

1997

Juliette Turley v. Robert W. Turley : Brief of Appellee

Utah Court of Appeals

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Rosemond G. Blakelock; Blakelock & Stringer; Attorneys for Appellee.

Don R. Peterson; Leslie W. Slauch; Howard, Lewis & Petersen; Attorneys for Appellant.

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IN THE COURT OF APPEALS

STATE OF UTAH

JULIETTE TURLEY,

Plaintiff and Appellee

V.

ROBERT W. TURLEY,

Defendant and Appellant

CASE NO. 970020-CA

Oral Argument
PRIORITY 15

BRIEF OF APPELLEE

APPEAL FROM A FINAL ORDER OF THE
COUNTY, UTAH THE HONORABLE

DISTRICT COURT OF UTAH
ROBERT H. MAETANI

ROSEMOND G. BLAKELOCK #6183
BLAKELOCK AND STRINGER, P.A.
37 East Center Street, 2nd Floor
Provo, UT 84601

ATTORNEYS FOR APPELLEE

DON R. PETERSEN and
LESLIE W. SLAUGH, for:
HOWARD, LEWIS & PETERSEN
120 East 300 North
Provo, UT 84606

ATTORNEYS FOR APPELLANT

IN THE COURT OF APPEALS

STATE OF UTAH

JULIETTE TURLEY,

Plaintiff and Appellee

v.

ROBERT W. TURLEY,

Defendant and Appellant

CASE NO. 970020-CA

Oral Argument
PRIORITY 15

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APPEAL FROM A FINAL ORDER OF THE FOURTH DISTRICT COURT OF UTAH
COUNTY, UTAH, THE HONORABLE HOWARD H. MAETANI

ROSEMOND G. BLAKELOCK #6183
BLAKELOCK AND STRINGER, P.A.
37 East Center Street, 2nd Floor
Provo, UT 84601

ATTORNEYS FOR APPELLEE

DON R. PETERSEN and
LESLIE W. SLAUGH, for:
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120 East 300 North
Provo, UT 84606

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

JURISDICTION	1
ISSUES PRESENTED	2
DETERMINATIVE PROVISIONS	4
STATEMENT OF THE CASE	4
A. <u>Nature Of The Case</u>	4
B. <u>Course Of Proceedings And Disposition Below</u>	4
C. <u>Statement Of Facts</u>	4
SUMMARY OF ARGUMENT	6
ARGUMENT	7
POINT I	
WHETHER A CONTEMPLATED OR ANTICIPATED EVENT USED AS THE BASIS FOR AN AGREEMENT AND DECREE, COULD LATER BE CONSIDERED A SUBSTANTIAL CHANGE OF CIRCUMSTANCES FOR MODIFICATION OF THE DECREE.	
	7
POINT II	
THE DIVORCE DECREE AND SUPPORTING FINDINGS PROVIDE THAT SUPPORT WAS TO CONTINUE REGARDLESS OF JOB STATUS: EITHER ON ACTUAL REPLACEMENT OR HISTORICALLY IMPUTED INCOME.	
	9
CONCLUSION	11
APPENDIX	
A. Findings of Fact, Conclusions of Law and Order (R. 190-183)	
B. Memorandum Decision (R. 182-177)	
C. Findings of Fact and Conclusions of Law (R. 103-96)	
D. Divorce Decree (R. 95-88)	

TABLE OF AUTHORITIES

Cases Cited:

<u>Allred v. Allred</u> , 797 P.2d 1108, 1111 (Utah Ct. App. 1990). . .	3
<u>Bettinger v. Bettinger</u> , 793 P.2d 389 (Utah Ct. App. 1990). . .	11
<u>Dana v. Dana</u> , 789 P.2d 726 (Utah Ct. App. 1990).	8
<u>Durfee v. Durfee</u> , 796 P.2d 713, 717 (Utah Ct. App. 1990). 3, 8, 10	
<u>Hansen v. Hansen</u> , 736 P.2d at 1056, 1055 (Utah Ct. App. 1987). 2-3	
<u>Hill v. Hill</u> , 841 P.2d 722, 724 (Utah Ct. App. 1992).	3
<u>Ostler v. Ostler</u> , 789 P.2d 713, 715 (Utah Ct. App. 1990). . . .	3
<u>Park City, Utah Corp. v. Ensign Co.</u> , 586 P.2d 446 (Utah 1978). .	11
<u>State in re Schreuder</u> , 649 P.2d 19, 22 (Utah 1982).	2
<u>Stettler v. Stettler</u> , 713 P.2d 699, 701 (Utah 1985).	10
<u>Turner v. Turner</u> , 649 P.2d 6, 8 (Utah 1982).	2
<u>Whitehead v. Whitehead</u> , No. 910205-CA, slip op. at 3 (Utah Ct. App. Aug. 7, 1992).	2
<u>Woodward v. Woodward</u> , 709 P.2d 393, 394 (Utah 1985).	3, 7

Statutes and Rules Cited:

Utah Code Ann. 78-45-7.5(1)(b) (1994).	1, 13
Utah Code Ann. 78-45-7.5(7)(b) (1994).	13
Utah Code Ann. 30-3-5(3) (1995).	7
Utah Code Ann. 78-2a-3(2)(i) (1996).	1

STATE OF UTAH

Oral Argument
PRIORITY 15

The documents in the trial court file are assembled in reverse chronological order. As a result, the pagination on each document is in reverse numerical order.

ISSUES PRESENTED

1. Where a Divorce Decree takes into consideration the likelihood that an obligor (Mr. Turley) has lost his job, and may experience a reduction in income, yet still orders child support and alimony based on the current (and historical) employment, does the inclusion of this information as consideration by the Court, preclude the post-decree loss of employment or reduction in income contemplated, from constituting the required change of circumstances, and from supporting review or justifying modification of the child support and alimony?

2. Pendant to the main issue: Whether the occurrence of the loss of job, while arguably sufficient to allow review of support, actually constitutes sufficient change of circumstances to modify the award set in contemplation of the event.

NOTE: In consideration of these issues, the standards of review by this Court should be:

a. This Court will not review issues that are raised for the first time on appeal. State in re Schreuder, 649 P. 2d 19, 22 (Utah 1982).

b. This Court will presume the correctness of the trial court's decision absent "manifest injustice or inequity that indicates a clear abuse of . . . discretion." Hansen v. Hansen, 736 P.2d at 1056, 1055 (Utah App. 1987) (citing Turner v. Turner, 649 P.2d 6, 8 (Utah 1982)); see also Whitehead v. Whitehead, No. 910205-CA, slip op. at 3 (Utah App. Aug. 7, 1992).

c. This Court gives great deference to the factual findings of the Trial Court, and will not supplement it's own judgment for that of the trial judge, as the trier of fact. The Appellant's argument that a lesser standard applies, is undercut by the continued reference to the Findings of Fact made by the Trial Court.

d. Due to the equitable nature of child support proceedings, this Court accords substantial deference to the trial court's findings and gives the trial court considerable latitude in fashioning child support orders. Woodward v. Woodward, 709 P.2d 393, 394 (Utah 1985); Hill v. Hill, 841 P.2d 722, 724 (Utah App. 1992). Absent an abuse of discretion, the Appeals Court "will not disturb the trial court's actions." Hill, 841 P.2d at 724.

e. Traditionally, this Court accords the trial court considerable discretion to the lower court and thus, the lower court's "actions are entitled to a presumption of validity." Allred v. Allred, 797 P.2d 1108, 1111 (Utah App. 1990)(quoting Hansen v. Hansen, 736 P.2d 1055, 1056 (Utah App. 1987)). In addition, the lower court's determination "will not be upset on appeal unless the evidence clearly preponderates to the contrary or [this court] determine[s] that the court has abused its discretion." Durfee v. Durfee, 796 P.2d 713, 717 (Utah App. 1990)(quoting Ostler v. Ostler, 789 P.2d 713, 715 (Utah App. 1990)).

DETERMINATIVE PROVISIONS

Appellee is not aware of any constitutional provisions, statutes, ordinances, rules, or regulations whose interpretation is determinative of the appeal.

STATEMENT OF THE CASE

A. Nature of the Case. This is an appeal from a final Order dismissing Mr. Turley's Petition for Modification of the child support and spousal support provisions of a Divorce Decree.

B. Course Of Proceedings And Disposition Below. The parties were divorced by a Decree entered February 9, 1996. (R. 95-88.) On May 30, 1996, Mr. Robert Turley filed his Verified Petition to Amend Decree of Divorce. (R. 122-119.) Both parties and the Trial Court agreed to treat Mrs. Turley's trial memorandum as a Motion and Memorandum for Summary Judgment. (R. 158.) Mr. Turley responded to the Motion and Memorandum for Summary Judgment (R. 168-64.), and Mrs. Turley subsequently filed a Reply Memorandum. (R. 173-69.)

The trial court considered the Motion and entered its Memorandum Decision on November 15, 1996, finding the issues in favor of the Appellee, Mrs. Turley. (R. 182-77.) On December 4, 1996, the court entered its Findings of Fact, Conclusions of Law and Order granting Mrs. Turley's Motion for Summary Judgment. Mr. Turley's Petition was dismissed with prejudice. (R. 190-183.)

C. Statement of Facts.

1. The Plaintiff and Defendant were divorced on February

9, 1996.

2. The divorce was granted pursuant to stipulation.

3. Paragraph 4 of the Divorce Decree sets out that the Defendant is to pay the Plaintiff alimony in the sum of \$1,500.00 per month for the Plaintiff's/ Juliette Turley's support and maintenance. The sum is to be paid in semi-monthly installments of \$750.00 each to be paid on the 5th and 20th of each month.

4. Paragraph 3 of the Divorce Decree sets out that the Defendant/ Robert Turley is to pay the Plaintiff child support in the sum of \$1,300.00 per month, for support and maintenance of the two minor children. Child support was set to continue until the minor children reach the age of 18 years or graduate from high school with their normal matriculated class, whichever occurs last.

5. Paragraph 7 of the Divorce Decree states:

The defendant's income from Intermountain Farmers will terminate on May 31, 1996, at which time he will no longer receive income from Intermountain Farmers; however, in the event the defendant's income does not terminate, the amounts paid for child support shall continue as set forth above. With respect to alimony, alimony shall increase in the amount that child support decreases when the minor children reach their majority, only so long as the defendant's income is based upon historical earnings of \$181,000.00 per year.

6. The Defendant/ Robert Turley filed a Petition to Modify the amount of alimony, based upon the occurrence of his anticipated change in employment/income.

7. Mr. Turley's Petition was dismissed, on a Motion for Summary Judgment.

SUMMARY OF ARGUMENT

FIRST. The parties were aware of and did contemplate the fact that Mr. Turley had lost his job with Intermountain Farmers. Paragraph 7 of the Divorce Decree specifically addresses this fact.

SECOND. The use of the language "based upon historical earnings" is broader than merely stating a specific income from a specific employment or source. The plain use of the language, when interpreted in light of the applicable support statutes, is to include the event where Mr. Turley might actually terminate his employment, or realize a substantial reduction in income, but provides that his historical ability to earn will continue as the basis for his support obligations.

THIRD. Not only did the parties contemplate the discontinuation or reduction of Mr. Turley's income from his then-present employment, testimony at trial supported that fact and also informed the Court that Mr. Turley's job had actually been terminated months prior to the parties' divorce: at the time of the Decree of Divorce, Mr. Turley had already been unemployed for months. The fact of the loss of the Intermountain Farmer's income, was more than contemplated, it was known, at the time of the stipulated resolution. Therefore, the recognition of the event contemplated and known, does not constitute a "change of circumstance" for purposes of modification or review.

FOURTH. It was the Defendant's counsel who drafted the

Decree of Divorce. In the event the Court finds there to be some ambiguity, it is black letter law that any ambiguities should be construed against the drafter, Mr. Turley.

FIFTH. Based upon these arguments, the Appeal should be dismissed, and the Trial Court's Dismissal upheld.

ARGUMENT

Point I

WHETHER A CONTEMPLATED OR ANTICIPATED EVENT USED AS THE BASIS FOR AN AGREEMENT AND DECREE, COULD LATER BE CONSIDERED A SUBSTANTIAL CHANGE OF CIRCUMSTANCES FOR MODIFICATION OF THE DECREE?

The event of Mr. Turley's change in income/employment, was a circumstance which had occurred and was contemplated and written into the Decree of Divorce.

While a divorce court is vested with the power to make subsequent changes to the Decree of Divorce Utah Code Ann. § 30-3-5(3)(1995), the vital prerequisite to permitting the divorce court to make changes is proof of "a substantial change of circumstances subsequent to the decree, that was not originally contemplated within the decree itself," Woodward v. Woodward, 709 P.2d 393, 394 (Utah 1985). The Trial Court correctly employed this threshold test to hold that Mr. Turley's potential loss of income was known and contemplated by the parties and court when the support amounts were established under the Decree of Divorce.

The plain language of paragraph 5 (quoting paragraph 7 of

the Divorce Decree) of the Findings of Facts and mirrored in the Decree, reflects the parties' and court's knowledge and contemplation of a change in Mr. Turley's income. Paragraph 7 of the Decree of Divorce states:

The defendant's income from Intermountain Farmers will terminate on May 31, 1996, at which time he will no longer receive income from Intermountain Farmers; however, in the event the defendant's income does not terminate, the amounts paid for child support shall continue as set forth above. With respect to alimony, alimony shall increase in the amount that child support decreases when the minor children reach their majority, only so long as the defendant's income is based upon historical earnings of \$181,000.00 per year.

The language of the Divorce Decree is plain on it's face. The parties did contemplate the fact that the Defendant could lose his income from Intermountain Farmers. Paragraph 7 of the Divorce Decree specifically addresses this contingency. It states that if the Defendant's income does not terminate, that the child support will continue as set out in the Decree. The Divorce Decree at paragraph 7 states a parallel provision.

The use of the language "based upon historical earnings" is broader than merely stating a specific income from a specific employment or source. The plain use of the language, when interpreted in light of the applicable support statutes, is to include the event where Mr. Turley might actually terminate his employment, but his historical ability to earn will continue as the basis for his support obligations.

Appellant's argument under application of or reference to the Durfee and Dana cases, is misplaced. To quote the Appellant,

the "rule established by these cases is that where a trial court makes a support order which is intended to account for anticipated future changes, the actual occurrence of those changes will not constitute a "substantial change in circumstances".

The Decree in this appeal, more than contemplated the loss of income; it did not have to contemplate some possible future event -- it was told of, and considered the fact that the loss of income and employment had occurred, when making the original order in the Decree. Further, it accounts for the future income, by making clear reference to the historical income as a basis for continuing support obligations. Any other interpretation would open the flood gates for obligor parents to avoid high paying and historical income sources, to intentionally punish and deprive spouses and children.

POINT II

**THE DIVORCE DECREE AND SUPPORTING FINDINGS
PROVIDE THAT SUPPORT WAS TO CONTINUE
REGARDLESS OF JOB STATUS:
EITHER ON ACTUAL REPLACEMENT OR
HISTORICALLY IMPUTED INCOME.**

Tangential to the main or threshold issue in this Appeal, is the question as to whether the occurrence of the loss of job / reduction in income, while even if arguably sufficient to allow review of support, actually constitutes sufficient change of circumstances to modify the award set in contemplation of the event.

The Court in Durfee v. Durfee, 796 P. 2d 713, 716 (Utah App. 1990) (quoting Stettler v. Stettler, 713 P.2d 699, 701 (Utah 1985)) stated

On a petition for a modification of a Divorce Decree, the threshold requirement for relief is a showing of a substantial change of circumstances occurring since the entry of the decree and not contemplated in the decree itself.

Not only did the parties contemplate the discontinuation or reduction of Mr. Turley's income from his then-present employment, testimony at trial supported that fact and also informed the Court that Mr. Turley's job had actually been terminated months prior to the parties' divorce; at the time of the Decree of Divorce, Mr. Turley had already been unemployed for months. The fact of the loss of the Intermountain Farmer's income, was more than contemplated, it was known, at the time of the stipulated resolution. Therefore, as to a "change of circumstance" which was "not contemplated in the decree itself" there has been no claim made by the Defendant that he did not then know of, let alone specifically contemplate a change in his income or his job (pursuant to Defendant's testimony) because it was already terminated at the time the parties' placed the Stipulation into the record.

As stated earlier, the use of the language "based upon historical earnings" is broader than merely stating a specific income from a specific employment or source. The plain use of the language, when interpreted in light of the applicable support

statutes, is to include the event where Mr. Turley might actually terminate his employment, but his historical ability to earn will continue as the basis for his support obligations.

Appellant's reference to and reliance upon Bettinger and Park City is simply a ploy to avoid the otherwise well-settled laws of construction and interpretation of written agreements. It was the Defendant's counsel who drafted the Decree of Divorce, not Plaintiff's. In the event the Court finds there to be some ambiguity, it is black letter law that any ambiguities should be construed against the drafter, Mr. Turley.

CONCLUSION

The event of Mr. Turley's loss of income from Intermountain Farmers, actually occurred prior to the Decree. The parties and the Court were all aware of and contemplated these events when setting the amount of support.

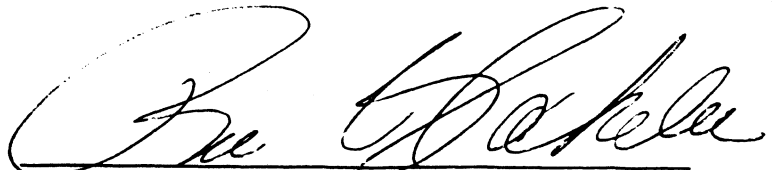
Therefore, the recognition of the event, does not constitute a "change of circumstance" necessary to review or modify support.

Further, even if nominally a change in circumstance might support review, it was insufficient to support modification, since the Decree clearly provides that the historical income would still be imputed to reach the support amounts agreed upon.

In the event the Court finds there to be some ambiguity, it is black letter law that any ambiguities should be construed against the drafter, Mr. Turley.

The Trial Court correctly interpreted and applied the stipulated agreements and Decree, and dismissed the Petition -- this Court should defer to the Trial Court and dismiss the Appeal, with costs to the Appellee. Appellee has incurred more than \$5,000.00 in fees and costs associated with responding to this appeal, and should be awarded her fees and costs.

RESPECTFULLY SUTMITTED this 18 day of June, 1997.

A handwritten signature in cursive script, appearing to read "Rosemond Blakelock", written over a horizontal line.

Rosemond Blakelock
Attorney for Mrs. Turley, Appellee

CERTIFICATE OF MAILING

I hereby certify that 2 copies of the foregoing Brief of Appellee were mailed to Don R. Petersen, 120 East 300 North, Provo, Utah 84606, this 18 day of June, 1997.

A handwritten signature in cursive script, appearing to read "R. B. Baker", is written over a horizontal line.

APPENDIX "A"

**Findings of Fact, Conclusions of Law and Order
(R. 190-183)**

Rosemond Blakelock #6183
BLAKELOCK AND STRINGER, P.A.
Attorney(s) for Plaintiff
37 East Center, 2nd Floor
Provo, Utah 84606
Telephone: (801) 375-7678

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IN THE FOURTH DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

JULIETTE TURLEY,	*	
	*	FINDINGS OF FACT,
Plaintiff,	*	CONCLUSIONS OF LAW AND
	*	ORDER
v.	*	
	*	
ROBERT WALTERS TURLEY,	*	Case No. 944402269
	*	
Defendant.	*	Judge Howard Maetani
	*	

This matter came before the Court for trial on October 10, 1996. Plaintiff Juliette Turley was present and represented by counsel Rosemond Blakelock. Defendant Robert Walters Turley was present and represented by counsel Don R. Petersen.

The Court granted the parties 10 days to submit their proposed Findings of Fact and Conclusions of Law and 5 days to submit replies. No Findings of Fact and Conclusions of Law were submitted. However, Defendant submitted a Memorandum in Opposition to Plaintiff's Motion for Summary Judgement on October 23, 1996, and Plaintiff submitted a response to Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment on October 28, 1996. Plaintiff then brought the matter before the Court on October 28, 1996, when Plaintiff filed a Motion to Submit.

The Court having heard the testimony of witnesses, considered

the exhibits and arguments of counsel, reviewed the submitted documents, and being fully advised in the premises, now makes the following:

FINDINGS OF FACT

1. The Court finds that the Plaintiff and Defendant were divorced on February 9, 1996.

2. The Court finds that the divorce was granted pursuant to stipulation.

3. The Court finds that paragraph 4 of the Divorce Decree sets out that the Defendant is to pay the Plaintiff alimony in the sum of \$1,500.00 per month for the Plaintiff's support and maintenance. the sum is to be paid in semi-monthly installments of \$750.00 each to be paid on the 5th and 20th of each month.

4. The Court finds that paragraph 3 of the divorce decree sets out that the Defendant is to pay the Plaintiff child support in the sum of \$1,300.00 per month for support and maintenance of the two minor children. Child support is to continue until the minor children reach the age of 18 years of graduate from high school with their normal matriculated class, whichever occurs last.

5. The Court finds that paragraph 7 of the divorce decree states:

The defendant's income from Intermountain Farmers will terminate on May 31, 1996, at which time he will no longer receive income from Intermountain farmers; however, in the event the defendant's income does not terminate, the amounts paid for child support shall continue as set forth above. With respect to alimony, alimony shall increase in the amount that child support decreases when the minor children reach their majority, only so long as the defendant's income is based upon

historical earnings of \$181,000.00 per year.

6. The Court finds that the Defendant has applied to modify the amount of alimony.

Based upon the forgoing Findings of Fact the Court now makes the following;

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties in this action and over the subject matter of this action.

2. The Court has "continuing jurisdiction to make subsequent changes or new orders for the support and maintenance of the parties. Utah Code Ann. §30-3-5(3).

3. Concerning the circumstances under which a court may modify a divorce decree, the Utah Court of Appeals stated, "On a petition for a modification of a divorce decree, the threshold requirement for relief is a showing of a substantial change of circumstances occurring since the entry of the decree and not contemplated in the decree itself. Durfee v. Durfee, 796 P.2d 713, 716 (Utah App. 1990) (emphasis added) (quoting Stettler v. Stettler, 713 P.2d 699, 701 (Utah 1985)). Therefore, in addition to finding there was a substantial change of circumstance, the Court must also determine if the change of circumstance was contemplated at the time of the divorce decree.

4. The decree of divorce specifically states:

The defendant's income from Intermountain Farmers will terminate on May 31, 1996, at which time he will no longer

receive income from Intermountain farmers; however, in the event the defendant's income does not terminate, the amounts paid for child support shall continue as set forth above. With respect to alimony, alimony shall increase in the amount that child support decreases when the minor children reach their majority, only so long as the defendant's income is based upon historical earnings of \$181,000.00 per year.

The language of the divorce decree is plain on its face. The parties did contemplate the fact that the Defendant could lose his income from Intermountain Farmers. Paragraph 7 of the divorce decree specifically addresses this contingency. It states that if the Defendant's income does not terminate, that the child support will continue as set out in the decree. The divorce decree at paragraph 7 states that Plaintiff's income from Intermountain Farmers will terminate on May 31, 1996. This statement is clear evidence that the parties knew the Plaintiff would lose his employment.

This paragraph when taken in whole plainly indicates the fact the Defendant would lose his income from Intermountain Farmers was contemplated and contingencies for child support were included in the document. Paragraph 7 particularly explicitly refers to the termination of his employment, yet there is nothing in the decree indicating agreement to alter alimony when this happened. Defendant argues that paragraph 7 contemplates a reduction in child support upon termination of the employment. Defendant argues that the language indicating that child support would not decrease indicates an agreement to reduce the child support on the termination of the Defendant's employment with Intermountain farmers. The fact that child support may or may not have been anticipated as being modified is not dispositive in this case. The

alimony and child support provisions are handled in separate paragraphs. The Court therefore must address them separately. The fact that a reduction in child support may have been anticipated does not affect the question of alimony. See Moore v. Moore, 872 P.2d 1054, 1055-56 (Utah App. 1994).

5. In Moore v. Moore, the Utah Court of Appeals held that a change in income is not a substantial change if the change was anticipated at the time the divorce decree was entered. The Court said, "The trial court further determined that Mrs. Moore's employment and stable income constituted a substantial change in material circumstances. However, the Court in its own findings makes clear that this circumstance was also contemplated at the time the decree was entered.... Id., at 1056. The Court went on to say:

The fact that Mrs. Moore presently has a stable income cannot be considered a change in circumstances. The parties obviously contemplated that Mrs. Moore would earn approximately \$ 1300 at the time the divorce decree was entered. Mrs. Moore's stable level of income was anticipated at the time of the divorce when the original alimony award was set. Thus, the court incorrectly determined that Mrs. Moore's present, stable income was a substantial change in her material circumstances.

In sum, the court's findings do not support a determination that a substantial change in material circumstances not contemplated at the time of the entry of the original decree has occurred. We therefore reverse the court's determination of a substantial change in circumstances and remand for a reinstatement of the original \$ 1050 alimony award.

The case at bar is similar in that the parties obviously knew the Plaintiff's employment was going to terminate in May and knew his income would change. This event was anticipated and contemplated by the parties yet they did not take account of this in setting alimony.

6. In addition, the Court in Moore faced an issue of child support. The divorce decree said that the child support obligation ceased when the children reached majority. Mr. Moore petitioned to terminate the alimony obligation because the children had all become emancipated and Mrs. Moore had a stable income. The Utah Court of Appeals did not reach the merits of whether a child reaching majority constituted a substantial change in circumstances saying, "It was certainly a circumstance that was contemplated at the time the decree was entered. Id. at 1055. This Court therefore does not decide if the change in Defendant's income is a substantial, material change in circumstances as this change was undoubtedly contemplated at the time the divorce decree was entered.

7. For the above stated reasons, the Court finds no grounds for modification of the divorce decree based on changed circumstances contemplated at the time the divorce decree was entered. The divorce decree explicitly refers to the fact that the Defendant would lose his income from Intermountain Farmers. Thus the Court cannot now alter the decree.

8. Each party should pay their own attorney's fees and costs in this matter.

BASED upon the foregoing Findings of Fact and Conclusions of Law, and for good cause appearing, the Court issues the following;

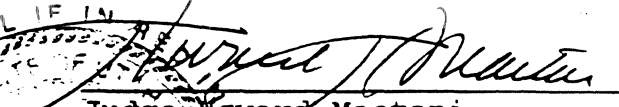
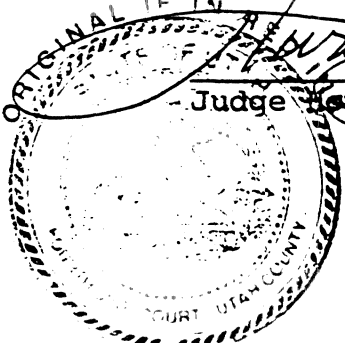
ORDER

1. The Plaintiff's Motion for Summary Judgment is granted, and the Petition for Modification is hereby dismissed with prejudice.

2. The Court cannot now alter the decree of divorce.

3. Each party shall pay their own attorney's fees and costs in this matter.

DATED this 2 day of December, 1996.


Judge Howard Maetani


APPENDIX "B"

**Memorandum Decision
(R. 182-177)**

11-15-96 TCC DED

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

JULIETTE TURLEY, Plaintiff, v. ROBERT WALTERS TURLEY, Defendant.	MEMORANDUM DECISION Case No. 944402269 Judge Howard H. Maetani
--	--

This matter came before the Court for trial on October 10, 1996. Plaintiff Juliette Turley was present and represented by counsel Rosemond Blakelock. Defendant Robert Walters Turley was present and represented by counsel Don R. Petersen.

The Court granted the parties 10 days to submit their proposed Findings of Fact and Conclusions of Law and 5 days to submit replies. No Findings of Fact and Conclusions of Law were submitted. However, Defendant submitted a Memorandum in Opposition to Plaintiff's Motion for Summary Judgement on October 23, 1996 and Plaintiff submitted a response to Defendants Memorandum in Opposition to Plaintiff's Motion for Summary Judgement on October 28, 1996. Plaintiff then brought the matter before the court on October 28, 1996 when Plaintiff filed a Motion to Submit.

The Court, having heard the testimony of witnesses, considered the exhibits and arguments of counsel, reviewed the submitted documents, and being fully advised in the premises now makes the following:

Memorandum Decision

Findings of Fact

1. The Plaintiff and Defendant were divorced on February 9, 1996.
2. The divorce was granted pursuant to stipulation.
3. Paragraph 4 of the divorce decree sets out that the Defendant is to pay the Plaintiff alimony in the sum of \$1,500.00 per month for the Plaintiff's support and maintenance. This sum is to be paid in semi-monthly installments of \$750.00 each to be paid on the 5th and 20th days of each month.
4. Paragraph 3 of the divorce decree sets out that the Defendant is to pay to the Plaintiff child support in the sum of \$1,300.00 per month for support and maintenance of the two minor children. Child support is to continue until the minor children reach the age of 18 years or graduate from high school with their normal matriculated class, whichever occurs last.
5. Paragraph 7 of the divorce decree states:

The defendant's income from Intermountain Farmers will terminate on May 31, 1996, at which time he will no longer receive income from Intermountain Farmers; however, in the event the defendant's income does not terminate, the amounts paid for child support shall continue as set forth above. With respect to alimony, alimony shall increase in the amount that child support decreases when the minor children reach their majority, only so long as the defendant's income is based upon historical earnings of \$181,000.00 per year.
6. Defendant has applied to modify the amount of alimony.

Conclusions of Law

1. This Court has jurisdiction over the parties to this action and over the subject matter of this action.

2. The Court has “continuing jurisdiction to make subsequent changes or new orders for the support and maintenance of the parties. Utah Code Ann. §30-3-5(3).

3. Concerning the circumstances under which a court may modify a divorce decree, the Utah Court of Appeals stated, “On a petition for a modification of a divorce decree, the threshold requirement for relief is a showing of substantial change of circumstances occurring since the entry of the decree and not contemplated in the decree itself.” *Durfee v. Durfee*, 796 P.2d 713, 716 (Utah App. 1990)(quoting *Stettler v. Stettler*, 713 P.2d 699, 701 (Utah 1985). Therefore, in addition to finding there was a substantial change of circumstance, the Court must also determine if the change of circumstance was contemplated at the time of the divorce decree.

4. The decree of divorce specifically states:

The defendant’s income from Intermountain Farmers will terminate on May 31, 1996, at which time he will no longer receive income from Intermountain Farmers; however, in the event the defendant’s income does not terminate, the amounts paid for child support shall continue as set forth above. With respect to alimony, alimony shall increase in the amount that child support decreases when the minor children reach their majority, only so long as the defendant’s income is based upon historical earnings of \$181,000.00 per year.

The language of the divorce decree is plain on its face. The parties did contemplate the fact the Defendant could lose his income from Intermountain Farmers. Paragraph 7 of the divorce decree specifically addresses this contingency. It states that if the Defendant’s income does not terminate, that the child support will continue as set out in the decree. The divorce decree in paragraph 7 states that Plaintiff’s income from Intermountain Farmers will terminate on May 31, 1996. This statement is clear evidence that the parties knew the Plaintiff would lose his employment.

This paragraph when taken in whole plainly indicates the fact the Defendant would

lose his income from Intermountain Farmers was contemplated and contingencies for child support were included in the document. Paragraph 7 particularly explicitly refers to the termination of his employment, yet there is nothing in the decree indicating agreement to alter alimony when this happened. Defendant argues that paragraph 7 contemplates a reduction in child support upon termination of the employment. Defendant argues that the language indicating that child support would not decrease indicates an agreement to reduce the child support on the termination of Defendant's employment with Intermountain Farmers. The fact that child support may or may not have been anticipated as being modified is not dispositive in this case. The alimony and child support provisions are handled in separate paragraphs. The Court therefore must address them separately. The fact that a reduction in child support *may* have been anticipated does not affect the question of alimony. *See Moore v. Moore*, 872 P.2d 1054, 1055-56 (Utah App. 1994).

5. In *Moore v. Moore*, the Utah Court of Appeals held that a change in income is not a substantial change in circumstances if the change was anticipated at the time the divorce decree was entered. The court said, "The trial court further determined that Mrs. Moore's employment and stable income constituted a substantial change in material circumstances. However, the court in its own findings makes clear that this circumstance was also contemplated at the time the decree was entered...." *Id.* at 1056. The court went on to say:

The fact that Mrs. Moore presently has a stable income cannot be considered a change of circumstances. The parties obviously contemplated that Mrs. Moore would earn approximately \$1,300 at the time the divorce decree was entered. Mrs. Moore's stable level of income was anticipated at the time of the divorce when the original alimony award was set. Thus, the court incorrectly determined that Mrs. Moore's present, stable income was a substantial change in her material circumstances.

In sum, the court's findings do not support a determination that a substantial change in material circumstances not contemplated at the time of the entry of the original decree

has occurred. We therefore reverse the court's determination of a substantial change in circumstances and remand for a reinstatement of the original \$1050 alimony award. *Id.* at 1056.

The case at bar is similar in that the parties obviously knew the Plaintiff's employment was going to terminate in May and knew his income would change. This event was anticipated and contemplated by the parties yet they did not take account of this in setting the alimony.

6. In addition, the court in *Moore* faced an issue of child support. The divorce decree said that the child support obligation ceased when the children reached majority. Mr. Moore petitioned to terminate the alimony obligation because the children had all become emancipated and Mrs. Moore had a stable income. The Utah Court of Appeals did not reach the merits of whether a child reaching majority constituted a substantial change in circumstances saying, "It was certainly a circumstance that was contemplated at the time the decree was entered." *Id.* at 1055. This court therefore does not decide if the change in Defendants income is a substantial, material change in circumstances as this change was undoubtedly contemplated at the time the divorce decree was entered.

7. For the above stated reasons, the Court finds no grounds for modification of the divorce decree based on changed circumstances contemplated at the time the divorce decree was entered. The divorce decree explicitly refers to the fact the Defendant would lose his income from Intermountain Farmers. Therefore, this Court cannot now alter the decree.

8. Each party is to pay their own attorney's fees and costs in this matter.

9. Attorney for Plaintiff is to prepare an Order in accordance with the above Memorandum Decision, and submit it to the Court for signature.

ited this 15 day of November, 1996.

BY THE COURT:

A handwritten signature in cursive script, reading "Howard H. Maetani", written over a horizontal line.

HOWARD H. MAETANI
District Court Judge

cc:

Rosemond Blakelock, Esq.
Don R. Petersen, Esq.

APPENDIX "C"

Findings of Fact and Conclusions of Law (R. 103-96)

FILED
CLERK OF DISTRICT COURT
OF UTAH COUNTY STATE OF UTAH

1996 FEB -9 AM 10:36

JK

DON R. PETERSEN (2576), for:
HOWARD, LEWIS & PETERSEN
ATTORNEYS AND COUNSELORS AT LAW
120 East 300 North Street
P.O. Box 778
Provo, Utah 84603
Telephone: (801) 373-6345
Facsimile: (801) 377-4991

Our File No. 22,905

Attorneys for Defendant

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

JULIETTE TURLEY, Plaintiff, vs. ROBERT WALTERS TURLEY, Defendant.	FINDINGS OF FACT AND CONCLUSIONS OF LAW <i>94440002</i> Case No. 91440002 Judge Howard H. Maetani
---	---

The above-entitled matter came on regularly for trial on December 14, 1995. The plaintiff appeared in person and was represented by her attorney, Rosemond Blakelock; the defendant appeared in person and was represented by his attorney, Don R. Petersen. The parties entered into a stipulation, which was presented to the Court and approved. The Court being fully advised in the premises, now makes and enters the following:

FINDINGS OF FACT

1. The plaintiff and defendant were married on May 31, 1967, in Salt Lake City, Salt Lake County, Utah.

2. During the course of the marriage, the parties have experienced irreconcilable differences making it impossible for them to continue their marriage relationship.

3. The parties have two minor children, to-wit: Christine Turley, born March 6, 1979; and Brian Judd Turley, born January 14, 1982.

4. The plaintiff and defendant are both responsible individuals fit to be awarded the care, custody and control of the minor children of the parties. It is, therefore, reasonable and proper that the plaintiff and defendant be awarded joint custody of the minor children, with the plaintiff being awarded residential and physical custody of the children and the defendant being awarded reasonable rights of visitation.

5. It is reasonable and proper that the defendant pay to the plaintiff child support in the sum of \$1,300.00 per month for support and maintenance of the two minor children. Child support shall continue until the minor children reach the age of 18 years or graduate from high school with their normal matriculated class, whichever occurs last. Support payments shall be made by automatically transferring funds from the defendant's bank account to Zions First National Bank, 2100 South 900 West, Salt Lake City, Utah, account number 07346943, into plaintiff's bank account at Bank of American Fork, Alpine Branch, Alpine, Utah, account number 0186452; \$650.00 on the 5th day of each month and \$650.00 on the 20th day of each month.

6. It is reasonable and proper that the defendant pay to the plaintiff alimony in the sum of \$1,500.00 per month for the plaintiff's support and maintenance.

7. The defendant has represented to the Court that his income with Intermountain Farmers will terminate on May 31, 1996, at which time he will no longer receive income from Intermountain Farmers; however, it is reasonable that in the event the defendant's income does not terminate, the amounts paid for child support and alimony shall continue as set forth above. In the event the defendant's income, which has historically been \$181,000.00 per year, should be that amount, and whether he is employed with Intermountain Farmers Association or any other company, or has income in said amount, then alimony paid by the defendant to the plaintiff shall increase in the amount that child support decreases when the minor children reach their majority, but only so long as the defendant's income is based upon historical earnings of \$181,000.00 per year.

8. It is reasonable and proper that the plaintiff be awarded all right, title and interest in and to the family home of the parties located at approximately 1221 North Grove Drive, Alpine, Utah, subject to the obligation owed thereon to Lomas Mortgage Company in the approximate amount of \$20,000.00, which obligation the plaintiff shall assume and shall hold the defendant harmless therefrom. Said property consists of a home and approximately 1.1 acres. Subject to an easement on the south side of the property in favor of the defendant or his successors in interest by which to gain access to the barn and property located thereon, said access shall be 24 feet in width. The defendant shall forthwith execute a quit claim deed conveying his interest in said property to the plaintiff.

9. It is reasonable and proper that the plaintiff be awarded all right, title and interest in and to a cabin in which the parties have an interest located in proximity to the Smith Moorehouse Reservoir in Summit County, Utah.

10. It is reasonable and proper that the defendant be awarded approximately 3.89 acres of property located on the east and west sides of the home property awarded to the plaintiff. The property shall be subject to an easement on behalf of the plaintiff which will allow the plaintiff and her successors in interest to traverse over and obtain access to the plaintiff's property. It is further reasonable and proper that the defendant may develop or sell the property awarded to him, but he will not live on the property in the event a home is built on the property. The dimensions of the easement are the road as presently used and occupied.

11. It is reasonable and proper that the defendant be awarded all right, title and interest in and to the Fountain Green property consisting of approximately 6.80 acres.

12. It is reasonable and proper that the defendant be awarded all right, title and interest in the real property located in Mexico.

13. It is reasonable and proper that the defendant be awarded all right, title and interest in and to the retirement plan he has accumulated at his place of employment, Intermountain Farmers Association, commonly known as Intermountain Farmers Association 401K Retirement Plan.

14. It is reasonable and proper that the defendant be awarded all right, title and interest in and to the radio station with call letters KTUR, consisting of stock, real property and

personal property. The defendant shall assume all obligations associated with said radio station and hold the plaintiff harmless therefrom.

15. It is understood that some or all of the real property being awarded to the plaintiff and the defendant may be held in a family trust. The plaintiff and defendant shall direct the trustee of the trust to take all actions necessary so the properties are divided as set forth herein.

16. It is reasonable and proper that the plaintiff assume the following debts and obligations and shall hold the defendant harmless therefrom: Discover credit card in the approximate amount of \$2,000.00; MasterCard in the approximate amount of \$2,000.00; and Visa credit card in the approximate amount of \$2,000.00, held in her name.

17. It is reasonable and proper that the defendant pay to the plaintiff the sum of \$1,000.00 for attorney fees, said sum to be paid on or before May 31, 1996.

18. It is reasonable and proper that the defendant pay to the accounting firm of Hawkins, Cloward & Simister the sum of \$300.00 towards fees incurred by said accounting firm. It is understood that the defendant has heretofore paid to said accounting firm the sum of \$2,400.00.

19. It is reasonable and proper that the defendant assume the following obligations and shall hold the plaintiff harmless therefrom: attorney fees incurred with the firm of Howard, Lewis & Petersen; James Knell, orthodontist, in the approximate amount of \$3,200.00; Zions Bank MasterCard in the approximate amount of \$3,944.00; Zions Bank line of credit in the

approximate amount of \$100,000.00; IFA Credit Union in the approximate amount of \$30,000.00; GM MasterCard in the approximate amount of \$8,413.00; Nations Bank Visa in the approximate amount of \$7,906.00; Zions Bank Visa in the approximate amount of \$14,969.00; 401K loan payment in the approximate amount of \$20,000.00; Park Leasing in the approximate amount of \$90,000.00; Howard Braun in the approximate amount of \$12,500.00; Contractors Leasing in the approximate amount of \$96,000.00; C. F. Turley in the approximate amount of \$165,000.00; radio station operating debt in the approximate amount of \$47,500.00; Jones Waldo law firm in the approximate amount of \$3,000.00; and First Security Bank Leasing in the approximate amount of \$9,000.00.

20. In the event there are other debts incurred by either the plaintiff or the defendant which are not set forth herein, each party shall pay for the debt that they have incurred.

21. Each party shall be awarded the personal property now in their possession, except for a grandfather clock which shall be delivered to the defendant, as well as a musical encyclopedia with records, which shall be delivered to the defendant when the children are no longer residing in the home and not using the same for piano lessons, and the Encyclopedia Britannica which shall be delivered to the defendant when the children are no longer residing in the home. The defendant shall further be awarded his musical records, consisting of both Spanish and English, and his personal paraphernalia located on the premises awarded to the plaintiff.

22. It is reasonable and proper that with respect to life insurance policies held in the names of the parties, said policies shall be kept in full force and effect with the minor children designated as beneficiaries. At such time as the children are no longer minors, the parties shall be free to do with the policies as they see fit. For the policies on which the plaintiff is designated the owner, she may designate new beneficiaries when the children are no longer minors; for the policies on which the defendant is designated the owner, he may designate new beneficiaries when the children are no longer minors. It is understood that there is a policy insuring the defendant's life through Intermountain Farmers Association, which is owned by Intermountain Farmers Association, and that International Farmers Association may terminate said policy at any time it desires. Each party shall take physical possession of the policies on which they are designated as owner.

23. It is reasonable and proper that the defendant maintain health insurance through his employer so long as it is available at a reasonable cost. Any medical expenses incurred on behalf of the minor children which are not paid for by insurance shall be paid 50% by the plaintiff and 50% by the defendant.

24. It is reasonable and proper that the plaintiff be awarded the 1986 GMC Suburban and the 1989 Oldsmobile Cutlass. At such time as the 1986 GMC Suburban and the 1989 Oldsmobile Cutlass are paid for, title shall be delivered forthwith to the plaintiff. Until the obligations are satisfied, the defendant shall pay for the vehicle insurance.

25. It is reasonable and proper that the defendant be awarded the 1988 Chevrolet pickup truck and the 1986 Buick automobile.

26. It is reasonable and proper that each party will execute such deeds and documents necessary to implement the terms of the orders of the Court.

From the foregoing Findings of Fact, the Court now makes and enters the following:

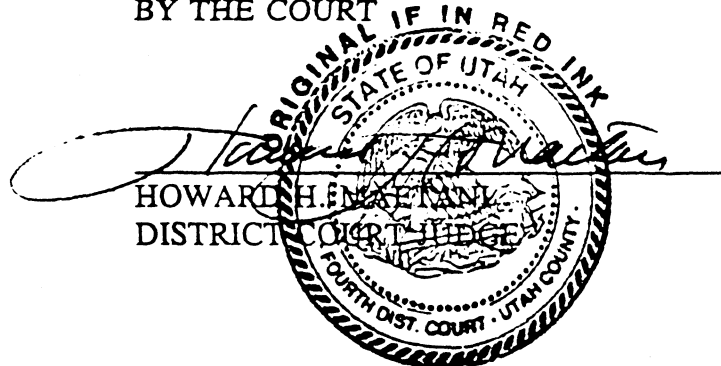
CONCLUSIONS OF LAW

1. The plaintiff is entitled to a decree of divorce divorcing her from the defendant, said decree to become final and absolute upon signing and filing of the same in the office of the Clerk of the Court.

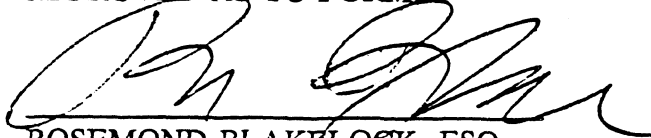
2. The plaintiff and defendant are entitled to judgment consistent with the foregoing Findings of Fact.

DATED this 7 day of February, 1996.

BY THE COURT



APPROVED AS TO FORM:


ROSEMOND BLAKELOCK, ESQ.
Attorney for Plaintiff

APPENDIX "D"

**Decree of Divorce
(R. 95-88)**

FILED
CLERK OF DISTRICT COURT
UTAH COUNTY
1996 FEB -8 AM 10:36
JK

DON R. PETERSEN (2576), for:
HOWARD, LEWIS & PETERSEN
ATTORNEYS AND COUNSELORS AT LAW
120 East 300 North Street
P.O. Box 778
Provo, Utah 84603
Telephone: (801) 373-6345
Facsimile: (801) 377-4991

Our File No. 22,905

MICROFILMED 2:12:46

Attorneys for Defendant

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

<p>JULIETTE TURLEY,</p> <p>Plaintiff,</p> <p>vs.</p> <p>ROBERT WALTERS TURLEY,</p> <p>Defendant.</p>	<p>DECREE OF DIVORCE</p> <p>944402269</p> <p>Case No. 91440002</p> <p>Judge Howard H. Maetani</p>
--	--

The above-entitled matter came on regularly for trial on December 14, 1995. The plaintiff appeared in person and was represented by her attorney, Rosemond Blakelock; the defendant appeared in person and was represented by his attorney, Don R. Petersen. The parties entered into a stipulation, which was presented to the Court and approved. The Court having heretofore entered its Findings of Fact and Conclusions of Law, and being fully advised in the premises, now makes and enters the following:

DECREE OF DIVORCE

1. The plaintiff is awarded a decree of divorce divorcing her from the defendant, which decree shall become final and absolute upon signing and filing of the same in the office of the Clerk of the Court.

2. The plaintiff and defendant are hereby awarded joint custody of the minor children of the parties, to-wit: Christine Turley, born March 6, 1979; and Brian Judd Turley, born January 14, 1982, with the plaintiff being awarded residential and physical custody of the children and the defendant being awarded reasonable rights of visitation.

3. The defendant is ordered to pay to the plaintiff child support in the sum of \$1,300.00 per month for support and maintenance of the two minor children. Said sum shall be paid in semi-monthly installments of \$650.00 each to be paid on the 5th and 20th days of each month, beginning on the 5th day of January, 1996. Child support shall continue until the minor children reach the age of 18 years or graduate from high school with their normal matriculated class, whichever occurs last.

4. The defendant is ordered to pay to the plaintiff alimony in the sum of \$1,500.00 per month for the plaintiff's support and maintenance. Said sum shall be paid in semi-monthly installments of \$750.00 each to be paid on the 5th and 20th days of each month, beginning on the 5th day of January, 1996.

5. The provisions of Utah Code Ann. § 62A-11-401 are not implemented at this time, provided all payments for child support and alimony are taken directly from the defendant's checking account automatically and deposited into a checking account designated by the plaintiff. Payments for child support and alimony shall be made by automatic transfer from the defendant's bank account at Zions First National Bank, 2100 South 900 West, Salt Lake City, Utah, account number 07346943, into plaintiff's bank account at Bank of American Fork,

Alpine Branch, Alpine, Utah, account number 0186452; \$650.00 on the 5th day of each month and \$650.00 on the 20th day of each month.

6. The defendant is granted the right to claim the minor children for income tax exemptions.

7. The defendant's income from Intermountain Farmers will terminate on May 31, 1996, at which time he will no longer receive income from Intermountain Farmers; however, in the event the defendant's income does not terminate, the amounts paid for child support shall continue as set forth above. With respect to alimony, alimony shall increase in the amount that child support decreases when the minor children reach their majority, only so long as the defendant's income is based upon historical earnings of \$181,000.00 per year.

8. The plaintiff is awarded all right, title and interest in and to the family home of the parties located at approximately 1221 North Grove Drive, Alpine, Utah, subject to the obligation owed thereon to Lomas Mortgage Company in the approximate amount of \$20,000.00, which obligation the plaintiff is ordered to assume and hold the defendant harmless therefrom. The defendant is ordered to execute a quit claim deed in favor of the plaintiff. Said property consists of a home and approximately 1.1 acres, subject to an easement on the south side of the property in favor of the defendant or his successors in interest by which to gain access to the barn and property located thereon, said access being 24 feet in width, which property is awarded to the defendant. The defendant is ordered to forthwith execute a quit claim deed conveying his interest in said property to the plaintiff.

9. The plaintiff is awarded all right, title and interest in and to a cabin in which the parties have an interest located in proximity to the Smith Moorehouse Reservoir in Summit County, Utah. The defendant is ordered to execute a quit claim deed in favor of the plaintiff.

10. The defendant is awarded all right, title and interest in and to approximately 3.89 acres of property located on the east and west sides of the home property awarded to the plaintiff. The plaintiff is ordered to execute a quit claim deed conveying her right, title and interest in said property to the defendant. The defendant's 3.89 acres of property shall be subject to an easement in favor of the plaintiff which will allow the plaintiff and her successors in interest to traverse over and obtain access to the plaintiff's property. The defendant may develop or sell the property awarded to him, but he will not live on the property in the event a home is built on the property. The dimensions of the easement are the road as presently used and occupied. The plaintiff is ordered to execute a quit claim deed conveying her interest in the said property to the defendant.

11. The defendant is awarded all right, title and interest in and to the Fountain Green property consisting of approximately 6.80 acres. The plaintiff is ordered to execute a quit claim deed conveying her interest in the said property to the defendant.

12. The defendant is awarded all right, title and interest in the real property located in Mexico.

13. The defendant is awarded all right, title and interest in and to the retirement plan he has accumulated at his place of employment, Intermountain Farmers Association, commonly known as Intermountain Farmers Association 401K Retirement Plan.

14. The defendant is awarded all right, title and interest in and to the radio station with call letters KTUR, consisting of stock, real property and personal property. The defendant is ordered to assume all obligations incurred in connection with the radio station and to hold the plaintiff harmless therefrom.

15. The plaintiff is ordered to assume the following debts and obligations and to hold the defendant harmless therefrom: Lomas Mortgage Company in the approximate amount of \$20,000.00; Discover credit card in the approximate amount of \$2,000.00; MasterCard in the approximate amount of \$2,000.00; and Visa credit card in the approximate amount of \$2,000.00.

16. The defendant is ordered to pay to the plaintiff's counsel the sum of \$1,000.00 for attorney fees, said sum to be paid on or before May 31, 1996.

17. The defendant is ordered to pay to the accounting firm of Hawkins, Cloward & Simister the sum of \$300.00 towards fees incurred by said accounting firm.

18. The defendant is ordered to assume the following obligations and to hold the plaintiff harmless therefrom: attorney fees incurred with the firm of Howard, Lewis & Petersen; James Knell, orthodontist, in the approximate amount of \$3,200.00; Zions Bank MasterCard in the approximate amount of \$3,944.00; Zions Bank line of credit in the approximate amount of \$100,000.00; IFA Credit Union in the approximate amount of \$30,000.00; GM MasterCard in

the approximate amount of \$8,413.00; Nations Bank Visa in the approximate amount of \$7,906.00; Zions Bank Visa in the approximate amount of \$14,969.00; 401K loan payment in the approximate amount of \$20,000.00; Park Leasing in the approximate amount of \$90,000.00; Howard Braun in the approximate amount of \$12,500.00; Contractors Leasing in the approximate amount of \$96,000.00; C. F. Turley in the approximate amount of \$165,000.00; radio station operating debt in the approximate amount of \$47,500.00; Jones Waldo law firm in the approximate amount of \$3,000.00; and First Security Bank Leasing in the approximate amount of \$9,000.00.

19. In the event there are other debts incurred by either the plaintiff or the defendant which are not set forth herein, each party is ordered to pay for the debt that they have incurred.

20. Each party is awarded the personal property now in their possession, except for a grandfather clock and a musical encyclopedia with records, which are awarded to the defendant and shall be delivered to the defendant when minor children are no longer residing in the home or not using the same for piano lessons, together with the Encyclopedia Britannica, which shall be delivered to the defendant when minor children are no longer residing in the home. The defendant is further awarded his musical records, consisting of both Spanish and English, and his personal paraphernalia located on the premises awarded to the plaintiff.

21. With respect to life insurance policies held in the names of the parties, said policies shall be kept in full force and effect with the minor children designated as beneficiaries.

At such time as the children are no longer minors, the parties shall be free to do with the policies as they see fit. For the policies on which the plaintiff is designated the owner, she may designate new beneficiaries when the children are no longer minors; for the policies on which the defendant is designated the owner, he may designate new beneficiaries when the children are no longer minors. It is understood that there is a policy insuring the defendant's life through Intermountain Farmers Association, which is owned by Intermountain Farmers Association, and that it may terminate said policy at any time it desires. Each party is awarded physical possession of the life insurance policies on which they are designated as the owner.

22. The defendant is ordered to maintain health insurance through his employer so long as it is available at a reasonable cost. Any medical expenses incurred on behalf of the minor children which are not paid for by insurance will be paid 50% by the plaintiff and 50% by the defendant. In the event the plaintiff desires to obtain health insurance through any existing COBRA plans, the defendant shall cooperate in executing such documents so that the plaintiff may obtain coverage, which shall be maintained at plaintiff's expense.


23. The plaintiff is awarded the 1986 GMC Suburban and the 1989 Oldsmobile Cutlass. At such time as the obligations owed on the 1986 GMC Suburban and the 1989 Oldsmobile Cutlass are satisfied, titles to those vehicles shall be delivered to the plaintiff. Until the obligations are satisfied, the defendant shall pay for the vehicle insurance.

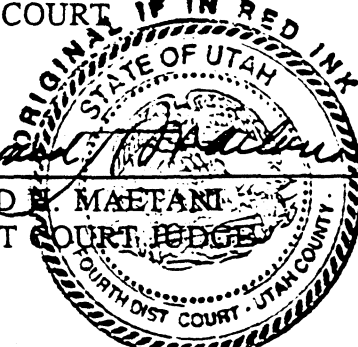
24. The defendant is awarded the 1988 Chevrolet pickup truck and 1986 Buick automobile.

25. Each party is ordered to execute such deeds and documents necessary to implement the terms of this Decree of Divorce.

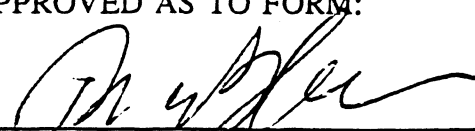
DATED this 7 day of ~~January~~ ^{February}, 1996.

BY THE COURT, IF IN RED INK


HOWARD H. MAEFANT
DISTRICT COURT JUDGE



APPROVED AS TO FORM:


ROSEMOND BLAKELOCK, ESQ.
Attorney for Plaintiff

J:\DRP\TURLEY.DEC