

1987

Gay Andersen v. Glade C. Andersen : Brief of Respondent

Utah Court of Appeals

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Recommended Citation

Brief of Respondent, *Andersen v. Andersen*, No. 870338 (Utah Court of Appeals, 1987).
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DOCKET NO. 870338-CA

IN THE UTAH COURT OF APPEALS

GAY ANDERSEN,

Plaintiff/Appellant,

BRIEF OF RESPONDENT

vs.

GLADE C. ANDERSEN,

Defendant/Respondent

Case No. 870338-CA

Appeal of a Decree of Divorce
by the Honorable Omer J. Call
First Judicial District Court
Cache County, Utah

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Priority No. 15

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COURT OF APPEALS

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BRIEF OF RESPONDENT

vs.

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IN THE UTAH COURT OF APPEALS

GAY ANDERSEN,

Plaintiff/Appellant,

BRIEF OF RESPONDENT

vs.

GLADE C. ANDERSEN,

Defendant/Respondent

Case No. 870338-CA

JURISDICTION OF COURT

The Findings of Fact, Conclusions of Law, and Decree of Divorce were entered by the District Court Judge in this matter on July 16, 1987. Appellant, Gay Andersen, filed a Notice of Appeal on August 10, 1987.

This Court has jurisdiction over the appeal by virtue of the Constitution of Utah, Article VIII, Section 1 et seq., Section 78-2A-1 et seq. Utah Code Ann. (1953 as amended), and Rule 3 of the R. Utah Ct. App.

NATURE OF THE PROCEEDINGS

This is an appeal from a final Decree of Divorce signed by Judge Omer J. Call of the First Judicial District Court of Cache County, State of Utah.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The Appellant has stated the issues he desires this Court to review on appeal and the Defendant agrees with that statement of the issues.

1. Whether the trial court abused its discretion in awarding Appellant, Gay Andersen, (hereinafter "Gay Andersen") the home until April 1, 1989, at which time the home was ordered sold and the proceeds divided equally between the parties.

2. Whether the trial court abused its discretion in not specifically valuing the IRA account, there being evidence before the court that the IRA at the time of the parties' separation had in it some \$8,340.76.

3. Whether the trial court abused its discretion by valuing the 1980 Cutlass Oldsmobile at an amount in excess of the evidence before the trial court.

4. Whether the trial court abused its discretion in not requiring Respondent Glade Andersen (hereinafter "Glade Andersen") to maintain certain policies of life insurance and retirement policies with Gay Andersen named as beneficiary thereon.

5. Whether the trial court abused its discretion in not awarding Gay Andersen her reasonable attorney fees and costs incurred in this matter as proffered at trial by stipulation of the parties.

STATEMENT OF THE CASE

NATURE OF THE CASE

This is a divorce case.

COURSE OF PROCEEDINGS

Gay Andersen filed a Complaint for divorce on September 26, 1986. An Order to Show Cause was also signed by the court on September 26, 1986. On October 16, 1986, Glade Andersen filed an Answer and Counterclaim.

On October 27, 1986, a hearing on Gay Andersen's Order to Show Cause was held before Judge VeNoy Christoffersen of the First Judicial District. A Temporary Order was signed by Judge Christoffersen on December 1, 1986, and entered on December 3, 1986.

Trial was held on March 13, 1987, before Judge Call. Judge Call signed his Memorandum Decision on May 5, 1987. The Memorandum Decision was entered on May 11, 1987.

The Findings of Fact and Conclusions of Law and Decree of Divorce were signed by Judge Call on July 15, 1987, and were entered July 16, 1987.

Gay Andersen filed her appeal on August 10, 1987.

DISPOSITION AT TRIAL COURT

Based upon the evidence and testimony adduced at the trial, the Court entered Findings of Fact, Conclusions of Law and a Decree of Divorce.

STATEMENT OF FACTS

1. Glade Andersen and Gay Andersen were married on July 22, 1953. (Transcript, page 3, line 22.)

2. During the course of the marriage, the parties had four children, all of whom are adults and emancipated from the household. (Transcript, page 3, line 23-page 4, line 9.)

3. The Plaintiff, Gay Andersen, is presently 51 years of age and the Defendant, Glade Andersen, is presently 50 years of age. (Transcript, page 3, lines 12-17.)

4. The Appellant, Gay Andersen, had been employed during the marriage for approximately 7 years as a part-time school lunch cook. (Transcript, page 6, lines 7-1.) Gay Andersen had made \$52.23 in 1984, \$320.83 in 1985, and \$1,153.40 in 1986. (Transcript, page 7, lines 11-20.) The Plaintiff, Gay Andersen, testified that she was an able-bodied individual, capable of working full time and that her health was good. (Transcript, page 31, lines 23-page 32, line 2; page 41, lines 10-13.)

5. Since the time of separation, Gay Andersen had turned down a job for \$3.95 per hour because it did not offer benefits and because she thought she would have to leave there eventually.

(Transcript, page 39, line 6-page 40, line 6.) Gay Andersen testified that she was enrolled in a business school which would take nine to ten months to complete. During that time, she would receive training in typing, word processing, shorthand, accounting and bookkeeping. She testified that her prospects of employment were especially good because of the job placement opportunities offered by the school. (Transcript, page 32, line 4-page 33, line 3.)

6. The Defendant, Glade Andersen, completed 10 years of formal education and has been a truck driver for 31 years. (Transcript, page 46, line 21-page 47, line 3.) During the past 7 or 8 years, he has worked for Miller Bros. Company in Hyrum, Utah. (Transcript, page 47, lines 6-7.) During 1984, Glade Andersen made \$29,319.00 and in 1985, made \$28,189.00 and in 1986 made approximately \$28,000.00. (Transcript, page 9, lines 19-24; page 58, lines 17-22.)

7. The Defendant, Glade Andersen, testified that for approximately 8 years, the Plaintiff Gay Andersen's mother lived with them and during that time, the Plaintiff withdrew her love and affection from the Defendant, making the continuation of the marriage impossible. (Transcript, page 47, line 14-page 48, line 16.)

8. Gay Andersen testified in court that her monthly expenses were between \$875.45 to \$915.45 (Plaintiff's Exhibit

#3). Gay Andersen testified that while she was attending school, she could work part-time and still accomplish all of the objectives that she wanted to accomplish with regard to her education. (Transcript, page 41, lines 2-9.)

9. Glade Andersen testified at trial that his monthly gross income was \$2,160.75. (Defendant's Exhibit #15.) From that amount, the following deductions were made: State and Federal income taxes of \$365.60, FICA in the amount of \$147.77 and medical insurance and expenses in at least the amount of \$50.00 per month. Mr. Andersen testified that his life insurance premiums were \$92.00 a month and that the payment on the \$2,000.00 loan taken out by the parties to pay bills was \$97.82 and was taken directly out of his check. The net take-home monies that Mr. Andersen had after the deductions outlined above was \$1,308.53. (Defendant's Exhibit #15; Transcript, page 59, line 1-page 62, line 16.)

10. Glade Andersen testified to a number of debts and obligations that the parties had incurred during the course of the marriage. There was an obligation owing to Zions Bank on a Visa card in the amount of \$1,985.00 with a monthly payment of \$60.00 that was incurred by Mrs. Andersen. Mr. Andersen was unsure as to the purpose for which Mrs. Andersen had incurred the debt. (Defendant's Exhibit #15; Transcript, page 62, line 25-page 63, line 7.) The parties incurred another obligation to

Zions Bank for a wedding of one of the daughters in the amount of \$286.46; (Transcript, page 63, lines 18-25.) The parties incurred another obligation to Zions Bank in the amount of \$2,762.02 for remodeling the bedrooms and for carpet. The Zions obligation is secured by one of the automobiles. The monthly payment on that obligation was \$148.17. (Defendant's Exhibit #15; transcript, page 64, lines 1-18.) The parties had an obligation to ZCMI in the amount of \$481.00 incurred by Mrs. Andersen with payments of \$70.00 per month. (Transcript, page 64, lines 18-23.) The parties owed CitiBank \$433.69. (Transcript, page 64, line 24-page 65, line 2.) Mrs. Andersen had incurred an obligation to the chiropractor in the amount of \$248.94 payable at \$35.00 per month. (Transcript, page 65, lines 4-11.) Mr. Andersen testified that the total amount of monthly installments he was required to pay was \$485.05. (Defendant's Exhibit #15.)

11. In addition to the debts and obligations, Mr. Andersen testified he needed \$250.00 a month for food based upon the fact that he has two meals, five days a week on the road, for which he is not compensated and generally spends no less than \$4.00 each. (Transcript, page 72, lines 2-14.) Mr. Andersen testified that \$90.00 for the remainder of the meals per month at home was reasonable. (Transcript, page 72, lines 16-18.) Mr. Andersen testified he was spending \$450.00 rent together with utilities of

\$120.00 per month, telephone of \$25.00, laundry and cleaning \$20.00, clothing \$50.00, medical and dental \$45.00, entertainment \$50.00, and incidentals of \$100.00. Finally Mr. Andersen testified that he spent \$180.00 in auto expense. (Transcript, page 72, line 19-page 73, line 13.) In essence, Mr. Andersen had \$1,800.00 of debts, obligations and monthly living expenses to meet with \$1,300.00 of net income.

12. The parties purchased their home in Hyrum, Utah, in approximately 1968. The home was purchased as an old home and the parties made improvements to the home. The home was paid off in 1985. The parties stipulated, based upon an appraisal that the value of the home was \$46,000.00. (Defendant's Exhibit #13.) Mr. Andersen testified that the home should be sold immediately and the proceeds divided because neither of the parties could maintain the home and the home would depreciate. Specifically, in addition to the furnace and the bathroom that had to be repaired, the outside needed extensive work. Mr. Andersen testified that the wood on the outside of the home actually had to be replaced because of warping and disfigurement. Further, he testified that unless the upkeep was in fact maintained on the home, in his opinion, the value of the home would depreciate greatly. (Transcript, page 52, line 8-page 53, line 4.) Mr. Andersen testified that Gay Andersen had a sister in Hyrum who lived in a trailer home and inasmuch as the home represented the

major asset of the marriage, the home could be sold and both parties could buy a trailer home or some kind of condominium unit in which to reside. Mr. Andersen testified that he had no ability to buy a home or other facility to live in because of his inability to qualify for a loan. (Transcript, page 53, line 5-page 54, line 5.)

13. In approximately 1983, Glade Andersen received from his work \$17,000.00 because the employer phased out a retirement program. That \$17,000.00 was accumulated by Mr. Andersen over 17 years. Glade Andersen testified that approximately \$10,000.00 of it went into the home for remodeling and the other \$7,000.00 was put in the bank. It was established that approximately \$7,500.00 of the money was rolled over into an IRA. The record further established that in September a distribution was made to Mr. Andersen in the sum of \$4,127.95 and a transfer of funds in the amount of \$4,000.00 was made to another certificate in the Brigham City office of Zions First National Bank. Mr. Andersen testified at court that there was approximately \$3,350.51 left. The remaining \$4,650.00 went to pay the alimony awarded under the terms of the Temporary Order and the living expenses outlined above. (Plaintiff's Exhibit #8; transcript, page 66, line 14-page 68, line 6.)

14. Both the Plaintiff and Defendant testified that there was some \$3,700.00 invested in E. A. Miller profit sharing

account. The court awarded each party one-half of said fund.

15. At the time of trial, there were two life insurance policies that were discussed by the parties. The insurance policies were paid for by the parties. The court did not make any order as it relates to the life insurance. Mr. Andersen testified that he could not afford to maintain the life insurance for the simple reason that it was through his employer and since they had changed companies, he was unsure as to what was going to happen with the life insurance. Further, Mr. Andersen said that the extra \$100.00 a month to pay premiums was simply not feasible for him in light of the court ordered obligations. (Transcript, page 68, lines 11-21.)

16. The court heard testimony from each of the parties as to the value of various items of personal property. The parties then stipulated to an appraisal of the personal property by SusAnn Palmer and both agreed that the values would be accepted for purposes of trial. (Plaintiff's Exhibit #6; transcript, page 12, lines 10-15.) Based upon the appraisal of the items by the expert, the court divided the personal property between the parties, awarding Gay Andersen \$3,438.00 worth of personal property and the Defendant \$3,785.00. (R. 102-103.)

17. As it relates to the personal property issue, the Plaintiff, Gay Andersen, without the permission of Glade Andersen, sold a trailer of the parties appraised at \$1,800.00

for only \$1,000.00. Gay Andersen kept the money and did not give any part of it to Mr. Andersen. (Transcript, page 70, line 10-page 71, line 7.)

18. Based upon a stipulation between the parties, each of the attorneys proffered their attorney's fees. Gay Andersen proffered fees of \$1,800.00 and the Defendant, Glade Andersen, proffered fees of \$2,600.00. (Transcript, page 29, lines 19-25; page 30, lines 1-17; page 74, lines 2-12.)

SUMMARY OF ARGUMENT

The trial court's award of \$300.00 per month alimony to Gay Andersen until such time as Gay Andersen finishes school or is employed full time is a proper Order and one that is based upon the evidence and testimony induced at the time of hearing. The trial court made explicit findings as to the duration of the marriage, the income and expenses of both parties and concluded that there was insufficient income to meet the living expenses claimed by each of the parties and provide monies for the payment of the debts accumulated for the Plaintiff's chiropractor, the daughter's wedding, home improvements, Visa charge accounts, among others. Based upon that, the court found that the home should be used by the Plaintiff, Gay Andersen, subject to the payment of taxes and insurance for a period ending April 1, 1989, at which time the home should be sold and the net proceeds divided evenly between the parties. The court awarded, as

alimony, the sum of \$300.00 until further order of the court or until such time as the Plaintiff completes her schooling or becomes employed on a full time basis. With that ruling, the court expressly recognized and found that the Defendant would have only \$843.00 of net income from which to pay the \$300.00 per month alimony and to pay his own living expenses while the Plaintiff appeared to have the \$300.00 alimony, her \$200.00 earnings and virtually free rent. Considering those various items, the trial court correctly concluded that each party could not be maintained on less than was provided under the terms of the Decree of Divorce and further, that the Decree of Divorce nearly, as possible, split the on-going monies to allow each of them to maintain an acceptable lifestyle.

The court awarded each of the parties one-half of the IRA account and one-half of the interest in the Defendant's pension plan. The court heard testimony that the original amount in the IRA had been depleted in order to pay alimony and on-going monthly living expenses. Therefore, the court's order that one-half of the IRA at the time of trial should be awarded to each parties was an entirely appropriate order.

As it relates to the issue of life insurance, Glade Andersen testified that it was costing him \$100.00 a month to maintain life insurance and that given the financial constraints of the divorce, it was impossible for him to continue that life

insurance. Further, Mr. Andersen testified that the insurance was changing due to his employment and he was unsure as to what policies would be available in the future. Given the tight financial constraints on the parties and the uncertainty as to the life insurance programs that would be available in the future, the court properly acted in not requiring Mr. Andersen to maintain any life insurance.

The Defendant incurred substantially more attorney's fees than the Plaintiff. The court found, given the equities of the situation, that each side should pay their own costs and attorney's fees and such order was appropriate under the circumstances.

ARGUMENT

POINT I

APPELLANT MUST ESTABLISH A SHOWING OF CLEAR AND PREJUDICIAL ABUSE OF DISCRETION ON THE PART OF THE TRIAL COURT

The Supreme Court has ruled consistently as to the standard of review in alimony cases. A clear statement as to the test on appeal was set out in Paffel vs. Paffel, 732 P.2d 96 (Utah 1986). The Supreme Court stated that:

The purpose of such support is to enable the receiving spouse to maintain, as nearly as possible, the standard of living enjoyed during the marriage and to prevent the spouse from becoming a public charge. In an action for divorce, the trial court has considerable discretion to provide for spousal support, and this Court will not interfere with the trial court's award of such support in a divorce

proceeding absent a showing of a clear and prejudicial abuse of discretion.

Id. at 100.

The Court in Paffel, supra, then noted the elements that must be properly considered by the trial court in determining the alimony issue. The Court noted that:

In deciding whether or not to award spousal support and, if so, in what amount, the trial court must consider the financial condition and needs of the spouse claiming support, the ability of that spouse to provide sufficient income for him or herself, and the ability of the responding spouse to provide the support. Failure to consider these factors constitutes an abuse of discretion.

Id. at 100-101.

The Court of Appeals again endorsed that test in Eames vs. Eames, 735 P.2d 395 (Utah App. 1987). In that case, the Court was faced with a marriage of 30 years with three children. At the time of trial, the youngest child was 18 years of age, the Plaintiff was employed and was making approximately \$10,000.00 per year and the Defendant was earning approximately \$34,000.00 per year. The Plaintiff was given the right to live in the home until February 1, 1989, or until it was sold by the agreement of the parties. Plaintiff was awarded alimony in the sum of \$450.00 per month as long as the 18 year old was successfully pursuing a full-time college education, lived in the family home, remained single, or reached the age of 21. Alimony was then reduced to \$300.00 per month and would remain so until the Plaintiff reached

the age of 65 years. At that time, alimony would terminate. Id. at 396-97. It is interesting to note that the Eames, supra case involves a decision by Judge Omer J. Call, the same District Court Judge involved in this matter and involves the same law firm, representing the Plaintiff, who was the recipient of the alimony award. In reviewing that decision, the Court once again recited the purpose of alimony which is to enable the receiving spouse to maintain as nearly as possible the standard of living enjoyed during the marriage and to prevent the spouse from public charge. The Court expressly noted that:

The Appellant Court should not interfere with such award without a showing of a 'clear and prejudicial abuse of discretion.'

Id. at 397.

The Appellant Court then went on to state as follows:

The Court in Paffel further set forth what must be considered by the trial court to avoid the challenge to the award as being an abuse of discretion. These factors are: (1) the financial condition and needs of the spouse claiming support, (2) the ability of that spouse to provide sufficient income for him or herself, and (3) the ability of the responding spouse [Mr. Eames] to provide the support. The trial court here shows that the court below carefully and properly considered the above factors. There was no abuse of discretion. Therefore, the award of alimony will not be disturbed.

Id. at 397.

The Court of Appeals reiterated that same analysis in Boyle vs. Boyle, 735 P.2d 669 (Utah App. 1987). In that case, the Court started with the proposition that the findings of the trial

court in a divorce action will not be disturbed unless there is a clear abuse of discretion. Id. at 670. See also Searle vs. Searle, 522 P.2d 697 (Utah 1974). The Appellant Court restated the factors outlined above and concluded as it did in prior decisions that inasmuch as the trial court considered the three factors outlined above, there was no abuse of discretion. Id. at 671-672.

Finally, in Marchant vs. Marchant, 743 P.2d 199 (Utah App. 1987), the Court of Appeals in fact undertook action in a case in which it found that the standards set out in the prior cases had not been explored by the trial court. In that case, the Appellate Court held that inasmuch as the Findings of Fact contained in the trial court record did not establish the Plaintiff's needs, her ability to provide sufficient income for those needs, nor the Defendant's ability to provide for her support, that the findings were inadequate. Id. at 207.

In this case, the record establishes that the trial court completely and thoroughly reviewed the three elements required by the case as outlined above. The relevant findings of the court relating to the alimony issue are as follows:

2. The court finds that the Plaintiff and Defendant were married to each other on July 22, 1953, in Garland, Box Elder County, State of Utah, and since that time have been and now are husband and wife.

3. The court finds that the Plaintiff and Defendant are the parents of four children, none of whom are minors, and none of whom reside at home, and further

that no children are expected . . .

6. The court finds that the parties are 51 and 50 years old respectfully.

7. The court finds that the Defendant is employed as a truck driver for E. A. Miller with earnings in 1985 of \$28,189.20 and a current gross monthly income of \$26,000.00 per year. The court finds, after the deduction of Federal and State income taxes, social security, medical and life insurance deductions, the Defendant has \$1,405.00 net income per month against which a credit union monthly payment of \$97.82 is also taken therefrom. The court finds that the Defendant further has payments on three Zions Bank loans, a ZCMI account, CitiBank and MedMaster of \$465.00 per month with a principal balance of those debts totaling more than \$7,400.00.

8. The court finds that the Plaintiff is in good health and has worked in the school lunch program earning approximately \$200.00 per month or less and desires to and has begun training for more remunerative employment . . .

10. The court notes that there is insufficient income to meet the living expenses claimed by each of the parties and the payment of the debts accumulated for the Plaintiff's chiropractor, the daughter's wedding, home improvements, Visa charge accounts among others . . .

12. The court finds that as to the home and alimony that the Plaintiff shall be entitled to live in the home subject to the payment of taxes and insurance thereon for a period ending April 1, 1989, at which time the home should be sold and the net proceeds divided equally one-half to each party.

13. The court finds that the Defendant shall pay to the Plaintiff as and for alimony the sum of \$300.00 per month until further order of the court or until such time as the Plaintiff completes her schooling or becomes employed on a full-time basis . . .

18. The court recognizes and finds that from the foregoing figures it would appear that the Defendant will have only \$843.00 per month from which to pay the

\$300.00 per month alimony and to pay his only living expenses while the Plaintiff appears to have the \$300.00 alimony, her \$200.00 per month earning and virtually free rent. However, the court notes that the Defendant has earned \$2,000.00 to \$3,000.00 more in the past years than he is currently earning and further, his total income tax deductions will be reduced by the tax on \$3,600.00 per year alimony.

R. 101-105.

As set out above, it is clear that the court examined all three of the elements required by the Supreme Court-Appellate Court decisions. Explicitly, the first element required of the Court to be discussed by the trial court is the financial conditions and needs of the wife. In that regard, the Plaintiff testified that she had worked for about 7 years as a part-time school lunch cook. She made \$52.23 in 1984, \$320.83 in 1985, and \$1,153.40 in 1986. Further, she testified she was making approximately \$200.00 per month at the time of trial from that program. (Transcript, page 7, line 10-page 8, line 12.

In addition to the work that she has done, Mrs. Andersen testified that her health is good and that she is able to maintain full-time employment. (Transcript, page 31, line 23-page 32, line 2.)

Mrs. Andersen testified that she has had people call her and offer her jobs but she has indicated to them she would not take the employment because they do not offer benefits. (Transcript, page 31, lines 3-13.) Mrs. Andersen testified that she fully intended to become skilled and trained and in that regard, she

started school at Bridger Land Vocational School. She testified it would take her nine to ten months to complete and at that time, she would have training in typing, word processing, shorthand, accounting and bookkeeping. She testified to the court that the nine or ten month program would give her a full scope of business training. (Transcript, page 32, lines 4-25.)

Mrs. Andersen testified explicitly that her prospects for employment would be good, partially if she completed their program. She testified that the school aided students with placement. (Transcript, page 33, lines 1-3.)

Finally, Mrs. Andersen testified that because the schooling is in the afternoon, she could work mornings and testified at court that she was capable of working part-time until she had completed the program. (Transcript, page 41, lines 2-13.)

As noted by the trial court, Mrs. Andersen testified to her monthly expenses as set out on Plaintiff's Exhibit #3. Her monthly expenses are approximately between \$875.00 and \$915.00 per month. Those monthly expenses include \$100.00 upkeep on the home and property, cable T.V. of \$28.45 and miscellaneous expenses of \$50.00. If one assumed that Mrs. Andersen could take part-time employment until her school was completed, she would make at the rate of \$3.95 the sum of \$339.70 per month based upon 20 hours per week. The wages, coupled with the \$300.00 alimony that she is to receive from Mr. Andersen, gives her \$639.70 from

which to meet living expenses of approximately \$900.00. Therefore, with part-time employment, the alimony awarded and the free use of the house, Mrs. Andersen is within \$260.00 of meeting her monthly living expenses.

As it relates to the loans that the court obligated her to pay under the terms of the Decree of Divorce and any schooling expenses, Mrs. Andersen can take care of those expenses from her one-half of the IRA account awarded her by the court. Mr. Andersen testified there was \$3,350.51 left in the account and, therefore, she would have access to \$1,675.25 to pay the cost of the tuition and books and also to pay any loan payments. (Transcript, page 67, lines 16-18.) It must be remembered that Mrs. Andersen has indicated that the schooling would take only nine months to ten months to complete. Under the terms of the Decree of Divorce, even though she will have full-time employment in a year, she has the use and benefit of the home until April 1, 1989. Further, there is no question once Mrs. Andersen obtains full-time employment, she will be able to meet her monthly living expenses.

Finally, the home has substantial value. As indicated by the appraisal, the home has a value of \$46,000.00 and thus, without considering costs of closing, the parties will have \$23,000.00 each and that is sufficient monies to buy a trailer home or other housing unit with no on-going mortgage payments.

In summary, as it relates to the first element, the financial conditions and needs of Mrs. Andersen were fully developed by both sides and fully considered by the court and certainly, as it relates to the test on appeal, there can be no question that the Findings of Fact, Conclusions of Law, and Decree adequately address and meet Mrs. Andersen's financial conditions.

The second element outlined in the case is the ability of Mrs. Andersen to produce a sufficient income for herself. As indicated above, that aspect was fully developed by all sides. Mrs. Andersen testified herself that her schooling would be complete in nine to ten months. She further testified that her health was sufficient to allow her to maintain full-time employment and she expected to maintain full-time employment at the end of her training. She indicated that her job prospects were good given the fact that placement would be provided through the institution that was training her. There was simply no evidence in the record that the court could use to conclude that Mrs. Andersen was not fully capable of supporting herself. Eventually, Mrs. Andersen will have a substantial settlement from the house which she can invest in other housing that will not have any debt associated with it.

The third factor outlined by the court is the ability of Mr. Andersen to provide support. The testimony relative to his

historical earnings and his current income was reviewed in the Statement of Facts. Mr. Andersen makes \$2,160.75 in gross revenue per month and, after Federal, State and FICA deductions together with the health insurance, the loan that is directly taken out of his check and the life insurance premium, has a net income of \$1,308.53. As indicated by the court, after the payment of the debts that Mr. Andersen is obligated to pay, he will have approximately \$843.00 per month to pay the alimony and to provide for his own living expenses. It is important to understand that the bills and obligations of the parties must be met and paid for inasmuch as the equity in the house is attachable by judgment creditors.

It is obvious that the debts and obligations that Mr. Andersen pays will be reducing over time but one must appreciate the significance of the financial constraints put on Mr. Andersen by the court ordered alimony. From the net income of \$843.00, if one subtracts the \$300.00 alimony, that leaves Mr. Andersen with \$543.00 per month. If one simply looks at Mr. Andersen's monthly expenses, the problem is evident. He needs a food allowance of \$250.00 per month to maintain himself on the road and at home and if he pays his auto expenses of \$180.00, his entire budget for the month is consumed. There is no money left for rent, utilities, phone, medical, dental, clothing, entertainment, incidentals or any other expenses. As opposed to

Mrs. Andersen who is within \$240.00 of meeting her monthly living expenses at the present time, Mr. Andersen has only \$543.00 left to satisfy over \$1,315.00 in monthly living expenses. There simply is no question that Mr. Andersen does not have any ability to pay alimony and in the balancing the courts must do, the \$300.00 is certainly more than an equitable order for Mrs. Andersen.

One last aspect of the matter is necessary to review. Mr. Andersen does not have the ability to go out and buy a home, condominium or other place. He must pay rent and incur the expenses that Mrs. Andersen will be relieved until such time as the home is sold.

Given the factors outlined above and the trial court's thorough consideration of all of the elements, the trial court's award as it relates to alimony should not be disturbed.

POINT II

THE FINDINGS, AS IT RELATES TO THE IRA ACCOUNT AND VALUATION OF THE CAR ARE ADEQUATE.

The Appellant, contends in their Brief that the court's findings as it relates to the automobile awarded to the Plaintiff are inadequate. Mr. Glade Andersen testified that when the loan was taken out on the automobile approximately a year before trial, it had a value of \$3,800.00. The court's value of \$350.00 after considering the debt thereon is entirely reasonable under the circumstances. Further, whether the value is \$300.00

or \$200.00, it is not a significant item as it relates to all of the personal property awarded.

The other issue raised by the Appellant is the IRA. As indicated in the Statement of Facts, Mr. Andersen used some of the monies in the IRA to pay alimony and the monthly living expenses and the debts of the parties. Mr. Andersen testified that at the time of trial, there was \$3,350.51 left. Therefore, the court's finding that she is awarded one-half of the IRA amounts is clearly sufficient.

It is obvious that the court concluded that one-half of the IRA amount is that which was testified to be in existence at the time of trial. The court did not adopt any findings that it gave to Mrs. Andersen the right to one-half of the initial amount of the IRA account. The court was persuaded that the monies had been used reasonably and to aid both of the parties during the period of separation. The fact that the trial court did not enter any findings as to Gay Andersen's right to the IRA amount as it existed initially, is not prejudicial inasmuch as both Mr. Andersen and Mrs. Andersen were involved in using assets of the marriage to sustain themselves. Mr. Andersen invaded the IRA and Mrs. Andersen sold nearly a \$2,000.00 trailer to support herself. Accordingly, the findings awarding Mrs. Andersen one-half of the amount in the IRA account are sufficient inasmuch as they tie into a definitive amount mentioned at the time of trial.

POINT III

THE TRIAL COURT'S FAILURE IN ENTERING AN ORDER
RELATING TO LIFE INSURANCE WAS PROPER UNDER
THE CIRCUMSTANCES.

Mr. Andersen testified as follows with regard to the life insurance policies:

Q. Now, you have heard your wife testify about the life insurance policies that are available; correct?

A. Yes.

Q. What do you wish with regard to the life insurance policies? Do you believe that based on your expenses you can afford the life insurance?

A. No, I don't for the simple reason that it is all through Millers now and since they have changed companies, I am not too sure what is going to happen after that.

Q. Do you find that you have an extra \$100.00 a month with which to be able to pay for insurance?

A. No I don't.

Transcript, page 68, lines 7-21.

On cross-examination, Mr. Andersen testified as follows:

Q. On life insurance, you have indicated that you don't have the where-with-all to pay that life insurance. What would happen to Gay if you died without any life insurance? How would she get along?

A. The life insurance that I have got now, if it continues, it would be fine, yes, but I would have to find a cheaper one if the company doesn't have one. That's all there is to it. I don't know what this new company is going to do.

Q. So are you willing to keep in place \$50,000.00 or \$60,000.00 of insurance with her as beneficiary?

A. I guess, yes.

Transcript, page 78, line 17-page 79, line 4.

The disagreement on behalf of the parties relating to life insurance is really two-fold. Because Mr. Andersen's employer had changed ownership, it did not know what policies of insurance will be available and what the cost would be as it relates to the life insurance. Secondly, Mr. Andersen indicated that he simply did not have the money to pay for life insurance and that the \$100.00 that was being expended was going to be necessary elsewhere.

It is clear from the discussion of the financial affairs of the parties outlined above that the additional \$100.00 is much needed in order to allow Mr. Andersen to pay some of the rudimentary expenses that he has on an on-going daily basis. Accordingly, the court's conclusion that Mr. Andersen should not be required to maintain insurance upon Mrs. Andersen is entirely appropriate. The parties simply do not have sufficient monies to be able to maintain elective life insurance.

POINT IV

THE PLAINTIFF IS NOT ENTITLED TO AN ATTORNEY'S FEE IN THIS MATTER

As indicated in the Statement of Facts, Gay Andersen's attorney's fee was approximately \$1,800.00 and Glade Andersen's attorney's fee was approximately \$2,600.00.

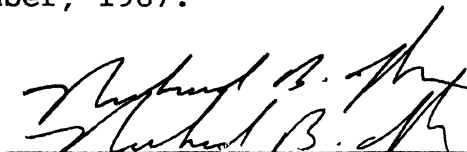
Further, as outlined above, Mrs. Andersen is much closer to

meeting her monthly living expenses on an on-going basis than Mr. Andersen. She is much more able of paying out small installment payments to pay her lawyer than Mr. Andersen. Given the alimony award and the disposition of the home, an award of attorney's fees would be totally inappropriate. The court, in its finding, clearly indicated that Mrs. Andersen was receiving more money than Mr. Andersen and he was going to be put under a much harder burden with regard to his monthly expenses and debt obligation. The court had ample basis based upon that analysis, to order Mrs. Andersen to discharge her own attorney's fees.

CONCLUSION

The trial court, after a clear and thorough examination of the issues made a fair and equitable division of the real and personal property of the parties and made an alimony award which is to say the least, burdensome upon the Defendant. In essence, the alimony award, makes it impossible for Mr. Andersen to meet his on-going monthly expenses. The complaints of the Appellant in this case relative to the equity of the alimony award and the other awards made by the court is simply without basis. Accordingly, the decision of the trial court should be upheld and Mr. Andersen should be awarded his reasonable attorney's fees and costs of this appeal.

DATED this 16 day of December, 1987.



RICHARD B. JOHNSON
Attorney for Defendant/Respondent

MAILING CERTIFICATE

I hereby certify that four true and correct copies of the foregoing BRIEF OF RESPONDENT were mailed, postpaid, to Larry E. Jones, Attorney for Plaintiff/Appellant, 175 East 1st North, Logan, Utah 84321, this 16 day of December, 1987.

Richard B. [Signature]
Richard B. [Signature]
