

1987

# Janet Sue Johnson v. Val Budge Johnson : Brief of Respondent

Utah Court of Appeals

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**BRIEF**

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IN THE COURT OF APPEALS FOR THE STATE OF UTAH

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DOCKET NO.

870241-CA

JANET SUE JOHNSON,

Plaintiff and  
Appellant,

vs.

VAL BUDGE JOHNSON,

Defendant and  
Respondent.

Case No. 870241-CA

(146)

**RESPONDENT'S BRIEF**

A response to the Appeal filed in this matter from the decision of the Second Judicial District Court, Weber County, Judge John F. Wahlquist.

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FEB 17 1988

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Plaintiff and	)	
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vs.	)	
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## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	ii
JURISDICTION .....	iii
STATEMENT OF ISSUES PRESENTED FOR REVIEW .....	iii
CONSTITUTIONAL PROVISIONS, STATUTES, RULES .....	iii & iv
STATEMENT OF THE CASE .....	1
SUMMARY OF ARGUMENTS .....	9
ARGUMENT .....	14
POINT I      APPELLANT IS NOT ENTITLED TO AN EQUITABLE INTEREST IN RESPONDENT'S MEDICAL LICENSE ..	14
POINT II     THIS COURT SHOULD NOT DISTURB THE TRIAL COURT'S FINDINGS AND DECREE ABSENT A CLEAR AND SUBSTANTIAL ABUSE OF DISCRETION .....	16
POINT III    THE TRIAL COURT WAS WITHIN ITS DISCRETION IN DISREGARDING APPELLANT'S EXPERT TESTIMONY AS TO THE VALUE OF RESPONDENT'S ON-GOING MEDICAL PRACTICE .....	20
POINT IV     THE AWARD OF ALIMONY WAS ADEQUATE TO ALLOW APPELLANT TO MAINTAIN THE STANDARD OF LIVING TO WHICH SHE HAD BECOME ACCUSTOMED DURING THE MARRIAGE, WAS BASED ON SUBSTANTIAL EVIDENCE IN THE RECORD AND WAS WELL WITHIN THE DISCRETION OF THE TRIAL COURT .....	26
POINT V      THE CHILD SUPPORT AWARDED BY THE TRIAL COURT IS ADEQUATE AND PROVIDES THE CHILDREN WITH A STANDARD OF LIVING COMPARABLE TO THAT ENJOYED DURING THE MARRIAGE .....	34
POINT VI     THE ADDITIONAL \$45,200.00 SHARE OF RESPONDENT'S INCOME, WHICH APPELLANT CLAIMS WAS ACCUMULATED WHILE SHE RECEIVED SUPPORT UNDER THE COURT'S TEMPORARY ORDER, DOES NOT EXIST .....	38
CONCLUSION .....	40
APPENDUM .....	42



# TABLE OF AUTHORITIES

	Page
<u>Alexander vs. Alexander</u> , 56 Utah Adv. Rep 31 (Utah 1987) .....	16
<u>Berger vs. Berger</u> , 713 P.2d 695 (Utah 1985) .....	16, 19
<u>Dogu vs. Dogu</u> , 652 P.2d 1308 at 1309 (Utah 1987) .....	20, 21, 36
<u>Eames vs. Eames</u> , 735 P.2d 395 (Utah App. 1987) .....	27
<u>English vs. English</u> , 565 P.2d 409 (Utah 1977) .....	17, 27
<u>Fletcher vs. Fletcher</u> , 651 P.2d 1218 (Utah 1980) .....	16, 19
<u>Gardner vs. Gardner</u> , 73 Utah Adv. Rep. 35 (Utah 1988) .....	14, 15, 27, 30
<u>Gramme vs. Gramme</u> , 587 P.2d 144 (Utah 1978) .....	19
<u>Jespersion vs. Jespersen</u> , 610 P.2d 326 (Utah 1980) .....	16
<u>Jones vs. Jones</u> , 700 P.2d 1072 (Utah 1985) .....	27, 30, 33
<u>Olsen vs. Olsen</u> , 704 P.2d 564 (Utah 1985) .....	21
<u>Penrose vs. Penrose</u> , 656 P.2d 1017 (Utah 1982) .....	16
<u>Peterson vs. Peterson</u> , 737 P.2d 237 (Utah App. 1987) ..	14, 21, 27, 31, 32, 36
<u>Pusey vs. Pusey</u> , 728 P.2d 117 (Utah 1986) .....	16
<u>Rayburn vs. Rayburn</u> , 738 P.2d 238 (Utah App. 1987) ....	14, 27, 32, 36
<u>Savage vs. Savage</u> , 658 P.2d 1201 (Utah 1983) .....	19, 31, 33, 34, 36
<u>Searle vs. Searle</u> , 658 P.2d 1201 (Utah 1983) .....	17
<u>Turner vs. Turner</u> , 649 P.2d 6 (Utah 1982) .....	16, 18, 19

	Page
<u>Yelderman vs. Yelderman</u> , 669 P.2d 406 at 408 .....	18, 31, 33

## STATUTES

Utah Code Annotated Section 30-3-5 (1953 as amended) ..	9
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## JURISDICTION

The Court of Appeals has jurisdiction over this appeal from a final decree pursuant to Section 78-2a-3(2)(g) of the Utah Code Annotated (1953, as amended 1986).

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

### POINT I

APPELLANT IS NOT ENTITLED TO AN EQUITABLE INTEREST IN RESPONDENT'S MEDICAL LICENSE.

### POINT II

THIS COURT SHOULD NOT DISTURB THE TRIAL COURT'S FINDINGS AND DECREE ABSENT A CLEAR AND SUBSTANTIAL ABUSE OF DISCRETION.

### POINT III

THE TRIAL COURT WAS WITHIN ITS DISCRETION IN DISREGARDING APPELLANT'S EXPERT TESTIMONY AS TO THE VALUE OF RESPONDENT'S ON-GOING MEDICAL PRACTICE.

### POINT IV

THE AWARD OF ALIMONY WAS ADEQUATE TO ALLOW APPELLANT TO MAINTAIN THE STANDARD OF LIVING TO WHICH SHE HAD BECOME ACCUSTOMED DURING THE MARRIAGE, WAS BASED ON SUBSTANTIAL EVIDENCE IN THE RECORD AND WAS WELL WITHIN THE DISCRETION OF THE TRIAL COURT.

POINT V

THE CHILD SUPPORT AWARDED BY THE TRIAL COURT IS ADEQUATE AND PROVIDES THE CHILDREN WITH A STANDARD OF LIVING COMPARABLE TO THAT ENJOYED DURING THE MARRIAGE.

POINT VI

THE ADDITIONAL \$45,200.00 SHARE OF RESPONDENT'S INCOME WHICH APPELLANT CLAIMS ACCUMULATED WHILE SHE RECEIVED SUPPORT UNDER THE COURT'S TEMPORARY ORDER, DOES NOT EXIST.

CONSTITUTIONAL PROVISIONS, STATUTES, RULES

The Statutory provision controlling the issues on appeal herein is Section 30-3-5 (U.C.A., 1953). The rules governing the appeal are the Rules of the Utah Court of Appeals, and appropriate common law rules for review of equity matters on appeal as cited in the brief.

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RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

Respondent agrees with Appellant's statement of the case except as to the facts set forth hereunder:

1. At the time that the parties were married, Respondent had completed his premedical training and the first year of medical school. (Finding of Fact number 8; hereinafter "FF #8"; located at Appendum TAB 8, hereinafter "TAB 8"). The Court also found that Respondent "would have achieved a medical degree with or without the Plaintiff's limited contribution" (FF #12; TAB 8). Appellant has a college degree from Weber State College (Trial Transcript: page number 3; hereinafter "TT; 3").

2. During the portion of medical school completed after the parties' marriage, Respondent received a grant of approximately \$400.00. During his third and fourth years, he contributed approximately \$150.00 per month as earnings from a part-time job. During that same time, his parents paid for all of his books and tuition. Appellant provided the remaining support needed by the parties, but such support hardly made her the "sole supporter of the family" during those three years (Appellant's Brief, p3).

3. From June, 1970, until the trial in March, 1987, a period of nearly seventeen years, Respondent was the sole supporter of the family. The family enjoyed an affluent lifestyle as a result of his practice from 1974 until the time of the trial (TT; 5).

4. The actual assets divided at the trial amounted to nearly \$910,000.00, excluding Appellant's unsatisfied claims for "excess earnings", the value of the "medical license" and the inflated value of the corporation stock (Conclusions of Law #15; hereinafter "CL #15"; as adjusted)<sup>1</sup>. Essentially all of the tangible property was divided by Stipulation as were the cash and financial accounts (TT; 7). Including what the Court awarded her as one-half the value of Respondent's medical practice, Appellant received nearly \$456,000.00. Of that, \$140,000.00 was equity in real and tangible personal property, leaving \$315,927.00 in cash, stock, and securities. At trial, Respondent testified that, using the proceeds of Appellant's settlement to pay off the mortgage on the home, and based upon a projected pension and profit sharing distribution to Appellant of approximately \$193,000.00 (rather than the \$228,372.00 which was actually distributed to her), and after deducting the penalty for withdrawal of income generated within the pension and profit sharing plan and taxes, Appellant would have additional income, based on an eight percent rate of return, in excess of \$1,500.00 per month from the liquid assets, without ever touching the principal received in her settlement or any of the tangible real and personal property (TT; 186, 187). In addition, her expenses would have been reduced by the \$330.00 per month which she had

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<sup>1</sup>In Appellant's Brief, page 27, Appellant chose improperly adjusted figures to purportedly reflect the final distribution at the end of the corporation's fiscal year. The correct figures are shown on Conclusion of Law #15, except that Plaintiff's share of the pension trust is increased to \$228,372.00, making the adjusted total \$455,927.00. The total cash was \$59,602.00, giving Plaintiff liquid assets having a value of \$315,927.00 and tangible real and personal property having a value of \$140,000.00.

allocated for the house payment (TT; 187 Ln 18, FF #15 figures; TAB 8). Utilizing the figures for property which she actually received, and an 8 percent rate of return on the liquid assets, and deducting the tax penalty for withdrawing the income from the pension and profit sharing plan, Appellant would receive \$23,447.18 per year as return on her property, or nearly \$2,000.00 per month.<sup>2</sup>

5. In addition to the above referenced property, Appellant claimed to be entitled to one-half of a greatly inflated value placed upon Respondent's medical practice with Associates of Pathology, Inc. However, the Trial Court found Appellant's expert witnesses "lack credibility" (CL #4; TAB 8), and found that Respondent's experts had "high credibility regarding the value of Defendant's interest and stock in Associates of Pathology . . . ." (CL #5). The record contains an abundance of evidence which supports the Trial Court's conclusion regarding Appellant's witnesses, such as the following:

A. Mr. Merrill is not an economist (TT; 61), and he admitted that he had drifted away from day to day accounting activities during the recent years (TT; 59).

B. In analyzing the data on his own chart, prepared for his client, he could not answer questions on direct examination as to the meaning of a percentage shown on the chart (TT; 69).

C. In determining the value of the medical license as opposed to a Bachelor's degree, he utilized the figure \$129,560.00 as the 1987 income for the average pathologist nationwide (TT; 80). When Respondent was provided the same document on rebuttal, he testified that the 1982 figure in the document (from which the 1987 estimate had been derived) was \$120,000.00 per year rather than \$107,000.00 (TT; 228). When

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<sup>2</sup>Calculations at 8 percent interest on \$87,555.00 cash and securities, and the \$228,372.00 pension and profit sharing trust to which the 10 percent penalty was applied in the calculations yields \$23,447.18.

Respondent extrapolated that figure at the rate purportedly utilized by Mr. Merrill, 9.4 percent, he estimated that the 1986 to 1987 average annual salary should have been \$184,000.00, not \$129,560.00 (TT; 229).

D. During his testimony Mr. Merrill admitted that he had no idea whether pension and profit sharing benefits were included in the national figures for pathologists' income (TT; 96). When pressed, he stated that he would have to refer to his book, but never did so (TT; 90). On the other hand, Respondent's expert Mr. Crouch testified that it was very unlikely that those figures would include pension and profit sharing sums as the figures are not generally so reported by the institutions (TT; 144). As a practical matter, government agencies and many larger corporate employers do not reflect pension benefits as part of the compensation package.

When asked whether the pension and profit sharing proceeds could be allocated between the parties during the divorce action, Mr. Merrill and his associate were not even aware that the Retirement Equity Act of 1984 (Ferraro Bill) requires allocation of private pension and profit sharing proceeds to spouses when so allocated by a Decree of Divorce (TT; 112). Mr. Crouch corrected this misconception early in his testimony (TT; 139, 140).

E. Mr. Merrill projects Dr. Johnson's income at an unrealistic rate utilizing a base line figure that is significantly distorted by events in the recent past. Specifically, he projects the income growth rate at 9.58 percent per year (TT; 85) in spite of the fact that he admitted on cross examination that the actual historic growth rate for Associates of Pathology, including recent distortions, had been approximately 6.8 percent during the corresponding period and that physicians' earnings in general were decreasing (TT; 102). He presented no data to the Court to substantiate using the growth rate of 9.58 percent.

F. Mr. Merrill totally disregarded the income depressing factors testified to by Drs. Johnson and Hammond. Dr.



Hammond testified that the income for the previous two years had been abnormally high because Dr. Wahlstrom had not been a full partner during those years, and thus had received only 13 percent of the total income during 1985 and 20 percent of the income during 1986, while the remaining three partners split the excess between them (TT; 117 and 124). Additional factors entered into evidence to show why Respondent's income was decreasing include:

1. During 1983 Dr. Eason had become disabled; The remaining three physicians had carried the load for four physicians and had divided the income by three for that and succeeding years until Dr. Wahlstrom's entry into the practice (TT; 117).

2. That 70 to 75 percent of the entire income for the corporation was generated from St. Benedict's Hospital which was experiencing significant cutbacks in its overhead (TT; 121). For example, the position of Medical Director, which at one time had paid \$72,000.00 per year into the corporation had been reduced to \$60,000.00 in 1985, \$40,000.00 for 1986, was expected to be reduced to \$1,000.00 per month for 1987, but would probably drop to zero as of May 1, 1987 (TT; 125, 126).

3. Medicare and Medicaid programs were cutting back on what was paid for various procedures, and the projection was that there would be significant further reductions (TT; 122). As a result, Dr. Hammond testified that income for the current year would be between \$122,000.00 and \$127,000.00, with an absolute maximum \$130,000.00 per principal (TT; 124), not the \$180,000.00 figure utilized by Mr. Merrill in his testimony (TT; 46) nor the \$190,000.00 figure argued by Appellant in her Brief (Ap Br; 15).

4. Health maintenance organizations and the increase in the number of doctors available throughout the country had resulted in significant reductions in doctor's incomes (TT; 131).

After hearing the above testimony, the Court then valued the stock in accordance with the Restrictive Stock Agreement which

contractually binds the stockholders at the present time, and which bound the associates at the time that these parties purchased their stock and Respondent became a principal in the corporation (TT; 118 Ln 8-13).

6. Appellant also claimed to be entitled to one-half of the value of Respondent's medical license, which her expert testified was worth \$1,156,426.000 (TT; 92 Ln 5-13). Appellant's expert, in establishing the proffered value based the calculation on speculative future income, projected from a starting income which was substantially distorted in the recent past because of the several unusual but explainable occurrences described above by Dr. Hammond which were not likely to be repeated (TT; 83-86; 117; 124). In addition, Appellant's expert totally disregarded the numerous occurrences which had recently taken place, or were presently in progress, which clearly indicated at best a leveling of corporate income at approximately \$122,000.00 to \$130,000.00 per year per partner, (TT; 124; 126; 206) or more likely a significant decrease in each partner's future income (TT; 117; 121; 122; 124; 125; 126; 131). The Trial Court disregarded the proffered value and held that "Defendant's medical degree should not be marital property subject to division by the Court in a divorce action" (CL #6; TAB 8).

7. Next, Appellant claimed entitlement to one-half of a hypothetical sum referred to as "amounts of money and distributions that were incurred after the date of separation . . . ." (TT; 70 Ln 20). In essence, the expert claimed that the income which Dr. Johnson earned during the pendency of the action should be utilized to pay to Appellant \$3,200.00 per month for support of herself and the family (TT; 24 Ln 9-17), and that she should be awarded as property an additional sum essentially equal to one-half of everything else that Respondent earned during that time frame. Mr. Merrill did reduce that sum by estimated amounts paid for taxes or deposited in the joint bank accounts and otherwise divided pursuant to the Stipulation of the parties (TT; 70-74), but disregarded Respondent's testimony accounting

for the entire amount (TT; 176-178). The sum claimed was \$45,220.00 (TT; 74). The expert stated that these calculations were based upon interviews with Mrs. Johnson (TT; 71 Ln 25) and that he did not know that the funds actually existed. He admitted that they may have been spent or might have been misunderstood, but felt that they were "unaccounted for . . . ." (TT; 71; 74; and 205 Ln 4-8). When then asked whether he felt that Dr. Johnson's testimony regarding what had been done with the money satisfied his "accountability", he admitted that he had not followed the testimony nor been able to reconcile that testimony with what he had shown as being "unaccounted for" (TT; 205 Ln 13-25). In actuality, Dr. Johnson accounted for all of the 1986 and 1987 bonus payments which were the basis of Appellant's claim (TT; 176-178). The Trial Court was able to reconcile the figures and found that Appellant

" . . . should not be entitled to any portion of Defendant's 1986 or 1987 bonus inasmuch as these are considered as part of Defendant's overall annual income, provided, however, that such portions of Defendant's 1986 bonus as were previously allocated to the various savings and checking accounts of the parties and formed a part of the Stipulation of the parties should not be affected" (CL #13).

In conjunction with this provision, the Court further ordered that Respondent be responsible for any federal and state income taxes owed as a result of his 1986 income (CL #14; TAB 8).

8. The Trial Court awarded Appellant \$1,000.00 per month as alimony for a period of ten years, or until otherwise terminated by law (CL #8). In addition, she was awarded child support for three children totalling \$1,944.00 per month (CL #3) for a total of \$2,944.00. In her testimony, Appellant repeatedly affirmed her earlier claim in her Affidavit (Ex #7D; TAB 1) that she needed \$3,200.00 per month in order to maintain the standard of living to which she and the children had been accustomed (TT;

24). The amount of child support, alimony and a conservative estimate of the rate of return on the liquid assets which she was awarded, after deducting withdrawal penalties, yields a total monthly income of nearly \$5,000.00 (TT; 24; 167; 186-187). Realistically evaluating the needs which she claimed in her Affidavit and at trial, the court could clearly find that she could maintain her current standard of living with substantially less than the \$3,200.00 per month. (TT; 25 at Ln 3; Ln 11-19 and TT; 169). In his testimony, Dr. Johnson testified that during the marriage those same expenses, excluding the \$330.00 house payment, had been approximately \$2,200.00 per month (TT; 169; Ex. 13D; TAB 2). In addition, Respondent testified that he still would be paying for the "big ticket" items such as the children's college, marriages and missions (TT; 165 Ln 14-22; 183 Ln 12). He testified that he had recently taken his children and their friends to Sun Valley for a weekend (TT; 179), that he took his son to Mexico with him for two days (TT; 180) and that he was planning to support his son on a mission in approximately a year and one-half (TT; 186 Ln 8-16). The parties had already funded separate accounts for each of the children during the marriage with approximate balances of \$16,000.00 each. Respondent testified that he intended to continue funding these accounts with approximately \$500.00 per month (TT; 165).

## SUMMARY OF ARGUMENTS

### POINT I

APPELLANT IS NOT ENTITLED TO AN EQUITABLE INTEREST IN RESPONDENT'S MEDICAL LICENSE.

- A. A medical license is not a property asset allocable under the provisions of Section 30-3-5, Utah Code Annotated (1953), or under the Common Law.
- B. Plaintiff has been adequately compensated for efforts expended while Defendant was attending medical school by enjoying a high standard of living during more than fifteen years of post-training marriage, by receiving a property settlement of nearly one half million dollars, and by receiving substantial alimony and child support awards.
- C. Defendant would have obtained his degree without financial assistance from Plaintiff.
- D. Appellant's expert testimony as to the value of Respondent's medical degree was not credible and was thus properly disregarded by the Trial Court.

## POINT II

THIS COURT SHOULD NOT DISTURB THE TRIAL COURT'S FINDINGS AND DECREE ABSENT A CLEAR AND SUBSTANTIAL ABUSE OF DISCRETION.

- A. The Trial Court is permitted considerable discretion in distributing assets and liabilities. Its determination should not be disturbed absent a clear abuse of discretion, a manifest injustice or a misunderstanding or misapplication of the law resulting in a substantial and prejudicial error.
- B. The Trial Court distributed the marital assets fairly and equitably based upon specific Findings of Fact and substantiated by the record.
- C. Appellant's evidence as to disputed property valuations was not credible and was thus properly disregarded by the Trial Court.

## POINT III

THE TRIAL COURT WAS WITHIN ITS DISCRETION IN DISREGARDING APPELLANT'S EXPERT TESTIMONY AS TO THE VALUE OF RESPONDENT'S ON-GOING MEDICAL PRACTICE.

- A. Appellant's expert testimony was not credible and was based upon highly speculative and factually erroneous data.

- B. Appellant's expert witness contradicted his own assumptions regarding the purported excess earnings upon which his valuation of this asset was based.
- C. Appellant's valuation is inconsistent with the contractual rights and obligations of the shareholders of the corporation in which Respondent practices.
- D. Appellant attempts to impose upon Respondent an asset at a value which is totally inconsistent with the value which Respondent is bound by contract to obtain if he sold that interest.

#### POINT IV

THE AWARD OF ALIMONY WAS ADEQUATE TO ALLOW APPELLANT TO MAINTAIN THE STANDARD OF LIVING TO WHICH SHE HAD BECOME ACCUSTOMED DURING THE MARRIAGE, WAS BASED ON SUBSTANTIAL EVIDENCE IN THE RECORD AND WAS WELL WITHIN THE DISCRETION OF THE TRIAL COURT.

- A. The alimony and child support awarded to Appellant nearly meets the amount which she requested, and exceeds the amount which she could demonstrate as being necessary to maintain the pre-separation standard of living for herself and the children.
- B. In setting the alimony award, the Trial Court implicitly acknowledged the income potential

available to Appellant from the property award of nearly one-half million dollars.

- C. The Trial Court considered all of the factors considered to relevant determining alimony, with the possible exception that no future income was imputed to the Plaintiff/Appellant.
- D. Appellant's evidence as to Respondent's current and expected income, from which the alimony award was derived, was not credible.

#### POINT V

THE CHILD SUPPORT AWARDED BY THE TRIAL COURT IS ADEQUATE AND PROVIDES THE CHILDREN WITH A STANDARD OF LIVING COMPARABLE TO THAT ENJOYED DURING THE MARRIAGE.

- A. The most credible evidence as to Respondent's 1987 income was that it would range between \$122,000.00 and \$130,000.00, and there was a high probability that it would decrease during the coming years.
- B. The child support guidelines in the Second Judicial District are advisory and not controlling upon the Court but in this case were followed.
- C. In Setting the child support, the Trial Court correctly acknowledged Respondent's significant ongoing contributions toward "Big Ticket" items



for the children made during the marriage and planned for after the divorce.

#### POINT VI

THE ADDITIONAL \$45,200.00 SHARE OF RESPONDENT'S INCOME WHICH APPELLANT CLAIMS WAS ACCUMULATED WHILE SHE RECEIVED SUPPORT UNDER THE TRIAL COURT'S TEMPORARY ORDER DOES NOT EXIST.

- A. The amount which Appellant received as temporary support was exactly what she requested as necessary to maintain her standard of living, and substantially exceeded the pre-separation monthly expenditures for the entire family.
- B. While Appellant continued her lifestyle at or above her prior standard of living under the Temporary Order, Respondent was left with \$699.00 per month (after taxes) and was forced to live with his parents during the ten months of the case. When he did receive his bonus, all but \$8,000.00 was put into various accounts that were split at trial and used to pay joint debts of the marriage, including taxes.

## ARGUMENT

### POINT I

#### APPELLANT IS NOT ENTITLED TO AN INTEREST IN RESPONDENT'S MEDICAL LICENSE.

Utah case law is clear concerning whether a supporting spouse is entitled to an interest in an advanced degree. As found by the Trial Court, Respondent "would have received a medical degree with or without the Plaintiff's limited contribution" (FF #12). The Court of Appeals in Peterson vs. Peterson, 737 P.2d 237 at 242 (Utah App. 1987) held that a medical degree is not property to be equitably divided between the spouses. The Court ruled that where the marriage has been long,

"(t)he contributions and sacrifices of the one spouse in enabling the other to attain a degree have been compensated by many years of a comfortable lifestyle which the degree permitted. Traditional alimony analysis works nicely to assure equity in such cases". Id. at 242 footnote 4.

The Court of Appeals reaffirmed the Peterson logic in Rayburn vs. Rayburn, 738 P.2d 238 at 240 (Utah 1987) in holding that "an advanced degree or professional license is not marital property subject to division upon divorce." The Trial Court's award of \$45,000.00 to Mrs. Rayburn as her share of Dr. Rayburn's medical degree was re-characterized as rehabilitative alimony.

The Utah Supreme Court in Gardner vs. Gardner, 73 Utah Adv. Rep. 35 at 38 (Utah 1988) affirmed the Utah Court of Appeals in holding that where "the marriage is of long duration, present

earnings and business assets provide a more accurate measure of the true worth of the wife's investment in her husband's degree." The spouse who sacrificed while the other spouse earned the degree "realized greater benefits from the medical degree in the form of a greater property settlement and higher alimony." Where the marriage has been long and assets are sufficient, the degree and medical practice need not be valued at all. Id. In the Gardner case, the Court considered \$250,000.00 to be a substantial property award.

In the case at bar, Mrs. Johnson enjoyed the fruits of the medical degree while she was supported for more than fifteen years from Dr. Johnson's residency until the parties separated in January of 1986 (TT; 18, 69). She received a property award of \$455,927.00, \$315,927.00 of which was capable of producing current income (CL #15 and Appellant's Brief 27. Note: Appellant is in error; the \$59,602.00 cash award was not reduced to \$42,602.00). Thus Mrs. Johnson received approximately twice the property award which the Gardner Court found adequate to bar an excursion into the realm of valuing the doctor's medical license. Gardner, page 38.

If the Court were to consider a reversal of the common law set forth above, then for the reasons set forth in Respondent's Statement of Facts, paragraphs 1 through 8, the evidence which Appellant presented was based upon such poorly founded assumptions and speculation that the Trial Court was correct in dismissing it with a summary that "Plaintiff's expert witnesses

lack credibility regarding the value placed on Defendant's interest and stock with the Associates of Pathology and regarding the value of his medical degree" (CL #4).

## POINT II

THIS COURT SHOULD NOT DISTURB THE TRIAL COURT'S FINDINGS AND DECREE ABSENT A CLEAR AND SUBSTANTIAL ABUSE OF DISCRETION.

The Trial Court is permitted considerable discretion in distributing assets and liabilities and its determination should not be disturbed absent a clear abuse of discretion, a manifest injustice or a misunderstanding or misapplication of the law resulting in a substantial and prejudicial error. See Pusey vs. Pusey, 728 P.2d 117 at 119 (Utah 1986), Turner vs. Turner, 649 P.2d 6 at 8 (Utah 1982), Penrose vs. Penrose, 656 P.2d 1017 at 1019 (Utah 1982), Fletcher vs. Fletcher, 615 P.2d 1218 at 1222 (Utah 1980), and Alexander vs. Alexander, 56 Utah Adv. Rep. 31 at 32 (Utah 1987). The policy of the Utah Supreme Court is to affirm the Trial Court's decision whenever it can do so, even if the Court has to use different reasoning than that used by the Trial Court. Jespersion vs. Jespersen, 610 P.2d 326, 328 (Utah 1980).

The party appealing a Trial Court's division of marital property has the burden of proving that the Trial Court's findings are contrary to a clear preponderance of the evidence. Berger vs. Berger, 713 P.2d 695 at 697 (Utah 1985). See also

English vs. English, 565 P.2d 409 at 410 (Utah 1977) and Searle vs. Searle, 522 P.2d 697 at 700 (Utah 1974).

Appellant's evidence as to disputed property valuations was not credible and was thus properly disregarded by the Trial Court. Her expert based his testimony on highly speculative projections, grounded upon unrealistic assumptions, and totally disregarded real life factors influencing the actual value of future income projections. Respondent's expert testified that as an accountant he could not disregard the actual market transaction regarding the purchase of an interest in the same business which had taken place when Dr. Wahlstrom recently purchased his shares for approximately \$14,000.00, as provided by the Restrictive Stock Agreement (TT; 142). Appellant's witness totally disregarded this transaction, and Dr. Hammond's testimony regarding the ongoing effectiveness of the Restrictive Stock Agreement (TT; 118). Although he conceded that the value of a company is what a willing buyer will pay to a willing seller, Mr. Merrill dismisses the transaction by saying that no actual sale takes place in a divorce (TT; 104). In calculating yields on investments, and present values of the flow of income, he makes assumptions as to future interest and inflation rates based on a period of inordinately high inflation throughout the country, and starts his projections with an income figure which is totally inconsistent with all evidence as to both the current year and future years' expected incomes (TT; 83). Illustrative are his use of a projected income growth rate for Associates of

Pathology of 9.58 percent per year (TT; 85) in spite of the fact that he admitted on cross-examination that the actual growth rate for the company, including recent distortions, had been only 6.8 percent per year, and that physicians' earnings in general were decreasing (TT; 102). His capitalization of earnings dependent on services of a single individual at five times his (erroneously) projected income is totally inconsistent with reasonable business valuations, particularly in light of his concessions that there should be a discount for "lack of marketability" and the fact that the position is a minority rather than control position in a corporation (TT; 87, 89). For these factors he discounts a total of 30 percent, in spite of the fact that Dr. Wahlstrom, in an actual arms-length transaction, had recently discounted his factor by 100 percent by purchasing his interest for a figure that included no "excess earnings" (TT; 142).

"The weight and credibility of the witness, including expert testimony, and evaluations of property are matters to be determined by the trier of fact." Yelderman vs. Yelderman, 669 P.2d 406 at 408 (Utah 1983) citing Weber Basin Water Conservancy District vs. Skeen, 8 Utah 2d 79, 328 P.2d 730 (1958). See also Turner vs. Turner, 649 P.2d 6 at 8 (Utah 1982).

The transcript in this case is replete with inconsistencies which undermine the credibility of Appellant's expert witnesses. Clearly the Trial Court did not abuse its discretion in

disregarding that evidence and basing its decision on the evidence presented by Respondent and his witnesses.

Appellant has not met the burden of demonstrating an abuse of discretion, a misunderstanding or misapplication of the law, a manifest injustice or substantial and prejudicial error. Any property award that gives each party one-half of the assets is equitable upon its face absent a showing otherwise (Fletcher vs. Fletcher, 615 P.2d 1218 at 1222 (Utah 1980)). While there is no fixed formula and the trial court has considerable discretion in dividing marital property, awards of much smaller percentages have been upheld by the Utah Supreme Court. See Gramme vs. Gramme, 587 P.2d 144 at 146 and 148 (Utah 1978), where Plaintiff's award of less than one-third of the marital property was upheld; Turner vs. Turner, 649 P.2d 6 at 8 (Utah 1982), where the Court upheld an award of between 27 percent and 42 percent depending on whose valuation was believed; Berger vs. Berger, 713 P.2d 695 at 699 (Utah 1985), where the Court upheld the wife's award of 60 percent of the marital assets where the wife earned more than the husband; and Savage v. Savage, 658 P.2d 1201 at 1204 (Utah 1983), where the wife's award of 40 percent of the marital assets was upheld.

The Trial Court distributed the marital assets fairly and equitably based upon specific findings of fact which were substantiated by the record. Under such circumstances, the Appellate Court should not disturb the Trial Court's findings and decree.

### POINT III

THE TRIAL COURT WAS WITHIN ITS DISCRETION IN DISREGARDING APPELLANT'S EXPERT TESTIMONY AS TO THE VALUE OF RESPONDENT'S ON-GOING MEDICAL PRACTICE.

In awarding Mrs. Johnson one-half of the value of Respondent's medical practice with Associates of Pathology, the Trial Court utilized the valuation based upon credible evidence presented by Respondent's expert witness. As defined by the Articles of Incorporation and the Stock Redemption Agreement which were in effect when Dr. (and Mrs.) Johnson joined the corporation in 1972, this valuation provides that an associate's interest in the corporation is defined as his portion of the value of the equipment, the cash on hand, and the accounts receivable less accounts payable (Ex 9D, Para 4; TAB 3). The corporation has no intrinsic value other than the earnings of the respective associates, particularly since under the terms of the agreement a stockholder forfeits all rights in the corporation, except as provided by the definition of his "interest" at the "end of four month's continuous absence from the business for any cause" (Ex 9D, Para 1; TAB 3). The award was based upon credible evidence, and was well within the discretion of the Trial Court.

In fact, contrary to the Supreme Court's definition in Dogu v. Dogu, 652 P.2d 1308 at 1309 (Utah 1982), the Trial Court in following the terms of the Stock Redemption Agreement included more assets in the valuation than was necessary. In Dogu the Appellant/wife was awarded assets equal to the value of her



physician husband's professional corporation which the Court found included only the checking account and savings certificates valued at \$26,300.00. The Court excluded the accounts receivable noting that they were deferred income from which the husband would pay alimony. Id. The Trial Court's allocation of one-half of Dr. Johnson's accounts receivable actually awards Mrs. Johnson an interest in the same money twice since the accounts receivable will constitute a portion of the future income upon which Appellant's alimony and child support awards were based.

In Dogu, the Court also found that the only earning power of a professional corporation is the ability of the licensed professional to receive payment for his services. Dogu at 1309. This concept is made graphically clear in Article One of the Corporate Stock Redemption Agreement which provides that a shareholder terminates his employment with the corporation at any time that he has been absent from the business, for any cause, for a period of four months (Ex 9D, Page 2; TAB 3).

Similarly, in Olsen vs. Olsen, 704 P.2d 564 at 567-568 (Utah 1985) the Court found that the value of the respondent's consulting business was nothing more than his ability to work and was not a factor to be considered in the property distribution since the respondent's potential earning capacity had been factored into the alimony award, as it was here (FF #23).

In Peterson vs. Peterson, 737 P.2d 237 at 243 (Utah App. 1987), appellant was awarded his entire professional corporation

because his anticipated income from the medical practice was considered in the alimony award to Mrs. Peterson.

Based on these cases, it is clear that both the Court of Appeals and the Supreme Court have rejected the concept of capitalized income flow as a means to value a personal service business in which the income from that business is totally dependant upon the future personal services provided by an individual. Appellant's expert relied to a great extent on exactly such a capitalization, using speculative and highly suspect data in forming his valuations.

In capitalizing Dr. Johnson's earnings to determine a value for his practice, Mr. Merrill uses five years' income, based on the distorted recent history of the corporation. Utilizing Mr. Merrill's figures would put Dr. Johnson in the untenable position of having assessed against his share of the divorce proceeds a five year capitalization of the same earnings which would be providing the child support and alimony, paid in advance and based on highly speculative assumptions. This would be in spite of the fact that upon withdrawal from the corporation he would receive nothing for any such capitalization that his wife had been awarded.

In explaining the four methods which he has utilized to value the various aspects of Dr. Johnson's practice, Mr. Merrill acknowledges the fact that the four methods utilized lead to four different valuations (TT; 91, 141). In his testimony, Mr. Crouch pointed out that in valuing Dr. Eason's one-fourth of the

corporation, Mr. Merrill had utilized five different valuations, in addition to the four valuations which he had utilized in this case for determining Dr. Johnson's one-fourth interest in the same corporation. All nine valuations led to different results, and in the case of Dr. Eason's evaluations, they varied from \$119,000.00 to \$349,000.00 (TT; 141). Mr. Crouch testified that if the values derived by the various methods did not come out relatively close, then something was wrong with the valuation process (TT; 141).

In comparison to Mr. Merrill's highly speculative and erratic testimony, Mr. Crouch systematically analyzes various problems with the income projections presented to the court. He advises that when a business has only one purchaser for the majority of its services (i.e. St. Benedicts), security of the income position is greatly reduced (TT; 143). This would clearly be substantiated by Dr. Hammond's testimony that the income to the corporation associated with his Medical Directorship had dropped from \$72,000.00 per year to zero over a period of less than three years (TT; 125, 126).

In addition, Mr. Crouch points out that there is no excess income to the corporation, since by agreement of all concerned, all earnings are drawn out and paid to the four doctors on an annual basis. He states that the concept of "excess income" upon which Mr. Merrill attempts to establish a significant value for the corporation does not even apply in these circumstances (TT; 143).

In analyzing Mr. Norman's data, Mr. Crouch testifies that many of the projections utilized in those calculations were based upon figures relating to hospitals and health maintenance organizations, and thus were not appropriate to valuing a specific practice in Ogden, Utah (TT; 145).

Mr. Crouch testified that the preference for determining the value of a company was to first take data from that specific company. The next best choice would be to use data from similar businesses within the same area. The least reliable choice would be to use national averages (TT; 146). He then provided the Court with an example from his own experience of two different medical practices in Ogden, Utah, of two specialists in the same specialty, one of whom earns \$40,000.00 per year net, and the other earns \$200,000.00 per year net. He advises that it is impossible to merely average the earnings, since such procedures disregard professional abilities of the specific doctor, the personal efforts expended, the personal efficiency and the personal ability to attract business. In utilizing national figures, the personalization necessary for accuracy in valuing the professional practice is just not possible (TT; 146, 147).

Mr. Merrill's valuation also disregards the basic contract principle that all four stockholders in the corporation have a contract right to the value which they hold, and which is derived from the earnings which they contribute to the overall income of the corporation. Until and unless that contract is dissolved or declared void, a party could not change those terms

and thereby affect the value of the other participants' shares. Since the corporation's only value is the income earned by the participants, attaching some esoteric value over and above that provided by the stock agreement for one participant would require an offsetting reduction in the value held by the other participants. To do so would violate the other principals' contract rights, and a party should not be able to expand his rights to the detriment of the other participants merely because the allocation or withdrawal was taking place in conjunction with a divorce. As a matter of estoppel, when the parties to this action entered into the corporation, assuming that the family did so as a joint venture, it was under the terms and conditions of the Restrictive Stock Agreement which Dr. Johnson signed, the most recent of which is attached as Exhibit 9D; TAB 3. They did not have to pay for any "excess value", such as Mr. Merrill is attempting to create for purposes of this divorce. Therefore, neither party to this joint venture should be entitled to create some such value and remove it from the corporation at the expense of the other joint venturer or the other principals in the corporation.

Other than the value of the equipment, the cash on hand, and the accounts receivable, the only value that Dr. Johnson will realize from the Associates of Pathology is the salary which he will earn in the future. Reasonable projections of these earnings formed the basis of the alimony and child support obligations ordered by the Court. If he is unable to continue

producing his "share" of the income, he will receive none. The shares of stock in the corporation do not entitle him to 25 percent of the income merely because he owns the shares. If he cannot produce he will be in the same situation as Dr. Eason, the withdrawing partner who is no longer able to practice. In other words there is no good will value to the practice other than what he is currently earning, plus inventory, equipment and accounts receivable, which the Court included. The value of Respondent's share of the corporation was thus correctly placed at \$14,521.00 by his witnesses (TT; 156). To attach a value greater than this would clearly prejudice Respondent by making him pay to Appellant a portion of his future earnings, based upon highly speculative projections, and then require him to pay alimony and child support based upon the earnings as they are finally received. If the future income turned out to be much less than projected, as is likely in light of the testimony at trial, then he would be paying her a substantially greater percentage of his earnings than would have been intended by the Court.

#### POINT IV

THE AWARD OF ALIMONY WAS ADEQUATE TO ALLOW APPELLANT TO MAINTAIN THE STANDARD OF LIVING TO WHICH SHE HAD BECOME ACCUSTOMED DURING THE MARRIAGE, WAS BASED ON SUBSTANTIAL EVIDENCE IN THE RECORD AND WAS WELL WITHIN THE DISCRETION OF THE TRIAL COURT.

On appeal, the Court should fashion its own remedy only where the Trial Court has abused its discretion. Unless the

Trial Court misunderstood or misapplied the law or the evidence clearly preponderated against the findings and a serious and prejudicial inequity resulted, the Trial Court's remedy should be affirmed. English vs. English, 565 P.2d 409 at 410 (Utah 1977).

Here, the Trial Court carefully considered the evidence, made specific findings on the relevant alimony factors required by the Utah Supreme Court (see below) and awarded Mrs. Johnson an amount exceeding what she claimed to be necessary to sustain the lifestyle that she had become accustomed to (TT; 24, 32). Her monthly income will be nearly \$5,000.00 including alimony, child support, and income from an award of \$315,927.00 liquid assets. (See Para 4, pages 2 & 3 and Footnote 2).

As in Peterson vs. Peterson, 737 P.2d 237 (Utah App. 1987), the Trial Court here properly analyzed Appellant's alimony award under the three factors cited in Jones vs. Jones, 700 P.2d 1072 at 1075 (Utah 1985). [See also Gardner vs. Gardner, 73 Utah Adv. Rep. 35 at 38 (Utah 1988), and Rayburn vs. Rayburn, 738 P.2d 238 at 240 (Utah App. 1987).] In analyzing Mrs. Peterson's award, the Court of Appeals used the three pronged test from Jones stating that all three factors must be utilized:

Under the first Jones factor, the Court carefully considered the needs of the Appellant. The purpose of alimony is to maintain as nearly as possible the standard of living the receiving spouse has enjoyed during the marriage. Eames vs. Eames, 735 P.2d 395 at 397 (Utah App. 1987). The temporary

support award which Appellant proposed, and to which Respondent acquiesced without change, provided her the requested \$3,200.00 per month. Mrs. Johnson testified that she felt \$3,200.00 would give her "the things I had always had" (TT; 24 and 32. See also Ex. 7D, pages 2 and 3; TAB 1). This included paying a \$330.00 monthly mortgage (TT; 24), saving \$500.00 per month to buy Appellant a new car every two years (i.e. \$12,000.00 plus a two year-old trade in available every two years) (TT; 25, 34), house repairs and upkeep in the amount of \$308.00 per month (TT; 25; 26; 33), car insurance at \$156.00 per month (TT; 34), and recreation and travel at \$669.00 per month (TT; 33). After analyzing these requests in light of Respondent's testimony as to historical costs of \$2,200.00 plus a \$330.00 mortgage payment (TT; 169; Ex 13D; TAB 2), the Court found that the parties had actually spent less while he was in the home than was provided for under the Uniform Child Support Schedule for the Second District based on Respondent's income (FF #28). The Trial Court then awarded Appellant \$1,000.00 in alimony and \$1,944.00 as child support (CL #8 and #3).

In addition to the \$2,944.00 monthly income, Mrs. Johnson received \$455,927.00 in assets, \$315,927.00 of which was cash and income-producing assets (CL #15, as corrected when the property was actually distributed based on the then current amount in the pension trust). As set forth in the Statement of Facts, paragraph 4 above, a conservative return on those liquid assets of 8 percent yields nearly \$2,000.00 per month additional income



even after adjusting the sum for the penalty upon withdrawing the portion of the income attributable to the pension trust. To generate this income requires no depletion of the principal awarded to Appellant, and does not require conversion to income earning property of the more than \$140,000.00 in real and tangible personal property awarded to her.

The second factor from Jones was the wife's ability to produce a sufficient income for herself. Again the Trial Court had significant evidence to find that Appellant had an ability to produce income for herself in addition to the alimony, child support and reasonably expected earnings from the liquid assets awarded to her. She was a college graduate and had worked during the first three years of the parties' marriage (TT; 4; 64). She testified that she had been taking college courses for two quarters at the time of trial (TT; 37), and she had expressed a desire back in 1979 to go back to work either part-time or full-time (TT; 53). This ability to provide for herself was clearly included in the scope of the alimony provision as was reflected in Conclusion of Law number 22 which provided that Appellant's circumstances would not be considered to have changed for purposes of modifying the alimony award until her earnings exceeded \$1,400.00 per month (CL #22; See also Memorandum Decision pages 5 and 8). Her youngest child is in school full time. The Trial Court found that she was in good health and that she "should be encouraged to work eventually" (Memorandum Decision, para 11). However, the nearly \$2,000.00 per month

income generated by her property award, which she will receive whether or not she remarries, is adequate to insure that she will never have to work (TT; 167).

In analyzing the third criteria, the Court carefully analyzed the testimony regarding Respondent's current income, the business climate for his practice, and the factors impacting his future income (FF #20, 21, 22). These earnings and his future potential earnings were considered by the Court in fixing the alimony amount.

The Utah Supreme Court in Gardner vs. Gardner, 73 Utah Adv. Rep. 35 (Utah 1988), citing Jones vs. Jones, 700 P.2d 1072 at 1075 (Utah 1985), says that the purpose of alimony is to equalize the parties' respective standards of living and maintain the standard enjoyed during the marriage. Respondent's net monthly income from his salary is \$3,899.00 per month until supplemented by his bonus (TT; 158). During the pendency of the divorce, he was forced to live with his parents because he could not afford rent or a mortgage payment on the \$699.00 which was left to him after the payment of the temporary support (TT; 160). With the current alimony and child support obligations, he will have approximately \$955.00 per month available until such time as he receives his bonuses, which depend entirely upon the income earned by the corporation during the preceding fiscal period (TT; 116). In order for Respondent to live in a house comparable to the house awarded to Appellant, he will have to pay considerably more than the \$330.00 monthly mortgage payment that Mrs. Johnson

will be paying. He will also be paying travel and recreation expenses for himself and his children's vacations. It should be noted that Dr. Johnson's proposal to award equal amounts to Appellant and Respondent for recreation and travel and for new car payments was rejected by Appellant who insisted that she needed substantially more than those sums (TT; 221-222). On his Exhibit 14D, based upon a proposed total payment of \$2,100.00 to Appellant for child support (and alimony) he estimated a requirement of \$6,750.00 per month as his living expenses. Adjusting this figure for the \$2,944.00 per month actually awarded to Appellant leaves him with a net monthly deficit of approximately \$650.00.<sup>3</sup> His budget also includes continuation of the pre-separation policy of depositing approximately \$500.00 per month into the children's college education, marriage and mission funds which at the time of trial contained approximately \$16,000.00 each (TT; 223).

The support award to Mrs. Johnson is actually higher than awards to other spouses in similar situations reviewed by this Court and the Utah Supreme Court. Appellant cites Peterson vs. Peterson, Yelderman vs. Yelderman, and Savage vs. Savage for his proposition that Mrs. Johnson's alimony award is approximately 73 percent below the average of the three cases (Appellant's Brief p26). In fact, in Peterson vs. Peterson, 737 P.2d 237 (Utah App.

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<sup>3</sup>The exhibit shows an excess of expenditures over income but in actuality reflects a surplus using the original figures. The deficit noted here is based upon an adjusted bottom line for Exhibit 14D, based on the income set forth on Exhibit 15D and the estimated taxes included thereon.

1987)), after re-characterizing her property award as alimony, Mrs. Peterson was awarded \$2,000.00 per month in alimony, terminable upon remarriage. However, Mrs. Peterson received only \$11,000.00 in cash and income-producing assets and owed a monthly mortgage on her home of \$1,600.00 (Peterson Trial Brief of Appellant p10). Mrs. Peterson's property award was in no way comparable to the \$455,927.00 which Mrs. Johnson received; the income Mrs. Peterson could expect from \$11,000.00 of assets would be less than \$75.00 per month compared to nearly \$2,000.00 per month that Mrs. Johnson's estate can generate. Mrs. Peterson's \$1,600.00 mortgage in no way compares to Mrs. Johnson's \$330.00 mortgage, and is nearly equal to Mrs. Johnson's total reasonable monthly expenses (FF #28). Furthermore, upon remarriage, the bulk of Mrs. Peterson's income (other than child support), will cease. Upon remarriage, Mrs. Johnson will still have \$1,944.00 per month child support and the nearly \$2,000.00 per month investment income without depleting her \$455,927.00 estate or converting any of the real or tangible personal property into income producing assets.

In Rayburn vs. Rayburn, 738 P.2d 238 (Utah App. 1987), Mrs. Rayburn was given \$750.00 per month alimony for five years, and \$56,850.00 in retirement assets which were re-characterized as alimony for tax deduction purposes. This compares as a small fraction of the \$228,372.00 which Mrs. Johnson received as retirement assets. Other aspects of the Rayburn property settlement were not reviewed on appeal.

In Yelderman vs. Yelderman, 669 P.2d 406 (Utah 1983), Mrs. Yelderman received \$2,500.00 per month alimony but had a \$950.00 monthly mortgage and received only 44 percent of the marital property, apparently none of which was capable of producing income. In addition, Dr. Yelderman had not paid the mortgage during seven months of separation.

Appellant also cites Savage vs. Savage, 658 P.2d 1201 (Utah 1983). Mrs. Savage received \$2,000.00 per month in alimony. She had enjoyed household help and gardening services during the marriage, which were not part of the Johnson family standard of living either before or after the separation. Mrs. Savage received by stipulation \$243,827.60 in marital property which included her own savings accounts (a gift), securities, her personal belongings, the value of which was not itemized, and 40 percent of the stock in Savage Companies. The Savage court held that the \$3,500.00 per month in total income available to Mrs. Savage and her three children was not "manifest injustice". This is nearly \$1,500.00 per month less than Mrs. Johnson has available to her and three children, and Mrs. Savage had a significantly higher standard of living before the separation than did Mrs. Johnson.

Obviously, comparing one high income divorce case to another using one factor in isolation, such as alimony, is meaningless. The Court must look at the total property and maintenance award, in light of the Jones criteria. Here the Trial Court took all of these factors into account, made findings and conclusions based

upon credible evidence, and made an equitable support order integrated with a substantial property award.

#### POINT V

THE CHILD SUPPORT AWARDED BY THE TRIAL COURT  
IS ADEQUATE TO PROVIDE THE CHILDREN WITH THE  
STANDARD OF LIVING COMPARABLE TO THAT ENJOYED  
DURING THE MARRIAGE.

Child support should be adequate to maintain the standard of living that the children enjoyed during the marriage. Savage vs. Savage, 658 P.2d 1201 at 1205 (Utah 1983). The Johnson children have lived in a home with a \$330.00 monthly mortgage, had skied, water skied, vacationed in the family cabin and in condominiums and had gone three-wheeling (TT; 216). Mrs. Johnson was awarded the boat to continue water skiing with the children, the cabin to continue vacationing there and the three wheel motorcycle (FF #15, p7; TAB 8) Respondent was awarded no comparable recreational items. Mrs. Johnson also testified that three children had taken piano lessons, one had taken dance lessons, and all three children want to take tennis lessons (TT; 116). In Mrs. Johnson's itemization of the amount she considered necessary to continue the family's lifestyle, she proposed the amount of \$669.00 per month for travel (TT; 33 and Plaintiff's Affidavit re Temporary Support, Ex. 7D; TAB 1) as part of the \$3,200.00 which she requested. She testified that this amount would be adequate

to allow herself and the three children to continue their trips (TT; 222).

The Trial Court found that the amount of child support provided on the top increment of the Uniform Child Support Schedule (Second District) for three children was more than the entire family had spent for its standard of living while Respondent was living in the home (FF #28 and Memorandum Decision #5). In arguing that the child support was insufficient, Mrs. Johnson's only substantiation of an alleged increase in need was that the price of ski tickets has risen (TT; 220) and that every driver in the home needed a car. She has purchased an \$8,000.00 car for her 16-year-old son and anticipated doing the same when the next child became a driver (TT; 217-218). Regardless of whether every child should now have an \$8,000.00 automobile, the pre-separation lifestyle that the family was accustomed to did not include automobiles for the children.

In addition to the child support of \$1,944.00, each child has \$16,000.00 in an individual savings account to use for college, a mission, and a wedding (TT; 165). Dr. Johnson anticipates spending a substantial portion of his budget on travel and recreation when he takes the children on vacations (TT; 164, 222), and he plans to continue depositing approximately \$500.00 per month into the "Big Ticket" accounts (TT; 183).

Although it is not particularly meaningful to discuss child support in isolation, since Appellant argues that the Uniform Child Support Schedule should not include a ceiling at the

\$120,000.00 per year gross income level, Respondent offers the following cases to illustrate approved child support awards in high income divorce cases. In Peterson vs. Peterson, 737 P.2d 237 (Utah App. 1987), Dr. Peterson earned over \$100,000.00 per year. The District Court awarded child support in the amount of \$300.00 per month per child for six children or a total of \$1,800.00. Under the Uniform Child Support Schedule, Dr. Peterson would have been ordered to pay \$407.00 per month per child for a total of \$2,442.00. The amount of child support was not made an issue on appeal. In Rayburn vs. Rayburn, 738 P.2d 238 (Utah App. 1987), Dr. Rayburn was ordered by the District Court to pay \$400.00 per month per child for each of three children for a total of \$1,200.00. Based on his income of \$125,000.00 per year, under the Uniform Child Support Schedule, he would have been assessed \$648.00 per month per child for a total of \$1,944.00 at the schedule ceiling of \$120,000.00. The child support was not an issue on appeal. In Dogu vs. Dogu, 652 P.2d 1308 (Utah 1982), Dr. Dogu was ordered by the District Court to pay \$200.00 per month for the support of one child. Under the Uniform Child Support Schedule, at an income of \$108,675.00, Dr. Dogu would have been ordered to pay \$1,078.00 for that child. Child support was again not an issue on the appeal.

Child support was appealed in Savage vs. Savage, 658 P.2d 1201 (Utah 1983). Mr. Savage was ordered to pay \$500.00 per month per child for each of three children for a total of \$1,500.00. At an income of \$133,370.00, under the Uniform Child



Support Schedule ceiling he would have paid \$648.00 per child for a total of \$1,944.00. The District Court's award of \$1,500.00 child support was upheld by the Utah Supreme Court.

Again, it is clear that the Trial Court did not abuse its discretion. In fact, the Court's finding that the \$1,944.00 child support exceeded what was actually spent by the parties while Defendant lived in the home reflects that the Court was generous in making that award and appropriately considered Respondent's ongoing contributions to the children in their recreational activities, travel and particularly in relation to the savings function associated with the "Big Ticket" items made possible by an income level at or above the top bracket of the Uniform Child Support Schedule. Furthermore, Appellant's argument regarding the use of the child support schedule is inconsistent as it is the very discretion of the Trial Court which is the crux of her argument. Here the Court used the discretion in limiting the child support rather than following her extrapolation of the amounts beyond the \$10,000.00 per month income level.

Finally, the Trial Court's capping the schedule at the \$10,000.00 per month level is consistent with the policy recommendation of the Child Support Task Force which is presently preparing Uniform Child Support guidelines for the State of Utah under the direction and supervision of the State Judicial Council. (See Draft Policy Statement, 2-10-88, page 6; TAB 6).

## POINT VI

THE ADDITIONAL \$45,200.00 SHARE OF RESPONDENT'S INCOME, WHICH APPELLANT CLAIMS WAS ACCUMULATED WHILE SHE RECEIVED SUPPORT UNDER THE COURT'S TEMPORARY ORDER, DOES NOT EXIST.

A. The amount which Appellant received as temporary support was exactly what she requested as necessary to maintain her standard of living and exceeded her pre-separation monthly expenditures by approximately \$1,000.00 per month (TT; 169).

B. The parties had stipulated to the division of all of the existing assets at the commencement of the trial, as they then existed (TT; 170-178; Exhibit 1D; TAB 10). The Trial Court found that the Appellant "should not be entitled to any portion of Defendant's 1986 or 1987 bonus inasmuch as these are considered as part of Defendant's overall annual income". Inasmuch as the 1986 bonus was "previously allocated to the various savings and checking accounts of the parties and formed part of the Stipulation of the parties," that part of the bonus should remain as already divided (CL #13; TAB 8).

In fact, the bonuses which Appellant is claiming somehow still exist included \$81,000.00, half of which was received before the separation and was already included as a part of the property division. The \$40,000.00 received after the separation included \$26,000.00 deposited in the Merrill Lynch ready asset account which was divided and \$4,000.00 paid for tithing. Of the final \$21,580.00 bonus, \$1,000.00 was used for a loan which was

included in Respondent's one-half of the property division, \$426.00 paid for Federal Income Tax preparation, \$211.00 paid car insurance for Appellant's automobiles, \$560.00 paid one life insurance premium, over \$12,000.00 was paid as estimated quarterly tax payments and Dr. Johnson made various philanthropic contributions as usual (TT; 177-179). After paying the temporary support from his wages, Respondent had only \$699.00 per month left for his own expenses, (TT; 160) so some bonus money was necessary to satisfy some of his own living expenses TT; 170, 195).

Appellant's expert admits that the mythical \$45,200.00 that was supposedly not allocated may well not be "somehow sitting in a fund someplace in its present form. It's just an unaccounted for portion of earnings for that period" (TT; 74). He admitted "that a substantial amount of that is not really going to be available to either Dr. Johnson or Mrs. Johnson because there are other calls . . . on those earnings" (TT; 71). He admits the money is unaccounted for but might not exist. The funds "may be spent, they may be misunderstood, but at this point, they are unaccounted for . . . ." (TT; 205).

Of the 1987 \$30,000.00 bonus, \$6,000.00 went to pay estimated taxes, \$4,000.00 was used to make up 1986 taxes, \$3,000.00 went to charity, and \$7,000.00 went into the Continental Bank account that was listed as an asset and had fallen below the \$20,000.00 stipulated to (TT; 170). Appellant's expert estimated the taxes on the income at 28 percent rather

than the actual 35 percent rate which Respondent was paid (TT; 70, 158). Some of the bonus money had to be used for Respondent's ongoing living expenses and some was part of the income upon which child support and alimony were based (TT; 195).

Finally, to further undermine Mr. Norman's credibility, he testifies that the salary upon which his calculations were made is what he "believed" had been paid to Dr. Johnson for the first two and two-thirds months of 1987. There are no facts in evidence, no discovery as to those sums, nor any testimony on that point in the trial (TT; 76).

When further questioned as to whether or not he had heard Dr. Johnson account for the "unaccounted for monies", Mr. Norman admitted that he had not followed, and had not been able to "reconcile" the accountability (TT; 205, Ln 13-206 Ln 3). He did however, admit that he had been present in court when Dr. Johnson had testified, item by item, as to the amounts that were disbursed from his checkbook (TT; 206, Ln 7-11).

#### CONCLUSION

Throughout the transcript and the record before the Court, it is clear that the Trial Court heard and weighed the credibility of the testimony, made appropriate Findings of Fact and Conclusions of Law consistent with the credible evidence presented to him, and based the Decree on all of these relevant factors. His alimony award took into account the sums to be

provided for child support, Respondent's income and expenses, the large property award conferred upon Appellant and its significant income-producing potential, viewed in light of Appellant's reasonable needs to maintain her pre-separation standard of living for herself and the minor children. There was no abuse of discretion, no manifest injustice, no misunderstanding of the law, nor any misapplication of the law resulting in any substantial or prejudicial error. Pursuant to the line of cases cited under Point II of the Brief, the decision of the Trial Court should be upheld.

RESPECTFULLY submitted this 16<sup>th</sup> day of February, 1988.



NEIL B. CRIST  
NELDA M. BISHOP  
Attorneys for Respondent

#### CERTIFICATE OF MAILING

I hereby certify that I mailed four true and correct copies of the foregoing RESPONDENT'S BRIEF to counsel for Appellant via first-class mail, postage prepaid on this 16<sup>th</sup> day of February, 1988:

Stephen W. Farr  
Farr, Kaufman and Hamilton  
Bamberger Square, Building I  
205 26th Street, Suite 34  
Ogden, Utah 84401



## APPENDUM

TAB 1, Exhibit 7D

TAB 2, Exhibit 13D

TAB 3, Exhibit 9D

TAB 4, Exhibit 14D

TAB 5, Exhibit 15D

TAB 6, Draft Policy Statement, Child Support Task Force

TAB 7, Memorandum Decision

TAB 8, Findings of Fact and Conclusions of Law

TAB 9, Decree of Divorce

TAB 10, Proposal for Settlement

TAB 11, Peterson vs. Peterson, Brief of Appellant

STEPHEN W. PARK  
Attorney for Plaintiff  
Bamberger Square, Building 1  
205 26th Street, Suite 34  
Ogden, Utah 84401  
Telephone: 394-5526

FORM A

IN THE DISTRICT COURT OF WEBER COUNTY, STATE OF UTAH

JANET SUE JOHNSON, )  
 )  
-vs- ) ORDER TO SHOW CAUSE  
 ) AND AFFIDAVIT  
VAL BUDGE JOHNSON, ) Civil No. 94737  
 )  
Serve defendant: 1332 Marilyn Drive, Ogden, Utah  
TO THE ABOVE-NAMED DEFENDANT :

You are hereby ordered to appear before the Hon. DAVID E. ROTH,  
one of the Judges of the above-entitled Court, on the 4th floor of the  
County Courthouse, Ogden, Utah, on the 19th day of February, 1986,  
at the hour of 9:45 O'clock a m., then and there to show cause, if any  
you have, why you should not pay to the (plaintiff) (~~reference~~) such sums as  
may be found to be reasonable for temporary alimony, temporary support money,  
and temporary attorney's fees during the pendency of these proceedings: and  
why you should not be restrained from disposing of any of marital assets  
during the pendency of this proceeding.

and why temporary custody of the minor (~~children~~) (children) should not be  
temporarily awarded to (plaintiff) (~~reference~~). You are further hereby ordered  
to bring with you to court, copies of your 1982, 1983, and 1984 income  
tax returns, and records of your earnings to date in 1985, including  
all bonuses, and a statement of any bonuses received to date in 1986, and  
estimated future bonuses for 1986.

The claims of the (plaintiff) (~~reference~~) and the relief prayed for are  
particularly described in the affidavit, a copy of which is attached hereto,  
and is hereby served upon you.

DATED this 2 day of February, 19 86



A handwritten signature in black ink, appearing to be "T. R. R.", located at the bottom right of the page.

STATE OF UTAH )  
 ) ss.  
 COUNTY OF WEBER )

The undersigned states:

That the amounts hereinafter set forth are reasonably necessary to maintain myself and my ~~(children)~~ (children) during the pendency of these proceedings.

Utilities, water, lights and garbage . . . . .	\$ <u>245.44</u>
Heat, gas or oil or coal, etc. . . . .	\$ <u>169.24</u>
Rent or home payments . . . . .	\$ <u>455.00</u>
Fire Insurance . . . . .	\$ <u>20.00</u>
Dentist. . . . .	\$ <u>12.25</u>
Drugs, vitamins, etc. (always had professional courtesy) . .	\$ <u>10.00</u>
Hospital Insurance, etc. (paid by employer) . . . . .	\$ <u>          </u>
Car Expense . . . . .	\$ <u>156.00</u>
Repairs and upkeep . . <i>Home</i> . . . . .	\$ <u>308.00</u>
Food . (including school lunch) . . . . .	\$ <u>346.00</u>
Clothing and haircuts . . . . .	\$ <u>250.00</u>
Life Insurance . . . . .	\$ <u>58.64</u>
Union Dues . . . . .	\$ <u>          </u>
Recreation . . . . .	\$ <u>669.72</u>
Child Care . . . . .	\$ <u>          </u>
Other . (new car every two years) . . . . .	\$ <u>500.00</u>



FORM A (page 3)

PAYMENTS ON DEBTS: (~~weekly~~) (monthly) OWED TO:

American General Mortgage Company	\$	330.40
_____	\$	_____
_____	\$	_____
_____	\$	_____

Family Income:

I am employed by unemployed.

My take-home pay is \$ -0- per (week) (month)

Other income from none in the amount of \$ -0-.

The (defendant) (~~XXXXXXXX~~) is employed by Associates of Pathology.

(Defendant) (~~XXXXXXXX~~) has other income in the amount of \$ \_\_\_\_\_.

Family Assets:

I own separate property as follows (real or personal):

Value \$ -----

I and the (defendant) (plaintiff) jointly own the following property:

Real property, vehicles, retirement account, bank accounts, Merrill Lyn  
accounts, furniture, furnishings and other Value \$ Unknown  
personal property.

The (defendant) (~~XXXXXXXX~~) owns property as follows (real or personal):

Value \$ -----

I hereby swear that the foregoing is true and correct.

X Janet Sue Johnson  
(Plaintiff) (Defendant)

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_.

\_\_\_\_\_  
Notary Public  
Commission expires \_\_\_\_\_

ESTIMATED MONTHLY INCOME - MRS. JANET JOHNSON

Child support from Dr. Johnson	\$ 2100.00
Return on investments & savings	
Cash \$51,911 +	
Stock 18,644 @ 8%	564.00
Return on Pension Plan - \$183,950 @ 8%	
less 10% penalty & taxes	938.00
	<u>\$ 3602.00</u>

Estimated monthly expenses - Mrs. Janet Johnson

Utilities	\$ 245.00
Heat, gas, coal, etc.	169.00
Fire Insurance	20.00
Dentist	12.25
Vitamins & drugs	10.00
Car expense inc. insurance	156.00
Repairs & upkeep - home	100.00
Food, including school lunch	400.00
Clothing & hair cuts	250.00
Life insurance	58.64
Recreation	400.00
Other (new car every 3 yrs.)	250.00
Property tax on home	125.00
	<u>\$ 2195.89</u>

Excess of estimated income over expenditures \$1406.00



ASSOCIATES OF PATHOLOGY  
(A Professional Corporation)

STOCK REDEMPTION AGREEMENT

AGREEMENT made this 1st day of April, 1980  
by and between DEAN F. HAMMOND, M.D., HAROLD R. EASON, M.D.,  
VAL B. JOHNSON, M.D., and THOMAS A. PIIRA, M.D.  
hereinafter called the "Stockholders" and the ASSOCIATES OF  
PATHOLOGY, INC. hereinafter called the "Company."

WHEREAS, the stockholders own stock in the Company as follows:

STOCKHOLDER

COMMON STOCK

---

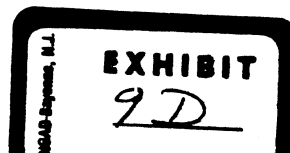
DEAN F. HAMMOND, M.D.	520 Shares of Common Stock
HAROLD R. EASON, M.D.	480 Shares of Common Stock
VAL B. JOHNSON, M.D.	480 Shares of Common Stock
THOMAS A. PIIRA, M.D.	480 Shares of Common Stock

and desire to express their agreement regarding their rights and  
obligations as Stockholders of the Company: and,

WHEREAS, the Stockholders and the Company desire to provide an  
arrangement whereby in the event of the death of any one of the  
Stockholders, the survivors of them shall own the Company.

IT IS THEREFORE AGREED:

1. Restriction on Stock. If any Stockholder at any time



desires to sell, encumber, or otherwise dispose of any of his stock of the Company, or if any Stockholder shall terminate his employment by the Company, he shall offer all his stock to the Company at adjusted book value (determined as provided in Paragraph 3), by written notice addressed to the principal office of the Company.

A Stockholder shall be deemed to have terminated his employment at the end of four (4) months continuous absence from the business for any cause, and shall be deemed to have made written offer of his stock to the Company at the expiration of such period, excluding absences with the permission and consent of the Company. Within thirty (30) days after receipt of such offer, the Company may deliver written notice of acceptance of such offer to the offering Stockholder at his residence, fixing a closing date for the purchase of the stock not more than thirty (30) days thereafter, or, alternatively the Company may within such period deliver written notice to the offering Stockholder that it is being dissolved and liquidated. If the Company elects either of these courses, the offering Stockholder shall vote and take any other necessary action in accordance with the vote of the remaining Stockholders (or, if there is more than one remaining Stockholder, the Stockholder or Stockholders owning a majority of the remaining voting stock), so as to effectuate the will of the Company. It is expressly stipulated, however, that the Company shall have the right not to pursue either of these courses, in which event the offering Stockholder may dispose of his stock to any other qualified purchaser approved by the Company free of the restrictions of this agreement; or, alternatively, he may call a

meeting of the Stockholders and Directors, within sixty (60) days after the Company's receipt of the original offer, at which he may vote all the shares of the Company held by him and by the other Stockholders in favor of immediate dissolution, the offering Stockholder being deemed to hold a proxy for this purpose.

2. Death of Stockholder. After the death of any one of the Stockholders while owning stock in the Company, the Company shall be dissolved unless it shall elect to purchase at adjusted book value all the stock of the Company owned by the decedent and the decedent's surviving widow, giving written notice of its election to the executors or administrators of the decedent, hereinafter called the personal representatives, and to the decedent's surviving widow, within sixty (60) days after appointment of such personal representatives. In the event the Company elects to purchase the stock of the decedent and his surviving widow, it shall fix a closing date not more than thirty (30) days after its giving of the foregoing notice, and the personal representatives of the decedent and the decedent's widow shall be obliged to sell their stock on the terms hereinafter provided. The personal representatives of the deceased Stockholder and his surviving widow shall vote and take any other necessary action in accordance with the vote of the remaining Stockholder (or if there is more than one remaining stockholder, the Stockholder or Stockholders owning a majority of the remaining voting stock), so as to effectuate the will of the Company.

3. Free Transferability of Stock. A Stockholder may transfer all or any portion of his stock to any person qualified by the Articles of Incorporation to be a stockholder; provided, however, that the Stockholder desiring to transfer all or any portion of his shares first shall advise the Company of the proposed transfer and the price offered for the Stock. Prior to any such sale, the Company shall have the option to redeem the said stock at the same price offered by the proposed transferee. If said option is not exercised by the Company within fifteen (15) days after notice to it of the proposed sale, the Stockholder shall be free to sell said stock to said transferee.

4. Purchase Price. For the purpose of Paragraph 1 and 2 above the adjusted book value of all the stock of the Company shall be an amount computed as follows:

An appraisal of all Company assets at the date provided for herein, shall be made by an independent certified public accountant, including accounts receivable at 85% of their stated amount and cash value of any insurance policies, but excluding any goodwill reflected on the books of the Company. In appraising accounts receivable consideration shall be given to the length of time they have been outstanding and to the amount of expenses necessary to collect said accounts.

\$ x x x x x

LESS: All Company liabilities

x x x x x

ADJUSTED VALUE OF ALL STOCK

\$ x x x x x

Adjusted book value shall be computed as of the close of the month preceding the death of a Stockholder or the date of the offer provided for in Paragraph 1, as the case may be.

Adjusted book value shall be furnished to the interested parties in a statement prepared by the Company's regular accountant; and such statement shall be conclusive upon the Company, the parties and their personal representatives.

5. Payment of Purchase Price. Payment of the purchase price to be paid by the Company for the stock of a Stockholder in the circumstances provided for in Paragraphs 1 and 2 above shall be made as follows:

(a) In case of a purchase under Paragraph 1, at the options of the Company either in a lump sum on the closing or one-third (1/3) shall be paid at the closing fixed by the Company, the balance in two (2) equal non-interest bearing installments payable six (6) months and twelve (12) months respectively, after the closing; payment must be made in cash.

(b) In case of a purchase under Paragraph 2, the entire amount shall be paid at the closing fixed by the Company in a lump sum or in not to exceed five (5) equal non-interest bearing installments, the first payable at the closing and succeeding installments payable six (6), twelve (12), eighteen (18), and twenty-four (24) months after such closing.

If the surplus of the Company is insufficient for the Company to purchase its stock, the Company and its officers and stockholders shall promptly take all necessary steps to reduce the capital stock of the Company to the extent required.

6. Obligations Pending Payment. Pending full payment of the purchase price as provided for in Paragraph 4 above:

(a) The sellers or their personal representatives shall deposit their stock at the closing with an escrow agent of his, or their choice, deliverable against final payment.

(b) The Company's policies and operations shall be governed by the following: (1) the nature of the Company's business will not be altered, and such business will be conducted and property will be sold, and commitments made, only in the ordinary course; (2) no dividend or other distributions will be declared or paid; (3) the level of compensation paid employees or officers shall not be increased unless warranted by increased business.

(c) Annual financial statements prepared by the Company's regular accountants shall be submitted to the selling Stockholder, or the estate of the decedent, until the full purchase price is paid.

7. Endorsement on Stock Certificates. During the continuance of this agreement, all stock certificates of the Company shall bear an endorsement as follows:

"This certificate is held subject to the terms of an agreement, dated the 25th day of February 1977, a copy of which is on file at the principal office of the Company in Ogden, Utah.

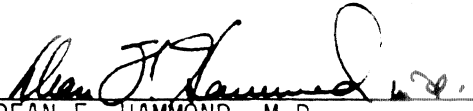
8. Arbitration. Any controversy arising under this agreement shall be settled in Ogden, Utah, by arbitration under the rules then




existing of the American Arbitration Association; provided however, that arbitration will not be exclusive remedy; and if the parties must retain attorneys to resolve such controversy, the party determined to be at fault or in breach shall pay all reasonable attorney's fees of the other party.

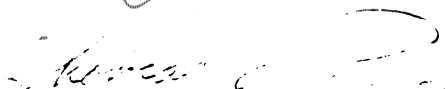
8. Benefit This agreement shall bind and inure to the benefit of the parties, their personal representatives, successors and assigns.

IN WITNESS WHEREOF, the parties have executed this instrument the day and year first above written.


  
DEAN F. HAMMOND, M.D.

  
HAROLD R. EASON, M.D.

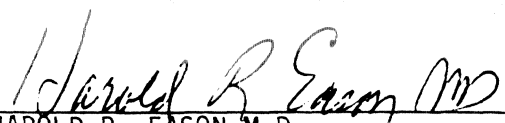
  
VAL B. JOHNSON, M.D.

  
THOMAS A. PIIRA, M.D.

ASSOCIATES OF PATHOLOGY, INC.

by:   
ITS PRESIDENT  
DEAN F. HAMMOND, M.D.

ATTEST:

  
HAROLD R. EASON M.D.  
SECRETARY

ESTIMATED MONTHLY EXPENSES - VAL B. JOHNSON, M.D.

House payment	\$ 1200.00
Utilities	250.00
Food	300.00
Clothing	150.00
Car repair & maintenance	150.00
VISA	200.00
Gasoline	100.00
Insurance premiums for auto, life & Home Owners	175.00
Recreation	400.00
Auto replacement (every 3 years.)	250.00
Child support	2100.00
Miscellaneous	75.00
Professional expenses & meetings	100.00
Legal expenses	300.00
Reserve for college, marriages & missions	500.00
Charitable contributions	500.00
	<u>\$ 6750.00</u>

Estimated monthly income from preceding page	\$ 6958.00
Estimated monthly expenditures	<u>\$ 6750.00</u>
Excess over income (per month)	\$ 208.00



INCOME - VAL B. JOHNSON M.D.

Wages	\$	72,000.00
Bonus		<u>55,000.00</u>
Estimated gross income	\$	127,000.00

Estimated taxes		
Federal income tax	\$	33,750.00
State income tax		6,750.00
Social Security		<u>3,000.00</u>
	\$	43,500.00

Net estimated income (Annually)	\$	83,500.00
Net estimated income (Monthly)	\$	6,958.00



D R A F T  
POLICY STATEMENT

2-10-88  
DRAFT

BACKGROUND

The Utah Child Support Task Force was created by the Utah Supreme Court and the Utah State Judicial Council to examine the present procedures for establishing child support awards and to make recommendations for the implementation of child support guidelines for use in Utah's courts and agencies involved in setting child support. Such guidelines were to be developed in compliance with the Child Support Enforcement Amendments of 1984 (P.L. 98-37; text included in Appendix together with its implementing regulations 45 CFR 302.56) which conditioned continued federal funding for certain social services programs on guideline implementation.

Task Force members were appointed by Utah Supreme Court Chief Justice Gordon Hall and include judges, lawyers, legislators, economists, professors and representatives of public interest groups (a list of members and positions included in Appendix). The Task Force has met regularly since its formation in February 1987, and has solicited input from any and all interested persons. Prior to formulating guidelines, the Task Force heard testimony from many parents at a public hearing in Salt Lake City, and from invited experts including judges and family law lawyers. Task Force members were interviewed on television and radio and for newspaper articles which resulted in the receipt of many letters from interested persons. Written questionnaires were sent to all District Court Judges and members of the Utah State Bar Family Law Section. Task Force members reviewed child support guidelines previously implemented in many other states and read extensive materials on the subject.

Following the formulation and dissemination of proposed guidelines, the Task Force conducted public hearings in Brigham City, Price, Provo, Richfield, St. George and Salt Lake City for further comment. Final guideline recommendations were presented to the Judicial Council in May 1988.

NEED FOR GUIDELINES

Prior to the passage of the Child Support Enforcement Amendments of 1984, only a few states had implemented child support guidelines. The congressional mandate for development of guidelines recognized deficiencies in the traditional case-by-case method of determining child support awards. Generally, these deficiencies can be described as: 1) a shortfall in the adequacy of awards when compared to the true costs of rearing children; 2) inconsistent orders resulting in inequitable treatment of parties in similarly situated cases; and 3) inefficient adjudication of child support awards in the absence of uniform standards.

SHORTFALLS IN LEVELS OF AWARDS

Recent studies indicate that child support awards are critically deficient when measured against the economic costs of child rearing.

A 1985 study estimated that \$26.6 billion in child support would have been due in 1984 if awards were based on either of two existing alternative guidelines, Delaware's or Wisconsin's.<sup>1</sup> By comparison, a

Census Bureau study indicated \$10.1 billion in child support was reported to be due in 1983 and \$7.1 billion was actually collected.<sup>2</sup> These figures demonstrate that there was a "compliance gap" of \$3 billion in 1983, but an "adequacy gap" of more than \$15 billion.

Further, the most recent U.S. Census Bureau study reported the mean court-ordered child support obligation in 1983 to be \$191 per month for 1.7 children.<sup>3</sup> One authoritative study indicated an order for \$191 per month is equivalent to only 25% of the average expenditures on children in a middle income household.<sup>4</sup> Assuming that the expenses for children should be borne in proportion to parental income, these figures suggest that court-ordered child support levels should be two and one-half times higher than the reported levels in 1983.

Other studies indicate that court ordered support falls far short of even the most minimal standards for the costs of raising children. Based on the U.S. poverty guideline, the average court order would have provided support at only 80% of the poverty level for 1983.<sup>5</sup> As the poverty guideline represents the lowest acceptable living standard in the U.S., court ordered support levels appear to be gravely deficient.

#### EQUITY OF CHILD SUPPORT AWARDS

There is considerable evidence that guidelines can improve the equity of child support awards and that unsystematic variation in awards persists in the absence of guidelines.<sup>6</sup> Testimony presented to the Task Force, particularly that by several District Court Judges, indicated little consistency among judges in setting support awards, even though each judge may demonstrate a high level of consistency in his own decisions.

It is the position of the Task Force that the traditional methods of setting child support awards, though having the advantage of allowing a case-by-case review of circumstances, can lead to the imposition of markedly different child support awards for obligors even if they have the same number of children and identical income levels. The appearance of inequity created by inconsistent orders inherent in the case-by-case approach has resulted in resentment and frustration for obligors and obligees alike. Obligor's perceptions of inequitable treatment also may contribute to existing compliance problems.

#### EFFICIENCY OF COURT PROCESSES

Experience of states with guidelines has shown that they can improve the efficiency of adjudication processes for child support awards. Guidelines can better facilitate voluntary settlements and reduce court or administrative agency time required to resolve those cases that are still contested.<sup>7</sup>

The Task Force expects that guidelines will increase settlements as they will provide parties with the presumptive amount. Even when the case is contested, courts may adjudicate cases more quickly because a guideline provides the framework for considering the issue, even if a deviation is requested.

Implementation of guidelines can also facilitate the use of an expedited case processing procedure as required by the Child Support Enforcement Amendments of 1984. As specified in federal regulations (45 CFR 303.101) states must adopt expedited judicial or administrative processes to establish and enforce child support awards. Guidelines can provide a framework for quasi-judicial and/or administrative hearing officers to use in setting amounts of child support awards.

#### GUIDELINE OBJECTIVES

In recognition of the need for, and advantages of, guidelines, the Task Force agreed the primary purpose of guidelines is to formulate a uniform and equitable method to determine child support. One that is predictable, reasonable, simply calculated, and which reflects the duty of both parents to support their children commensurate with their ability. Toward that end, the Task Force adopted the following objectives:

1. To provide as simple as possible a uniform child support guideline to facilitate understanding by the parties and efficient administration by the courts.
2. To provide a uniform, consistent and objective method for determining child support obligations to enable parents and attorneys to estimate a child support award.
3. To ensure that inadequate child support doesn't contribute to the number of children living below the U.S. Census Bureau's poverty threshold level.
4. To protect children as much as possible from the adverse economic consequences of family breakup or non-formation.
5. To encourage joint parental responsibility by allocating support in proportion to each parent's income.
6. To meet a child's basic needs first, but to the extent either parent enjoys a higher than basic standard of living, the child is entitled to share in that higher standard of living.
7. To structure guidelines to accommodate the subsistence needs of parents but in all instances to require at least a minimum payment toward child support.
8. To allow parents to rely on the amount of the child support obligation so that both parents can plan other parts of their lives.

9. To provide a standard for reviewing the adequacy of existing child support orders.
10. To provide a method for periodic updating of child support orders.
11. To apply the uniform child support guideline without regard for the gender of the custodial parent.
12. To minimize negative effects on the major life style decisions of both parents. The guideline should avoid creating economic disincentives for remarriage or labor force participation.
13. To ensure Utah is in conformity with federal law and therefore qualifies for continued federal funding for state and federal welfare programs.

#### USE OF THE GUIDELINES

The Task Force identified and considered many individual factors, and the relation of each to the other, in formulating the guidelines. Many of the factors considered were made an integral part of the guidelines, while others were deemed inappropriate for integration in the guidelines, but may deserve consideration in a particular case.

#### INTEGRATED FACTORS

##### Application of the Guidelines

The guidelines will apply in all cases, not just in those that are litigated, including divorce, separation and paternity.

The guidelines will create a rebuttable presumption and require that trial judges enter a specific written finding of fact in the event a child support order deviates from the guidelines.

Worksheets explaining the formula applied in the use of the guidelines shall be attached to the guidelines.

#### Income

Gross income is used to determine each parent's share of child support. Gross income includes income from any source except as may be excluded elsewhere in the guidelines, and includes, but is not limited to, income from salaries, wages, commissions, royalties, bonuses, rents, dividends, severance pay, pensions, interest, trust income, alimony, annuities, capital gains, social security benefits, workman's compensation benefits, unemployment insurance benefits, and disability insurance benefits. Additionally, business expense account payments for items such as meals, automobile expenses and lodging, should be included to the extent that they provide the recipient parent with something he or she would otherwise have to provide.

### Deductions From Gross Income

After the amount of gross income is determined, a subsistence level for each parent will be deducted. A subsistence level will be equal to the federal poverty guidelines for a one-person household (\$458 per month in 1987).

Also deducted from gross income will be child support previously ordered and actually paid for children of a prior relationship. Proof of payment of such child support should be required before the deduction is allowed.

Aid to families with dependent children and other similar welfare benefits being received by an obligor parent are not to be included as income. Also, benefits received under the State Housing Subsidy, the Job Training Partnership Act, Medicaid benefits and food stamps, as well as General Assistance, should not be included as income.

### Determining Income

Gross income, whenever possible, should first be computed on an annual basis and then recalculated to determine the average gross monthly income. Suitable documentation of current earnings shall be provided and should include year-to-date pay stubs and employer statements. Documentation of current earnings should be supplemented with copies of at least the last three years of tax returns to provide verification of earnings over time. Historical earnings will be used to determine whether an underemployment or overemployment situation exists.

Gross income from self-employment or operation of a business is defined as: Gross receipts minus minimum necessary expenses required for self-employment or business operation. In general, income and expense from self-employment or operation of a business should be carefully reviewed to determine an appropriate level of gross income available to the parent to satisfy a child support award. This amount will ordinarily differ from a determination of business income for tax purposes. Specifically, only those expenses necessary to allow the business to operate at a reasonable level should be deducted from gross receipts.

### Imputed Income

In circumstances where either parent is voluntarily underemployed or unemployed, earning capacity should be imputed to that parent based upon employment potential and probable earnings as derived from work history, occupation qualifications, and prevailing earnings for persons of similar backgrounds and gender in the community. If one parent has been absent from the work force for a significant period of time, there may be no recent work history to consider. In



such cases, income should be imputed at least at the federal minimum wage for a forty-hour work week.

However, income should not be imputed if any of the following conditions exist:

1. The reasonable costs of day care for the parties' minor children approach or equal the amount of income the custodial parent can earn;
2. A parent is physically or mentally disabled to the extent where he or she cannot earn minimum wage;
3. A parent is engaged in education or retraining to establish basic job skills; or
4. If the emotional and physical needs of the child require the responsible parent's presence in the home.

#### Step-parent Income

Only the income from the natural parents of the child is used to determine support.

#### Minimum/Maximum Support Awards

A minimum child support award will be required in all instances. If a parent's annual income is equal to or less than \$5,500 per year, such parent must pay \$25 per month per child or ten percent of that parent's monthly gross income, whichever amount is greater.

There will be an upper limit on the amount of child support awarded. Not more than fifty percent of the noncustodial parent's gross income should be awarded. The guidelines should be used for all incomes up to \$10,000 per month. If either parent has income above \$10,000 per month, child support should be determined on a case-by-case basis, and some of the child support obligation may be fulfilled in a form other than cash. In no case, however, should the cash amount fall below the presumptive level of support set by the schedule for a parent earning \$10,000 per month.

#### Child's Income

The earnings of a child who is the subject of a child support award should not be considered income to either parent for the purposes of the guidelines. However, Social Security or Old Age Dependents benefits received by a child will be credited as child support to the parent whose earning record it is based upon.

#### Children From A Second Family

Additional children from second families will not affect the support level ordered for the first children.

### Temporary Changes In Income

*Policy*

Temporary or reasonably contemplated changes in income should not be deemed to be a substantial change of circumstances.

*less than 6 mos*

### Ages of Children

In recognition of the fact that the costs of rearing children differ depending on the age of each child, the guidelines apply varying amounts of support for three age groups; 0-6 years of age, 7-12 years of age, and 12 years of age to majority.

### Child Care Costs

The reasonable costs of child care expenses actually incurred should be allocated to each parent in proportion to income. The child care expenses considered should include child care costs to allow the custodial parent to work, child care costs to allow the custodial parent to look for work, and also the costs for child care which allow the custodial parent to complete education as a prerequisite for obtaining employment.

### Health Insurance/Medical Expenses

The parent who can obtain the most favorable medical/dental and optical insurance coverage for the benefit of the minor children at the lowest cost should generally be ordered to do so. If economically beneficial to the minor children, both parents should be ordered to provide such insurance. The costs incurred for the child's portion of the insurance premium(s) will be allocated in proportion to income. Those non-covered routine medical expenses will be borne by the custodial parent. Routine expenses include routine office visits, physical examinations and immunizations.

Extraordinary medical expenses should be allocated to the parents in proportion to income. Extraordinary expenses include, but are not limited to, surgery, orthodontic care, all dental treatment, psychological or psychiatric care, hospitalization, physical therapy, ophthalmology and optometry, broken limbs, and continuing illnesses or allergies, such as diabetes or asthma. If neither parent has an insurance policy for the benefit of the minor children, all medical expenses should be shared proportionately.

### Extended Visitation

In the event a minor child which is the subject of a child support award spends at least 25 of 30 consecutive days, including overnight, with the noncustodial parent, said parent's child support obligation should be offset by 25% for that month.

FACTORS NOT INTEGRATED

Visitation

NOT in worksheet  
incl in Big Picture

Despite the fact that the scope of the Task Force was limited to the formulation of a schedule to facilitate reasonable and uniform child support awards, many individuals expressed extreme concern about problems with child visitation. Some parents addressing the Task Force felt that visitation should not be allowed unless child support payments are current, while others believe child support payments should not be required unless visitation is effected.

Policy  
start  
only

It is the position of the Task Force that every child has the right to be financially supported and physically and emotionally nurtured by both parents. The Task Force recognizes the anguish experienced by parents who have not been allowed to develop and maintain a meaningful relationship with their children. However, to link the two in the guidelines would be contrary to Utah case law and beyond purview of the Task Force.

Additionally, the Task Force felt that any travel expenses incurred by either parent as necessary to effect child visitation should not be integrated in the guidelines but considered on a case-by-case basis.

Tax Considerations

The guidelines do not address the question of which parent is permitted to claim dependent children as tax exemptions. Since tax exemptions have a value and affect the parties' available resources, consideration must be given to which of the parties will receive this benefit when setting child support. However, because tax laws are subject to change and because the IRS is the final arbitrator in deciding which party will receive the tax exemption, it was deemed inappropriate to attempt to include such consideration in the guidelines. *It is not clear that a judge can award these tax deductions.*

Policy  
only

Split/Shared Custody

The guidelines will not apply in cases of split or shared (joint) physical custody. Rather, these situations should be considered on a case-by-case basis. Shared or joint custody is typified by a child residing with both parents on a 50-50 basis. Split custody refers to the situation where each parent is ordered physical custody of at least one child born of the relationship. The Task Force has concluded that it costs more to rear children under either type of arrangement since two households (including personal items and transportation) must be maintained. Generally, an amount equal to 50 percent of the support award as determined by using the guidelines should be added to determine the total costs of support necessary in such situations. (Example included in Appendix).

parents  
on

loop hole to  
get around the  
schedule

~~Policy~~

dictated by

~~Split~~ Split Custody  
Colo 1.5 multiplier for Shared Custody - ~~Split~~ Split Custody  
-8-  
total # kids

### Updating Awards

Child support orders should be updated regularly and, to facilitate updating, the parties should be ordered in the original decree to exchange financial information every two years. Ideally, child support awards would be automatically updated every two years by applying current financial information to the guidelines.

However, the Task Force recognizes that a mechanism for systematic updating does not presently exist and that the existing judicial structure could not accommodate the extreme increase in case filings given current case loads. Therefore, it is recommended that an administrative agency be created to devise, implement and administer a system for regular and reasonable updating of child support awards.

### Impact on Extant Child Support Awards

In the event application of the present guidelines would increase or decrease an existing child support award by 20 percent or more, such variation should constitute a substantial change of circumstances such that the court could consider modifying the existing order.

1045M/jj

## APPENDIX

Assuming that there is one child; that parent number one has a gross income of \$2,200 per month and a net income of \$900 per month; that parent number two has a gross income of \$1,527 per month and net income of \$762 per month. These parent's total child support obligation would be \$430 per month (obtained by multiplying their gross amount of income by 18.8). An additional 50 percent is necessary to maintain these two households, or \$430 times 50% = \$215.  $\$430 + \$215 = \$645$ . Therefore, \$645 would be the total amount of child support in these or shared custody arrangement. Such a figure is 28% of the total combined family income, making parent number one's share and support 28% of \$1,527 or \$427; and parent number two's share of support 28% of \$962 or \$221 per month.

## CITATIONS

- 1 Ron Hoskins, et. al., Estimates of National Child Support Collections Potential and the Income Security of Female-Headed Families, Report to Office of Child Support Enforcement, Bush Institute for Child and Family Policy, Univ. of No. Carolina at Chapel Hill (April 1985).
- 2 U.S. Bureau of the Census, Child Support and Alimony: 1983, Current Population Reports, Special Studies, Series P-23, No. 141 (July 1985).
- 3 U.S. Bureau of the Census, Child Support and Alimony: 1983, Current Population Reports, Special Studies, Series P-23, No. 141 (July 1985).
- 4 See Thomas J. Espenshade, Investing in Children: New Estimates of Parental Expenditures, (Urban Institute Press: Washington, 1984).
- 5 Federal Register, Vol. 48, No. 34, 2/17/83, pp. 7010-7011.
- 6 Robert G. Williams and Stephen G. Campbell, Review of Literature and Statutory Provisions Relating to the Establishment and Updating of Child Support Awards, Report to U.S. Office of Child Support Enforcement (National Institute of Socioeconomic Research: Denver, January 1984), pp. 1-3.  
  
Kenneth R. White and R. Thomas Stone, Jr., "A Study of Alimony and Child Support Rulings with Some Recommendations," Family Law Quarterly, Vol. X, No. 1 (Spring 1976), p. 83.  
  
Lucy Marsh Yee, "What Really Happen in Child Support Award Cases: An Empirical Study of Establishment and Enforcement of Child Support Orders in the Denver District Court," Denver Law Journal, Vol. 57, No. 1 (1979), pp. 38-42.  
  
David L. Chambers, Making Fathers Pay: The Enforcement of Child Support (Chicago: University of Chicago Press, 1979), pp. 38-42.  
  
Proposed Child Support Guideline for the State of Michigan, Friend of the Court Bureau, State Court Administrative Office (Lansing: draft dated January 9, 1985), pp. 4-5.
- 7 Robert G. Williams and Stephen G. Campbell, Review of Selected State Practices in Establishing and Updating Child Support Awards, Report to U.S. Office of Child Support Enforcement National Institute for Socioeconomic Research: Denver, January 1984), pp. 1-3.

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IN THE DISTRICT COURT OF WEBER COUNTY, STATE OF UTAH

---

JANET SUE JOHNSON,  
Plaintiff,  
vs.  
VAL BUDGE JOHNSON,  
Defendant.

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)  
)  
)  
)  
)  
)  
)  
)  
)

MEMORANDUM DECISION

Case No. 94737

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Defense counsel is invited to submit findings, conclusions, and decree consistent with that indicated below. If he has not done so within two weeks after receipt of this decision, plaintiff's counsel is invited to do so.

FACTS

1. The Court has jurisdiction of the case because of the residency of both parties in Weber County.

2. The parties were married in 1966, and separated in 1986. Each party is now requesting a divorce.

3. Each party has been cruel to the other. The plaintiff's cruelty is that she did not make a reasonable effort to keep the romance alive. She gave priority to her church work, children, and personal interests. This caused her husband to feel isolated and unappreciated. She attempted marriage counseling about five years ago. Her husband attempted to revive

this counseling in 1985, but the plaintiff took no interest in that effort. Defendant's solution to his problem is legally unacceptable. He developed a secret romance. The plaintiff eventually discovered the romance and filed for separate maintenance. He counterclaimed for divorce. She has a desire to continue the marriage, but does not plan any personal behavior changes towards her husband. He now plans to continue with his new romance. The Court's conclusion is that each of the parties are entitled to a divorce on the grounds of mental cruelty. If the parties agree, the divorce may be final at once.

4. The Court accepts the parties' stipulation so far as it goes, concerning child custody, visitation, and property division, etc., and rules on the remaining issues. If any issue is not here ruled on, or further guidance is needed, the Court is available for conference.

5. The parties' stipulation reserves the issue of child support. The Court finds that the following of the child support table's last line, that is for approximately \$120,000 per year, is proper. The Court recognizes that the father's earnings likely exceed that figure by \$10,000 to \$25,000 per year. The exact income is deemed by the Court to be immaterial. The Court's reasoning on this matter is set out below.



This Judge wrote the first child support guidelines in Utah. He also served on the Utah Judicial Council when the first statewide guidelines were adopted. The issue of how high child support guidelines should go is a matter of considerable debate. It may be helpful to examine a somewhat similar case. That case concerns a multi-millionaire's divorce in Clearfield, Utah. The children were left with the mother in the family home, and everyone planned the children would remain in the public schools and continue to enjoy their friends and association in the middle class neighborhood. This is very similar to the case at hand. The calculations begin with the consideration of foodstuffs. Milk, eggs, bread and vegetables, etc., cost a rich child close to the same as it costs a middle class child. A rich child, by and large, wears the same fashions as his peers. The recreation is principally shared with persons of his own age group. There are some trips expected that will be taken with grandparents, father, and occasionally with the mother, that may be considered more exotic. Doctors and dentists charge rich children and middle class children a fixed rate. The bottom line, arithmetically, was that once a child's father gets to the \$10,000 a month level, and a child is raised locally, there is no effect on sums spent actually rearing the child when the father's income increases. One runs into a problem similar to "Brewster's Millions". The Davis County millionaire was the product of

generations of rich men, and their efforts to adjust. He concluded that to give a child more than one and one-half times the neighboring kids' allowance is to buy your child problems. An analysis of the monthly budget of this couple while they lived together, and since the separation, supports the hypothesis that prudence does not indicate that anymore should be spent on child support in the future than was spent on child care while the father lived at the home. This couple actually spent less while the father lived in the home than is indicated in the child support guidelines in the tables. It is not the purpose of child support to provide savings and/or estates. Savings and estates are matters that are controlled by the parents and involve other considerations.

6. The parties did not stipulate on whether or not the house should be paid off. The plaintiff should be allowed to chose whether to take the cash and the obligation and/or pay off the mortgage. There is sufficient equity in the home that there is little risk to the defendant. The subject of alimony is not covered by the stipulation, nor is the value of the medical doctor degree, nor the value of the defendant's position in the professional corporation.

*ends of her death or sever.* The plaintiff is awarded alimony at the rate of \$1,000 to be continued under the general terms of alimony, but not to exceed ten years. The Court's rationale in ruling on this matter is indicated below.

*Per M.V.*

The plaintiff has enjoyed the benefits of this medical degree for a substantial period of the time.

The plaintiff did not create this degree. Her contribution was a very limited financial one for three years and a few months that she worked at I.R.S. She earned about \$14,000 during that time and shared it with the defendant. The defendant was well on his way to the medical degree before this marriage. He had achieved his undergraduate education and the degree that made his acceptance into medical school possible. He had been accepted into medical school. He had already completed one year before the marriage. He had the support of his parents. His parents continued to pay all of his tuition and book charges until the degree was obtained. He had a limited fellowship. He worked part time for two of the three years the couple lived together during medical school. The evidence indicates that the defendant would have achieved a medical degree with or without the plaintiff's limited financial contribution. She married a medical student. She will further enjoy the fruits of his study in the future. She has received substantial sums of money that his training has provided in the property settlement. The child support here awarded reflects his higher earning capacity.

7. The stipulation does not cover attorneys' fees or the cost of expert witnesses. Each party shall bear their own expenses in this matter.

Much of the trial time has been concerned with the plaintiff's allegation of the present value of the medical degree and the stock exceeds a million dollars and that he should pay her one-half. The plaintiff's expert witness' testimony as to the value of the medical degree and/or the stock lacks credibility.

First let us be concerned with the value of the stock position in the professional corporation. There is no fixed contract for employment with the hospitals. It is a "going rate" situation. Each doctor does equal work and gets equal pay regardless of the number of years he has spend with the group. The articles of incorporation are actually little more than a partnership at will. The buy out agreement fixes the buy out figure as a porportional share of the fixed assets. Each doctor bills the hospital for each service, and the money is eventually split equally. One of the principal benefits of the business is the arrangement makes <sup>it</sup> possible for the corporation to pay into a retirement fund sums that, in effect, defer taxation. This accumulation of funds for the purpose of division in this case shall be calculated as of the value indicated by the defendant's experts as of April 1, 1987. Both the plaintiff and the defendant must bear their own tax consequences from any draw from these sums. The value of these deferred earnings is as indicated by the defendant's experts. The market place has provided

substitute or new doctors. The new doctors come in substantially in the same position as the leaving doctors. This is true of the manner in which this defendant was treated. There is no indication in the immediate future that the earnings of these doctors will exceed the simple value of a pathologist's services on a piecemeal basis to the hospitals.

8. The value of the plaintiff's expert witness testimony as to the worth of the M.D. degree is not credible. One of his flaws is the assumption that a doctor's income will increase each year by a fixed percentage. The basic income of this group is on the formula that cash received will equal the normal charges for piece work done by the pathologist at the various hospital's directions. Unless the rate charged for the piecemeal service is increased, and there is no evidence that it will be, in fact evidence is that it will lessen, or the amount of piece work increases, and there is no evidence that it will, or the number of doctors sharing the funds will decrease, and there is no evidence that suggests this, the earnings have leveled off at the present rate for the expected future. Each one of the pathologists charges rates identical to the others, and there is no specific reward for seniority or length of service. The income of these pathologists is expected to be set by the fair market place in the future. The defendant's

accountant has high credibility, the plaintiff's expert is not credible. There is no reason the defendant should pay the plaintiff's experts.

9. Each party has funds from which they may pay their own attorney. The Court finds that each of the parties have employed their attorney and relied upon their attorney in good faith. Each party will bear their own attorney's fees.

10. The value of the professional corporation stock is as indicated by the defendant's accountant.

11. The Court has considered the defendant's contention that the plaintiff should be forced to either find employment or charged as though she were working. It is recognized that, in this day and age, it is rare to see a 44 year old woman, in good health, with a college degree, who has no serious plans for employment. The Court is also aware of the fact that she does have an 8 year old child at home. She should be encouraged to work eventually. She is not to be considered to have changed the circumstances if she finds employment, so long as the earnings do not exceed \$1,300 or \$1,400 per month.

DATED this 27 day of March, 1987.

JS/  
JOHN F. WAHLQUIST, Judge

TIM W. HEALY, #7606  
Attorney for Defendant  
863 25th Street  
Ogden, Utah 84401  
Telephone: 621-2630

IN THE DISTRICT COURT OF WEBER COUNTY, STATE OF UTAH

---

JANET SUE JOHNSON,	)	
	)	
Plaintiff,	)	
vs.	)	FINDINGS OF FACT and
	)	CONCLUSIONS OF LAW
VAL BUDGE JOHNSON,	)	
	)	Civil No. 94737
Defendant.	)	
	)	

---

The above entitled matter came before the Honorable John F. Wahlquist, District Judge, presiding for trial on the 20th day of March 1987 and again on the 23rd day of March 1987; plaintiff was present represented by her counsel, Stephen W. Farr, Esq; defendant was present represented by his counsel, Tim W. Healy, Esq. A stipulation of the parties regarding the division of real and personal property was read and acknowledged by the parties. Various witnesses were sworn and testified and various items of documentary evidence were received. Counsel for the respective parties met again with the Court on April 22, 1987 for the purpose of clarifying some items from the Memorandum Decision and the Court being duly advised in the premises now enters the following:

FINDINGS OF FACT

1. That the Court has jurisdiction in this matter inasmuch as both parties are actual and bona fide residents of Weber County, Utah.
2. That the parties were married in Salt Lake City, Utah on August 19, 1966. They separated on or about February 1, 1986. Each party is now requesting a divorce.

3. That three children have been born as issue of the marriage, to-wit: Erik Val Johnson, born October 30, 1970; Jennifer Johnson, born January 22, 1973 and Jamie Anne Johnson, born November 30, 1978.

4. That both parties have caused the other party pain and anguish to such an extent that they are unable to continue in the marital relationship with the other. Plaintiff's cruelty was that she did not make a reasonable effort to keep the romance alive and she gave priority to her church work, children and personal interests and has caused her husband, the defendant, to feel isolated and unappreciated

5. Plaintiff attempted marriage counselling approximately five years ago. Defendant attempted to revive this counselling in 1985 but plaintiff took no interest in that effort.

6. Defendant's cruelty consisted of having developed a secret romance which plaintiff eventually discovered and she filed for separate maintenance. Defendant counterclaimed for divorce. Plaintiff has expressed a desire to continue the marriage but does not plan any personal behavioral changes toward the defendant. Plaintiff testified that defendant plans to continue his relationship with another woman.

7. Plaintiff did obtain a college degree in business from Weber State College prior to her marriage to defendant.

8. That at the time of the marriage of the parties, defendant had obtained his bachelor's degree and had completed one year of medical school.

9. That plaintiff worked for approximately three years following the marriage of the parties but has not worked in the ensuing 17 years. Defendant also worked part-time for two of the three years he was in medical school after the parties were married.

10. That defendant's parents paid all of the expenses for defendant's tuition and books during the time that he was in medical school.



JOHNSON v JOHNSON  
FINDINGS OF FACT & CONCLUSIONS OF LAW  
Page Three

11. That defendant had a limited fellowship during medical school which was a credit upon his tuition costs.

12. That defendant would have achieved a medical degree with or without the plaintiff's limited contribution.

13. That plaintiff has enjoyed the benefits and fruits of defendant's medical degree for a substantial period of time.

13. That the articles of incorporation of defendant's employer, The Associates of Pathology, are actually little more than a partnership at will.

14. That the buy-out agreement fixed the buy-out figure as a proportional share of fixed assets.

15. That there is no fixed contract of employment with the hospitals served by the aforesaid corporation; it is a going rate situation.

16. That each doctor within the aforesaid professional corporation bills the hospital and/or the other clients for services rendered and the money is eventually divided equally.

17. That the market place has provided substitute or new doctors. New doctors come in substantially in the same position as the doctors leaving said corporation. The rates charged by each pathologist are identical to the others and there is no specific reward for seniority or length of service.

18. That the value of defendant's interest in the Associates of Pathology, a professional corporation, is \$14,521.00.

19. That one of the flaws in plaintiff's calculation of the value of defendant's medical degree is the assumption that the defendant's income would increase each year by a fixed percentage.

JOHNSON v JOHNSON  
FINDINGS OF FACT & CONCLUSIONS OF LAW  
Page Four

20. That the basic income of defendant in his employment with the Associates of Pathology will equal the normal charges for piece work done by the pathologist at the direction of the various hospitals and other clients. There is no evidence that the pay for this piecemeal service will increase; in fact, the evidence is that it will lessen. There is also no evidence that the amount of piece work will increase or that the number of doctors sharing the earnings from the Associates of Pathology will decrease.

21. That the earnings of the defendant has levelled off at the present rate for the expected future. The projected income for the defendant for 1987 including salary and bonus is between \$127,000 and \$132,000 which income level is expected to remain constant in the ensuing few years. \*

22. That the income of the defendant as well as the other pathologists within the Associates of Pathology is expected to be set by the fair market place in the future. The rates charged by each pathologist are identical to the others and there is no specific reward for seniority or length of service.

23. That the earnings of the defendant as well as his future potential have been considered by the Court for the purpose of fixing alimony.

24. That each of the parties have employed their attorney and relied upon said attorney in good faith.

25. That each party has funds with which they may pay their own attorney.

26. That the parties have acquired substantial real and personal property during the course of their marriage which should be equitably divided pursuant to the stipulation of the parties.

27. That the maximum <sup>income</sup>/figure used for child support pursuant to the Uniform Child Support Schedule of \$10,000 per

JOHNSON v JOHNSON  
FINDINGS OF FACT & CONCLUSIONS OF LAW  
Page Five

month recognizes that even though a father's income may be higher the cost of raising and supporting said children locally will not increase although the father's income may exceed the \$10,000 per month figure. X

28. That plaintiff and defendant actually spent less while defendant lived in the home for the support of the children of the parties than is indicated in the child support guidelines and the tables adopted by this judicial district based upon defendant's income. X

CONCLUSIONS OF LAW

1. That plaintiff and defendant should each be awarded a decree of divorce from the other upon the grounds of mental cruelty the same to become final upon signing and entry.

2. That plaintiff should be awarded the care, custody and control of the minor children of the parties subject to reasonable rights of visitation by defendant.

3. That defendant should pay to plaintiff as and for child support the sum of \$648.00 per month per child commencing with the month of April 1987.

4. That plaintiff's expert witnesses lack credibility regarding the values placed on defendant's <sup>interest and</sup> stock with the Associates of Pathology and regarding the value of his medical degree.

5. That defendant's expert witness has high credibility regarding the value of defendant's interest and stock in the Associates of Pathology as well as his earnings as a medical doctor.

6. That defendant's medical degree should not be marital property subject to division by the Court in a divorce action.

7. That defendant's earnings as well as his future potential have been considered by the Court for the purpose of fixing alimony.

8. That defendant should pay to plaintiff as and for alimony the sum of \$1,000 per month commencing with the month of April 1987. Said alimony should be paid to plaintiff for a period of ten years or until plaintiff either remarries, cohabits with another male person or dies.

9. That plaintiff should be awarded one-half of the value in defendant's interest in the Associates of Pathology, a professional corporation which total interest is in the sum of \$14,521.00.

10. That plaintiff should be awarded the family home of the parties subject to assuming and discharging the outstanding mortgage balance thereon and holding the defendant harmless therefrom.

11. That defendant should be entitled to claim the two oldest children of the parties for income tax purposes commencing in 1986. At such time as the oldest child of the parties reaches the age of 18 or graduates from high school with his appropriate year group, whichever is later, that child support should be discontinued. Defendant should then be entitled to claim the <sup>next</sup> oldest child of the parties for income tax purposes. At such time as just one child remains the defendant should be entitled to claim said child for income tax purposes every other year.

12. That each of the parties should bear the expenses of their own expert witnesses as well as their own attorney fees and costs.

13. That plaintiff should not be entitled to any portion of defendant's 1986 or 1987 bonus inasmuch as these are considered as part of defendant's overall annual income, provided,

JOHNSON v JOHNSON  
FINDINGS OF FACT & CONCLUSIONS OF LAW  
Page Seven

however, that such portions of defendant's 1986 bonus as were previously allocated to the various savings and checking accounts of the parties and formed part of the stipulation of the parties should not be affected.

14. That defendant should be responsible for any and all federal and state income taxes owed by him upon his 1986 income. \*

15. That the parties should be awarded the following real and personal property with the values indicated herein:

Plaintiff

House	\$ 96,000
Cars	11,000
Cabin	10,000
Boat	11,000
Furniture	12,000
1/2 cash incl. \$17,000	59,602
in Amer. 1st	
1/2 stock	18,644
Add'l cash in lieu	
of AofP stock & life ins.	
cash value	9,309
Share of <u>pension</u> trust	200,950
	<u>\$ 428,505</u>

Defendant

Share of cash	43,791	-including \$20,000 in Continental Bank
1/2 stock	18,644	checking
FFCA-EF Hutton	10,000	
South Gate Lodge	10,500	
A of P stock	14,521	
Life Ins. cash value	4,099	
Loan to Dean	900	
Muni bonds MLPF&S & EF Hutton	116,628	
Pension trust share	203,421	
Car	6,000	
	<u>428,504</u>	

The pension trust share of plaintiff & defendant as reflected above was calculated as of 3/31/86. The additional amounts in said pension trust share which have accrued as of 4/1/87, figures are not yet available.

JOHNSON v JOHNSON  
FINDINGS OF FACT & CONCLUSIONS OF LAW  
Page Eight

16. That the accumulated amounts in the pension & profit sharing trusts for purposes of property division should be as of April 1, 1987. Both the plaintiff and the defendant should bear their own tax consequences from any draw from these sums.

17. That the remaining items of personal property including but not limited to silverware, china and porcelain should be divided equally, traded against other items of similar value or purchased for cash for the value of the other party's interests.

18. That the defendant should receive the photo equipment, the snow blower and the stereo.


19. That the plaintiff should be awarded the sewing machines, ATV 3 wheeler and the parties should also divide the Lennox china and the Lunt silverware or one party may buy out the other party for one-half of the said value.

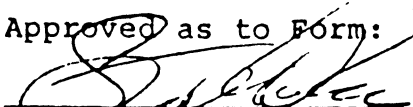
20. That the parties should sign such Quit Claim Deeds to real property as well as vehicle titles as may be required to effect transfer of the aforesaid real and personal property.

21. That any amounts in the savings and checking accounts as well as stocks and bonds in excess of the amounts as shown in paragraph 15 above should be equally divided.

22. That plaintiff's circumstances should not be considered to have changed for purposes of modifying alimony awarded herein so long as her earnings do not exceed \$1400 per month. \*

DATED this 12 day of MAY, 1987.

  
DISTRICT JUDGE

Approved as to Form:  


TIM W. HEALY #7606  
Attorney for Defendant  
863 25th Street  
Ogden, Utah 84401  
Telephone: 621-2630

Recorded Book	139
Page	2208
Indexed	.....

May 22 3 02 PM '87

WEBER COUNTY CLERK  
RICHARD GREENE

IN THE DISTRICT COURT OF WEBER COUNTY, STATE OF UTAH

JANET SUE JOHNSON,

Plaintiff,

vs.

VAL BUDGE JOHNSON,

Defendant.

DECREE OF DIVORCE

Civil No. 94737

59/192

The above entitled matter came before the Honorable John F. Wahlquist, District Judge presiding, for trial on the 20th day of March, 1987 and again on the 23rd day of March, 1987; plaintiff was present represented by her counsel, Stephen W. Farr, Esq; defendant was present represented by his counsel, Tim W. Healy, Esq. A stipulation of the parties regarding the division of real and personal property was read and acknowledged by the parties. Various witnesses were sworn and testified and various items of documentary evidence were received. Counsel for the respective parties met again with the Court on April 22, 1987 for the purpose of clarifying some items from the Memorandum Decision and the Court being duly advised in the premises and having filed the Findings of Fact and Conclusions of Law in writing, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That the plaintiff and defendant shall each be awarded a Decree of Divorce from the other upon the grounds of mental cruelty the same to become final upon signing and entry.

2. That the plaintiff shall be awarded the care, custody and control of the minor children of the parties subject to

reasonable rights of visitation by defendant.

3. That defendant shall pay to plaintiff as and for (child support) the sum of \$648.00 per month per child commencing with the month of April 1987.

1987  
1/4

4. That defendant's medical degree is not marital property subject to division by the Court in a divorce action.

5. That defendant's earnings as well as his future potential have been considered by the court for the purpose of fixing alimony.

6. That defendant shall pay to plaintiff as and for alimony the sum of \$1,000 per month commencing with the month of April 1987. Said alimony shall be paid to plaintiff for a period of ten years or until plaintiff either remarries, cohabits or dies.

7. That plaintiff shall be awarded one-half of the value in defendant's interest in the Associates of Pathology, a professional corporation, which total interest is in the sum of \$14,521.00.

8. That plaintiff shall be awarded the family home of the parties subject to assuming and discharging the outstanding mortgage balance thereon and holding the defendant harmless therefrom.

9. That defendant shall be entitled to claim the two oldest children of the parties for income tax purposes



JOHNSON v JOHNSON  
DECREE OF DIVORCE  
Page Three

commencing in 1986. At such time as the oldest child of the parties reaches the age of 18 or graduates from high school with his appropriate year group, whichever is later, that child support shall be discontinued. Defendant shall then be entitled to claim the next oldest child of the parties for income tax purposes. At such time as just one child remains the defendant shall be entitled to claim said child for income tax purposes every other year.

10. That each of the parties shall bear the expenses of their own expert witnesses as well as their own attorney fees and costs.

11. That plaintiff shall not be entitled to any portion of defendant's 1986 or 1987 bonus inasmuch as these are considered as part of defendant's overall annual income, provided, however, that such portions of defendant's 1986 bonus as were previously allocated to the various savings and checking accounts of the parties and formed part of the stipulation of the parties shall not be affected.

12. That defendant shall be responsible for any and all federal and state income taxes owed by him upon his 1986 income.

13. That the parties shall be awarded the following real and personal property with the values as indicated herein:

PLAINTIFF:	
House	96,000
Cars	11,000
Cabin	10,000
Boat	11,000
Furniture	12,000
½ cash incl \$17,000 in Amer. 1st	59,602
½ stock	18,644
Addt'l cash in lieu of AofP stock & life Ins.	9,309
Share of pension trust	200,950
	<hr/> 428,505

*Cash & income producing assets  
228,505*

DEFENDANT:

Share of cash	43,791	including \$20,000 in Continental Bank checking
½ stock	18,644	
FFCA-EF Hutton	10,000	
South Gate Lodge	10,500	
A of P stock	14,521	
Life ins. cash value	4,099	
Loan to Dean	900	
Muni bonds MLPF&S & EF Hutton	116,628	
Car	6,000	
Pension trust share	203,421	
	<u>428,504</u>	

14. That the accumulated amounts in the pension and profit sharing trusts for purposes of property division shall be as of April 1, 1987.

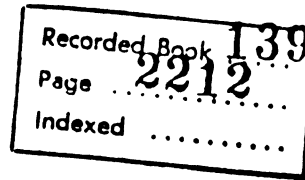
15. That the remaining items of personal property including ~~limited to~~ but not/silverware, china and porcelain shall be divided equally, traded against other items of similar value or purchased for cash for the value of the other party's interests.

16. That the defendant shall receive the photo equipment, the snow blower and stereo.

17. That the plaintiff shall be awarded the sewing machines, ATV 3 wheeler and the parties shall also divide the Lennox china and the Lunt silverware or one party may buy out the other party for one-half of said value.

18 . That the parties shall sign such Quit Claim Deeds to real property as well as vehicle titles as may be required to effect transfer of the aforesaid real and personal property.

19. Any amounts in the savings and checking accounts as well as stocks and bonds in excess of the amounts as

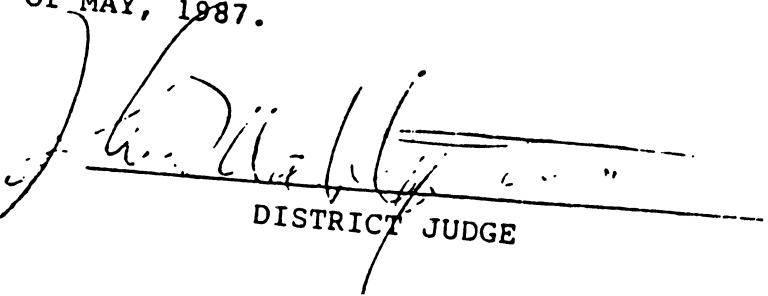


shown in paragraph 13 above shall be equally divided.

20. The pension trust share of plaintiff and defendant reflected above was calculated as of March 31, 1986. The additional amounts in said pension trust shares which have accrued as of April 1, 1987 but which figures are not yet available shall be equally divided between the parties and added to the pension trust shares of defendant and plaintiff as shown herein. Both the plaintiff and the defendant shall bear their own tax consequences from any draw from these sums.

21 That plaintiff's circumstances shall not be considered to have changed for purposes of modifying the alimony awarded herein so long as her earnings do not exceed \$1400 per month.

DATED this 25 day of MAY, 1987.

  
DISTRICT JUDGE

Approved as to Form:

  
Attorney for Plaintiff

# PROPOSAL FOR SETTLEMENT

1/20/87

## ASSETS

Note: The following values are approximate although the cash will be equally divided.

CASH:	Continental Bank checking	20,000
	Continental Bank liquid money	7,500
	American 1st	17,000
	Peoples 1st	7,700
	Ogden 1st	7,000
	American Savings	9,000
	Merrill Lynch Ready Assets	38,000
	Continental Bank	<u>13,004</u>
		\$ 119,204

HOUSE:	Gross value	\$130,000	Award to plaintiff as s
	Mortgage	<u>34,000</u>	of assets
	Net Value	\$ 96,000	

\*\* Pay off mortgage out of cash, leaving \$85,204 in available cash to be divided.

Bear Lake Cabin - our 1/3 value - \$10,000. This should go to plaintiff since the other owners are members of her family and since it was built at the request of her father who asked defendant to help fund it.

CARS:	1985 Chevrolet Astro Van	\$11,000	Plaintiff
	1987 Chevrolet Spectrum	No Equity	Plaintiff
	1984 Dodge Daytona	6,000	Defendant

\*\* Defendant does not know the equity in the Chevy Spectrum or how it was paid for.

STOCKS:	Insured Income Properties (FFCA)	E. F. Hutton	\$10,000
	Several stocks at Merrill Lynch		37,280

MUNICIPAL BONDS:		
	Merrill Lynch	\$37,057
	E.F. Hutton	74,192
	A/O 1/31/87	116,628

SOUTH GATE LODGE	(Not liquid)	\$ 10,500
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ASSOCIATES OF PATHOLOGY STOCK	\$ 14,521
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BOAT:	\$11,000 - Plaintiff
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INSURANCE POLICIES -	
Cash value of	\$4,099

Page -2-

A OF P PENSION PLAN	\$405,000	
LOAN TO DEAN JOHNSON	\$ 900	
HOME FURNISHINGS	\$ 12,000	- plaintiff
TOTAL ASSETS	\$857,008	

PETERSON vs. PETERSON  
BRIEF OF APPELLANT

The court has not directed defendant to sell the family home, but it is highly unlikely that she will be able to keep it as a residence short of contracting a new marriage, but at least that decision is up to the defendant. (quoting from page 4 of the Memorandum Decision)

Having noted the financial problems, the court failed to work around the problem and by its decision has in fact exacerbated the same. Respondent's payment on the first mortgage on the \$331,000 home is \$1,600 per month. Appellant recognizes that the purpose of alimony is to provide support for a wife as stated in the foregoing cases, with the view that the purpose is not to inflict punitive damages, however. With the expensive home and large payment, together with the approximately \$600 in maintenance, utilities, and upkeep, it is clear that the court's attempt to leave the respondent the decision with respect to the house is entirely unworkable in view of the financial realities in this case.

If the court ordered the home sold, the parties have agreed that there would approximately \$150,000 in equity, with which respondent could purchase a smaller, affordable home. Further, respondent did not work during the 18-month period of separation prior to the divorce trial which in part is understandable in view of the time that she has been out of the work force. However, as found by the court, she has the capacity to earn, and appellant urges that her earning capacity should be considered in evaluating the reasonableness of the court's award.