  
TOTAL FUND SHARE 826,854.37  
TOTAL EVALUATION 826,855.42

MONTHLY AND YEAR TO DATE PLAN SUMMARY

DIVID/INTEREST LY	PLAN NAME 8 81.000 PER SHARE	OPENING BALANCE	CLOSING BALANCE	DIVIDEND/INTEREST MONTHLY	YEARLY
4.50	ML READY ASSET TRUST	8114,421.85	826,854.37	8313.52	88,146.93

DAILY ACTIVITY REVIEW

AMOUNT	D/B DATE	TRANSACTION	DESCRIPTION	PRICE	AMOUNT
8.50CR	10 25	OPENING BALANCE			81.05CR
87500.00CR	42111 01	WITHDRAWAL	CK T 0421-33544		887881.00
87500.00	00011 01	RECEIVED	87881 ML READY ASSET TRUST		887881.00CR
87500.00CR	00011 01	REDEEMED	87881 ML READY ASSET TRUST		81.05CR
87500.00		CLOSING BALANCE			81.05CR

YOUR ENCLOSURE DISCUSSES THE DEC 31 DEADLINE TO REDUCE YOUR '85 TAXES WITH A BASIC (KEOGH PLUS) PLAN. IT ALSO EXPLAINS OUR TAX REPORTING PROCEDURE FOR '85.

YES WITH A  
URE FOR '85.

Exhibit 2

CASE # 90432

DATE \_\_\_\_\_

**Merrill Lynch**  
**Pierce, Fenner & Smith Inc.**  
(Member, Securities Investor Education Fund)

ACCOUNT # A/E # PAGE # 33  
421 07671 1640 1 87-02191  
OFFICE SERVING YOUR ACCOUNT  
PO BOX 2610  
SALT LAKE CITY UT 84110  
PERIOD STARTING PERIOD ENDING  
OCT 26 1985 NOV 29 1985 CA

OPENING BALANCE 8322.15CR  
CLOSING BALANCE 81697.15CR

DIVIDEND, INTER

DESCRIPTION

DIVIDENDS (REPORTABLE)  
MUNICIPAL INTEREST  
INTEREST (NOT REPORTABLE)

DAILY

D/B DATE, TRANSACTION

10 25 OPENING BALANCE

00011 01 COUPON INTEREST

41911 05 RECEIVED  
41911 05 RECEIVED

20000 E  
20 Y

CLOSING BALANCE

SECURITY POSITIONS IN

20000 CONSUM PMTAG11  
10000 INTERMPTN PWR AL  
5000 SPLY RV JUL 10 SI  
5000 ALASKA MFC ELLT  
5000 ST STD DEC 10 121  
5000 NORTHERN RUN PWR  
20000 MAY83 04.250XJAM  
ADAMS CO 2600 FCO  
5000 ECOLO NOV 13 PSE  
DAVIS ENTY NY 800  
ADIA JUN 9

WEBSTER  
RICHARD GREENE  
APR 23 8 20 AM '86

ROBERT A. ECHARD, 953  
Attorney for Plaintiff  
635 - 25th Street  
Ogden, Utah 84401  
801-621-3317

Recorded Book  
Page .....1534.  
Indexed .....

MAY 20 2 43 PM '86  
FILED BY: *lund*  
WEBER COUNTY CLERK  
RICHARD R. GREENE

IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY  
STATE OF UTAH

JUDITH A. KOERPEL,	)	
	)	
	)	FINDINGS OF FACT,
Plaintiff,	)	CONCLUSIONS OF LAW AND ORDER
	)	
vs.	)	
	)	
BARRY JON KOERPEL,	)	
	)	Civil No. 90432
Defendant.	)	

*5/19/86*

The plaintiff's Order to Show Cause came on for hearing before the Honorable David E. Roth at 11:00 a.m. on the 21st day of April, 1986. The plaintiff was present in Court represented by her attorney, Robert A. Echard. The defendant was not present in Court, but was represented by his attorney Ronald Nehring. The Court having received a proffer of evidence from the parties, having heard argument from the parties, and being fully informed in the premises, now therefore, makes the following:

FINDINGS OF FACT

1. That the defendant is delinquent in child support through the 21st day of April, 1986, in the sum of \$217.00 which represents sums he has withheld from child support for the periods of time during which he has visited with the minor children.

2. That the defendant has failed to return the children according to the previous Court Order concerning visitation and that Order should remain in full force and effect and if the defendant fails to pick up the children within one hour of the time ordered by the Court, then the plaintiff may assume he will not exercise his visitation rights. That the defendant shall return the children at the time set in the original Divorce Decree.

3. That the Court finds that at the beginning of the Divorce trial in this matter the defendant held approximately \$112,000.00 in a Merrill Lynch Money Market Certificate in the defendant's individual name. That the defendant claimed that said funds were part of a pension and profit sharing plan and on approximately November 7, 1985, two days after the beginning of the trial in this matter transferred a substantial part of that money into the Dr. Koerpel Professional Corporation Defined Benefit Plan. That at the time there was a restraining order in effect which was issued by the Court at the end of the first day of trial on November 5, 1985.

4. That the Court has considered the argument of the defendant, that the Employment Retirement Security Act (ERISA) prohibits the Court from transferring the money held in the Merrill Lynch Money Market Certificate to the plaintiff because it is not a qualified domestic relations order. The Court has reviewed the law on this matter and finds that the Federal act does not prohibit the Court from exercising its personal jurisdiction over Dr. Koerpel in ordering him to terminate the

plan. The Court finds that the plan can be voluntarily terminated by Dr. Koerpel and that the Court has the authority to hold him in contempt if he fails to terminate the plan and turn over the money as previously ordered. The defendant shall take whatever actions are necessary to turn over said sums to the plaintiff within 30 days which shall be by May 21, 1986. That if it becomes necessary to terminate the pension and profit sharing plan in order to comply with the Court's Order, then the defendant must do so.

5. That there should be approximately \$25,000.00 held in the Merrill Lynch Money Market account in the name of Dr. Koerpel. That the plaintiff should be awarded an order transferring said funds to the plaintiff in a sum not to exceed \$100,000.00. However, said order shall not be effective until May 19, 1986, in order to give the defendant an opportunity to have a hearing in the Federal lawsuit which has been filed in connection with this matter.

6. That the issue raised in the plaintiff's Order to Show Cause requiring the defendant to assume legal defenses on the lawsuits being brought as a result of the debts incurred during the marriage and the awarding of attorney's fees incurred in the defense to the date of this hearing is reserved to be handled by Brief on the part of the parties. The Court does find that Attorney Robert A. Echard has incurred attorney's fees in the sum of \$1,900.00 in defending lawsuits brought by First Security Bank, by Jacqueline Jackson, and by Mark J. Benson against the defendants.

7. That the plaintiff has incurred attorney's fees for defending the defendant's Motion for a New Trial and for this Order to Show Cause and various hearings in the sum of \$750.00 and should be granted a judgment against the defendant in the sum of \$750.00.

CONCLUSIONS OF LAW

1. That the plaintiff should be awarded a judgment for delinquent child support in the sum of \$217.00.

2. That the defendant shall return the children after having visitation rights with them at the times originally ordered by the Court and if the defendant fails to pick up the children within one hour of the time specified in said order, the plaintiff may assume he will not exercise his visitation for that period.

3. That the defendant should be held in contempt of Court for failing to transfer the moneys held in the Merrill Lynch Money Market account in the sum of \$100,000.00 to the plaintiff and the defendant should take whatever actions are necessary to transfer said moneys, <sup>(100,000.00) D.R.</sup> including terminating the pension and profit sharing plan if necessary, within 30 days which shall be by May 21, 1986.

4. That the plaintiff should be awarded the ownership of the moneys presently held in the Merrill Lynch Money Market account in the name of Barry Koerpel in a sum not to exceed \$100,000.00 provided said order shall not become effective until May 19, 1986.

5. That the plaintiff ~~should be~~ awarded a judgment for attorney's fees for appearing on the motion for a new trial and this Order to Show Cause in the sum of \$750.00.

6. That the issues pertaining whether or not the defendant shall assume and defend the plaintiff on lawsuits arising out of debts incurred during their marriage and whether or not the plaintiff should be awarded attorney's fees incurred in the defense of those actions to date in the sum of \$1,900.00 shall be reserved and briefed by the parties.

ORDER

1. That the plaintiff is awarded a judgment in said delinquent child support in the sum of \$217.00.

2. That the defendant is ordered to comply with the previous Divorce Decree Order pertaining to visitation and to return the children at the time specified therein; and if the defendant fails to pick up the children within one hours of the time specified in said order then the plaintiff may assume the defendant will not exercise his visitation for that visitation period.

3. That the defendant is held in contempt of Court for failing to transfer the moneys held in the Merrill Lynch Money Market account in the sum of ~~\$100,000.00~~ <sup>\$100,000.00</sup> to the plaintiff and the defendant is to take whatever actions are necessary to transfer said moneys, including terminating the pension and profit sharing plan if necessary, within 30 days which shall be by May 21, 1986.

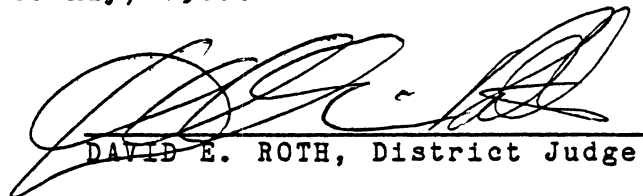
4. That the plaintiff is awarded the ownership of the moneys presently held in the Merrill Lynch Money Market account

in the name of Barry Koerpel in a sum not to exceed \$100,000.00 provided said order shall not become effective until May 19, 1986.

5. That the plaintiff is awarded a judgment for attorney's fees for appearing on the motion for a new trial and this Order to Show Cause in the sum of \$750.00.

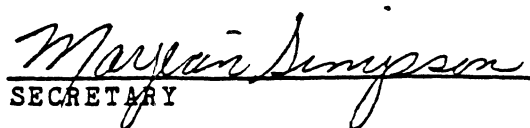
6. That the issues pertaining whether or not the defendant shall assume and defend the plaintiff on lawsuits arising out of debts incurred during their marriage and whether or not the plaintiff should be awarded attorney's fees incurred in the defense of those actions to date in the sum of \$1,900.00 shall be reserved and briefed by the parties.

DATED this 20 day of May, 1986.

  
DAVID E. ROTH, District Judge

CERTIFICATE OF MAILING

I hereby certify a true and correct copy of the foregoing Findings of Fact, Conclusions of Law, and Order was mailed, postage prepaid, this 8th day of May, 1986, to Ronald E. Nehring, Attorney for Defendant, 424 East 500 South, Salt Lake City, Utah 84111.

  
SECRETARY