

1996

Glen P. Willey v. Rosalind Ann Johnson Willey : Petition for Writ of Certiorari

Utah Court of Appeals

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IN THE UTAH SUPREME COURT

GLEN P. WILLEY,)	
Plaintiff/Petitioner,)	Appeal No. 93-0205-CA
	)	960229
vs.)	
ROSALIND ANN JOHNSON WILLEY,	)	District Court No. 91 490 0101
Defendant/Respondent.)	

PETITION FOR WRIT OF
CERTIORARI OF GLEN P. WILLEY

Petition for Writ of Certiorari from a
Decision of the Utah Court of Appeals
Judges Davis, Greenwood, and Wilkins

UTAH SUPREME COURT
BRIEF
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DOCKET NO. 960229

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**PETITION FOR WRIT OF
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QUESTIONS PRESENTED FOR REVIEW

- I. Whether the Court of Appeals erred in substantially increasing the amount and duration of the trial court's alimony award without evidence to support the award.
- II. Whether the Court of Appeals erred by awarding an amount of attorneys' fees not sought by respondent and not based on any evidence in the record.

THE DECISION OF THE COURT OF APPEALS

The opinion of the Court of Appeals is found at *Willey v. Willey*, 287 Utah Adv. Rep. 27 (Utah App. April 4, 1996). The opinion is attached as Exhibit 1 of the Addendum.

GROUND FOR SUPREME COURT JURISDICTION

- 1. *Date of Entry of Decision.*** The decision of the Court of Appeals was filed on April 4, 1996.

2. ***Petition for Writ of Certiorari.*** The petition for writ of certiorari of plaintiff/petitioner Glen P. Willey (“Mr. Willey”) was filed within thirty days after the entry of the final decision by the Court of Appeals, pursuant to rule 48(a) of the Utah Rules of Appellate Procedure.

3. ***Statutory Basis for this Court's Jurisdiction.*** This appeal is properly before this Court pursuant to UTAH CODE ANN. § 78-2-2(3)(a) and § 78-2-2(5) (Supp. 1995).

DETERMINATIVE STATUTES AND RULES

This case is governed by UTAH CODE ANN. § 30-3-3 and § 30-3-5 (Supp. 1995).

STATEMENT OF THE CASE

Nature of the Case. This is a divorce action originally filed in 1991. This current appeal was from an order of the trial court amending the decree of divorce on remand.

Course of Proceedings and Disposition Below. This case was originally tried in November 1991. The findings of fact and conclusions of law (hereinafter “Original Findings”), and decree of divorce were entered on January 14, 1992 (Exhibits 2 and 3 of the Addendum). Defendant/respondent Rosalind Ann Johnson Willey (“Ms. Willey”) appealed (the “First Appeal”). *Willey v. Willey*, 866 P.2d 547 (Utah App. 1993) (Exhibit 4 of the Addendum). In *Willey*, the Court of Appeals held that the trial court had not made the requisite findings on each party’s needs so that alimony could be determined. The Court further held that the division of debt should also be considered in determining alimony.

Ms. Willey had also asserted that the court should include the expenses of her children from a prior marriage in calculating alimony; the Court of Appeals rejected that argument. The Court of Appeals held that the trial court did not have sufficient evidence before it to impute income to Ms. Willey and invited the trial court to receive additional evidence on that issue. *Id.* at 554.

The Court of Appeals also rejected Ms. Willey's arguments that the trial court erred in failing to recognize her premarital equity in the marital home, finding that the equity had been consumed by the parties.

The Court of Appeals also found that the trial court's findings concerning attorneys' fees were inadequate and remanded for additional findings on that issue and directed the trial court to consider attorneys' fees on appeal. *Id.*

Ms. Willey also appealed from an order of the trial court of April 5, 1993 (Exhibit 5 of Addendum), allowing Mr. Willey to offset payment of Ms. Willey's share of the marital debt against his alimony obligation (the "Second Appeal").

After the Court of Appeals issued its original opinion on November 29, 1993, Ms. Willey did not seek an immediate hearing to consider the issues remanded to the trial court. Instead, on February 18, 1994, she filed a petition to modify the decree and a request for temporary support. She also served extensive interrogatories and a request for production of documents. Mr. Willey moved to dismiss the petition and for a protective order with respect to the discovery. The domestic relations commissioner stayed the petition and granted the motion for protective order. Ms. Willey objected to the commissioner's recommendation; the trial court denied the objection.

In October of 1994, the trial court held a scheduling conference and entered a pretrial order (Exhibit 6 of the Addendum). The court found that the record of the original trial already contained sufficient evidence to determine the expenses of each party and that findings on that issue could be made from the record. The court directed an evidentiary hearing be held to determine the amount of income Ms. Willey was able to earn.

The evidentiary hearing took place on November 17, 1994. The court heard testimony from a vocational evaluator and from Ms. Willey's counsel as to attorneys' fees. Neither party attempted to offer any other evidence.

On January 31, 1995, the trial court issued a detailed memorandum decision. The memorandum decision is attached as Exhibit 7 of the Addendum. At the court's direction, Mr. Willey's counsel drafted findings and conclusions to which Ms. Willey's counsel objected. The court entered the findings, conclusions, and order on March 7, 1995. The findings of fact and conclusions of law (hereinafter "Findings on Remand"), and order are attached as Exhibits 8 and 9 of the Addendum. Ms. Willey appealed the trial court's order of March 7, 1995 (the "Third Appeal").

On April 18, 1995, the Court of Appeals entered an order consolidating the Second and Third Appeals for purposes of briefing and decision.

The Court of Appeals issued its decision on the Second and Third Appeals on April 4, 1996, without oral argument. The Court of Appeals found that (1) the amount and duration of the trial court's alimony award were not equitable, and (2) the trial court failed to make adequate findings to support its award of attorney's fees.

Instead of remanding the case to the trial court for further findings, the Court of Appeals issued its own order substantially increasing the amount and duration of the alimony award and making a specific attorney's fees award.

STATEMENT OF FACTS

The Willeys were married on April 29, 1982. Both parties had been married previously. (Findings on Remand nos. 1 and 2.)

Ms. Willey had three children from her previous marriage; the parties had no children together. In November 1990, the parties separated after eight years of marriage. (Findings on Remand nos. 2-4.)

From the time the parties separated until the time of trial in November 1991, Mr. Willey paid Ms. Willey monthly temporary support, which included payment of the

mortgage on the marital residence in the amount of \$2,492, temporary alimony in the amount of \$1,500, payment of Ms. Willey's car payment, and payment of a joint installment debt of \$360. Ms. Willey received temporary support during this year of separation in excess of \$4,500 per month. (Findings on Remand nos. 22 and 34)

The original trial took place on November 21 and 22, 1991. At trial, the trial court found that Ms. Willey was capable of earning an income of between \$1,500 and \$2,000 per month. Ms. Willey submitted to the trial court that her monthly living expenses were \$2,678. (Original Findings no. 12, Findings on Remand no. 17.)

The trial court awarded Ms. Willey alimony in the amount of \$1,500 per month for one year from the time of trial, and \$1,000 per month for three years thereafter. The court took into account the fact that Mr. Willey had already been supporting Ms. Willey for a year since their separation. (Original Findings no. 12.)

In addition to alimony of \$1,500 per month for the first year, the court awarded Ms. Willey one-half of certain bonuses to be received by Mr. Willey. Early in 1992, Ms. Willey received \$6,562.39, representing her portion of such a bonus. (Original Findings no. 14, Findings on Remand no. 35.)

The court awarded Ms. Willey attorney's fees of \$5,000, finding that the \$19,215 requested by Ms. Willey was not reasonable under the circumstances. (Original Findings no. 22, Findings on Remand nos. 46-49.)

After trial, Mr. Willey paid Ms. Willey alimony as ordered by the court. In addition, Mr. Willey continued to pay the mortgage through October 1992, until the marital residence was sold. Mr. Willey also paid Ms. Willey's share of the installment debt which she was ordered to pay pursuant to the decree of divorce. (Findings on Remand nos. 30 and 34.)

During 1991 and 1992, when Ms. Willey was receiving support equivalent to \$4,300-\$4,500 per month, she did nothing to further her education or to obtain additional training to enhance her earning capacity. (Findings on Remand no. 9.)

Mr. Willey was awarded a judgment in the amount of \$18,840.86 against Ms. Willey for Ms. Willey's share of the joint installment debt and the deficiency resulting from the sale of the marital residence paid by Mr. Willey. (Order, ¶ 2, Exhibit 5 of Addendum.) The trial court allowed Mr. Willey to offset the amount of the judgment against the amount he would otherwise have been required to pay Ms. Willey. *Id.* Ms. Willey appealed this decision of the trial court.

On remand, the trial court found that the reasonable monthly living expenses for each party were \$2,000. The court found that Mr. Willey had satisfied joint marital debt in the amount of \$37,681.71, of which Ms. Willey should have been responsible for half. The court found that Ms. Willey should not reimburse Mr. Willey for her share of the joint marital debt, and instead took the marital debt payment into account in fashioning the alimony award. (Findings on Remand nos. 21, 31-34, and 40.)

Based on the testimony of the vocational evaluator, the court found that Ms. Willey had the ability to earn \$1,027.09 per month. (Findings on Remand no. 11.)

The court found that Ms. Willey had done nothing to pursue her education or to increase her earning capacity during the parties' separation, trial, or pending appeals. (Findings on Remand no. 9.)

Based in part upon the payment of marital debt made by Mr. Willey, the court did not modify its original alimony award under the decree of divorce, but did award Ms. Willey an additional \$500 per month, in addition to the cost of tuition and books, to assist her in furthering her education for any month she was a fully matriculated student at the University

of Utah or comparable university for a period of nine quarters. (Findings on Remand nos. 15 and 16.)

The court found that all of the attorney's fees requested by Ms. Willey were not reasonable and awarded Ms. Willey an additional \$10,000 attorneys' fees. (Findings on Remand nos. 45-50.)

The court entered its findings, conclusions, and order on March 7, 1995, and Ms. Willey appealed.

Instead of remanding to the trial court for further findings, the Court of Appeals issued its own ruling, awarding Ms. Willey alimony in the amount of \$2,240 per month from March 7, 1995, until March 6, 2000, unless sooner terminated or modified according to law. The Court of Appeals did not indicate how this amount was calculated. *Willey*, 287 Utah Adv. Rep. at 30.

The Court of Appeals also awarded Ms. Willey the additional \$500 per month, in addition to the cost of tuition, fees, and books, for each month she is enrolled as a full-time student up to a maximum of nine quarters, not to extend past March 6, 2000. *Id.*

Finally, the Court of Appeals awarded Ms. Willey a total of \$37,554.38 for attorneys' fees and costs incurred in connection with the trial and all three appeals. The Court of Appeals did not explain the basis for this award. *Id.* at 32.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN ARBITRARILY INCREASING THE AMOUNT AND DURATION OF MS. WILLEY'S ALIMONY AWARD

In its original findings, the trial court imputed income to Ms. Willey of \$1,500-\$2,000 per month. Ms. Willey claimed expenses of \$2,678 per month. The trial court awarded her

alimony of \$1,500 per month for one year and \$1,000 per month for three years thereafter. Ms. Willey was also awarded one-half of any bonuses received by Mr. Willey.

After the First Appeal, the Court of Appeals remanded to the trial court for additional findings with respect to the reasonable financial needs of the parties and the imputation of income to Ms. Willey. After a hearing, the trial court issued a detailed memorandum decision containing such findings. The trial court found Ms. Willey's monthly living expenses to be \$2,000, imputed income to Ms. Willey of \$1,027.09, kept the original alimony award in place, and added an additional \$500 per month for nine academic quarters, in addition to the cost of tuition and books, for rehabilitative alimony.

On the Second and Third Appeals, the Court of Appeals held that the trial court again did not make adequate findings and issued its own ruling on the amount and duration of alimony, but without factual findings.

The standard of review for a trial court's award of alimony is abuse of discretion. *Rasband v. Rasband*, 752 P.2d 1331 (Utah App. 1988). The trial court's award of alimony will not be disturbed absent a clear and prejudicial abuse of discretion. *Chambers v. Chambers*, 840 P.2d 841 (Utah App. 1992). The Court of Appeals should not overturn a trial court's alimony ruling as long as the court supports its ruling with adequate findings and exercises its discretion according to the proper standards. *Bell v. Bell*, 810 P.2d 489, 491 (Utah App. 1991).

Upon its second review, the Court of Appeals posed three questions with regard to the trial court's award of alimony to Ms. Willey: First, whether the trial court erred in imputing income to Ms. Willey; second, whether the trial court erred in determining the parties' expenses; and third, whether the trial court erred in fashioning Ms. Willey's rehabilitative alimony award.

With regard to the imputation of income, the Court of Appeals held that the trial court properly imputed income to Ms. Willey of \$1,027.09 per month and said “[w]e do not disturb these findings on appeal.” *Willey*, 287 Utah Adv. Rep. at 28.

With regard to Ms. Willey’s monthly living expenses, the Court of Appeals held that the trial court’s finding that Ms. Willey’s monthly living expenses were \$2,000 was “speculative.”¹ This holding is difficult to understand based on detailed findings by the trial court, which in turn were based on testimony and evidence contained in the original trial record. Exhibit 36-D, R. 440-42 (attached hereto as Exhibit 10 of the Addendum). The Court of Appeals apparently rejected the trial court’s adjustments to the amount of expenses claimed and held that the amount of expenses submitted to the court at the time of trial was the amount to be used for Ms. Willey’s monthly living expenses. That amount was \$2,678. Notwithstanding this ruling, however, the Court of Appeals awarded Ms. Willey alimony of \$2,240 per month for five additional years from March 7, 1995, until March 6, 2000.

With regard to the rehabilitative alimony award, the Court of Appeals upheld the trial court’s award to Ms. Willey of an additional \$500 per month while she is a fully matriculated student, plus the cost of tuition and books, for a period equal to nine academic quarters to be completed within five years. However, the Court of Appeals held that this rehabilitative alimony award should coincide with its new alimony award for a period of five years.

Apparently, the Court of Appeals intended its “new” alimony award of \$2,240 per month to have a duration concurrent with the trial court’s \$500 per month award, which is tied to Ms. Willey’s furthering her education. However, the trial court did not award \$500 per month for five years; rather, it awarded \$500 per month for nine quarters--a few months more than two years, if Ms. Willey chooses to be a student. Ms. Willey has five years in

¹ The Court of Appeals said that the trial court considered a “stipulated” statement of the parties’ reasonable monthly expenditures. This is inaccurate. The trial court used the evidence submitted by Ms. Willey at the original trial to determine her expenses. (Findings on Remand nos. 17 and 19.)

which to complete her 2+ years of education. Clearly, the duration of the Court of Appeals' award lacked any basis in the trial court's findings or in the evidence.

Further, the Court of Appeals approved the trial court's imputation of income to Ms. Willey of \$1,027.09 per month. Thus, if Ms. Willey does not attend school, she does not need \$2,240 per month in alimony to meet her needs whether her expenses are \$2,240, \$2,000, or \$2,678. In order to justify its award of alimony, the Court of Appeals would have had to limit the time during which Mr. Willey is required to pay \$2,240 to those months during which Ms. Willey attends school.

Moreover, the Court of Appeals ignored the fact that Ms. Willey had already received alimony for more than four years and that she failed to take any steps to improve her earning capacity during that time. Under the findings of the trial court, Ms. Willey's income, together with alimony for the years November 1991 through 1995, was adequate to meet her reasonable expenses. (Findings on Remand no. 13). In addition, as the trial court pointed out, Mr. Willey made the mortgage payment for the parties' home through October of 1992, which decreased Ms. Willey's expenses for that time period. The Court of Appeals also ignored the fact that Ms. Willey received \$6,562.39 in 1992 as additional alimony, as a share of Mr. Willey's bonus.

It is important to note that this was a second marriage for both parties. Ms. Willey was already the mother of three children before her marriage to Mr. Willey and had supported herself. She has a college degree and, as the trial court found, she could have obtained a teaching certificate within one year and enhanced her earning capacity in that manner. Within two years, Ms. Willey could have enhanced her earning capacity somewhere between \$9.58 and \$12.41 per hour, had she furthered her education to become a marketing expert or social worker. (Findings on Remand no. 14.)

It is clear that the Court of Appeals simply disagreed with the trial court's findings.

[A] party seeking to overturn the trial court's findings has the burden of marshaling the evidence in support of the findings and then demonstrating that, despite such evidence, the findings are so lacking in support as to be against the clear weight of the evidence and, therefore, clearly erroneous.

Crouse v. Crouse, 817 P.2d 836, 838 (Utah App. 1991). In this case, the Court of Appeals has simply ignored the evidence supporting the findings of fact and ignored Ms. Willey's failure to marshal the evidence supporting them and substituted its own judgment for that of the trial court. "Although [an appellate] court may fashion its own remedy as a substitute for the judgment of the trial court in equity cases, [it should] not disturb the trial court's judgment only where necessary to prevent manifest injustice." (Citations omitted.) *MacKay v. Hardy*, 896 P.2d 626, 629 (Utah 1995). It is obvious in this case that the Court of Appeals thought that its new award of alimony was preventing manifest injustice. However, it is difficult to see why it is manifest injustice for a trial court to award alimony for a period of four years after trial in a case where the parties lived together for only eight years and where the marriage was a second marriage for both parties. As the trial court found, Ms. Willey was healthy and extremely intelligent. She has not offered any reason why she could not have become rehabilitated and self-supporting within the time period during which she originally received alimony.

The Court of Appeals has not indicated what evidence provided the basis for its award of alimony. According to the reasoning of the Court's opinion, there would have had to have been a finding of what Ms. Willey's reasonable expenses were in order to justify the award of alimony. According to Ms. Willey, her expenses were \$2,678.41 per month. However, the Court of Appeals did not award that amount to her. The Court of Appeals accused the trial court of making factual findings without basis in the evidence. However, the implied factual findings on which the Court of Appeals' decision rests have no basis in the evidence.

In arriving at its award, the Court of Appeals criticized the trial court for imposing “speculation in the adjudicatory process” by finding Ms. Willey’s monthly living expenses to be \$2,000. The Court of Appeals held that the correct amount to use for Ms. Willey’s monthly living expenses was the amount submitted at the time of trial, \$2,678. The Court of Appeals then set Ms. Willey’s alimony award at \$2,240, with no explanation as to how it arrived at that figure. In essence, the Court of Appeals did exactly what it criticized the trial court for doing--arbitrarily set an alimony amount without any factual findings that provide support for such an award.

In contrast, the trial court’s award was based on detailed findings. The court specifically said Ms. Willey testified at trial that her monthly expenses were \$2,678.41 (Findings on Remand no. 17). The court found that:

[D]efendant’s automobile expense of \$381.83 is unreasonably high and should be reduced to \$300 per month. Also, defendant’s monthly unreimbursed medical/dental expenses of \$660 per month are unreasonably high and should be reduced to \$60 per month. While the record shows that defendant had major surgery in the fall of 1991, there is nothing in the record to establish why the ongoing expenses should continue on a monthly basis.

(Findings on Remand no. 19.) A trial court can properly reduce the amount of expenses claimed. *Thronson v. Thronson*, 810 P.2d 428, 435 (Utah App. 1991). It is difficult to determine what additional findings of fact the trial court could have made to support its conclusion that Ms. Willey’s reasonable monthly expenses were \$2,000 per month. The Court of Appeals did not explain in any manner its conclusion that the alimony should be set at \$2,240 per month. This does not coincide with the amount of monthly expenses found by the trial court nor with what Ms. Willey asserted her monthly expenses were. It appears that it is the Court of Appeals’ award that is based on “improper speculation,” not that of the trial court.

The Court of Appeals also extended the underlying alimony award for five years. In making this decision, the Court of Appeals found that the underlying and rehabilitative alimony awards should coincide. This finding ignores the alimony already received by Ms. Willey since 1990. The trial court purposely did not extend the underlying alimony award for the same period of time as the additional rehabilitative alimony awarded. The reason for this was based on the excess support received by Ms. Willey during the separation and during the first year after the divorce, together with Mr. Willey's payment of substantial joint marital debt.

The record clearly establishes that during the year the parties were separated, Mr. Willey paid Ms. Willey \$1,500 in temporary support, in addition to paying the house payment of \$2,492 per month, joint marital installment debt of \$360 per month, and Ms. Willey's car payment. After the trial in November of 1991, Mr. Willey paid Ms. Willey alimony, in addition to paying the house payment until October 1992, when the home was sold. In addition, in early 1992, Ms. Willey received \$6,562.39 as her share of Mr. Willey's bonus. In late 1992, Mr. Willey paid over \$37,000 of joint marital debt. Accordingly, for two years, Ms. Willey received support in excess of her established needs. During that two year period, Ms. Willey did nothing to obtain additional training or education or to help increase her earning potential.

The Court of Appeals stated that both awards should continue for five years because the trial court found that it was reasonable for rehabilitative alimony to continue for a period of five years. This is not accurate. In setting the additional \$500 per month rehabilitative alimony, the trial court did not say that such an award should continue for five years. The court awarded this amount for a period not to exceed nine quarters to be completed at an educational institution within five years. This does not mean that Ms. Willey would receive the rehabilitative alimony award for the full five years.

The net effect of the Court of Appeals' award is to reward Ms. Willey for doing nothing to increase her earning potential by doubling the amount of alimony awarded to her for a period double the time originally ordered and to penalize Mr. Willey who paid the original award. Based on the foregoing, the Court of Appeals' award of alimony and the duration of that alimony constitutes error, and the decision of the Court of Appeals should be reversed.

II. THE COURT OF APPEALS ERRED BY ARBITRARILY INCREASING THE AMOUNT OF MS. WILLEY'S ATTORNEY'S FEE AWARD.

At trial, Ms. Willey submitted evidence requesting attorney's fees in the amount of \$19,215 for 128.1 hours on the case billed at \$150 per hour. The reasonableness of these fees was challenged by Mr. Willey. The trial court found those fees to be unreasonable, stating that combined attorneys' fees of \$31,000 to \$32,000 was an unfortunate use of funds. At trial, the court awarded Ms. Willey \$5,000 attorney's fees. On appeal, the Court remanded the case to the trial court for additional findings with respect to the award of attorneys' fees.

On remand, the trial court made specific findings concerning the attorneys' fees at issue. Specifically, the trial court found that "[a] great problem is encountered when the fees are greatly out of proportion to the marital estate and the present and future financial circumstances of the parties." (Memorandum Decision, Exhibit 7 of Addendum.) The court entered the following specific findings with respect to the issue of attorneys' fees:

41. With respect to the issue of the reasonableness of attorneys' fees, the court notes that the district court's file is contained in two large volumes. There are seven pages of docket entries describing pleadings and filing activity. There have been sixteen court appearances in District Court alone, in addition to the activity in the Court of Appeals.

42. With respect to unusual or particular issues of law, defendant argued that plaintiff had a continuing obligation to pay support for her

children from a prior marriage. This assertion was rejected by the trial court and the Court of Appeals.

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44. In applying the factors to be considered in making an award of attorney's fees, the court finds that this case was not and should not have been particularly difficult. It was a relatively routine divorce of a couple with extreme financial difficulties and disagreements on how to manage their incomes and expenses.

45. The court further finds that the efficiency of the attorneys in handling the case was not good and the reasonableness of the number of hours is excessive and beyond a reasonable evaluation of the case.

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47. While defendant's attorney does not request payment for all recorded hours, he does request payment for 101 hours in the amount of \$15,150.00 for fees and costs of \$1,539.38 for a total of \$16,689.38. This amount is presumably in addition to the \$5,000.00 already paid by plaintiff for defendant's attorney's fees after the trial.

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49. However, the amount of attorneys' fees charged in this case, considering the marital estate, cannot justify the fees incurred. The parties' net worth approached zero and the only meaningful asset was the plaintiff's earning capacity which he brought into the marriage. The court finds that the entire financial condition of the parties cannot justify combined attorneys' fees in excess of \$65,000, with little or no marital property remaining. Accordingly, the court finds the fees are not reasonable.

The trial court found that Ms. Willey did not have the ability to pay attorney's fees, but that Mr. Willey did. Accordingly, the court found that an additional \$10,000 was a reasonable amount to be awarded for attorney's fees.

A trial court's award of attorneys' fees should not be disturbed absent an abuse of discretion. *Bell*, 810 P.2d 489. The trial court has broad discretion in awarding attorneys' fees. *Peterson v. Peterson*, 818 P.2d 1305 (Utah App. 1991). Factors to be taken into account in such an award are the financial need of the receiving spouse, the ability of the other spouse to pay, and the reasonableness of the requested fees. *Bell*, 810 P.2d at 493. The

trial court is encouraged to “make findings to explain the factors which they considered relevant in arriving at an attorney fee award.” *Id.* at 494 (citations omitted).

Upon its second review, the Court of Appeals stated that the trial court again failed to make the necessary findings regarding attorneys’ fees. It is difficult to imagine what additional findings as to reasonableness the trial court could have made to satisfy the Court of Appeals. The trial court was not required to award all of the attorney’s fees Ms. Willey requested. Utah law does not require that; instead, it allows and requires the trial court to assess reasonableness of the fees in making its award. *Beals v. Beals*, 682 P.2d 862 (Utah 1984). The trial court properly did so in this case.

The trial court examined the court’s files, considered Ms. Willey’s insistence upon arguing a position on which she was unlikely to prevail, the difficulty of the litigation, the efficiency of the attorneys, and the reasonableness of the number of hours. It was clearly in the discretion of the trial court to award attorneys’ fees which it found were reasonable, based on all of the facts and circumstances of the case with which it was familiar. The trial court properly reduced the attorney’s fees requested on remand from \$16,689.38 to \$10,000.

The Court of Appeals rejected the trial court’s award of attorney’s fees and, without explanation, awarded Ms. Willey a total of \$36,015 in attorneys’ fees, plus \$1,539.38 in costs, to cover fees and costs incurred at trial, remand, and on all the appeals. This amount appears to have no relationship to the amount claimed by Ms. Willey for the trial--\$19,215, or for the proceedings on remand--\$16,689.38, or to the amount she might have claimed for the appeal. Instead, this is the total of all fees Ms. Willey claimed to have incurred between the trial and the remand hearing. Ms. Willey did not even request that the court award this amount because it included many other proceedings, such as her petition to modify. She requested only \$16,689.38 for the remand proceedings and the First Appeal.

It is impossible to determine from the Court of Appeals' opinion how it arrived at the amount of its award. The Court of Appeals offered no analysis, as required under *Bell*, to support its award. In essence, the Court did exactly what it criticized the trial court for doing--awarded an arbitrary amount of attorneys' fees with no supporting evidence.

In its remand decision, the trial court made detailed findings concerning the award of attorneys' fees. The Court of Appeals erred in substituting its own arbitrary determination of attorneys' fees for the trial court's well-supported award. The Court of Appeals said:

The trial court should have addressed the question of whether, under all the relevant circumstances, Ms. Willey's attorney fees are reasonable. The factors identified in *Bell* also permit an examination of the difficulty of the litigation, the attorneys' efficiency, the reasonableness of the number of hours spent on the case, the fee customarily charged in the locality, the amount involved in the case and the result obtained, and the expertise and experience of the attorneys involved.

Willey, 866 P.2d at 555.

In this case, the trial court did examine all those factors in its findings of fact nos. 41 through 51. The Court of Appeals said:

The critical determination to be made here is not the overall efficiency of attorneys for both parties, but whether or not the fees sought by Ms. Willey are reasonable under the circumstances of this case.

Willey, 287 Utah Adv. Rep. at 31.

The trial court made exactly that determination in reducing Ms. Willey's claimed fees to \$10,000. The Court of Appeals offered absolutely no rationale, justification, or calculation of its award of \$36,015, an amount not even claimed by Ms. Willey. The Court of Appeals did not explain why that amount should cover the Second and Third Appeals or how it increased or reduced the total fees claimed for the various proceedings to the amount awarded.

Because the Court of Appeals' attorney's fees award was arbitrary and unsupported by evidence, the award should be reversed. The award flies in the face of the well-established Utah law that attorneys' fees awards must be supported by specific findings and replaces it with the theory that the Court of Appeals can arbitrarily award attorneys' fees without explanation.

CONCLUSION

In its decision in this case, the Court of Appeals has done exactly what it chastised the trial court for doing--entered awards of alimony and attorney's fees that have no relationship to the evidence presented. The findings of fact made by the trial court support its decision with respect to alimony and attorney's fees. There are no findings of fact and, in fact, no evidence in the record that would support the Court of Appeals' substitution of its own awards of alimony and attorney's fees for the trial court's.

The decision by this panel of the Court of Appeals conflicts with prior pronouncements of the Supreme Court and the Court of Appeals with respect to alimony and attorneys' fees. The Court of Appeals has taken the position that it may substitute its own judgment for that of the trial court without relying on the findings of fact of the trial court, or pointing to any evidence which supports its new awards. In this way, the Court of Appeals has rendered a decision that departs from the accepted and usual course of judicial proceedings in such a way as to invoke an exercise of the Supreme Court's power of supervision.

For the foregoing reasons, Mr. Willey's petition for writ of certiorari should be granted.

DATED this 6th day of May, 1996.

Respectfully submitted,

KRUSE, LANDA & MAYCOCK, L.L.C.

Eighth Floor, Bank One Tower

50 West Broadway

Salt Lake City, UT 84101-2034

By  _____

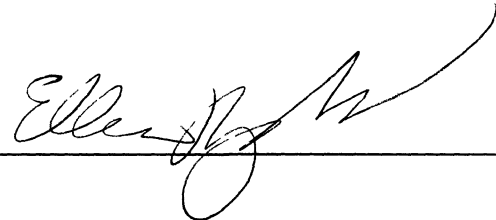
ELLEN MAYCOCK

Attorneys for Petitioner Glen P. Willey

CERTIFICATE OF SERVICE

I hereby certify that I caused two true and correct copies of the foregoing **PETITION FOR WRIT OF CERTIORARI OF GLEN P. WILLEY** to be mailed, postage prepaid, to each of the following, this 6th day of May, 1996:

Roger D. Sandack, Esq.
170 South Main Street, Suite 400
Salt Lake City, UT 84101

 _____

ADDENDUM INDEX

<u>Exhibit</u>	<u>Description</u>
1	<i>Willey v. Willey</i> , 287 Utah Adv. Rep. 27 (Utah App. April 4, 1996)
2	Findings of Fact and Conclusions of Law dated January 14, 1992
3	Decree of Divorce dated January 14, 1992
4	<i>Willey v. Willey</i> , 866 P.2d 547 (Utah App. 1993)
5	Order dated April 5, 1993
6	Pretrial Order dated October 18, 1994
7	Memorandum Decision dated January 31, 1995
8	Findings of Fact and Conclusions of Law dated March 7, 1995
9	Order Amending Decree of Divorce on Remand dated March 7, 1995
10	Defendant's Exhibit 36-D

Tab 1

Cite as
287 Utah Adv. Rep. 27

IN THE
UTAH COURT OF APPEALS

Glen P. WILLEY,
Plaintiff and Appellee,
v.
Rosalind Ann Johnson WILLEY,
Defendant and Appellant.

No. 930205-CA
FILED: April 4, 1996

Third District, Salt Lake County
The Honorable David S. Young

ATTORNEYS:
Roger D Sandack, Salt Lake City, for
Appellant
Ellen Maycock, Salt Lake City, for Appellee

Before Judges Davis, Greenwood, and Wilkins.

This opinion is subject to revision before
publication in the Pacific Reporter.

WILKINS, Judge:

This case has been before us previously on appeal.

Because the trial court failed to make adequate findings of fact, we remand[ed] for the entry of appropriate findings, and a reassessment of the awards in light of those findings and our opinion, on (1) the award of alimony, (2) the allocation of debt, and (3) the award of attorney fees at trial and on appeal. We otherwise affirm[ed] [the trial court's prior decision].

Willey v. Willey, 866 P.2d 547, 556 (Utah App. 1993) (hereinafter *Willey I*). Ms. Willey again challenges the proceedings in the trial court. We reverse and remand for the entry of an amended decree as herein described.

BACKGROUND

The factual background of this case is well-described in *Willey I*. For our purposes, we add only those facts and events necessary to review the trial court's actions on remand pursuant to our directions in *Willey I*.

In *Willey I*, we held that the trial court failed to enter sufficient findings of fact in determining Ms. Willey's alimony award. Therefore, we remanded this case and directed the trial court to review the evidence and enter findings sufficient for us to review its determinations regarding the income imputed to Ms. Willey, the timing and amount of Ms. Willey's rehabilitative alimony award, the allocation of the parties' debts, and the basis for Ms. Willey's limited award of attorney fees at trial. *Willey I*, 866 P.2d at 550-51, 554-56. We also directed the trial court

to determine and award to Ms. Willey the attorney fees she incurred in the *Willey I* appeal *Id.* at 556.

On remand, the trial court took additional evidence limited to Ms. Willey's ability to earn income. The court declined to allow discovery of or testimony regarding Mr. Willey's then-current ability to pay support or attorney fees for Ms. Willey. The court also declined to allow evidence of Ms. Willey's then-current ability to pay her attorney fees. Instead, the trial court chose to rely upon evidence received at trial regarding the parties' financial abilities.

Based upon the review ordered by this court and the additional evidence presented below, the trial court entered additional findings of fact on some of the issues we directed it to address by our remand order, but failed to address others. The trial court revised the award of alimony, considered the allocation of debt, and partially addressed the questions raised regarding attorney fees.

ISSUES RAISED ON APPEAL

Ms. Willey again challenges the adequacy of the trial court's findings regarding alimony. Specifically, she claims the trial court failed to enter adequate findings regarding the duration of alimony, resulting in an arbitrary termination of that award. She also claims the trial court entered findings of fact unsupported by the evidence, resulting in incorrect calculation and consideration of alimony amounts.

Ms. Willey also claims the trial court abused its discretion by prohibiting her from going forward on a petition to modify the decree and in denying her request for discovery during the course of the proceedings on remand.

In addition, Ms. Willey raises by a separate but now consolidated appeal the question of whether Mr. Willey may offset a post-decree judgment entered in his favor and against Ms. Willey, which arose from the allocation of the marital debts, against his alimony obligation.

Finally, Ms. Willey also claims the trial court failed to make and enter the findings required by our holding in *Willey I* regarding the award of attorney fees incurred at trial and attorney fees on appeal, resulting in an insufficient award of fees.

ANALYSIS

We are troubled by the incomplete resolution of the issues raised in our remand order. Parties to a divorce proceeding are rarely well-served by repeated examination of the same issues. This is particularly true in a case such as this, where the financial resolution of the marital affairs produces a loss for both parties. To permit the dispute to continue is an injustice to the parties. Moreover,

[w]e approach the problem here presented in full awareness of the standard rules which favor the findings, judgments and decrees of the trial court, particularly in divorce matters. Notwithstanding this, the right of

review on appeal has its purposes. . . . [This court] would be remiss in its responsibility and this assured right of appeal would be meaningless if it unquestioningly accepted all actions of the trial court and remained insensitive to pleas to rectify inequity or injustice. Consequently, the rule is that when it is made to appear that the court has failed to correctly apply principles of law or equity, . . . or that the judgment has so failed to do equity that it manifests a clear abuse of discretion, this court on review will take appropriate corrective action in the interests of justice.

Watson v. Watson, 561 P.2d 1072, 1073-74 (Utah 1977) (footnotes omitted).

I. Alimony

Ms. Willey has raised three questions that we agree must be addressed to resolve what alimony award should be included in the original divorce decree. First, we consider whether the trial court erred in imputing income to Ms. Willey. Second, we address whether the trial court erred in determining the parties' expenses. Finally, we examine whether the trial court erred in fashioning Ms. Willey's rehabilitative alimony award. "We will not overturn a trial court's alimony ruling as long as the court supports its ruling with adequate findings and exercises its discretion according to the standards we have set." *Willey I*, 866 P.2d at 550. We review the trial court's conclusions of law with respect to alimony awards for correctness, but we will not reverse the court's findings of fact unless they are clearly erroneous. *Breinholt v. Breinholt*, 905 P.2d 877, 879 (Utah App. 1995).

A. Income imputed to Ms. Willey.

On remand, we instructed the trial court to review the question of how much income should be imputed to Ms. Willey, if any. *Willey I*, 866 P.2d at 554. The trial court took additional evidence on this question by admitting a vocational counselor's testimony regarding her evaluation of Ms. Willey. The trial court then entered findings of fact imputing monthly income to Ms. Willey of \$958.08 for 1992, \$991.61 for 1993, \$1,026.32 for 1994, and \$1,062.24 for 1995. These findings were premised upon the following evidence: at the time of trial, Ms. Willey was employed part-time at the rate of \$5.00 per hour in a job for which there were no full-time positions available; Ms. Willey had previously worked part-time in a clothing store in trade for clothing; the vocational evaluator's testimony that Ms. Willey was capable of obtaining full-time employment at an average rate of \$5.32 per hour; and the vocational evaluator's testimony that Ms. Willey could expect a 3.5 percent increase in salary each year. We do not disturb these findings on appeal.

Based on this evidence, the court found that Ms. Willey's earning capacity at the time of trial

was \$5.90 per hour, or \$1,027.09 per month if she worked full-time. At the time of trial Ms. Willey was employed only part-time. We therefore accept as implied the finding apparently relied upon by the trial court that Ms. Willey is voluntarily underemployed, allowing an imputation of income. Because the trial court relied on evidence sufficiently detailed in its findings of fact in imputing income to Ms. Willey, we hold that the court did not abuse its discretion by imputing income to Ms. Willey, and we will not disturb the court's related findings. Instead, we will use the court's imputed income figures to further evaluate and resolve the remaining alimony questions.

B. Reasonable financial needs of the parties.

On remand, the trial court considered a stipulated statement of the parties' reasonable monthly expenditures. Without evidence regarding these stipulated expenses, the trial court reduced Ms. Willey's expenses by \$678.41, for a total of \$2,000.00 per month, on the basis of what appears to be speculation. In the memorandum decision on remand, the trial court commented that Ms. Willey's "medical expenses surely must not be a monthly ongoing amount of \$660.00" and reduced them by \$600.00 to a total of \$60.00. He also reduced Ms. Willey's automobile expense of \$381.83 by the unlikely amount of \$78.41. These reductions lowered Ms. Willey's monthly expenses to an even \$2,000.00 per month. The trial court likewise reduced Mr. Willey's expenses by \$463.16 again to reach an even \$2,000.00 per month by reducing the amount of Mr. Willey's uncontested automobile expense, without explanation, saying only that Mr. Willey's "automobile expenses can be similarly adjusted down to reach a figure of \$2,000.00 per month for him."

The sheer absence of any evidence upon which to base factual findings regarding these adjustments makes them unacceptable. To allow the trial court to impose speculation on the adjudicatory process violates the basic premise upon which our judicial system is founded. All parties are absolutely entitled to a fair and impartial hearing and adjudication of their affairs. That did not occur in this case. We cannot accept the adjustments made in the parties' monthly expenses crafted by the trial court in the apparent pursuit of round numbers.

For purposes of our correction of the divorce decree, we accept the amounts the parties submitted to the trial court as reflective of their reasonable financial needs at the time of trial.

C. Rehabilitative alimony.

It is clear from the structure of the alimony award that it was intended to achieve a rehabilitative purpose. . . . Thus, the court must make realistic assessments of actual current income and actual expenses. The court must also consider the time demands and expenses of attending school.

Absent such an assessment and appropriate findings, there is no basis on which to determine the proper amount and duration of alimony needed to achieve a rehabilitative outcome.

Willey I, 866 P.2d at 554.

We anticipated that on remand the trial court would review the facts relevant to appellant's rehabilitative alimony award. However, no evidence regarding the circumstances surrounding Ms. Willey's pursuit of further education was sought by or presented to the court. The trial court simply reconfirmed the award of "additional alimony" of \$500 per month for "a maximum of nine quarters" of university level education, plus the costs of tuition and books. Mr. Willey is to pay all of this to Ms. Willey, "provided such education is completed within five years of January 1, 1995" or "within five years following the date of this order," March 7, 1995.

Unfortunately, based upon other factual findings made by the trial court, it is evident that during the course of the proceedings in both this court and the trial court that have followed entry of the original divorce decree, Ms. Willey's financial needs have not been met by the alimony she has actually received. The disparity is sufficient that for her to have pursued university level education on a full-time basis as contemplated by the trial court would likely have made her a public charge. Because she had not received the originally awarded alimony, she could not have made use of any "additional alimony."

We accept the trial court's findings that rehabilitative alimony of \$500 per month, plus the costs of tuition and books, for a period equal to that of nine academic quarters is warranted by the facts of this case. The court found that Ms. Willey "could enhance her earning capacities through obtaining further education," and substantial evidence was presented to the court by both parties that revealed a great disparity between Mr. and Ms. Willey's earnings. The trial court also implied a finding in its conditional rehabilitative award that Ms. Willey must maintain full-time student status for such study to be appropriately beneficial. These findings sufficiently support the rehabilitative alimony award, and we affirm that portion of the decree.

However, given the full-time nature of the contemplated study and the parties' income and needs, we find that the rehabilitative award also contemplated a concurrence in time with the original alimony awarded. How else may the rehabilitative alimony be considered "additional alimony?" As the trial court found, for Ms. Willey to attend full-time study, she must be able to meet not only her reasonable monthly expenses, but also the increased costs of education. The trial court determined these increased costs to be university costs, tuition, books, and \$500 per month, for the duration of the nine quarters of anticipated study. An

important purpose of alimony is to provide for reasonable monthly expenses and to prevent Ms. Willey from becoming a public charge. See *Jones v. Jones*, 700 P.2d 1072, 1075 (Utah 1985).

Given these factors, and in reliance upon the facts as found by the trial court, we hold that the rehabilitative alimony award shall coincide with the underlying alimony award, for the period established by the trial court as reasonable, a period of five years. However, given the confused, and indeed patently unfair nature of the prior order, under which Ms. Willey was required to elect one award or the other, we extend the underlying alimony from March 7, 1995, for a period of five years.

D. Alimony award to Ms. Willey.

As we discussed in *Willey I*, the Utah Supreme Court has established a standard for setting alimony. See *Jones*, 700 P.2d at 1075. Under that standard, three factors must be considered in fashioning a reasonable alimony award: "[1] the financial conditions and needs of the [spouse seeking support]; [2] the ability of the [spouse seeking support] to produce a sufficient income for [himself or] herself; and [3] the ability of the [payor spouse] to provide support." *Willey I*, 866 P.2d at 550 (quoting *Jones*, 700 P.2d at 1075) (alterations in original). We held in *Willey I* that the trial court had abused its discretion because it failed to consider all three of the *Jones* factors. *Id.* at 550-51.

This court has already recognized that the trial court addressed the second *Jones* factor in its original divorce decree, and we recognize that it again did so on remand. See *id.* However, in *Willey I*, this court noted that the trial court "made no findings on [Ms.] Willey's financial need as the first *Jones* factor requires. Nor did it make findings on Mr. Willey's financial need, which underlying factual determination is required for an assessment of the third *Jones* factor, the ability of the payor spouse to provide support." *Id.*

As we explained above, we accept the amounts the parties submitted as reflective of their reasonable financial needs at the time of trial. We also have discussed our determination, based upon findings made by the trial court, that Ms. Willey is in need of support to meet her financial needs, which have not been met by the alimony she has actually received. See *Hall v. Hall*, 858 P.2d 1018, 1025 (Utah App. 1993) (explaining that this court may imply unstated findings "if it is reasonable to assume that the trial court actually considered the controverted evidence and necessarily made a finding to resolve the controversy, but simply failed to record the factual determination it made"), see also *State v. Ramirez*, 817 P.2d 774, 787 (Utah 1991) (explaining "in cases in which factual issues are presented to and must be resolved by the trial court but no findings of fact appear in the record," the appellate court can "assume that

the trier of facts found them in accord with its decision"); *Adams v. Board of Review*, 821 P.2d 1, 5 (Utah App. 1991) ("A finding may be implied if it is clear from the record, and therefore apparent upon review, that the finding was actually made as part of the tribunal's decision."). Also, based on the trial court's findings and our above analysis, we find that Mr. Willey is able to provide Ms. Willey with the financial support she needs. *See Hall*, 858 P.2d at 1018, 1025 (Utah App. 1993).

Based upon the facts as found by the trial court, and upon the correction of errors described above, Ms. Willey is awarded alimony as follows:

1. From March 7, 1995, until March 6, 2000, the sum of \$2,240.00 as monthly alimony, unless sooner terminated or modified according to law.

2. As additional alimony, for the purpose of assisting Ms. Willey in rehabilitation, and to prevent her from becoming a public charge, the sum of \$500.00 per month for each month or portion of a month during which she is duly enrolled as a full-time student at the University of Utah or similar institution, up to a maximum of nine academic quarters over a period not to extend past March 6, 2000, plus an amount equal to the sum of tuition, fees, books, and other costs directly incurred in pursuing that education.

II. Allocation of Debt

We have before us two related issues arising from the allocation of the parties' marital debts. First, we review the numerical allocation made by the trial court. Second, we consider Ms. Willey's argument that the trial court improperly allowed Mr. Willey to offset his alimony obligation against Ms. Willey's share of the marital debt.

A. Allocation of marital debt.

After trial, the parties' marital residence was sold at a loss. The resulting debt was divided between the parties. Other debts arising from various loans and obligations were also divided between the parties. However, Mr. Willey voluntarily paid his and Ms. Willey's marital debts in full. As a result, the trial court allowed Mr. Willey to withhold alimony from Ms. Willey to offset amounts Ms. Willey owed Mr. Willey for repaying her share of the marital debts. On remand, the trial court considered Ms. Willey's portion of the marital debts forgiven because Mr. Willey had already fully paid Ms. Willey's debts. As an exchange, the court did not calculate the debt as a part of Ms. Willey's needs in determining alimony.

The attorneys for both parties agreed to this arrangement at trial on remand, and on appeal, neither party challenges the trial court's action. We therefore accept the resolution reached and do not disturb this award.

B. Offset of alimony.

In a separate but consolidated appeal, Ms. Willey challenges the legality of allowing Mr. Willey to offset marital debt Ms. Willey owed him against the alimony obligation he owed Ms. Willey. This specific question was referred by the trial court to the domestic commissioner for review. After noting the obligation Ms. Willey owed to Mr. Willey arising from the marital debts, and rejecting Mr. Willey's suggestion that it is inequitable to allow Ms. Willey to collect alimony while leaving available to her the ability to discharge the countervailing debt through filing for bankruptcy, the commissioner focused on what he considered to be more compelling concerns. The commissioner stated:

[The] Commissioner also recognizes that the Court's award of alimony recognized [Ms. Willey's] inability to meet her own reasonable and necessary monthly living expenses and [Mr. Willey's] ability to contribute toward [Ms. Willey's] unmet need. To allow [Mr. Willey] a total offset of his alimony obligation against [Ms. Willey's] obligation to [him] would frustrate the purpose of the Court's award of alimony.

The commissioner recommended that the trial court require Mr. Willey to repay the total amount of withheld alimony to Ms. Willey, and to make ongoing alimony payments as required by the divorce decree. The trial court rejected this recommendation. Instead, in its order of April 5, 1993, the trial court expressly allowed Mr. Willey to "offset against [\$18,840.86, the amount of Mr. Willey's judgment against Ms. Willey for the marital debt she owed to him,] the alimony he would otherwise be required to pay to [Ms. Willey]." In addition, the trial court apparently took the offset amount into consideration in reallocation of the marital debts in Ms. Willey's favor.

Under the facts of this case, the trial court erred by allowing Mr. Willey to offset the alimony against Ms. Willey's debt to him. Nonetheless, we have taken into account the inappropriate offset in extending Ms. Willey's alimony. Therefore, we do not disturb the trial court's allocation and award only because we have awarded Ms. Willey additional alimony to facilitate the rehabilitative award the trial court found appropriate. To also require Mr. Willey to retroactively pay the alimony retained under the inappropriate offset would be inequitable and unjust. Our resolution of the case does not require reworking the debt allocation, nor does it require us to revisit the trial court's decision to allow Mr. Willey to offset Ms. Willey's debt to him against his alimony obligation.

III. Attorney Fees

The trial court has again failed to make the necessary findings regarding attorney fees for the original trial and proceedings in this case. Furthermore, no findings have been made regarding the appropriate amount of attorney

fees to be awarded Ms. Willey for her prior successful appeal, as we ordered. As we said in *Willey I*, the

trial court may award attorney fees in divorce proceedings. Utah Code Ann. §30-3-3 (Supp. 1993). "The award must be based on evidence of the financial need of the receiving spouse, the ability of the other spouse to pay, and the reasonableness of the requested fees." *Bell v. Bell*, 810 P.2d 489, 493 (Utah App. 1991). "The decision to make such an award and the amount thereof rest primarily in the sound discretion of the trial court." *Id.* However, "[t]o permit meaningful review of the trial court's discretionary ruling, '[w]e have consistently encouraged trial courts to make findings to explain the factors which they considered relevant in arriving at an attorney fee award.'" *Id.* at 494. . . .

A court may consider, among other factors, the difficulty of the litigation, the efficiency of the attorneys, the reasonableness of the number of hours spent on the case, the fee customarily charged in the locality, the amount involved in the case and the result attained, and the expertise and experience of the attorneys involved.

Id., 810 P.2d at 493-94.

. . . However, the trial court did not independently assess . . . the reasonableness of [Ms.] Willey's fees. The court merely noted ["the entire financial condition of the parties cannot justify combined attorney's fees in excess of \$65,000 with little or no marital property remaining"]. While this statement may indicate the trial court believed both parties' fees were unreasonable, it does not constitute a finding addressing the reasonableness of [Ms.] Willey's attorney fees according to the *Bell* factors.

Willey I, 866 P.2d at 555-56.

While the trial court has entered findings regarding Ms. Willey's financial ability to pay attorney fees necessitated by the trial, no findings regarding her ability to pay fees incurred on appeal have been made. The trial court found that Mr. Willey had the ability to pay Ms. Willey's attorney fees. However, the trial court failed to make specific findings regarding the reasonableness of Ms. Willey's fees at trial and on appeal.

In this case the trial court has twice failed to address and make the necessary factual determinations. In the interests of finality, and to avoid subjecting the parties to even more expense and difficulty in resolving what should have been a routine part of the case, we are constrained to make our own determination on the issue. Fairness to both parties demands such a resolution.

Rather than remanding again for the trial court to examine these same issues, we will exercise our equitable power to review the evidence

directly regarding equitable matters, and to make the necessary findings on the issues not reached by the trial court. *See Owen v. Owen*, 579 P.2d 911, 913 (Utah 1978) (noting that appellate court can review evidence and make its own findings in divorce proceeding, which is in equity); *see also Thompson v. Thompson*, 709 P.2d 360, 361 (Utah 1985) (per curiam) ("On appeal, we have broad equitable powers and are not necessarily bound or limited by the trial court's findings."); *Haddow v. Haddow*, 707 P.2d 669, 671 (Utah 1985) ("[I]n reviewing a trial court's actions in a divorce case, we are vested with broad equitable powers."). To do otherwise would subject both parties to the unwarranted necessity of once again presenting these questions to the trial court.

We accept the trial court's finding that Ms. Willey was unable to pay attorney fees incurred in the course of the trial. We find no evidence to suggest her ability has improved. We therefore find her still in need of financial assistance to pay those fees.

We also accept and find no evidence requiring us to revisit or revise the trial court's finding that Mr. Willey is financially able to assist Ms. Willey with payment of the attorney fees she incurred.

The trial court has twice expressed concern that the total attorney fees incurred by the parties in the course of this litigation is excessive considering the absence of any financial net worth after deduction of the marital debts from the marital assets. We share that concern. However, that is not the determining issue. *See Bell v. Bell*, 810 P.2d 489, 493-94 (Utah App. 1991). The trial court should have addressed the question of whether, under all the relevant circumstances, Ms. Willey's attorney fees are reasonable. The factors identified in *Bell* also permit an examination of the difficulty of the litigation, the attorneys' efficiency, the reasonableness of the number of hours spent on the case, the fee customarily charged in the locality, the amount involved in the case and the result obtained, and the expertise and experience of the attorneys involved. *Willey I*, 866 P.2d at 555.

The trial court found that this litigation should not have been difficult, that the efficiency of both attorneys was not good, that the number of total hours for which the attorneys have billed is excessive under the circumstances of this case, that Ms. Willey's attorney presented evidence of \$19,215.00 in fees as of the time of trial, and a total of \$36,015.00 as of the time of the hearing on remand, for which Ms. Willey sought reimbursement of \$15,150.00 for fees and \$1,539.38 in costs at the time of the hearing on remand. The trial court also found Ms. Willey's attorney's hourly rate of \$150 to be reasonable, given his experience and expertise. We do not disturb these findings.

The critical determination to be made here is not the overall efficiency of attorneys for both parties, but whether or not the fees sought by

Ms. Willey are reasonable under the circumstances of this case. At the time of the hearing on remand, Ms. Willey sought reimbursement of \$20,150 from a total of \$36,015 she is obligated to pay. Of this amount, Mr. Willey had already been ordered to pay \$5,000.00. Without adequate explanation or findings, on remand the trial court ordered Mr. Willey to pay an additional \$10,000 as the correct adjustment.

Under the unique circumstances of this case we award Ms. Willey a total of \$36,015.00 in attorney fees, plus \$1,539.38 in costs, for fees and costs incurred at trial, on appeal, on remand, and on this appeal. All other fees and costs incurred herein by either party, including those incurred in the course of this second appeal, shall be the sole obligation of the party incurring those expenses.

CONCLUSION

We reverse and remand to the trial court for entry of an amended decree as is necessary to correct the alimony award to include the sum of \$2,240.00 per month effective March 7, 1995, and continuing until five years from that date. This award shall be subject to termination or modification according to law. The order shall include the rehabilitative award previously described in this opinion, with the provision that it shall be available from March 7, 1995, and continuing until five years from that date. Finally, the order shall include a total of \$37,554.38 awarded to Ms. Willey for attorney fees and costs incurred in the entire course of these proceedings. Any amount Mr. Willey actually paid to Ms. Willey for attorney fees under any prior trial court order shall be credited against this award of fees and costs.

Reversed and remanded for entry of an order consistent with this opinion.

Michael J. Wilkins, Judge

WE CONCUR:

James Z. Davis, Associate Presiding Judge

Pamela T. Greenwood, Judge

Cite as

287 Utah Adv. Rep. 32

IN THE UTAH COURT OF APPEALS

Carolyn Marie ENDRODY,
Plaintiff and Appellant,

v.

Laszlo ENDRODY Jr., Endrody Trust, et
al.,
Defendants and Appellees.

No. 940753-CA

FILED: April 4, 1996

Fifth District, Iron County
The Honorable J. Philip Eves

ATTORNEYS:

Michael W. Park and James M. Park, St.
George, for Appellant
Deborah D. Blackburn, Cedar City, for
Appellee Laszlo Endrody Jr.
Michael A. Day, St. George, for Appellee
Endrody Trust and All Other Appellees

Before Judges Bench, Billings, and Greenwood.

**This opinion is subject to revision before
publication in the Pacific Reporter.**

GREENWOOD, Judge:

Carolyn Endrody (Ms. Endrody) appeals the trial court's awards of marital property, alimony, and attorney fees. The Endrody Trust (the Trust) responds only to Ms. Endrody's challenge regarding the determination of marital property. Laszlo Endrody Jr. (Mr. Endrody) responds to all of the issues raised by Ms. Endrody.¹ We affirm in part and remand in part.

BACKGROUND

Mr. Endrody, a former sea captain, was employed as a Panama Canal pilot beginning in early 1975. Ms. Endrody met Mr. Endrody while she was serving in the U.S. military in Panama, and the parties married on April 11, 1975. The parties lived in Panama until 1979, during which time two children were born.

In 1979, the parties established residence in Iron County, Utah where they lived on a working ranch (the Endrody Ranch) owned by Mr. Endrody and his parents. Ms. Endrody lived at the Endrody Ranch with the parties' two children, and Mr. Endrody spent his leave time there, while continuing his employment with the Panama Canal. The Endrody Ranch had been purchased by Mr. Endrody's parents in 1970 for \$80,000. The parents made a \$25,000 down payment on the property, and paid annual payments on the remaining balance. Prior to the marriage of the parties, Mr. Endrody entered into a rental agreement with his parents, under

Tab 2

FILED DISTRICT COURT
Third Judicial District

JAN 14 1992

SALT LAKE COUNTY

By _____ Deputy Clerk

ELLEN MAYCOCK - 2131
KRUSE, LANDA & MAYCOCK
A Professional Corporation
Attorneys for Plaintiff
Eighth Floor, Valley Tower
50 West Broadway
Salt Lake City, Utah 84101
Telephone: (801) 531-7090

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

GLEN P. WILLEY,)	
Plaintiff,	)	FINDINGS OF FACT AND
vs.	)	CONCLUSIONS OF LAW
ROSALIND ANN JOHNSON WILLEY,)	
Defendant.	)	Civil No. 91 490 0101
	)	Judge David S. Young

The above-entitled matter came on for trial on November 21 and 22, 1991. Plaintiff was present and represented by his counsel, Ellen Maycock, and defendant was present and represented by her counsel, Roger Sandack. The court having heard testimony, received exhibits, heard the arguments of counsel, and being fully advised, now makes and enters the following:

Findings of Fact

1. Residence. Plaintiff and defendant were *bona fide* residents of Salt Lake County, Utah, for more than three months prior to the filing of this action.
2. Marriage. Plaintiff and defendant are husband and wife having been married on April 29, 1982, in Salt Lake County, Utah.

3. Children. No children have been born as issue of this marriage, and none are expected.

4. Grounds for Divorce. During the marriage, irreconcilable differences have developed between the parties making continuation of their marriage impossible. Each party is entitled to a decree of divorce from the other party.

5. Real Property. During the marriage, the parties acquired a house and real property located at 2605 East Maywood Drive, Salt Lake City, Utah. The house should be sold as soon as feasible because it constitutes a substantial financial burden for the parties. The house should be listed at a price of \$350,000 with a new real estate agent to be agreed upon by the parties as soon as the present listing agreement expires. Upon sale of the house, the first mortgage in the approximate amount of \$232,000 to Zions Bank should be paid in full, and the second mortgage in the approximate amount of \$80,000 to Beverly Johnson should be paid in full, together with all costs of sale. Any net proceeds of the sale then remaining should be divided as follows:

(a) If the house is sold within 90 days of the date of November 22, 1991, all remaining net proceeds of sale should be awarded to defendant.

(b) If the house is sold after the expiration of 90 days from November 22, 1991, the parties should divide any net proceeds equally.

(c) In the event that the sales price of the house is not sufficient to pay the first and second mortgages and costs of sale, the parties shall be equally responsible for payment of any short fall or deficiency.

Plaintiff should continue to make the first mortgage payment until the house is sold. Payment of the second mortgage shall continue to be deferred. Defendant may remain in possession of the house until it is sold.

6. Automobiles. The court finds, based on the parties' stipulation, that the 1988 Landcruiser has a net value, after payment of the encumbrance thereon, of \$7,000. The Landcruiser shall be awarded to defendant. The court finds that the 1987 Mercedes has no equity, since it is subject to a lease agreement. Plaintiff should assume and pay the lease payments, and hold defendant harmless therefrom.

7. Individual Retirement Account. The individual retirement account in the name of Rosalind Willey should be divided as follows:

(a) The stock in American Telephone and Telegraph should be awarded to defendant since it was a family gift to her.

(b) The cash amounts in the individual retirement account should be divided equally between the parties.

8. 401K Plan. The 401K plan has a net value of approximately \$24,000, which should be divided equally between the parties. Plaintiff should repay the loan to the 401K plan and should be entitled to the benefit of any increase in the value of the 401K plan accrued as a result of the payment of the loan.

9. Furniture and Personal Property. The furniture in the parties' home should be awarded to defendant. The furniture acquired by plaintiff after the parties' separation should be awarded to him, and he should assume and pay any obligations incurred in connection therewith. In addition, plaintiff should be awarded the following personal items currently located in the parties' home:

(a) Oak chair in den;

- (b) Oak table and chairs (presently being stored);
- (c) Plaintiff's books;
- (d) Framed maps in the den;
- (e) Framed birds in the master bedroom;
- (f) Brass bird bookends;
- (g) Carved arctic loon; and
- (h) Butter churn.

Each party should be awarded the other personal property presently in his or her possession.

10. J. G. Willey Limited Partnership. Based on the stipulation of the parties, the court finds that this is a premarital asset of no value and awards it to plaintiff.

11. Pension Plan. Plaintiff currently has a pension plan with his employer, Kidder, Peabody & Company. The pension plan should be divided between the parties pursuant to the Woodward formula as of November 21, 1991, pursuant to a qualified domestic relations order.

12. Alimony. The court finds that a reasonable average income to use for plaintiff in determining alimony to be paid in this matter is \$110,000. Because of plaintiff's employment as a stock broker, his income has fluctuated. In 1987 and 1991, plaintiff had unusually good income years. The court further finds that defendant is capable of earning an income of between \$1,500 and \$2,000 per month, based on her education and qualifications. Accordingly, the court finds that it is equitable that plaintiff pay alimony to defendant of \$1,500 per month for one year from the date of trial herein, and \$1,000 per month for three years thereafter. The court further finds that plaintiff has been supporting defendant during the parties'

separation of approximately one year, and it is appropriate to take that time period into account in determining the term of alimony. Alimony shall terminate at the end of four years from the date of trial, or when defendant remarries, cohabits with a member of the opposite sex, or dies, whichever first occurs.

13. Decree of Divorce. The decree of divorce herein should be final upon January 1, 1992.

14. Deferred Compensation and Bonuses. The court finds that based on work already performed by plaintiff as an employee of Kidder, Peabody & Company, he is entitled to a bonus in January of 1992. The amount of that bonus should be divided equally between the parties. The court further finds that future bonuses, which plaintiff is entitled to be paid in 1995 and 1996, have been earned as of this time and are contingent only upon plaintiff's continued employment with Kidder, Peabody & Company. Accordingly, if plaintiff is still employed by Kidder, Peabody & Company and receives those bonuses, the amount of those bonuses should be divided equally between the parties. The court further finds that plaintiff's deferred compensation for 1991 will be used to pay ongoing expenses and should not otherwise be divided between the parties. Each party shall be responsible for the payment of taxes on the portion of the bonuses distributed to that party.

15. Claim of Premarital Contribution. Defendant asserted a claim in this matter that she made a premarital contribution to the marriage of approximately \$29,000, consisting of the equity in the home owned by her located on Logan Avenue prior to the marriage. The court finds that the funds received upon the sale of the Logan Avenue house in 1983 were commingled with other funds of the parties by their choice and have lost their separate character as premarital property.

Accordingly, the court makes no award as a result of the claimed premarital contribution.

16. Joint Tax Return. The parties shall file a joint income tax return for 1991 and divide any refunds to be received equally. In the event that taxes are due, the parties shall each pay one-half of any taxes.

17. Medical Expenses of Defendant. Defendant underwent surgery in September of 1991. The medical expenses incurred in connection with that surgery have been submitted for payment to plaintiff's health insurance provider. Any of those expenses not paid by insurance should be paid from plaintiff's Complus Plan insofar as there are sufficient funds in the plan to do so. In the event that the Complus Plan does not cover all of those medical expenses, plaintiff should be responsible for payment.

18. First Interstate Advance Line. During the marriage, plaintiff and defendant had a credit line with First Interstate Bank. The court finds that the credit line was incurred to cover family expenses. Each party should pay one-half of the amount due on the credit line as of November 21, 1991.

19. Other Debts and Obligations. Any debts and obligations incurred by the parties since their separation should be paid by the party who incurred them. The court finds that defendant is not entitled to be reimbursed for tuition incurred by her for Spring Quarter of 1991.

20. Obligation of Blake Johnson. Blake Johnson owes the parties approximately \$2,000 which he pays to them at the rate of approximately \$100 per month. Defendant should be entitled to receive the payments from Blake Johnson.

21. State Tax Refund for 1990. The state income tax refund for 1990 should be divided equally between the parties.

22. Attorneys' Fees and Costs. Plaintiff has previously paid \$1,950 toward defendant's attorney's fees and should be required to pay an additional \$3,500 toward defendant's attorney's fees. Otherwise, each party should pay his or her own costs and fees incurred herein.

From the foregoing findings of fact, the court now makes an enters the following:

Conclusions of Law

1. Each party should be awarded a decree of divorce from the other party, to become final upon January 1, 1992.

2. The real and personal property of the parties should be awarded as set forth in paragraphs 5, 6, 7, 8, 9, 10, 11, and 20 of the findings of fact herein.

3. The court should enter a qualified domestic relations order with respect to the division of the pension plan as set forth in paragraph 11 of the findings of fact herein.

4. Plaintiff should be ordered to pay alimony to defendant as set forth in paragraph 12 of the findings of fact herein.

5. Future bonuses to plaintiff through Kidder, Peabody & Company in 1992, 1995, and 1996, should be divided between the parties as set forth in paragraph 14 of the findings of fact herein. Plaintiff's deferred compensation for 1991 should be used to pay the ongoing expenses and should not otherwise be divided by the parties. Each party should be ordered to pay the taxes due on the portion of the bonuses distributed to that party.

6. Defendant is not entitled to an award of a premarital contribution in the amount of \$29,000, as set forth in paragraph 15 of the findings of fact herein.

7. The parties should file a joint income tax return for 1991 and should be ordered to divide any refunds to be received equally. The parties should each be ordered to pay one-half of any taxes.

8. Any of defendant's surgery expenses not paid by insurance should be paid from plaintiff's Complus Plan, insofar as there are sufficient funds in the plan to do so. In the event that the Complus Plan does not cover all of those medical expenses, plaintiff should be responsible for payment.

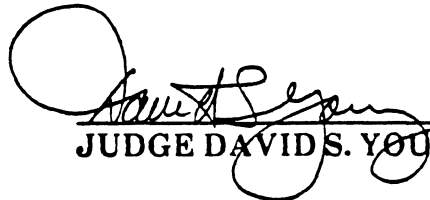
9. The parties should be ordered to pay the debts and obligations incurred during the marriage as set forth in paragraphs 18, 19, and 20.

10. The state income tax refund for 1990 should be awarded equally between the parties.

11. Plaintiff should be ordered to pay an additional \$3,500 toward defendant's attorney's fees. Otherwise, each party should be ordered to pay his or her own costs and fees incurred herein.

DATED this 14th day of January, 1992.

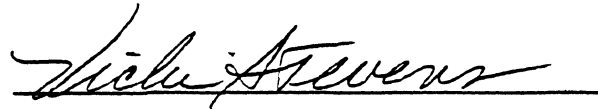
BY THE COURT:


JUDGE DAVIDS. YOUNG

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing
FINDINGS OF FACT AND CONCLUSIONS OF LAW to be delivered to the
following, this 30th day of December, 1991:

Roger D. Sandack, Esq.
500 Kearns Building
Salt Lake City, Utah 84101

A handwritten signature in cursive script, reading "Vicki Stevens", is written over a horizontal line.

Tab 3

FILED DISTRICT COURT
Third Judicial District

JAN 14 1992

SALT LAKE COUNTY

By

Deputy Clerk

ELLEN MAYCOCK - 2131
KRUSE, LANDA & MAYCOCK
A Professional Corporation
Attorneys for Plaintiff
Eighth Floor, Valley Tower
50 West Broadway
Salt Lake City, Utah 84101
Telephone: (801) 531-7090

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

GLEN P. WILLEY,)

Plaintiff,)

vs.)

ROSALIND ANN JOHNSON WILLEY,)

Defendant.)

DECREE OF DIVORCE

2171234

1-15-92-800am

Civil No. 91 490 0101

Judge David S. Young

The above-entitled matter came on for trial on November 21 and 22, 1991. Plaintiff was present and represented by his counsel, Ellen Maycock, and defendant was present and represented by her counsel, Roger Sandack. The court having heard testimony, received exhibits, heard the arguments of counsel, and being fully advised, and having made and entered its findings of fact and conclusions of law,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. Decree of Divorce. Plaintiff Glen P. Willey is hereby awarded a decree of divorce from defendant Rosalind Ann Johnson Willey, and defendant Rosalind Ann Johnson Willey is hereby awarded a decree of divorce from plaintiff Glen P. Willey,

on grounds of irreconcilable differences, such decree to become final on January 1, 1992.

2. Real Property. The house and real property located at 2605 East Maywood Drive, Salt Lake City, Utah is ordered to be sold as soon as feasible. The house shall be listed at a price of \$350,000 with a new real estate agent to be agreed upon by the parties, as soon as the present listing agreement expires. Upon sale of the house, the first mortgage in the approximate amount of \$232,000 to Zions Bank is ordered to be paid in full, and the second mortgage in the approximate amount of \$80,000 to Beverly Johnson is ordered to be paid in full, together with all costs of sale. Any net proceeds of the sale then remaining are ordered to be divided as follows:

(a) If the house is sold within 90 days of the date of November 22, 1991, all remaining net proceeds of sale are awarded to defendant.

(b) If the house is sold after the expiration of 90 days from November 22, 1991, the parties are ordered to divide any net proceeds equally.

(c) In the event that the sales price of the house is not sufficient to pay the first and second mortgages and costs of sale, the parties are ordered to be equally responsible for payment of any short fall or deficiency.

Plaintiff is ordered to continue to make the first mortgage payment until the house is sold. Payment of the second mortgage shall continue to be deferred. Defendant may remain in possession of the house until it is sold.

3. Automobiles. The Landcruiser is awarded to defendant. Plaintiff is ordered to assume and pay the lease payments on the 1987 Mercedes, and hold defendant harmless therefrom.

4. Individual Retirement Account. The individual retirement account in the name of Rosalind Willey is ordered to be divided as follows:

(a) The stock in American Telephone and Telegraph is awarded to defendant since it was a family gift to her.

(b) The cash amounts in the individual retirement account are ordered to be divided equally between the parties.

5. 401K Plan. The 401K plan having a net value of approximately \$24,000 is ordered to be divided equally between the parties. Plaintiff is ordered to repay the loan to the 401K plan and is awarded the benefit of any increase in the value of the 401K plan accrued as a result of the payment of the loan.

6. Furniture and Personal Property. The furniture in the parties' home is awarded to defendant. The furniture acquired by plaintiff since the parties' separation is awarded to him, and he is ordered to assume and pay any obligations incurred in connection therewith. In addition, plaintiff is awarded the following personal items currently located in the parties' home:

- (a) Oak chair in den;
- (b) Oak table and chairs (presently being stored);
- (c) Plaintiff's books;
- (d) Framed maps in the den;
- (e) Framed birds in the master bedroom;
- (f) Brass bird bookends;
- (g) Carved arctic loon; and
- (h) Butter churn.

Each party is awarded the other personal property presently in his or her possession.

7. J. G. Willey Limited Partnership. The J. G. Willey Limited Partnership is awarded to plaintiff.

8. Pension Plan. The pension plan with Kidder, Peabody & Company is ordered to be divided between the parties pursuant to the Woodward formula as of November 21, 1991, pursuant to a qualified domestic relations order.

9. Alimony. Plaintiff is ordered to pay alimony to defendant in the amount of \$1,500 per month for one year from the date of trial herein, and \$1,000 per month for three years thereafter. Alimony shall terminate at the end of four years from the date of trial, or when defendant remarries, cohabits with a member of the opposite sex, or dies, whichever first occurs.

10. Deferred Compensation and Bonuses. The amount of the bonus plaintiff is entitled to in January of 1992 as a result of his employment with Kidder, Peabody & Company is ordered to be divided equally between the parties. Any future bonuses which plaintiff is entitled to be paid in 1995 and 1996, and which have been earned as of this time and are contingent only upon plaintiff's continued employment with Kidder, Peabody & Company, are ordered to be divided equally between the parties. Plaintiff's deferred compensation for 1991 is ordered to be used to pay ongoing expenses and shall not otherwise be divided by the parties. Each party is ordered to pay the taxes on the portion of the bonuses distributed to that party.

11. Joint Tax Return. The parties are ordered to file a joint income tax return for 1991 and divide any refunds to be received equally. In the event that taxes are due, the parties are ordered to each pay one-half of any taxes.

12. Medical Expenses of Defendant. Any medical expenses incurred by defendant in connection with her surgery in September of 1991 which have not been

paid by plaintiff's health insurance provider shall be paid from plaintiff's Complus Plan, insofar as there are sufficient funds in the plan to do so. In the event that the Complus Plan does not cover all of those medical expenses, plaintiff is ordered to be responsible for payment.

13. First Interstate Advance Line. Each party is ordered to pay one-half of the amount due on the credit line with First Interstate Bank as of November 21, 1991.

14. Other Debts and Obligations. Any debts and obligations incurred by the parties since their separation are ordered to be paid by the party who incurred them.

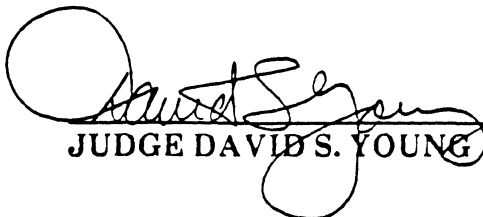
15. Obligation of Blake Johnson. Defendant is awarded the obligation from Blake Johnson of \$2,000, which he pays at the rate of approximately \$100 per month.

16. State Tax Refund for 1990. The state income tax refund for 1990 is ordered to be divided equally between the parties.

17. Attorneys' Fees and Costs. Plaintiff is ordered to pay an additional \$3,500 toward defendant's attorney's fees. Otherwise, each party is ordered to pay his or her own costs and fees incurred herein.

DATED this 14th day of January, 1992.

BY THE COURT:


JUDGE DAVID S. YOUNG

Tab 4

BENCH and JACKSON, JJ., concur.



Glen P. WILLEY, Plaintiff and Appellee,

v.

Rosalind Ann Johnson WILLEY,
Defendant and Appellant.

No. 920091-CA.

Court of Appeals of Utah.

Nov. 29, 1993.

In divorce action, the Third District Court, Salt Lake County, David S. Young, J., divided marital property, granted alimony and awarded wife attorney fees. Wife appealed. The Court of Appeals, Billings, P.J., held that trial court failed to make sufficient findings to support award of alimony, allocation of debt and award of attorney fees.

Affirmed in part, and reversed and remanded in part.

1. Divorce \S 256(3.1)

Court of Appeals will not overturn trial court's alimony ruling as long as court supports its ruling with adequate findings and exercises its discretion according to governing standard.

2. Divorce \S 239

In fixing reasonable alimony award, trial court must make sufficiently detailed findings on each of the governing factors to enable reviewing court to insure that trial

court's discretionary determination was rationally based upon those factors.

3. Divorce ⚭239

In setting alimony award, trial court failed to make required findings regarding parties' financial need.

4. Divorce ⚭237

In determining husband's alimony obligation, trial court failed to adjust either party's financial needs to account for debt payments each would owe on bank line of credit after court's property distribution, or probable result of sale of marital home in assessing the parties' respective needs.

5. Divorce ⚭252.4

Trial court did not abuse its discretion in dividing debt for second mortgage between the parties, despite wife's contention that husband should have been individually responsible for mortgage because portion of money borrowed from her parents, secured by trust deed against the house, was used for purchase of couple's automobile.

6. Divorce ⚭237

Since husband had duty of supporting stepchildren only during prior marriage, expenses of his former stepchildren were not to be considered in determining his financial need and award of alimony to wife from subsequent marriage. U.C.A.1953, 78-45-1.

7. Divorce ⚭237

In calculating husband's alimony obligation, expenses of mother's children from former marriage were not to be considered, where children's father was paying support required under the guidelines.

8. Divorce ⚭239

In determining husband's alimony obligation, trial court did not abuse its discretion in setting wife's earnings at \$860 per month based on projection of full-time work at her current salary, but there was no basis for trial court's finding that wife could earn \$1,500 to \$2,000 per month within a year or two.

9. Divorce ⚭247

To extent that alimony award is intended to be rehabilitative, its goal is to close the

gap between actual expenses and income to enable receiving spouse better able to support himself when alimony and schooling end

10. Divorce ⚭247

In fashioning award of rehabilitative alimony, court must make realistic award of actual current income and actual expenses and must consider time demands of attending school.

11. Divorce ⚭252.5(1)

Wife had no equity in marital home derived from proceeds of sale of her home, where any premarital equity consumed during the marriage.

12. Divorce ⚭224

Award of attorney fees in divorce case must be based on evidence of financial ability of receiving spouse, ability of other spouse to pay, and reasonableness of request. U.C.A.1953, 30-3-3.

13. Divorce ⚭223, 227(1)

Decision to award attorney fees in divorce case and amount thereof rely in sound discretion of trial court. U.C.A.1953, 30-3-3.

14. Divorce ⚭226

Trial court, in awarding wife 25% of her requested attorney fees, was not in error in according to governing factors, and findings regarding either wife's ability to pay her own attorney fees or husband's ability to pay her fees. U.C.A.1953, 30-3-3.

Roger D. Sandack, Salt Lake City, for defendant and appellant.

Ellen Maycock, Salt Lake City, for plaintiff and appellee.

Before BILLINGS, P.J., and B. J. ORME, JJ.

BILLINGS, Presiding Judge:

Rosalind Willey appeals the decisions in this divorce action regarding division of marital property, and

attorney fees. Because of insufficient findings, we reverse and remand the court's rulings on alimony and the award of attorney fees. We also reverse and remand the property division to give the court the opportunity to reconsider these related financial aspects of the divorce. We otherwise affirm.

FACTS

Appellant Rosalind Ann Johnson Willey and appellee Glen Paul Willey were married on April 29, 1982. The parties had no children together, and both had been married previously. Mrs. Willey had custody of three children from her former marriage who, at the time of the Willeys' divorce, were twenty, seventeen, and thirteen years old.

During the marriage, Mr. Willey worked as a stockbroker, receiving commissions instead of regular wages. Since 1986, Mr. Willey's annual income ranged from a high of \$138,052 in 1987, to a low of \$73,096 in 1989. In addition, Mr. Willey earned deferred bonuses in 1987 (approximately \$14,200), 1990 (approximately \$11,000) and 1991 (projected at \$16,219), payable in 1992, 1995 and 1996, respectively, as long as he remained employed by the same firm.

At the time of their marriage, Mrs. Willey was employed full-time in retail clothing sales and earned approximately \$10,000 annually. After the marriage, Mrs. Willey worked sporadically part-time. Her income ranged from a high of \$6871 in 1985 to nothing in 1989. In 1990, she earned gross wages of \$4412, working for five dollars an hour as a part-time salesperson in a bookstore and occasionally leading literary discussion groups formed through the bookstore. Mrs. Willey also received \$332 per month in child support from her first husband.

To finance their lifestyle, the parties liquidated assets and incurred debts. Mrs. Willey owned a home at the time of her marriage to Mr. Willey. The parties sold this home in 1983, using the \$29,164 in equity to purchase and improve a new home in their joint names. In 1986, the parties sold their joint home and purchased the home in which they lived at the time of their divorce. At the time of trial, they owed \$232,000 to Zions

Bank on the first mortgage on the marital home. In addition, the parties had consolidated loans from Mrs. Willey's parents into an approximately \$80,000 second mortgage on the home.

The parties separated in November of 1990. In February of 1991, they reached a stipulation regarding temporary support. Under the agreement, Mr. Willey made most of the payments on the marital debts, including the \$2492 monthly payment to Zions Bank on the first mortgage for their home and an approximately \$360 monthly payment against a First Interstate Bank line of credit (the First Interstate debt). He also paid \$1500 in monthly support to Mrs. Willey. The monthly payments for the second mortgage were deferred temporarily by agreement. Mrs. Willey remained in possession of the marital home.

After a two-day trial, the trial court entered findings of fact and conclusions of law and a final decree of divorce. We review the court's decision only as it affects the issues on appeal.

The court ordered each party to assume one-half of the approximately \$12,000 First Interstate debt. The court denied Mrs. Willey's claim that she should receive \$29,164 from the sale of her premarital home as premarital property, finding that these proceeds had lost their separate identity. The court awarded Mrs. Willey \$5000 of her documented \$19,215 in attorney fees. Furthermore, the court set alimony for Mrs. Willey at \$1500 a month for one year to be reduced to \$1000 a month for the next three years and then to terminate. Relevant to that award, the court found that Mrs. Willey could earn \$1500 to \$2000 monthly and that Mr. Willey earned an average of \$110,000 annually, or approximately \$9000 a month. In addition, the court ordered the marital home to be listed at \$350,000 and sold as soon as possible. The court ordered the sale proceeds to be used to retire both mortgages on the home and cover the costs of sale. Any remaining proceeds were to go to Mrs. Willey if the home sold within ninety days after trial. If the home sold after ninety days, the court ordered the parties to divide equally any loss or gain. At oral argument,

the parties agreed the home sold for a loss, resulting in a debt of approximately \$37,000.

On appeal, Mrs. Willey argues the court abused its discretion in: (1) setting the alimony award; (2) ordering her to be responsible for one-half of the marital debts; (3) failing to recognize her premarital equity in the marital home; and (4) failing to award her a significant contribution toward her claimed attorney fees of \$19,215. In addition, Mrs. Willey requests attorney fees on appeal.

I. ALIMONY AND PROPERTY DIVISION

Mrs. Willey contends the trial court abused its discretion in setting the alimony award. She claims the court failed to make sufficient findings regarding either party's financial need, ignored both her actual needs and her ability to support herself, and erroneously imputed \$1500 to \$2000 a month to her as income. Because the trial court failed to make sufficient findings regarding the parties' needs and resources, we reverse and remand for a redetermination of the amount of the alimony award and the entry of findings necessary to support the revised award.

A. Legal Standard

[1] We will not overturn a trial court's alimony ruling as long as the court supports its ruling with adequate findings and exercises its discretion according to the standards we have set. *Bell v. Bell*, 810 P.2d 489, 491 (Utah App.1991). In *Bell*, this court reiterated the well-settled standard for alimony set forth by the Utah Supreme Court in *Jones v. Jones*, 700 P.2d 1072, 1075 (Utah 1985), which stated:

"[T]he most important function of alimony is to provide support for the [spouse] as nearly as possible at the standard of living she [or he] enjoyed during the marriage, and to prevent the [spouse] from becoming a public charge." *English v. English*, 565 P.2d [409] at 411 [(Utah 1977)].... [T]hree factors ... must be considered in fixing a reasonable alimony award:

[1] the financial conditions and needs of the [spouse seeking support];

[2] the ability of the [spouse] to produce a sufficient support for [himself or] herself; and
[3] the ability of the [payor] to provide support.

Jones, 700 P.2d at 1075.

[2] "Failure to consider the [spouse's] ability to produce a sufficient support in fashioning an alimony award is an abuse of discretion." *Bell*, 810 P.2d at 491 (citations omitted). Thus, "the trial court must make sufficiently detailed findings on each factor to enable a review to ensure that the trial court's determination was rationally based on the three *Jones* factors. *Id.* (citation omitted). "If sufficient findings are not made, we reverse unless the record is controverted such as to allow us to affirm the *Jones* factors as a matter of law. *Id.* (citation omitted).

B. Trial Court Findings

In its findings of fact and law on alimony, the trial court

The court finds that a reasonable income to use for plaintiff's alimony to be paid in \$110,000. Because of plaintiff's employment as a stock broker, his income fluctuated. In 1987 and 1990, plaintiff had unusually good income years. The court further finds that defendant was earning an income of between \$2,000 per month, based on her education and qualifications. According to the court, it is equitable that the alimony to defendant of \$1,000 per month from the date of trial, or when defendant terminates the term of alimony, terminate at the end of four years, or when defendant cohabits with a member of the opposite sex, or dies, whichever first occurs.

[3] In setting the alimony award, the trial court made no findings on M

nancial need as the first *Jones* factor requires. Nor did it make findings on Mr. Willey's financial need, which underlying factual determination is required for an assessment of the third *Jones* factor, the ability of the payor spouse to provide support.¹

We have previously reversed an alimony award in a similar case when the trial court failed to address the parties' financial needs. In *Bell v. Bell*, 810 P.2d 489 (Utah App.1991), because the parties "dissipated and lived on credit," the trial court did not give "much weight . . . as to what the needs and abilities of the parties might be." *Id.* at 492. Thus, the trial court failed to determine the reasonableness of the expenses each party claimed. This court reasoned that "[w]ithout a finding on reasonable expenses, we are unable to determine the true needs of Wife, or to determine Husband's actual ability to pay and, therefore, to balance Wife's needs against Husband's ability to pay as required in *Jones*." *Id.* at 493.

We face the identical problem here. At trial, both parties testified about their financial needs. Mr. Willey claimed monthly expenses totalling \$3623, including \$360 for repayment of the First Interstate debt, but excluding mortgage payments and expenses for the marital home. Mrs. Willey countered that his expenses were approximately \$2400 because they should exclude attorney fees, credit card repayments, and the \$360 First Interstate debt repayment. On the first day of trial, Mrs. Willey claimed expenses of \$6905, including payment of the first mortgage on the marital home. Alternatively, she claimed expenses of \$5405, which excluded the mortgage payment but included rent. On the second day of trial, Mrs. Willey presented revised expense figures of \$4754 for herself and her children, or alternatively, \$2673 for herself alone. The court made no findings on which, if any, of the expenses claimed by the parties were appropriate.

1. The trial court should consider a payor spouse's reasonable needs when determining that spouse's ability to provide support to a former spouse: in short, the payor spouse's reasonable needs are a necessary subsidiary step in determining the ability to provide support. See *Baker v. Baker*, 366 P.2d 340, 347 (Utah App.1993).

2. Arguing Mr. Willey incurred most of the First Interstate debt after separation, Mrs. Willey chal-

Thus, as in *Bell*, we remand for findings on each party's reasonable needs so we can determine if the court abused its discretion in setting the amount and duration of the alimony award. See *id.* at 493.

Because several issues raised on appeal are relevant to the *Jones* alimony analysis, we reach them to aid the trial court on remand.

C. Division of Debt as it Affects Alimony Award

[4] The trial court made no findings that would enable us to conclude it considered either the impact of its division of the First Interstate debt or the probable result of the sale of the marital home in assessing the parties' respective needs.

Regarding the First Interstate debt, Mrs. Willey argues that distribution of one-half of the debt to her was inequitable, given her resources and the disparity in the parties' income. She argues this is especially true in light of the court's alimony award. She correctly notes that Mr. Willey conceded that she would be incapable of assuming a portion of this debt, and that he agreed to pay the full amount.² We vacate the court's allocation of the First Interstate debt to allow the court to reconsider its assignment when establishing the appropriate amount of alimony. If the trial court determines that Mrs. Willey is still obligated to pay a portion of the debt, the court should factor in her share of the debt payment when calculating the alimony award. The court may, of course, reallocate the debt if it deems that appropriate.

In order to effectuate repayment of the two mortgages, the trial court ordered:

The house should be sold as soon as feasible because it constitutes a substantial financial burden on the parties. The house

lenges the trial court's finding that it was incurred for family expenses. However, Mrs. Willey has failed to marshal the evidence in support of the trial court's finding and then show why this evidence is insufficient to support that finding. See Utah R.Civ.P. 32(a). Thus, we accept the court's finding.

refused to consider evidence of
obligation to her children in co-
alimony award. The extent to
individual's needs and ability to su-
or herself are affected by that
obligation to support children
marriage is an issue Utah's ap-
have not directly considered.

We note, however, the Utah law imposed a duty of support or only during the duration of the Utah law expressly provides that the husband's obligation to support a state terminates upon divorce.

A stepparent shall support the same extent that a natural parent is required to support provided, however, that upon the dissolution of the marriage or common-law partnership between the stepparent and the child's natural or adoptive parent, the stepparent's support obligation shall terminate.

Utah Code Ann. § ~~78-15-1.1~~ (

[6] Mr. Willey's former step-penses should not be considered Mrs. Willey alimony. The expenses are properly addressed Uniform Civil Liability for Support Code Ann. §§ 78-45-1 through 78-45-10. As calculated from the income of the children's parents (not former step-penses) guidelines presumptively cover living expenses, including basic expenses. See *Christiansen v. Christiansen*, 592 (Utah 1983).

[7] The children's father, previous husband, is paying the required under the guidelines. Circumstances have changed since the calculation. Mrs. Willey can see:

cured by a trust deed against the house for the purchase of the couple's home. She contends the trial court should have made Mr. Willey individually liable for the second mortgage. The appellate court abused its discretion in dividing the property. However, on remand, if the court allocates a portion of this marital property to Willey, that decision must be consistent with the alimony award.

(b) If the house is sold after the expiration of 90 days from November 22, 1991, the parties should divide any net proceeds equally.

(c) In the event that the sales price of the house is not sufficient to pay the first and second mortgages and costs of sale, the parties shall be equally responsible for payment of any short fall or deficiency.

(5) Although it set a listing price, the court did not include any specific finding regarding the value of the home.³ At oral argument on appeal, counsel for both parties agreed that the sale incurred a debt of approximately \$37,000. Again, we conclude the trial court should consider this debt when it reexamines the alimony award on remand, because this debt has a direct bearing on all three of the *Jones* criteria. See *Burt v. Burt*, 799 P.2d 1166, 1172 (Utah App.1990).⁴

D. Mrs. Willey's Financial Obligation to Her Children by a Previous Marriage

Mrs. Willey also contends the court misapprehended her financial situation because it

3. The trial court could have taken evidence on and made a specific finding regarding the value of the home. If that valuation was proven incorrect after the sale, either party could have petitioned the court for a modification based on a change of circumstances. Following this procedure would allow the court to make an informed decision based on the best data available.

4. As a side argument regarding the debt on the marital home, Mrs. Willey argues that a portion of the money borrowed from her parents, se-

of the support order. She should not, however, be able to require Mr. Willey to help support the children through an alimony award. See, e.g., *Baker v. Baker*, 866 P.2d at 546 (considering expenses of grandchildren living with spouse receiving alimony "would be tantamount to giving a child support award for the grandchildren"); see also *Needel v. Needel*, 15 Ariz.App. 471, 489 P.2d 729, 732 (1971) (rejecting attempt to introduce testimony about expenses of children from prior marriage); *Brendel v. Brendel*, 566 So.2d 1269, 1273 (Miss.1990) (disallowing portion of alimony that would have gone to expenses of child by former spouse); *Skribner v. Skribner*, 153 N.J.Super. 374, 379 A.2d 1044, 1045 (Cl.Ch.Div.1977) (holding wife "should not be permitted to obtain through the back door what she cannot obtain directly").

E. Imputation of Income to Mrs. Willey

[3] Mrs. Willey contends the court improperly imputed to her a monthly income of \$1500 to \$2000 in setting her alimony award. She argues that the court's finding is based solely upon speculation. We agree.

At trial, Mr. Willey called Mrs. Willey's current employer, who testified that if Mrs. Willey were employed full-time in the same position, she would make \$300 per month gross income, but that no full-time sales or managerial positions were available for Mrs. Willey. Mrs. Willey called the director of human resources from a large Utah company to testify. This expert testified that a forty-two-year-old woman with an outdated bachelor of arts degree, without marketable skills, and who had not been employed full-time for ten years, needed at least three years of education to upgrade her skills, unless she is to be relegated to an unskilled sales or similar position. The trial court rejected this witness's testimony, finding it not credible in light of the witness's prior relationship with Mrs. Willey and the fact that she was planning to charge Mrs. Willey \$1100 for her services. Mrs. Willey testified that to earn a teacher's starting salary of \$1333 to \$1500 a

month,⁵ she would need to complete thirty-eight to forty hours of a forty-five hour university program, which could be done in one year only if she attended school full-time. She also testified that a teacher's salary was not enough income for her to live on and thus she hoped to pursue other avenues of employment.

Regarding Mrs. Willey's ability to earn income, the trial court stated:

The court finds that the defendant is capable of earning income substantially in excess of that which is proposed here. Her earnings projection are at the level of \$360.00. While there is not testimony of her having actively sought other income she described herself as a hobbyist. The court finds that she has previously worked in sales, in retail sales and clothing, that she works in a bookstore in sales, that she conducts classes . . . with interested persons, and those yield greater income. The court believes that it would not be unreasonable to expect that her income could or should be in the range of \$1,500 to \$2,000 per month based upon her education and her circumstances. I recognize that there may be a little bit of time necessary to get to that level, that starting a job takes a little time at a lower rate, but it should not be below \$360.00 and should certainly be within that level within 12 to 24 months.

We cannot say the trial court abused its discretion in setting Mrs. Willey's earnings at \$360 per month based on a projection of full-time work at her present salary. See *Thronson v. Thronson*, 810 P.2d 423, 435 (Utah App.), cert. denied, 826 P.2d 651 (Utah 1991). However, there is no basis for the trial court's finding that Mrs. Willey could earn \$1500 to \$2000 per month within a year or two. We have previously held such a finding improper. In *Bell v. Bell*, 810 P.2d 439 (Utah App.1991), the trial court imputed a \$1500 income to Mrs. Bell, despite undisputed testimony that she earned \$363 per month as a part-time teaching assistant at Utah State University. *Id.* at 492 n. 2. The imputed income was based on the level she had

5. There is no evidence that Mrs. Willey had any foundation on which to base her estimate of a

teacher's starting salary.

previously earned as a full-time school teacher in another state, approximately two years before she filed for divorce from her husband of ten years. *Id.* We noted that "[n]o explanation was offered for this unusual [income] adjustment." *Id.*

Mrs. Willey's circumstances are similar to Mrs. Bell's. Like Mrs. Bell, who began working part-time two years prior to filing for divorce, Mrs. Willey worked part-time during her marriage. Both possessed college degrees. However, unlike Mrs. Bell, Mrs. Willey never utilized her twenty-year-old education degree in an employment capacity. In Mrs. Bell's case, the trial court imputed an income she had actually earned on a full-time basis three years before trial. However, for Mrs. Willey, the trial court first imputed an income based on full-time employment at her current wage (\$860 per month), and then, without any factual basis, speculated that she could raise her income to \$1500 to \$2000 per month.

The only evidence presented to suggest that she could earn income greater than \$860 per month came from Mrs. Willey herself and from the witness whose testimony the court found not credible. If the trial court relied on Mrs. Willey's testimony, it appears the court failed to take into account her statement that she could earn \$1333 to \$1500 monthly as a starting teacher only after attending school for one year on a full-time basis, and then only if jobs were available. Furthermore, she had never taught school before, and there was no historical record of other earnings on which to base this finding.

We do not question the trial court's authority to impute income to Mrs. Willey. Imputing income to an unemployed or underemployed spouse when setting an alimony award is conceptually appropriate as part of the determination of that spouse's ability to produce a sufficient income. *See Bell*, 810 P.2d at 491-92. However, it cannot be premised upon mere conjecture; instead, it demands a careful and precise assessment requiring detailed findings. We have examined imputation in other contexts and outlined a detailed approach that, while not expressly applicable to the instant situation, should inform the trial court's assessment upon re-

mand. *See, e.g., Hall v. Hall*, Adv.Rep. 29 (Utah App.1993) (discussing statutory guidelines and articulated findings for imputation of income to parents in determining child support obligations); *State v. Vincent*, 841 P.2d 1000 (Utah App.1992) (describing findings of fact and conclusions of law regarding imputing assessments of earning capacity and other financial factors in determining appropriate agency for appointment of counsel).

Such findings, however, are not present in the record before us. With the record as it is, we are unable to see how the trial court's imputed income level follows from or is supported by the evidence. Based on the record, we conclude that the trial court's jump to the higher salary rate was an abuse of discretion. *See Robinson v. Robinson*, 752 P.2d 1331 (Utah App.1992). On remand, the trial court may base its decision on Mrs. Willey's \$860 per month earnings or, should it wish to use a higher income figure, hold further evidentiary hearings to receive evidence on a party's future earning capacity consistent with the cases cited above.

F. Rehabilitative Alimony

[9,10] It is clear from the record that the alimony award that it was made was not for a rehabilitative purpose. There is no difficulty with a properly fashioned rehabilitative award under the facts of this case. However, to the extent the alimony award is intended to be rehabilitative, it is intended to close the gap between actual and imputed income to enable the recipient to then be better able to support herself when the alimony and support award ends. *See Bell v. Bell*, 810 P.2d 489, 492-93 (Utah App.1991). Thus, the court must make realistic assessments of actual current income and actual expenses. The court should also consider the time demands and attending school. Absent such findings, the basis on which to determine the amount and duration of alimony to achieve a rehabilitative outcome is lacking.

G. Summary

A thorough review of the record indicates that the court made no findings of fact or conclusions of law regarding the alimony award.

either party's reasonable financial needs. The court also failed to adjust either party's financial needs to account for the debt payments each would owe to First Interstate after the court's property distribution. Further, the trial court did not incorporate the contemplated debt arising from the sale of the marital home in the alimony determination. However, the court did not act in excluding evidence of the impact of Mrs. Willey's obligation to support her children from her previous marriage in assessing the appropriate alimony award. Finally, the court imputed income to Mrs. Willey that is unsupported by the record. Given the record before us, we are simply unable to balance Mrs. Willey's need and her ability to support herself against Mr. Willey's ability to pay as required by *Jones*; consequently, we cannot determine whether the trial court abused its discretion in setting the amount and duration of the alimony award. We therefore reverse and remand the alimony award for additional findings on each of the *Jones* factors and a reassessment of the alimony award in light of those findings and our decision.

II. PREMARITAL EQUITY

[11] Mrs. Willey next contends the trial court abused its discretion by failing to recognize her equity in the marital home derived from proceeds of the sale of her premarital home. Mr. Willey responds that the evidence supports the trial court's finding that Mrs. Willey's premarital equity has lost its separate character as premarital property. We affirm the trial court's ruling on the basis that any premarital equity was consumed during the marriage.

"Generally, the rule for premarital property is that each party retain the separate property he or she brought into the marriage." *Dunn v. Dunn*, 802 P.2d 1314, 1321 (Utah App.1990). However, if the "property has been consumed or its identity lost through commingling or exchanges" it no longer falls within the rule. *Mortensen v. Mortensen*, 760 P.2d 304, 303 (Utah 1988) (emphasis added).

Although the trial court found the funds had lost their identity through commingling,

the evidence shows that they were actually consumed, i.e., the equity was used for various expenses during the course of the marriage. Therefore, we affirm the court's rejection of Mrs. Willey's claim on that basis.

III. ATTORNEY FEES

A. Fees Through Trial

[12, 13] Mrs. Willey maintains that the trial court abused its discretion in awarding her only \$5000 in attorney fees when she submitted evidence supporting her claim for \$19,215. A trial court may award attorney fees in divorce proceedings. Utah Code Ann. § 30-3-3 (Supp.1993). "The award must be based on evidence of the financial need of the receiving spouse, the ability of the other spouse to pay, and the reasonableness of the requested fees." *Bell v. Bell*, 810 P.2d 439, 493 (Utah App.1991). "The decision to make such an award and the amount thereof rest primarily in the sound discretion of the trial court." *Id.* However, "[t]o permit meaningful review of the trial court's discretionary ruling, '[w]e have consistently encouraged trial courts to make findings to explain the factors which they considered relevant in arriving at an attorney fee award.'" *Id.* at 494 (quoting *Regional Sales Agency, Inc. v. Reichert*, 784 P.2d 1210, 1215 (Utah App. 1989)).

A court may consider, among other factors, the difficulty of the litigation, the efficiency of the attorneys, the reasonableness of the number of hours spent on the case, the fee customarily charged in the locality, the amount involved in the case and the result attained, and the expertise and experience of the attorneys involved.

Id. 810 P.2d at 493-94.

[14] Mrs. Willey testified that she thought her attorney fees were reasonable. Counsel for Mrs. Willey made a proffer at trial concerning his \$19,215 bill for legal services and testified that he had spent 123.1 hours on the case. Counsel's documented time was billed at \$150 per hour. Counsel for Mr. Willey challenged the reasonableness of opposing counsel's expenses, activities, and billing rate. However, the trial court did not independently assess either this testimony or

of attorney fees at trial a
otherwise affirm.

BENCH and ORME, J.



STATE of Utah, Plaintiff

v.

Dennis M. HODSO.
and Appell

No. 910722-

Court of Appeals.

Nov. 30, 1

Defendant was convicted in District Court, Salt Lake County, of distributing controlled substance of controlled substance. The Court of Appeals, C that: (1) exigent circumstances warranting warrantless searches had probable cause defendant had placed drugs (3) remand was required if officers had used excessive force officer may place hands to prevent swallowing or not choke the suspect.

Remanded.

1. Criminal Law §103.

Defendant who did not raise the court's ruling allowing the Fifth Amendment in response to questions and, in fact, the court that the Fifth Amendment advance in the context of defendant precluded from contending that it was error to admit testimony had invoked the Fifth Amendment. 3.

Tab 5

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KRUSE, LANDA & MAYCOCK
A Professional Corporation
Attorneys for Plaintiff
Eighth Floor, Valley Tower
50 West Broadway
Salt Lake City, Utah 84101
Telephone: (801) 531-7090

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

GLEN P. WILLEY)

Plaintiff,)

vs.)

ROSALIND ANN JOHNSON WILLEY)

Defendant.)

)

ORDER

Civil No. 91 490 0101
Judge David S. Young

Plaintiff's and defendant's objections to the commissioner's recommendation came before the court for hearing on March 5, 1993, pursuant to notice. Plaintiff was present and represented by his counsel, Ellen Maycock, and defendant was present and represented by her counsel, Roger D. Sandack. The Honorable David S. Young presided. The court having reviewed the file herein and heard the arguments of counsel, and good cause appearing,

IT IS HEREBY ORDERED as follows:

1. Plaintiff's objection to the commissioner's recommendation is granted.

2. Plaintiff is awarded a judgment against defendant in the amount of \$18,840.86 and may offset against that amount the alimony he would otherwise be required to pay to defendant.

3. Plaintiff shall pay \$500 in alimony to defendant for March and may offset the remaining \$500 that would otherwise be part of his March alimony obligation against the judgment.

4. Plaintiff presently has in his possession tax refund checks from the United States in the amount of \$1,132 and the State of Utah in the amount of \$639. Defendant's share of those tax refund checks should also be offset against the judgment, and defendant should be ordered to endorse the checks so that can be accomplished.

5. Defendant's objection to the commissioner's recommendation is denied.

DATED this 15 day of ^{April} ~~March~~, 1993.

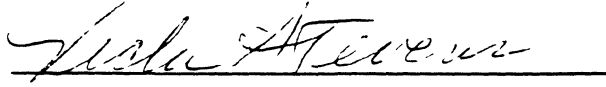
BY THE COURT:

15
JUDGE DAVID S. YOUNG

CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and correct copy of the foregoing **ORDER** to the following, postage prepaid, this 5th day of March, 1993:

Roger D. Sandack, Esq.
500 Kearns Building
136 South Main Street
Salt Lake City, Utah 84101



Tab 6

ELLEN MAYCOCK - 2131
KRUSE, LANDA & MAYCOCK, L.L.C.
Attorneys for Plaintiff
Eighth Floor, Bank One Tower
50 West Broadway
Salt Lake City, Utah 84101-2034
Telephone: (801) 531-7090

FILED DISTRICT COURT
Third Judicial District
OCT 18 1994
By [Signature]
SALT LAKE COUNTY
Deputy Clerk

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

GLEN P. WILLEY,)	
Plaintiff,	)	PRETRIAL ORDER
vs.)	
ROSALIND ANN JOHNSON WILLEY,	)	Civil No. 91 490 0101 DA
Defendant.	)	Judge David S. Young Commissioner Michael S. Evans

The decree of divorce was entered by this court in this matter on January, 14, 1992. Defendant appealed the final divorce decree entered by this court to the Utah Court of Appeals, and the Court of Appeals remanded to this court on November 29, 1993, for further findings on three issues:

- a. The award of alimony;
- b. The allocation of certain debts; and
- c. Defendant's attorney's fees.

Specifically, this court was directed to make additional findings on the following:

- a. The financial needs of both parties;
- b. The reasonableness of each party's expenses;

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FILED DISTRICT COURT
Third Judicial District
OCT 18 1994
By Shall
SALT LAKE COUNTY
Deputy Clerk

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

GLEN P. WILLEY,)	
Plaintiff,	)	PRETRIAL ORDER
vs.)	
ROSALIND ANN JOHNSON WILLEY,)	Civil No. 91 490 0101 DA
Defendant.)	Judge David S. Young Commissioner Michael S. Evans

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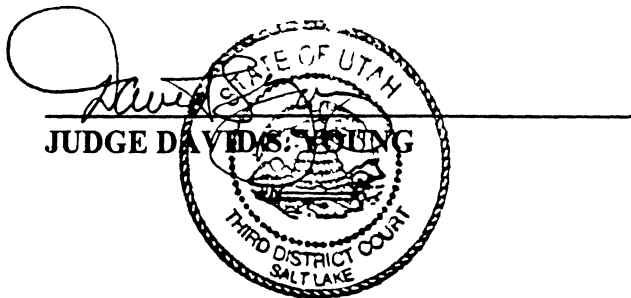
- a. The financial needs of both parties;
- b. The reasonableness of each party's expenses;

000952

- (iii) Plaintiff.
- e. Defendant will call the following witnesses:
 - (i) The parties;
 - (ii) Defendant's attorney;
 - (iii) Rebuttal vocational expert, if necessary; and
 - (iv) Roxanne Hanson.

DATED this 18th day of October, 1994.

BY THE COURT:



KRUSE, LANDA & MAYCOCK, L.L.C.
Eighth Floor, Bank One Tower
50 West Broadway
Salt Lake City, Utah 84101

By Ellen Maycock
ELLEN MAYCOCK
Attorneys for Plaintiff

(iii) Plaintiff.

e. Defendant will call the following witnesses:

(i) The parties;

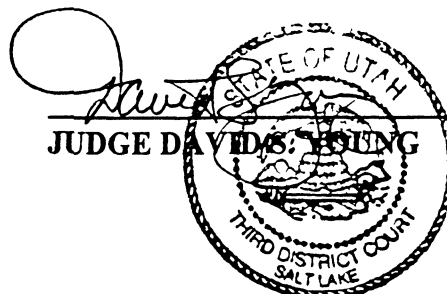
(ii) Defendant's attorney;

(iii) Rebuttal vocational expert, if necessary; and


(iv) Roxanne Hanson.

DATED this 18th day of October, 1994.

BY THE COURT:



KRUSE, LANDA & MAYCOCK, L.L.C.
Eighth Floor, Bank One Tower
50 West Broadway
Salt Lake City, Utah 84101

By 
ELLEN MAYCOCK
Attorneys for Plaintiff

Tab 7

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

GLEN P. WILLEY,	:	MEMORANDUM DECISION
Plaintiff,	:	CASE NO. 914900101
vs.	:	
ROSALIND ANN JOHNSON WILLEY,	:	
Defendant.	:	

FILED DISTRICT COURT
Third Judicial District
JAN 31 1995
By *[Signature]*
SALT LAKE COUNTY
Deputy Clerk

The above-entitled matter came on for hearing after remand from the Court of Appeals the 17th day of November, 1994, pursuant to Notice. The plaintiff was present and represented by his attorney Ellen Maycock, the defendant was present and represented by her attorney Roger D. Sandack.

On remand from the Utah Court of Appeals, (Willey v. Willey, 866 P2d 547 [Utah App. 1993]) the trial court was asked to make findings with respect to the following:

1. The reasonable financial needs of the parties.
2. The division of the parties' debt as it affects the award of alimony.
3. The imputation of income to the defendant.
4. The ability of each party to pay the defendant's attorney's fees.

5. The reasonableness of those fees.

A Brief History of the Case

The Parties separated in November of 1990 and the Plaintiff (husband) filed for divorce January 8, 1991. Both parties had been previously married and the defendant had children who were supported, in part, by the plaintiff during the marriage. The parties were married to each other on the 29th of April, 1982. No children were born as issue of this marriage. The parties at the time of separation had lived together for eight and one-half years. The original case was tried November 21-22, 1991. The Decree of Divorce was entered January 14, 1992. The defendant appealed the Trial Court's decision. The Court of Appeals "reverse(d) and remand(ed) the court's rulings on alimony and the award of attorney fees" and also requested the trial court to "reconsider" the division of property as it would effect the issues of alimony and fees. The Appeals Court remanded the case for the entry of findings on "... (1) the award of alimony, (2) the allocation of debt, and (3) the award of attorneys fees at trial and on appeal." The case was "otherwise affirm(ed.)"

This court asked Counsel to list the issues they thought should be reviewed and they provided five (5) areas as discussed hereafter.

Facts and Ruling on Remand

1. The reasonable financial needs of the parties.

Defendant submitted exhibit 36-D as a summary of both parties' monthly expenses. The court finds that the parties' reasonable monthly expenditures are as stated hereafter.

<u>ITEM</u>	<u>G. PAUL WILLEY</u>		<u>ROSALIND WILLEY</u>
Rent.....	\$610.00	.....	\$610.00
Food.....	246.83	.....	246.83
Auto Insurance...	83.00	.....	83.00
Apartment Ins....	7.50	.....	7.50
Incidentals.....	200.00	.....	200.00
Dry Cleaning.....	21.00	.....	21.00
Auto payments....	793.00	.....	381.83
Gas & Maint.....	163.37	.....	163.37
Utilities.....	40.00	.....	40.00
Telephone.....	48.30	.....	40.45
Entertainment....	75.00	.....	75.00
Unreimbursed med/dent..	-0-	.....	660.00
Counseling.....	60.00	.....	60.00
Newspaper & Sub..	19.43	.....	19.43
Pet Care.....	-0-	.....	30.00

Housecleaning....	<u>40.00</u>	.....	<u>40.00</u>
TOTALS.....	\$2,463.16	.....	\$2,678.41

The figures above were initially prepared by and presented by the Plaintiff. Thereafter the defendant simply adopted the plaintiff's expenses as hers with minor adjustments. This method is not to be preferred as it does not require the defendant to critically analyze her reasonable expenses and present them to the court. However, under the circumstances, the court has no other choice than to accept them with the following comment.

The court finds these expenses to be "reasonable" but notes that both parties have high automobile expenses and the defendant's medical expenses surely must not be a monthly ongoing amount of \$660.00 per month. The record shows the defendant had major surgery in the fall of 1991 but nothing is reflected as to why the ongoing expenses would continue on a monthly basis.

The court concludes that each party, in order to maintain a standard of living consistent with both the expectations during marriage and the financial circumstances of the parties should incur reasonable monthly living expenses of \$2,000.00. This number is arrived at for the defendant by reducing the monthly medical bills to \$60.00 and reducing the automobile expense by \$80.00 per month. The plaintiff's automobile expenses can be similarly adjusted down to reach the figure of \$2,000.00 per

month for him.

2. Division of the parties debts as it affects the award of alimony.

The focus of the review of debts was to be to examine how payment of those debts would affect the ability of the Plaintiff to render alimony and of the defendant to earn sufficient income to pay a share of the debts.

At the time of the divorce (though the parties lived otherwise due to expenditures beyond their income and beyond their cash flow) the parties had virtually no net worth. The home was represented at trial as an asset with a presumed equity. This was not found to be true through the experience of sale. The parties, after separation needed to sell the home. While the defendant states that she was interested in the speedy sale of the home, the record seems to belie that assertion.

On July 17, 1992 Presiding Judge Michael Murphy held an emergency hearing regarding the sale of the home. The Judge concluded that the home was listed too high at \$350,000.00. After hearing the testimony of Ms. Sue Christensen of The Ramsey Group Judge Murphy concluded that, "...the parties could not reasonably expect to receive a gross sales price greater than \$330,000.00 and the house may sell for \$300,000.00."

Due to the conflicts between the parties in arriving at an agreed sales price, Judge Murphy ordered, "Ms. Christensen is authorized to accept a price as low as \$300,000.00 if, in her discretion and judgment, that is the best price she reasonably believes she can currently obtain for the house."

At the time of trial in November of 1991, the home had a first mortgage of approximately \$232,000.00 and a second mortgage of approximately \$80,000.00. During the period of separation, the amount paid on the second mortgage, which was owed to the defendant's mother, was not able to be paid to her but was paid instead in temporary support to the defendant. The unpaid amount continued to accrue interest and was paid to the defendant's mother upon sale of the home.

The parties now acknowledge that the home sold October 5, 1992. After paying the mortgages and the costs of sale, a deficiency on the home remained in the amount of \$28,113.71 of which, due to the date of sale and the language of the Decree of Divorce, each party was obligated for \$14,056.86. The plaintiff has paid the entire amount.

In addition to the deficiency on the home there remained a credit line to First Interstate Bank. Each party was obligated to pay one-half of the balance of \$9,568.00. The entire amount was liquidated by the plaintiff requiring him to pay \$4,784.00

for the defendant.

At this time, the plaintiff has paid on the defendant's behalf, \$14,056.86 for the mortgage deficiency and \$4,784.00 for the First Interstate Bank balance. These combined amount to \$18,840.86. It is the court's further understanding that no marital debts remain unpaid. The plaintiff has satisfied them all. During the entire period of separation, the plaintiff paid the monthly mortgage payments of \$2,485.55 which for some 11 months until sale amounted to \$27,341.05. All of that amount was lost (except for the interest expense benefit) in the sale which resulted the deficiency of \$28,113.71.

Substantial sums have now been paid by the plaintiff to liquidate the family obligations and the court finds that it is reasonable to deny any further repayment by the defendant to the plaintiff. The defendant is thus awarded \$18,840.86 in value.

At the present time, it does not appear that the division of debts has a continuing bearing on the issue of alimony.

3. The imputation of income to the defendant.

At the time of trial, the plaintiff was employed as a stock broker. The Court made findings that his income over the relevant period of time yielded an average of \$110,000 per year. The defendant worked part time in a book store.

The defendant, in addition to being a part time book store salesperson, conducted literature discussion groups for additional income. She was paid \$5.00 per hour for her work in sales, and received varying amounts of income, depending upon the number of persons who attended the discussion groups. The defendant's employer was unable to employ her "full-time," and the defendant took no steps during the parties' separation to obtain alternative employment or to enhance her employability through education. Indeed, since the parties separation in 1991 to the present time she remains in the same employment and without having made any further effort to seek rehabilitative education in order to enhance her employment skills or opportunities.

Prior to the parties' marriage, the defendant worked in retail clothing sales at Nordstroms Department Store. Shortly after marriage she terminated her full-time employment and began to pursue actively her literary interests. This decision caused great stress in the parties' relationship. The plaintiff continually requested that the defendant continue her education, and/or return to work which she refused to do.

The defendant's income for the years 1982 through 1991 as contained in defendant's Exhibit 34-D, showed an average annual income of \$4,135.75. Her income in 1991 was \$6,287.00.

At the hearing, Ms. Connie Romboy was called as a career guidance counselor to provide information as to the employability of the defendant.

Ms. Romboy's test evaluations indicated that Ms. Willey enjoys superior learning potential, and ranked in the 95th percentile, compared to persons of her own age. She further found that she was well-adjusted and stable in her personality factors. Her scores indicated skills in management, teaching and social services. Ms. Romboy testified that Ms. Willey's vocational barriers were precisely the same now as existed in November of 1991. Ms. Romboy's report indicates that had Ms. Willey chosen to quit her job at the book store and look for other work, she could have obtained work with her then existing skills in employment, carrying a low income of \$4.25 per hour as a sales clerk, to a high of \$6.17 as a customer service representative. The average of the rates suggested is \$5.32 per hour, and over the three intervening years, a 3.5% annual increase could reasonably have been expected. Thus, the present earning capacity of Ms. Willey should be \$5.90 per hour, or \$12,325.08 per annum, or \$1,027.09 per month. This earning would be so if Ms. Willey had not pursued further education which she did not do. Ms. Willey is thus imputed to have earnings of \$11,108.16 for 1991; \$11,496.95 for 1992; \$11,889.34 for 1993;

and, \$12,315.82 if working full time.

After trial, the defendant received \$1,500 per month alimony for one year from January 1992 to January 1993. Thereafter she received \$1,000 per month for three years or until January 1996.

Thus the schedule of monthly income imputed to the defendant for each of the years in question is as follows:

<u>Year</u>	<u>Earnings</u>	<u>Alimony</u>	<u>Total</u>
1992	\$ 958.08	\$1,500.00	\$2,458.08
1993	991.61	1,000.00	1,991.61
1994	1,026.32	1,000.00	2,026.32
1995	1,062.24	1,000.00	2,062.24

Had Ms. Willey pursued her education, she would have enhanced her earning capacities within one year as a school teacher, to \$6.70 per hour; and, within two years to somewhere between \$9.58 and \$12.41 per hour, had she sought education to become either a marketing expert or social worker.

Ms. Willey expressed no interest in becoming a school teacher, and since it would not provide as much earning potential as the other alternatives, the Court would find it reasonable for her to have anticipated pursuing education for two years in order to qualify for a higher paying job. She apparently has chosen neither educational option to date.

The court thus concludes that, consistent with the testimony

of Ms. Romboy, Ms. Willey's imputed income today should be \$5.90 per hour or \$12,315.82 per annum.

4. The ability of each party to pay the marital debts and the defendant's attorney's fees.

For the purposes of this analysis, the plaintiff at trial was determined to earn \$110,000.00 per year. The defendant is imputed to have earnings of \$12,315.82 if working full time.

Each party received a lump sum of \$6,562.39 representing one-half of the plaintiff's 1992 employment bonus.

Had Ms. Willey pursued her education immediately upon separation, she could have earned in 1994 as a school teacher \$1,165.80 per month, and in 1995 and thereafter as a marketing expert or social worker \$1,913.13 per month.

The defendant retained all the furniture, furnishings and fixtures not conveyed on sale, and other incidental personal property in the way of household supplies, kitchenware, and tools etc., from the party's home. These were retained without lien or encumbrance.

The Plaintiff was awarded eight (8) specifically named items of personal property of an unknown dollar value. The court ignores the value of this division of personal property in considering either parties ability to pay for the marital debts

or attorney's fees.

At this time, only the plaintiff is able to pay toward marital debts due to his higher income and the fact that the defendant has not sought to improve her income through either efforts in employment or improved education and skills.

5. The reasonableness of those fees.

The attorney's fees in this case constitute a matter of considerable concern to the court. The court is well aware that a broader discretionary award of reimbursement in fees is allowed in domestic cases over other civil cases. (see Peterson v. Peterson, 818 P2d 1305 [Utah App. 1991]) The policy makes considerable sense since the trial courts are charged with making equitable divisions of property when marriages fail and likewise courts should make equitable assessments of financial responsibility for payment of attorneys fees.

A great problem is encountered when the fees are greatly out of proportion to the marital estate and the present and future financial circumstances of the parties.

In this case, we have a plaintiff with considerable earnings potential. We have a defendant with remarkable skills (95th percentile of her age group) and yet having little history of employment and apparently little desire to seek to maximize her

earnings potential through education or other training.

In examining the legal work, the court notes that the District Court's file is now contained in two (2) large volumes. The docket alone shows entries amounting to seven (7) pages of docket entries describing pleadings and filing activity; and, in addition, the parties have been to court or had hearings set sixteen (16) different times. This activity includes only the District Court and not the Court of Appeals.

One may ask if this case contained unusual or particular issues of law that may not have otherwise been considered at trial or on appeal? Throughout the initial proceeding and on appeal, the defendant argued that the plaintiff had a continuing obligation to pay support for her children of a prior marriage. That matter was rejected by the Trial Court and by the Appeals Court. The defendant did however, prevail on issues as to the adequacy of the findings of fact before the trial court. This hearing was therefore necessitated on remand.

This court may further consider the "difficulty of the litigation, the efficiency of the attorneys, the reasonableness of the number of hours spent on the case, the fee customarily charged in the locality, the amount involved in the case, the result attained, and the expertise and experience of the attorneys involved." (Bell v. Bell, 810 P2d. 489 at p 493-4)

In applying these factors, the court finds that this case was not and should not have been particularly difficult. It was a relatively routine divorce of a couple with extreme financial difficulties and disagreements on how to manage their income and expenses.

The attorneys efficiency in handling the case was not good. The defendant's attorney requested trial fees of \$19,215.00. The present affidavit shows 240.1 hours at a billing rate of \$150.00 per hour which results in a fee of \$36,015.00. I recognize that for some of the hours in the present affidavit, defendant's counsel is not requesting payment, however, he is requesting payment for 101 hours for \$15,150.00 with additional costs of \$1,539.38 for a total of \$16,689.38. This amount is presumably in addition to the \$5,000.00 paid after the initial trial.

The reasonableness of the number of hours seems excessive and beyond a reasonable evaluation of the case.

The rate of \$150.00 per hour for the experience of defendant's counsel is high but within reasonable rates.

The amount involved in the case, considering the marital estate, can in no wise justify the fees incurred. The parties net worth approached zero. The only meaningful asset was the plaintiff's earning capacity which he had before the marriage and

obviously brought into the marriage.

The result attained leads one to conclude that since the matter was sent back on appeal for further findings that, in that respect, the defendant prevailed. However, the entire financial condition of the parties cannot justify combined attorneys fees in excess of \$65,000.00 with little or no marital property remaining.

Thus the court finds the fees are not reasonable and are not appropriate as a measure of this case.

Ruling at the Conclusion of the Remand

Based upon the forgoing findings, the court rules as follows:

1. The reasonable financial need of the parties for monthly income is \$2,000.00 each.
2. The division of the parties debt is not to be further reconsidered. The debt paid by the plaintiff shall remain as paid and the plaintiff's claim for contribution from the defendant is barred. Thus the amount of \$18,840.86 shall remain as now paid and the defendant shall be discharged therefrom.
3. The imputation of income to the defendant shall remain in the annual amount of \$12,315.82. Had the defendant pursued promptly either of the educational directions presented by Ms.

Romboy she would be earning between \$16,500 and \$23,800.00 at this time.

4. The court finds that the ability of the defendant to pay attorneys fees is minimal. On that basis, and viewing the case as it now stands, (rather than as we all wish it were,) the court orders the plaintiff to pay an additional amount to the defendant for attorney's fees of \$10,000.00. This combined with the prior amount shall mean that the plaintiff shall pay to the defendant the total amount of \$15,000.00 toward her attorney's fees. The Court feels that this is an equitable amount considering the incomes of the parties and the other matters discussed above. Of course, the Court recognizes that each party is responsible for the payment of fees incurred independent of this award.

5. The court finds the reasonableness of the fees to be out of line with the true value of the case and with the parties ability to pay. This case should have been viewed more objectively early on and the parties and their attorneys should not have allowed the case to arrive at this point with combined attorney's fees in excess of \$65,000.00.

6. One final matter shall be dealt with and that is the alimony and the concept of "rehabilitative alimony."

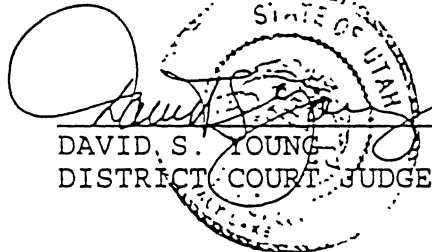
The Alimony shall not be increased due to the substantial

payments of marital debt the plaintiff has already paid.

Naturally, it would be better for the defendant to enhance her skills through obtaining further education. Even though she has had opportunities during and after the marriage to do so, she has not chosen to pursue those opportunities to date. To assist her in that respect, should she desire to do so, the court orders the plaintiff to pay tuition and books for a period of nine (9) quarters at the University of Utah or some comparable university. This option must be completed within five (5) years of this date. While a fully matriculated student, the plaintiff shall pay \$500.00 per month as additional alimony for financial assistance.

Ms. Maycock is requested to prepare findings and an order consistent herewith and with the record at trial and on remand.

Dated this 31st day of January 1995.


DAVID S. YOUNG
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of
the foregoing Memorandum Decision, to the following, this 31st
day of January, 1995:

Ellen Maycock
Attorney for Plaintiff
50 W. Broadway, 8th Floor
Salt Lake City, Utah 84101-2034

Roger D. Sandack
Attorney for Defendant
170 S. Main, Suite 400
Salt Lake City, Utah 84101

J. Kendall

Tab 8

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Porter

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

GLEN P. WILLEY,)	
Plaintiff,	)	FINDINGS OF FACT AND
	)	CONCLUSIONS OF LAW
vs.)	
ROSALIND ANN JOHNSON WILLEY,	)	Civil No. 91 490 0101 DA
	)	Judge David S. Young
Defendant.	)	Commissioner Michael S. Evans

The above-entitled matter came before the court for hearing on November 17, 1994, pursuant to notice. The Honorable David S. Young presided. Plaintiff was present and represented by his counsel, Ellen Maycock, and defendant was present and represented by her counsel, Roger D. Sandack.

This matter was before the court on remand from the Utah Court of Appeals. The Court of Appeals held that additional findings of fact were necessary with respect to the issues of alimony and attorneys' fees, and specifically directed this court to make such findings on the following issues:

- (i) the reasonable financial needs of each of the parties;
- (ii) the division of the parties' debt as it affects the award of alimony;

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- (iii) the imputation of income to the defendant;
- (iv) the ability of each party to pay defendant's attorney's fees; and
- (v) the reasonableness of those fees.

The court was also directed to consider the award of attorney's fees on appeal.

The Court of Appeals invited this court to receive additional evidence with respect to the imputation of income to defendant and the court did hear such evidence. The court having heard the testimony of witnesses, received exhibits, and reviewed the original record of the trial of this matter which took place on November 21 and 22, 1991, now makes and enters the following:

Findings of Fact

1. The parties were married on April 29, 1982.
2. Each party has been married previously. Defendant had three children from her prior marriage.
3. No children were born as issue of the marriage.
4. The parties separated in November 1990, and plaintiff filed for divorce on January 8, 1991.
5. A decree of divorce was entered on January 14, 1992.
6. At the time of trial, defendant was employed part-time in a bookstore as a sales person and conducting literature discussion groups. She was paid \$5.00 per hour for her work as a sales person and varying amounts for conducting the discussion groups depending upon the number of persons who attended. Defendant's employer, the owner of the bookstore, testified that no full-time positions were available. Defendant considered her work at the bookstore a hobby. Despite these facts, defendant took no steps during the parties' separation to obtain other employment.

7. Prior to the marriage of the parties, defendant worked at retail clothing stores and was able to support herself in that work. At the time of trial, defendant also worked part-time at a store selling expensive clothing in trade for the clothing she received.

8. At the time of trial, plaintiff was employed as a stock broker with an average income of \$110,000 per year.

9. Since the parties' divorce, defendant has taken no steps to become employed full time or to increase her income through training or education. At the present time, defendant remains in the same employment at the bookstore and has made no effort to seek rehabilitative education in order to enhance her employment skills or opportunities to seek other employment.

10. During the parties' marriage, plaintiff continually requested that defendant continue her education and/or return to work, which she refused to do.

11. At the hearing in 1994, Ms. Connie Romboy, a qualified vocational evaluator employed by the Career Guidance Center, testified concerning the employability of the defendant and her income earning ability. Ms. Romboy's test and evaluations indicated that defendant enjoys superior learning potential and ranked in the ninety-fifth percentile compared to persons of her own age. She further found that defendant is well-adjusted and stable in her personality factors. Defendant's scores indicated skills in management, teaching, and social services. Ms. Romboy's report indicated that, had defendant chosen to quit her job in the bookstore before or at the time of trial and seek other employment, she could have obtained work with her then existing skills earning an income between \$4.25 per hour as a sales clerk and \$6.17 per hour as a customer service representative. The average of the rates is \$5.32 per hour and over the three intervening years, a 3.5% annual increase could reasonably have been expected. Accordingly, the court finds that the present earning capacity of defendant should be \$5.90 per hour or

\$12,325.08 per annum, or \$1,027.09 per month, assuming defendant did not pursue further education, which she did not.

12. The court imputes earnings to defendant of \$11,108.16 for 1991, \$11,496.95 for 1992, \$11,889.34 for 1993, and \$12,315.82 for 1994, if working full time.

13. At trial, defendant was awarded \$1,500 per month alimony for one year from November 1991 to November 1992. Thereafter, she was awarded \$1,000 per month for three years until November 1995. Accordingly, the schedule of monthly income imputed to defendant for the years in question is as follows:

<u>Year</u>	<u>Earnings</u>	<u>Alimony</u>	<u>Total</u>
1992	\$ 958.08	\$1,500.00	\$2,458.08
1993	991.61	1,000.00	1,991.61
1994	1,026.32	1,000.00	2,026.32
1995	1,062.24	1,000.00	2,062.24

In addition, plaintiff paid the mortgage payment for the parties' home through October of 1992, thus decreasing defendant's expenses for that period. In addition, defendant received \$6,562.39 as additional alimony in 1992, in that she received one-half of plaintiff's bonus.

14. Defendant has a bachelor's degree. She could enhance her earning capacities through obtaining further education, although she has chosen not to pursue those opportunities to date. For example, according to Ms. Romboy, had defendant pursued her education, she could have obtained a teaching certificate within one year and enhanced her earning capacities as a school teacher to \$6.70 per hour. Within two years, she could have enhanced her earning capacity to somewhere between \$9.58 and \$12.41 per hour, had she sought education to become either a marketing expert or social worker.

15. So that defendant may continue her education, it is reasonable for plaintiff to pay the costs of tuition and books for defendant for a period of nine quarters at the University of Utah or some comparable university, providing such education is completed within five years of January 31, 1995, to assist defendant in enhancing her earning potential.

16. Under the present circumstances, the alimony obligation of plaintiff to defendant should not be increased due in part to the substantial payment of marital debt that plaintiff has already made. However, if defendant seeks to enhance her skills through obtaining further education and becomes a fully matriculated student, the court finds that it is reasonable for plaintiff to pay to defendant \$500 per month as additional alimony for financial assistance for a maximum of nine quarters to be completed within five years following the date of this order.

17. At trial, plaintiff testified that his monthly expenses were \$2,463.16 and defendant testified that her monthly expenses were \$2,678.41.

18. The court finds plaintiff's automobile expense of \$793 per month is unreasonably high and should be reduced to \$329.84 per month.

19. The court finds that defendant's automobile expense of \$381.83 is unreasonably high and should be reduced to \$300 per month. Also, defendant's monthly unreimbursed medical/dental expenses of \$660 per month are unreasonably high and should be reduced to \$60 per month. While the record shows that defendant had major surgery in the fall of 1991, there is nothing in the record to establish why the ongoing expenses would continue on a monthly basis.

20. During the marriage, the parties maintained their standard of living by incurring debt.

21. The court finds that, in order to maintain a reasonable standard of living consistent with both the expectations during the marriage and the financial circumstances of the parties, the reasonable monthly living expenses for each party are \$2,000.

22. In addition, from the time of trial in November of 1991 through October of 1992, plaintiff paid the mortgage payment on the home where defendant was residing. Thus, her monthly expenses for that time period were reduced by \$610 per month. Thus, her monthly expenses during that time period were \$1,400 per month and she received \$1,500 per month as alimony. In addition, the court has imputed income to defendant for 1992 of \$958 per month.

23. The court finds that the alimony paid to defendant and to be paid in the future is sufficient, together with the income imputed to her, to meet her needs.

24. The court finds it reasonable that defendant would have anticipated pursuing education for two years in order to qualify for a higher paying job. If she had done so, she would now be able to meet her own financial needs.

25. After the parties' separated, there were not sufficient marital assets to adequately support the parties and it was necessary for them to sell the marital home.

26. The home was listed for sale at a selling price of \$350,000.

27. Defendant refused to consider a lower offer to purchase the marital home and an emergency hearing regarding the sale of the home was held on July 17, 1992, before Judge Michael R. Murphy because Judge Young was out of town.

28. Judge Murphy concluded that the home was listed too high at \$350,000 and, based on the testimony of Ms. Sue Christensen of the Ramsey Group, the parties should expect to sell the house for between \$300,000 and \$330,000.

29. Judge Murphy authorized Ms. Christensen to accept a price as low as \$300,000 if she reasonably believed that was the best price she could obtain for the house.

30. From the time of separation until the house sold, plaintiff paid the monthly mortgage payments of \$2,485.55. The cost to plaintiff was \$57,167.65. Plaintiff paid this entire amount as a loss.

31. The home sold on October 5, 1992. The proceeds of the sale were not adequate to pay the outstanding liens and the costs of sale. A deficiency on the home remained in the amount of \$28,113.71. Pursuant to the decree of divorce, each party was ordered to pay one-half of this debt.

32. Plaintiff paid this entire deficiency amount without reimbursement from defendant.

33. As of the time of trial, the parties owed \$9,568 to First Interstate Bank. Pursuant to the decree of divorce, each party was ordered to pay one-half of this debt.

34. Plaintiff paid the entire debt to First Interstate without reimbursement from defendant.

35. Plaintiff paid to defendant one-half of his 1992 employment bonus. She received \$6,562.39.

36. Defendant was awarded nearly all of the furniture, furnishings, and fixtures not conveyed on sale, and other incidental personal property in the way of household supplies, kitchenware, and tools from the parties' home. She received these without lien or encumbrance.

37. Plaintiff was awarded eight specifically named items of personal property of an unknown dollar value.

38. The court finds that the value of the personal property awarded to each party should not be considered in determining the parties' abilities to pay for the marital debts.

39. The court finds that based on plaintiff's higher income and the fact that defendant has not sought to improve her income through efforts to obtain alternate employment or improved education and skills, defendant is not able to pay toward the marital debts.

40. Accordingly, the court finds that given the fact that plaintiff has already paid the marital debts and given the court's findings with respect to alimony and to defendant's

reasonable needs and ability to earn income, it is reasonable that defendant be awarded the value of one-half of the amount of marital debts paid by plaintiff in the amount of \$18,840.86 and that defendant not be required to repay this amount to plaintiff.

41. With respect to the issue of the reasonableness of attorneys' fees, the court notes that the district court's file is contained in two large volumes. There are seven pages of docket entries describing pleadings and filing activity. There have been sixteen court appearances in District Court alone, in addition to the activity in the Court of Appeals.

42. With respect to unusual or particular issues of law, defendant argued that plaintiff had a continuing obligation to pay support for her children from a prior marriage. This assertion was rejected by the trial court and the Court of Appeals.

43. The most recent hearing was necessitated by defendant's challenging and prevailing on the adequacy of the findings of fact before the trial court.

44. In applying the factors to be considered in making an award of attorney's fees, the court finds that this case was not and should not have been particularly difficult. It was a relatively routine divorce of a couple with extreme financial difficulties and disagreements on how to manage their incomes and expenses.

45. The court further finds that the efficiency of the attorneys in handling the case was not good and the reasonableness of the number of hours is excessive and beyond a reasonable evaluation of the case.

46. At the time of trial, defendant's attorney requested fees of \$19,215.00. The present affidavit shows 240.1 hours at a billing rate of \$150.00 per hour which results in fees of \$36,015.00.

47. While defendant's attorney does not request payment for all recorded hours, he does request payment for 101 hours in the amount of \$15,150.00 for fees and costs of \$1,539.38

for a total of \$16,689.38. This amount is presumably in addition to the \$5,000.00 already paid by plaintiff for defendant's attorney's fees after the trial.

48. The court finds that the rate of \$150 per hour for the experience of defendant's counsel is high, but within reasonable range.

49. However, the amount of attorneys' fees charged in this case, considering the marital estate, cannot justify the fees incurred. The parties' net worth approached zero and the only meaningful asset was the plaintiff's earning capacity which he brought into the marriage. The court finds that the entire financial condition of the parties cannot justify combined attorneys' fees in excess of \$65,000, with little or no marital property remaining. Accordingly, the court finds the fees are not reasonable.

50. The ability of defendant to pay attorney's fees is minimal and the court finds it reasonable that plaintiff should pay an additional amount to defendant for attorney's fees in the amount of \$10,000. In making this award, the court has considered the fees incurred on appeal. This amount, combined with the prior amount plaintiff was ordered to pay, shall mean that plaintiff shall pay to defendant a total amount of \$15,000 towards her attorney's fees. The court finds that this is an equitable amount concerning the incomes of the parties and the other matters discussed above.

51. The court recognizes that each party is responsible for the payment of fees incurred independent of this award.

From the foregoing findings of fact, the court now makes the following:

Conclusions of Law

1. The original findings of fact, conclusions of law, and decree in this matter should be amended to delete the requirement that defendant pay one-half of the First Interstate Bank obligation and one-half of the deficiency incurred in connection with the sale of the home.

2. The alimony award of \$1,500 per month for one year from the date of trial and \$1,000 per month for three years thereafter was proper and is affirmed.

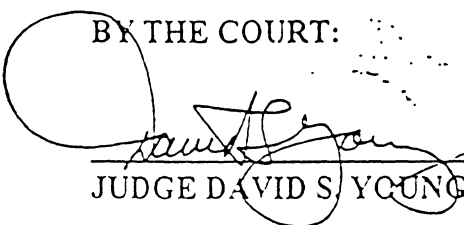
3. Plaintiff should be ordered to pay the costs of tuition and books for defendant for a period of nine quarters at the University of Utah or a comparable university, providing such education is completed within five years of January 31, 1995, to assist defendant in enhancing her earning potential.

4. Plaintiff should be ordered to pay to defendant additional alimony in the amount of \$500 per month while defendant is a fully matriculated student for a maximum of nine quarters to be completed within five years following the date of this order.

5. Plaintiff should be ordered to pay to defendant additional attorney's fees in the amount of \$10,000.

DATED this 7th day of March, 1995.

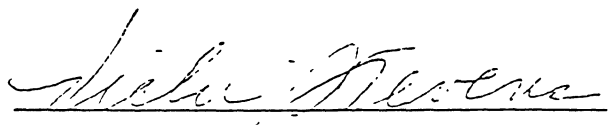
BY THE COURT:


JUDGE DAVID S. YOUNG

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW to be delivered, by hand, to the following, this 14th day of February, 1995:

Roger D. Sandack, Esq.
First Interstate Plaza, Suite 400
170 South Main Street
Salt Lake City, UT 84101



Tab 9

MAR 7 1995

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Telephone: (801) 531-7090

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

GLEN P. WILLEY,	)	2171234
Plaintiff,	)	ORDER AMENDING
vs.	)	DECREE OF DIVORCE
	)	ON REMAND
ROSALIND ANN JOHNSON WILLEY,	)	Civil No. 91 490 0101 DA 2198613
Defendant.	)	Judge David S. Young 3-8-95-802ar

The above-entitled matter came before the court for hearing on remand from the Court of Appeals on November 17, 1994. Plaintiff was present and represented by his counsel, Ellen Maycock, and defendant was present and represented by her counsel, Roger D. Sandack. The court having heard the testimony of witnesses, received exhibits, and heretofore entered its findings of fact and conclusions of law,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. Plaintiff is ordered to pay to defendant additional attorney's fees in the amount of \$10,000.

001007

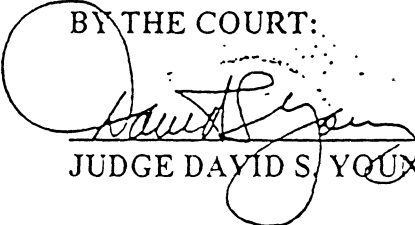
2. Defendant shall not be required to pay one-half of the First Interstate Bank obligation and one-half of the deficiency incurred in connection with the sale of the marital residence. The amount of \$18,840.86, representing defendant's original share of these obligations, shall be considered to be awarded to her.

3. In the event that defendant decides to continue her education, plaintiff is ordered to pay tuition and books for a period of nine quarters for defendant at the University of Utah or a comparable university. Defendant must complete this education within five years of January 31, 1995. In addition, during the time that defendant is a fully-matriculated student at the university, plaintiff shall pay to her \$500 per month as additional alimony.

4. Except as set forth in this order, the original findings of fact, conclusions of law, and decree of divorce entered January 14, 1992, shall remain in full force and effect.

DATED this 7th day of March, 1995.

BY THE COURT:


JUDGE DAVID S. YOUNG

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing ORDER AMENDING DECREE OF DIVORCE ON REMAND to be delivered by hand to the following, this 14th day of February, 1995:

Roger D. Sandack, Esq.
First Interstate Plaza, Suite 400
170 South Main Street
Salt Lake City, UT 84101



Tab 10

EXHIBIT __
Willey v. Willey

SUMMARY OF PARTIES' MONTHLY EXPENSES

<u>Item</u>	<u>Paul Willey</u>	<u>Ros & Family</u>	<u>Ros</u>
Rent	\$ 610.00	\$1,100.00	\$ 610.00
Food	246.83	800.00	246.83
Insurance:			
Auto	83.00	120.00	83.00
Apartment	7.50	7.50	7.50
Incidentals	200.00	500.00	200.00
Dry Cleaning	21.00	61.00	21.00
Parking	55.00	.00	.00
Auto payments	793.73	381.83	381.83
Gas Maint. & Tax	163.37	250.00	163.37
Utilities	40.00	224.00	40.00
Telephone	48.30	40.45	40.45
Entertainment	75.00	240.00	75.00
Unreimbursed Medical & Dental	.00	800.00	660.00
Personal Counseling	.00	100.00	60.00
Newspaper & subscriptions	19.43	19.43	19.43
Pet care	.00	30.00	30.00
Housecleaning	<u>40.00</u>	<u>80.00</u>	<u>40.00</u>
TOTALS	\$2,403.16	\$4,754.21	\$2,678.41