

1986

Karen Shumann Marchant v. Donald J. Marchant : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Craig M. Peterson, E. Paul Wood; Attorneys for Appellant.

Hans Q. Chamberlain; Attorneys for Respondent.

Recommended Citation

Brief of Appellant, *Marchant v. Marchant*, No. 860250 (Utah Court of Appeals, 1986).
https://digitalcommons.law.byu.edu/byu_ca1/146

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH COURT OF APPEALS
BRIEF

UTAH
DOCUMENT
KFU
50

.A10

DOCKET NO. 860250-CA

IN THE COURT OF APPEALS IN AND FOR
THE STATE OF UTAH

-----oo0oo-----

KAREN SHUMANN MARCHANT,)	
	)	APPELLANT'S BRIEF
Plaintiff/Appellant,)	
)	
v.)	
	)	Supreme Court No. 860498
DONALD J. MARCHANT,)	
	)	Civil No. 85-8-9605-2
Defendant/Respondent.	)	Category No. 7

-----oo0oo-----

APPEAL FROM TRIAL BEFORE
HONORABLE DONALD V. TIBBS,
SIXTH JUDICIAL DISTRICT COURT

Attorney for Respondent:

HANS Q. CHAMBERLAIN
110 North Main Street
Cedar City, Utah 84720

Attorneys for Appellant:

CRAIG M. PETERSON
E. PAUL WOOD
426 South 500 East
Salt Lake City, Utah 84102

RECEIVED
FEB 3 1987
860250-CA
COURT OF APPEALS

IN THE COURT OF APPEALS IN AND FOR
THE STATE OF UTAH

-----oo0oo-----

KAREN SHUMANN MARCHANT,)	
	)	APPELLANT'S BRIEF
Plaintiff/Appellant,)	
)	
v.)	
	)	Supreme Court No. 860498
DONALD J. MARCHANT,)	
	)	Civil No. 85-8-9605-2
Defendant/Respondent.)	

-----oo0oo-----

APPEAL FROM TRIAL BEFORE
HONORABLE DONALD V. TIBBS,
SIXTH JUDICIAL DISTRICT COURT

Attorney for Respondent:

HANS Q. CHAMBERLAIN
110 North Main Street
Cedar City, Utah 84720

Attorneys for Appellant:

CRAIG M. PETERSON
E. PAUL WOOD
426 South 500 East
Salt Lake City, Utah 84102

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CASES	i
ISSUES PRESENTED FOR APPEAL.	1
STATUTES REQUIRING INTERPRETATION.	2
STATEMENT OF CASE.	3
STATEMENT OF FACTS	6
A. Facts Supporting Divorce Petition	9
B. Facts Relating to Custody	10
1. Conditions in Salt Lake City	10
2. Living conditions in the duplex.	12
C. Facts relating to "involvement with another man".	14
D. Psychological Evaluation.	17
E. Financial Status of Parties	18
F. Courts Findings and Rulings	20
SUMMARY OF ARGUMENTS	21
INTRODUCTION	21
LEGAL ARGUMENT	22
INTRODUCTION	22
I. THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING PERMANENT CUSTODY TO DONALD MARCHANT.	24
A. Legal Standards in Custody Determination.	24
B. Judge Tibbs Misapplied the Law in Making the Custody Determination	26
1. Finding of Fact 5.A.	26
2. Finding of Fact 5.B.	27
3. Finding of Fact 5.C.	28

4.	Finding of Fact 5.D.	29
5.	Finding of Fact 5.E.	31
C.	The Court Should Have Awarded the Parties' Children to Karen Marchant	32
D.	The Court Abused its Discretion in Custody Determination	35
II.	THE COURT ABUSED ITS DISCRETION IN FAILING TO AWARD KAREN MARCHANT ALIMONY.	35
A.	Applicable Standard for Alimony Determination	36
B.	The Facts Warrant Awarding Alimony to Karen Marchant	36
C.	The Court Abused Its Discretion in Failing to Award Alimony.	39
III.	THE COURT ABUSED ITS DISCRETION IN FAILING TO CONSIDER PERSONAL INJURY AWARD TO KAREN MARCHANT IN ITS DISTRIBUTION OF MARITAL ASSETS	39
A.	Legal Standard in Assessing Division of Marital Assets.	40
B.	The Personal Injury Awards to Karen Marchant Should be Considered to Recompute the Division of the Marital Assets.	42
IV.	FAILURE TO AWARD KAREN MARCHANT ONE-HALF OF THE RETIREMENT BENEFITS WAS AN ABUSE OF DISCRETION.	43
A.	Equity Requires at Least an Equal Distribution of the Marital Assets.	43
B.	The Court Failed to Consider the Terms of the Civil Service Retirement Spouse Equity Act of 1984 for Alternative Distribution.	44
C.	Awarding Eight Percent (8%) Interest was Arbitrary and an Abuse of Discretion. . .	45
	CONCLUSION	45

TABLE OF CASES

	<u>Page</u>
<u>Cox v. Cox</u> , 532 P.2d 994, 995 (Utah, 1975)	24
<u>Dority v. Dority</u> , 645 P.2d 56 (Utah, 1982)	39
<u>Englart v. Englart</u> , Utah, 576 P.2d 1274 (1978)	41
<u>English v. English</u> , 565 P.2d 409 (Utah, 1977).	36,38
<u>Fletcher v. Fletcher</u> , 615 P.2d 1218 (Utah, 1980)	36,38
<u>Gramme v. Gramme</u> , 587 P.2d 144 (Utah, 1978).	36
<u>Higley v. Higley</u> , 676 P.2d 379 (Utah, 1983).	36
<u>Hutchinson v. Hutchinson</u> , 649 P.2d 38 (Utah, 1982)	25,26,32
<u>Jones v. Jones</u> , 700 P.2d 1072 (Utah, 1985)	36,39
<u>Kallas v. Kallas</u> , 614 P.2d 641 (Utah, 1980).	24,30
<u>Kerr v. Kerr</u> , 610 P.2d 1380 (Utah, 1980)	41,42
<u>McDonald v. McDonald</u> , 236 P.2d 1066 (Utah, 1951)	43
<u>Pusey v. Pusey</u> , 728 P.2d 117 (Utah, 1986).	26,32,34
<u>Read v. Read</u> , 594 P.2d 871 (Utah, 1979).	43
<u>Savage v. Savage</u> , 685 P.2d 1201 (Utah, 1983)	37
<u>Shioji v. Shioji</u> , 671 P.2d 135 (Utah, 1983).	30
<u>Smith v. Smith</u> , 726 P.2d 423 (Utah, 1986).	24,26,32,35
<u>Turner v. Turner</u> , 649 P.2d 6 (Utah, 1982).	41
<u>Woodward v. Woodward</u> , 656 P.2d 431 (Utah, 1982).	40,41
<u>Workman v. Workman</u> , 652 P.2d 931 (Utah, 1982).	41
 Section 30-3-5, <u>Utah Code Ann.</u> (1984, as amended).	 2,40
Section 30-3-10, <u>Utah Code Ann.</u> (1977, as amended)	2,24
Section 15-1-4, <u>Utah Code Ann.</u> (1981, as amended).	45

CRAIG M. PETERSON - 2579
E. PAUL WOOD - 3537
Attorneys for Plaintiff
LITTLEFIELD & PETERSON
426 South 500 East
Salt Lake City, Utah 84102
Telephone: (801) 531-0435

IN THE COURT OF APPEALS IN AND FOR
THE STATE OF UTAH

-----oo0oo-----

KAREN SHUMANN MARCHANT,)	
	)	APPELLANT'S BRIEF
Plaintiff/Appellant,)	
)	
v.)	
	)	Supreme Court No. 860498
DONALD J. MARCHANT,)	
	)	Civil No. 85-8-9605-2
Defendant/Respondent.)	

-----oo0oo-----

ISSUES PRESENTED FOR APPEAL

As a result of the trial held June 18, 1986 before the Honorable Don V. Tibbs, Sixth Judicial District Court Judge, Karen Shumann Marchant, Appellant, requests that this Court review the following issues:

1. The custody award of the parties' two minor children, Sara Marchant and Brandon Marchant, to the Respondent, Donald Marchant, was an abuse of discretion of the Trial Judge.

2. The evidence offered at trial regarding custody does not support the Conclusions of Law that it is in the best interests of the children that the Plaintiff be awarded permanent custody.

3. The Trial Court Judge failed to properly apply the law to the facts in determining the best interests of the children in making the custody award to Donald Marchant.

4. The Trial Court's failure to award Karen Marchant alimony under the facts presented was an abuse of discretion and a misapplication of law to the facts.

5. The Trial Court's unequal distribution of Donald Marchant's pension plan was an abuse of discretion.

6. The Trial Court's failure to award \$15,000.00 to Karen Marchant as separate property, which she had received from a personal injury settlement, or its failure to consider the amount in the property distribution, was an error in law.

7. The Trial Court's award of interest on deferred payments of the pension plan at less than the statutory rate was arbitrary and an abuse of discretion.

8. The Trial Court's failure to award attorney's fees in light of Karen Marchant's need and Don Marchant's ability to pay was an abuse of discretion and a misapplication of law to facts.

STATUTES REQUIRING INTERPRETATION

The following statutes require interpretation:

1. Section 30-3-5 Utah Code Ann. (1984, as amended),
- Attached.
2. Section 30-3-10 Utah Code Ann. (1977, as amended),
- Attached.

STATEMENT OF CASE

Appellant Karen Marchant initiated this divorce proceeding against her husband of 18 years, Donald Marchant, on March 5, 1985, requesting custody of the parties' two minor children, Brandon, age 12, and Sara, age 9, child support, alimony and an equitable division of the marital assets. Donald Marchant answered, denying that Mrs. Marchant should be awarded a divorce or custody of the children.

Both parties initially moved for temporary custody of the children and child support. However, by Stipulation dated August 28, 1985 and entered by the Court October 2, 1985, Donald Marchant agreed that Karen Marchant should be awarded custody of the children subject to his right of visitation, that he would pay child support in the amount of \$200.00 per month per child, that the parties' home in Central, Utah, would be rented and that Karen would move to Salt Lake City to reside with the children until trial. (A copy is attached hereto as Exhibit "A"; Stipulation and Order, Record pp. 17-19.) The Stipulation reflected the status quo. Donald Marchant had moved from the parties' home in Central, Utah, in March, 1985 to a trailer home at Karen Marchant's request (Transcript, p. 76).

Karen Marchant resided in Salt Lake City with the children from September, 1985 to June 18, 1986, the date of the trial. The Findings of Fact, Conclusions of Law and Decree of Divorce are appended hereto respectively as Exhibits "B" and "C" (Record pp. 30-49).

The Trial Court granted Karen Marchant's Petition for Divorce. However, it found that she was the cause for the marital breakup (Findings of Fact, para. 5.B., Record p. 32).

Judge Tibbs granted Respondent Donald Marchant custody of Brandon and Sara, based upon the following Findings of Fact:

5. In determining what is the best interests of the children for purposes of determining custody, the Court makes the following specific findings:

A. That both the Plaintiff and Defendant are good parents, and that both parties could be awarded custody of the minor children.

B. That the marriage entered into between Plaintiff and Defendant was broken by the actions on the part of the Plaintiff, which were not justified.

C. That when the Plaintiff vacated the family home in Central, Utah, and moved to Salt Lake City, Utah, in September of 1985, she moved into an apartment and in approximately November or December of 1985, her sister, another woman who is divorced, moved in with her, together with her minor child. That the standard of living under which Plaintiff has been residing while having the temporary custody of the children in Salt Lake City, Utah, is not what it should have been nor was it in the best interests of the children.

D. That during the latter part of the marriage between Plaintiff and Defendant, Plaintiff became involved with another man and this fact had an influence with the Court in determining what is in the best interests of the minor children.

E. That during the latter years of the marriage, Plaintiff's lifestyle changed and that change was not in the best interests of the family unit, but rather the change was pursuant to the Plaintiff's desires and for her benefit to the exclusion of the family unit.

(Record at pp. 31-32)

Karen was granted visitation of every other weekend, every other holiday and six weeks in the summer, and was required to make the children attend church each Sunday while in her care (Findings of Fact, para. 6, Record 33; Decree of Divorce, para. 3, Record pp. 42-43).

No child support was awarded to Donald Marchant (Decree, para. 7, Record p. 43).

The Court found that Karen Marchant was not entitled to alimony but made no other specific Findings of Fact on the point. (Findings, para. 8, Record p. 33, Decree, para. 5, Record p. 43.)

The parties' home in Central, Utah, was awarded to Donald Marchant, subject to a lien of one-half of the equity in the amount of \$17,000.00 in favor of Karen Marchant (Decree, para. 6.A., Record p. 43).

The parties' farm was determined to have a net equity of \$43,500.00 which was awarded equally to the parties in the amount of \$21,750.00 each (Decree, para. 6.B., at p. 44). Defendant was ordered to pay Plaintiff \$1,500.00 for the farm equipment in his possession (Decree, para. 6.C., Record 44).

To satisfy the awards to the Plaintiff totalling \$40,250.00, the Court ordered that the farm be sold by June 18, 1987, and Karen Marchant would be entitled to the first \$40,250.00 from the sale (Decree, para. 6.D., pp. 45-46).

Donald Marchant's pension plan with the United States Government Forest Service was found to have a value of \$18,000.00

which was then vested; the Court awarded Mr. Marchant two-thirds of the amount and Mrs. Marchant one-third of the amount, requiring Mr. Marchant to pay \$6,000.00 over ten years, in one annual installment, the unpaid balance bearing interest at eight percent per annum (Decree, para. 7, Record 47).

The Court found that Karen Marchant's net monthly income was \$1,321.00 and Don Marchant's was \$2,114.00 (Findings, para. 10, Record p. 37).

Each party was required to pay the debts which they incurred individually from and after October 2, 1985, except that Donald Marchant was required to pay medical and dental bills incurred by Mrs. Marchant and Sara and Brandon (Decree, para. 9, Record 47).

The Court found that neither party was entitled to an award of attorney's fees (Decree, para. 10, Record p. 48).

STATEMENT OF FACTS

Donald and Karen Marchant were married September 8, 1967 in Salt Lake City, Utah, and divorced June 18, 1986, after an 18 year marriage. At the time of the divorce, Karen was 36 years old and Donald was 43 years old. Karen was 18 when they were married and had completed one year of college. Karen finished one more year of college and quit school to work while her husband completed his education (Transcript, lines 1-11, p. 28). Donald obtained a Bachelor's Degree in Civil Engineering from Brigham Young University (Transcript, lines 6-10, p. 71).

Donald Marchant went to work for the United States Forest Service after graduation, finally being stationed in Richfield, Utah. The parties purchased a home in Central, Utah, and a farm in Central, Utah, in 1976. The source of the down payment of the farm is unclear. Mr. Marchant withdrew monies from his retirement (Transcript, lines 15-19, p. 99). Mrs. Marchant received a settlement from an automobile accident in the amount of \$15,000.00, which apparently was applied to the down payment as well as mutual debts and a loan to her brother (Transcript, lines 1-10, p. 100).

The Marchants were unable to have children and adopted Brandon in April, 1974, at age 2 months and Sara shortly after her birth on April 22, 1977. The parties resided in Central, Utah, until the marital split in March, 1985. During the marriage, both were active in the LDS Church, with Donald Marchant serving in two Bishoprics and Karen Marchant serving in the Relief Society Presidency.

Karen Marchant began work for Intermountain Health Care in Richfield, Utah, in 1982 (Transcript, lines 4-8, p. 31). Prior to that time, she had worked briefly at the start of the marriage. Prior to 1982, Karen and her husband had discussed her going to work part-time on several occasions. She returned to work to help with the debt on the farm. She was also concerned that she have a viable skill to earn money for her and her children in the event of Donald's death (Transcript, lines 10-19,

p. 31). After 1983, Kay Bowden and David Brown, both of whom were friends of the Marchants and belonged to the same ward, testified that Mrs. Marchant's work interfered with her church attendance and her goals apparently became more career oriented since she spent less time with her family and with them at church and social functions (Transcript, lines 20-25, p. 120; lines 1-21, p. 121; lines 4-20, p. 124).

Mrs. Bowden was employed as a teacher's aid at the local elementary school (Transcript, lines 4-5, p. 115). She testified that during the time Donald and Karen were having marital problems, she confronted Karen in her home after a return from a business trip. Mrs. Bowden states that Karen's appearance had changed and that "everything was for Karen. We were no longer in her field." (Transcript, lines 9-11, p. 116). She further stated that Karen told her she would not work for peanuts like Mrs. Bowden was and that "when I leave my home, I leave my home-made cookies and homemade bread." (Transcript, lines 15-16, p. 116). Mrs. Bowden, in concluding her testimony, stated "I just don't think Karen has been fair to us. How long has she been faithful to us as a friend? And that's what I feel I'm really concerned about." (Transcript, lines 13-15, p. 118).

In response to allegations that her career takes precedence over her family, Mrs. Marchant testified "My career aspirations were to be a wife and a mother. And a job is nice and I am grateful I enjoy my work. But I certainly wouldn't term myself a

career girl or woman, or whatever. I'm grateful I enjoy my work." (Transcript, lines 12-16, p. 60).

In March, 1985, Mr. Marchant vacated the parties' home in Central, Utah, at the request of Mrs. Marchant (Transcript, lines 10-17, p. 76). During this period, the parties received marriage counseling from Dr. Richard Kirkham (Transcript, lines 5-9, p. 29). Finally, in August, 1985, Karen filed the Petition for Divorce and in September, 1985, pursuant to Stipulation attached hereto as Exhibit "A", moved to Salt Lake City, Utah with the parties' two children.

A. Facts Supporting Divorce Petition:

Mrs. Marchant testified that she and her husband were sexually and financially incompatible (Transcript, lines 8-17, p. 27). Additionally, in April, 1985, the Marchants engaged in an angry argument which resulted in Donald Marchant striking his wife and knocking her unconscious (Transcript, pp. 102 and 109). She testified that the turning point in her marriage was when her husband forced her to have sexual relations the night she returned from the hospital after a complicated operation and she was very ill (Transcript, lines 23-25, p. 63; lines 1-5, p. 64). Mrs. Marchant also stated she did not feel good about the kind of control Mr. Marchant tried to exercise in the kinds of clothing she wore and was critical of her (Transcript, lines 7-18, p. 54). Her husband objected to her sunbathing and going to hot tubs "things she'd never gone to before in our marriage" (Transcript, lines 18-21, p. 74; lines 1-5, p. 75).

Mr. Marchant did not want a divorce and desired reconciliation (Transcript, lines 1-7, p. 21).

B. Facts Relating to Custody:

1. Conditions in Salt Lake City. Mrs. Marchant had been the primary caretaker of Brandon and Sara during the marriage; she continued in this capacity despite her working full time both in Central, Utah, and Salt Lake (Defendant's Exhibit 9, "Recommendations", p. 3).

Mrs. Marchant maintained sole custody and control of the children from March, 1985, to June 18, 1986, the date of the trial. In September, 1985, when Mrs. Marchant moved to Salt Lake City, her husband agreed that she take the children with her to reside in Salt Lake (Stipulation-Order, Exhibit "A" herein). During that period, Mr. Marchant exercised visitation every other weekend by taking the children back to Central, Utah, from Salt Lake City, Utah.

Sara and Brandon both adjusted well to living in Salt Lake and performed well in school and established friends (Defendant's Exhibit 9, "Evaluation of Brandon Marchant"; "Evaluation of Sara Marchant"). Their scores on report cards indicate they maintained or improved grades at William Penn Elementary School (Plaintiff's Exhibits 1 and 2; Transcript, pp. 33-34).

While in Salt Lake, Mrs. Marchant took the children to ballet, concerts, theatre, movies, and hiking; she took skiing

lessons with Brandon on the weekends (Transcript, p. 35).

Brandon had several friends; and Sara enjoyed friendships with several children (Transcript, p. 39).

Elizabeth Stewart, the custody evaluator, stated with respect to the living situation in Salt Lake City, a clear preference for maintaining the status quo:

Situational factors:

1. Maintaining a satisfactory custody arrangement when the children are happy and well adjusted. There is a preference for leaving a custody arrangement in place where it is clear that they have made a reasonably good adjustment, and there is no reason to think that they are not doing well or that a different custody arrangement would be clearly better for them. In this respect, both the Marchant children have adjusted well although it is quite clear in observing them with their father that they miss him a great deal. It also seems likely that Sara's depression and feelings of loneliness are related to her father's absence. However, if she were living with her father she may well feel as sad and lonely because of her mother's absence.

2. The least disruptive placement. Since the children are doing well in their mother's custody at the present time the least disruptive placement would be to leave them in her custody.

3. Primary caretaker. Although Mrs. Marchant has worked full time in recent years, she has been the primary caretaker. Mr. Marchant, however, has provided direct care also although the division of parental responsibility has been quite traditional in this family. Mrs. Marchant could adapt to being the primary caretaker.

(Defendant's Exhibit 9, "Recommendation, p. 3)

Donald Marchant did not like the idea of his children being raised in Salt Lake.

"Q. Why do you think the children would be better off being raised in Central as opposed to Salt Lake?

A. I think there is more responsibility for them there. I do not like the city environment for children. I don't like the household environment they're in right now. . . ."

(Transcript, lines 13-19, p. 89)

Also, Mr. Marchant, in cross-examination, was asked about changes he observed in the children since living in Salt Lake. He replied:

"A. I would say more of a worldly approach to things, a little slick sophistication. It's hard to define. It's they're exposed to a different kind of people in Salt Lake. Brandon has attended several parties. He has been invited to go to the movies with girls and things in Salt Lake and it's a different lifestyle."

(Transcript, lines 7-12, p. 106)

Donald Marchant testified his wife had not tried to turn the children against him while in Salt Lake (Transcript, p. 87). Don's activities on every other weekend with the children were fishing, hunting, swimming, bowling, boy scout trips, horseback riding and rodeos (Transcript, p. 88).

2. Living conditions in the duplex. When Mrs. Marchant moved to Salt Lake, her sister, Helen, who is divorced and has a son, moved in with them in November or December, 1985; each person had their own bedroom (Transcript, lines 7-19, p. 45).

Much has been made of Karen living with Helen, "a divorced woman" so the testimony offered regarding Helen and the apartment is particularly relevant in light of Finding of Fact 5.C. In opening remarks, the Defendant's counsel stated that Mr. Marchant was concerned with the living situation in Salt Lake in that Mrs. Marchant was living with her sister, whom Mr. Marchant believed had "moral problems" (Transcript, lines 4-8, p. 25). Mr. Marchant's entire testimony regarding Helen is as follows:

A. Allusion was made to Helen and her presence in the home. I don't dislike Helen as a person. I'd like to put that on the record. But I do object to her being the mother of my children.

Q. Why do you think she's a mother to your children?

A. She's home more than Karen and she does a lot of mothering as far as I can tell.

Q. Do you think she is a good or a bad influence on the children?

A. I would have to say bad.

Q. Why do you say that?

A. Because her moral values do not coincide with what I think is right."

(Transcript, lines 18-25, p. 89; lines 1-5, p. 90)

Mrs. Marchant's testimony was that her sister, Helen, had a boyfriend, Chuck Moore, who came to the home but never stayed overnight (Transcript, lines 6-14, p. 46); that Helen occasionally brings alcohol into the duplex but that she has discussed Helen's drinking with the children and "they know my

standards and their own." (Transcript, lines 8-21, p. 47). She also stated that she did not agree with Helen's past relationships with men but that had changed (Transcript, lines 14-24, p. 49).

Karen's work schedule was leaving home at 7:30 a.m. and returning from work at 5:00 p.m. (Transcript, lines 12-21, p. 55). When she worked through her lunch, she would arrive home at 4:00 p.m. The children left for school at 9:00 a.m. and returned at 4:00 p.m. and were cared for by Helen while Karen was absent (Transcript, lines 1-22, p. 56). When Karen went out late at night, Sara and Brandon were cared for by a twin sister, Kathy, who lived close to the duplex. Kathy had children approximately the same age as Sara and Brandon (Transcript, lines 1-9, p. 57).

In addition to Karen's two sisters and their children living in Salt Lake, Karen's mother also resided in Salt Lake; additionally, Donald Marchant's parents and Karen Marchant's other brother and sister lived in Peoa, Utah (Transcript, lines 1-10, p. 62).

C. Facts relating to "involvement with another man."

A significant dispute between Donald and Karen Marchant existed over Karen's friendship with her boss, Doug Fonnesbeck, in Richfield, Utah. Conflicting testimony was offered regarding the extent of their relationship. Mrs. Marchant was unequivocal that nothing beyond a friendship existed and Mr. Marchant

insisted Karen was in love with him. However, it was clear that nothing of a sexual nature ever occurred. Doug Fannesbeck was Karen's immediate supervisor at Intermountain Health Care in Richfield, Utah; she first met him when she went to work in 1982 (Transcript, lines 20-21, p. 50).

Donald Marchant tied the trouble in his marriage to Doug Fannesbeck. He believed his marriage was in trouble when his wife stated what a wonderful man her boss was and that people in town were talking about her and her boss (Transcript, lines 16-23, p. 72). Mr. Marchant testified that he asked her about the relationship, and she reportedly stated that there was a "sexual attraction" (Transcript, lines 1-3, p. 73). In contrast, when asked about the relationship on cross-examination, Karen Marchant states:

"Q. Do you recall telling Mr. Marchant when he asked you what the relationship was that you might be in love, but it didn't matter because you could handle it?"

A. No. I didn't say that. I said that there was a possibility that I could sometime, if my situation were different, have liked Mr. Fannesbeck because I find him an interesting person. But that was the extent of it. There was no inclination on my part to have a relationship with Mr. Fannesbeck in any way. I was married and committed to my marriage."

(Transcript, lines 9-18, p. 52)

The "relationship" between Karen Marchant and her boss was based upon evidence introduced at trial regarding items which Mr. Marchant believed were gifts from Doug Fannesbeck. Mr.

Marchant discovered flowers on Karen's desk one day and Karen told him they were from her boss; he also discovered flowers in her hospital room (Transcript, lines 7-18, p. 73). On cross-examination, Mr. Marchant testified he couldn't tell whether the flowers were for National Secretary's Day (Transcript, lines 1-8, p. 97). Mrs. Marchant stated that the flowers in her hospital room were from the office, generally, and not Mr. Fonnesbeck (Transcript, lines 3-5, p. 51). The gifts consisted of a large phony diamond ring which Mr. Fonnesbeck gave Karen Marchant as a joke at a Christmas party in the Marchant's home when Mr. Marchant and all the staff were present (Transcript, lines 7-23, p. 32). However, the ring made Donald Marchant angry when Mrs. Marchant wore it (Transcript, lines 8-14, p. 74). Mr. Fonnesbeck also brought her some candy and "trinkets" which Mr. Marchant saw on Karen's desk; on occasion, Mrs. Marchant brought the candy home and stated to Mr. Marchant they were a gift from Mr. Fonnesbeck (Transcript, p. 73).

Karen Marchant gave everyone at her office Valentine's Day cards as well as cards on other occasions; she states she indicated on Mr. Fonnesbeck's card appreciation for their friendship (Transcript, lines 6-16, p. 51). Donald Marchant recalled that he looked at the Valentine in February, 1984, and saw expressions of affection (Transcript, pp. 94-95); however, on cross-examination, he admitted that he had no notes from the card and that he only recalled the signature from memory (Transcript, lines 1-12, p. 96).

Sometime prior to their separation, Karen Marchant met Doug Fannesbeck at a motel suite at Little America in Salt Lake; Mr. Fannesbeck was moving to Logan and was in Salt Lake on business and Karen Marchant was in Salt Lake having a medical check-up after having had a hysterectomy (Transcript, lines 9-21, p. 53). They met for approximately one and one-half hours and discussed the effect of Mr. Fannesbeck moving to Logan on Karen Marchant's employment in Richfield (Transcript, lines 14-25, p. 32; lines 1-5, p. 33). She further stated that she had never been unfaithful to her husband (Transcript, lines 6-7, p. 33). Mrs. Marchant disclosed the meeting at Little America to Mr. Marchant. Mr. Marchant states that at the time of disclosure, Mrs. Marchant said she and Mr. Fannesbeck had no physical relationship but they had expressed love for one another (Transcript, lines 1-9, p. 76).

Additionally, Karen Marchant went on a trip with the Fannesbeck's entire family to Lake Powell (Transcript, lines 20-24, p. 54).

In summary, no romantic relationship was shown to have existed, and at most, a trusting friendship.

D. Psychological Evaluation.

Elizabeth Stewart performed the custodial evaluation on Mr. and Mrs. Marchant, Brandon and Sara. Mr. and Mrs. Marchant are rated as equal in their caretaking ability and the children have expressed no preference for either parent. Equal degrees of bonding exist. The custody evaluator concludes as follows:

"The custody decision will clearly have to be made in view of other factors which are not covered by the custody evaluation. Both parents truly have the best interests of their children at heart and the children clearly need continuing the relationships with both parents."

(Defendant's Exhibit 9, "Recommendations", p. 4)

E. Financial Status of Parties.

Karen Marchant earned \$1,750.00 gross and \$1,321.00 net per month from her employment at the time of the divorce (Transcript, lines 17-21, p. 10). Donald Marchant earned \$2,908.00 gross and \$2,114.00 per month net from his employment with the United States Forest Service (Transcript, lines 1-12, p. 11).

The division of the marital assets is set forth at pages 4-5 herein. The Court, except for the pension plan, divided the assets equally between the parties and required payment to Mrs. Marchant of her equity of \$40,250.00 from the sale of the farm (Decree, para. 6.D., p. 45, Record).

The expenses of each party was submitted at trial in the form of exhibits based upon the cost of living when Karen had custody of the children and Donald had visitation rights. To the extent that the shift in custody altered expenses, the exhibits are inaccurate. Plaintiff's Exhibit 3 (attached hereto as Exhibit "D") shows Karen Marchant expenses as \$2,220.00; however, at trial, Karen Marchant testified that medical and dental bills were to be paid 100% by her employment and, therefore, the net

expenses should be reduced by \$125.00 (Transcript, lines 18-21, p. 40). Her sister, Helen, paid two-fifths of the \$550.00 rent, two-fifths of the \$135.00 utility bill and one-half of the \$40.00 telephone bill, reducing her overall expenses by \$294.00 (Transcript, lines 14-25, p. 48; lines 1-10, p. 49). Her expenses after these deductions were \$1,801.00.

Donald Marchant's expenses, with child support and travel to pick up the kids, equalled \$2,370.00 (Defendant's Exhibit 10, attached hereto as Exhibit "E"). The child support monthly payment was \$400.00 and travel expenses to exercise visitation was \$300.00, which probably should be reduced from Mr. Marchant's total expense sheet. Donald Marchant testified his trailer was on consignment in Salt Lake for sale and would additionally reduce his monthly expenses by \$165.00 (Transcript, lines 23-25, p. 76).

Donald Marchant testified Mrs. Marchant had received two personal injury settlements totaling \$20,000; the \$15,000 settlement was used to pay the farm, pay marital debts and make a loan to Karen's brother (Transcript, lines 23-25, p. 99; lines 1-10, p. 100).

Mr. Marchant was required to pay debts incurred during the marriage which were as follows:

<u>Description</u>	<u>Amount</u>	<u>Balance Due</u>
Truck	320.00	11,000.00
Visa	65.00	1,200.00
Master Charge	65.00	1,300.00
Loan, M. A. Marchant	---	14,000.00
Farm Loan, Zions Bank	---	2,000.00
Personal Loan	50.00	1,300.00

Mr. Marchant testified that the \$14,000.00 loan was from his father and that he did not sign a Promissory Note, but it was due "when he could get it" (Transcript, lines 6-15, p. 104). The other payments on marital obligations were already included in his monthly expenses. Therefore, he had no additional debt increase as a result of the Decree.

Mr. Marchant testified that his pension plan was valued at \$18,000.00 and was currently vested at the time of trial (Transcript, lines 17-25, p. 66; lines 1-12, p. 67).

Regarding alimony, Karen Marchant stated that she desires to return to school and complete her education and that schooling cost approximately \$135.00 per semester hour; she estimated she would need \$200.00 per month as alimony (Transcript, p. 43).

F. Courts Findings and Rulings.

Judge Tibbs "Findings and Rulings" from the Transcript are attached hereto as Exhibit "F". His statements and rulings reflect significant bias against divorcing women generally and Mrs. Marchant specifically.

SUMMARY OF ARGUMENTS

INTRODUCTION

The remarks, Findings of Fact and Conclusions of Law by Judge Donald V. Tibbs show bias towards divorcing women generally and Karen Marchant specifically.

1. THE FACTORS SET FORTH BY THE TRIAL COURT IN DETERMINING THE "BEST INTERESTS" OF THE CHILDREN IN THE CUSTODY AWARD SHOW THE COURT FAILED TO FOLLOW LEGAL STANDARDS ESTABLISHED IN UTAH FOR CUSTODY DETERMINATIONS, DO NOT SET FORTH A RATIONAL OR LOGICAL BASIS FOR MAKING THE AWARD TO MR. MARCHANT AND TERMINATING LONG TIME TEMPORARY CUSTODY OF MRS. MARCHANT, AND DO NOT REFLECT THE PREPONDERANCE OF THE EVIDENCE THAT THE "BEST INTERESTS" OF THE CHILDREN WERE BETTER SERVED BY MAINTAINING MRS. MARCHANT AS THE CUSTODIAL PARENT.

2. THE EVIDENCE ESTABLISHED THAT MRS. MARCHANT MET THE LEGAL STANDARD FOR BEING AWARDED ALIMONY IN THAT HER INCOME WAS LESS THAN HER EXPENSES, DONALD MARCHANT'S EARNING POWER AND INCOME GREATLY EXCEEDED KAREN MARCHANT'S, MRS. MARCHANT DESIRED TO RETURN TO SCHOOL AND THE PARTIES HAD BEEN MARRIED 18 YEARS DURING WHICH TIME MRS. MARCHANT REMAINED IN THE HOME AS A HOUSEWIFE.

3. UTAH LAW REQUIRES THE TRIAL COURT TO CONSIDER, IN DIVISION OF MARITAL ASSETS, ALL PROPERTY ACQUIRED DURING THE COURSE OF THE MARRIAGE; THE COURT GAVE NO CONSIDERATION OR CREDIT TO MRS. MARCHANT FOR PERSONAL INJURY AWARDS OF \$20,000.00 WHICH WERE CONTRIBUTED TO THE MARRIAGE.

4. THE COURT'S AWARD OF 100% OF THE RETIREMENT PLAN TO MR. MARCHANT AND ONE-THIRD THAT AMOUNT TO MRS. MARCHANT WAS INEQUITABLE IN LIGHT OF THE FACTS AND CIRCUMSTANCES OF THE MARRIAGE, AND THE COURT'S FAILURE TO AWARD ALIMONY, ATTORNEY'S FEES OR CREDIT MRS. MARCHANT FOR PERSONAL INJURY AWARDS.

LEGAL ARGUMENT

INTRODUCTION

Karen Marchant decided, after years of an unhappy marriage, that she should get a divorce. The decision came after sexual incompatibility, financial incompatibility and constant jealous rage and anger by her husband. For this decision, Judge John Tibbs deprived her of the custody of her children, Sara and Brandon. As further penalties, he refused to award her alimony after an 18 year marriage or attorney's fees, despite her earning a little more than 60% of her husband's income during her relatively recent employment.

Judge Tibbs' punitive attitude towards Mrs. Marchant is apparent in his remarks at the conclusion of the trial and his Findings of Fact regarding the custody issue. In his closing remarks, Judge Tibbs rails over the young criminals who are the product of a broken home, asserting that every criminal who comes before him for sentencing has divorced parents. Further, Judge Tibbs states:

"I'll be honest. I have difficulty with what the Plaintiff (Karen Marchant) sues. Alleges grounds. I have difficulty finding that this Defendant's done anything wrong, other than slapping her. Maybe that was justified. I don't believe in it. I don't believe anyone should use

force and violence. But I am having difficulty.
(Transcript, p. 130)

This "difficulty" exists despite Mrs. Marchant's testimony and Mr. Marchant's testimony of sexual incompatibility, that they had not engaged in sexual relations for more than two years prior to the divorce, had one year of marital counseling prior to the divorce, and that Mr. Marchant had forced her to have sex with him the night she returned home from the hospital after an operation for infertility and she was extremely ill. Further, Karen Marchant testified that her husband was constantly jealous and that in a fit of anger he had hit and knocked her unconscious. No doubt Mr. Marchant is a good fellow but saying that there is no basis for the divorce goes to the point of highlighting an apparent bias against divorcing women generally.

That bias is explicit in the Findings of Fact where the Judge states that a basis for awarding custody of the children to Mr. Marchant is that Mrs. Marchant moved into an apartment and "her sister, another woman who is divorced, moved in with her, together with her minor child." (Transcript, p. 135).

Although the appealable errors are based generally upon misapplication of law to facts, the various rulings are made increasingly questionable by Judge Tibbs' attitude towards Mrs. Marchant as evidenced by his statements and the shallowness of the basis of his decision on the custody issue. It is apparent his decision is solely against Mrs. Marchant on that point and

not in favor of the "best interests" of the Brandon and Sara Marchant.

I.

THE TRIAL COURT ABUSED ITS DISCRETION IN
AWARDING PERMANENT CUSTODY TO DONALD MARCHANT

Judge Tibbs abused his discretion in awarding the parties' minor children to Donald Marchant. The evidence strongly shows the Judge should have maintained the existing custodial award rather than changing its prior Orders. Although a Trial Court Judge is granted broad discretion in making custody determination Cox v. Cox, 532 P.2d 994, 995 (Utah, 1975), a Court must apply legal standard to the decision making process which rationally relate to the ultimate conclusions in the custody process. Smith v. Smith, 726 P.2d 423, 425 (Utah, 1986). It is particularly because of this broad discretion that Trial Court Judges must carefully weigh a variety of facts and look to established legal guidelines in arriving at proper conclusions. In the instant case, the Trial Court totally failed in its charge.

A. Legal Standards in Custody Determination.

A Trial Court must make custody awards based upon the "best interests" of the children. Section 30-3-10, Utah Code Ann. (1977, as amended). A child custody proceeding is equitable in nature and must be based primarily and foremost on the "welfare and interest of the minor children". Kallas v. Kallas, 614 P.2d 641, 645 (Utah, 1980).

On numerous occasions, this Court has set forth factors which should be considered in arriving at conclusions regarding the "best interests" of the children. In Hutchinson v. Hutchinson, 649 P.2d 38 (Utah, 1982), this Court stated:

"Some factors the Court may consider in determining the child's best interests relate primarily to the child's feelings or special needs: the preference of the child; keeping siblings together; the relative strength of the child's bond with one or both of the prospective custodians; and, in appropriate cases, the general interests in continuing previously determined custody arrangements where the child is happy and well adjusted. (Citations omitted)

Other factors relate primarily to the prospective custodians' character or status or to their capacity or willingness to function as parents; moral character and emotional stability; duration and depth of desire for custody; ability to provide personal rather than surrogate care; significant impairment of ability to function as a parent through drug abuse, excessive drinking, or other cause; reasons for having relinquished custody in the past; religious compatibility with the child; kinship, including, in extraordinary circumstances, stepparent status; and financial condition." (Citations omitted) At p.41.

This Court has, on occasion, highlighted factors which are most importantly considered in custody determinations.

"We believe that the choice in competing child custody claims should instead be based on function-related factors. Prominent among these, though not exclusive, is the identity of the primary caretaker during the marriage. Other factors should include the identity of the parent with greater flexibility to provide personal care for the child and the identify of the parent with whom the child has spent most of his or her time pending custody determination if that period has been lengthy. Another important factor should be the stability of the environment provided by each parent."

Citing Atkinson, Criteria for Deciding Child Custody in the Trial and Appellate Courts, 18

Fam.L.Q.1 (Spring, 1984). Pusey v. Pusey, 728 P.2d 117, 120 (Utah, 1986).

Assessment of the applicability and relative weight of these various factors in a particular case lie within the sound discretion of the Trial Court. Hutchinson v. Hutchinson, *supra* at 41. However, a Court may not arbitrarily substitute factors which are not functionally related to the "best interests of the child". Smith v. Smith, *supra*.

B. Judge Tibbs Misapplied the Law in Making the Custody Determination.

The Findings of Fact entered by the Trial Court show the complete misapplication of law in this case. The Findings show no sufficient basis whatsoever for terminating Karen's temporary custody which existed for 15 months prior to the divorce and awarding permanent custody to her husband. This Court has recently held that Findings of Fact must demonstrate a rational factual basis for the ultimate decision of custody award by references to pertinent factors that relate to the best interests of the child, including specific attributes of the parents. Smith v. Smith, 726 P.2d 423, 426 (Utah, 1986).

The Findings of Fact in this case are not logical, do not relate to the best interests of the children, show bias and prejudice on the part of the Trial Court Judge and, in some instances, are not supported by the evidence in the record.

1. Finding of Fact 5.A. "That both the Plaintiff and Defendant are good parents, and that both parties could be awarded custody of the minor children."

The Trial Court here recognizes the equality of the parties as confirmed in the Elizabeth Stewart custody evaluations wherein she makes no preference by way of recommendation for custody in either party. However, the Trial Court makes no further reference to important factors examined by the custody evaluator, especially the preference for maintaining the status quo with Karen Marchant as the custodial parent and the fact that the least disruptive placement would be maintaining custody with Mrs. Marchant. (Defendant's Exhibit 9, "Recommendations" p. 3).

2. Finding of Fact 5.B. "That the marriage entered into between Plaintiff and Defendant was broken by the actions on the part of the Plaintiff, which were not justified."

This Finding of Fact flies directly in the face of granting Plaintiff the divorce on grounds of mental cruelty and is not supported by the record. To the contrary, Karen Marchant testified of unhappiness in her marriage which she believed began at the time when her husband, Donald Marchant, forced her to have sexual relations the night she arrived home from the hospital after an operation for infertility when she was feeling very ill. She further testified of years of sexual incompatibility, of her husband's jealousy and anger of her outside relationships and activities and of other emotional incompatibility. Additionally, both Mr. and Mrs. Marchant testified of the incident when Mr. Marchant angrily struck Mrs. Marchant, knocking her unconscious.

Finally, the Finding of Fact does not relate in any respect to the best interests of the children. It rather

reflects a punitive view of the Trial Court that Donald Marchant is a deserving man and Karen Marchant's extreme difficulty during the course of the marriage are not worthy of being deemed "justification" for divorce.

3. Finding of Fact 5.C. "That when the Plaintiff vacated the family home in Central, Utah, and moved to Salt Lake City, Utah, in September of 1985, she moved into an apartment and in approximately November or December of 1985, her sister, another woman who is divorced, moved in with her, together with her minor child. That the standard of living under which Plaintiff has been residing while having the temporary custody of the children in Salt Lake City, Utah, is not what it should have been nor was it in the best interests of the children."

The Judge's bias against a divorcing or divorced woman is underscored by his making reference to Mrs. Marchant living with "another woman who is divorced". There is no other basis why this is a salient factor for his consideration in custody determination. The testimony regarding Karen Marchant's sister, Helen, provided no basis upon which the Court could find that this "divorced woman" should be a significant factor. Donald Marchant testified that he did not think Helen would be a good influence on his children "because her moral values don't coincide with what I think is right". (Transcript, line 4-5, p. 90). No other evidence was offered which plausibly could discredit Karen's sister.

The finding that "the standard of living . . . is not what it should have been nor was it in the best interests of the children" is not supported by the record and is vague. Karen Marchant testified that each of the parties lived in separate bedrooms, that her social life revolved around taking the children to concerts, theatre, movies, skiing and other activities. Elizabeth Stewart's psychological evaluations of Brandon Marchant and Sara Marchant indicate both are reasonably well adjusted in the environment and there is nothing adverse about the living conditions, except the absence of their father (Defendant's Exhibit 9). Karen Marchant's absence from the duplex in Salt Lake was work-related and she is home each day between 4:00 and 5:00 p.m. and her sister provides the care during her absence when the children are not in school. Donald Marchant testified that he was not aware of any time during the period they were in Salt Lake City when Sara and Brandon did not have food, shelter and clothing or were not adequately cared for. (Transcript, lines 1-8, p. 107)

In short, this unsupported and vague Finding of Fact does not provide a rational basis upon which the Court made its custody determination.

4. Finding of Fact 5.D. "That during the latter part of the marriage between Plaintiff and Defendant, Plaintiff became involved with another man and this had an influence with the Court in determining what is the best interests of the minor children."

Karen Marchant's "involvement" with Doug Fannesbeck was shown to be no more than on a friendship level. Mrs. Marchant testified that she liked her boss as a friend, found him interesting and trusted him. She testified that there was no romantic or sexual involvement. No evidence was introduced to the contrary, although Mr. Marchant stated that he had seen flowers, a couple of other gifts like candy and the famous ring incident where Fannesbeck gave Mrs. Marchant a phony diamond at a Christmas party with Intermountain Health Care staff in the Marchant's home. Karen Marchant voluntarily brought home candy and disclosed that it was from her boss and also voluntarily disclosed her meeting in Salt Lake with Doug Fannesbeck. These voluntary disclosures are contrary to any significant sexual or romantic involvement. However, beyond that, the Utah Supreme Court has held that even in the most extreme instances of flagrant sexual involvement, in order to be considered as a factor in custody determinations, the relationship must be shown to be adverse to the best interests of the children. Shioji v. Shioji, 671 P.2d 135 (Utah, 1983); Kallas v. Kallas, 614 P.2d 641 (Utah, 1980).

The declaration that her "involvement with another man" influenced the Court is patent affirmation of the Court ignoring traditional factors of either parents' positive or negative attributes, caretaking abilities, or environmental conditions which may play a role in appropriate child rearing

process. The Court's findings essentially negate the possibility of a woman having any friendship relationship with a man who is not her husband at the risk of losing her children in a child custody battle. Further, it may have been the case that the relationship could have been a very positive factor with respect to the best interests of the children but no further finding is evident on that point.

5. Finding of Fact 5.E. "That during the latter years of the marriage, Plaintiff's lifestyle changed and that change was not in the best interests of the family unit, but rather the change was pursuant to Plaintiff's desires and for her benefit to the exclusion of the family unit."

It is accurate that Karen Marchant decided, after some years of an unhappy marriage, that she no longer wanted to be married to Donald Marchant which certainly does not promote "the best interests of the family unit". However, Mrs. Marchant again is being penalized for exercising her right to obtain a divorce rather than this being a factor which relates to either her or Donald Marchant's ability to care for and raise Sara and Brandon Marchant. The only "lifestyle" change in the latter years of the marriage was that in 1982, Karen Marchant decided to go to work. Her testimony on that point was that she felt a clear economic need to reduce the indebtedness which had been incurred with the purchase of the farm and that as a result of her experience as a child when her father died leaving her mother

with eight children to rear, she felt a clear need to have a vocation upon which to rely in the event of her husband's death. She continued as the primary caretaker of Sara and Brandon Marchant while working. The record is void of any characteristic of her lifestyle which would adversely effect the best interests of the children, such as drug or alcohol abuse, illicit relationships with men in the presence of the children, adverse psychological traits, or other negative "lifestyle" factors. Her behavior is simply consistent with a person who had made the decision to obtain a divorce which should not preponderate against her on a child custody issue.

In conclusion, the Trial Court wholly failed to provide a "rational factual basis for the ultimate decision by reference to pertinent factors that relate to the best interests of the child". Smith v. Smith, supra, at 426. The Court employed none of the factors outlined in Hutchinson, supra, in making the award.

C. The Court Should Have Awarded the Parties' Children to Karen Marchant.

Under Pusey v. Pusey, supra, and Hutchinson v. Hutchinson, supra, the factors therein dictate that the Trial Court should have awarded custody of Brandon and Sara Marchant to Karen Marchant. Under Pusey, "prominent" considerations relate to the primary caretaker during marriage and the person with whom the children have spent their time during the determination of

custody. Karen Marchant, up until her employment of 1982, had been almost the sole caretaker of the children while she was at home as a housewife and her husband worked. After 1982, she continued as the primary caretaker. (Defendant's Exhibit 9, "Recommendations", para. 3). Donald Marchant moved out of the parties' home in Central, Utah, in March, 1985, and from March, 1985, to September, 1985, Karen Marchant was the primary caretaker in Central, Utah. From September, 1985, to June, 1986, Karen Marchant maintained custody in Salt Lake City, Utah.

These factors become increasingly more prominent where the custody evaluator has not recommended custody in either party. In fact, the change in custody from Mrs. Marchant to Mr. Marchant becomes more puzzling in light of the custody evaluator indicating that "there is a preference for leaving the custody arrangement in place where it is clear that they have made a reasonably good adjustment and there is no reason to think that they are not doing well or that a different custody arrangement would be better for them." Further, the evaluator states "since the children are doing well in their mother's custody at the present time the least disruptive placement would be to leave them in her custody." (Defendant's Exhibit 9, "Recommendations" p. 3).

There is simply no evidence in the record which pointed to disturbing the custody arrangement after the children had attended one full year at William Penn Elementary School in Salt

Lake City, Utah, had become well adjusted to the Salt Lake City condition and environment, had gained friends. This is especially true in light of the childrens' familial ties through Karen Marchant's mother, two sisters and their families living in Salt Lake, and Don Marchant's and Karen Marchant's brother and sister and parents living in Peoa, Utah, which is nearby. In fact, during working hours, Mrs. Marchant had a preferable caretaker in her sister, Helen, who was a close relative and could provide care and nurturing on a familial basis. That evidence is opposed to Donald Marchant's testimony who stated that on a theoretical basis he would obtain some "good ladies" from the neighborhood to care for the children while he was at work and they had returned home from school, or in the alternative, during summer months when he was at work (Transcript, lines 1-12, p. 91). He could only make statements on an assumed basis and could provide no practical experience.

On a variety of other factors, the best interests of the children would have been equally well served by awarding custody to either party in that no strong preponderance occurred from character traits, caretaking abilities, child preference or emotional stability. The factors set forth by the Court as weighing importantly in its custody determination were strongly outweighed by the factors discussed in Pusey v. Pusey, supra.

D. The Court Abused its Discretion in Custody Determination.

Based upon the Court's apparent prejudice, its lack of consideration or explication of appropriate factors, its failure to apply the law, and the positive factors which preponderate in favor of Karen Marchant having continued custody of Sara and Brandon Marchant, it is apparent that the Court abused its discretion. As the Court has traditionally held and recently stated:

"This Court will not overturn a Trial Court's custody determination on appeal unless the evidence clearly shows that the custody determination was not in the best interests of the child or that the Trial Court misapplied applicable principles of law." (Citation omitted) Smith v. Smith, at 425.

This case is one of those clear instances when the Court abused its discretion and should be reversed.

II.

THE COURT ABUSED ITS DISCRETION IN FAILING
TO AWARD KAREN MARCHANT ALIMONY

The Trial Court abused its discretion in failing to award Karen Marchant alimony in that she clearly met the traditional legal standard required for an award of alimony. The Court entered no Findings of Fact on the point other than Mrs. Marchant is not entitled to alimony. The evidence supports that after an 18 year marriage to the Defendant, alimony should have been awarded.

A. Applicable Standard for Alimony Determination.

This Court, on numerous occasions, has held that the most important function of alimony is to support for wife as nearly as possible to the standard of living she enjoyed during the marriage. Jones v. Jones, 700 P.2d 1072, 1075 (Utah, 1985); Higley v. Higley, 676 P.2d 379, 381 (Utah, 1983); English v. English, 565 P.2d 409, 411 (Utah, 1977).

With this purpose in mind, the Trial Court must consider three factors in making a reasonable alimony award:

1. The financial conditions and needs of the wife;
 2. The ability of the wife to produce a sufficient income for herself; and
 3. The ability of the husband to provide support.
- Jones v. Jones, supra, at 1075; English v. English, supra, at 411-12; Fletcher v. Fletcher, 615 P.2d 1218, 1223 (Utah, 1980); Gramme v. Gramme, 587 P.2d 144, 147 (Utah, 1978).

B. The Facts Warrant Awarding Alimony to Karen Marchant.

The living conditions of the Marchants prior to the marital breakup, the economic earning powers of the parties and their relative needs strongly show that the Court should have awarded alimony. Don and Karen Marchant were married 18 years at the time of divorce. Karen had quit college to support Don while he obtained his Bachelor of Science in Civil Engineering at

Brigham Young University. Karen worked only during the first few years of the marriage and then from 1974 to 1982 cared full time for the parties' children. In 1982 she went to work as a secretary in that she had no other skills upon which she could rely or significant educational experience by way of a degree. Don Marchant testified that his gross annual income was \$37,000.00 per year or \$2,908.00 gross and \$2,114.00 net. Karen Marchant's employment produced approximately \$21,000.00 per year gross, \$1,750.00 per month gross and \$1,350.00 per month net. Prior to the marital breakup, the parties lived in a home in Central, Utah, which was awarded to Don Marchant. In light of Don Marchant's engineering degree and longevity with the United States Forest Service, his earning power is significantly greater than Mrs. Marchant's. This Court has held:

"Where a marriage is of long duration and the earning capacity of one spouse greatly exceeds that of the other, as here, is appropriate to order alimony and child support at a level which will insure that the support spouse and children may maintain a standard of living not unduly disproportionate to that which they would have enjoyed had the marriage continued." Savage v. Savage, 685 P.2d 1201, 1205 (Utah, 1983).

Mrs. Marchant testified and submitted her exhibit showing that her expenses were \$1,801.00, which is \$470.00 greater than her net income. (Transcript, lines 17-21, p. 10; lines 18-21, p. 4; Plaintiff's Exhibit 3.) Reducing her expenses for the absence of the children by deducting the child care of \$100.00 and school expenses of \$80.00, she is still \$290.00

short. Don Marchant's expenses are a total \$2,370.00; however, this included a monthly support payment of \$400.00 and travel expenses to exercise visitation of \$300.00 which should be deducted out, leaving expenses of \$1,670.00. Also, Mr. Marchant testified with respect to the \$165.00 per month payment on the trailer, that it was on consignment in Salt Lake and should immediately be sold which would reduce his monthly expenses to \$1,505.00.

Mrs. Marchant testified that she desired to return to school and gain further education which would cost \$135.00 per semester hour. She estimated that she would need approximately \$200.00 per month in alimony to obtain that education.

Although Mrs. Marchant was awarded marital assets which would theoretically produce income upon the sale which was ordered by June, 1987, division of marital assets is an inappropriate measure of alimony. The Court has held:

"The standard utilized by the Trial Court, i.e. the length of the marriage and contributions of each to their joint financial success, is not an appropriate measure to determine alimony. There is a distinction between the division of assets accumulated during marriage, which should be distributed upon an equitable basis, and the post-marital duty of support and maintenance."

English v. English, supra, at 411. Also see Fletcher v. Fletcher, 615 P.2d 1218, at 1223 (Utah, 1980).

In light of the disparate earning capacities of Mr. and Mrs. Marchant, their expenses and needs, his ability to pay and her current and future needs, it is apparent she unqualifiably met the requirements for being awarded alimony.

C. The Court Abused Its Discretion in Failing to Award Alimony.

This Court has stated that it will not disturb an award of alimony unless there is a clear and prejudicial abuse of discretion. Dority v. Dority, 645 P.2d 56, at 59 (Utah, 1982). However, the Court's failure to observe this Court's standard for awarding alimony in the instant case is apparent. In the Court's Memorandum Decision, and its Findings of Fact, there is no record of any analysis performed by the Court of the three factors which warranted granting Mrs. Marchant alimony. As we have suggested before, this may, in part, be due to a punitive attitude on the part of the Trial Court to Mrs. Marchant's move to obtain a divorce where the Trial Court felt that her actions were not justified. However, this Court, while sitting in equity, has the ability to independently review the record and make its own conclusions. Jones v. Jones, *supra*, at 1075. The Court in Jones, applying the standard set forth above, held that the Trial Court abused its discretion in failing to award an appropriate amount of alimony. The evidence before the Court clearly shows that the Trial Court abused its discretion by not granting reasonable alimony to Karen Marchant.

III.

THE COURT ABUSED ITS DISCRETION IN FAILING TO
CONSIDER PERSONAL INJURY AWARD TO KAREN MARCHANT
IN ITS DISTRIBUTION OF MARITAL ASSETS

There is no evidence in the record that Judge Tibbs considered the total of \$20,000.00 awarded to Karen Marchant from

two personal injury accidents. According to Mr. Marchant's testimony, he was unclear as to the portion of the \$15,000.00 award which was contributed by Karen to purchase the farm; however, he states that a portion went to pay mutual debts, purchased personal items and some was loaned to Karen's brother (Transcript, lines 1-10, p. 110). The record reflects that it was a separate award to Karen Marchant.

A. Legal Standard in Assessing Division of Marital Assets.

Interpretation and construction of Section 30-3-5, Utah Code Ann. (1953, as amended) requires the Trial Court to consider the entirety of each parties' assets and how they were acquired and their use during the course of the marriage. In Woodward v. Woodward, 656 P.2d 431 (Utah, 1982), the Trial Court awarded the wife a percentage of the husband's retirement fund. The husband appealed contending the pension plan should not be included in property distribution in that the income was to be received in the future. Using an analysis which is particularly appropriate in the instant case, this Court stated:

"If the rights to those benefits are acquired during the marriage, then the Court must at least consider those benefits in making an equitable distribution of marital assets." Woodward, at p. 432.

The Court cited prior case law for the proposition that all assets brought into the marriage, all assets acquired during the marriage, from whatever source, must be considered when making an equitable distribution:

"In Englart v. Englart, Utah, 576 P.2d 1274 (1978), we emphasize the equitable nature of proceedings dealing with the family, pointing out that the Court may take into consideration all of the pertinent circumstances. The circumstances encompass all of the assets of every nature possessed by the parties, whenever obtained and from whatever source derived" Woodward at p. 432.

More recently, in upholding a division of marital property where sixty percent (60%) of the estate was awarded to the wife and forth percent (40%) to the husband, the Utah Supreme Court considered it a prominent factor that the wife had used proceeds from the sale of her home to purchase the parties' original home in Park City, Utah. Workman v. Workman, 652 P.2d 931 (Utah, 1982). Accord Turner v. Turner, 649 P.2d 6 (Utah, 1982). In Kerr v. Kerr, 610 P.2d 1380 (Utah, 1980), the husband (Defendant) appealed an award splitting the marital estate fifty-five percent (55%) in favor of his wife and forty-five percent (45%) to him, claiming abuse of discretion. Upholding the Trial Court's award, the Court stated:

"The Trial Court had before it testimony that Plaintiff had not been gainfully employed outside the home for nearly 22 years and her skills were in clerical and sales work. On the other hand, the Defendant had a well established profession netting him in excess of \$40,000.00 per year. The fact that, due to her willingness to work while he attended school, Plaintiff has not increased her earning capacity to the same extent as had the Defendant, speaks in favor of the Trial Court's distribution."

"Furthermore, it was undisputed that Plaintiff contributed \$10,000.00 from her own separate funds to completely furnish the first home of the parties and when that home was sold and their current home was purchased, many of those furnishings were moved to and are still in the new residence. Plaintiff

contributed another \$5,000.00 of her own funds in 1967 to retire the mortgage on this residence. In view of these undisputed facts, the Trial Court did not abuse its discretion in awarding a greater portion of the marital property to the Plaintiff than to the Defendant." Kerr, at 1382-83.

B. The Personal Injury Awards to Karen Marchant Should be Considered to Recompute the Division of the Marital Assets.

In each of the cases cited above, the Court upheld division of marital assets which, in some instances, disproportionately favored the party contributing a significant amount of money or assets to the marital estate. However, in this case, the larger portion of the assets were awarded to Donald Marchant. The Trial Court made no consideration of the personal injury award to Karen Marchant in its division of the marital assets which is apparent from its dividing all of the property, except for the pension plan, fifty percent (50%) to Don Marchant and fifty percent (50%) to Karen Marchant. The inequity worked against Mrs. Marchant is apparent from the property award. Further, it cannot be claimed that she is being compensated on another level in that she was not awarded alimony or attorney's fees. Therefore, the Court's failure to consider the personal injury award is a misapplication of the law which results in substantial prejudice.

IV.

FAILURE TO AWARD KAREN MARCHANT ONE-HALF OF THE RETIREMENT BENEFITS WAS AN ABUSE OF DISCRETION

A. Equity Requires at Least an Equal Distribution of the Marital Assets.

In distributing marital assets, a variety of equitable concerns must be considered by the Court such as the fifteen specific factors stated in McDonald v. McDonald, 236 P.2d 1066, at 1070 (Utah, 1951). The Trial Court has broad discretion entering its Orders. In commenting on the Trial Court's discretion, this Court has stated:

"When a marriage has failed, a court's duty is to consider the various factors relating to the situation and to arrange the best possible allocation of the property and the economic resources of the parties so that the parties and their children can pursue their lives in as happy and useful a manner as possible." Read v. Read, 594 P.2d 871 (Utah, 1979).

In accordance with equitable considerations, Karen Marchant should have been awarded at least fifty percent (50%) of Donald Marchant's retirement plan to maintain at least a fifty-fifty split of the marital assets. During the majority of the time Donald Marchant worked for the U.S. Forest Service, Karen was at home raising the children. Her activities as a housewife during those several years warrant consideration in his accumulation of retirement benefits. Further, during the short period of time she has been employed, she has received no accumulation of benefits other than social security income. Other factors are

that the Court failed to include consideration for the personal injury awards which were contributed to the marriage, no award of alimony or attorney's fees. The Trial Court was in a unique position to consider the parties, their children, their incomes and accumulated property. However, viewing the overall division of property, it is apparent that the Court strongly favored Donald Marchant when equitable considerations would dictate otherwise.

B. The Court Failed to Consider the Terms of the Civil Service Retirement Spouse Equity Act of 1984 for Alternative Distribution.

Under the Civil Service Retirement Spouse Equity Act of 1984 (Pub. L. No. 95-615, 92 Stat. 3195, 1984, amending 5 U.S.C. Section 8331, 8339, 8345, 8901 et seq.), the Court could have provided that Karen Marchant be made an alternative beneficiary for all benefits due under the Civil Service Retirement Plan. A Qualified Domestic Relations Order could have been entered directing the Administrator of the Plan to transfer the appropriate percentage of funds to the account of Karen Marchant. Given Karen's lack of retirement benefits and no significant prospects for accrual of similar benefits, the alternative may have been significantly preferred. However, the Court failed to address the alternative which should have been paramount in looking to the most beneficial treatment available for each of the parties. From the Court's Orders, it is unclear upon what

basis and under what conditions the determination was made that Karen should be paid no more than one-third (1/3) of the vested amount of the retirement plan. However, consideration of protection of Mrs. Marchant's rights to pension plan benefits should have been addressed.

C. Awarding Eight Percent (8%) Interest was Arbitrary and an Abuse of Discretion.

The Court awarded Donald Marchant one hundred percent (100%) of his retirement benefits of \$18,000.00 and awarded Karen Marchant \$6,000.00, payable over a ten year period in equal installments, accruing interest at eight percent (8%) per annum. In making the award, the Court does not address the percentage interest on any factual basis or tie it to any relevant requirement. Utah law requires that judgments bear interest at the rate of twelve percent (12%) per annum. Section 15-1-4, Utah Code Ann. (1981, as amended). The \$6,000.00 award is clearly a "judgment" within the meaning of the statute and should accrue interest at twelve percent (12%) as required by the statute. The Court's failure to make the award was an abuse of discretion.

CONCLUSION

In prosecuting this appeal, we have been mindful of Karen Marchant's burden to show error and that this Court will overturn the Trial Court's Findings of Fact only if they are contrary to the clear preponderance of the evidence. On the issue of custody, the Findings of Fact clearly are not disposi-

tive of the best interests of the children, underscore a misapplication of the law and an apparent bias by the Trial Court Judge and wholly fail to consider prominent bases that this Court has asserted should be controlling in the instant case. The failure to award alimony to Mrs. Marchant where it is clearly warranted under the standards set forth by this Court and the inequitable distribution of the parties' property show a pervasive abuse of discretion by the Trial Court Judge which has resulted in significant injustice. This Court should reverse the judgment of the Trial Court as abuses of discretion and enter judgment in accordance with the controlling cases set forth herein and the facts in the record.

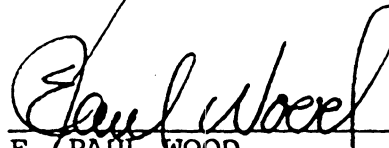
DATED this 20 day of February, 1987.

LITTLEFIELD & PETERSON

By:


CRAIG M. PETERSON

By:


E. PAUL WOOD
Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Appellant's Brief to be mailed to Hans Q. Chamberlain, Esq., Attorney for Respondent, 110 North Main Street, #6, Cedar City, Utah 84720, this _____ day of February, 1987.

EXHIBIT "A"

David L. Mower, 2340
JACKSON, McIFF and MOWER
Attorneys at Law
Attorneys for Plaintiff
151 North Main Street
P.O. Box 605
Richfield, Utah 84701
Telephone (801) 896-5441

SEVIER COUNTY
RECEIVED NO. 9645

1985 SEP 19 PM 4:16

DEVON POOLSON, CLERK
BY Norina DEPUTY
S. Roberts

IN THE DISTRICT COURT OF SEVIER COUNTY

STATE OF UTAH

Karen Schumann Marchant,

Plaintiff,

vs.

Donald J. Marchant,

Defendant.

STIPULATION FOR
TEMPORARY ORDER and
TEMPORARY ORDER

Civil No. 9605

The above matter was heard by the Court on August 21, 1985, at Richfield, Utah. Plaintiff was present, with counsel, David L. Mower. Defendant was present, with counsel, Hans Q. Chamberlain. Counsel recited for the Court a Stipulation, which is hereby memorialized and reduced to writing:

1. Temporary custody of the parties' minor children, Brandon Justice Marchant, born February 1, 1974, and Sara Marlana Marchant, born April 22, 1977, shall be awarded to plaintiff, subject to reasonable and liberal visitation rights reserved in defendant.

2. Temporary possession of the home in Central, RFD Monroe, Utah, and farm shall be awarded to defendant.

3. There shall be no contact between the parties unless the same is initiated by plaintiff, save and except to discuss and arrange for the defendant's exercise of visitation rights and save and except to discuss financial matters.

4. Neither party shall file any pleading nor do any act to advance this cause for a period of one hundred and twenty (120) days.

5. Defendant shall pay to plaintiff temporary child support in the amount of TWO HUNDRED DOLLARS (\$200.00) per month per child.

6. Plaintiff will vacate the family home located in Central, RFD Monroe, Utah, and will, during the next one hundred and twenty (120) days occupy only rental property.

7. Neither party shall dispose of any marital assets without a prior Court order or without mutual consent.

8. Neither party shall incur any debt without mutual consent.

9. Defendant shall maintain in force the medical insurance coverage presently existing for the benefit of the plaintiff and the parties' minor children. In addition, defendant will pay any medical expenses not covered by insurance.

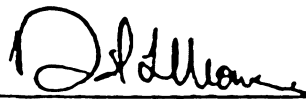
10. Defendant will assume and pay all marital debts, except those specifically assumed by plaintiff, including, but not limited to, the following: the monthly house payment in the amount of FOUR HUNDRED THREE DOLLARS (\$403.00), the monthly truck payment in the amount of THREE HUNDRED THIRTY DOLLARS (\$330.00), the monthly trailer payment in the amount of ONE HUNDRED SIXTY

FIVE DOLLARS (\$165.00), and the annual farm payment in the amount of approximately FIVE THOUSAND DOLLARS (\$5,000.00).

11. Defendant will pay to plaintiff the sum of THREE HUNDRED SEVENTY FIVE DOLLARS (\$375.00) to be applied towards the debts to ZCMI and to Dr. Reed Christensen, which debts will thereafter be assumed by plaintiff.

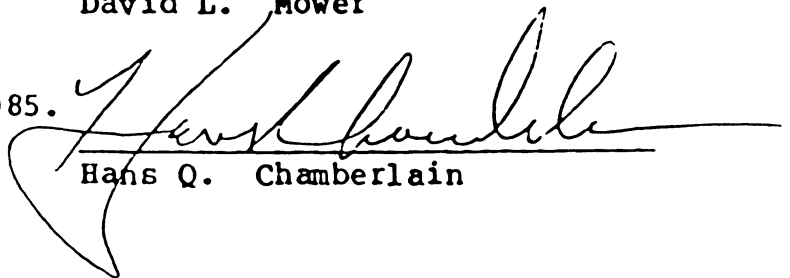
12. Either party may have the children examined by a child psychologist or child psychiatrist.

Executed on August 28, 1985.



David L. Mower

Executed on August _____, 1985.



Hans Q. Chamberlain

ORDER

The within and foregoing Stipulation is approved by the Court and hereby adopted as it's Order.

Executed on ~~August~~ October 2nd, 1985.


Don V. Tibbs, Judge

EXHIBIT "B"

SEVIER COUNTY
RECEIVED NO. 9605
1986 SEP -3 AM 9 15

DEVON POULSON, CLERK
BY *Mark E. Anderson* DEPUTY

HANS Q. CHAMBERLAIN
CHAMBERLAIN & HIGBEE
Attorneys for Defendant
250 South Main
P. O. Box 726
Cedar City, Utah 84720
Telephone: (801) 586-4404

IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR
SEVIER COUNTY, STATE OF UTAH

KAREN SCHUMANN MARCHANT,)	
	)	FINDINGS OF FACT AND
Plaintiff,	)	CONCLUSIONS OF LAW
)	
vs.)	
)	
DONALD J. MARCHANT,	)	Civil No. 9605
)	
Defendant.)	

The above-entitled matter was tried to the Court, sitting without a jury, on June 18th, 1986. At that time, Plaintiff appeared, together with her attorney, David L. Mower. Defendant likewise appeared, together with his attorney of record, Hans Q. Chamberlain. More than three months have elapsed since the filing of the Complaint by Plaintiff, and Plaintiff and Defendant were each called to testify concerning said matter, together with other witnesses. The matter having been submitted to the Court, and the Court having been fully advised in the premises, now makes the following:

FINDINGS OF FACT

1. That Plaintiff was a bona fide resident of Sevier County, Utah, for more than three months prior to the time

1 the Complaint was filed in this matter.

2 2. Plaintiff and Defendant were married on September 8th,
3 1967, in Salt Lake City, Utah, and ever since said time have been
4 and now are husband and wife.

5 3. The Court finds that Defendant has treated the Plaintiff
6 cruelly, both mentally and physically, and that the parties
7 simply cannot continue to maintain the marital relationship. By
8 reason of the same, Plaintiff is entitled to a Decree of Divorce,
9 final and effective upon entry, the Court, for good cause, having
10 waived the interlocutory period required by law.

11 4. Two children were adopted by the parties, namely,
12 Brandon Justice Marchant, born February 1, 1974, and Sara Marlana
13 Marchant, born April 22, 1977. Pursuant to a Stipulation
14 concerning temporary custody and subsequent Order by the Court
15 dated October 2nd, 1985, the children have been residing with
16 Plaintiff in Salt Lake City, Utah, and Defendant has been
17 visiting with the children every other weekend by traveling from
18 his home in Central, Sevier County, Utah, to Salt Lake City,
19 Utah, picking up the children, returning to his home, and
20 thereafter returning the children to the Plaintiff's home on
21 Sunday evening and then again returning to Defendant's home in
22 Central, Utah.

23 5. In determining what is in the best interests of the
24 children for purposes of determining custody, the Court makes the
25 following specific findings:

1 A. That both the Plaintiff and Defendant are good
2 parents, and that both parties could be awarded custody of
3 the minor children.

4 B. That the marriage entered into between Plaintiff
5 and Defendant was broken by the actions on the part of
6 Plaintiff, which were not justified.

7 C. That when the Plaintiff vacated the family home in
8 Central, Utah, and moved to Salt Lake City, Utah, in
9 September of 1985, she moved into an apartment and in
10 approximately November or December of 1985, her sister,
11 another woman who is divorced, moved in with her, together
12 with her minor child. That the standard of living under
13 which Plaintiff has been residing while having the temporary
14 custody of the children in Salt Lake City, Utah, is not what
15 it should have been nor was it in the best interests of the
16 children.

17 D. That during the latter part of the marriage between
18 Plaintiff and Defendant, Plaintiff became involved with
19 another man and this fact had an influence with the Court in
20 determining what is in the best interests of the minor
21 children.

22 E. That during the latter years of the marriage,
23 Plaintiff's lifestyle changed and that change was not in the
24 best interests of the family unit, but rather the change was
25 pursuant to Plaintiff's desires and for her benefit to the
exclusion of the family unit.

1 6. That by reason of the foregoing Findings of Fact, the
2 Court finds that it is in the best interests of the minor
3 children that their custody be awarded to Defendant, effective
4 July 1st, 1986, subject to reasonable rights of visitation vested
5 in the Plaintiff, including, but not limited to the following
6 specific visitation privileges:

7 A. Every other weekend commencing Friday at 6:00 p.m.
8 and ending Sunday at 7:00 p.m., provided however, that for
9 each Sunday while the children are in the care of the
10 Plaintiff, the children shall be required to attend church
11 and it can be a church of their choice.

12 B. Every other holiday, commencing with the 24th of
13 July, 1986, except Christmas at which time the children are
14 to remain in the care of the Defendant.

15 C. A six-week visitation with the minor children
16 during the summer months commencing in the summer of 1987,
17 at a time as may be mutually agreeable between the parties.

18 7. By reason of the fact that the care of the minor
19 children is to be awarded to Defendant, the Court does not award
20 child support to either party.

21 8. The Court finds that Plaintiff is not entitled to
22 alimony.

23 9. The assets accumulated by Plaintiff and Defendant are
24 awarded as follows:

25 A. The family home located in Central, Sevier County,
Utah, is hereby awarded to Defendant, subject to the debt

1 thereon which Defendant shall be required to pay and
2 discharge, and to indemnify and hold Plaintiff harmless from
3 the payment of the same. Plaintiff is entitled to one-half
4 of the equity owned by the parties in said home, or the sum
5 of \$17,000, and Plaintiff is hereby awarded a lien against
6 said home in that amount subject to payment as hereinafter
7 set forth. Said home is more particularly described as
8 follows:

9 Beginning at a point lying N 79°53'04"E for
10 2483.91' more or less from the SW Corner of
11 Section 14, T.24S., R3W., SLB&M and running thence
12 South along the west line of State Highway Right
13 of Way, for 104', thence West for 192.31'; thence,
14 North for 104'; thence East for 192.31' to the
15 point of beginning and containing 0.47 acres, more
16 or less.

17 B. The Court finds that the farm owned by the parties
18 located in Sevier County has a total net equity in the sum
19 of \$43,500 and Plaintiff and Defendant are each entitled to
20 one-half of said equity, or the sum of \$21,750 each. The
21 farm, consisting of approximately 43.5 acres shall be sold
22 on or before June 18th, 1987, with the proceeds to be
23 distributed as hereinafter set forth. The remaining 43.5
24 acres of the farm to be sold is more particularly described
25 as follows:

PARCEL 1:

Commencing 1.55 chains North and 2.25 chains West
of the Southeast corner of Section 15, Township 24
South, Range 3 West, of the Salt Lake Meridian,
thence West 12.00 chains; thence South 1.55
chains; thence West 15.77 chains; thence North

1 10.00 chains; thence East 10.00 chains; thence
2 South 0.80 of a chain; thence East 6.95 chains;
3 thence South 2.13 chains; thence East 13.05 chains
4 to West line of Rio Grande & Western Railway;
5 thence Southwesterly along the West line of said
6 railway to the place of beginning, containing
7 20.74 acres, more or less, situate in the South
8 half of the Southeast quarter of aforesaid Section
9 15.

10 PARCEL 2:

11 Commencing at a point 14.10 chains East and 86
12 links North of the Southwest corner of Section 14,
13 Township 24 South, Range 3 West, SLB&M; running
14 thence East 17.95 chains; thence North 2.88
15 chains; thence East 184 feet; thence North 85.42
16 feet; thence East 146 feet, more or less, to West
17 line of State Hwy. right-of-way; thence North,
18 along the same 104 feet; thence West 11.00 chains;
19 thence North 3.89 chains; thence West 10.50
20 chains; more or less, to the Canal; thence
21 Southwesterly along the canal 10.00 chains, more
22 or less, to the place of beginning, cont. approx.
23 15.61 acres.

24 Excluding therefrom:

25 Beginning at a point lying N 79°53'04"E for
26 2483.91' more or less from the SW Corner of
27 Section 14, T.24S., R3W., SLB&M and running
28 thence South along the west line of State
29 Highway Right of Way, for 104', thence West
30 for 192.31'; thence, North for 104'; thence
31 East for 192.31' to the point of beginning
32 and containing 0.47 acres, more or less.

33 PARCEL 3:

34 Commencing 1.55 chains North of the Southwest
35 corner of Section 14, Township 24 South, Range 3
36 West, Salt Lake Base and Meridian; thence North
37 1.50 chains; thence North 12° 14' East along East
38 Line of Rio Grande & Western Railway 4.10 chains,
39 more or less, to a point 7.05 chains North and
40 1.60 chains East of the Southwest corner of
41 aforesaid Section 14; thence East 13.35 chains to
42 Canal; thence Southwesterly along canal to Section
43 line; thence West 1.80 chains; thence North 9° 35'
44 East 1.55 chains; thence West 11.77 chains, more
45 or less, to the place of beginning.
Containing 7.83 acres, more or less.

1 C. The farm equipment owned by the parties is hereby
2 awarded to Defendant, provided, however, that Defendant
3 shall pay to Plaintiff the sum of \$1,500 for her interest in
4 said equipment.

5 D. Plaintiff is therefore awarded the total sum of
6 \$40,250 for her interest in the above-described property.
7 To secure payment of the same, Plaintiff is hereby awarded a
8 lien against the farm property above-described in said
9 amount and when the farm is sold as ordered herein,
10 Plaintiff shall be entitled to receive the first \$40,250,
11 and the excess, if any, is hereby awarded to Defendant. If
12 the sale of the farm property fails to produce \$40,250 to
13 satisfy Plaintiff's lien, Plaintiff shall be entitled to all
14 of the proceeds available for distribution at the time of
15 the sale, and the difference between that amount and the sum
16 of \$40,250 shall constitute a Judgment against Defendant and
17 shall be payable by the Defendant to the Plaintiff over a
18 five year period, in yearly installments, together with
19 interest on said amount at the rate of 8% per annum.

20 E. The proceeds that will be available for
21 distribution between Plaintiff and Defendant arising from
22 the sale of 15 acres of the farm property due and payable in
23 August of 1986, consisting of approximately \$8,000 shall be
24 equally divided between Plaintiff and Defendant.

1 F. The 21.53 shares of water owned by the parties that
2 is surplus water over and above that which is needed to
3 irrigate the farm, having an estimated value of \$1,000 per
4 share, shall be sold by the Defendant on or before June
5 18th, 1987, and the proceeds therefrom, shall be divided
6 equally between the Plaintiff and Defendant.

7 G. Plaintiff and Defendant are each awarded all of the
8 personal property now in their possession.

9 H. The photographs and family albums now in the
10 possession of the Plaintiff are to be delivered by the
11 Plaintiff to the Defendant and he shall be entitled to
12 reproduce any of said photographs within thirty days
13 thereafter. At the end of thirty days, said photographs and
14 family albums are to be returned to the Plaintiff in the
15 same condition as when they were delivered by the Plaintiff
16 to the Defendant.

17 10. The Court finds that as of June 18th, 1986, Plaintiff
18 receives as net income the sum of \$1,321.00 per month, and
19 Defendant receives net income in the sum of \$2,114.00 per month.

20 11. The Court finds that Defendant has a vested interest in
21 his retirement by reason of his U.S. Government employment in the
22 approximate sum of \$18,000, as of June 18th, 1986, and that
23 Defendant should be awarded all of the right, title and interest
24 in said retirement, provided, however, that Plaintiff is entitled
25 to \$6,000 by reason of said vested interest. Said sum shall be

1 payable by the Defendant to the Plaintiff over a ten year period,
2 together with interest at the rate of 8% per annum, payable at
3 the rate of \$600.00 per year, together with accrued interest,
4 with the first annual payment of principal and interest to be
5 paid by the Defendant to the Plaintiff on June 1st, 1987, and
6 continuing thereafter on said day of each succeeding year until
7 the entire principal in the sum of \$6,000, together with accrued
8 interest is paid in full. Defendant shall be entitled to prepay
9 said amount at any time without penalty.

10 12. Defendant shall be required to maintain health and
11 accident insurance on behalf of said minor children, and for any
12 medical or dental costs which are not paid for by said insurance,
13 Defendant shall be required to pay and discharge the same.

14 13. The debts accumulated between Plaintiff and Defendant
15 after October 2nd, 1985, shall be paid by the party incurring the
16 same, with the exception of the medical and dental bills which
17 have been incurred by the Plaintiff and the minor children, which
18 shall be paid by Defendant as per the Temporary Order of the
19 Court dated October 2nd, 1985. In connection with said medical
20 bills to be paid by Defendant, the parties are each required to
21 first submit the same to their respective carrier for payment and
22 in the event payment is not made, Defendant shall thereafter pay
23 and discharge said medical and dental expenses.

24 14. The Court finds that neither party is entitled to an
25 award of attorney's fees.

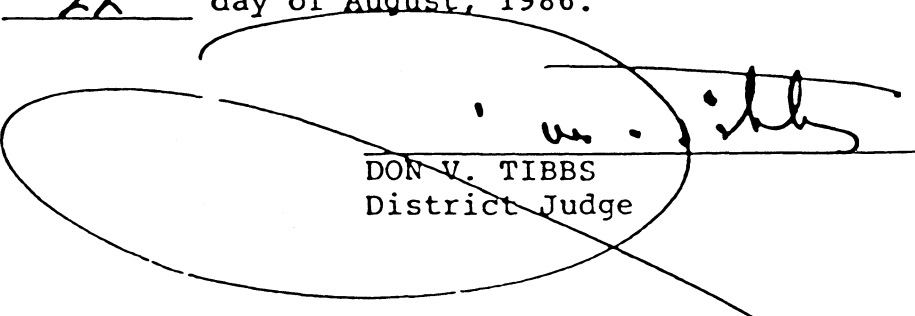
1 CONCLUSIONS OF LAW

2 1. That Plaintiff is entitled to a Decree of Divorce from
3 the Defendant, final upon entry, upon the grounds of physical and
4 mental cruelty.

5 2. The care, custody and control of the minor children is
6 hereby awarded to the Defendant, effective July 1st, 1986, upon
7 the terms and conditions as set forth above.

8 3. That the Decree of Divorce include and be consistent
9 with the Findings of Fact as above set forth.

10 DATED this 22nd day of August, 1986.

11 
12 DON V. TIBBS
13 District Judge
14
15
16
17
18

19 APPROVED AS TO FORM:

20
21  8/18/86
22 DAVID L. MOWER
23 Attorney for Plaintiff

24 
25 HANS Q. CHAMBERLAIN
Attorney for Defendant

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the within and foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW to Mr. David L. Mower, JACKSON, McIFF & MOWER, 151 North Main, Richfield, Utah 84701, first-class postage prepaid, on this 2nd day of September, 1986.

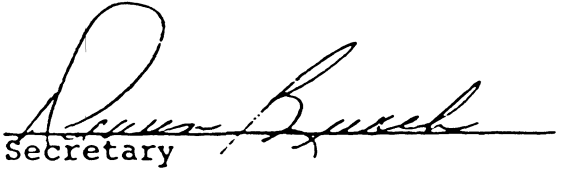

Secretary

EXHIBIT "C"

SEVIER COUNTY
RECEIVED NO. 9605

1986 SEP -3 AM 9 15

DEVON POULSON, CLERK
BY Muri E. Anderson DEPUTY

HANS Q. CHAMBERLAIN
CHAMBERLAIN & HIGBEE
Attorneys for Defendant
250 South Main
P. O. Box 726
Cedar City, Utah 84720
Telephone: (801) 586-4404

IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR
SEVIER COUNTY, STATE OF UTAH

KAREN SCHUMANN MARCHANT,)	
)	
Plaintiff,	)	DECREE OF DIVORCE
)	
vs.)	
)	
DONALD J. MARCHANT,	)	Civil No. 9605
)	
Defendant.)	

This matter having been tried to the Court, sitting without a jury, on June 18th, 1986. On said date, Plaintiff having appeared, together with her attorney of record, David L. Mower, and Defendant having appeared, together with his attorney, Hans Q. Chamberlain, and Plaintiff and Defendant having been sworn to testify concerning said matter together with other witnesses, and the Court having been fully advised in the matter and having made its Findings of Fact and Conclusions of Law, now therefor;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that said Plaintiff be granted a Decree of Divorce from Defendant providing as follows:

1. The Decree of Divorce shall become final upon the filing of the same in the office of the Sevier County Clerk.

1 2. That two children were adopted by the parties, namely,
2 Brandon Justice Marchant, born February 1, 1974, and Sara Marlana
3 Marchant, born April 22, 1977. Pursuant to a Stipulation
4 concerning temporary custody and subsequent Order by the Court
5 dated October 2nd, 1985, the children have been residing with
6 Plaintiff in Salt Lake City, Utah, and Defendant has been
7 visiting with the children every other weekend by traveling from
8 his home in Central, Sevier County, Utah, to Salt Lake City,
9 Utah, picking up the children, returning to his home, and
10 thereafter returning the children to the Plaintiff's home on
11 Sunday evening and then again returning to Defendant's home in
12 Central, Utah.

13 3. That pursuant to the Finding of Fact made herein, the
14 Court finds that it is in the best interests of the minor
15 children that their custody be awarded to Defendant, effective
16 July 1st, 1986, subject to reasonable rights of visitation vested
17 in the Plaintiff, including, but not limited to the following
18 specific visitation privileges:

19 A. Every other weekend commencing Friday at 6:00 p.m.
20 and ending Sunday at 7:00 p.m., provided, however, that for
21 each Sunday while the children are in the care of the
22 Plaintiff, the children shall be required to attend church
23 and it can be a church of their choice.

24 B. Every other holiday, commencing with the 24th of
25 July, 1986, except Christmas at which time the children are
 to remain in the care of the Defendant.

1 C. A six-week visitation with the minor children
2 during the summer months commencing in the summer of 1987,
3 at a time as may be mutually agreeable between the parties.

4 4. That by reason of the fact that the care of the minor
5 children is to be awarded to Defendant, the Court does not award
6 child support to either party.

7 5. That the Court finds that Plaintiff is not entitled to
8 alimony.

9 6. That the assets accumulated by Plaintiff and Defendant
10 are awarded as follows:

11 A. The family home located in Central, Sevier County,
12 Utah, is hereby awarded to Defendant, subject to the debt
13 thereon which Defendant shall be required to pay and
14 discharge, and to indemnify and hold Plaintiff harmless from
15 the payment of the same. Plaintiff is entitled to one-half
16 of the equity owned by the parties in said home, or the sum
17 of \$17,000, and Plaintiff is hereby awarded a lien against
18 said home in that amount subject to payment as hereinafter
19 set forth. Said home is more particularly described as
20 follows:

21 Beginning at a point lying N 79°53'04"E for
22 2483.91' more or less from the SW Corner of
23 Section 14, T.24S., R3W., SLB&M and running thence
24 South along the west line of State Highway Right
25 of Way, for 104', thence West for 192.31'; thence,
North for 104'; thence East for 192.31' to the
point of beginning and containing 0.47 acres, more
or less.

1 B. The Court finds that the farm owned by the parties
2 located in Sevier County has a total net equity in the sum
3 of \$43,500 and Plaintiff and Defendant are each entitled to
4 one-half of said equity, or the sum of \$21,750 each. The
5 farm, consisting of approximately 43.5 acres shall be sold
6 on or before June 18th, 1987, with the proceeds to be
7 distributed as hereinafter set forth. The remaining 43.5
8 acres of the farm to be sold is more particularly described
9 as follows:

10 PARCEL 1:

11 Commencing 1.55 chains North and 2.25 chains West
12 of the Southeast corner of Section 15, Township 24
13 South, Range 3 West, of the Salt Lake Meridian,
14 thence West 12.00 chains; thence South 1.55
15 chains; thence West 15.77 chains; thence North
16 10.00 chains; thence East 10.00 chains; thence
17 South 0.80 of a chain; thence East 6.95 chains;
18 thence South 2.13 chains; thence East 13.05 chains
19 to West line of Rio Grande & Western Railway;
20 thence Southwesterly along the West line of said
21 railway to the place of beginning, containing
22 20.74 acres, more or less, situate in the South
23 half of the Southeast quarter of aforesaid Section
24 15.
25

PARCEL 2:

Commencing at a point 14.10 chains East and 86
links North of the Southwest corner of Section 14,
Township 24 South, Range 3 West, SLB&M; running
thence East 17.95 chains; thence North 2.88
chains; thence East 184 feet; thence North 85.42
feet; thence East 146 feet, more or less, to West
line of State Hwy. right-of-way; thence North,
along the same 104 feet; thence West 11.00 chains;
thence North 3.89 chains; thence West 10.50
chains; more or less, to the Canal; thence
Southwesterly along the canal 10.00 chains, more
or less, to the place of beginning, cont. approx.
15.61 acres.

1 Excluding therefrom:

2 Beginning at a point lying N 79°53'04"E for
3 2483.91' more or less from the SW Corner of
4 Section 14, T.24S., R3W., SLB&M and running
5 thence South along the west line of State
6 Highway Right of Way, for 104', thence West
7 for 192.31'; thence, North for 104'; thence
8 East for 192.31' to the point of beginning
9 and containing 0.47 acres, more or less.

10 PARCEL 3:

11 Commencing 1.55 chains North of the Southwest
12 corner of Section 14, Township 24 South, Range 3
13 West, Salt Lake Base and Meridian; thence North
14 1.50 chains; thence North 12° 14' East along East
15 Line of Rio Grande & Western Railway 4.10 chains,
16 more or less, to a point 7.05 chains North and
17 1.60 chains East of the Southwest corner of
18 aforesaid Section 14; thence East 13.35 chains to
19 Canal; thence Southwesterly along canal to Section
20 line; thence West 1.80 chains; thence North 9° 35'
21 East 1.55 chains; thence West 11.77 chains, more
22 or less, to the place of beginning.
23 Containing 7.83 acres, more or less.

24 C. The farm equipment owned by the parties is hereby
25 awarded to Defendant, provided, however, that Defendant
26 shall pay to Plaintiff the sum of \$1,500 for her interest in
27 said equipment.

28 D. Plaintiff is therefore awarded the total sum of
29 \$40,250 for her interest in the above-described property.
30 To secure payment of the same, Plaintiff is hereby awarded a
31 lien against the farm property above-described in said
32 amount and when the farm is sold as ordered herein,
33 Plaintiff shall be entitled to receive the first \$40,250,
34 and the excess, if any, is hereby awarded to Defendant. If

1 the sale of the farm property fails to produce \$40,250 to
2 satisfy Plaintiff's lien, Plaintiff shall be entitled to all
3 of the proceeds available for distribution at the time of
4 the sale, and the difference between that amount and the sum
5 of \$40,250 shall constitute a Judgment against Defendant and
6 shall be payable by the Defendant to the Plaintiff over a
7 five year period, in yearly installments, together with
8 interest on said amount at the rate of 8% per annum.

9 E. The proceeds that will be available for
10 distribution between Plaintiff and Defendant arising from
11 the sale of 15 acres of the farm property due and payable in
12 August of 1986, consisting of approximately \$8,000 shall be
13 equally divided between Plaintiff and Defendant.

14 F. The 21.53 shares of water owned by the parties that
15 is surplus water over and above that which is needed to
16 irrigate the farm, having an estimated value of \$1,000 per
17 share, shall be sold by the Defendant on or before June
18 18th, 1987, and the proceeds therefrom, shall be divided
19 equally between the Plaintiff and Defendant.

20 G. Plaintiff and Defendant are each awarded all of the
21 personal property now in their possession.

22 H. The photographs and family albums now in the
23 possession of the Plaintiff are to be delivered by the
24 Plaintiff to the Defendant and he shall be entitled to
25 reproduce any of said photographs within thirty days

1 thereafter. At the end of thirty days, said photographs and
2 family albums are to be returned to the Plaintiff in the
3 same condition as when they were delivered by the Plaintiff
4 to the Defendant.

5 7. That Defendant should be awarded all of the right, title
6 and interest in his retirement account with the U.S. Government,
7 said retirement, provided, however, that Plaintiff is entitled to
8 \$6,000 by reason of said vested interest. Said sum shall be
9 payable by the Defendant to the Plaintiff over a ten year period,
10 together with interest, payable at the rate of \$600.00 per year,
11 together with accrued interest at the rate of 8% per annum, with
12 the first annual payment of principal and interest to be paid by
13 the Defendant to the Plaintiff on June 1st, 1987, and continuing
14 thereafter on said day of each succeeding year until the entire
15 principal in the sum of \$6,000, together with accrued interest is
16 paid in full. Defendant shall be entitled to prepay said amount
17 at any time without penalty.

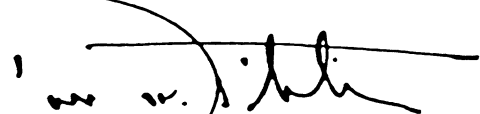
18 8. That Defendant shall be required to maintain health and
19 accident insurance on behalf of said minor children, and for any
20 medical or dental costs which are not paid for by said insurance,
21 Defendant shall be required to pay and discharge the same.

22 9. That the debts accumulated between Plaintiff and
23 Defendant after October 2nd, 1985, shall be paid by the party
24 incurring the same, with the exception of the medical and dental
25 bills which have been incurred by the Plaintiff and the minor

1 children, which shall be paid by Defendant. In connection with
2 said medical bills to be paid by Defendant, the parties are each
3 required to first submit the same to their respective carrier for
4 payment and in the event payment is not made, Defendant shall
5 thereafter pay and discharge said medical and dental expenses.

6 10. That neither party is entitled to an award of attorney's
7 fees.

8 DATED this 22nd day of August, 1986.

9
10 
11 DON V. TIBBS
12 District Judge
13
14
15
16

17 APPROVED AS TO FORM:

18  8/18/86
19 DAVID L. MOWER
20 Attorney for Plaintiff

21 
22 HANS Q. CHAMBERLAIN
23 Attorney for Defendant
24
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy
the within and foregoing DECREE OF DIVORCE to Mr. David L. Mow
JACKSON, McIFF & MOWER, 151 North Main, Richfield, Utah 8470
first-class postage prepaid, on this 2nd day of September, 196

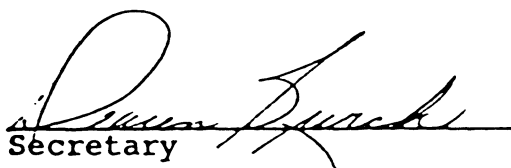

Secretary

EXHIBIT "D"

Karen S. Marchant

FINANCIAL DECLARATION

Gross Monthly Income	(2 weeks)	\$ 875.00
Taxes		} 214.18
Social Security		
Savings Plan		-0
Net Monthly Income		\$ 660.82 x 2 = 1321.64

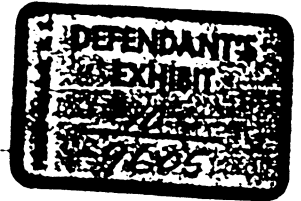
Monthly Expenses

Rent or Mortgage	550.00	2/5
Real Property Insurance	25.00	
Maintainance	50.00	
Food & Household Supplies	400.00	
Utilities	135.00	2/5
Telephone	40.00	1/2
Laundry and cleaning	25.00	
Clothing	150.00	
Medical	75.00	
Dental	50.00	
Insurance	30.00	
Child Care	100.00	
School	80.00	
Entertainment	80.00	
Incidentals (Grooming, Gifts, Etc.)	200.00	
Auto expenses	150.00	
Installment payments	80.00	
Total Expenses	\$ 2,220.00	

EXHIBIT "E"

JUNE 18, 1986

CURRENT DEBTS - BUDGET



HOUSE PAYMENT	\$410 / MONTH	
TRUCK "	320	\$11,000 BAK
TRAILER "	165	5,000 "

VISA	65	1,200
MASTER CHARGE	65	1,300
LOAN - M.A. MARCHANT		14,000
FARM LOAN - ZION'S BANK		2,000
PERSONAL LOAN - OG CREDIT UNION	50	1,300

ELECTRICITY	150
PHONE	50
INSURANCE - AUTO -	45

CHILD SUPPORT	400
TRAVEL + VISITS - CLOTHES, ETC -	300

GASOLINE - WORK	50
FOOD	150
CLOTHES	50
PERSONAL	50

\$ 2370

KIDS - INCIDENTALS CHRISTMAS
BIRTHDAYS, ETC -

DISPOSABLE
INCOME \$2114/MO

EXHIBIT "F"

1 Mower.

2 MR. MOWER: Thank you, Your Honor.

3 [WHEREUPON the Plaintiff's Counsel presented the
4 first part of his closing argument.]

5 THE COURT: Mr. Chamberlain?

6 [WHEREUPON the Defendant's Counsel presented his
7 closing argument, after which Counsel for the Plaintiff
8 completed his closing argument.]

9 COURT FINDINGS & RULINGS

10 THE COURT: These are very difficult cases for the
11 Court, in all honesty. You know I just know that you folks
12 have sat here all day and when I handle criminal matters the
13 whole morning, one after another where I sent four young men
14 to prison, where probably a lot more are going to go, things
15 you didn't see. You didn't see the presentence reports that
16 I examined, and on each one of them they came from separated
17 families, every one of them.

18 I don't justify their conduct, but I'm just saying that's
19 what it comes from. I see in those cases the same pattern,
20 over and over again. They give nothing of themselves to
21 anyone else, total and complete living for their own bene-
22 fits, broken homes, problems in school, and then it's alcohol
23 and drugs, petty crime, and then all of a sudden it's
24 graduated into the criminal system and I've got them.

25 And then I sit and grant divorces the rest of the day on

1 Law & Motion days. Think of the number of divorces I granted
2 today. Most of them are stipulations. They just come in and
3 I approve the stipulations. They go out and then every once
4 in awhile I get one like this where the parties are obviously
5 good people, but things have gone wrong and all of a sudden
6 I've got to start trying to make a decision from the mess
7 that they're in. And frankly, it's traumatic to me. You
8 don't think it is, but it's my responsibility to hear it and
9 make the best decision I can make and I obviously am not
10 going to make people happy in that job from what I find. But
11 that's what I do as I see it.

12 As I see it, this case basically, it's for the best
13 interest of those children and I have heard the evidence and
14 I have to do what I think is right at this point and regard-
15 less of where the problems fall. And I appreciate the way
16 Counsel have submitted the exhibits and the evidence and
17 everything else. And be that as it may, this is my decision
18 and I'm making it at this time. Frankly, I'm having a very
19 difficult time finding grounds for a divorce.

20 I'll be honest. I have difficulty with what the Plain-
21 tiff sues, alleges grounds. I have difficulty finding where
22 this Defendant's done anything wrong, other than slapping
23 her. Maybe that was justified. I don't believe in it. I
24 don't believe anyone should use force and violence. But I'm
25 having difficulty. However, under the circumstances I don't

1 see where I can force them to live together. So based on
2 that I'm going to find that the Defendant did treat the
3 Plaintiff cruelly, causing her physical and mental anguish,
4 physical anguish because he struck her on the one occasion
5 when he was what appeared to me highly provoked. Based upon
6 that fact, the Plaintiff is awarded the decree of divorce,
7 which under the circumstances I think these parties have to
8 be divorced.

9 Normally, I'll leave the interlocutory period in exis-
10 tence, but I'm going to terminate it. This decree shall
11 become absolute and final upon the date of this entry, the
12 interlocutory period being waived because I think they must
13 be divorced and I see no advantage to anyone to have that
14 continued.

15 The Court awards the parcel of real property with the
16 corrals and the 1 1/2 acres of land with home located thereon
17 to Mr. Marchant, the Defendant in this action, He shall
18 assume the debt and hold the Plaintiff harmless from those
19 debts and obligations. The Court finds that she has a
20 \$17,000 equity in that house as of this date and I'm just
21 going to hold that off for a moment.

22 The Court finds that the parties have a home with
23 approximately 43 acres of land that's now disposable, which
24 the Court finds is valued at \$2,000 an acre and has a debt on
25 it of approximately \$1,000 an acre, so that the Court finds

1 there is a \$43,500 value of that property.

2 Now let me just make sure I'm not missing this. There's
3 43.5 acres valued at \$2,000 an acre with debt on it of
4 approximately \$1,000 per acre; that's right, isn't it?

5 MR. CHAMBERLAIN: Yes.

6 THE COURT: So that the Court finds there's \$43,500
7 equity in that property that the parties have. The Court
8 finds that the Plaintiff has consequently half interest in
9 that \$43,500, or she has \$21,750 equity in that property.
10 The Court finds that there's another \$8,000 due and each of
11 the parties are entitled to \$4,000 of that money.

12 The Court finds that they have assets in water stock.
13 The Court orders that water stock sold at this time. It
14 shall be sold by the Defendant within a period of one year
15 and the proceeds 50 percent to each of the parties.

16 The Court finds that they have \$5,000 worth of farm
17 equipment and the Court finds that there was some division of
18 a household furniture and a mistake on it. I'm going to say
19 that the Defendant should pay to the Plaintiff for the
20 parties interest in the farm equipment the sum of \$1,500 and
21 he's awarded the farm equipment.

22 If my mathematics are right, I'm adding \$17,000, \$21,750,
23 and \$4,000, and if my mathematics are correct it comes out to
24 \$42,750; do you agree with that, gentlemen? Check it. Well,
25 that's what it is. The Plaintiff is awarded the judgement

1 against the Defendant for that \$42,750.

2 The farm shall be sold within a period of one year and
3 all of the proceeds of that farm shall be applied against the
4 \$42,750. The balance will go to the Defendant. If the farm
5 doesn't bring the \$42,750, then the Plaintiff will have a
6 judgement against the Defendant for the balance, which will
7 be payable with interest at the rate of 8 percent per annum
8 over a 5-year period on an annual basis.

9 MR. CHAMBERLAIN: I'm sorry, five years?

10 THE COURT: Five years.

11 The Court makes the specific finding that the Plaintiff
12 has a net takehome of \$1,321 per month, the Defendant has a
13 net of \$2,114 a month.

14 All of the Defendant's right to title and interest in and
15 to his retirement shall be awarded to the Defendant, subject,
16 however, that he shall pay to the Plaintiff the sum of
17 \$6,000, which \$6,000 shall be payable over a 10-year period
18 at \$600 per year for 10 years together with interest at 8
19 percent per annum on the unpaid balance. So he can pay it
20 earlier, if he wants to, but it shall be payable in that
21 direction.

22 MR. MOWER: Excuse me, Your Honor. That means that
23 he will pay \$600 plus.

24 THE COURT: Plus Interest. And I'll make it on an
25 annual basis, any particular time you want to. We'll make it

1 on September 1st of each year. Well, this year we'll make it
2 on June 1st, starting on June 1st, 1987.

3 No Attorneys fees are awarded to either party.

4 The Court specifically finds that no alimony should be
5 awarded to either party in this matter.

6 The Court finds that both parties are good parents, and
7 both parties could be awarded custody of the minor children.
8 The Court does, however, find that this marriage has been
9 broken up by actions of the Plaintiff, and the Court finds
10 that they are not justified. And even though these children
11 have been in the Plaintiff's custody since this action was
12 commenced, by prior order of the Court, the Court is of the
13 opinion that in the best interest of the children the custody
14 should be awarded to the Defendant.

15 The Plaintiff is awarded the right of reasonable visita-
16 tion at reasonable times and places. So that there is no
17 question on visitation rights, the Plaintiff is awarded every
18 other holiday, commencing with the 4th of July, except for
19 Christmas where the children shall stay in the home of the
20 custodial parent.

21 The Court finds that the Plaintiff shall be awarded for
22 six weeks visitation in this summer at a six-week period,
23 that time when she desires.

24 [PLAINTIFF began crying and collapsed to the floor
25 at her Counsel's table in the Courtroom.]

1 THE COURT: No Attorneys fees are awarded to either
2 party. You better call in the EMT's.

3 [WHEREUPON the Bailiff responded, along with family
4 members of the Plaintiff and her Counsel, Mr. Mower, to help
5 the Plaintiff out of the Courtroom and to give aid and
6 assistance to her.]

7 THE COURT: Do you want me to go forward, Counsel,
8 or do you want me to wait?

9 MR. MOWER: I think you ought to go forward. I
10 think it will be some time for her to gain her composure.

11 THE COURT: All right. It's the order of the Court
12 that the Defendant shall find findings of fact, conclusions
13 of law and decree for the conformity of this record. For
14 the purpose of the record I think that I should make a record
15 that the Plaintiff is very emotional because of this order
16 and has collapsed in the Courtroom.

17 The Court makes specific findings that the Plaintiff has
18 taken these children to Salt Lake while she has had them
19 under Court order, that they have been living in an apart-
20 ment, jointly with her sister who is a divorced woman having
21 a minor child in that apartment, and the Court is of the
22 opinion that the change of the custody since this divorce
23 action was had has not been in compliance with the normal
24 standard of living and standards these parties had before
25 this action was filed.

1 The Court makes a specific finding that the Plaintiff has
2 become involved with another man and that was a factor in the
3 Court's decision.

4 The Court makes a specific finding that the Plaintiff's
5 lifestyle has changed and that her concern is basically no
6 longer for the family unit, but for the purpose of accom-
7 plishing her own desires

8 Now gentlemen, I want to make any findings that you feel
9 you would like me to make for the purpose of the record, and
10 Mr. Mower, if you have something you'd like me to find, you
11 state it now, please.

12 MR. MOWER: I think it would be important for the
13 Court to schedule a transfer based on the Court's order.
14 There's going to be need for a change on the custody.

15 THE COURT: Has school terminated?

16 MR. CHAMBERLAIN: On the 14th, it terminated in Salt
17 Lake, Your Honor.

18 THE COURT: Transfer will be made on July 1st. I
19 believe I better make these rights of reasonable visitation.
20 I'm going to make specific visitation, she shall be able to
21 take the children every other Friday until Sunday night when
22 they shall be returned by 7:00 o'clock. So she can take them
23 by Friday at 6:00 p.m., return them by 7:00 p.m. Sunday. But
24 the children shall attend church of there choice so that they
25 shall be in church in view of the lifestyle of these parties.

1 MR. CHAMBERLAIN: Your Honor, just one question on
2 the date of change. The Court awarded her visitation
3 continuing with the 4th of July and I'm wondering about the
4 effect that might have on the children to change and I just
5 raise that for discussion.

6 THE COURT: Well, maybe we better make it on the
7 following holiday.

8 MR. MOWER: The 24th.

9 THE COURT: All right. They'll have visitation on
10 the 24th.

11 MR. CHAMBERLAIN: Instead of the 4th?

12 THE COURT: Instead of the 4th. Now, is there
13 anything else, Mr. Mower?

14 MR. MOWER: I don't have anything further.

15 THE COURT: I'd like to, if you can think of
16 anything I missed, I want to make a complete record.

17 MR. MOWER: Nothing else I can think of.

18 THE COURT: Mr. Chamberlain?

19 MR. CHAMBERLAIN: No. I think not, Your Honor.

20 THE COURT: Thank you. I appreciate your courtesy,
21 gentlemen. I'm sorry it's been so traumatic, but I can't
22 help that. This Court will be in recess. Thank you.

23 If you'll prepare your findings of fact, conclusions of
24 law and submit them to opposing Counsel at least five days
25 before you send them to me, I'll assume that they're correct

1 When I get them. So make your findings.

2 MR. CHAMBERLAIN: I will submit them and ask him to
3 sign them because of the time.

4 MR. MOWER: I appreciate that.

5 THE COURT: Thank you. This Court will be in
6 recess.

7 [WHEREUPON Proceedings were completed in the matter
8 herein.]

9 --ooOoo--

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25