

1996

Linda Mezenen v. Kelly Mezenen : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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IN THE UTAH COURT OF APPEALS

LINDA MEZENEN,	:	
	:	
Plaintiff/Appellee/	:	
Cross Appellant,	:	BRIEF OF APPELLANT
	:	
vs.	:	
	:	
KELLY MEZENEN,	:	
	:	
Defendant/Appellant/	:	
Cross Appellee.	:	Case No. 960652
	:	
	:	Priority No. 15
	:	

APPEAL FROM THE DECREE OF DIVORCE ENTERED BY THE
THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY,
STATE OF UTAH, JUDGE FRANK G. NOEL

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FILED

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COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

LINDA MEZENEN,	:	
	:	
Plaintiff/Appellee/	:	
Cross Appellant,	:	BRIEF OF APPELLANT
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	:	
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JURISDICTION

The Utah Court of Appeals has jurisdiction to decide this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(i) (Supp. 1994).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the trial court abuse its discretion in finding that Ms. Mezenen had not cohabitated with a member of the opposite sex and that, consequently, Mr. Mezenen was not entitled to a refund of alimony previously paid under temporary orders. The trial court's decision regarding cohabitation presents a mixed question of law and fact; the appellate court will defer to the trial court's findings unless they are shown to be clearly erroneous, but will review its ultimate decision for correctness. Pendleton v. Pendleton, 918 P.2d 159 (Utah Ct.App. 1996).

2. Did the trial court abuse its discretion by allowing Ms. Mezenen to amend her Complaint to add a claim for attorney's fees during the course of the trial. The standard of appellate review is an abuse of discretion. Kasco Servs. Corp. v. Benson, 831 P.2d 86 (Utah 1992).

3. Did the trial court abuse its discretion by awarding Ms. Mezenen her attorney fees and costs. The standard of appellate review is an abuse of discretion. Wells v. Wells, 871 P.2d 1036 (Utah Ct.App. 1994).

DETERMINATIVE STATUTES

1. Utah Code Ann. § 30-3-3 (1993). See Addendum A for a complete recitation of that section.

2. Utah Code Ann. § 30-3-5 (Supp. Vol. 1995). See Addendum A for a complete recitation of that section.

STATEMENT OF THE CASE

A. Course of Proceedings.

Linda Mezenen ("Ms. Mezenen") filed for divorce on September 2, 1994, to dissolve her thirteen year marriage to Kelly Mezenen ("Mr. Mezenen"). The case was tried before Judge Frank G. Noel in the Third Judicial District Court on January 30 and 31, 1996, and May 20 and 21, 1996. The court entered its Findings of Fact and Conclusions of Law and Decree of Divorce on September 5, 1996. The Decree of Divorce provided for the following:

1. Ms. Mezenen was not awarded any alimony or marital support.

2. Mr. Mezenen was not entitled to a refund of alimony previously paid under the temporary orders, as his claim that Ms. Mezenen had engaged in cohabitation with a member of the opposite sex was denied.

3. Mr. Mezenen was awarded a lot in Duchesne, Utah, as his sole and separate property, two vehicles, various personal items, a Certificate of Deposit in the amount of \$13,000.00, all right,

title, and interest in Kelly's Excavating, LLC, the parties' marital residence on Bagpiper Circle, and one-half of personal loans due and owing to the parties.

4. Ms. Mezenen was awarded her vehicle, various personal property, a New Haven building lot acquired by the parties, \$12,700.00 as her share of the equity in the parties' marital residence, less \$5,800.00 representing Mr. Mezenen's pre-marital funds used as a down payment, one-half of personal loans due and owing to the parties, and the amount of \$64,900.00 payable from Mr. Mezenen to equalize the property award.

5. Both parties were ordered to pay all separate debts incurred since September of 1994.

6. Both parties were ordered to pay their own costs and attorney's fees; however, Mr. Mezenen was ordered to pay to Ms. Mezenen \$10,000.00 in attorney's fees and \$513.00 in costs.

On October 2, 1996, Mr. Mezenen filed his Notice of Appeal. On October 8, 1996, Ms. Mezenen filed her Notice of Cross Appeal.

B. Statement of Facts.

1. The parties began residing together in the same home in July of 1986. (Exhibit A, ¶ 3; Tr. Vol. I, p. 12; Tr. Vol. III, p. 542).

2. The parties were married in November, 1989, and divorced on September 5, 1996, a marriage of approximately seven years. (Exhibit A, ¶ 5; Tr. Vol. I, p. 22).

3. At the time of trial, Mr. Mezenen and Ms. Mezenen were both 34 years of age. (Tr. Vol. I, p. 3; Tr. Vol. II, p. 536).

4. There were no children born as the issue of the marriage. However, Ms. Mezenen has two children from previous relationships. Mr. Mezenen has one child from a prior marriage. (Exhibit A, ¶ 2; Tr. Vol. II, pp. 543-544).

5. The parties decided to form an excavation business, Kelly's Excavating, LLC, in February of 1992. The business began as a sole proprietorship, but became a limited liability company in 1994. (Exhibit A, ¶ 10; Tr. Vol. III, pp. 555, 559).

6. Ms. Mezenen worked for Sports Trax Kawasaki from 1991 to February, 1995, on both a part-time and full-time basis. She also worked a few hours a week at the parties' business, Kelly's Excavating, LLC, doing clerical work. (Exhibit A, ¶ 9; Tr. Vol. I, pp. 6-7).

7. The court found that Ms. Mezenen was engaged in a training program with Ames Construction which would allow her to provide for her own support without any alimony from Mr. Mezenen, which she did not seek in any event. Consequently, permanent

alimony was not awarded. (Exhibit A, ¶¶ 14, 15; Exhibit B, ¶ 2; Tr. Vol. I, p. 101).

8. The court effected an equitable distribution of assets, which Mr. Mezenen does not contest on this appeal. (Exhibit B, ¶¶ 6-10; Exhibit A, ¶¶ 22, 24-31, 34). The court also ordered that the parties be awarded their separate pre-marital property and property acquired since the separation with their separate funds, and that they separately assume debts incurred since their separation. (Exhibit A, ¶ 29; Exhibit B, ¶¶ 5, 6, and 13).

9. Prior to trial, Mr. Mezenen was ordered to pay Ms. Mezenen temporary alimony in the amount of \$1,200.00 per month. (Exhibit A, ¶ 16; Tr. Vol. I, p. 69; Tr. Vol. III, p. 604).

10. All such alimony payments were in fact made. (Exhibit A, ¶ 16; Tr. Vol. III, p. 604).

11. Prior to the parties' separation, Ms. Mezenen became acquainted with Mr. Robert Grumwald, who was employed by Ames Construction, and worked primarily in Nevada, Idaho, and Utah. (Tr. Vol. I, p. 112-113).

12. The court found that Mr. Grumwald and Ms. Mezenen were not cohabitating and, consequently, Mr. Mezenen was not entitled to a refund of alimony previously paid Ms. Mezenen under the temporary orders. (Exhibit A, ¶¶ 17-20); Exhibit B, ¶¶ 3-4). The court made

this finding despite the fact that, subsequent to the parties' separation, but prior to their divorce:

(a) Mr. Grumwald stayed in Ms. Mezenen's home for overnight periods. (Tr. Vol. I, p. 116);

(b) Mr. Grumwald and Ms. Mezenen traveled together outside the State of Utah, and went on camping trips within the state. (Exhibit A, ¶ 17; Tr. Vol. I, pp. 128, 117-120, 133-137);

(c) Mr. Grumwald and Ms. Mezenen engaged in sexual intercourse, when Mr. Grumwald was residing in Ms. Mezenen's home and when they traveled together. (Exhibit A, ¶ 19; Tr. Vol. I, pp. 118-119, 125);

(d) while residing with Ms. Mezenen, Mr. Grumwald purchased some groceries for the home, assisted in cooking, performed household chores, helped Ms. Mezenen's children with their homework, attended teacher's conferences with Ms. Mezenen, used the utilities, including the telephone, had free access to Ms. Mezenen's residence, and stored snowmobiles in Ms. Mezenen's garage. (Exhibit A, ¶ 19; Tr. Vol. I, pp. 123-124, 126-127); and

(f) Mr. Mezenen observed Mr. Robert Grumwald and his vehicles at Ms. Mezenen's residence, which is approximately one and one-half blocks from Mr. Mezenen's residence, on various overnight occasions in the summer of 1995. (Tr. Vol. III, p. 607).

13. Furthermore, Mr. Grumwald's twenty-two year old daughter lived with Ms. Mezenen in her residence in May and June, 1995, without paying any rent to Ms. Mezenen. (Tr. Vol. I, p. 130-131).

14. The court granted Ms. Mezenen's Motion to Amend her Complaint to add a claim for attorney's fees, despite the fact that such motion was not made until mid-trial. (Exhibit A, ¶ 21).

15. The court found that Ms. Mezenen's Motion to Amend her Complaint to add a claim for attorney's fees was proper based upon Mr. Mezenen's alleged "concealment of assets." (Exhibit A, ¶ 21).

16. The court's finding that Mr. Mezenen had concealed assets was based upon the testimony of Ms. Donna Chatwin, who previously had been involved in a relationship with Mr. Mezenen. (Exhibit A, ¶ 21).

17. The court found that the fees incurred by Ms. Mezenen's counsel in connection with his efforts to determine the assets of the business allegedly concealed by Mr. Mezenen in the sum of \$10,000.00 were "reasonable," despite the fact that the court made no specific findings regarding the reasonableness of the fees, plaintiff's need for payment of such fees, or defendant's ability to pay. (Exhibit A, ¶ 21).

18. The court also awarded Ms. Mezenen costs in the amount of \$513.00, for the deposition of Mr. Mezenen and the filing fee. Such award was also based upon Mr. Mezenen's alleged concealment of

assets, despite the fact that Ms. Mezenen did not file her Motion to Amend her Complaint until well after Mr. Mezenen's deposition had been taken. (Exhibit A, ¶ 16; Exhibit B, ¶ 21).

SUMMARY OF ARGUMENTS

The trial court clearly abused its discretion in three respects. First, the court's finding regarding cohabitation is blatantly erroneous, in light of the evidence presented, including Ms. Mezenen's own testimony. Ms. Mezenen herself testified that Mr. Grumwald spent the night in her home on a number of occasions, that the two traveled together and engaged in sexual intercourse, that he helped with household chores, shared meals, assisted with her children, and stored vehicles in her garage. This evidence is plainly sufficient to support a finding of cohabitation under Utah law. Consequently, the court was required, under U.C.A. § 30-3-5, to order a refund of alimony previously paid Ms. Mezenen during the period of cohabitation.

Second, the court clearly abused its discretion in allowing Ms. Mezenen to amend her Complaint to add a claim for attorney's fees midway through the trial. Such amendment was not only untimely, it significantly prejudiced Mr. Mezenen's right to examine Ms. Mezenen's counsel regarding such fees.

Finally, the court's award of attorney's fees and costs is improper, both as to entitlement and amount. The court made

absolutely no finding regarding Ms. Mezenen's need for such fees, Mr. Mezenen's ability to pay, or the reasonableness of the requested fees, all of which are required under Utah law. Furthermore, the court's award of costs incurred in connection with Mr. Mezenen's deposition is patently inequitable, as the deposition was completed well before Ms. Mezenen amended her complaint or raised any claim regarding concealment of assets.

ARGUMENT

I.

THE TRIAL COURT ABUSED ITS DISCRETION BY FINDING THAT MS. MEZENEN DID NOT ENGAGE IN COHABITATION, DESPITE OVERWHELMING EVIDENCE TO THE CONTRARY.

The trial court's finding that Ms. Mezenen did not engage in cohabitation is startling, and patently erroneous, in light of the evidence presented at trial regarding the details of Ms. Mezenen's relationship with Mr. Grumwald. Under applicable Utah law, the uncontroverted testimony which was presented is more than sufficient to support a finding of cohabitation; in fact, it is difficult to imagine a clearer-cut case of cohabitation. Consequently, Mr. Mezenen is entitled to a refund of alimony he previously paid under the trial court's temporary orders.

In Sigg v. Sigg, 905 P.2d 908 (Utah Ct. App. 1995), this Court set forth the standard for a finding of cohabitation under Utah Code Ann. § 30-3-5(6) (1995). The Court noted:

[i]n Utah, a party's obligation to pay alimony to a former spouse is terminated upon a showing of "cohabitation," which means the former spouse is residing with a person of the opposite sex and engaging in sexual contact with that person . . . [c]ommon residency means "the sharing of a common abode that both parties consider their principal domicile for more than a temporary or brief period of time. Sexual contact means participation in a relatively permanent sexual relationship akin to that generally existing between husband and wife."

Id. at 917 (citing Haddow v. Haddow, 707 P.2d 669, 672 (Utah 1985)).

This Court further found that, where Ms. Sigg and the alleged cohabitant possessed separate condominiums in the same condominium complex, but "had a sexual relationship, shared living expenses, had open access to each other's condominiums, ate together and shared food expenses, kept clothing in the same condominium, [and] used the same furniture" a finding of cohabitation was warranted. The Court made this finding despite the fact that Ms. Sigg contested whether or not the couple regularly shared food and living expenses, or kept food at the same condominium, noting that "the weight of the evidence supports the finding of cohabitation" Id. at 918. See Wacker v. Wacker, 668 P.2d 533 (Utah 1983) (evidence supported finding of cohabitation where

the plaintiff and cohabitant resided together and engaged in a sexual relationship, despite the plaintiff's assertions that the two were merely "sharing expenses").

In Pendleton v. Pendleton, 918 P.2d 159 (Utah Ct. App. 1996), this Court held that a finding of cohabitation was warranted on strikingly similar facts to those at hand. The alleged cohabitant stayed with Ms. Pendleton in her home "ninety percent of the time" while he was in town, despite the fact that his job required substantial travel out of state. Furthermore, he came and went at will, and ate almost all of his meals with Ms. Pendleton while he was in town. Id. at 161. Consequently, a finding of cohabitation was warranted.

Here, Ms. Mezenen's own testimony is more than sufficient to support, and frankly mandates, a finding of cohabitation. Ms. Mezenen admitted that Mr. Grumwald stayed in her home for overnight periods during 1995 when he was in the state of Utah, that the two traveled together outside the State of Utah on numerous trips which he financed, went on camping trips within the state, and engaged in sexual intercourse. Furthermore, while residing with Ms. Mezenen, Mr. Grumwald performed various household tasks obviously indicative of his position as a resident, rather than a guest. He purchased groceries on occasion and assisted with cooking and household chores. Significantly, he also helped Ms. Mezenen's children with

their homework and attended teacher's conferences with Ms. Mezenen. He used the utilities, including the telephone at will, and had free access to Ms. Mezenen's residence, where he stored snowmobiles and other vehicles. Additionally, Mr. Grumwald's daughter lived at her residence without charge for two months during 1995.

In light of the prevailing standards for a finding of cohabitation under Utah law, and the substantial uncontroverted testimony which was presented on this issue, it is difficult to understand how any finding other than a finding of cohabitation could be reached. Consequently, the trial court's finding is patently erroneous, and should be reversed.

II.

THE TRIAL COURT ERRONEOUSLY AWARDED MS. MEZENEN HER ATTORNEY'S FEES.

A. The Trial Court Erred by Granting Ms. Mezenen's Motion to Amend her Complaint to add a Claim for Attorney's Fees Mid-Trial, Despite Substantial Prejudice to Mr. Mezenen.

In her Verified Complaint for Divorce, not only did Ms. Mezenen fail to request an award of attorney's fees, she affirmatively sought an order requiring each party to bear their own fees and costs. Despite this failure to request fees, the trial court granted Ms. Mezenen's Motion, filed mid-trial, to amend her Complaint in clear deviation from prevailing standards of Utah law. Allowing Ms. Mezenen to add a new and distinct claim at such

a late date operated to substantially prejudice Mr. Mezenen's rights, particularly since his counsel did not have an opportunity to conduct any discovery or examination regarding the necessity and reasonableness of such fees.

Amendment of pleadings is governed by Utah Rule of Civil Procedure 15(a)¹. In Bekins Bar V Ranch v. Huth, 664 P.2d 455 (Utah 1983), the Supreme Court of Utah noted:

[a] primary consideration that a trial judge must take into account in determining whether leave [to amend] should be granted is whether the opposing side would be put to unavoidable prejudice by having an issue adjudicated for which he has not had time to prepare.

Id. at 464. See Ringwood v. Foreign Auto Works, Inc., 786 P.2d 1350 (Utah Ct. App. 1990) cert denied 795 P.2d 1138 (Utah 1990) (trial court must consider whether parties have adequate notice to meet new issues and whether any party receives an unfair advantage or disadvantage from a leave to amend).

In determining the propriety of a motion to amend a complaint on the eve of, or during, trial, Utah courts have uniformly held that the potential for severe prejudice to the adverse party weighs

¹ Rule 15(a) provides "[a] party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave to amend shall be freely given when justice so requires."

heavily against amendment. In Girard v. Appleby, 660 P.2d 245 (Utah 1983) the Utah Supreme Court noted that Rule 15(a) "is to be applied with less liberality when the amendments are proposed during or after trial, rather than before trial." Id. at 248. In Girard, the court found that the plaintiff's motion to amend its complaint to introduce "new and different causes of action" on the day of trial was properly denied, particularly in light of the potential disadvantage faced by defendants. Id. at 248. See Hein's Turkey Hatcheries, Inc. v. Nephi Processing Plant, Inc., 470 P.2d 257 (Utah 1970) (an amended answer presented at the commencement of trial was properly excluded); Staker v. Huntington Cleveland Irrigation Co., 664 P.2d 1188 (Utah 1983) (trial court was well within its discretion in denying defendant's motion to amend answer on the day of trial to add a new statute of limitations defense).

Here, Ms. Mezenen failed to raise any claim for attorney's fees until mid-trial. Consequently, Mr. Mezenen had no opportunity to conduct any discovery regarding the reasonableness or necessity of such fees. In fact, Mr. Mezenen had absolutely no reason to believe that any inquiry into amount or reasonableness of fees was even relevant, given the fact that Ms. Mezenen affirmatively sought an order requiring each party to bear their own fees and costs in her Complaint. Any claim of attorney's fees requires some

investigation regarding the number of hours spent on the case, the work performed, the efficiency of the attorneys involved, and other factors². The mid-trial amendment introducing this issue virtually ensured that Mr. Mezenen would be unable to conduct this discovery. He was forced to defend against a claim with no information. It is difficult to imagine a clearer showing of prejudice.

B. The Court's Order Regarding Attorney's Fees Does Not Address the Considerations Required by Utah Law

² In fact, such a claim requires investigation and consideration of factors such as the following: "(1) [w]hat legal work was actually performed?; (2) how much of the work performed was reasonably necessary to adequately prosecute the matter?; (3) is the attorneys' billing rate consistent with the rates customarily charged in the locality for similar services?; (4) are there circumstances which require consideration of additional factors, including those listed in the code of professional responsibility." Dixie State Bank v. Bracken, 764 P.2d 985, 990 (Utah 1988). Furthermore, Rule 1.5 of the Utah Rules of Professional Conduct requires consideration of:

- a. The time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly;
- b. The likelihood, if apparent to the client of the acceptance of the particular employment will preclude other employment by the lawyer;
- c. The fee customarily charged in the locality for similar legal services;
- d. The amount involved and the results obtained;
- e. The time limitations imposed by the client or by the circumstances;
- f. The nature and length of the professional relationship with the client;
- g. The experience, reputation and ability of the lawyer or lawyers performing the service; and
- h. Whether the fee is fixed or contingent.

Based upon Ms. Mezenen's mid-trial amendment of her Complaint, the trial court ordered Mr. Mezenen to pay \$10,000.00 in attorney's fees and \$513.00 in costs incurred by Ms. Mezenen, despite the fact that it made no finding whatsoever regarding Ms. Mezenen's need, Mr. Mezenen's ability to pay, or the reasonableness of the fees. This order does not conform to the requirements of Utah law, which compels consideration of such factors.

Utah Code Ann. § 30-3-3 allows a court in a divorce action to order one party to pay the attorney's fees of the other party. In Bell v. Bell, 810 P.2d 489 (Utah Ct. App. 1991), this Court listed the factors to be considered in determining the propriety of an attorney's fee award. "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." Id. at 493.

In determining the reasonableness of the requested fees, a court may 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 and the result attained, and the expertise and experience of the attorneys involved." Id. at 493-94.

Here, the court entered a fee award in Ms. Mezenen's favor based upon Mr. Mezenen's alleged concealment of assets. There are two fundamental flaws with that proposition. First, the court found that the fees incurred by Ms. Mezenen's counsel in connection with his efforts to determine "all of the assets of the business" in the sum of \$10,000.00 were "reasonable." This conclusory assertion is insufficient to support an award of fees under Utah law, which requires consideration of the reasonableness of the fees, plaintiff's need for payment of such fees, and defendant's ability to pay. The court made no findings whatsoever regarding those factors. In fact, it is impossible to discern from the court's Findings whether or not need and ability ever entered into the court's consideration; rather, it appears that the award was entered solely on the basis of Mr. Mezenen's alleged concealment of assets.

Utah appellate courts have not hesitated to reverse trial court decisions which do not properly employ consideration of these factors. In Rappleye v. Rappleye, 855 P.2d 260 (Utah Ct. App. 1993), this Court reversed an award of attorney's fees where the trial court's findings failed to demonstrate that the award was arrived at after consideration of the relevant factors. See First Sec. Servs. v. Perkins, 918 P.2d 480 (Utah Ct. App. 1996) (holding

that all factors must be given careful consideration in determination of any attorney's fee award).

The second problem with the court's award is the fact that it is based entirely upon Mr. Mezenen's alleged concealment of assets. The court based the award entirely on such alleged concealment, and awarded Ms. Mezenen costs in the amount of \$513.00, for the deposition of Mr. Mezenen and the transcript. However, Ms. Mezenen's Motion to Amend her Complaint was filed mid-trial, well after Mr. Mezenen's deposition of September 29, 1995, had been taken. The finding of concealment was based upon the trial testimony of Donna Chatwin, who previously did some work for Mr. Mezenen at his business. The trial court's award of costs and fees, then, is even more insupportable; the deposition of Mr. Mezenen was taken well before Ms. Chatwin presented her testimony, which supported the trial court's determination of alleged concealment. Any investigation on the part of Ms. Mezenen's counsel regarding alleged concealment, which was based on Ms. Chatwin's trial testimony, could not have included the deposition of Mr. Mezenen, which took place months before the trial.

In sum, the trial court's award to Ms. Mezenen of \$10,000.00 in attorney fees and \$513.00 in costs is completely insupportable. The trial court utterly failed to employ any consideration whatsoever of the factors mandated by Utah law. This failure is

grounds for reversal in itself. Furthermore, the court entered its award because of Mr. Mezenen's alleged concealment, based on Ms. Chatwin's testimony, which was not even presented until the "investigation" by Ms. Mezenen's attorney had already taken place. Consequently, the trial court's attorney's fee award should be reversed.

CONCLUSION

The trial court's decision is blatantly erroneous and insupportable in three respects. First, the court found that cohabitation during the period of temporary support had not occurred, despite overwhelming evidence to the contrary, including Ms. Mezenen's own testimony. A clearer showing of cohabitation, under Utah law, is difficult to imagine. Mr. Mezenen is entitled to a refund of alimony paid under the temporary orders.

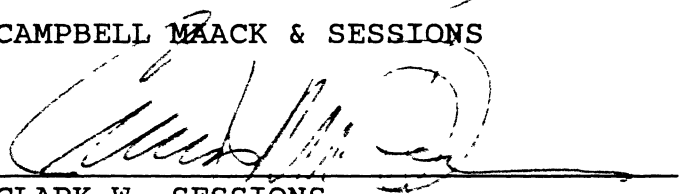
Second, the trial court improperly allowed Ms. Mezenen to amend her Complaint mid-trial, to Mr. Mezenen's significant prejudice. By allowing Ms. Mezenen to add a claim for attorney's fees at that late date, the trial court deprived Mr. Mezenen of any opportunity for reasonable investigation and examination regarding the work done, reasonableness, and necessity of the fees incurred. This is exactly the result that Rule 15(a) seeks to avoid.

Finally, the fee award contains absolutely no consideration of the factors required by Utah law. These factors are not advisory,

they are mandatory upon trial courts. By failing to consider these factors, the trial court entered an insupportable award. The trial court's Findings regarding cohabitation, amendment, attorney's fees and costs should be reversed, and Mr. Mezenen awarded his fees and costs.

DATED: July 17, 1997.

CAMPBELL ~~MAACK~~ & SESSIONS

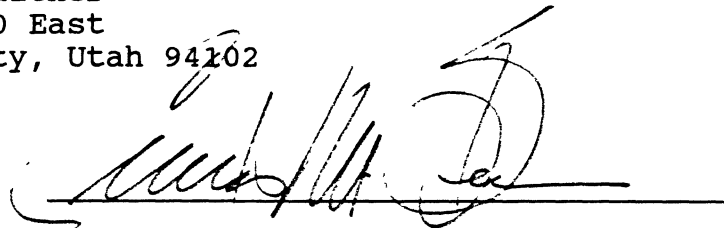
A handwritten signature in dark ink, appearing to read "Clark W. Sessions", is written over a horizontal line.

CLARK W. SESSIONS
DEAN C. ANDREASEN
KRISTINE EDDE
Attorneys for
Defendant/Appellant/Cross-Appellee
Kelly Mezenen

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of July 1997, two true and correct copies of the foregoing **BRIEF OF APPELLANT** was hand delivered to:

Randall C. Gaither
321 South 600 East
Salt Lake City, Utah 94102

A handwritten signature in black ink, appearing to read "Randall C. Gaither", is written over a horizontal line.

IN THE UTAH COURT OF APPEALS

LINDA MEZENEN,	:	
	:	
Plaintiff/Appellee/	:	
Cross Appellant,	:	BRIEF OF APPELLANT
	:	
vs.	:	
	:	
KELLY MEZENEN,	:	
	:	
Defendant/Appellant/	:	
Cross Appellee.	:	Case No. 960652
	:	
	:	Priority No. 15
	:	

ADDENDUM TO BRIEF OF APPELLANT

EXHIBIT A	-	FINDINGS OF FACT AND CONCLUSIONS OF LAW
EXHIBIT B	-	DECREE OF DIVORCE
EXHIBIT C	-	UTAH CODE ANN. § 30-3-3
		UTAH CODE ANN. § 30-3-5
EXHIBIT D	-	ORDER OF THE UTAH COURT OF APPEALS, DATED June 4, 1997

Tab A

FILED DISTRICT COURT
Third Judicial District

SEP 05 1996

CLARK W. SESSIONS (2914)
DEAN C. ANDREASEN (3981)
CAMPBELL MAACK & SESSIONS
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Telephone: (801) 537-5555

By Pat Jones
Deputy Clerk

Attorneys for Defendant

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

LINDA MEZENEN,	:	FINDINGS OF FACT
	:	AND
Plaintiff,	:	CONCLUSIONS OF LAW
	:	
v.	:	
	:	Civil No. 944903679 DA
KELLY MEZENEN,	:	
	:	Judge Frank G. Noel
Defendant.	:	

The above-entitled action came on regularly for trial pursuant to notice before the undersigned, one of the Judges of the above-entitled Court commencing on January 30, 1996 and continuing thereafter on January 31, 1996, May 20, 1996 and May 21, 1996. The Plaintiff Linda Mezenen appeared in person and by and through her attorney Randall Gaither. The Defendant Kelly Mezenen appeared in person and by and through his attorney Clark W. Sessions. The Court heard and considered the testimony of the parties, various witnesses, including expert witnesses, received and considered documentary evidence and heard the arguments and statements of counsel. The Court having fully considered the matter and having issued its Memorandum Decision on May 29, 1996 now makes the following:

FINDINGS OF FACT

1. The Court finds that the Plaintiff and Defendant were residents of Salt Lake County, State of Utah for a period in excess of three (3) months prior to the commencement of the above-entitled action.

2. The Court finds that no children were born as the issue of the marriage of the parties nor are any expected and that the parties have children from prior marriages.

3. The Court finds that the parties became acquainted with each other and moved into the same residence and used one checking account for their mutual benefit in approximately the summer of 1986 and that during that time the Plaintiff was unemployed, on public assistance and housing, and had children from a previous marriage and relationship. The Court further finds that the Defendant was employed as a mechanic and heavy equipment operator and had previous experience in the operation, maintenance and repair of automobiles and construction equipment from his early years as a teenager growing up in a farming environment in eastern Utah. Defendant had a child from a previous marriage which the plaintiff cared for during the day. At that time the Defendant moved into a residence which the Plaintiff was renting while on public housing he started to make payments out of his checking account for the rental payments which were subsidized by public housing assistance. The parties were able to save money on housing

because of the low housing payment that the Plaintiff had at that time until they purchased the Bagpiper residence.

4. The Court finds that the parties dated each other and spent time with each other both in the Roosevelt/Duchesne area and in Salt Lake County culminating in the parties' moving in together in 1989. The Court further finds that during that period, the Plaintiff was still on welfare and unemployed whereas the Defendant was employed as a heavy equipment operator on the Jordanelle Dam project in Wasatch County, State of Utah.

5. The Court finds that the parties were thereafter married on November 4, 1989 in Salt Lake County, State of Utah and resided together as husband and wife until their separation in September 1994.

6. The Court finds that the Plaintiff brought into the parties' relationship and marriage an automobile, pots, pans, cooking utensils, a couch and her personal effects and wearing apparel.

7. The Court finds that the Defendant brought into the parties' relationship a Certificate of Deposit in both parties names which he received as the result of an inheritance which appreciated to the approximate sum of \$13,000 and which is being held at First Security Bank as collateral for the purchase of certain equipment in Kelly's Excavating, LLC. The Court finds in addition that the Defendant had a house trailer which was sold, a lot in Duchesne, cash, various tools and equipment including

mechanics tools and other equipment and implements used in the construction business generally.

8. The Court finds that the parties acquired a residence and real property on Bagpiper Circle in Salt Lake County, State of Utah and that the Defendant paid from his pre-marital funds the sum of \$5,800.00 as part of the down payment for the marital residence which the Court finds should be returned to the Defendant.

9. The Court finds that during the course of the parties' marriage, the Plaintiff worked at various part-time jobs including Sports Trax, the manufacture and sale of various handicraft works and Kelly's Excavating, LLC a few hours per week doing principally clerical and accounting work. The Court further finds that since the parties' separation in the fall of 1994, Plaintiff has had virtually no contact with Kelly's Excavating, LLC and that her duties and responsibilities were assumed and discharged during that period by the Defendant based upon Court order that stated "The Defendant is permitted to operate the business jointly owned by the parties as he has done historically. The Defendant shall not dispose of any asset of the business other than in the ordinary course of business without court order or the consent of the Plaintiff."

10. The Court finds that during 1992, the Defendant and Plaintiff, jointly determined to form an excavation business which they started as a sole proprietorship but which was later converted to a Utah limited liability company and further that each of the

parties owned a fifty percent (50%) interest in that business. Additionally, the Court finds that the business of Kelly's Excavating, LLC since its inception has grown significantly and in particular that the business has acquired various vehicles, construction equipment, inventory, tools and equipment, all as detailed on Defendant's exhibits offered through Defendant's expert Merrill Norman, principally Exhibit D-18.

11. The Court finds that the Defendant was and is responsible for securing customers for Kelly's Excavating, LLC, negotiating construction contracts, negotiating financing arrangements with various lenders, that no advertising of the business has been undertaken and specifically that there is no telephone listing, telephone book or similar advertising and that the business is dependent upon the Defendant and his construction skills and expertise for its successful operations. The Court finds in addition that the Defendant works 12 to 14 hours per day, most often for a period of seven days each week and that when weather impacts excavation, the Defendant works in maintaining and repairing business equipment and vehicles which the Court finds are adequately maintained.

12. The Court finds that Kelly's Excavating, LLC conducts its business principally from the residence of the Defendant and an adjacent shop as well as a vacant lot known as the Bagley property on which is located a storage trailer, inventory, parts and equipment that belong to the business. Further, the Court finds

that no charges were made by the Defendant to the business for the use of heat, electricity and other utilities of the Defendant which were used by the business.

13. The Court finds that in the forepart of 1994, the business paid the Defendant \$2,000.00 per month as and for wages and salary and that in order for the Plaintiff to have sufficient earnings to enable her to claim her children as exemptions and deductions for income tax purposes, there was a shift of the \$2,000.00 per month salary to the Plaintiff and the Defendant received no direct salary from the business thereafter based upon the temporary order of the court which permitted the Defendant a draw and the Plaintiff \$1,200.00 in alimony in lieu of the draw which she requested.

14. The Court finds that during the latter part of 1995, the Defendant made the decision to close the business of Kelly's Excavating, LLC and to become employed in the construction industry for others and further that he could earn from such employment \$18.00 to \$24.00 per hour plus benefits, including life and health insurance, which benefits Defendant did not receive through Kelly's Excavating, LLC. The Court finds in addition that given the duties and responsibilities of the Defendant in the operation of the business, and his experience, a reasonable salary for the Defendant would approximate \$72,000 per year.

15. The Court finds that the Plaintiff is currently engaged in a training program with Ames Construction that she is able to

provide for her own support and maintenance without contribution from the Defendant and that she seeks no alimony or other marital support from him. The Court finds in addition, that the expectation of the Plaintiff upon completion of her training program is that she will receive a fairly significant pay increase at her new job and position. In addition, the Court finds that each of the parties are in good health and suffer from no physical or mental impairment that would prevent them from earning a living.

16. The Court finds that the Defendant was ordered to pay to the Plaintiff as and for alimony on a temporary basis the sum of \$1,200.00 per month and that certain of the alimony payments were made directly by Kelly's Excavating, LLC which the parties' accounting experts adjusted. The Court further finds that the Defendant is current in his alimony payments through the date of trial and that the parties agreed in the Fall of 1995 that the Defendant could increase his salary from the business to \$4,000.00 per month in consideration of which the business would continue at least through trial.

17. The Court finds that in approximately December of 1994, the Plaintiff became acquainted with one Robert Grumwald and that during the period January 1995 through the commencement of trial, the Plaintiff traveled to the midwest with Mr. Grumwald on at least two occasions, once together and once with the Plaintiff and her family for the purpose of meeting Mr. Grumwald's family; that Mr. Grumwald paid for the transportation costs of the Plaintiff and her

family as well as lodging and meals during those trips and further that those parties engaged in sexual intercourse while on those trips. The Plaintiff, Linda Mezenen, prior to meeting Mr. Grumwald had purchased in her own name a separate residence where she has been living with her daughter from a previous marriage and which is located within one block of the Defendant's residence. Tiffany Anderson has been renting the spare bedroom from time to time in the residence. Mr. Grumwald at no time moved any of his personal effects, clothing or possessions into any of the bedrooms located in the residence and the only personal property that was stored at the residence was some snowmobiles in the Plaintiff's garage for a short period of time until Mr. Grumwald could find a location to store the snowmobiles. Mr. Grumwald was working most of the time in 1994 and 1995 out of the State of Utah and during the periods of time he was staying in the state of Utah, he rented motel rooms and used the motel as his residence during the times he was in the State of Utah. Mr. Grumwald had a permanent residence in another State for which all of his mail and other correspondence was mailed and at not time did he ever use the Plaintiff's residence as his legal mailing address.

18. The Court finds that the Defendant and Mr. Grumwald traveled on vacations during 1995, principally for fishing and camping activities which were funded by Mr. Grumwald and during which vacation periods those parties had sexual intercourse. The Plaintiff testified that during 1995 she had gone on vacations with

other male friends and had dated other persons other than Mr. Grumwald. The Court finds that Mr. Grumwald did maintain a residence in the State of Utah outside of Plaintiff's residence, and according to the undisputed testimony only stayed at the Plaintiff's residence for possibly one evening over one night on sporadic occasions. During periods of time when Mr. Grumwald was out-of-state and residing out-of-state, the Plaintiff had allowed Mr. Grumwald to park and store his vehicle at her residence and observations of the vehicle by neighbors or employees of the Defendant do not mean that Mr. Grumwald was staying as a guest with the Plaintiff.

19. The Court finds that Mr. Grumwald did not maintain a permanent residence in the State of Utah, but that while he was here working for Ames Construction Company, on occasion while there as a guest, he used the telephone and utilities without paying any of the expenses for occasional use, assisted the Plaintiff's children with their homework, parked his vehicles there on overnight occasions, engaged in sexual intercourse with the Plaintiff on numerous occasions throughout the calendar year 1995 and to the date of trial and was observed both inside the Plaintiff's residence and outside working in the yard and in the Plaintiff's garage on numerous occasions by the Defendant, his employees and others who resided in and around the neighborhood where Plaintiff's residence was located and that in his job he traveled out of state extensively, principally in Idaho and Nevada.

20. The Court finds that the claim of the Defendant for termination of and reimbursement to him of alimony for that period on grounds of cohabitation should be denied, the Court specifically finding that the Defendant has failed to prove by a preponderance of the evidence that Plaintiff has resided with a person of the opposite sex since the date of the parties' separation and that the Plaintiff was paid directly out of the profits of the business and not by the Defendant. Further this was the only benefit received by the Plaintiff from the business during separation from her 50% ownership interest in the business.

21. The Court finds and the record will reflect that the Plaintiff filed during the course of the trial a motion to amend Plaintiff's Complaint to include a claim for attorney's fees on the various grounds including concealment of assets from the Court supported by a detailed breakdown of legal fees in Exhibit 38, the Court finds that the amendment is proper and should be granted. The Defendant has withheld assets from consideration of the Court by not cashing certain checks, but by placing them in a file or drawer to be cashed after the divorce became final, the Court noting however, that it is difficult due to the nature of the conduct to determine the amount involved; the Court finds that the rates and fees charged by Plaintiff's counsel in connection with his effort to determine all of the assets of the business and the difficulty in doing so by reason of Defendant's conduct, it is fair and reasonable and that the Court should order Defendant to pay to

the Plaintiff as and for attorney's fees the sum of \$10,000.00 and costs of \$90.00 for the transcript; \$398.00 for the deposition of the Defendant and the filing fee. Evidence was introduced from several witnesses discovered and called by the Plaintiff that the Defendant was hiding or concealing assets. Donna Chatwin testified that she operated heavy equipment for Kelly's Excavating, LLC for periods of time in May through August 1995 and November 1995 through January 1996 without pay. During this period of time she was never listed as an employee although she identified projects she would be working without Mr. Mezenen ever being present. She testified that Mr. Mezenen ordered an employee to move property to the garage at her residence from Kelly's Excavating, LLC on the night before the appraisal was to take place for the purpose of the Court hearing. She indicated that Mr. Mezenen told her that he hid the property in her garage because he did not want the appraiser to see the property. She testified that there was a substantial amount of property which filled her 3-car garage. She also testified that there were uncashed checks which she saw in the file drawer of Kelly's Excavating, LLC and that Mr. Mezenen said that he was going to use in the future to pay off any divorce settlement with Linda Mezenen. Donna Chatwin testified that she worked on a project and that when a check was made out to Kelly's Excavating, LLC, Mr. Mezenen told her to tear up the check and to obtain another check which evidence was supported by the person that wrote the check. Mr. Mezenen admitted that he did receive a check for a

specific project and that the check was turned over to Gary Fielding without being accounted for in the books and records of the business. Donna Chatwin testified that there were invoices for projects upon which she worked that did not coincide with the date on which she recalled working the projects. Donna Chatwin identified a job for Mary Williams for which heavy equipment had to be moved from Provo, Utah at company expense for digging footings and other work which the Defendant failed to report on the accounting information required by Court Order. The Defendant, Kelly Mezenen, admitted that the amount of the project of approximately \$1,000.00 was converted to an alleged verbal trade which was never disclosed to any of the accountants preparing the books and records for Court and only revealed upon cross-examination during the trial. The Defendant wrote off an account receivable from Tom Biesinger as a bad debt without reporting to any person until discovered during trial that he had taken a camp trailer in trade for the account receivable which he falsely reported during trial as an uncollectible.

22. The Court finds after extensive consideration of the testimony offered by Plaintiff's expert Robin Baster and Defendant's expert Merrill Norman with respect to the valuation of the business of Kelly's Excavating, LLC that while Mr. Baster indicated the outside limit of the value of the business to be in the neighborhood of \$440,000, he offered no opinion as to its actual fair market value at the time of trial. The Court finds on

the other hand, that Mr. Norman determined the value of the business to be approximately \$112,000, which testimony the Court finds is more credible and has a more sound basis in the facts of this case and as such the Court finds the business of Kelly's Excavating, LLC has a value of \$112,000, and further that all of the assets of the business as found by Mr. Norman to be a part of the business and should be awarded to the Defendant as his sole and separate property without claim from the Plaintiff.

23. The Court finds and the files and records herein will reflect that the plaintiff seeks reimbursement for one-half of all net income shown on the books and records of the business since the parties' separation in September of 1994, less the amount that she has received in temporary alimony. With respect to Plaintiff's claim, the Court finds there is no cash fund from which the calculated undistributed profits could be paid to the Plaintiff and that if any cash exists in the company or accounts receivable, such was included as a basis for Mr. Norman's calculation of the worth of the business. The Court further finds that the evidence is established that all monies that have been withdrawn from the company since the date of separation of the parties is accounted for either in draws which the Defendant has received and which represent a reasonable salary or in amounts paid to the Plaintiff as alimony. As such, the Court finds that there are no undistributed net profits to which the Plaintiff would be entitled and her claim therefore should be denied.

24. The Court finds that prior to the marriage of the parties, and by their stipulation, a lot in Duchesne, Utah claimed by the Defendant is his pre-marital property and should be awarded to him as his sole and separate property without claim from the Plaintiff.

25. The Court finds that since the parties' marriage, they acquired a lot known as the New Haven Lot with a fair market value of \$19,000 which should be awarded to the Plaintiff as her sole and separate property without claim from the Defendant and the Defendant be required to pay any obligation to his parents.

26. The Court finds that the parties acquired a lot known as the Bagley lot which is included in the assets of Kelly's Excavating, LLC to be awarded to the Defendant as his sole and separate property and as such the Plaintiff's claim thereto should be denied.

27. The Court finds that the parties maintained a safe in their marital residence and that during the course of their marriage, various amounts of cash were placed into and withdrawn from the safe. While the evidence on the amount in the safe at various times was in dispute, the Court finds that at the time of the separation of the parties, there was approximately \$19,000 in the parties safe which was accumulated during the marriage by buying and selling property and savings. The Court finds in addition, that said amount has been substantially used by the

Defendant and therefore awards that sum and amount to him as his sole and separate property without claim from the Plaintiff.

28. The Court finds that during the parties' association and subsequent marriage, they acquired a residence and real property on Bagpiper Circle in Salt Lake County and completed remodeling and repairs to that property including the construction of a shop adjacent thereto from which the business of Kelly's Excavating, LLC is conducted. The Court further finds that the parties stipulated as to the equity in that property and the payment to the Plaintiff of her portion thereof. Specifically, the Court finds that the Defendant paid \$5,800 of pre-marital funds as a down payment on the Bagpiper residence which should be returned to him and that the Defendant should pay to the Plaintiff \$12,700 as her share of the balance of the equity in the Bagpiper residence. As per the parties' stipulation, her equity calculated at \$12,700, less \$5,800 or a net equity of \$6,900 should be paid by the Defendant to the Plaintiff within ninety (90) days following the entry of the Decree of Divorce herein.

29. The Court finds that the parties had pre-marital property or property acquired by them since their separation with their separate funds and awards such property as follows:

a. To the Plaintiff: The vehicle she is currently driving and a couch which she brought into the marriage.

b. To the Defendant: A Certificate of Deposit at First Security Bank in the approximate sum of \$13,000, a Kenwood

stereo and speakers, a quilt from Defendant's son Derek's great-grandmother, tackle boxes, canner, 1972 Chevrolet truck and a 1987 Corvette automobile.

30. The Court finds after reviewing the parties' claims as to personal property as specifically set forth in Exhibits D-15, D-16, D-17 and P-36, that the Plaintiff has personal property with a value of approximately \$6,000 and the Defendant has personal property with a value of approximately \$10,000. The Court that it is fair, just and equitable that each of the parties be awarded that property currently in their possession free and clear of any claim from the other.

31. The Court finds that the parties have made personal loans to two acquaintances and that there is an amount due the parties from a Mr. Steele the sum of \$2,600 and from a Mr. Fielding, the sum of \$1,296.00 which the Court finds should be divided equally between the parties at such time as they are collected and paid.

32. The Court finds that there are various debts and obligations associated with Kelly's Excavating, LLC which should be assumed and paid by the Defendant as well as obligations from the Defendant to his parents which he should assume, pay, discharge and hold the Plaintiff harmless from. The Court finds in addition that each of the parties should be ordered to pay those obligations and debts incurred by that party since their separation in the summer of 1994.

33. The Court finds that while there is a significant dispute between the parties as to their rights, duties and obligations in connection with federal and state individual income tax returns, that it is fair, just and equitable that the parties should file individual state and federal income tax returns for 1994 and 1995 each having the benefit of pre-paid taxes as would be permitted under applicable law for equal owners of the business of Kelly's Excavating, LLC. Further, the Court finds that if the parties so agree, they may file such returns on a married, filing jointly basis.

34. The Court finds that the award of property to the Plaintiff herein totals \$25,000 and to the Defendant herein, the sum of \$141,000. It is therefore fair, just and equitable that the Defendant be required to pay to the Plaintiff \$58,000 to equalize the property distribution.

Based upon the foregoing findings of fact, the Court now concludes as follows:

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the Court now concludes as follows:

1. That the Court has jurisdiction over the subject matter hereof and the parties hereto.

2. That Plaintiff is entitled to be awarded a Decree of Divorce from Defendant on the grounds of irreconcilable differences

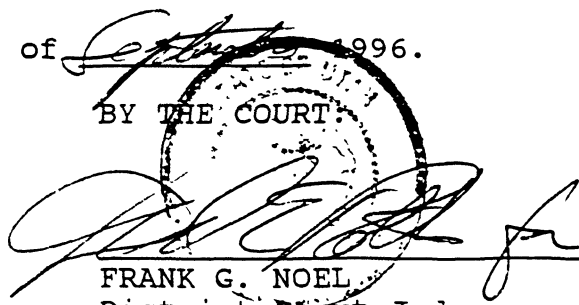
and that such should become final upon its entry as provided by law.

3. That each of the parties should be ordered to execute such deeds, conveyances, bills of sale and other documents as may be necessary to transfer the property awarded by the Court to the party entitled thereto and to implement the terms hereof.

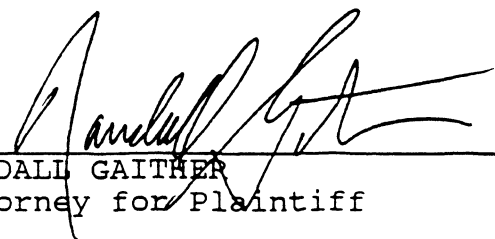
4. That the Court should make and enter its Decree of Divorce accordingly.

DATED this 5 day of September 1996.

BY THE COURT:


FRANK G. NOEL
District Court Judge

APPROVED THIS 27 DAY OF AUGUST 1996.


RANDALL GAITHER
Attorney for Plaintiff

Tab B

JUDGEMENT

FILED DISTRICT COURT
Third Judicial District

SEP 05 1996

CLARK W. SESSIONS (2914)
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Paterson
Deputy Clerk

Attorneys for Defendant

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

LINDA MEZENEN,

Plaintiff,

v.

KELLY MEZENEN,

Defendant.

DECREE OF DIVORCE

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Civil No. 944903679 DA

Judge Frank G. Noel

The above-entitled action came on regularly for trial pursuant to notice before the undersigned, one of the Judges of the above-entitled Court commencing on January 30, 1996 and continuing thereafter on January 31, 1996, May 20, 1996 and May 21, 1996. The Plaintiff Linda Mezenen appeared in person and by and through her attorney Randall Gaither. The Defendant Kelly Mezenen appeared in person and by and through his attorney Clark W. Sessions. The Court heard and considered the testimony of the parties, various witnesses, including expert witnesses, received and considered documentary evidence and heard the arguments and statements of counsel. The Court having fully considered the matter and having

heretofore entered its Findings of Fact and Conclusions of Law now ORDERS, ADJUDGES AND DECREES as follows:

1. That the Plaintiff be and she is hereby awarded a Decree of Divorce from the Defendant on the grounds of irreconcilable differences, said Decree to become final upon its entry herein as by law provided.

2. That no alimony or other marital support or maintenance is awarded to the Plaintiff herein.

3. That the Defendant is not entitled to a refund of any alimony paid under the temporary orders existing and in force herein.

4. That the claim of the Defendant therefore being based upon the alleged cohabitation of the Plaintiff with a person of the opposite sex be and the same is hereby denied.

5. That prior to the marriage of the parties, the Defendant acquired a lot in Duchesne, Utah which is hereby awarded to the Defendant as his sole and separate property without claim from the Plaintiff.

6. That the Plaintiff be and she is hereby awarded as her sole and separate property the vehicle she is currently driving and a couch she brought into the marriage. The Defendant be and he is hereby awarded as his sole and separate property without claim from the Plaintiff a certificate of deposit at First Security Bank in the approximate amount of \$13,000, Kenwood stereo and speakers, a

quilt from Defendant's son Derek's great-grandmother, tackle boxes, canner, a 1972 Chevrolet truck and a 1987 Corvette. The parties be and they are hereby awarded those items of personal property currently in their possession other than as hereinabove specifically set forth.

7. That the Defendant be and he is hereby awarded as his sole and separate property all of the parties' right, title and interest in and to Kelly's Excavating, LLC, including the business and all assets of the business as found and determined by Defendant's expert Merrill Norman and that the claim of the Plaintiff for undistributed net profits from Kelly's Excavating, LLC be and the same is hereby denied.

8. That the Defendant be and he is hereby awarded as his sole and separate property all funds in the parties' safe in an original amount of approximately \$19,000 which amount has been substantially used by the Defendant prior to the date hereof.

9. That the New Haven building lot acquired by the parties be and the same is hereby awarded to the Plaintiff as her sole and separate property without claim from the Defendant and the Defendant be and he is hereby ordered to pay any obligation connected therewith to his parents.

10. That the Bagpiper Circle marital residence acquired by the parties during the course of their marriage be and the same is hereby awarded to the Defendant as his sole and separate property

parties less a deduction of \$5,800 representing the Defendant's pre-marital property, the Defendant be and he is hereby ordered to pay to the Plaintiff the balance in the amount of \$64,900.

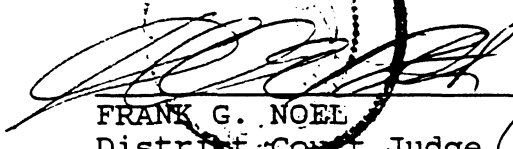
15. That the parties be and they are hereby ordered to file individual federal and state income tax returns for the calendar year 1994 and 1995 and that each should have the benefit of pre-paid taxes such as would be permitted under law for equal owners of the business of Kelly's Excavating, LLC. If both parties can agree, they are instructed to file such returns on a married, filing jointly basis.

16. That each of the parties shall assume, pay and discharge their own costs and attorneys fees incurred herein, provided however, the Plaintiff be and she is hereby awarded as and for attorney's fees from the Defendant the sum of \$10,000.00 together with costs of \$513.00.

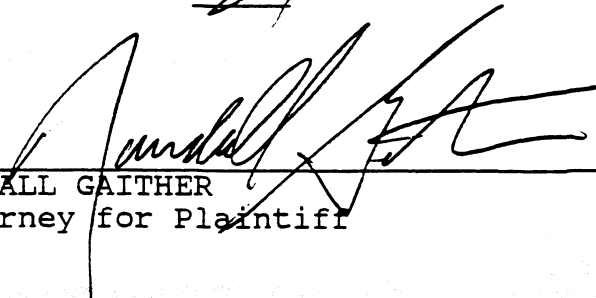
17. That each of the parties be and they are hereby ordered to execute such deeds, conveyances, bills of sale and other documents as are necessary to transfer the property awarded by the Court to the party entitled thereto and to cooperate each with the other in implementing the terms hereof.

DATED this 5 day of September 1996.

BY THE COURT:


FRANK G. NOEL
District Court Judge

APPROVED THIS 27 DAY OF AUGUST 1996.


RANDALL GAITHER
Attorney for Plaintiff

Tab C

30-3-3. Award of costs, attorney and witness fees — Temporary alimony.

(1) In any action filed under Title 30, Chapter 3, 4, or 6, and in any action to establish an order of custody, visitation, child support, alimony, or division of property in a domestic case, the court may order a party to pay the costs, attorney fees, and witness fees, including expert witness fees, of the other party to enable the other party to prosecute or defend the action. The order may include provision for costs of the action.

(2) In any action to enforce an order of custody, visitation, child support, alimony, or division of property in a domestic case, the court may award costs and attorney fees upon determining that the party substantially prevailed upon the claim or defense. The court, in its discretion, may award no fees or limited fees against a party if the court finds the party is impecunious or enters in the record the reason for not awarding fees.

(3) In any action listed in Subsection (1), the court may order a party to provide money, during the pendency of the action, for the separate support and maintenance of the other party and of any children in the custody of the other party.

(4) Orders entered under this section prior to entry of the final order or judgment may be amended during the course of the action or in the final order or judgment.

30-3-5. Disposition of property — Maintenance and health care of parties and children — Division of debts — Court to have continuing jurisdiction — Custody and visitation — Determination of alimony — Nonmeritorious petition for modification.

(1) When a decree of divorce is rendered, the court may include in it equitable orders relating to the children, property, debts or obligations, and parties. The court shall include the following in every decree of divorce:

(a) an order assigning responsibility for the payment of reasonable and necessary medical and dental expenses of the dependent children;

(b) if coverage is or becomes available at a reasonable cost, an order requiring the purchase and maintenance of appropriate health, hospital, and dental care insurance for the dependent children;

(c) pursuant to Section 15-4-6.5:

(i) an order specifying which party is responsible for the payment of joint debts, obligations, or liabilities of the parties contracted or incurred during marriage;

(ii) an order requiring the parties to notify respective creditors or obligees, regarding the court's division of debts, obligations, or liabilities and regarding the parties' separate, current addresses; and

(iii) provisions for the enforcement of these orders;

(d) provisions for income withholding in accordance with Title 62A, Chapter 11, Parts 4 and 5; and

(e) with regard to child support orders issued or modified on or after January 1, 1994, that are subject to income withholding, an order assessing against the obligor an additional \$7 per month check processing fee to be included in the amount withheld and paid to the Office of Recovery Services within the Department of Human Services for the purposes of income withholding in accordance with Title 62A, Chapter 11, Parts 4 and 5.

(2) The court may include, in an order determining child support, an order assigning financial responsibility for all or a portion of child care expenses incurred on behalf of the dependent children, necessitated by the employment or training of the custodial parent. If the court determines that the circumstances are appropriate and that the dependent children would be adequately cared for, it may include an order allowing the noncustodial parent to provide child care for the dependent children, necessitated by the employment or training of the custodial parent.

(3) The court has continuing jurisdiction to make subsequent changes or new orders for the custody of the children and their support, maintenance, health, and dental care, and for distribution of the property and obligations for debts as is reasonable and necessary.

(4) (a) In determining visitation rights of parents, grandparents, and other members of the immediate family, the court shall consider the best interest of the child.

(b) Upon a specific finding by the court of the need for peace officer enforcement, the court may include in an order establishing a visitation

schedule a provision, among other things, authorizing any peace officer to enforce a court ordered visitation schedule entered under this chapter.

(5) If a petition for modification of child custody or visitation provisions of a court order is made and denied, the court shall order the petitioner to pay the reasonable attorneys' fees expended by the prevailing party in that action, if the court determines that the petition was without merit and not asserted or defended against in good faith.

(6) If a petition alleges substantial noncompliance with a visitation order by a parent, a grandparent, or other member of the immediate family pursuant to Section 78-32-12.2 where a visitation right has been previously granted by the court, the court may award to the prevailing party costs, including actual attorney fees and court costs incurred by the prevailing party because of the other party's failure to provide or exercise court-ordered visitation.

(7) (a) The court shall consider at least the following factors in determining alimony:

- (i) the financial condition and needs of the recipient spouse;
- (ii) the recipient's earning capacity or ability to produce income;
- (iii) the ability of the payor spouse to provide support; and
- (iv) the length of the marriage.

(b) The court may consider the fault of the parties in determining alimony.

(c) As a general rule, the court should look to the standard of living, existing at the time of separation, in determining alimony in accordance with Subsection (a). However, the court shall consider all relevant facts and equitable principles and may, in its discretion, base alimony on the standard of living that existed at the time of trial. In marriages of short duration, when no children have been conceived or born during the marriage, the court may consider the standard of living that existed at the time of the marriage.

(d) The court may, under appropriate circumstances, attempt to equalize the parties' respective standards of living.

(e) When a marriage of long duration dissolves on the threshold of a major change in the income of one of the spouses due to the collective efforts of both, that change shall be considered in dividing the marital property and in determining the amount of alimony. If one spouse's earning capacity has been greatly enhanced through the efforts of both spouses during the marriage, the court may make a compensating adjustment in dividing the marital property and awarding alimony.

(f) In determining alimony when a marriage of short duration dissolves, and no children have been conceived or born during the marriage, the court may consider restoring each party to the condition which existed at the time of the marriage.

(g) (i) The court has continuing jurisdiction to make substantive changes and new orders regarding alimony based on a substantial material change in circumstances not foreseeable at the time of the divorce.

(ii) The court may not modify alimony or issue a new order for alimony to address needs of the recipient that did not exist at the time the decree was entered, unless the court finds extenuating circumstances that justify that action.

(iii) In determining alimony, the income of any subsequent spouse of the payor may not be considered, except as provided in this subsection.

(A) The court may consider the subsequent spouse's financial ability to share living expenses.

(B) The court may consider the income of a subsequent spouse if the court finds that the payor's improper conduct justifies that consideration.

(h) Alimony may not be ordered for a duration longer than the number of years that the marriage existed unless, at any time prior to termination of alimony, the court finds extenuating circumstances that justify the payment of alimony for a longer period of time.

(8) Unless a decree of divorce specifically provides otherwise, any order of the court that a party pay alimony to a former spouse automatically terminates upon the remarriage of that former spouse. However, if the remarriage is annulled and found to be void ab initio, payment of alimony shall resume if the party paying alimony is made a party to the action of annulment and his rights are determined.

(9) Any order of the court that a party pay alimony to a former spouse terminates upon establishment by the party paying alimony that the former spouse is cohabitating with another person.

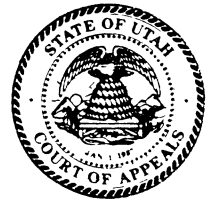
Tab D

James Z. Davis
Presiding Judge
Michael J. Wilkins
Associate Presiding Judge
Russell W. Bench
Judge
Judith M. Billings
Judge
Pamela T. Greenwood
Judge
Norman H. Jackson
Judge
Gregory K. Orme
Judge

Utah Court of Appeals

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Marilyn M. Branch
Clerk of the Court

June 4, 1997

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201 South Main Street
Salt Lake City, UT 84111-2215

Linda Mezenen,
Plaintiff, Appellee and Cross-Appellant,
v. Case No. 960652-CA
Kelly Mezenen,
Defendant, Appellant and Cross-Appellee.

Dear Counsel:

The record index on this appeal was filed in this court. The record remains on file with the trial court for your use in preparing your brief. The purpose of this letter, therefore, is to set the briefing schedule.

Pursuant to Rules 13 and 26, Utah Rules of Appellate Procedure, the appellant's brief must be served and filed on or before July 17, 1997. This due date takes into consideration the three days mailing provision of Rule 22(d).

Parties are advised to refer to Rules 24, 26, and 27, Utah R. App. P., for content and format requirements. These requirements are strictly enforced, and the brief may be returned pursuant to Rule 27(d) if not properly prepared.

Please be reminded that in civil cases where the record, excluding any transcripts, totals 300 pages or more, all parties must file with the clerk of the trial court, within 10 days after briefing is completed, a joint or separate designation of those papers referred to in their respective briefs. Only those designated papers, and those papers identified in Rule 11(d)(2)(B) of the Utah Rules of Appellate Procedure, will be transmitted to this court by the clerk of the trial court.

Failure to perfect an appeal at any time during the appeal process may result in dismissal of the appeal.

Sincerely,

A handwritten signature in cursive script, appearing to read "Susan Willis".

Susan Willis
Deputy Court Clerk