

1997

# Janna Griffith v. David Gary Griffith : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS  
BRIEF

UTAH  
DOCUMENT

IN THE UTAH COURT OF APPEALS

3

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DOCKET NO. 970123

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JANNA GRIFFITH,	:	
	:	Case No. 970123-CA
PLAINTIFF/APPELLANT,	:	Priority No.15
	:	
v.	:	
	:	
DAVID GARY GRIFFITH,	:	
	:	
DEFENDANT/APPELLEE.	:	

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OPENING BRIEF OF APPELLANTS

This is an appeal from a supplemental decree of divorce entered in the Third District Court of Tooele County, State of Utah, the Honorable John Rokich, and L.A. Dever, Judges, presiding.

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**FILED**  
NOV 17 1997  
COURT OF APPEALS

**IN THE UTAH COURT OF APPEALS**

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	:	Case No. 970123-CA
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PARTIES TO THE PROCEEDINGS

The following are parties to the proceedings: Appellants are Janna Griffith and J. Franklin Allred. David Gary Griffith is the sole appellee.



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Utah Code Ann. §78-45-3 (1987 Repl. Vol)

Utah Code Ann. §78-45-7.5 (1994 Cum. Supp., Repl. Vol. 9)

## JURISDICTION

Utah Code Ann. §78-2a-3(2)(h) provides this Court's jurisdiction over this appeal from a domestic relations case.

## ISSUES PRESENTED FOR REVIEW, STANDARDS OF REVIEW, AND PRESERVATION OF THE ISSUES

1. Did Judge Dever err in assessing Defendant's income, and consequently err in the amount of child support and alimony that he awarded?

This issue involves questions of law, to be reviewed for correctness. E.g. Pendleton v. Pendleton, 918 P.2d 159, 160 (Utah App. 1986).

This issue was preserved (e.g. 1468-1483, 1628, 1598-1605).

2. Did Judge Dever err factually and legally in setting the alimony award?

This issue involves mixed questions of fact and law. The Court defers to the factual findings of the trial court unless they are clearly erroneous, and reviews the legal conclusions for correctness. E.g. Pendleton v. Pendleton, 918 P.2d 159, 160 (Utah App. 1986).

This issue was preserved (e.g. 1473-1480, Plaintiff's exhibit 132).

3. Did Judge Dever err in failing to divide the C&G retirement account?

This issue appears to involve mixed questions of fact and law. The Court defers to the factual findings of the trial court unless they are clearly erroneous, and reviews the legal conclusions for

correctness. E.g. Pendleton v. Pendleton, 918 P.2d 159, 160 (Utah App. 1986).

This issue was preserved (e.g. 2645-2649).

4. Did Judge Dever err in failing to order David Griffith to pay Janna Griffith's attorney fees?

Rulings on attorney fees are normally reviewed for an abuse of discretion. Finlayson v. Finlayson, 874 P.2d 843, 850 (Utah App. 1994).

This issue was preserved (1502-23).

5. Should Judge Dever have vacated the orders signed by Judge Rokich after Judge Rokich recused himself from this case?

This issue involves questions of law, to be reviewed for correctness. See e.g. State v. Pena, 869 P.2d 932, 936 (Utah 1994).

This issue was preserved in the trial court (e.g. 983-1002, 1010-1027, 1042-1059).

6. Did Judge Dever err in awarding attorney fees as a result of Mrs. Griffith's motion to disqualify defense counsel, Robert McDonald?

This issue involves questions of law, to be reviewed for correctness. See e.g. State v. Pena, 869 P.2d 932, 936 (Utah 1994).

This issue was preserved in the trial court (e.g. 793-804).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following constitutional provisions, statutes and rules pertain, and are copied in the addendum to this brief: Code of Judicial Conduct, Canon 3 (1996), Utah Rule of Civil Procedure 11 (1996), Utah Rule of Civil Procedure 52 (1997), Utah Rule of Civil Procedure 63 (1997), Utah Code Ann. §30-3-3 (1997), Utah Code Ann. §30-3-5 (1994 Cum. Supp., Repl. Vol 3B), Utah Code Ann. §78-27-56 (1997), Utah Code Ann. §78-45-3 (1987 Repl. Vol), and Utah Code Ann. §78-45-7.5 (1994 Cum. Supp., Repl. Vol. 9).

#### STATEMENT OF THE CASE

##### NATURE OF CASE, COURSE OF PROCEEDINGS, AND DISPOSITION

Janna Griffith filed a complaint seeking a divorce from David Gary Griffith on September 14, 1994 (1-11). Janna was represented by J. Franklin Allred, and David was initially represented by Bruce Richards, and then by Robert McDonald (11, 16, 32).

Judge John Rokich originally presided over the case, but recused himself after one day of trial (1756-1762).

Judge L.A. Dever then presided over the case, granting a decree of divorce on June 3, 1996, ruling that the child custody, property division, child support and alimony issues would be resolved following a full trial (1225-1231). Judge Dever presided over a trial in August of 1996, and entered a supplemental decree of divorce and findings of fact and conclusions of law on February 10, 1997 (1704-1747).

Janna Griffith filed a timely notice of appeal on March 3, 1997 (1750-51).

STATEMENT OF FACTS

Janna Griffith and David Gary Griffith were married on November 12, 1976 (2177).

At the time of trial, Janna Griffith was forty-one years old, and David was thirty-eight years old, and their four children ranged in age from ten to seventeen years (2081, 2084).

At the outset of the marriage, David attended college, while Janna worked full-time as a bank teller (2079). David worked throughout the marriage for the family construction company, Christensen and Griffith (hereinafter "C&G"), and began working full-time for C&G in 1977 (2078). He worked initially as a laborer, and advanced to become a construction manager (2078).

During the course of the marriage, she was the primary caretaker of the children and devoted eight years exclusively to that role (2164, 2166). Janna supplemented her high school education with some banking courses (2161). Janna worked off and on as a bank teller at various banks, and also did office work and served as a runner for C&G (2160-64).

Janna was always supportive of David's efforts on behalf of C&G, traveling with him to various remote construction sites and raising some of their small children while living in trailers on the construction sites (2173-76). They did not move into their

home until 1983 (2172). Janna was not compensated for her work for C&G in the early years of their marriage (2087).

Particularly from her discussions with David's father, Janna expected that the joint efforts of her and her husband on behalf of C&G would pay off financially for her and her family in the future, when David would inherit his share of the family business (2162, 2371-74).

Janna and David separated in April or May of 1994, after David informed Janna of his extra-marital affair (2251, 2254).

After the separation, Janna stayed with the children and worked full time as a bank teller, and also worked every other Sunday at a gas station (2153, 2160-61).

David moved in with his parents, continued driving the company car and using gas and service for the car paid for by C&G, and charged several thousand dollars' worth of vacations and other personal expenses to a C&G credit card, while the company maintained no record of David's debts (2024, 2034, 2822-26, 2592-93).

Shortly after the separation, David Griffith, with the help of his family and family business, C&G, began maneuvering to minimize Janna's financial recovery from the divorce. For instance, David opted to abstain from taking his annual bonus of \$15,000 in 1994 (2062). He later took a company car valued at \$9,500 for his daughter after the bonus would have been distributed (2790).

Shortly after the separation, David ceased performing side jobs for C&G, which side jobs had previously earned David and Janna's family some \$13,206 per year, and which had principally been used to improve their family home (2212, 2231).<sup>1</sup>

David testified that he quit doing side jobs shortly after the separation from Janna, completing the last project by the Spring of 1995 (2068-69). He testified that he stopped performing the side jobs because the family home was completed and he had no further interest, and because of his increasing responsibilities at work at C&G stemming from his brother's illness and father's political activities (2068). He testified that David's brother's leukemia and David's father's increasing responsibilities as a Tooele County Commissioner resulted in David's spending more time and effort at C&G (2073-77).

David testified that he did not request a salary increase to compensate him for his extra work for C&G, because it was a family business (2063).

Gary Griffith, C.E.O. of C&G, with 70% of the voting stock (2452, 2485),

confirmed that his son David would not receive additional compensation for his extra efforts at C&G in compensating for Paul's and Gary's absence (2449). He did, however, testify that

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<sup>1</sup> Because records were not kept on many of the side jobs, and because the side jobs were not reported on tax forms, the exact figures on this income are not available (2248, 2294-2301).

David used the company credit cards to support himself, and that the company kept no records of David's debt to the company, and simply left it up to David to determine how to pay back the company (2592-93).<sup>2</sup>

David's father, Gary Griffith, gave several thousand dollars' worth of company stock to David's grandmother, with the intention of transferring the stock to David after the divorce as part of David's inheritance (2369). This arrangement was made in an effort to prevent Janna from getting any benefit from the transfer (2369).

During discovery, David Griffith represented that his share of the C&G profit sharing plan was valued at \$3,650.84 (Plaintiff's exhibit 10), when in fact, that figure represented the value of a small annuity, and the true value of the profit sharing plan was \$63,981.17 (Plaintiff's exhibit 11).

After Judge Dever issued his original order preceding the supplemental decree, counsel for Mr. Griffith filed a motion attempting to persuade Judge Dever that Mr. Griffith's salary at

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<sup>2</sup> C&G's bookkeeping methods have historically facilitated David Griffith's efforts to minimize his apparent income. The comptroller of C&G testified that the company maintained no records concerning what David owed the company as a result of his use of company equipment, supplies and credit in performing side jobs (2432-34, 2404). The comptroller testified that David has had access to company equipment, supplies and credit, and was trusted to keep his own records and reimburse the company (2428-30).

The same comptroller prepared David and Janna's taxes, and was aware that David did not report on his taxes his side job income or unrestricted use of a company car, car maintenance, and gas (2420, 2409-15, 2408-9, 2406-07).



C&G was \$970 a week, rather than \$1020 a week, as Mr. Griffith testified at trial (1640, 2065). The motion also attempted to persuade the court to account for Janna Griffith's earning \$211 per month in interest income, when in fact, the exhibit upon which he relied demonstrated that she earned a total of \$211 in the entire year of 1995, and demonstrated no interest income for Janna in 1996 (1640, 1688).

Janna and David's divorce was complete and final on February 10, 1997 (1704-1747).

Additional facts are stated in the argument portion of the brief, as they pertain to the issues raised.

#### SUMMARY OF ARGUMENTS

Judge Dever's assessment of David Griffith's income was incorrect in three respects: he should have included David's history of side-job income; he should have included David's income from the possession, use and maintenance of the company car; and he assessed Mr. Griffith's annual bonus on the basis of a historical average, rather than on the basis of the most current figures. The errors in Judge Dever's assessment of David Griffith's income resulted in an erroneous calculation of child support and alimony.

In assessing the alimony award, Judge Dever failed to consider the proper factors, and granted an award that was inadequate and unfair.

Judge Dever also erred in the property division, in failing to

divide David's retirement account at C&G. This was qualitatively by far the best asset earned by the Griffiths during the course of their marriage, and no other assets awarded to Mrs. Griffith compensated for the lack of her fair share of the retirement account.

In denying Janna Griffith attorney fees, Judge Dever failed to make adequate findings. Proper consideration of the issue indicates that the fees requested were reasonable, that Janna Griffith was unable to pay them, and that David should have been ordered to do so.

Judge Rokich erred in adjudicating the issue of attorney fees after he disqualified himself from presiding over this case. His judgment and orders were illegal by virtue of his preceding recusal, and also by virtue of the fact that there was no basis for the orders in fact or in law. Judge Dever should have vacated the orders signed by Judge Rokich after his recusal.

There was no basis for imposing rule 11 sanctions for Janna Griffith's motion to disqualify defense counsel. Because Judge Dever's order was induced by an incorrect view of the law and is without evidentiary support, this Court should reverse it.

#### ARGUMENT

##### I.

##### THE COURT ERRED IN ASSESSING DAVID GRIFFITH'S INCOME.

##### A. RELEVANT FACTS

## 1. Side Job Income

From 1983 to 1995, David Griffith earned side job income averaging \$13,206 per year (2212). Because no records were kept on many of the side jobs, and because the side jobs were not reported on tax forms, the exact figures on this income were not available (2248, 2294-2301).

The side job income was used to the benefit of David and Janna and their four children, primarily in improving the family home (2231).

The side jobs involved David using equipment and supplies from C&G to complete independent projects after hours, or work C&G had, which it was unable to complete during regular hours (2069-72). The company policy permitted work with employees to use company equipment and supplies and credit, and anticipated that the employees would reimburse the company (2454, 2475-79). The company did not maintain records on David Griffith's use of or reimbursement for use of the company credit card or the other benefits, and relied on David to keep his own records (2425-28, 2592-93).

David testified that he quit doing side jobs shortly after the separation from Janna, completing the last project by the Spring of 1995 (2068-69). He testified that he stopped the side jobs because the family home was completed and he had no reason to do more side jobs (2068). He then testified that David's brother's leukemia and

his father's increasing responsibilities as a Tooele County Commissioner resulted in David's spending more time and effort at C&G (2073-77).

Evidence presented by Janna established that if David were paid for performing the 80% of Paul's job he claimed to have been doing, he should have been paid an annual salary of \$80,704 (2187-90), rather than the approximate \$54,000 David testified he was being paid (2065). David testified that he did not request a salary increase to compensate him for his extra work, because it was a family business (2063).

Judge Dever agreed with David that this side job income should not be included in his income for calculating child support and alimony, ruling that David's uncompensated increasing responsibilities at C&G, stemming from Paul Griffith's leukemia and Gary Griffith's mounting responsibilities as a Tooele County Commissioner, justified David's ceasing to perform the side jobs (1628). The judge ruled that David had testified that his extra efforts at C&G were essential to the viability of the company (1628), despite the absence of any testimony to this effect. The court ruled that Mr. Griffith was not voluntarily underemployed, and that there was no basis for imputing side job income historically earned or income he should have received for performing 80 % of Paul Griffith's job (1723-24).

## 2. Company car income

As part of his employment at C&G, David Griffith was given full use of a 1995 Chevy Suburban, and all service and gas for the car was paid for by C&G (2407-9). Mr. Allred's written proffer of evidence from witness, Becky Roderick, set the value of the car, service and gas at \$10,289.72 (1598-1605).

At trial on August 8, 1996, Judge Dever refused to allow Mr. Allred to admit the evidence proffered on the value of the car and services and gas, or on the value of one of David's side jobs, on the theory that Mr. Allred had violated a continuing obligation to notify opposing counsel of witnesses he would call at trial (2333). Because Mr. McDonald did not file discovery documents seeking information on Mr. Allred's witnesses, Mr. Allred's duty to provide a witness list was the result of a minute entry entered at Mr. McDonald's request stating, ". . . the Court orders that exchange of witnesses to be completed by Friday, the 26th day of July, 1996." (2330, 1372). Despite the fact that the witnesses on the value of the car, services and gas, and side job, were not located until after July 26, 1996, the court barred the witnesses from testifying because Mr. Allred had failed to notify opposing counsel of his intent to call the witnesses (2330).

On August 8, 1996, Allred moved to reopen his case to present the testimony of the two witnesses at the continued trial on August 13, 1996, arguing that this would provide opposing counsel with sufficient notice to investigate and rebut her testimony (1492).

Judge Dever denied the motion (1634).

### 3. Bonus income

David Griffith earned the following bonuses in the following years: \$2,500 in 1990, 0 in 1991; \$4,000 in 1992, \$5,000 in 1993, \$15,000 in 1994, and \$12,000 in 1995 (2063, 2787, 2790). The company bonuses were determined by David's father, Gary Griffith (who had 70 percent of the voting stock of the company) and by Ron Christensen (who had 30 percent of the voting stock of the company), and were not guaranteed at any particular level (2485, 2449, 2445).

Rather than assessing David's income on the basis of his current income, Judge Dever opted to average the total bonuses for six years in determining David's income (1628). His rationale in doing so was to avoid acrimony between Janna and David that might ensue if they were forced to recalculate David's child support obligations annually (1725-26).

## B. RELEVANT LAW

### 1. Side job income

In ruling that there was no basis for imputing the historically earned side job income to David Griffith in setting David's child support obligations, the court disregarded numerous precedents from this Court.

Particularly where David Griffith's side job income stemmed so directly from his primary employment (the side jobs involved

David's using C&G's equipment and supplies to complete projects or projects for C&G customers that C&G was unable to finish during regular work hours (2069-72)), it would have been proper to include the side job income in assessing Mr. Griffith's continuing obligations to his children. This is seen by reference to Jensen v. Bowcut, 892 P.2d 1053 (Utah App. 1995).<sup>3</sup>

While David did testify in accordance with the trial court's findings, that as a result of his brother's illness and his father's political activities, David was doing more work at C&G which prevented him from doing side jobs (2073-77), David's first explanation of why he ceased performing the side jobs was that the family home was complete and he had no reason to do any more side jobs (2068).

Particularly in light of the evidence in the record and discussed in the statement of facts, *supra*, about how David

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<sup>3</sup> In Jensen, this Court upheld a trial court's award of child support which relied on income from the defendant physician's second job as the county jail physician. The trial court reasoned and this Court agreed that consideration of the second job was appropriate because the income from the second job could be viewed as emanating from the physician's primary job. This Court acknowledged that the trial court's calculation may well have contemplated a work week that exceeded forty hours, but ruled that this is permissible practice if such hours were "consistent with the obligee's prior practice." Id. at n.3 (citations omitted). See also Hurt v. Hurt, 793 P.2d 948, 950 (Utah App. 1990) (trial court properly based child support award on history of overtime, and, rather than speculating that the defendant would decrease his overtime work, opted to permit modification of the order in the future if those circumstances arose).

Griffith and his family business began maneuvering to minimize Janna's financial recovery from the divorce shortly after their separation, the trial court should not have accepted David's loss of interest in improving the family home or other excuses to disregard David's history of earnings from the side jobs. See Hill v. Hill, 869 P.2d 963 (Utah 1993).<sup>4</sup>

While David Griffith's choice to work to support his brother and father in their times of need may seem laudable, David Griffith did not have the legal option to elevate the needs of his father and brother over the needs of his wife and children, to whom he owed a legal duty of support.<sup>5</sup> When Mr. Griffith decided that he had no further interest, and quit doing the side-jobs, he disregarded his primary familial obligations and is properly characterized as being voluntarily underemployed. See Hill, *supra*.

The trial court should have imputed income to David to account for the historical side job earnings, or to account for the salary

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<sup>4</sup> In Hill, when the marriage broke up, a husband and father of five left high paying job and took lower paying jobs. Id. at 964-65. Despite Mr. Hill's contention that he left the higher paying job because his wife ordered him out of the county when they split up, the trial court found that Mr. Hill was voluntarily underemployed, because he had "voluntarily disregarded his familial obligations" in leaving the more lucrative job. Id. at 965. This Court approved of the trial court's setting child support and alimony obligations on the basis of three years of regular and overtime wages from his previous job. Id. at 965-66.

<sup>5</sup> See Utah Code Ann. §78-45-3(1) ("Every father shall support his child; and every man shall support his wife when she is in need.").



David should have been earning for the work he was doing without visible compensation at C&G.<sup>6</sup>

Particularly in the context of setting the alimony award, the law is abundantly clear that the trial court should have included Mr. Griffith's historical side job income in setting David's obligations.<sup>7</sup>

This Court should remand this to the trial court for correction of the child support and alimony orders, to incorporate the side job income.

## 2. Company car income

As noted above, the trial court's refusal to consider as income David Griffith's unrestricted use of the company car, service and gasoline was based on Mr. Allred's failure to comply with a perceived continuing duty to supplement his witness list, as a result of the trial court's order to produce a witness list by a certain date.

Under Utah Rule of Civil Procedure 26(e), continuing discovery duties apply only to responses to discovery requests, or to court

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<sup>6</sup> See e.g. Utah Code Ann. §78-45-7.5(7)(b) ("If income is imputed to a parent, the income shall be based upon employment potential and probable earnings as derived from work history, occupation qualifications, and prevailing earnings for persons of similar backgrounds in the community."); Hall v. Hall, 858 P.2d 1018, 1026 (Utah App. 1993).

<sup>7</sup> See e.g. Breinholt v. Breinholt, 905 P.2d 877, 880 (Utah App. 1995); Crompton v. Crompton, 888 P.2d 686 (Utah App. 1994); Olsen v. Olsen, 704 P.2d 564 (Utah 1985); Hill, *supra*; Utah Code Ann. §30-3-5.

orders indicating a continuing duty.

In the instant matter, Mr. McDonald did not file a discovery request, and so Mr. Allred was not under any duty to supplement any response. Judge Dever's order did not impose a continuing obligation to update Mr. Allred's witness list, and Mr. McDonald simply relied on the Court's order, and did not himself request any updated information after Mr. Allred submitted his witness list in compliance with the trial court's order that the lists be exchanged by July 26, 1996 (2330-33, 1372).

In these circumstances, Mr. Allred had no duty to supplement his witness list with witnesses found after his initial compliance with the trial court's order. At a minimum, the trial court could have granted Mr. Allred's motion to reopen his case, if the court wished to provide Mr. McDonald with additional time to prepare to cross-examine or rebut the witness. The exclusion of this evidence substantially undercut both the child support and alimony awards, and should have been considered in assessing Mr. Griffith's obligations. <sup>8</sup>

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<sup>8</sup> See e.g. Utah Code Ann. §78-45-7.5 (1)(a) defining gross income for purposes of child support as including "income from any source, including non-earned sources"; Utah Code Ann. §78-45-2(7) (defining earnings as follows: "compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and specifically includes periodic payment pursuant to pension or retirement programs, or insurance policies of any type. Earnings specifically includes all gain derived from capital, from labor, or from both combined, including profit gained through sale or conversion of capital assets."); Breinholt v. Breinholt, 905 P.2d 877 (Utah App. 1995) ("This court has previously held that when

### 3. Bonus income

As noted above, Judge Dever refused to consider Mr. Griffith's historical side job income in assessing income imputable to him as a result of his voluntary unemployment. Yet, in the context of Mr. Griffith's earned bonuses, the judge insisted on relying on an historical average, rather than the most current information. Rather than assessing Mr. Griffith's income from his bonus in accordance with the most current year, 1995, in which Mr. Griffith received \$12,000, Judge Dever opted to average the bonuses David received in the past six years, attributing only \$6,416 in annual income from the bonuses (1628, 2063, 2787, 2790).

This approach was inconsistent with this Court's clear indication that income is to be determined on the basis of current figures, rather than averages, in setting child support obligations. In Thronson v. Thronson, 810 P.2d 428 (Utah 1991), this Court stated, "Moreover, the trial court averaged Mr. Thronson's earned income for several years rather than using 'current earnings.' Section 78-45-7.5(5)(b) indicates that current earnings are to be used." Id. at 434.<sup>9</sup>

On remand in this case, this Court should instruct the trial

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determining an alimony award, "it is appropriate and necessary for a trial court to consider all sources of income that were used by the parties during their marriage to meet their self-defined needs, from whatever source -- overtime, second job, self employment, etc., as well as unearned income.").

<sup>9</sup> As noted above, Utah Code Ann. §78-45-2(7) includes bonuses within the definition of earnings.

court to redetermine Mr. Griffith's income in accordance with his most recent bonus. See id.

II.  
THE TRIAL COURT'S ALIMONY AWARD  
WAS IMPROPER.

A. RELEVANT FACTS

Janna submitted detailed records in support of her claimed monthly expenses of \$4155.44 (Plaintiff's exhibits 132, 136, 137, 138, 139, 140, 141, 142). David testified that he had no specific information, but thought that Janna's estimates of family cost of living were significantly inflated (2010). While the comptroller for C&G testified that he could not account for all of Janna's claimed expenses in reviewing her financial records, he conceded that the records were incomplete, and did not account for cash transactions (2792-2803, 2761-68).

In assessing Janna's needs, Judge Dever first found that Janna Griffith failed to establish by a preponderance of the evidence that her needs were as claimed, \$4115.44 a month (1627). He found that David claimed that \$2910 was the correct amount to attribute for monthly expenses, despite the fact that David Griffith testified that he had no specific information, but generally felt that Janna's listed expenses were inflated (2010-2012).

Despite the fact that Janna claimed \$4115.44 a month and that David supposedly claimed that \$2910 was the correct amount, Judge Dever found that the "undisputed" amount of expenses was \$2,806

(1627).<sup>10</sup>

Judge Dever indicated that the \$2806 figure was to have accounted for the "mortgage, utilities, food, clothing, automobile expenses, cable T.V., newspapers and books, haircuts, and entertainment" requested by Janna and uncontested by David (1627). However, adding up the figures on plaintiff's exhibit 132 for the listed expenses results in a total of \$3139.81 (Plaintiff's Exhibit 132).

Under his ruling, Judge Dever allowed Janna Griffith nothing for maintenance of her home and yard, for tithing and charitable

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<sup>10</sup> Judge Dever's assessment of the relative positions of the parties was further confused by the trial court's reliance on a purported agreement by David Griffith to pay 80 percent of the expenses stemming from his children's extra-curricular activities and some insurance expenses, when in fact, this agreement was contingent on the court's awarding no alimony. In the original order, Judge Dever stated,

The plaintiff argues that her monthly expenses are \$4115.44. The defendant disputes this amount and claims that \$2910 is the correct amount. Part of the difference is realized by the defendant's agreement to absorb 80% of the dance and school activities costs and insurance costs relating to him and his daughter. The defendant does not dispute the plaintiff's claims for mortgage, utilities, food, clothing, automobile expenses, cable T.V., newspapers and books, haircuts, and entertainment. The undisputed amount is \$2806. (1627). The court, however, never ordered David Griffith to pay in accordance with the purported agreement.

As Mr. McDonald noted after the entry of the court's order, the purported agreement to pay 80% of expenses such as those stemming from the children's extra-curricular activities was contingent on the court not awarding alimony (1685). Nonetheless, in the final decree and supporting findings of fact and conclusions of law, Judge Dever relied on the purported agreement in rationalizing the disparities between the estimated expenses, again without ordering Mr. Griffith to comply with the agreement (1720-21).

contributions, for her own prescriptions, for laundry and dry cleaning, medical expenses, dental expenses, car insurance, life insurance, or for several expenses for the children, such as extracurricular school activities, dance expenses, orthodontic expenses, prescriptions, and glasses (Plaintiff's Exhibit 132).<sup>11</sup>

Judge Dever concluded that an award of \$400 would "roughly equalize" the position of the parties. In the order drafted by the court, Judge Dever stated,

Child support and the plaintiff's income (second job included) combined are \$2769. Defendant's income minus child support is \$3579. Alimony in the amount of \$400 would be appropriate in that it roughly equalizes the parties and allows the plaintiff the necessary sum to continue in the lifestyle the parties shared during the marriage. The alimony is to continue for nineteen years subject to the standard terms and conditions.

(1626-27).

The findings of fact and conclusions of law state,

Plaintiff has living expenses of \$2,806 and a total gross income (including wages from primary occupation, second job and child support) of \$2,769. Defendant's income less child support is \$3,579. An alimony award of \$400 would roughly equalize the respective incomes of the parties and allows Plaintiff sufficient funds to continue the lifestyle the parties shared during the marriage.

(1721).

Under the court's orders, Janna Griffith is expected to work

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<sup>11</sup> Expenses for children are not normally to be considered in awarding alimony, e.g. Chambers v. Chambers 840 P.2d 841, 843 n.1 (Utah 1992). In the instant case, Judge Dever credited child support paid to Janna as income, and decreased David's income by the amount of child support he was paying, and considered the children's expenses along with Janna's in reaching the alimony award.

two jobs and is left with \$363 a month in discretionary income to provide for all expenses disallowed by the trial court, and any emergencies and unplanned-for expenses for herself and her four children.<sup>12</sup> Meanwhile, David Griffith will continue to work in his comfortable position at C&G, and is left with a minimum of \$3,179 a month, in addition to whatever benefits the family business may offer, to provide only for himself.

Janna's ability to earn sufficient funds to achieve her marital standard of living is limited by her limited education, consisting of high school and some bank teller classes, by her relatively unskilled and low-paying employment experience as a bank teller and runner for C&G, by her age of 41, and by her time commitments to her four children (2160-66, 2084).

David's ability to support Janna at the requisite level is excellent, given his comfortable position and bright future with C&G, discussed in the statement of facts.

#### B. RELEVANT LAW

The purpose of alimony is to prevent the spouse receiving alimony from becoming a public charge, and to maintain her marital standard of living after the divorce, to the degree possible. Fletcher v. Fletcher, 615 P.2d 1218, 1222 (Utah 1980). In setting the amount of alimony, the court should have considered three

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<sup>12</sup> As is discussed below, the court refused to order David Griffith to pay any of Mr. Allred's attorney's fees totaling over \$70,000.

factors: "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." Paffel v. Paffel, 732 P.2d 96, 100-101 (Utah 1986). See also Utah Code Ann. §30-3-5. Alimony is not limited to providing for most basic needs, provided that the paying spouse can afford to pay more. Howell v. Howell, 806 P.2d 1209, 1212 (Utah App. 1991).

In the instant case, Judge Dever did not articulate a tripartite analysis of the alimony question, as he should have under Paffel. Rather, as noted above, he articulated and then widely missed his goal of "roughly" equalizing Janna's and David's positions.

Consideration of the proper factors leads to the conclusion that the alimony award was grossly inadequate.

At trial, Janna Griffith established that her monthly needs, in order to maintain the marital standard of living, required income of \$4155.44 (Plaintiff's exhibit 132). David testified that he had no specific information, but thought that Janna's estimates of family cost of living were significantly inflated (2010). The comptroller for C&G testified that he could not account for all of Janna's claimed expenses in reviewing her financial records, but conceded that the records were incomplete, and did not account for cash transactions (2792-2803, 2761-68).



While Judge Dever found that Janna failed to establish her claimed needs by a preponderance of the evidence, and chose to set the sum of \$2,806 as the value of her needs, the trial court's findings regarding her needs are not attributed or attributable to any source of evidence in the record, and are so vague and confused, see supra at 19, 20, 21 as to render futile a traditional effort to marshal the evidence in support of the findings.<sup>13</sup>

Judge Dever did not address Janna's ability to achieve her historical standard of living on her own, which ability is limited by virtue of her limited education and job experience and earning capacity, and by her age and time commitments to her children.

Judge Dever did not address Mr. Griffith's substantial ability to pay to support Janna's standard of living. Nor did he

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<sup>13</sup> In the often cited opinion, Woodward v. Fazzio, 823 P.2d 474, 477 (Utah App. 1991), this Court explained the importance of trial courts' making adequate findings of fact, and stated that adequate findings must "embody sufficient detail and include enough subsidiary facts to clearly show the evidence upon which they are grounded," in order to facilitate appellate review. Id. at 477. This Court further explained that the traditional marshaling requirement, wherein an appellant must marshal the evidence in support of any finding subject to challenge on appeal, does not apply if the findings of fact are insufficiently detailed to disclose their evidentiary basis. Id. at 477. The Court concluded,

In other words, the way to attack findings which appear to be complete and which are sufficiently detailed is to marshal the supporting evidence and then demonstrate the evidence is inadequate to sustain such findings.

But where the findings are not of that caliber, appellant need not go through a futile marshaling exercise. Rather, appellant can simply argue the legal insufficiency of the court's findings as framed.

Id. at 477-478. See also Utah Rule of Civil Procedure 52.

acknowledge that when a party such as Mr. Griffith is in a position to pay, the alimony award should attempt to maintain the station in life to which the other spouse is accustomed. See e.g. Howell, supra.

This Court should remand this matter to the trial court for the entry of adequate findings, and for recalculation and augmentation of the alimony award, or should itself enter an appropriate alimony award in the amount requested by Janna Griffith.<sup>14</sup>

III.  
THE TRIAL COURT ERRED IN  
DISTRIBUTING THE MARITAL ASSETS.

A. RELEVANT FACTS

During the course of the marriage, the parties amassed several retirement accounts. Janna Griffith had an I.R.A. worth \$2,559, a 4-501 account worth \$2,891, and a pension worth \$2,513, while David had an I.R.A. worth \$5,975 and a retirement profit sharing account at C&G worth well over \$85, 264 (1630-1632). The present value of the C&G profit sharing plan could not be determined at the time of trial, because C&G operates on a fiscal year, rather than a calendar year, and thus the annual valuation of the plan is delayed

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<sup>14</sup> See e.g. Woodward; Rule 52, supra. Compare Martinez v. Martinez, 754 P.2d 69, 75 (Utah App. 1988) (increasing alimony award from \$400 to \$750, in light of family's standard of living, wife's poor prospects for achieving that standard on her own, and husband's ability to pay), rev'd on other grounds, Martinez v. Martinez, 818 P.2d 538 (Utah 1991).

substantially (2647, Plaintiff's exhibit 12, page 15). While Mr. Allred argued that the Court should enter an order dividing the retirement plans on the basis of the upcoming valuation of the C&G profit sharing plan, in order to ascertain the present value and properly divide the C&G account (2645-47), the court never ascertained the present value of the C&G account.

Evidence at trial established that the C&G profit sharing plan contemplated the entry of qualified domestic relations orders (2460).

Despite Janna Griffith's argument that the retirement accounts should be divided nearly equally because of the unique tax and investment benefits that they provided (2645-1649), Judge Dever awarded each party their own accounts, leaving the entire C&G account to David (1630-31).

#### B. RELEVANT LAW

Retirement accounts are recognized as marital assets, and are subject to distribution along with all other marital property, to the extent that rights to the accounts accrued during the marriage. See e.g. Woodward v. Woodward, 656 P.2d 431, 433 (Utah 1982).<sup>15</sup>

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<sup>15</sup> In Woodward, *supra*, the court indicated that trial courts may award retirement accounts solely to the employee spouses, in limited circumstances. The court explained,

"Long-term and deferred sharing of financial interests are obviously too susceptible to continued strife and hostility, circumstances which our courts traditionally strive to avoid to the greatest extent possible. This goal may be best accomplished, if a present value of the pension plan is ascertainable, by fixing the other

Since Woodward, this Court has recognized that there is a legal presumption that each marital asset is to be divided equally between divorcing spouses, that in order to deviate from this presumption, there must be unusual circumstances, and that the trial court must make adequate findings to justify any deviation.<sup>16</sup>

In the instant case, Judge Dever made no findings to justify his failure to divide the retirement accounts evenly, and there appear to be no unusual circumstances in this case that would justify such a deviation. This trial court's failure to make appropriate findings thus calls for reversal under Hall.

The trial court's errors in failing to divide the retirement accounts evenly is even more clear in light of the Woodward analysis. As noted above, the trial court never determined a present value for the C&G account, or took the effects of C&G's fiscal year accounting methods into account. The trial court did

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spouse's share thereof, as adjusted for all appropriate considerations, including the length of time the pensioner must survive to enjoy its benefits, to be satisfied out of other assets leaving all pension benefits to the employee himself.

On the other hand, where other assets for equitable distribution are inadequate or lacking altogether, or where no present value can be established and the parties are unable to reach agreement, resort must be had to a form of deferred distribution based upon fixed percentages."

Id. at 433, quoting Kikkert v. Kikkert, 427 A.2d 76, 79-80 (N.J. Super. 1981).

<sup>16</sup> See e.g. Hall v. Hall, 858 P.2d 1018, 1022 (Utah App. 1993) (discussing inheritance) (citations omitted).

not make any findings concerning the time period over which David Griffith would have to survive in order to obtain the benefits of the plan, or note any other adjustments to be made. He simply took the latest (but not current) evaluation of the C&G account, and awarded the entirety of the account to David.

While it appears that Judge Dever attempted to award other marital assets to Janna to compensate for her not receiving her share of the C&G retirement account, a cursory review of the property granted to Janna demonstrates that none of the other assets awarded her had a qualitative value approaching the large account at C&G, which carried with it such significant tax and investment advantages. (See 1714-17, 1706-1707).

Moreover, the trial court's assessment of marital assets was clearly erroneous, to the detriment of Janna. For instance, the trial court found that nearly \$7,500 in savings bonds were the separate property of David Griffith (1726-27). The bonds were given to David and Janna at Christmas time by David's grandmother, Alene Griffith, who handed the bonds to Janna and told them both, "Merry Christmas." (2157-58). Despite David's agreement concerning Janna's account of how the gifts were given to him and her, he maintained, and Judge Dever apparently agreed, that the bonds were his separate property on the sole basis that they had David's name on them, and not Janna's (2044-45). Alene Griffith was never called to challenge her intention in giving the bonds to

both David and Janna.

Judge Dever's finding on this point was legally erroneous. See Jackson v. Jackson, 617 P.2d 338 (Utah 1980).<sup>17</sup> While the majority of the bonds were in David's name, the evidence established Aline Griffith's intent to make a joint gift to David and Janna with the bonds. In these circumstances, the bonds should not have been considered David's separate property. See id. See also Smith v. Smith, 738 P.2d 655, 657 (Utah App. 1987) (trial court erred in excluding evidence regarding grantor's intent on theory that title of property was binding on question of whether property was a marital or separate asset).

#### IV.

#### JANNA GRIFFITH SHOULD HAVE BEEN AWARDED ATTORNEY FEES.

##### A. RELEVANT FACTS

At the conclusion of the trial, Mr. Allred submitted a detailed claim for outstanding attorney fees in the amount of \$75,533.61 (1502-1523), and Mr. McDonald submitted a detailed claim for outstanding attorney fees totaling \$47,366.50, and costs totaling \$3,123.96 (1524-1582). Mr. McDonald claimed that a

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<sup>17</sup> The Jackson Court explained,  
The state of title to marital property prior to a divorce decree is not necessarily binding on the trial court in its distribution of such property pursuant to such decree. The trial court is empowered to make such distributions as are just and equitable, and may compel such conveyances as are necessary to that end.  
Id. at 340.

proper prosecution and defense of the case should have cost a maximum of \$20,000, and attributed the fees generated in excess of this amount to Mr. Allred's allegedly meritless litigation throughout the case (1574-75) .

The financial evidence before the court clearly established Janna Griffith's need for assistance in paying her attorney's fees, and David Griffith's ability to pay. See e.g. discussion of relevant facts in Point II of this brief, *supra* at pages 19 through 25.

Judge Dever did not award attorney fees to either party.<sup>18</sup>

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<sup>18</sup> In Judge Dever's original order, he stated summarily, The attorney's fees generated by this case are not reasonable. Both parties are gainfully employed, the division of property and income is roughly equal and therefore both sides are to assume their own fees, with the exception of those fees previously awarded to the defendant and the fees incurred by the defendant in opposing the motion to disqualify his counsel.

(1625-26).

The findings of fact and conclusions of law drafted by Mr. McDonald state,

This is a divorce involving two salaried individuals with a modest marital estate and no dispute as to custody. The Court finds that the attorneys' fees claimed for the motions and memoranda filed by the Plaintiff are unreasonable.

Inasmuch as both parties are gainfully employed, and the division of property and income is roughly equal between the parties, and subject to the provisions of paragraphs 41 and 42-44 [involving fees from Judge Rokich's recusal and the motion to disqualify Mr. McDonald], each party shall be solely responsible for the payment of their own costs and attorneys fees.

(1719).

The final decree drafted by Mr. McDonald states,

## B. RELEVANT LAW

In ruling on a motion for attorney fees in divorce proceedings, a trial court should consider the financial need of the requesting spouse, the reasonableness of the fees, and the other spouse's ability to pay.<sup>19</sup> The reasonableness of the fees is determined by considering such factors as

"the difficulty of the litigation, the efficiency of the attorneys in presenting the case, the reasonableness of the number of hours spent on the case, the fee customarily charged in the locality for similar services, the amount involved in the case and the result attained, and the expertise and experience of the attorneys involved."

Muir v. Muir, 841 P.2d 735, 741 (Utah App. 1992) (citations omitted).

When a trial court chooses to reduce requested fees *sua sponte*, the court must make findings to demonstrate that the

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The Court concludes that the costs and attorneys fees claimed by Plaintiff's attorney in representing Plaintiff in this action are unreasonable in light of the complexity (or lack thereof) to the issues involved in this litigation, the size of the marital estate, and the remedies sought by many of the motions filed by Plaintiff in light of the legal expense necessary to prepare said motions and supporting memoranda. Subject to the provisions of paragraphs 30 and 31, each party shall be solely responsible for the payment of their respective costs and attorneys fees incurred in the prosecution and defense of this action.

(1710).

<sup>19</sup> See e.g. Maughan v. Maughan, 770 P.2d 156, 162 (Utah App. 1989); Muir v. Muir, 841 P.2d 736, 741 (Utah App. 1992); Utah Code Ann. §30-3-3.



requested fees are not reasonable under the foregoing standards.<sup>20</sup>

As noted above, in the instant matter, Judge Dever did not consider either party's ability to pay (other than noting that both parties are salaried employees), but flatly ruled that the fees involved in Mr. Allred's motions and memoranda were unreasonable. He did not articulate any factual or evidentiary basis for his conclusion that the fees were unreasonable, or address the reasonableness of the fees to Janna Griffith which stemmed from Mr. Allred's work, aside from that involved in the motions and memoranda.

In altering the final documents to reflect unreasonableness solely on the part of Mr. Allred, where the original order indicated that both parties' fees were unreasonable, and in creating a reasonableness rationale in support of this conclusion out of whole cloth, and without any guidance from the trial court, Mr. McDonald created final documents that did not reflect the trial court's original intent.<sup>21</sup>

Moreover, nothing in the findings and conclusions or final decree addresses the needs of Janna Griffith in paying her attorney

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<sup>20</sup> See Muir.; Finlayson v. Finlayson, 874 P.2d 843, 850 (Utah App. 1994).

<sup>21</sup> See e.g. Automatic Control Prods. Corp. v. Tel-Tech, Inc., 780 P.2d 1258, 1263 (Utah 1989) (Zimmerman, J., concurring) (warning of hazards of relying on counsel to draft findings and conclusions which do not reflect intent of court); State v. Rio Vista Oil, Ltd., 786 P.2d 1343, 1347 (Utah 1990) (citing Justice Zimmerman's opinion in Automatic Control with approval).

fees, or David's ability to pay them.

Because the trial court's findings were legally inadequate, this Court should remand to the trial court for consideration of and entry of findings on the proper criteria.<sup>22</sup>

Alternatively, this Court should simply review the affidavit of Mr. Allred in support of his fees (in the addendum to this brief), in light of the overall record of this case, and determine that the trial court's refusal to award the requested fees was an abuse of discretion warranting a full award of attorney fees to Janna Griffith. (See 1502-23).

V.  
JUDGE ROKICH'S POST-RECUSAL ORDERS  
WERE ILLEGAL.

A. RELEVANT FACTS

Prior to trial, Mr. McDonald submitted a trial memorandum characterizing David Griffith's side job income as "the primary dispute" in the divorce (926). The memorandum explained that the leukemia of David's brother, Paul Griffith, and Paul's attendant treatment, in conjunction with David's father's increasing responsibilities as a Tooele County Commissioner, required David Griffith to assume more responsibility and stress at C&G, effectively precluding David from continuing to do the side jobs (924-925). In memoranda filed prior to trial, Janna Griffith

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<sup>22</sup> See Utah Rule of Civil Procedure 52; Woodward v. Fazzio, 823 P.2d 474, 477-478 (Utah App. 1991), quoted supra at page \*; Maughan; and Muir.

argued that David's obligation to perform the side jobs was not diminished by his brother's illness or by his father's political activities, inasmuch as David's legal duty was to support his wife and children (e.g. 650-658).

On March 14, 1996, trial began before Judge Rokich. Prior to Mr. Allred's opening statement, Judge Rokich indicated that he had read the trial memorandum (which discussed Paul Griffith's illness and treatment and its effect on David Griffith's ability to continue with side jobs) (924-25, 1965).

At the conclusion of Mr. Allred's opening statement, Judge Rokich interjected, explaining that about a week prior to trial, Judge Rokich had received a telephone call from Paul Griffith, regarding his treatment for the leukemia, because the judge was considering undergoing the same treatment and the judge's doctor wanted the judge to talk to Paul Griffith. Mr. Allred said he had no problem with that, asked the judge some questions about the conversation, and thanked the judge. The judge did not ask if there were any objections, or ask the parties if they agreed to his continued service on the case. (1951-1953).

The trial proceeded for the first day, in which the attorneys examined five witnesses (1763-1951).

At the outset of the second day of trial, Mr. Allred addressed Judge Rokich, seeking additional details concerning how the judge came in contact with the witness Paul Griffith, to establish

whether there had been any improper effort to influence the judge. Mr. Allred explained that it was Janna's legal position that Paul Griffith's illness and treatment were irrelevant, and did not diminish David's responsibilities to support his wife and children. Mr. Allred indicated that if Judge Rokich would rule that the evidence was irrelevant, any concerns about the pre-trial contact of Judge Rokich by the witness would effectively be moot.

During the course of the discussion, Judge Rokich became incensed. He indicated that it would be to Mr. Allred's benefit for the Judge to have personal understanding of Paul Griffith's condition and treatment. Judge Rokich interpreted the questions regarding the contact as an affront to his own integrity and recused himself from the case, stating that such recusal was a necessary result of Mr. Allred's asking the questions. After he recused himself, he indicated that he was considering assessing attorneys fees against Mr. Allred for the day of trial that transpired before the court recused himself. (1756-1762).

On March 21, 1996, Mr. McDonald moved for costs and attorneys fees stemming from the judge's recusal (968-980). Mr. Allred filed his opposition on March 26, 1996 (983-1002).

On May 6, 1996, Judge Rokich entered a signed minute entry ordering Mr. Allred and Janna Griffith to pay \$4,542.00 in attorneys fees, reasoning that Mr. Allred had manipulated the court into recusing himself, and had forced the recusal by suggesting

that the court could have been improperly influenced by the telephone call from Paul Griffith. (1008-1009).

On May 16, 1996, Mr. Allred moved for the vacation of the minute entry and for a hearing before Judge Dever, arguing that Judge Rokich had no authority to act in the case after he had recused himself (1010-1027). Mr. Allred also opposed a proposed order, judgment and findings and conclusions drafted by Mr. McDonald (1042-1059), and moved to stay enforcement of the judgment, and for relief from the judgment (1066-1143).

On May 29, 1996, Judge Rokich entered a judgment against Janna Griffith and J. Franklin Allred in the amount of \$4,542 (1175-76). He also signed findings of fact and conclusions of law incorporating the minute entry (1178-1181). He also signed an order of recusal (1183-1186). Judge Rokich also submitted an additional minute entry on May 30, 1996, seeking to rebut documents filed by Mr. Allred, and Mr. Allred and Mr. McDonald filed subsequent affidavits seeking to establish what occurred after the judge recused himself (1187-1188, 1198-1207, 1302-1306).

Judge Dever did not vacate the orders of Judge Rokich, but in the supplemental divorce decree, ordered Mr. Allred and Mrs. Griffith to pay the attorney fees ordered by Judge Rokich, and incorporated the minute entries and orders of Judge Rokich by reference in the supplemental divorce decree (1738-1739).

#### B. RELEVANT LAW

The numerous errors of law which occurred are addressed herein in the order in which they arose.

1. Judge Rokich violated Canon 3 of the Code of Judicial Conduct.

Judge Rokich's contact with a witness prior to trial, during which the judge and the witness discussed the effects of Paul Griffith's illness, facts that were in issue in this case, provided a basis for Judge Rokich's disqualification under subsection E of Canon 3 of the Code of Judicial Conduct. Thus, Judge Rokich was correct in revealing the basis for disqualification. See id.

Under subsection F of Canon 3 of the Code of Judicial Conduct, Judge Rokich should have disclosed any basis for his disqualification to the attorneys and parties, and left them to consider outside his presence whether they wished to proceed with him presiding, despite the basis for disqualification. Assuming that the parties and attorneys agreed to his continuing to preside, he should then have made an independent decision as to his willingness to preside over the case, and made a record of the parties' and attorneys' agreement permitting him to continue presiding.

Thus, it was in failing to leave the courtroom while the parties and attorneys discussed the issue, and in failing to obtain a record of the consent of all attorneys and parties to Judge Rokich's presiding over the case despite the basis for his

disqualification, that Judge Rokich violated Canon 3 of the Code of Judicial Conduct.

2. Judge Rokich misunderstood the law in concluding that Mr. Allred's questions forced the judge to recuse himself.

In concluding that Judge Rokich's recusal was required by Mr. Allred's questioning whether the judge might have been improperly influenced, Judge Rokich misunderstood the relevant law.

As is set forth in Utah Rule of Civil Procedure 63, a party's mere inquiry into whether a judge should be recused does not automatically result in recusal.<sup>23</sup> Under the rule, a party must file an affidavit of prejudice and certificate of good faith in order to initiate recusal proceedings. It is then incumbent on the trial judge to assess the legal adequacy of an affidavit of prejudice, and then either recuse himself from the case, or immediately refer the matter to another judge for review of the legal adequacy of the grounds for recusal. Barnard at 682.

3. Judge Rokich should not have participated further in the case after recusing himself.

Once Judge Rokich recused himself from the case, he should have taken no further action, but should have immediately

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<sup>23</sup> See e.g. Barnard v. Murphy, 882 P.2d 679, 683 (Utah 1994) (in declining motion to require judge to recuse himself in each case in which Mr. Barnard filed an affidavit of prejudice, this Court stated, "A blanket, prospective direction of automatic recusal is beyond the scope of Rule 63(b).").

relinquished the entire case to a qualified judge.<sup>24</sup>

There was no need for Judge Rokich to even enter a findings of fact and conclusions of law on the recusal.<sup>25</sup>

Judge Rokich's orders signed after he recused himself were void and violated the parties' rights to due process of law, because he had no authority to make them.<sup>26</sup>

4. There was no legal basis for assessing attorney fees, assuming that Judge Rokich could enter such an order after he had recused himself.

"In Utah, attorney fees are awardable only if authorized by statute or by contract." Dixie State Bank v. Bracken, 764 P.2d 985, 988 (Utah 1988). The statute governing the award of attorney

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<sup>24</sup> See Code of Judicial Conduct, Canon 3(B)(1) ("A judge shall hear and decide matters assigned to the judge except those in which disqualification is required or permitted by rule, or transfer to another court occurs."). Cf. Utah Rule of Civil Procedure 63(b) ("if the judge to whom the affidavit is certified finds that it is legally sufficient, another judge must be called in to try the case or determine the matter in question."); Barnard, 882 P.2d 679, 682 (Utah App. 1994) (court faced with recusal motion must either grant the motion and transfer the case, or refer the matter to another judge, and may not perform even ministerial functions after the recusal issue is raised).

<sup>25</sup> See State v. Poteet, 692 P.2d 760, 762-763 (Utah 1984) (court denying recusal under 63B need not enter findings of fact and conclusions of law).

<sup>26</sup> See Anderson v. Anderson, 368 P.2d 264 (Utah 1962) (judgment entered by court who failed to comply with 63(b) was ineffective against the person who filed the affidavit of prejudice under the rule); Richins v. Delbert Chipman & Sons, 817 P.2d 382, 385 (Utah App. 1991) (judgment is void if judge was incompetent to render judgment); Christiansen v. Harris, 163 P.2d 314, 317 (Utah 1945) (fundamental tenet of due process of law is lawful authority of person or body who adjudicates).



fees in civil cases is Utah Code Ann. §78-27-56, which is copied in the addendum.

In the context of this case, there is no basis for an award of attorney fees under the statute, because there was no prevailing party when Judge Rokich simply recused himself, and did not act on the motion of the defendant.<sup>27</sup>

Moreover, there was no cause of action or defense involved in Judge Rokich's recusing himself.<sup>28</sup>

Assuming *arguendo* that it were proper to consider awarding fees under section 78-27-56 where there is no prevailing party or cause of action or defense at issue, application of the law interpreting that statute demonstrates that attorney fees should not be awarded here. "For a prevailing party in a civil action to be awarded attorney fees under Sec. 78-27-56, a court must find that (1) the action, or in this case the defense, is without merit and (2) the defense was asserted in bad faith." Broadwater v. Old Republican Surety, 854 P.2d 527, 534 (Utah 1993).

A trial court awarding fees under this rule is required to make specific findings as to each element, so that a reviewing

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<sup>27</sup> See Hermes v. Park's Sportsman, 813 P.2d 1221, 1225 (Utah App. 1991) (finding no attorney fees awardable under 78-27-56, because Park was not the prevailing party).

<sup>28</sup> Cf. e.g. State v. Poteet, 692 P.2d 760 (Utah 1984) (affidavit of prejudice under 63(b) is not properly characterized as an action for purposes of rules 3 or 63(b) of the Utah Rules of Civil Procedure).

court can determine the propriety of the award.<sup>29</sup> In the instant matter, Judge Rokich did indicate that Mr. Allred had acted in bad faith, but did not indicate that Allred's actions were meritless. This Court need not remand for more specific findings, however, for the record is sufficient for this Court to determine that Allred's actions were meritorious.<sup>30</sup>

"A defense lacks merit when it is 'frivolous' or 'of little weight or importance, having no basis in law or fact.'" Id. Mr. Allred's inquiry into the circumstances of the contact between the judge and Paul Griffith was meritorious. The judge's contact with Paul Griffith resulted in the court's receipt of evidence that was key to the defendant's position on what the defendant himself characterized as the most hotly contested issue in the divorce -- David Griffith's side job income. Particularly given the court's personal illness and upcoming treatment, and the possibility that the court would feel sympathy with Paul Griffith, it was important for Mr. Allred to determine the exact circumstances of the contact between the witness and the judge, and the potential impact of the contact. Because there was merit to Mr. Allred's inquiry, no fees were awardable under Broadwater.

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<sup>29</sup> See e.g. Watkiss & Campbell v. Foa & Son, 808 P.2d 1061, 1068 (Utah 1991).

<sup>30</sup> Cf. Broadwater v. Old Republic Surety, 854 P.2d 527, 534 (Utah 1993) (reversing attorney fee award, in spite of absence of proper findings by trial court, because record did not prove meritless action).

For purposes of argument, taking the analysis to its final step, confirms that there was no bad faith to justify the award of attorney fees. Under 78-27-56, "[t]o establish bad faith, one or more of the following must be lacking: '(1) An honest belief in the propriety of the activities in question; (2) no intent to take unconscionable advantage of others; (3) no intent to, or knowledge of the fact that the activities in question will, [sic] hinder, delay or defraud others.'" Baldwin v. Burton, 850 P.2d 1188, 1199 (Utah 1993) (footnote and citations omitted).

There is no evidence of bad faith in Mr. Allred's inquiry of Judge Rokich's contact by Paul Griffith. There is no evidence that Mr. Allred acted with a belief that his actions were improper, or with the intent to take advantage of others, or with intent or knowledge that his actions would hinder, delay or defraud anyone. While it obviously would have been preferable for Mr. Allred to have realized the need for further inquiry on the first day of trial, particularly given the judge's failure to adjourn the case and conduct a proper inquiry pursuant to Canon 3, Allred's delay does not rise to the level of bad faith.<sup>31</sup>

In short, there was no factual or lawful basis for an award of attorney fees under Utah law.

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<sup>31</sup> Compare Cady v. Johnson, 671 P.2d 149, 152 (Utah 1983) (trial court erred in finding a lack of good faith stemming from plaintiff's failure to research issue and determine its meritless nature prior to trial).

5. Judge Dever should have vacated Judge Rokich's orders.

As noted above, because Judge Rokich had no lawful authority to act further in the case after he recused himself, his orders were void. Nonetheless, Judge Dever refused to vacate the orders, and adopted them in the supplemental decree of divorce.

While the "law of the case" doctrine generally indicates that co-equal district court judge may not overrule one another on identical issues decided in the same case, under the doctrine, courts have the authority to alter non-final orders, and orders that are incorrect. Trembly v. Mrs. Fields Cookies, 884 P.2d 1306, 1311 (Utah App. 1994). Because Judge Rokich had recused himself before he uttered any orders regarding attorney fees, Judge Rokich was not acting with authority co-equal to Judge Dever's when Judge Rokich entered the attorney's fee orders. See e.g. Canon 3(B)(1), supra. Moreover, because Judge Rokich's entire analysis was premised on the incorrect idea that Mr. Allred's inquiry automatically forced the judge to recuse himself, see e.g. Barnard, supra, the orders were legally incorrect.

Judge Dever had full authority to vacate the orders of Judge Rokich, and should have done so.

VI.  
JANNA GRIFFITH'S MOTION  
TO DISQUALIFY ROBERT MCDONALD  
DID NOT JUSTIFY AN AWARD OF  
ATTORNEY FEES.

A. RELEVANT FACTS

Judge Dever ordered Mr. Allred, and Janna Griffith to pay to Mr. McDonald, stemming from Mrs. Griffith's unsuccessful motion to disqualify Mr. McDonald from the case. Judge Dever then assessed \$2,588.50 in attorney fees, to be paid by Janna Griffith and Mr. Allred (1718). The facts and procedural history pertinent to the disqualification issue follow.

On December 15, 1995, Mr. McDonald submitted a motion to compel and supporting documents indicating an agreement between the parties to voluntarily produce all financial information (287-346).

On December 22, 1995, Mr. Allred filed a response in opposition and supporting documents, disclaiming any such broad agreement to produce information (356-466).<sup>32</sup>

On January 5, 1996, Mr. Allred moved to disqualify Mr. McDonald (617-635).

With the motion to disqualify, he submitted an affidavit from Janna Griffith indicating that in November of 1994, David Griffith had called her and indicated that he had hired an attorney who knew Mr. Allred very well, and had implied that his attorney had some influence over Mr. Allred. Upon learning that David Griffith had retained Mr. McDonald, Mr. Allred explained to Janna Griffith that

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<sup>32</sup> At a later hearing, in discussing discovery matters, Mr. McDonald retreated from his position that Allred had agreed to provide all documents voluntarily (2352-2364).

Judge Dever found that no such agreement existing in denying McDonald's motion to compel based on "the claimed oral agreement to produce any and all documents." (836-837).

McDonald had represented Allred in a domestic case in 1980 and 1981. Mr. Allred told her that as long as Mr. McDonald behaved ethically, there should be no problem.

Her affidavit indicated that on September 14 of 1995, Mr. Allred reported to her that Mr. Griffith's father had made threats against Mrs. Griffith, and inquired about McDonald's prior representation of Mr. Allred.

Her affidavit indicated finally that she interpreted McDonald's false claim that Allred had agreed to voluntarily produce all her financial information as implying McDonald's expectation of improper influence over Allred as a result of information McDonald had about Allred from previously representing Allred. She therefore asked Mr. Allred to make efforts to disqualify Mr. McDonald from representing Mr. Griffith. (617-622).

Mr. Allred's affidavit in support of the motion to disqualify explained that as a result of McDonald's prior representation of Allred, McDonald was privy to Mr. Allred's litigation tactics in divorce proceedings, and a good deal of highly personal information about Mr. Allred, and could damage Allred substantially should he reveal any such information. The Allred affidavit indicated that on September 5, 1995, David Griffith's father, Gary Griffith, called Allred, and among other things, asked whether McDonald's prior representation of Allred was impeding a settlement in the Griffith case. The Allred affidavit indicated that Mr. McDonald

grossly expanded the scope of Allred's agreement to produce certain documents in discovery, and thereby made it appear that Allred was not being diligent in representing Janna's interests. The Allred affidavit noted that in McDonald's affidavit in support of the motion to compel, in conjunction with the fabricated discovery stipulation, McDonald referred to his reliance on a "long association" with Mr. Allred, despite the fact that they had had no social or professional contact since 1981. Allred concluded that the fabricated stipulation, the "long association" mischaracterization in the affidavit alleging the fabricated stipulation, and David and Gary Griffith's statements about McDonald's familiarity with Mr. Allred, indicated that McDonald could no longer serve as counsel for David Griffith without undermining Janna Griffith's confidence in Allred and/or violating Allred's attorney-client privilege with McDonald. (623-632).

Allred submitted a lengthy memorandum of law supporting the motion to disqualify (635-647). The memorandum, signed by both Mr. Allred, and co-counsel, Edward K. Brass, relied on numerous rules of professional conduct, Utah Rule of Evidence 504, and numerous cases from this Court, the Utah Supreme Court, the Utah Federal District Court, and the Tenth Circuit (635-647).

On January 19, 1996, McDonald submitted a memorandum in opposition disqualification, arguing that the vintage of his prior representation of Allred resulted in McDonald's having no memory of

any sensitive information, and arguing that the Griffith and Allred cases were factually unrelated (700-706). In his supporting affidavit, Mr. McDonald alleged that he had no record or recollection of details concerning Mr. Allred's divorce case, and that he had not violated Mr. Allred's confidences. He argued that inasmuch as he was the attorney in the Allred divorce, Allred stood to benefit from McDonald's strategies, and not vice versa (707-711).

Mr. McDonald submitted an affidavit from Gary Griffith indicating that he had not received improper information regarding Allred from McDonald (712-716).

Mr. McDonald submitted an affidavit from David Griffith indicating that Griffith had informed him of previously representing Allred, and that David Griffith had not implied in his telephone conversation with Janna Griffith that McDonald held sway over Allred as a result of his prior representation (720-717).

On January 26, 1996, Mr. Allred submitted a reply memorandum in support of disqualification (760-780).

Allred submitted an affidavit from Janna Griffith indicating that she did not anticipate the problems that would flow from McDonald's prior representation of Allred, but upon becoming aware, immediately sought his removal from the case (760-762).

An affidavit from Richard MacDougal indicated that Allred and MacDougal were the strategists in the Allred divorce, and that



McDonald simply examined witnesses in accordance with the strategy set forth by Allred and McDougal (763-766).

Mr. Allred filed an additional affidavit alleging that the motion to disqualify was filed in good faith, and immediately upon Allred's realization that the conflicts stemming from McDonald's prior representation were intolerable (767-769).

On January 29, 1996, Judge Dever heard and denied the motion to disqualify Mr. McDonald indicating that he did not "see from the affidavits that there was any hint of any type of special arrangement between Mr. Allred and Mr. McDonald that was there and came as a result of any type of control that Mr. McDonald had over Mr. Allred." (784; 2340-2352).

On March 12, 1996, Judge Dever entered the order denying the motion to disqualify, reserving the issue of attorney fees pursuant to rule 11 until a hearing on the motion for sanctions (885-887).

On January 24, 1996, Mr. McDonald submitted a motion for in Rule 11 sanctions stemming from the motion to disqualify McDonald, seeking a judgment against J. Franklin Allred and Edward K. Brass in the amount of \$2,588.50 (742-751).

On February 2, 1996, Mr. Allred submitted a response to the motion for sanctions (793-804). He submitted affidavits of himself and Mr. Brass, demonstrating that the disqualification issue had been fully investigated on the facts and the law, and that several attorneys who had been consulted concurred in the propriety of

moving to disqualify McDonald (793-804).

Judge Dever never held hearing on the specific issue of rule 11 sanctions on the motion to disqualify, as he previously had indicated he would in the order denying the motion to disqualify (885).<sup>33</sup> In the supplemental decree of divorce, Judge Dever ordered Mr. Allred and Mrs. Griffith to pay \$2,588.50 (742-751). In the original order drafted by the court, Judge Dever stated,

The attorney's fees generated by this case are not reasonable. Both parties are gainfully employed, the division of property and income is roughly equal and therefore both sides are to assume their own fees, with the exception of those fees previously awarded to the defendant and the fees incurred by the defendant in opposing the motion to disqualify his counsel.

(1624-25). The findings of fact drafted by defense counsel and signed by the court state,

Plaintiff's Motion to Disqualify Defendant's Attorney filed on January 4, 1996, was not well grounded in fact or warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and was filed for an improper purpose to harass Defendant and cause unnecessary delay and needless increase in the costs of litigation.

(1719).

The conclusions of law drafted by defense counsel and signed by the court stated,

Plaintiff's Motion to Disqualify Defendant's Attorney filed on January 4, 1996, was without merit. The legal

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<sup>33</sup> It appears that because the parties were given the opportunity to brief the issue fully in writing, due process of law did not require a hearing. See Poulsen v. Frear, 1997 Utah App. LEXIS 113 at 12 (Case No. 960484-CA, filed October 8, 1997).

services performed by Defendant's attorney in opposing Plaintiff's Motion to Disqualify Defendant's Attorney were necessary and the time devoted to each service was reasonable. The Court further concludes that the hourly rate charged for said legal services was fair and reasonable.

(1708-09).

It is critical to note that the original conclusion of law drafted by defense counsel included language indicating that the filing of the motion to disqualify violated rule 11, but Judge Dever ordered this language replaced with the language indicating simply that the motion was without merit (1700).

#### B. RELEVANT LAW

The findings of fact and conclusions of law drafted by defense counsel and signed by the court parroted the portion of rule 11 (in the addendum to this brief) referring to whether the motion was well grounded in fact or law, but failed to address the key issue -- the reasonableness of Mr. Allred's inquiry in assessing the legal and factual accuracy of the motion.<sup>34</sup>

A finding that the motion was not well grounded in fact or law does not justify sanctions under Rule 11, in the absence of any analysis of the reasonableness of the inquiry of counsel. See

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<sup>34</sup> The findings of fact stated, Plaintiff's Motion to Disqualify Defendant's Attorney filed on January 4, 1996, was not well grounded in fact or warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and was filed for an improper purpose to harass Defendant and cause unnecessary delay and needless increase in the costs of litigation.  
(1719).

Barnard v. Sutliff, 846 P.2d 1229, 1236 (Utah 1992).

Judge Dever did not address in any ruling or document the reasonableness of Mr. Allred's inquiry, or acknowledge the affidavits of Mr. Allred and Mr. Brass detailing the exhaustive factual and legal research done prior to the filing of the motion, and specifying several attorneys Mr. Allred consulted about filing the motion prior to doing so (793-804). Compare Barnard v. Utah State Bar, 857 P.2d 917 (Utah 1993).<sup>35</sup>

Judge Dever's orders denying the motion to disqualify did not turn on any perceived factual misrepresentations or legal misrepresentations or statements, but essentially disagreed with the conclusions that Mr. Allred and Janna Griffith drew from the

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<sup>35</sup> In Barnard, the court reversed the trial court's award of rule 11 sanctions, stating,

As we noted in Sutliff, rule 11 does not require perfect research but rather research that it "objectively reasonable under all the circumstances." Id. at 1236 (citations omitted). In other words, Barnard need not have reached the correct conclusion; he need only have made a reasonable inquiry. The trial court's order fails to acknowledge that Barnard submitted affidavits from eight attorneys indicating that they could find no law precluding a suit of this kind from being filed in district court. In addition, the order ignores Barnard's own affidavit, prepared in Sutliff and submitted as an exhibit in this case, describing his own research and his reliance on the fact that several district court judges had exercised jurisdiction over actions he had previously filed against the Bar.

In light of this evidence and in light of the fact that Sutliff had not yet been decided, we cannot say that Barnard failed to make a reasonable inquiry. Barnard v. Utah State Bar, 857 P.2d at 920.

facts (885-887).<sup>36</sup> As the Barnard cases demonstrate, however, incorrect conclusions do not justify rule 11 sanctions, in the absence of a finding that the attorney failed to perform a reasonable inquiry into the merits of the motion at issue. See id. As in the Barnard cases, because the trial court failed to recognize the proof demonstrating a reasonable inquiry by counsel, the trial court's order for rule 11 sanctions should be reversed.

The findings of fact drafted by counsel and signed by the court indicating that the motion "was filed for an improper purpose to harass Defendant and cause unnecessary delay and needless increase in the costs of litigation," parrots the language of rule 11, and appears to have been inserted by counsel to bolster the trial court's ruling. Neither of the trial court's oral or written rulings denying the motion to disqualify intimate any improper purpose in filing the motion (784; 2340-2352). More importantly, Judge Dever ordered defense counsel to delete from the conclusions of law language indicating that the motion to disqualify violated rule 11, and ordered counsel to simply indicate that the motion was without merit (1700). The language in the findings of fact and conclusions of law drafted by counsel thus appears to be inconsistent with the trial court's original and final intent, and

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<sup>36</sup> Mr. Allred and Janna Griffith continue to maintain that the facts and the law set forth in the motion to disqualify and supporting documents are correct.

should be disregarded.<sup>37</sup>

Assuming *arguendo* that the findings of fact properly reflected the view of the trial court, they are unsupported by the evidence. Any delay or expense be experienced as a result of the filing of the motion would have been equally prejudicial to Janna Griffith and Mr. Allred as it would have been to David Griffith. There is simply no evidence to marshal in support of the conclusion that the motion was filed for an improper purpose. The only evidence regarding the intention behind the filing of the motion is provided in the affidavits filed in support of the motion, and in opposition to the defendant's motion for sanctions, all of which demonstrate that the motion was filed only when Janna Griffith and Mr. Allred determined that the potential conflicts posed by Mr. McDonald's continuing to represent David Griffith were intolerable. (617-6222, 623-632, 760-762, 767-769).

Because there is no basis for the rule 11 sanctions, this Court should reverse the Court's order to pay the sanctions.

#### CONCLUSION

This Court should remand this matter to the trial court with instructions to correct all of the errors addressed above, and for

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<sup>37</sup> See e.g. Automatic Control Prods. Corp. v. Tel-Tech, Inc., 780 P.2d 1258, 1263 (Utah 1989) (Zimmerman, J., concurring) (warning of hazards of relying on counsel to draft findings and conclusions which do not reflect intent of court); State v. Rio Vista Oil, Ltd., 786 P.2d 1343, 1347 (Utah 1990) (citing Justice Zimmerman's opinion in Automatic Control with approval).

consideration of whether Janna Griffith is entitled to attorney fees Utah Code Ann. §30-3-3. See e.g. Maughan v. Maughan, 770 P.2d 156, 162 (Utah App. 1989); and Schaumberg v. Schaumberg, 875 P.2d 598, 604 (Utah App. 1994).

Respectfully submitted this \_\_\_\_\_ day of November, 1997.

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J. FRANKLIN ALLRED  
Attorney for Janna Griffith

CERTIFICATE OF MAILING/DELIVERY

I, J. Franklin Allred, hereby certify that I have caused to be ~~hand-delivered~~<sup>J.F.A.</sup>/mailed, first-class postage pre-paid, the original and seven true and correct copies of the foregoing brief and following addendum, to the Utah Court of Appeals, 230 South 500 East, #400, SLC, UT, 84102, and two true and correct copies of the foregoing brief and following addendum to Robert M. McDonald, 3269 South, #270, SLC, UT, 84115, this \_\_\_\_\_ day of November, 1997.

\_\_\_\_\_  
J. FRANKLIN ALLRED  
Attorney for Janna Griffith

~~Hand-delivered~~<sup>J.F.A.</sup>/mailed this \_\_\_\_\_ day of November, 1997.



IN THE UTAH COURT OF APPEALS

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JANNA GRIFFITH,

PLAINTIFF/APPELLANT,

v.

DAVID GARY GRIFFITH,

DEFENDANT/APPELLEE.

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: Case No. 970123-CA

: Priority No.15

:

:

:

ADDENDUM TO OPENING BRIEF OF APPELLANT

This is an appeal from a supplemental decree of divorce entered in the Third District Court of Tooele County, State of Utah, the Honorable John Rokich, and L.A. Dever, Judges, presiding.

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"May" denotes discretionary conduct or conduct that is not covered by specific proscriptions.

"Political organization" denotes a political party or other group, the principal purpose of which is to further the election or appointment of candidates to political office.

"Shall" and "shall not" impose binding obligations to respectively engage in or refrain from the described conduct. The failure to act in accordance with those obligations can result in disciplinary action.

"Should" and "should not" are used to indicate conduct that is respectively encouraged or discouraged. The failure to engage in or refrain from such conduct cannot result in disciplinary action.

"Third degree of relationship" denotes the following relatives: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew or niece.

## CANON 1

### A JUDGE SHALL UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY.

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and shall personally observe, high standards of conduct so that the integrity and independence of the judiciary will be preserved. The provisions of this Code are to be construed and applied to further that objective.

## CANON 2

### A JUDGE SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL ACTIVITIES.

A. A judge shall respect and comply with the law and should exhibit conduct that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge shall not allow family, social, or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of the judicial office to advance the private interests of others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness but may provide honest references in the regular course of business or social life.

C. A judge shall not belong to any organization, other than a religious organization, which practices invidious discrimination on the basis of race, sex, religion, or national origin.

#### COLLATERAL REFERENCES

**A.L.R.** — Consorting with, or maintaining social relations with, criminal figure as ground for disciplinary action against judge, 15 A.L.R.5th 923.

## CANON 3

### A JUDGE SHALL PERFORM THE DUTIES OF THE OFFICE IMPARTIALLY AND DILIGENTLY.

A. **Judicial Duties in General.** The judicial duties of a full-time judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the following standards apply.

#### B. Adjudicative Responsibilities.

(1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required or permitted by rule, or transfer to another court occurs.

(2) A judge shall apply the law and maintain professional competence. A judge shall not be swayed by partisan interests, public clamor, or fear of criticism.

(3) A judge should maintain order and decorum in proceedings before the judge.

(4) A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and should require similar conduct of lawyers, and of staff, court officials, and others subject to judicial direction and control.

(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and should not permit, and shall use all reasonable efforts to deter, staff, court officials and others subject to judicial direction and control from doing so. A judge should be alert to avoid behavior that may be perceived as prejudicial.

(6) A judge should require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, against parties, witnesses, counsel or others. This Canon does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, or other similar factors, are issues in the proceeding.

(7) A judge shall accord to every person who is legally interested in a proceeding, or that person's lawyer, full right to be heard according to law. Except as authorized by law, a judge shall neither initiate nor consider, and shall discourage, ex parte or other communications concerning a pending or impending proceeding. A judge may consult with the court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges provided that the judge does not abrogate the responsibility to personally decide the case pending before the court. No communication respecting a pending or impending proceeding shall occur between the trial judge and an appellate court unless a copy of any written communication or the substance of any oral communication is provided to all parties. A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the court if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond. A judge may, with the consent of the parties either in writing or on the record, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.

(8) A judge shall dispose of all judicial matters promptly, efficiently, and fairly.

(9) A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing. A judge should require similar abstention on the part of court personnel subject to judicial direction and control. This Canon does not prohibit a judge from making public statements in the course of official duties or from explaining for public information the procedures of the court. This Canon does not apply to proceedings in which a judge is a litigant in a personal capacity.

(10) A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding but may express appreciation to jurors for their service to the judicial system and the community.

(11) A judge shall not disclose or use, for purposes unrelated to judicial duties, information acquired in a judicial capacity that is not available to the public.

(12) A judge should prohibit broadcasting, televising, or recording in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions, except that a judge may authorize

(a) the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record, or for other purposes of judicial administration; or

(b) the broadcasting, televising, recording, or photographing of investitive, ceremonial, or naturalization proceedings.

(13) A judge should prohibit taking photographs (including motion picture and videotape) in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions, except that still photographs of the judge and other court personnel, counsel, spectators, parties and witnesses are permissible, subject to restrictions specified by the court and subject, in the case of parties and witnesses, to their advance consent in writing, provided that the court shall specifically forbid the taking of any photographs where it finds a substantial likelihood that such activity would jeopardize a fair hearing or trial in the matter at issue.

#### **C. Administrative Responsibilities.**

(1) A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice, maintain professional competence in judicial administration, and cooperate with other judges and court officials in the administration of court business.

(2) A judge should require staff, court officials and others subject to judicial direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties.

(3) A judge with supervisory authority for the judicial performance of other judges should take reasonable measures to assure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities.

(4) A judge shall not make unnecessary appointments, shall exercise the power of appointment impartially and on the basis of merit, and shall avoid nepotism and favoritism. A judge shall not approve compensation of appointees beyond the fair value of services rendered.

**D. Disciplinary Responsibilities.** A judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware. This section does not apply to information generated and communicated under the policies of the Judicial Performance Evaluation Program.

#### **E. Disqualification.**

(1) A judge shall enter a disqualification in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, a strong personal bias involving an issue in a case, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) the judge had served as a lawyer in the matter in controversy, had practiced law with a lawyer who had served in the matter at the time of their association, or the judge or such lawyer has been a material witness concerning it;

(c) the judge knows that the judge, individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge's family residing in the judge's household, has

an economic interest in the subject matter in controversy or in a party to the proceeding, or has any other more than de minimis interest that could be substantially affected by the proceeding;

(d) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

(2) A judge shall keep informed about the judge's personal and fiduciary economic interests, and should make a reasonable effort to keep informed about the personal economic interests of the judge's spouse and minor children residing in the judge's household.

**F. Remittal of Disqualification.** A judge disqualified by the terms of Canon 3E may disclose the basis of the judge's disqualification and ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree that the judge need not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be entered on the record, or if written, filed in the case file.

#### NOTES TO DECISIONS

##### **Interest substantially affected.**

Under Subdivision (E)(1)(d)(iii) of this canon, a relative of the requisite degree of relationship has an "interest" that might be sufficiently "affected by the outcome" of a case

whenever a judge sits on a case in which the judge's relative is a partner or otherwise an equity participant in a firm that represents a party to the case. *Regional Sales Agency, Inc. v. Reichert*, 830 P.2d 252 (Utah 1992).

#### COLLATERAL REFERENCES

**Brigham Young Law Review.** — Note, Maintaining Public Confidence in the Integrity of the Judiciary: *State Bar of Nevada v. Claiborne*, 1989 B.Y.U. L. Rev. 283.

**A.L.R.** — Disqualification from criminal proceedings of trial judge who earlier presided over disposition of case of coparticipant, 72 A.L.R.4th 651.

Abuse or misuse of contempt power as ground for removal or discipline of judge, 76 A.L.R.4th 982.

Disciplinary action against judge for engag-

ing in ex parte communication with attorney, party, or witness, 82 A.L.R.4th 567.

Judge's previous legal association with attorney connected to current case as warranting disqualification, 85 A.L.R.4th 700.

Removal or discipline of state judge for neglect of, or failure to perform, judicial duties, 87 A.L.R.4th 727.

Disciplinary action against judge on ground of abusive or intemperate language or conduct toward attorneys, court personnel, or parties to or witnesses in actions, and the like, 89 A.L.R.4th 278.

### CANON 4

#### **A JUDGE SHALL SO CONDUCT THE JUDGE'S EXTRA-JUDICIAL ACTIVITIES AS TO MINIMIZE THE RISK OF CONFLICT WITH JUDICIAL OBLIGATIONS.**

**A. Extra-judicial Activities in General.** A judge shall conduct the judge's extra-judicial activities so that they do not:

(1) cast reasonable doubt on the judge's capacity to act impartially as a judge;

(2) demean the judicial office;

(3) interfere with the proper performance of judicial duties; or

(4) exploit the judge's judicial position.

pers. The clerk is given discretion to waive requirements of the rule for parties who are not represented by counsel; for good cause shown, the court may relieve parties of the obligation

to comply with the rule or any part of it.

**Compiler's Notes.** — Subdivisions (a) to (c) of this rule are similar to Rule 10, F.R.C.P.

#### NOTES TO DECISIONS

##### ANALYSIS

Exhibits.

—Use as pleadings.

Cited.

Exhibits.

—Use as pleadings.

While an exhibit may be considered as a part

of a pleading to clarify or explain the same, an exhibit to a pleading cannot serve the purpose of supplying necessary material averments nor can the content of the exhibit be taken as part of the allegations of the pleading itself. *Girard v. Appleby*, 660 P.2d 245 (Utah 1983).

Cited in *State ex rel. Cannon v. Leary*, 646 P.2d 727 (Utah 1982).

#### COLLATERAL REFERENCES

**Am. Jur. 2d.** — 61A Am. Jur. 2d Pleading §§ 23 to 56, 69, 117.

**C.J.S.** — 71 C.J.S. Pleading §§ 5, 9, 63 to 98, 371 to 375, 418.

**A.L.R.** — Propriety of attaching photographs to a pleading, 33 A.L.R.3d 322.

Propriety and effect of use of fictitious name of plaintiff in federal court, 97 A.L.R. Fed. 369.

**Key Numbers.** — Pleading ⇐ 4, 13, 15, 38½ to 75, 307 to 312, 340.

### Rule 11. Signing of pleadings, motions, and other papers; sanctions.

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name who is duly licensed to practice in the state of Utah. The attorney's address also shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certification by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

(Amended effective Sept. 4, 1985.)

**Compiler's Notes.** — This rule is similar to Rule 11, F.R.C.P.

#### NOTES TO DECISIONS

##### ANALYSIS

Amendment of complaint.

Appeals.

Nature of duty imposed.

Reasonable inquiry.

Violation.

—Question of law.

—Sanctions.

—Standard.

Cited.

Amendment of complaint.

Amendment by an attorney of the facts stated in a complaint was sufficient to establish those facts as they would have been by a verified complaint before the changes made by this rule making verification unnecessary.



1971); Flynn v. W.P. Harlin Constr. Co., 29 Utah 2d 327, 509 P.2d 356 (1973); Henderson v. Meyer, 533 P.2d 290 (Utah 1975); Lamkin v. Lynch, 600 P.2d 530 (Utah 1979); State v. Hall, 771 P.2d 201 (Utah 1983); Highland Constr. Co. v. Union Pac. R.R., 683 P.2d 1042 (Utah 1984); Gill v. Timm, 720 P.2d 1352 (Utah 1986); Penrod v. Carter, 737 P.2d 199 (Utah 1987); King v. Fereday, 739 P.2d 618 (Utah 1987); State v. Cox, 751 P.2d 1152 (Utah Ct. App. 1988); Ramon ex rel. Ramon v. Farr, 770 P.2d 131 (Utah 1989); Anton v. Thomas, 806 P.2d 744 (Utah Ct. App. 1991); Reeves v. Gentile, 813 P.2d 111 (Utah 1991); Hodges v. Gibson Prods. Co., 811 P.2d 151 (Utah 1991); Home Sav. & Loan v. Aetna Cas. & Sur. Co., 817 P.2d 341 (Utah Ct. App. 1991); Russell v. Russell, 852 P.2d 997 (Utah 1993); Anderson v. Sharp, 899 P.2d 1245 (Utah Ct. App. 1995).

#### COLLATERAL REFERENCES

Am. Jur. 2d. — 75A Am. Jur. 2d Trial 1077 et seq.

C.J.S. — 88 C.J.S. Trial §§ 266 to 448.

A.L.R. — Propriety and prejudicial effect of instructions in civil case as affected by the manner in which they are written, 10 A.L.R.3d 501.

Sufficiency of evidence, in personal injury action, to prove future pain and suffering and to warrant instructions to jury thereon, 18 A.L.R.3d 10.

Sufficiency of evidence, in personal injury action, to prove impairment of earning capacity and to warrant instructions to jury thereon, 18 A.L.R.3d 88.

Sufficiency of evidence, in personal injury action, to prove permanence of injuries and to warrant instructions to jury thereon, 18 A.L.R.3d 170.

Propriety and effect, in eminent domain proceeding, of instruction to the jury as to landowner's unwillingness to sell property, 20 A.L.R.3d 1081.

Verdict-urging instructions in civil case

stressing desirability and importance of agreement, 38 A.L.R.3d 1281.

Verdict-urging instructions in civil case commenting on weight of majority view or authorizing compromise, 41 A.L.R.3d 845.

Verdict-urging instructions in civil case admonishing jurors to refrain from intransigence or reflecting on integrity or intelligence of jurors, 41 A.L.R.3d 1154.

Construction of statutes or rules making mandatory the use of pattern or uniform approved jury instructions, 49 A.L.R.3d 128.

Necessity and propriety of instructing on alternative theories of negligence or breach of warranty, where instruction on strict liability in tort is given in products liability case, 52 A.L.R.3d 101.

Federal Rules of Civil Procedure, construction and effect of provision in Rule 51, and similar state rules, that counsel be given opportunity to make objections to instructions out of hearing of jury, 1 A.L.R. Fed. 310.

Key Numbers. — Trial — 182 to 296.

### Rule 52. Findings by the court.

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A; in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. The trial court need not enter findings of fact and conclusions of law in rulings on motions, except as provided in Rule 41(b). The court shall, however, issue a brief written statement of the ground for its decision on all motions granted under Rules 12(b), 50(a) and (b), 56, and 59 when the motion is based on more than one ground.

(b) Amendment. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to

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such findings or has made either a motion to amend them, a motion for judgment, or a motion for a new trial.

(c) **Waiver of findings of fact and conclusions of law.** Except in actions for divorce, findings of fact and conclusions of law may be waived by the parties to an issue of fact:

- (1) by default or by failing to appear at the trial;
  - (2) by consent in writing, filed in the cause;
  - (3) by oral consent in open court, entered in the minutes.
- (Amended effective Jan. 1, 1987.)

**Compiler's Notes.** — This rule is similar to Rule 52, F.R.C.P.

#### NOTES TO DECISIONS

##### ANALYSIS

##### Adoption.

- Abandonment of contract.
- Advisory verdict.
- Breach of contract.
- Child custody.
- Credibility of witnesses.
- Denial of motion.
- Divorce decree modifications.
- Easement.
- Evidentiary disputes.
- Juvenile action.
- Material issues.
- Harmless error.
- Submission by prevailing party.
- Court's discretion.
- Water dispute.
- Findings of state engineer.

##### Amendment.

- Caption.
- Conformance with original findings.
- New trial.
- Notice of appeal.
- Time.
- Tolling of appeal period.
- When made.
- Overruling or vacation.
- Another district judge.
- Lack of notice.

##### Child custody awards.

##### Criminal cases.

##### Criminal contempt.

##### Effect.

##### Preclusion of summary judgment.

##### Relation to pleadings.

##### Failure to object to findings.

##### How findings entered.

##### Judgments upon multiple claims or parties.

##### Judicial review.

##### Assistance of counsel.

##### Equity cases.

##### Standard of review.

##### Conclusions of law.

##### Criminal cases.

##### Criminal trials.

##### Findings of facts by jury.

##### Intent.

##### Juvenile proceedings.

##### Purpose of rule.

##### Stipulations.

##### Sufficiency.

##### Allegations of pleadings.

##### Burden on appeal.

##### Found insufficient.

##### Vacation of judgment.

##### Found sufficient.

##### Opinion or memorandum of decision.

##### Recitals of procedures.

##### Technical error.

##### Ultimate facts.

##### Summary judgment.

##### Statement of grounds.

##### Waiver.

##### Failure of court.

##### When filed.

##### Tardy filing.

##### Cited.

##### Adoption.

##### Abandonment of contract.

In a contract action by a real estate broker for his commission, where the defendant raises the issue of abandonment of the contract by his answer, the court should make findings on the issue of abandonment. Failure of the trial court to make findings of fact on all material issues is reversible error where it is prejudicial. *Gaddis Inv. Co. v. Morrison*, 3 Utah 2d 43, 278 P.2d 284 (1954).

##### Advisory verdict.

The trial court has the responsibility to make findings of fact and conclusions of law, notwithstanding the advisory verdict of a jury. *Romrell v. Zion's First Nat'l Bank*, 611 P.2d 392 (Utah 1980).

##### Breach of contract.

Where plaintiffs, in action for breach of contract, requested finding by court on material issue as to whether the foundation of their house had been located in accordance with zoning ordinances and restrictive covenants, it was the duty of the court to make such a finding. *Quagliana v. Exquisite Home Bldrs., Inc.*, 538 P.2d 301 (Utah 1975).

##### Child custody.

The trial court must enter specific findings on the factors relied upon in awarding or modifying the custody of a child. *Hutchison v. Hutchison*, 649 P.2d 38 (Utah 1982).

##### Credibility of witnesses.

Credibility itself is not a factual issue that is appropriately the subject of the trial court's findings; rather, the findings of the ultimate facts implicitly reflect consideration of the believability of the witnesses' testimony. *Adoption of McKinstry v. McKinstry*, 628 P.2d 1286 (Utah 1981).

view, judgment or order revoking or suspending professional, trade, or occupational license, 42 A.L.R.4th 516.

Constitutionality, construction, and application of statute as to effect of taking appeal, or

staying execution, on right to redeem from execution or judicial sale, 44 A.L.R.4th 1229.

Key Numbers. — Execution — 75, 158 to 177; Judgment — 851 to 856.

### Rule 63. Disability or disqualification of a judge.

(a) **Disability.** If by reason of death, sickness, or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these rules after a verdict is returned or findings of fact and conclusions of law are filed, then any other judge regularly sitting in or assigned to the court in which the action was tried may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial.

(b) **Disqualification.** Whenever a party to any action or proceeding, civil or criminal, or his attorney shall make and file an affidavit that the judge before whom such action or proceeding is to be tried or heard has a bias or prejudice, either against such party or his attorney or in favor of any opposite party to the suit, such judge shall proceed no further therein, except to call in another judge to hear and determine the matter.

Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed as soon as practicable after the case has been assigned or such bias or prejudice is known. If the judge against whom the affidavit is directed questions the sufficiency of the affidavit, he shall enter an order directing that a copy thereof be forthwith certified to another judge (naming him) of the same court or of a court of like jurisdiction, which judge shall then pass upon the legal sufficiency of the affidavit. If the judge against whom the affidavit is directed does not question the legal sufficiency of the affidavit, or if the judge to whom the affidavit is certified finds that it is legally sufficient, another judge must be called in to try the case or determine the matter in question. No party shall be entitled in any case to file more than one affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith.

**Compiler's Notes.** — This rule is similar to Rule 63, F.R.C.P., and to the federal statute on disqualification of judges, 28 U.S.C. § 144.

**Cross-References.** — Disqualification for interest or relation to parties, § 78-7-1.

**NOTES TO DECISIONS**

**Action on affidavit.**  
**Basis for disqualification.**  
**Effect of affidavit.**  
**Failure to file affidavit.**  
**Findings entered by successor.**  
**Nature of affidavit.**  
**"Other disability."**  
**Sufficiency of affidavit.**  
**Timeliness of motion.**  
**Untimely filing of affidavit.**  
**Validity of prior rulings.**  
**Written findings not required.**  
**Cited.**

**Action on affidavit.**

By characterizing and ruling on the affidavit filed under Subdivision (b) as if it were a motion, and by making reference to his decisions in other cases, judge risked improperly influencing the review by another judge after certification. The order went beyond the procedure outlined in Subdivision (b) and thus was va-

lated. *Barnard v. Murphy*, 852 P.2d 1023 (Utah Ct. App. 1993), cert. denied, 878 P.2d 1154 (Utah 1994).

The requirement of Subdivision (b) — that, once an affidavit is filed questioning the neutrality of a judge, the judge must either certify the affidavit to another judge for review or transfer the case — must be followed even if there is only minimal judicial action remaining to be taken in the case. *Barnard v. Murphy*, 882 P.2d 679 (Utah Ct. App. 1994).

A blanket, prospective direction of automatic recusal is beyond the scope of Subdivision (b); thus, the appellate court would not issue an order that a district court judge disqualify himself immediately in any future case in which plaintiff filed an affidavit. *Barnard v. Murphy*, 882 P.2d 679 (Utah Ct. App. 1994).

**Basis for disqualification.**  
Judge's forming of impressions as to the merits of the controversy at a pretrial hearing and comments thereafter do not in and of themselves justify disqualification to proceed

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justifying divorce, 82 A.L.R.3d 725.

Contract between husband or wife and third person promotive of divorce or separation, what constitutes, 93 A.L.R.3d 523.

"Incompatibility" within statute specifying it as substantive ground for divorce, what constitutes, 97 A.L.R.3d 989.

Modern status of views as to validity of premarital agreements contemplating divorce or separation, 53 A.L.R.4th 22.

Enforceability of premarital agreements governing support or property rights upon divorce or separation as affected by circumstances surrounding execution — modern status, 53 A.L.R.4th 85.

Enforceability of premarital agreements governing support or property rights upon divorce or separation as affected by fairness or adequacy of those terms — modern status, 53 A.L.R.4th 161.

Right to jury trial in state court divorce proceedings, 56 A.L.R.4th 955.

Lis pendens as applicable to suit for separation or dissolution of marriage, 65 A.L.R.4th 522.

Insanity as defense to divorce or separation suit — post-1950 cases, 67 A.L.R.4th 277.

Divorce and separation: effect of court order prohibiting sale or transfer of property on party's right to change beneficiary of insurance policy, 68 A.L.R.4th 929.

Joinder of tort action between spouses with proceeding for dissolution of marriage, 4 A.L.R.5th 972.

Pre-emptive effect of Employee Retirement Income Security Act (ERISA) provisions (29 USC §§ 1056(d)(3), 1144(a), 1144(b)(7)) with respect to orders entered in domestic relations proceedings, 116 A.L.R. Fed. 503.

Key Numbers. — Divorce ⇐ 12-38, 57-65.

### 30-3-2. Right of husband to divorce.

The husband may in all cases obtain a divorce from his wife for the same causes and in the same manner as the wife may obtain a divorce from her husband.

History: R.S. 1898 & C.L. 1907, § 1209; C.L. 1917, § 2997; R.S. 1933 & C. 1943, 40-3-2.

#### NOTES TO DECISIONS

##### ANALYSIS

Both parties at fault.  
Cruel treatment.

Both parties at fault.

Marriage may be dissolved by making a grant of divorce to each party where each was equally at fault. Mullins v. Mullins, 26 Utah 2d

82, 485 P.2d 663 (1971).

Cruel treatment.

Acts constituting cruel conduct sufficient to cause great mental distress need not be aggravated and more severe when directed toward the husband than when directed toward the wife. Hansen v. Hansen, 537 P.2d 491 (Utah 1975).

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

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

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

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

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

History: C. 1953, 30-3-3, enacted by L. 1953, ch. 137, § 1.  
Repeals and Reenactments. — Laws 1993, ch. 72, § 10 repeals former § 30-3-3, Utah Code Annotated 1953, allowing a court to

order either party to pay for the separate support and maintenance of the adverse party and the children, and enacts the present section, effective May 3, 1993.

# NOTES TO DECISIONS

## ANALYSIS

Appeal from order.  
Attorney fees.  
Appeal.  
Award to attorney not permitted.  
Contesting petition for modification.  
Need.  
Reasonable.  
Attorney's lien on alimony.  
Contempt proceedings.  
Costs and expenses on appeal.  
Discretion of trial court.  
Enforcement of order or decree.  
Jurisdiction.  
Mandamus.  
Order of court.  
Stipulation and effect thereof.  
Temporary alimony.

## Appeal from order.

Where there were no findings or evidence in support of attorney's fees, Supreme Court granted issue for disposition by trial court. Allowed wife's attorney \$100 for services rendered with reference to husband's appeal and judgment modifying divorce decree. Parish, 84 Utah 390, 35 P.2d 999 (1934). Supreme Court assumed that evidence supported award of suit money to wife where no alimony as to wife's need was before the court. Appeal on judgment roll from the decree of divorce of action in husband and awarding of expenses of suit, attorney's fees and temporary alimony to wife. Weiss v. Weiss, 111 Utah 353, 111 P.2d 1005 (1947).

Court should have made findings regarding need for reimbursement and ability to pay. Where one party sought reimbursement of attorney's costs that had been incurred in prosecuting the action. Rappleye v. Rappleye, 855 P.2d 600 (Utah Ct. App. 1993).

## Attorney fees.

Where decree of divorce was obtained by

mother of minor children against father, who was required to pay certain sum periodically for support, care, maintenance, and education of such children, and he, without sufficient cause, refused to comply with decree, as result of which mother was compelled to bring proceedings against him, father was required to pay counsel fees in such proceedings. Tribe v. Tribe, 59 Utah 112, 202 P. 213 (1921).

Court properly awarded attorney's fees to wife in subsequent proceeding on application of wife for arrears in alimony. Christensen v. Christensen, 65 Utah 597, 239 P. 501 (1925).

While fact that wife is able to pay expenses of defending husband's divorce suit or to obtain credit therefor should be considered by court in determining whether to make award for expenses of suit and amount thereof, such fact alone does not show that award is unjustified, and consequently fact that award to wife for expenses of defending suit was made after expenses were paid or credit extended therefor did not render award erroneous as showing that she had no need therefor. Weiss v. Weiss, 111 Utah 353, 179 P.2d 1005 (1947).

Although there was no detailed presentation of facts establishing the usual requisite factors to support an award of attorney's fees, trial court did not abuse its discretion in awarding attorney fees to plaintiff to enable her to prosecute an action to enforce a provision of the divorce decree where the facts implicit in the proceeding and the evidence necessarily presented to the trial court, together with the de minimis nature of the award, constituted a sufficient basis to sustain the exercise of trial court's discretion. Beardall v. Beardall, 629 P.2d 425 (Utah 1981).

Trial court properly denied wife's request for attorney fees in divorce proceeding where she offered no evidence at trial to show the nature or amount of any attorney fees incurred or any need for court-ordered assistance in the payment of such fees. Warren v. Warren, 655 P.2d 684 (Utah 1982).

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1991, substituted "Section 78-3-31" for "Section 78-3-3.1" in the third sentence of Subsection (1).

The 1992 amendment by ch. 98, effective April 27, 1992, in Subsection (1) added Subsection (c) and the subsection designations (a), (b), and (d).

The 1992 amendment by ch. 290, effective July 1, 1992, in Subsection (2), substituted "order of the court upon the motion of either

party" for "the court upon the written motion of either party and payment of a \$5 fee" in the first sentence, inserted "sealed portion" in the second sentence, made a stylistic change in the second sentence, and made stylistic changes in the third and fourth sentences.

This section is set out as recommended by the Office of Legislative Research and Counsel.

#### COLLATERAL REFERENCES

**A.L.R.** — Authority of court, upon entering default judgment, to make orders for child custody or support which were not specifically

requested in pleadings of prevailing party. A.L.R.5th 863.

### 30-3-4.1 to 30-3-4.4. Repealed.

**Repeals.** — Laws 1990, ch. 230, § 4 repeals these sections, as last amended by L. 1989, ch. 104, §§ 2 to 5, providing for the appointment,

authority, duties, and jurisdiction of child support commissioners, effective April 23, 1990.

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

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

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

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

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

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

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

(iii) provisions for the enforcement of these orders;

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

(e) with regard to child support orders issued or modified on or after January 1, 1994, that are subject to income withholding, assessing against the obligor an additional \$7 per month check-off fee to be included in the amount withheld and paid to the Department of Human Services Recovery Services within the Department of Human Services.

newly written order of income withholding in accordance with Title 62A, Chapter 11, a \$5 fee, and 4 and 5.

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

The court has continuing jurisdiction to make subsequent changes or orders for the support and maintenance of the parties, the custody of the children, and their support, maintenance, health, and dental care, or the division of the property and obligations for debts as is reasonable and appropriate.

In determining visitation rights of parents, grandparents, and other members of the immediate family, the court shall consider the best interests of the child.

Upon a specific finding by the court of the need for peace officer supervision, the court may include in an order establishing a visitation schedule a provision, among other things, authorizing any peace officer to enforce a court ordered visitation schedule entered under this chapter.

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

Upon an order of the court that a party pay alimony to a former spouse, the court shall establish by the party paying alimony that the former spouse is residing with a person of the opposite sex. However, if it is further established by the person receiving alimony that that relationship or association is without any sexual contact, payment of alimony shall resume.

Upon a petition for modification of child custody or visitation provisions of a decree of divorce, if the petition is made and denied, the court shall order the petitioner to pay the attorneys' fees expended by the prevailing party in that action, if the court determines that the petition was without merit and not asserted or maintained in good faith.

If a petition alleges substantial noncompliance with a visitation order by a grandparent, or other member of the immediate family pursuant to 62-12.2 where a visitation right has been previously granted by the court, the court may award to the prevailing party costs, including actual fees and court costs incurred by the prevailing party because of the party's failure to provide or exercise court-ordered visitation.

R.S. 1898 & C.L. 1907, § 1212; L. 1909, § 4; C.L. 1917, § 3000; R.S. 1943, 40-3-5; L. 1969, ch. 72, § 3; 1971, § 1; 1979, ch. 110, § 1; 1984, ch. 152, § 1; 1985, ch. 100, § 1; 1987, § 4; 1993, ch. 152, § 1; 1993, ch. 152, § 1; 1994, ch. 284, § 1.

ment, effective April 29, 1991, inserted "debts or obligations" in the introductory paragraph of Subsection (1), added Subsection (1)(c), and inserted "and obligations for debts" near the end of Subsection (3).

The 1993 amendment by ch. 152, effective May 3, 1993, substituted "members of the immediate family" for "relatives" and "best inter-

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**PART 5****UNIVERSAL INCOME WITHHOLDING — NON IV-D  
OBLIGEES [EFFECTIVE JANUARY 1, 1994]****501. Definitions — Application [Effective January 1, 1994].**

Requirements of this part apply only to cases in which the obligee receives IV-D services.

For purposes of this part the definitions contained in Section 501 apply.

1953, 62A-11-501, enacted by  
§ 8.

**Effective Dates.** — Laws 1993, ch. 261,  
§ 13 makes the act effective on January 1,  
1994.

For citation to Title IV-D,  
under same catchline following

**502. Child support orders issued or modified on or  
after January 1, 1994 — Immediate income with-  
holding [Effective January 1, 1994].**

Regarding obligees who are not receiving IV-D services, each child support order issued or modified on or after January 1, 1994, subjects the obligor to immediate income withholding as of the effective date of the order, regardless of whether a delinquency occurs unless:

(i) the court or administrative body that entered the order finds that the parties have demonstrated good cause not to require immediate income withholding; or

(ii) a written agreement that provides an alternative arrangement is entered into by the obligor and obligee, and reviewed and entered in the record by the court or administrative body.

For purposes of this section:

"good cause" shall be based on, at a minimum:

(i) a determination and explanation on the record by the court or administrative body that implementation of income withholding would not be in the best interest of the child; and

(ii) proof of timely payment of any previously ordered support; and in determining "good cause," the court or administrative body may, in addition to any other requirement that it deems appropriate, consider whether the obligor has:

(i) obtained a bond, deposited money in trust for the benefit of the dependent children, or otherwise made arrangements sufficient to guarantee child support payments for at least two months; and

(ii) arranged to deposit all child support payments into a checking account belonging to the obligee, or made arrangements insuring that a reliable and independent record of the date and place of child support payments will be maintained.

In cases where the court or administrative body that entered the order finds demonstration of good cause or enters a written agreement that imme-



date income withholding is not required, in accordance with this section, the party may subsequently pursue income withholding on the earlier of the following dates:

- (a) the date payment of child support becomes delinquent;
  - (b) the date the obligor requests; or
  - (c) the date the court or administrative body so modifies the order.
- (4) The court shall include in every child support order issued on or after January 1, 1994:

(a) a provision that the income of an obligor is subject to income withholding in accordance with this chapter; however, if for any reason a provision is not included in the child support order, the obligor's income is nevertheless subject to income withholding; and

(b) with regard to child support orders that are subject to income withholding, an order assessing against the obligor a \$7 per month processing fee to be included in the amount withheld and paid for the purposes of income withholding in accordance with the provisions of this chapter.

History: C. 1953, 62A-11-502, enacted by § 13 makes the act effective on January 1, 1994.  
L. 1993, ch. 261, § 9.  
Effective Dates. — Laws 1993, ch. 261,

**62A-11-503. Income withholding for obligees not receiving IV-D services — Responsibilities of the court effective January 1, 1994].**

(1) As of January 1, 1994, with regard to child support orders subject to income withholding, the court may not modify or issue a new child support order or any other document, including a divorce decree, that contains a final child support order unless and until it receives the parties' documentation regarding employment and information regarding process income withholding in accordance with the requirements of this chapter.

(2) The court shall order the parties to provide the court with the information described in Subsection (1). The court shall provide that information together with a copy of the child support order, to the office that issues the order.

(3) If an obligor under a child support order issued or modified on or after January 1, 1994, has no source of income and there is no identifiable source of income, the obligor shall swear to that fact in an affidavit submitted to the court. The court shall issue or modify the order, and shall provide a copy of that affidavit with a copy of the order and the information described in Subsection (1) to the office.

(4) If an obligor cannot be located through the reasonable efforts of the obligee and the court, and for that reason the information described in Subsection (1) cannot be obtained, a verified representation of the obligor's employment or source of income, based on the best evidence available, shall be submitted to the court. The court may issue or modify the order, and shall provide a copy of that verified representation, together with a copy of the order, to the office.

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nance of a ski run that was alleged to create a hazard to skiers. *Clover v. Snowbird Ski Resort*, 808 P.2d 1037 (Utah 1991).

— **Supervision of employees.**

Evidence raised a genuine issue of material

fact, precluding summary judgment, as to whether a ski area operator was negligent in not supervising its employees in regard to the practice of reckless skiing. *Clover v. Snowbird Ski Resort*, 808 P.2d 1037 (Utah 1991).

**COLLATERAL REFERENCES**

**Utah Law Review.** — Utah's Inherent Risks of Skiing Act: Avalanche from Capitol Hill, 1980 Utah L. Rev. 355.

**78-27-54. Inherent risks of skiing — Trail boards listing inherent risks and limitations on liability.**

Ski area operators shall post trail boards at one or more prominent locations within each ski area which shall include a list of the inherent risks of skiing, and the limitations on liability of ski area operators, as defined in this act.

**History:** L. 1979, ch. 166, § 4.

**Meaning of "this act."** — See note following same catchline in notes to § 78-27-51.

**78-27-55. Repealed.**

**Repeals.** — Section 78-27-55 (L. 1979, ch. 166, § 5), relating to notice requirements in case of injury arising from the inherent risks of

skiing and the statute of limitations on such action, was repealed by Laws 1980, ch. 43, § 1.

**78-27-56. Attorney's fees — Award where action or defense in bad faith — Exceptions.**

(1) In civil actions, the court shall award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith, except under Subsection (2).

(2) The court, in its discretion, may award no fees or limited fees against a party under Subsection (1), but only if the court:

(a) finds the party has filed an affidavit of impecuniosity in the action before the court; or

(b) the court enters in the record the reason for not awarding fees under the provisions of Subsection (1).

**History:** L. 1981, ch. 13, § 1; 1988, ch. 92, § 1.

**NOTES TO DECISIONS**

**ANALYSIS**

**Appeal.**

— Frivolous appeal.

Breach of covenant of good faith by insurer.

Discretion of court.

**Essential elements.**

Findings.

Hearing.

Paralegal services.

State of mind.

"Without merit" and "good faith."

**78-45-3. Duty of man.**

Every man shall support his child; and he shall support his wife when she is in need.

**History:** L. 1957, ch. 110, § 3; 1977, ch. 140, § 3.

**Cross-References.** — Criminal nonsupport of children, § 76-7-201.

Divorce, maintenance of parties, § 30-3-5.  
Uniform Reciprocal Enforcement of Support Act, § 77-31-1 et seq.

## NOTES TO DECISIONS

## ANALYSIS

Child's right to support.  
Duty to support children.  
—Judicial limitation.  
—Retarded child.  
—Transfer.  
Duty to support wife.  
—Termination.  
—Divorce.  
Estoppel to assert duty to support.  
Wrongful death action.  
—Medical and burial expenses.

**Child's right to support.**

A child's right to support is his own right, not his parent's. *Wasescha v. Wasescha*, 548 P.2d 895 (Utah 1976).

**Duty to support children.****—Judicial limitation.**

Parents are permanently "duty-bound" to support their children; however, the extent of that duty is not without limitation, and where the question of child support has been submitted to a court of competent jurisdiction and a ruling thereon has been obtained, the more general statutory duty of support becomes circumscribed by the more specific duty imposed by the court. In re C.J.U., 660 P.2d 237 (Utah 1983).

**—Retarded child.**

Trial court properly required husband to pay child support after the child reached 21 years of age where the child was retarded and incapable of self-support. *Garrand v. Garrand*, 615 P.2d 422 (Utah 1980).

**—Transfer.**

A parent cannot rid himself of his duty to support his children by purporting to transfer this duty to someone else by contract. *Gulley v. Gulley*, 570 P.2d 127 (Utah 1977).

**Duty to support wife.****—Termination.****—Divorce.**

Divorce terminates husband's duty to sup-

port his wife except for any obligations imposed by the divorce decree. *Gulley v. Gulley*, 570 P.2d 127 (Utah 1977).

**Estoppel to assert duty to support.**

Children have a right to support, but where their mother and her second husband had provided it, mother was estopped to demand that her first husband also contribute support; since her demand was not in the nature of a claim for reimbursement, to grant it would have been in effect to give the children "double support" to which they were not entitled. *Wasescha v. Wasescha*, 548 P.2d 895 (Utah 1976).

**Wrongful death action.****—Medical and burial expenses.**

District court erred in deducting proceeds of medical and burial insurance policy from amount of special damages in action by father for wrongful death of son, since father was under legal duty imposed by statute to pay cost of medical care and burial expenses for son and was thus entitled to recover amounts reasonably expended for that purpose; mere fact that plaintiff at own expense carried insurance to protect against such contingencies should not inure to benefit of wrongdoer. *Ottley v. Hill*, 21 Utah 2d 396, 446 P.2d 301 (1968).

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**78-45-4.**

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### - Stipulation

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on 78-45-7.5(5)

(c) a written statement indicating whether or not the amount of child support requested is consistent with the guidelines.

(2) (a) If the documentation of income required under Subsection (1) is not available, a verified representation of the defaulting party's income by the moving party, based on the best evidence available, may be submitted.

(b) The evidence shall be in affidavit form and may only be offered after a copy has been provided to the defaulting party in accordance with Utah Rules of Civil Procedure or Title 63, Chapter 46b, Administrative Procedures Act, in an administrative proceeding.

(3) (a) In a stipulated proceeding, one of the moving parties shall submit:

(i) a completed child support worksheet;

(ii) the financial verification required by Subsection 78-45-7.5(5); and

(iii) a written statement indicating whether or not the amount of child support requested is consistent with the guidelines.

(b) A hearing is not required, but the guidelines shall be used to review the adequacy of a child support order negotiated by the parents.

(c) A stipulated amount for child support or combined child support and alimony is adequate under the guidelines if the stipulated child support amount or combined amount equals or exceeds the base child support award required by the guidelines.

History: C. 1953, 78-45-7.3, enacted by L. ch. 214, § 5; 1990, ch. 100, § 4; 1994, ch. 118, § 5.

Amendment Notes. — The 1994 amendment, effective July 1, 1994, in Subsection substituted "equals or exceeds the base"

for "exceeds the total" and deleted the former second sentence which read "When the stipulated amount exceeds the guidelines, it may be awarded without a finding under Section 78-45-7.2."

### 78-45-7.4. Obligation — Adjusted gross income used.

Adjusted gross income shall be used in calculating each parent's share of the combined child support obligation. Only income of the natural or adoptive parents of the child may be used to determine the award under these guidelines.

History: C. 1953, 78-45-7.4, enacted by L. ch. 214, § 6; 1994, ch. 118, § 6.

Amendment Notes. — The 1994 amend-

ment, effective July 1, 1994, substituted "base combined child support obligation" for "child support award."

### 78-45-7.5. Determination of gross income — Imputed income.

As used in the guidelines, "gross income" includes:

(a) prospective income from any source, including nonearned sources, except under Subsection (3); and

(b) income from salaries, wages, commissions, royalties, bonuses, rents, gifts from anyone, prizes, dividends, severance pay, pensions, interest, trust income, alimony from previous marriages, annuities, capital gains, social security benefits, workers' compensation benefits, unemployment compensation, disability insurance benefits, and payments from "nonmeans-tested" government programs.

- (2) Income from earned income sources is limited to the equivalent of full-time job.
- (3) Specifically excluded from gross income are:
- (a) Aid to Families with Dependent Children (AFDC);
  - (b) benefits received under a housing subsidy program, the Job Training Partnership Act, S.S.I., Medicaid, Food Stamps, or General Assistance and
  - (c) other similar means-tested welfare benefits received by a parent.
- (4) (a) Gross income from self-employment or operation of a business shall be calculated by subtracting necessary expenses required for self-employment or business operation from gross receipts. The income and expenses from self-employment or operation of a business shall be reviewed to determine an appropriate level of gross income available to the parent to satisfy a child support award. Only those expenses necessary to allow the business to operate at a reasonable level may be deducted from gross receipts.
- (b) Gross income determined under this subsection may differ from the amount of business income determined for tax purposes.
- (5) (a) When possible, gross income should first be computed on an annual basis and then recalculated to determine the average gross monthly income.
- (b) Each parent shall provide verification of current income. Each parent shall provide year-to-date pay stubs or employer statements and complete copies of tax returns from at least the most recent year unless the court finds the verification is not reasonably available. Verification of income from records maintained by the Office of Employment Security may be substituted for pay stubs, employer statements, and income tax returns.
- (c) Historical and current earnings shall be used to determine whether an underemployment or overemployment situation exists.
- (6) Gross income includes income imputed to the parent under Subsection (7).
- (7) (a) Income may not be imputed to a parent unless the parent stipulates to the amount imputed or a hearing is held and a finding made that the parent is voluntarily unemployed or underemployed.
- (b) If income is imputed to a parent, the income shall be based on the parent's employment potential and probable earnings as derived from work history, occupation qualifications, and prevailing earnings for persons of similar backgrounds in the community.
- (c) If a parent has no recent work history, income shall be imputed at least at the federal minimum wage for a 40-hour work week. To impute a greater income, the judge in a judicial proceeding or the presiding officer in an administrative proceeding shall enter specific findings of fact on the evidentiary basis for the imputation.
- (d) Income may not be imputed if any of the following conditions exist:
- (i) the reasonable costs of child care for the parents' minor child approach or equal the amount of income the custodial parent can earn;
  - (ii) a parent is physically or mentally disabled to the extent the parent cannot earn minimum wage;
  - (iii) a parent is engaged in career or occupational training to establish basic job skills; or

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(iv) unusual emotional or physical needs of a child require the custodial parent's presence in the home.

(8) (a) Gross income may not include the earnings of a child who is the subject of a child support award nor benefits to a child in the child's own right such as Supplemental Security Income.

(b) Social Security benefits received by a child due to the earnings of a parent may be credited as child support to the parent upon whose earning record it is based, by crediting the amount against the potential obligation of that parent. Other unearned income of a child may be considered as income to a parent depending upon the circumstances of each case.

History: C. 1953, 78-45-7.5, enacted by L.  
80, ch. 214, § 7; 1990, ch. 100, § 5; 1994,  
118, § 7.

Amendment Notes. — The 1994 amend-  
ment, effective July 1, 1994, rewrote Subsection  
(5)(b).

#### NOTES TO DECISIONS

##### ANALYSIS

Findings by court.  
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Findings by court.

Although a trial court entered findings re-  
quired by Subsection 7(b), since the trial court  
led to enter any findings required under  
Subsection 7(a), the findings on the whole  
are insufficient. Hall v. Hall, 858 P.2d 1018  
(Utah Ct. App. 1993).

puted income.

Even though the court's findings of fact did

not include a specific finding that ex-husband  
was underemployed, because he had acquiesced  
to the imputation of income at the trial level  
and because his job history and current employ-  
ment options inarguably supported this impu-  
tation, the trial court did not abuse its discre-  
tion in imputing income in an amount greater  
than the ex-husband's current salary. Hill v.  
Hill, 229 Utah Adv. Rep. 46 (Utah Ct. App.  
1993).

Cited in Cummings v. Cummings, 821 P.2d  
472 (Utah Ct. App. 1991).

#### 78-45-7.7. Calculation of obligations.

(1) The parents' child support obligation shall be divided between them in proportion to their adjusted gross incomes, unless the low income table is applicable.

(2) Except in cases of joint physical custody and split custody as defined in Section 78-45-2 and in cases where the obligor's adjusted gross income is \$1,050 or less monthly, the base child support award shall be determined as follows:

(a) Combine the adjusted gross incomes of the parents and determine the base combined child support obligation using the base combined child support obligation table.

(b) Calculate each parent's proportionate share of the base combined child support obligation by multiplying the combined child support obligation by each parent's percentage of combined adjusted gross income.

(3) In cases where the monthly adjusted gross income of the obligor is between \$650 and \$1,050, the base child support award shall be the lesser of the amount calculated in accordance with Subsection (2) and the amount calculated using the low income table.

(4) The base combined child support obligation table provides combined child support obligations for up to six children. For more than six children, additional amounts may be added to the base child support obligation shown.

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Robert M. McDonald (2175)  
McDONALD & WEST  
Jennifer P. Lee (6765)  
Attorneys for Defendant  
3269 South Main, Ste. 270  
Salt Lake City, Utah 84115  
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IN THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR TOOELE COUNTY, STATE OF UTAH

JANNA GRIFFITH,

Plaintiff,

v.

DAVID GARY GRIFFITH,

Defendant.

DECREE OF DIVORCE

DAVID GARY GRIFFITH,

Counterclaimant,

v.

JANNA GRIFFITH,

Counterclaim Defendant.

Civil No. 944300281DA

Judge Leon A. Dever

The above-entitled matter came on for hearing on the issue for grounds for divorce before the Honorable Leon Dever, District Judge, on Tuesday, May 28, 1996. Present at said hearing were Plaintiff and her attorney, J. Franklin Allred and Defendant and his attorney, Robert M. McDonald. The Court having heard the arguments and presentations by the respective parties, and being fully advised in the premises, and the Court having heretofore entered its Findings of Fact and Conclusions of Law, it is hereby

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ORDERED, ADJUDGED AND DECREED as follows:

1. Plaintiff is granted a decree of divorce forever dissolving the bonds of matrimony heretofore existing between the parties on the grounds of irreconcilable differences. Said divorce shall become final and absolute on the date of its entry.

2. All other issues raised by the pleadings in this action are reserved for trial to be commenced on August 7, 1996.

DATED on this 13 day of May, 1996.

BY THE COURT

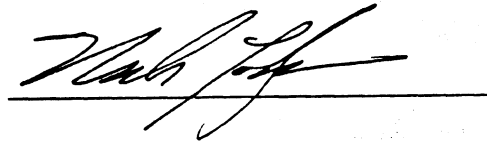
  
\_\_\_\_\_  
HONORABLE LEON DEVER  
DISTRICT COURT JUDGE



CERTIFICATE OF SERVICE

I hereby certify that on this 30<sup>th</sup> day of May, 1996, I caused to be hand delivered,  
a true and correct copy of the foregoing DECREE OF DIVORCE to the following:

J. Franklin Allred  
321 South 600 East  
Salt Lake City, Utah 84101



a:\wpdocs\griffith\decree.div

3RD DISTRICT COURT-TOOELE  
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IN THE THIRD DISTRICT COURT OF TOOELE COUNTY  
IN AND FOR THE STATE OF UTAH

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JANNA GRIFFITH,  
Plaintiff,

VS.

DAVID GARY GRIFFITH,  
Defendant.

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Order

Case # 944300281 DA

Judge L. A. Dever

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This matter came on for trial before L. A. Dever, Judge of the Third District Court on August 7, 8, and 13, 1996. Counsel for the plaintiff and defendant and the parties were present. Testimony was taken. On Aust 9, 1996, Plaintiff made a motion to reopen her case. Notice to submit on that issue was filed with the Court on September 3, 1996. On September 27, 1996, the Court denied plaintiff's request to reopen her case and denied plaintiff's motion to strike trial memorandum of defendant. All pending motions submitted to the Court having been resolved, the matter is ripe for decision.

FINDINGS AND CONCLUSIONS

1. The parties were married on November 12, 1976. Four children were born of the union. This action was filed on September 14, 1994, and the parties were divorced on June 3, 1996. By stipulation, the parties have agreed that the plaintiff is a fit and

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proper person to have custody of the children. The plaintiff objects to joint legal custody. The Court finds that the standard visitation schedule as outlined by U.C.A. 30-3-35 and as supplemented by U.C.A. 30-3-33 law is appropriate in this case.

2. At the trial, testimony was received from both parties as to the proper division of personal and real property, income, alimony and child support.

3. Based upon the testimony and stipulation of the parties, the Court finds the following division of real property to be appropriate: House and lot to be awarded to the plaintiff subject to the first mortgage. Defendant to assume the second mortgage. The defendant is awarded a first right of refusal if and when the plaintiff determines to sell it. The equity in this property is \$99,510.00. Defendant is awarded the Lake Point property. The Court finds that this lot is property of the marital estate as a result of the defendant's transfer to him and his wife. The value of this property is \$25,000.00, it is unencumbered.

4. Based upon the testimony of the parties and exhibits received, the Court finds the following division of personal property to be appropriate,

PLAINTIFF:

<u>Item</u>	<u>Value</u>
Grand Prix	\$7,000
Kitchen ware	125

Cannonball bed set	900	
Queen Anne chair	50	
Bench settee	50	
2nd Refrigerator	100	
Washer & Dryer	100	
Couch, 2 Queen Anne chairs, etc.	800	
Couch and loveseat (downstairs)	2,000	
Stereo	1,300	
Couch, loveseat & chair (upstairs)	200	
Oval table & six chairs	200	
Big screen T.V.	3,000	
T.V. stand	500	
Zenith T.V. and G.E. VCR	350	
Freezer	<u>300</u>	
Sub-Total	16,975	\$16,975
Plaintiff's IRA	2,559	
Plaintiff's 4-501	2,891	

Plaintiff's pension	<u>2,513</u>	
Sub-Total	7,933	7,933
4-\$500 bonds	5,133	
Savings(with sister)	3,400	
Savings(Key Bank)	<u>11,780</u>	
Sub-Total	20,333	<u>20,333</u>
Total		\$45,241

DEFENDANT:

<u>Item</u>	<u>Value</u>
Camper	\$400
Fishing desk	400
VCR/Video camera	300
Entertainment center	200
Treadmill	400
Microwave(office)	200
Mitsubishi T.V.	500
Fishing equipment (etc.)	800
Boats	4,400

Trailer	1,000	
Snowmobile	100	
Sleeping bags	35	
Riding lawn mower	<u>1,000</u>	
Sub-Total	9,735	\$ 9,735
Defendant's IRA	5,975	
Def's Retirement	<u>85,264</u>	
Sub-Total	91,239	91,239
Bonus - 1994	5,500	
Bonus - 1995	12,000	
Sub-Total	17,500	<u>17,500</u>
Total		\$118,474

5. The total amount of marital real and personal property awarded to each party

is as follows: Plaintiff	personal	\$45,241
	real	<u>99,510</u>
Total		\$144,751
Defendant	personal	\$118,474
	real	<u>25,000</u>
Total		\$143,474

6. There are various other items listed by both parties that the Court does not

find to be appropriate for inclusion in the list of property to be divided. These items are

a. The icemaker, refrigerator, microwave and dishwasher. These items are properly part of the value of the home and have been valued there.

b. The \$25 and \$200 savings bonds were gifts to the defendant and are not included in marital property.

c. The framed pictures from defendant's grandmother, which were not valued, are awarded to the defendant.

d. The plaintiff claims that some value should be attributed to the Christenson and Griffith stock that Gary Griffith intends to transfer to his son. Gary Griffith testified that he has not transferred any stock to his son at this time. The claim for value to be attributed to a future gift is without merit and is denied.

e. All other personal property not included is awarded to the party in possession.

7. Child support is determined pursuant to statute. The amount of income attributable to the plaintiff is \$1313 a month. This is the income derived from her job at Key Bank and based upon plaintiff's exhibit 112. Defendant's income is \$4955 a month. This income is derived from his job at Christenson & Griffith and is based upon his weekly pay from defendant's exhibit 152 plus a yearly bonus derived from testimony. The bonus figure was determined on a six year average. The plaintiff

argues that the side income the defendant traditionally earned should be imputed to him at this time. The evidence established that the side income ceased in 1995. The evidence is that the defendant is not underemployed. The plaintiff argues that the defendant should be compensated more for the work he does for the corporation. The defendant testified that he works extra hours to help his father and brother since they are unable to work full time. The defendant is paid for full time work. The fact that he does extra work for his family members does not mean he is underemployed. The defendant testified that he does this extra work in order to keep the business viable.

The Court finds that the corporation regularly pays a bonus and that the average is proper to be included in the salary of the defendant for child support purposes and on a monthly basis. U.C.A. 78-45-7.5(5)(a). The defendant has argued that the bonus should be taken into account for child support only after paid at the year's end. The defendant argues that his base salary should be the basis of the support order and a recalculation of the child support amount should occur after the payment of the bonus. Although this approach has some merit, the Court finds that this approach would entangle the parties in a yearly re-evaluation of the child support which would not be beneficial to anyone concerned and would not comply with the statute cited above. Based upon the Court's calculations the total child support is \$1740. Defendant's portion to be paid to the plaintiff is \$1376.00 a month. Based upon the



performance of the defendant in regularly paying the temporary orders on support, the standard provision for withholding is not ordered until the defendant fails to make payment. Support to continue until each child reaches eighteen or graduates from high school with his or her regular class. The defendant is awarded three deductions for tax purposes. One deduction is awarded to plaintiff. U.C.A. 78-45-7.2. When there is only one child left to be claimed as a deduction, the parties shall alternate years in claiming the child. An accounting of child support is not ordered at this time.

8. This is a marriage of nineteen years. The parties have become accustomed to a comfortable lifestyle. It is appropriate based upon the disparity of income that support be awarded to the plaintiff. The plaintiff argues that her monthly expenses are \$4115.44. The defendant disputes this amount and claims that \$2910 is the correct amount. Part of the difference is realized by the defendant's agreement to absorb 80% of the dance and school activities costs and insurance costs relating to him and his daughter. The defendant does not dispute the plaintiff's claims for mortgage, utilities, food, clothing, automobile expenses, cable T.V., newspapers and books, haircuts, and entertainment. The undisputed amount is \$2806. The remaining amounts claimed by the plaintiff are disputed and insufficient or no evidence was introduced to support her claims. The undisputed amounts claimed by the plaintiff are presumably those necessary to support her and her children in their accustomed lifestyle. Child support

and the plaintiff's income(second job included) combined are \$2769. Defendant's income minus child support is \$3579. Alimony in the amount of \$400 would be appropriate in that it roughly equalizes the parties and allows the plaintiff the necessary sum to continue in the lifestyle the parties shared during the marriage. The alimony is to continue for nineteen years subject to the standard terms and conditions.

9. The parties have accumulated certain debts. The defendant has agreed to assume the debt to his grandmother, which is the second mortgage on the residence, and the Key Bank Silver MasterCard. The plaintiff has agreed to assume the debt to AT & T, First Card Visa, Citibank Visa, Key Preferred Line, Key Bank Visa, Key Credit Line. The debt owing to Dr. Olsen is to be paid by the defendant. Any other pre-separation debts to be split between the parties. Any debt, other than those named above, incurred after September 14, 1994, is the responsibility of the party incurring the debt.


10. Certain information relating to the Christenson & Griffith Corporation is in the possession of the plaintiff. The Houghlihan Report is proprietary information and may not be disclosed by the plaintiff to third parties.

11. The attorney's fees generated by this case are not reasonable. Both parties are gainfully employed, the division of property and income is roughly equal and therefore both sides are to assume their own fees, with the exception of those fees

previously awarded to the defendant and the fees incurred by the defendant in opposing the motion to disqualify his counsel.

Counsel for the defendant to prepare the appropriate findings, conclusions, and decree.

Dated this 11th day of November, 1996

  
\_\_\_\_\_  
L. A. Bever  
Judge

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing ORDER was mailed  
this 12 day of November, 1996, to the following:

J. Franklin Allred  
321 South 600 East  
Salt Lake City, UT 84102

Robert M. McDonald  
3269 South Main, Ste 270  
Salt Lake City, UT 84115

*Roberta Gammon*  
Deputy Court Clerk

FILED BY:

notification to the plaintiff of his intention to exercise his option to purchase for an amount equal to the purchase price stated in the offer.

20. Insert language that to include a yearly adjustment would entangle the parties, foster disputes and not comply with 78-49-7.5(5)(a).

24. Insert after the first sentence the following sentence: The evidence established that the majority of income received for these "side-jobs" was used to improve or finish portions of the residence of the parties.

25. Strike the last sentence of the paragraph.

28. Begin the paragraph with the following: Due to the fact that the defendant is employed in a family business where his children come and go, it would not be in the best interest of the children for discussions of support and withholding issues to be occurring where they may hear. Further, the evidence . . . (etc.)

34. In the fourth sentence strike the sum of \$400 per month as. The clause should now read Defendant should be ordered to pay Plaintiff alimony for a period of 19 years.

39. Replace with the following: This is a divorce involving two salaried individuals with a modest marital estate and no dispute as to custody. The Court finds that the attorneys fees claimed for the motions and memoranda filed by the plaintiff are unreasonable.

44. Strike the portion allowing prejudgment interest.

The following paragraphs correspond to the paragraph numbers in the Conclusions and are in addition to those change which would correspond to changes in the Findings:

24. Last sentence should be corrected to read: . . . 19 year period if Plaintiff. . .

31. Strike in violation of the provisions of Rule 11, Utah Rules of Civil Procedure  
and replace with without merit.

The Court has considered all the objections of the plaintiff to the Findings and  
Conclusions. All objections except those noted above are denied.

All other objections and motions filed by the plaintiff and the defendant that have not  
been previously addressed are hereby denied.

Counsel for the defendant is to revise the Findings, Conclusions, and Decree in  
accordance with the changes in this Order and submit to the Court for its signature.

Dated this 13th day of January, 1997

  
L. A. Dever  
Judge

#### CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing ORDER was mailed this

13 day of January, 1997, to the following:

J. Franklin Allred  
321 South 600 East  
Salt Lake City, UT 84102

Robert M. McDonald  
3269 South Main, Ste 270  
Salt Lake City, UT 84115

  
Deputy Court Clerk

3rd DISTRICT COURT-TOOELE

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Robert M. McDonald (2175)  
Attorney for Defendant  
3269 South Main, Ste. 270  
Salt Lake City, Utah 84115  
Telephone: (801) 485-5500

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

JANNA GRIFFITH,

Plaintiff,

v.

DAVID GARY GRIFFITH,

Defendant.

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

DAVID GARY GRIFFITH,

Counterclaimant,

v.

JANNA GRIFFITH,

Counterclaim Defendant.

Civil No. 944300281DA

Judge Lee Dever

This matter came on for trial before the Honorable Lee A. Dever, District Judge, on August 7, 8 and 13, 1996. Present at said hearing were Plaintiff and her attorney, John Franklin Allred and Defendant and his attorney Robert M. McDonald. On August 9, 1996, Plaintiff made a Motion to Reopen her Case. A Notice to Submit on that issue was filed with the Court on September 3, 1996. On September 27, 1996, the Court denied Plaintiff's



Request to Reopen her Case and denied Plaintiff's Motion to Strike the Trial Memorandum Submitted by Defendant. All pending motions submitted to the Court having been resolved, the matter is ripe for decision. The Court having heard the testimony of witnesses called by the respective parties, having reviewed the documents admitted into evidence during the course of the trial, and having reviewed all of the documents in the Court file, and good cause appearing, the Court hereby enters its Findings of Fact and Conclusions of Law:

**FINDINGS OF FACT**

THE COURT FINDS:

1. The parties were married, one to the other, on November 12, 1976.
2. There were four children born of the marriage: Jennifer, born October 25, 1978; Brianne, born April 14, 1981; Chad, born September 5, 1983 and Brett, born June 5, 1986.
3. This action was filed on September 14, 1994, and the Court issued a decree terminating the marriage on June 3, 1996, reserving adjudication with respect to all other matters raised by the pleadings in the action.
4. There is no genuine dispute that between the parties the Plaintiff is a fit and proper person to be awarded custody of the minor children born of the marriage. The interests of the children would be best served by awarding Plaintiff custody subject to the minimum visitation schedule outlined by Utah Code Annotated § 30-3-35 and supplemented by Utah Code Annotated § 30-3-33.

- 7
5. Based on the testimony and stipulation of the parties, Plaintiff should be awarded all right, title and interest in and to the Marital Domicile located at 454 West Vine Street, Tooele, Utah and more particularly described as follows:

Beginning on the North line of Vine Street 660 feet West of the Southeast corner of Lot 2, Block 4, Plat B, Tooele City Survey, Tooele City, which point is also the Southeast corner of the Dunn property, running thence North 100 feet; thence East 100 feet; thence South 100 feet; thence West 100 feet to the point of beginning.

Beginning on the North line of Vine Street 553 feet West of the Southeast corner of Lot 2, Block 4, Plat B, Tooele City Survey, Tooele City, running thence West 107 feet; thence North 100 feet; thence East 107 feet; thence South 100 feet to the point of beginning (hereinafter "Marital Domicile").

The award of the Marital Domicile to Plaintiff is subject to the first lien held by Key Bank with an unpaid balance of approximately \$64,500. Plaintiff should be required to indemnify Defendant, and save Defendant harmless, with respect to the claims of Key Bank arising out of said indebtedness.

6. The market value of the Marital Domicile is approximately \$164,000, leaving an equity (exclusive the second mortgage) in the approximate sum of \$99,510.
7. During the course of the marriage, Defendant has expended significant time and effort in improving the Marital Domicile and thereby enhancing the value of the Marital Domicile. By reason thereof, it is reasonable that Defendant be awarded a first right of refusal if and when Plaintiff determines to sell the Marital Domicile. In the event Plaintiff wishes to sell the Marital Domicile, and receives an arms-length

and bona fide offer to purchase the Marital Domicile, she shall promptly deliver said offer to Defendant. Defendant shall have ten (10) days after receipt of any offer to purchase to notify the Plaintiff of his intention to exercise his right of refusal. Defendant has thirty (30) days from the date of his notification to the Plaintiff of his intention to exercise his option to purchase for an amount equal to the purchase price stated in the offer.

8. The Lake Point Property is part of the marital estate by reason of Defendant's transfer of an ownership interest to Plaintiff pursuant to a deed dated April 15, 1992. The market value of said property is \$25,000 and not subject to any liens and encumbrances.

9. Defendant is awarded all right, title and interest in and to the Lake Point Property more particularly described as follows:

Beginning at a point 5.80 chains South and 45.36 rods West of the Northeast corner of Section 2, Township 2 South, Range 4 West, Salt Lake Base and Meridian, running thence South 214.5 feet; thence West 203 feet; thence North 214.5 feet; thence East 203 feet to the point of beginning. Containing 1 acre more or less.

10. Based upon the testimony of the parties and the exhibits received, the Court finds that all right, title and interest in and to the personal property described on the attached Exhibit "A" should be awarded to Plaintiff. The value of the personal property awarded to Plaintiff is \$45,241 and the value of the real property awarded to Plaintiff is \$99,510, a total award of \$144,751.

11. Based upon the testimony of the parties and the exhibits received, the Court finds that all right, title and interest in and to the personal property described on the attached Exhibit "B" should be awarded to Defendant. The value of the personal property awarded to Defendant is \$118,474 and the value of the real property awarded to Defendant is \$25,000 a total award of \$143,474.
12. The ice-maker, refrigerator, microwave oven and dishwasher are attached to or a part of the Marital Domicile and included in the value of said home and should be awarded to Plaintiff as part of the award of the Marital Domicile.
13. The savings bonds hereinafter described were gifts from Defendant's grandmother and constitute Defendant's separate property. Bond number R65262347EE in the principle sum of \$200; Bond number R65262348EE in the principle sum of \$200; Bond number R64794715EE in the principle sum of \$200; Bond number R64578340EE in the principle sum of \$200; Bond number Q2220986522E in the principle sum of \$25; Bond number Q2345483802E in the principle sum of \$25; Bond number Q2250615826E in the principle sum of \$25; Bond number Q2250615810E in the principle sum of \$25; Bond number Q2071559559E in the principle sum of \$25; Bond number R54222223EE in the principle sum of \$200; Bond number R53982674EE in the principle sum of \$200; Bond number R98192458EE in the principle sum of \$200; Bond number R65206123EE in the principle sum of \$200; Bond number R65261627EE in the principle sum of \$200;

- Bond number R65261626EE in the principle sum of \$200; Bond number R65262346EE in the principle sum of \$200;
14. All of the framed pictures painted by Defendant's grandmother, which were not valued during the course of the trial, should be awarded to Defendant as his separate property.
  15. Inasmuch as Defendant's father, Gary Griffith, has not transferred any stock of Christenson & Griffith to Defendant at the time of trial, Plaintiff's claim that the value of the stock constitutes marital property is without merit and denied.
  16. Any and all items of personal property not expressly identified in Exhibit "A, Exhibit "B" or in paragraphs 12-15 should be awarded to the party presently possessing such property.
  17. Plaintiff has a gross monthly income of \$1,313 per month arising from her employment at Key Bank (Plaintiff's Ex. 12).
  18. Defendant receives a gross weekly income of \$1020 arising out of his employment with Christenson & Griffith (Defendant's Ex. 152). Defendant's salary is determined solely by Gary Griffith and Ronald Christenson.
  19. Depending on the profitability of the business operations of Christenson & Griffith, Defendant may receive an annual bonus. However, the amount of said bonus has varied substantially during the preceding 6 years. There is no assurance that Defendant will receive an annual bonus, and no assurances as to the amount thereof.

The decision as to whether Defendant shall receive an annual bonus, and the amount thereof are determined solely by Gary Griffith and Ronald Christenson.

20. There is significant antagonism between Plaintiff and Defendant which adversely impacts on the well-being of the children born to the parties. On this basis, it would be imprudent and unreasonable to require the parties to recalculate child support every calendar year during the post-divorce period on the basis of the annual bonus actually received by Defendants for such year. An obligation to recalculate child support at the end of each calendar year would require the parties to deal with each other in an adversary environment and thereby exacerbate the antagonism between the parties to the detriment of the parties and the minor children. A yearly adjustment would entangle the parties, foster disputes and not comply with Utah Code Annotated §78-45-7.5(5)(a).
21. On the basis of the finding stated in the preceding paragraph, it is fair and reasonable that the Court impute to Defendant a sum of money equal to the average bonus received by Defendant during the years 1990-1995 in the sum of \$535 per month.<sup>1</sup> Defendant's salary together with the average bonus, results in a gross monthly income equivalent of \$4,955 per month.
22. Defendant is one of two construction managers employed by Christenson & Griffith. The other construction manager is Defendant's brother, Paul Griffith. In April, 1995,

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<sup>1</sup>The total bonus received by Defendant during the period 1990-1995 was \$38,500. This results in an average annual bonus of \$6,416 (\$38,500 divided by 6 = \$6,416). This is a monthly equivalent of \$535 (\$6,416 divided by 12 = \$535).

Paul Griffith was diagnosed with leukemia. The physical and psychological impact of the disease substantially impairs Paul Griffith's ability to perform the functions of his employment. By reason thereof, Defendant has been required to perform a substantial portion of Paul Griffith's duties in addition to Defendant's responsibilities which has increased the stress inherent in Defendant's job and the number of hours of work at Christenson & Griffith.

23. Gary Griffith, Defendant's father, is the chief operating officer of Christenson & Griffith Construction Company. In January, 1993, Gary Griffith was elected to the Tooele County Commission. Since undertaking this responsibility, there has been a substantial increase in the amount of time necessary to perform his duties as a county commissioner. Beginning in 1994, Gary Griffith began devoting more time to his county commission duties. Since that time, Defendant has been required to perform a substantial portion of the duties previously performed by Gary Griffith. This additional responsibility has increased the stress inherent in Defendant's job and the number of hours of work at Christenson & Griffith.
24. During the period commencing in September, 1983, and continuing until April, 1995, Defendant occasionally performed "side-jobs" in order to generate extra income. The evidence established that the majority of income received from these "side-jobs" was used to improve or finish portions of the residence of the parties. This side-job activity terminated in April, 1995 by reason of significant increase in demands of Defendant's full-time employment with Christenson & Griffith imposed by

Defendant's brother's illness and the involvement of Defendant's father in county government. Plaintiff failed to establish by a preponderance of the evidence any facts or circumstances which would justify imputing income historically received from said side-jobs to Defendant.

25. The fact that Defendant does extra work for Christenson & Griffith by reason of his brother's illness and the involvement of his father in county government, and does not receive additional compensation from Christenson & Griffith, does not mean Defendant is voluntarily underemployed.
26. The undisputed evidence establishes that Defendant is employed in a demanding occupation on a full-time basis at Christenson & Griffith and works in excess of 50 hours per week.
27. Defendant should be ordered to pay to Plaintiff, for the use and benefit of the minor children born of the marriage, the sum of \$1,376 per month as child support effective November 11, 1996. A copy of the child support worksheet used to determine the amount of this obligation is attached hereto as Exhibit "C". Child support should continue with respect to each child until such child attains that age of 18 years or the date that the child's classmates are scheduled to graduate from high-school, whichever last occurs.
28. Due to the fact that Defendant is employed in a family business where his children come and go, it would not be in the best interest of the children for discussions of support and withholding issues to be occurring where they may hear. Further, the



evidence established Defendant has regularly complied with temporary orders with respect to alimony and child support, it is unnecessary to require mandatory withholding unless and until such time as Defendant is in default in making said payments of child support.

29. Based upon the respective incomes of the parties, Defendant should be awarded the right to take three of the children as dependency deductions on his state and federal income tax returns. In the event state or federal tax laws hereafter permit a tax credit for dependent children, Defendant shall be entitled to the tax credit for three children. Plaintiff should be awarded the right to take one of the children as a dependency deduction on her state and federal income tax returns. In the event state or federal tax laws hereafter permit a tax credit for dependent children, Plaintiff shall be entitled to the tax credit for one child. At such time as only one child is qualified to be claimed as a dependency deduction or qualifies for a tax credit, the parties shall alternate years in claiming said child.
30. During the course of the marriage, Defendant has maintained a policy of medical insurance naming the minor children born to the parties as insureds. The premium for the medical insurance is fully paid by Defendant's employer. Notwithstanding such coverage, Plaintiff has obtained medical insurance through her employer wherein the children are named as insureds thereby providing duplicative coverage for the minor children. The premium for the insurance obtained by Plaintiff is approximately \$53 per month.

31. By reason of the ages of the minor children, and the close proximity of the paternal grandparents, neither party is required to obtain work-related child care services.
32. An accounting of child support is not ordered at this time.
33. Plaintiff claims her monthly living expenses total \$4,115.44. Defendant claims that Plaintiff's living expenses total \$2,910. A portion of the discrepancy arises from Defendant's agreement to pay 80% of dance and school activities and car insurance costs relating to his daughter. Defendant did not dispute Plaintiff's claim with respect to the mortgage installment payment, utilities, food, clothing, automobile expense, cable TV, newspapers and books, haircuts and entertainment. The undisputed amount is \$2,806. Considering the evidence presented by the respective parties, Plaintiff has failed to establish by a preponderance of the evidence monthly living expense in excess of \$2,806. The living expenses of \$2,806 are sufficient to support Plaintiff and her children in their accustomed life-style.
34. Plaintiff has living expenses of \$2,806 and a total gross income (including wages from primary occupation, second job and child support) of \$2,769. Defendant's income less child support is \$3,579. An alimony award of \$400 would roughly equalize the respective incomes of the parties and allows Plaintiff sufficient funds to continue the lifestyle the parties shared during the marriage. After considering the evidence bearing on the financial conditions and needs of Plaintiff; the ability of Plaintiff to produce income for herself; and, the ability of Defendant to provide support, Defendant should be ordered to pay Plaintiff alimony for a period of 19 years from

September, 1994, the date Defendant began paying alimony. Defendant's obligation to pay alimony in the sum of \$400 per month shall become effective November 11, 1996. Provided, however, Plaintiff's obligation to pay alimony shall terminate prior to the expiration of the 19 year period if Plaintiff dies, remarries or cohabits with another person.

35. During the course of the marriage, and prior to separation, the parties incurred indebtedness to Key Bank (secured by a first mortgage on the Marital Domicile), Aline Griffith (Defendant's grandmother secured by a second mortgage on the Marital Domicile) Key Bank Silver Mastercard; AT&T; First Card Visa; Citibank Visa; Key Preferred Line; Key Bank Visa; Key Credit Line; and Dr. Olsen.
36. It is fair and reasonable that Plaintiff pay and discharge the following indebtedness and indemnify Defendant, and save Defendant harmless with the claims of the following creditors: Key Bank (secured by first mortgage on Marital Domicile); AT&T; First Card Visa; Citibank Visa; Key Preferred Line; Key Bank Visa; Key Credit Line.
37. It is fair and reasonable that Defendant pay and discharge the following indebtedness and indemnify Plaintiff, and save Plaintiff harmless with the claims of the following creditors: Aline Griffith (Defendant's grandmother, secured by a second mortgage on the Marital Domicile) and Key Bank Silver Mastercard; and Dr. Olsen.

38. The Houghlihan Report in the possession of Plaintiff, and any copies thereof, shall forthwith be returned to Christenson and Griffith and the content thereof shall not be disclosed by Plaintiff or her attorney to any other person or entity.
39. This is a divorce involving two salaried individuals with a modest marital estate and no dispute as to custody. The Court finds that the attorneys' fees claimed for the motions and memoranda filed by the Plaintiff are unreasonable.
40. Inasmuch as both parties are gainfully employed, and the division of property and income is roughly equal between the parties, and subject to the provisions of paragraphs 41 and 42-44, each party shall be solely responsible for the payment of their own costs and attorneys fees.
41. Plaintiff and her attorney shall pay and discharge the costs and attorneys fees stated in the judgment heretofore entered by this Court on May 24, 1996, in the principle sum of \$4,542. The judgment entered by this Court on May 24, 1996, and the Findings of Fact And Conclusions of Law supporting said judgment, are incorporated herein by reference.
42. Plaintiff's Motion to Disqualify Defendant's Attorney filed on January 4, 1996, was not well grounded in fact or warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and was filed for an improper purpose to harass Defendant and cause unnecessary delay and needless increase in the costs of litigation.

43. The legal services performed by Defendant's attorney in opposing Plaintiff's Motion to Disqualify Defendant's Attorney were necessary and the time devoted to each service was reasonable. In light of the experience of Defendant's counsel, the hourly rate charged for said legal services was fair and reasonable. The costs incurred in opposing Plaintiff's Motion to Disqualify Defendant's Attorney were necessarily incurred and the amounts thereof are fair and reasonable.
44. On the basis of the Findings noted in paragraphs 42 and 43, judgment should be entered for and on behalf of Defendant, and against Plaintiff and her attorney, John Franklin Allred, in the sum of \$2,588.50, said judgment to hereafter bear interest at the statutory rate.

#### CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and the subject matter of this action and venue is proper laid in the Third District Court in and for Tooele County, State of Utah.
2. Plaintiff should be awarded the sole care, custody and control of the minor children born of the marriage, to wit: Jennifer, born October 25, 1978; Brianne, born April 14, 1981; Chad, born September 5, 1983, and Brett, born June 5, 1986. Said custody should subject to the minimum visitation schedule outlined by Utah Code Annotated § 30-3-35 and supplemented by Utah Code Annotated § 30-3-33.

3. Plaintiff should be awarded all right, title and interest, free and clear of the claims of Defendant, in and to the Marital Domicile located at 454 West Vine Street, Tooele, Utah, and more particularly described as follows:

Beginning on the North line of Vine Street 660 feet West of the Southeast corner of Lot 2, Block 4, Plat B, Tooele City Survey, Tooele City, which point is also the Southeast corner of the Dunn property, running thence North 100 feet; thence East 100 feet; thence South 100 feet; thence West 100 feet to the point of beginning.

Beginning on the North line of Vine Street 553 feet West of the Southeast corner of Lot 2, Block 4, Plat B, Tooele City Survey, Tooele City, running thence West 107 feet; thence North 100 feet; thence East 107 feet; thence South 100 feet to the point of beginning (hereinafter "Marital Domicile").

4. The award of the Marital Domicile is subject to a first lien held by Key Bank with an unpaid balance of approximately \$64,500. Plaintiff should be required to indemnify Defendant, and save Defendant harmless, with respect to the claims of Key Bank arising out of said indebtedness.
5. Defendant should be awarded a first right of refusal if and when Plaintiff determines to sell the Marital Domicile. In the event Plaintiff wishes to sell the Marital Domicile, and receives an arms-length and bona fide offer to purchase the Marital Domicile, she shall promptly deliver said offer to Defendant. Defendant shall have ten (10) days after receipt of any offer to purchase to notify the Plaintiff of his intention to exercise his right of refusal. Defendant has thirty from his notification

to the Plaintiff of his intention to exercise his option to purchase for an amount equal to the purchase price stated in the offer.

6. Defendant should be awarded all right, title and interest, free and clear of the claims of Plaintiff, in and to the Lake Point Property more particularly described as follows:

Beginning at a point 5.80 chains South and 45.36 rods West of the Northeast corner of Section 2, Township 2 South, Range 4 West, Salt Lake Base and Meridian, running thence South 214.5 feet; thence West 203 feet; thence North 214.5 feet; thence East 203 feet to the point of beginning. Containing 1 acre more or less.

7. Plaintiff is awarded all right, title and interest, free and clear of the claims of Defendant, in and to the personal property described on the attached Exhibit "A" which is incorporated herein by reference.
8. Defendant is awarded all right, title and interest, free and clear of the claims of Plaintiff, in and to the personal property described on the attached Exhibit "B" which is incorporated herein by reference.
9. The ice-maker, refrigerator, microwave oven and dishwasher are attached to or a part of the Marital Domicile and included in the value of said home and should be awarded to Plaintiff as part of the award of the Marital Domicile.
10. Defendant should be awarded all right, title and interest, free and clear of the claims of Plaintiff, in and to the US Government savings bonds hereinafter described inasmuch as the Court has determined that said bonds constitute Defendant's separate property received as a gift from his grandmother: Bond number

R65262347EE in the principle sum of \$200; Bond number R65262348EE in the principle sum of \$200; Bond number R64794715EE in the principle sum of \$200; Bond number R64578340EE in the principle sum of \$200; Bond number Q2220986522E in the principle sum of \$25; Bond number Q2345483802E in the principle sum of \$25; Bond number Q2250615826E in the principle sum of \$25; Bond number Q2250615810E in the principle sum of \$25; Bond number Q2071559559E in the principle sum of \$25; Bond number R54222223EE in the principle sum of \$200; Bond number R53982674EE in the principle sum of \$200; Bond number R98192458EE in the principle sum of \$200; Bond number R65206123EE in the principle sum of \$200; Bond number R65261627EE in the principle sum of \$200; Bond number R65261626EE in the principle sum of \$200; Bond number R65262346EE in the principle sum of \$200;

11. All framed pictures painted by Defendant's grandmother, which were not valued during the course of the trial, should be awarded to Defendant as his separate property.
12. Inasmuch as Defendant's father, Gary Griffith, has not transferred any stock of Christenson & Griffith to Defendant at the trial, Plaintiff's claim that the value of the stock constitutes marital property is without merit and denied. Even if Gary Griffith had gifted said stock to Defendant prior to trial, such stock would be considered Defendant's separate property and not subject to property division.

*Mortensen v. Mortensen*, 730 P.2d 304 (Utah 1988).



13. Any items of personal property not expressly identified in the attached Exhibit "A", attached Exhibit "B", or in paragraphs 9 - 12, should be awarded to the party presently possessing such property.
14. There is insufficient evidence before the Court to impute to Defendant income historically received by Defendant from "side-jobs" performed after working hours and on weekends. The evidence established that the majority of income received for these "side-jobs" was used to improve or finish portions of the residence of the parties.
15. There is insufficient evidence to impute to Defendant additional income by reason of extra work for Christenson & Griffith performed by reason of Defendant's brother's illness and the involvement of Defendant's father in county government. Furthermore, the Court concludes that it would be inequitable to impute such income to Defendant inasmuch as such income is not received by Defendant and Defendant does not have the power or authority to increase his salary by reason of such extra work.
16. Defendant is employed in a demanding occupation on a full-time basis at Christenson & Griffith and works in excess of fifty hours per week. On this basis, the Court concludes that Defendant is not voluntarily underemployed in any respect.
17. Defendant should be ordered to pay to Plaintiff, for the use and benefit of the minor children born of the marriage, the sum of \$1,376 per month as child support effective November 11, 1996. A copy of the child support worksheet used to determine the

amount of this obligation is attached hereto as Exhibit "C". Child support should continue with respect to each child until such child attains the age of 18 years or the date of that the child's classmates are scheduled to graduate from high school, which ever last occurs.

18. Due to the fact that Defendant is employed in a family business where his children come and go, it would not be in the best interests of the children for discussions of support and withholding issues to be occurring where they may hear. Further, the evidence establishes Defendant has regularly complied with temporary orders concerning alimony and child support, the Court concludes it is unnecessary to require mandatory withholding until such time as Defendant is in default in making child support payments.
19. Pursuant to the provisions of Utah Code Annotated § 78-45-7.21, the Court concludes that Defendant should be awarded the right to take three of the children born to the parties as dependency deductions on his state and federal income tax returns. In the event state or federal tax laws thereafter permit a tax credit for dependent children, Defendant shall be entitled to take the tax credit for three children.
20. Pursuant to the provisions of Utah Code Annotated § 78-45-7.21, the Court concludes that Plaintiff should be awarded the right to take one of the children as dependency deductions on her state and federal income tax returns. In the event

state or federal laws hereafter permit tax credit for dependent children, Plaintiff shall be entitled to use the tax credit for one child.

21. At such time as only one child is qualified to be claimed as a dependency deduction or qualifies for a tax credit, the parties shall alternate years in claiming said child.
22. During the course of the marriage, Defendant has maintained a policy of medical insurance naming the minor children born to the parties as insureds. The premium for this insurance is fully paid for by Defendant's employer. Notwithstanding such coverage, Plaintiff has obtained medical insurance through her employer wherein the children born to the parties are named as insureds thereby providing duplicative coverage for the children. The coverage maintained by Plaintiff requires her to pay a premium of \$53 per month. Pursuant to the guidelines states in Utah Code Annotated § 78-45-7.15(2), Defendant should be ordered to maintain the existing medical insurance naming the children as insureds so long as it is available through his employment. In the event Plaintiff chooses to continue duplicative medical coverage for the children, she shall be solely responsible for the payment of the portion of the premium attributable to the children.
23. The Court concludes on the basis of the facts presented at trial, there is no necessity at the present time to require Plaintiff to account for child support received from Defendant.
24. The Court concludes that Defendant should pay to Plaintiff, for the use and benefit of Plaintiff, the sum of \$400 per month as alimony. Plaintiff's alimony obligation

shall continue for a period of 19 years from September, 1994, the date Defendant began paying alimony. Defendant's obligation to pay alimony in the sum of \$400 per month shall become effective November 11, 1996. This determination has been made on the basis of the guidelines outlined in *Jones v. Jones*, 700 P. 2d 1072 (Utah 1985). Inasmuch as Utah Code Annotated § 30-3-5(7), which purports to codify the guidelines for determination of alimony awards, was not in effect at the time this action was commenced, the guidelines stated in *Jones v. Jones*, Supra, are applicable in this case. However, after considering the guidelines stated in Utah Code Annotated § 30-3-5(7), the Court's decision with respect to Plaintiff's alimony obligation would be the same. Provided, however, Defendant's obligation to pay alimony shall terminate prior to the expiration of the 19 year period if Plaintiff dies, remarries or cohabits with another person.

25. The Court concludes that Plaintiff should pay and discharge the following indebtedness and indemnify Defendant and save Defendant harmless, with respect to the claims of the following creditors: Key Bank (secured by first mortgage on Marital Domicile); AT&T; First Card Visa; Citibank Visa; Key Preferred Line; Key Bank Visa; Key Credit Line.
26. The Court concludes that Defendant should pay and discharge the following indebtedness and indemnify Plaintiff, and save Plaintiff harmless with respect to the claims of the following creditors: Aline Griffith (Defendant's grandmother, secured

by a second mortgage on the Marital Domicile) and Key Bank Silver Mastercard; and Dr. Olsen.


27. The Court concludes that the Houghlihan Report in the possession of Plaintiff and any copies thereof, shall forthwith be returned to Christenson & Griffith and the content thereof shall not be disclosed by Plaintiff or her attorney to any other person or entity.
28. The Court concludes that the costs and attorneys fees claimed by Plaintiff's attorney in representing Plaintiff in this action are unreasonable in light of the complexity (or lack thereof) to the issues involved in this litigation, the size of the marital estate, and the remedies sought by many of the motions filed by Plaintiff in light of the legal expense necessary to prepare said motions and supporting memoranda.
29. Subject to the provisions of paragraphs 30 and 31, each party shall be solely responsible for the payment of their respective costs and attorneys fees incurred in the prosecution and defense of this action.
30. The Court concludes that Plaintiff and her attorney should pay and discharge the costs and attorneys fees stated in the judgment heretofore entered by the Court on May 24, 1996, in the principle sum of \$4,542. In this regard the judgment entered by the Court on May 24, 1996, and the Findings of Fact and Conclusions of Law supporting said judgment are incorporated herein by reference.
31. Plaintiff's Motion to Disqualify Defendant's Attorney filed on January 4, 1996, was without merit. The legal services performed by Defendant's attorney in opposing

Plaintiff's Motion to Disqualify Defendant's Attorney were necessary and the time devoted to each service was reasonable. The Court further concludes that the hourly rate charged for said legal services was fair and reasonable.

32. The Court concludes that judgment should be forthwith entered for and on behalf of Defendant, and against Plaintiff and her attorney, John Franklin Allred, in the sum of \$2,588.50, said judgment to thereafter bear interest at the statutory rate.
33. In order to expedite the Decree of Divorce to be entered in this matter, the parties should be ordered to forthwith execute and deliver to the other party any deed, certificate of title, bill of sale or other document necessary to transfer record title to property awarded to the parties herein. In the event either party has possession of property awarded to the other party, such party should be ordered to forthwith deliver such property to the other party.

DATED on this 10 day of <sup>January</sup>~~January~~, 1997.

BY THE COURT

  
\_\_\_\_\_  
HONORABLE LEE DEVER  
DISTRICT COURT JUDGE

CERTIFICATE OF MAILING

I hereby certify that on this \_\_\_\_\_ day of January, 1997, I caused to be mailed, postage prepaid, U.S. mail, a true and correct copy of the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW to the following:

J. Franklin Allred  
321 South 600 East  
Salt Lake City, Utah 84102

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**EXHIBIT "A"**  
**PERSONAL PROPERTY TO BE AWARDED TO PLAINTIFF**

DESCRIPTION	VALUE	SUB-TOTAL
Grand Prix	\$7,000	
Kitchen ware	\$125	
Cannonball bed set	\$900	
Queen Anne Chair	\$50	
Bench settee	\$50	
2nd Refrigerator	\$100	
Washer & Dryer	\$100	
Couch, 2 Queen Anne chairs, etc.	\$800	
Couch and loveseat (downstairs)	\$2,000	
Stereo	\$1,300	
Couch, loveseat & Chair (upstairs)	\$200	
Oval Table & six chairs	\$200	
Big screen T.V.	\$3,000	
T.V. Stand	\$500	
Zenith T.V. and G.E. VCR	\$350	
Freezer	\$300	
<b>Sub-Total</b>	<b>\$16,975</b>	<b>\$16,975</b>
Plaintiff' IRA	\$2,559	
Plaintiff's 4-501	\$2,891	
Plaintiff's pension	\$2,513	



<b>Sub-Total</b>	<b>\$7,933</b>	<b>\$7,933</b>
Savings (with sister)	\$3,400	
Savings (Key Bank)	\$11,780	
4-\$500 bonds	\$5,133 <sup>2</sup>	
<b>Sub-Total</b>	<b>\$20,333</b>	<b>\$20,333</b>
<b>TOTAL</b>		<b>\$45,241</b>

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<sup>2</sup> Bond number D211219608E in the principle sum of \$500; Bond number D211219609E in the principle sum of \$500; Bond number D211219610E in the principle sum of \$500; Bond number D211219611E in the principle sum of \$500;

**EXHIBIT "B"**  
**PERSONAL PROPERTY TO BE AWARDED TO DEFENDANT**

DESCRIPTION	VALUE	SUB-TOTAL
Camper	\$400	
Fishing desk	400	
VCR/Video Camera	300	
Entertainment center	200	
Treadmill	400	
Microwave (office)	200	
Mitsubishi T.V.	500	
Fishing equipment (etc.)	800	
Boats	4,400	
Trailer	1,00	
Snowmobile	100	
Sleeping bags	35	
Riding lawn mower	1,000	
<b>Sub-Total</b>	<b>\$9,735</b>	<b>\$9,735</b>
Defendant's IRA	\$5,975	
Defendant's Retirement	\$85,264	
<b>Sub-Total</b>	<b>\$91,239</b>	<b>\$91,239</b>
Bonus - 1994	5,500	
Bonus - 1995	12,000	
<b>Sub-Total</b>	<b>\$17,500</b>	<b>\$17,500</b>
<b>TOTAL</b>		<b>\$118,474</b>

**EXHIBIT "C"**

Robert M. McDonald (2175)

**IN THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR TOOELE COUNTY, STATE OF UTAH**

JANNA GRIFFITH v. DAVID GRIFFITH	<b>CHILD SUPPORT OBLIGATION WORKSHEET</b> (Sole Custody and Paternity)  Civil No. 944300281DA Judge: Lee Dever
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	MOTHER	FATHER	COMBINED
1. Enter the # of natural and adopted children of this mother and father for whom support is to be awarded.			4
2a. Enter the father's and mother's gross monthly income. Refer to Instructions for definitions of income.	\$ 1313	\$ 4955	
2b. Enter previously ordered alimony that is actually paid. (Do not enter alimony ordered for this case.)	-	-	
2c. Enter previously ordered child support. (Do not enter obligations ordered for the children in Line 1.)	-	-	
2d. OPTIONAL: Enter the amount from Line 12 of the Children in Present Home Worksheet for either parent.	-	-	
3. Subtract Lines 2b, 2c, and 2d from 2a. This is the Adjusted Gross Income for child support purposes.	\$ 1313	\$ 4955	\$ 6268
4. Take the COMBINED figure in Line 3 and the number of children in Line 1 to the Support Table. Find the Base Combined Support Obligation. Enter it here.			\$ 1740
5. Divide each parent's adjusted monthly gross in Line 3 by the COMBINED adjusted monthly gross in Line 3.	20.9%	79.1%	
6. Multiply Line 4 by Line 5 for each parent to obtain each parent's share of the Base Support Obligation.	\$ *	\$ *	

7. BASE CHILD SUPPORT AWARD: Bring down the amount in Line 6 for the Obligor Parent or enter the amount from the Low Income Table.	\$ 1376
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8. Which parent is the obligor? ( ) Mother ( ) Father
9. Is the support award ordered different from the guideline amount in Line 7 ?  
( ) Yes ( ) No If YES, enter the amount ordered:
10. What were the reasons stated by the Court for the deviation?  
( ) property settlement  
( ) excessive debts of the marriage  
( ) absence of need of the custodial parent  
( ) other:  
( ) Electronic filing ( ) Manual filing

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Robert M. McDonald (2175)  
Attorney for Defendant  
3269 South Main, Ste. 270  
Salt Lake City, Utah 84115  
Telephone: (801) 485-5500

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

JANNA GRIFFITH,

Plaintiff,

v.

DAVID GARY GRIFFITH,

Defendant.

SUPPLEMENTAL  
DECREE OF DIVORCE

DAVID GARY GRIFFITH,

Counterclaimant,

v.

JANNA GRIFFITH,

Counterclaim Defendant.

Civil No. 944300281DA

Judge Lee Dever

This matter came on for trial before the Honorable Lee A. Dever, District Judge, on August 7, 8 and 13, 1996. Present at said hearing were Plaintiff and her attorney, John Franklin Allred and Defendant and his attorney Robert M. McDonald. On August 9, 1996, Plaintiff made a Motion to Reopen her Case. A Notice to Submit on that issue was filed with the Court on September 3, 1996. On September 27, 1996, the Court denied Plaintiff's

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Request to Reopen her Case and denied Plaintiff's Motion to Strike the Trial Memorandum Submitted by Defendant. All pending motions submitted to the Court having been resolved, the matter is ripe for decision. The Court having heard the testimony of witnesses called by the respective parties, having reviewed the documents admitted into evidence during the course of the trial, and having reviewed all of the documents in the Court file, and good cause appearing, and the Court having heretofore entered its Findings of Fact and Conclusions of Law, it is hereby

**ORDERED, ADJUDGED AND DECREED** as follows:

1. Plaintiff is awarded the sole care, custody and control of the minor children born of the marriage, to wit: Jennifer, born October 25, 1978; Brianne, born April 14, 1981; Chad, born September 5, 1983, and Brett, born June 5, 1986. Said custody should subject to the minimum visitation schedule outlined by Utah Code Annotated § 30-3-35, a copy of which is attached hereto as Exhibit "A" and incorporated herein by reference.
2. In the course of implementing the minimum visitation schedule attached as Exhibit "A", the parties shall give special consideration to make the children available to attend family functions including funerals, weddings, family reunions, religious holidays, important ceremonies, and other significant events in the life of the child or in the life of either party which may inadvertently conflict with the visitation schedule: Plaintiff shall have the children ready for visitation at the time Defendant is scheduled to pick up the children; Plaintiff shall be present in the marital domicile

or make reasonable alternate arrangements to receive the children at the time Defendant returns the children after visitation.

3. With respect to requests for visitation in excess of the minimum guidelines noted on Exhibit "A", Plaintiff shall consider additional visitation requests in the context of the best interests of the children which require that children have frequent, meaningful and continuing access to each parent and to have both parents actively involved in parenting the child.
4. Plaintiff shall notify Defendant within 24 hours of receiving notice of any and all significant school, social, sports, and community function in which any of the children are participating or being honored, and Defendant shall be entitled to attend and participate fully; Defendant shall have direct access to all school reports and records and direct access to medical records and shall be notified immediately by Plaintiff in the event of a medical emergency involving the children; both parties shall provide the other party with his or her current address and telephone number within 24 hours of any change; Plaintiff shall permit and encourage liberal telephone contact between Defendant and the children during reasonable hours and uncensored mail privileges; parental care shall be presumed to be better care for any of the children than surrogate care and the parties shall cooperate in allowing Defendant, if willing and able, to provide child care in lieu of surrogate care; Plaintiff and Defendant shall be entitled to equal division of major religious holidays celebrated by the parents, and the parent who celebrates a religious holiday that the other parent does

not celebrate shall have the right to be together with the child on the religious holiday.

5. Plaintiff is awarded all right, title and interest, free and clear of the claims of Defendant, in and to the Marital Domicile located at 454 West Vine Street, Tooele, Utah, and more particularly described as follows:

Beginning on the North line of Vine Street 660 feet West of the Southeast corner of Lot 2, Block 4, Plat B, Tooele City Survey, Tooele City, which point is also the Southeast corner of the Dunn property, running thence North 100 feet; thence East 100 feet; thence South 100 feet; thence West 100 feet to the point of beginning.

Beginning on the North line of Vine Street 553 feet West of the Southeast corner of Lot 2, Block 4, Plat B, Tooele City Survey, Tooele City, running thence West 107 feet; thence North 100 feet; thence East 107 feet; thence South 100 feet to the point of beginning (hereinafter "Marital Domicile").

6. The award of the Marital Domicile to Plaintiff is subject to a first lien held by Key Bank with an unpaid balance of approximately \$64,500. Plaintiff should be required to indemnify Defendant, and save Defendant harmless, with respect to the claims of Key Bank arising out of said indebtedness.
7. Defendant is hereby awarded a first right of refusal if and when Plaintiff determines to sell the Marital Domicile. In the event Plaintiff wishes to sell the Marital Domicile, and receives an arms-length and bona fide offer to purchase the Marital Domicile, she shall promptly deliver said offer to Defendant. Defendant shall have ten (10) days after receipt of any offer to purchase to notify the Plaintiff of his

intention to exercise his right of refusal. Defendant has thirty (30) days from the notification to Plaintiff of his intention to purchase for an amount equal to the purchase price stated in the offer.

8. Defendant is hereby awarded all right, title and interest, free and clear of the claims of Plaintiff, in and to the Lake Point Property more particularly described as follows:

Beginning at a point 5.80 chains South and 45.36 rods West of the Northeast corner of Section 2, Township 2 South, Range 4 West, Salt Lake Base and Meridian, running thence South 214.5 feet; thence West 203 feet; thence North 214.5 feet; thence East 203 feet to the point of beginning. Containing 1 acre more or less.

9. Plaintiff is awarded all right, title and interest, free and clear of the claims of Defendant, in and to the personal property described on the attached Exhibit "B" which is incorporated herein by reference.
10. Defendant is awarded all right, title and interest, free and clear of the claims of Plaintiff, in and to the personal property described on the attached Exhibit "C" which is incorporated herein by reference.
11. The ice-maker, refrigerator, microwave oven and dishwasher are attached to or a part of the Marital Domicile and included in the value of said home and should be awarded to Plaintiff as part of the award of the Marital Domicile.
12. Defendant is awarded all right, title and interest, free and clear of the claims of Plaintiff, in and to his separate property constituting of US Government savings bonds hereinafter described: Bond number R65262347EE in the principle sum of



\$200; Bond number R65262348EE in the principle sum of \$200; Bond number R64794715EE in the principle sum of \$200; Bond number R64578340EE in the principle sum of \$200; Bond number Q2220986522E in the principle sum of \$25; Bond number Q2345483802E in the principle sum of \$25; Bond number Q2250615826E in the principle sum of \$25; Bond number Q2250615810E in the principle sum of \$25; Bond number Q2071559559E in the principle sum of \$25; Bond number R54222223EE in the principle sum of \$200; Bond number R53982674EE in the principle sum of \$200; Bond number R98192458EE in the principle sum of \$200; Bond number R65206123EE in the principle sum of \$200; Bond number R65261627EE in the principle sum of \$200; Bond number R65261626EE in the principle sum of \$200; Bond number R65262346EE in the principle sum of \$200;

13. All framed pictures painted by Defendant's grandmother, which were not valued during the course of the trial, are hereby awarded to Defendant as his separate property.
14. Any items of personal property not expressly identified in the attached Exhibit "B", attached Exhibit "C", or in the preceding paragraphs, are hereby awarded to the party presently possessing such property.
15. In the event Plaintiff is in current possession of any of the personal property awarded to Defendant herein, Plaintiff shall forthwith deliver said property to Defendant. In

the event Defendant is in current possession of any of the personal property awarded to Plaintiff herein, Defendant shall forthwith deliver said property to Plaintiff.

16. Defendant should be ordered to pay to Plaintiff, for the use and benefit of the minor children born of the marriage, the sum of \$1,376 per month as child support effective November 11, 1996. A copy of the child support worksheet used to determine the amount of this obligation is attached hereto as Exhibit "D". Child support should continue with respect to each child until such child attains the age of 18 years or the date of that the child's classmates are scheduled to graduate from high school, whichever last occurs. There shall be no mandatory withholding of child support unless and until Defendant materially defaults in the payment of his child support obligation.
17. Defendant shall have the right to take three of the children born to the parties as dependency deductions on his state and federal income tax returns. In the event state or federal tax laws thereafter permit a tax credit for dependent children, Defendant shall be entitled to take the tax credit for three children.
18. Plaintiff shall have the right to take one of the children as dependency deductions on her state and federal income tax returns. In the event state or federal laws hereafter permit tax credit for dependent children, Plaintiff shall be entitled to use the tax credit for one child.
19. At such time as only one child is qualified to be claimed as a dependency deduction or qualifies for a tax credit, the parties shall alternate years in claiming said child.

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20. Defendant shall maintain the existing medical insurance coverage naming the children born of the marriage as insureds so long as such coverage is available through his employment. In the event Plaintiff chooses to continue duplicative medical coverage for the children, she shall be solely responsible for the payment of the portion of the premium attributable to the children.
21. Plaintiff and Defendant shall pay fifty percent (50%) of all reasonable and necessary uninsured medical and dental expenses, including deductibles and co-payments, incurred for the minor children. Provided, however, that as a condition to reimbursement for fifty percent (50%) of such medical and dental costs, the party incurring the medical or dental expense must provide written verification of the cost and payment of the medical or dental expense to the other party within thirty days of the payment.
22. Defendant shall pay to Plaintiff, for the use and benefit of Plaintiff, the sum of \$400 per month as alimony. Defendant's obligation to pay alimony shall continue for a period of nineteen years from September, 1994, the date Defendant began paying alimony. Defendant's obligation to pay alimony in the sum of \$400 per month shall become effective November 11, 1996. Provided, however, Defendant's obligation to pay alimony shall terminate prior to the expiration of the 19 year period if Plaintiff dies, remarries or cohabits with another person.
23. Plaintiff shall pay and discharge the following indebtedness and indemnify Defendant and save Defendant harmless, with respect to the claims of the following creditors:

Key Bank (secured by first mortgage on Marital Domicile); AT&T; First Card Visa; Citibank Visa; Key Preferred Line; Key Bank Visa; Key Credit Line.


24. Defendant shall pay and discharge the following indebtedness and indemnify Plaintiff, and save Plaintiff harmless with respect to the claims of the following creditors: Aline Griffith (Defendant's grandmother, secured by a second mortgage on the Marital Domicile) and Key Bank Silver Mastercard; and Dr. Olsen.
25. Any debt or other obligation not described in the preceding paragraphs, incurred after September 14, 1994, shall be paid and discharged by the party who incurred the debt and the party incurring the debt shall indemnify the other party, and save the other party harmless with respect to the claims of said creditors.
26. Plaintiff and her attorney, John Franklin Allred, are hereby ordered to forthwith deliver to Christenson & Griffith the Houghlihan Report and any and all copies thereof. Plaintiff and her attorney, John Franklin Allred, are hereby enjoined from disclosing the contents of the Houghlihan Report to any other person or entity.
27. Subject to the provisions of the following paragraphs, each party shall be solely responsible for the payment of their respective costs and attorneys fees incurred in the prosecution and/or defense of this action.
28. Plaintiff and her attorney, John Franklin Allred, shall pay and discharge the costs and attorneys fees stated in the judgment heretofore entered by the Court on May 24, 1996, in the principle sum of \$4,542. The judgment entered by the Court on May 24,

1996, and the Findings of Fact and Conclusions of Law supporting said judgment are incorporated herein by reference.

29. Judgment is hereby entered in favor of Defendant, and against Plaintiff and her attorney, John Franklin Allred in the sum of \$2,588.50, said judgment to thereafter bear interest at the statutory rate.
30. Plaintiff and Defendant shall each deliver to the other party any deed, certificate of title, bill of sale or other document reasonably requested by the other party to clear record title to the real and personal property awarded to the parties herein.

DATED on this 10 day of January, 1997.

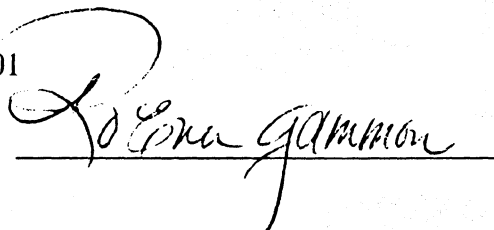
BY THE COURT

  
\_\_\_\_\_  
HONORABLE LEE DEVER  
DISTRICT COURT JUDGE

CERTIFICATE OF MAILING

I hereby certify that on this 10 day of Feb, 1997, I caused to be mailed, postage prepaid, U.S. mail, a true and correct copy of the foregoing DECREE OF DIVORCE to the following:

J. Franklin Allred  
321 South 600 East  
Salt Lake City, Utah 84101

  
\_\_\_\_\_  
Rebecca Gammon

**EXHIBIT "A"**  
**U.C.A. § 30-3-35 MINIMUM SCHEDULE FOR VISITATION**

(Summarized)

**Reasonable Visitation** should be defined as the parents may agree. If they are not able to agree, the definition for school-age children (beginning kindergarten) will be as follows:

**Midweek:** One weekday evening to be specified by the non-custodial parent or specified by the Court from 5:30 - 8:30 p.m.

**Alternate Weekends:** Friday 6:00 p.m. to Sunday 7:00 p.m.

*Holidays take precedence over the weekend visitation and weekend schedule doesn't change.*

**Holiday Visitation:** (6:00 p.m. day before holiday to 7:00 p.m. day of unless specified otherwise)

**Odd Numbered Years**

Human Rights Day  
Easter from Fri. 6:00 p.m. to Sun 7:00 p.m.  
Memorial Day Fri. 6:00 p.m.  
to Mon. 7:00 p.m.  
July 24th to 11:00 p.m.  
Veteran's Day  
Day before or after Child's Birthday  
3:00 p.m. to 9:00 p.m.  
First Half Christmas Vacation, including  
Christmas Eve and Christmas Day  
to 1:00 p.m.

**Even Numbered Years**

New Year's Day  
President's Day  
July 4th to 11:00 p.m.  
Labor Day from Fri. 6:00 p.m.  
to Mon. 7:00 p.m.  
Columbus Day  
UEA weekend from Wed. 6:00 p.m. to  
Sun. 7:00 p.m.  
Child's Actual Birthday to 9:00 p.m.  
Thanksgiving from Wed. 7:00 p.m. to  
Sun. 7:00 p.m.  
Second Half Christmas Vacation 1:00  
p.m. to 9:00 p.m. Christmas Day

**Father's Day:** With Father 9:00 a.m. to 7:00 p.m.

**Mother's Day:** With Mother 9:00 a.m. to 7:00 p.m.

**Summer:** 4 weeks during summer or, if year round, 1/2 school breaks, custodial parent allowed two weeks uninterrupted. Notification of summer visitation or vacation weeks with children should be provided in writing to the other parent at least 30 days in advance.

**Telephone:** Contact at reasonable hours



**EXHIBIT "B"**  
**PERSONAL PROPERTY TO BE AWARDED TO PLAINTIFF**

DESCRIPTION	VALUE	SUB-TOTAL
Grand Prix	\$7,000	
Kitchen ware	\$125	
Cannonball bed set	\$900	
Queen Anne Chair	\$50	
Bench settee	\$50	
2nd Refrigerator	\$100	
Washer & Dryer	\$100	
Couch, 2 Queen Anne chairs, etc.	\$800	
Couch and loveseat (downstairs)	\$2,000	
Stereo	\$1,300	
Couch, loveseat & Chair (upstairs)	\$200	
Oval Table & six chairs	\$200	
Big screen T.V.	\$3,000	
T.V. Stand	\$500	
Zenith T.V. and G.E. VCR	\$350	
Freezer	\$300	
<b>Sub-Total</b>	<b>\$16,975</b>	<b>\$16,975</b>
Plaintiff IRA	\$2,559	
Plaintiff's 4-501	\$2,891	
Plaintiff's pension	\$2,513	



<b>Sub-Total</b>	<b>\$7,933</b>	<b>\$7,933</b>
Savings (with sister)	\$3,400	
Savings (Key Bank)	\$11,780	
4-\$500 bonds	\$5,133 <sup>1</sup>	
<b>Sub-Total</b>	<b>\$20,333</b>	<b>\$20,333</b>
<b>TOTAL</b>		<b>\$45,241</b>

<sup>1</sup> Bond number D211219608E in the principle sum of \$500; Bond number D211219609E in the principle sum of \$500; Bond number D211219610E in the principle sum of \$500; Bond number D211219611E in the principle sum of \$500;

**EXHIBIT "C"**  
**PERSONAL PROPERTY TO BE AWARDED TO DEFENDANT**

DESCRIPTION	VALUE	SUB-TOTAL
Camper	\$400	
Fishing desk	400	
VCR/Video Camera	300	
Entertainment center	200	
Treadmill	400	
Microwave (office)	200	
Mitsubishi T.V.	500	
Fishing equipment (etc.)	800	
Boats	4,400	
Trailer	1,00	
Snowmobile	100	
Sleeping bags	35	
Riding lawn mower	1,000	
<b>Sub-Total</b>	<b>\$9,735</b>	<b>\$9,735</b>
Defendant's IRA	\$5,975	
Defendant's Retirement	\$85,264	
<b>Sub-Total</b>	<b>\$91,239</b>	<b>\$91,239</b>
Bonus - 1994	5,500	
Bonus - 1995	12,000	
<b>Sub-Total</b>	<b>\$17,500</b>	<b>\$17,500</b>
<b>TOTAL</b>		<b>\$118,474</b>

79

**EXHIBIT "D"**

Robert M. McDonald (2175)

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

JANNA GRIFFITH v. DAVID GRIFFITH	CHILD SUPPORT OBLIGATION WORKSHEET (Sole Custody and Paternity)  Civil No. 944300281DA Judge: Lee Dever
--	--

	MOTHER	FATHER	COMBINED
1. Enter the # of natural and adopted children of this mother and father for whom support is to be awarded.			4
2a. Enter the father's and mother's gross monthly income. Refer to Instructions for definitions of income.	\$ 1313	\$ 4955	
2b. Enter previously ordered alimony that is actually paid. (Do not enter alimony ordered for this case.)	-	-	
2c. Enter previously ordered child support. (Do not enter obligations ordered for the children in Line 1.)	-	-	
2d. OPTIONAL: Enter the amount from Line 12 of the Children in Present Home Worksheet for either parent.	-	-	
3. Subtract Lines 2b, 2c, and 2d from 2a. This is the Adjusted Gross Income for child support purposes.	\$ 1313	\$ 4955	\$ 6268
4. Take the COMBINED figure in Line 3 and the number of children in Line 1 to the Support Table. Find the Base Combined Support Obligation. Enter it here.			\$ 1740
5. Divide each parent's adjusted monthly gross in Line 3 by the COMBINED adjusted monthly gross in Line 3.	20.9%	79.1%	
6. Multiply Line 4 by Line 5 for each parent to obtain each parent's share of the Base Support Obligation.	\$ *	\$ *	

7. BASE CHILD SUPPORT AWARD: Bring down the amount in Line 6 for the Obligor Parent or enter the amount from the Low Income Table.	\$ 1376
--	---------

8. Which parent is the obligor? ( ) Mother ( ) Father
9. Is the support award ordered different from the guideline amount in Line 7 ?  
( ) Yes ( ) No If YES, enter the amount ordered:
10. What were the reasons stated by the Court for the deviation?  
( ) property settlement  
( ) excessive debts of the marriage  
( ) absence of need of the custodial parent  
( ) other:
- ( ) Electronic filing ( ) Manual filing

1 because the defendant had all of the benefits available  
2 through his father's business. I think he's a shareholder,  
3 but --- we're going to put something on shares as well, I  
4 believe. All of the benefits that Christensen and Griffith  
5 had showered on David and Janna Griffith, the parties in this  
6 action prior, they're still available, they're still there  
7 and I don't think that the Court should even consider cutting  
8 Janna off the continuation of this living standard, this  
9 living style, is possible and that's what we're going to show  
10 the Court and be done here. And that's what we're asking and  
11 that's why that \$1,800 figure's there.

12 Thank you, Your Honor.

13 THE COURT: Just one minute. I'd like to call your  
14 attention. I was not aware that Paul Griffith is a brother  
15 to the defendant here. I had a conversation with him the  
16 other day - nothing to do with this case. I just wanted to  
17 let you know I did have a conversation. He and I have a  
18 common ailment that the doctor suggested I talk to him. He  
19 called me. And I want to call that to your attention, but in  
20 no way did I discuss this case or even know until this  
21 morning, I read the --- your memorandum that they were  
22 brothers. But I just mention that to you.

23 MR. ALLRED: I have no problem with that.

24 THE COURT: So I don't want anybody saying ---  
25 well, you know --- I don't know him --- I just talked to him

1 on the phone because the doctor had him call me.

2 MR. ALLRED: Anything about side jobs, Your Honor?

3 THE COURT: No. Nothing.

4 MR. ALLRED: Was that prior ---

5 THE COURT: That day we talked about horseback  
6 riding, if you want to know the truth of the matter.

7 MR. ALLRED: Tennessee walker?

8 THE COURT: No, he's a rodeo man. I'm a tux man  
9 wearing tuxes, you know.

10 MR. ALLRED: Did that --- and that was prior to the  
11 time we filed the financial declaration?

12 THE COURT: Yes. I just thought --- I mean, I  
13 think he talked to me last week in about a 10 minute  
14 conversation. He and I are undergoing the same type of  
15 treatment and I just wanted to know what effects he had so  
16 that I could anticipate what I'd have. And that was the  
17 extent of the conversation.

18 MR. ALLRED: And the Court called him rather than  
19 him calling the Court.

20 THE COURT: Pardon?

21 MR. ALLRED: The Court called him rather than him  
22 calling the Court.

23 THE COURT: The doctor had him call me. I didn't  
24 call him.

25 MR. ALLRED: Oh, the doctor did.

1 THE COURT: The doctor had him --- I didn't know  
2 him from --- I didn't know him. He just called me on the  
3 phone. I wouldn't recognize him if I saw him here today.

4 MR. ALLRED: Thank you, Your Honor.

5 THE COURT: Okay. I just wanted to bring that out  
6 so that there was no question about it.

7 MR. MCDONALD: Your Honor, I would like to briefly  
8 involve what the rest of this case involves. First of all,  
9 Your Honor, I would like to note to the Court the evidence  
10 will show there is no significant sacrifice on the part of  
11 the plaintiff in providing defendant with his education.  
12 During the years he attended school, which was only about two  
13 years, his tuition was paid by a basketball scholarship.  
14 Defendant --- or plaintiff, at the same time pursued her  
15 education, defendant worked and contributed to the family  
16 income so the notion that there's some type of sacrifice or  
17 lien on his income just isn't won out by the evidence as the  
18 case --- this all will show. And as the evidence will show.

19

20 Secondly, Your Honor, Counsel made mention of the fact  
21 of 30-3-5, which said, "The Court may consider the fault of  
22 the parties in determining alimony." I submit, Your Honor,  
23 that that standard is not applicable to this case. That  
24 statute was effective May 1, 1995. This case was filed in  
25 September 1994. So at the time the grounds were being

1 morning.

2 THE COURT: You may call your next witness Mr.  
3 Allred.

4 MR. ALLRED: Your Honor, I have a couple of matters  
5 I'd like to address the Court with first, if we may.  
6 Yesterday, the Court indicated that a witness in this case  
7 contacted the Court, if I recall correctly, Your Honor, said  
8 that at the time of the conversation, did not understand that  
9 this individual witness is Paul Griffith, who was a witness  
10 in the case pending before you. As I sorted this out last  
11 night, I'm concerned that perhaps that there has been an  
12 attempt to unduly influence this Court.

13 THE COURT: Now, look. Absolutely not. Now I want  
14 to tell you ---

15 MR. ALLRED: I don't mean it with the Judge. I  
16 don't mean that at all, Your Honor.

17 THE COURT: No. There was absolutely nothing. It  
18 was at my request. I'll have you know, Mr. Allred, that I'm  
19 suffering from a disease.

20 MR. ALLRED: I understand that.

21 THE COURT: And this individual, at the request of  
22 the doctor, called me, not to discuss this case whatsoever.  
23 The only discussion I had with him with regards to the  
24 treatment - he is evidently undergoing the same treatment.  
25 The doctor wanted him to advise me of what the effects of the

1 treatment were. And are. And that's the only thing. He  
2 never once mentioned anything to do about the construction  
3 business. We discussed horseback riding, we discussed what  
4 effects it has on your memory, the effect it has on your  
5 riding, and that's all I wanted to know. And there's no way,  
6 whatsoever, that he in any way attempted or --- in fact, I  
7 appreciated the fact that he took the time. And someday you  
8 may be in my position and ---

9 MR. ALLRED: Your Honor, I understand. Can I  
10 just --- as delicately as I can let you know how it appears  
11 from the plaintiff's side? The issue was raised in advance  
12 of trial, that an individual has an unfortunate and probably  
13 very terrible disease. The issue was intended to be brought  
14 before this Court, in this proceeding, and we anticipated  
15 that would happen after Your Honor has sworn the witnesses  
16 after the start. But we find out yesterday --- and I  
17 approach this with extreme caution --- we find out yesterday  
18 that a contact was made, not initiated by the Court, not  
19 anything to do with the Court, but came from the witness ---

20 THE COURT: Wrong. Wrong. I asked the doctor to  
21 have him call me. My wife asked the doctor to have him call  
22 me. He did not initiate the call at his request. It was at  
23 my request that he initiated the call. Because my wife and I  
24 are both concerned about the treatments I'm to undergo here  
25 in another couple weeks. No way did he initiate that call on



1 his own. You want to call Dr. Symloski's office? You call  
2 Dr. Symloski's office. They're the ones that initiated the  
3 call. And this is a real affront to me to have this brought  
4 up at this time and I thought once and for all that these  
5 things would not arise again. And that's why I brought it to  
6 everybody's attention yesterday. We go through a whole day's  
7 trial, and then to think I'm going to be influenced by an  
8 individual who calls me, to advise me at the request of my  
9 doctor, --- I'm going to be influenced by that. You don't  
10 know me very well.

11 MR. ALLRED: I did not say that ---

12 THE COURT: And your client doesn't know me very  
13 well either.

14 MR. ALLRED: And I didn't even mean to insinuate --  
15 -

16 THE COURT: Then what are we talking about?

17 MR. ALLRED: The information that we have was that  
18 the client had made the --- the witness had made the call.  
19 And from the plaintiff's standpoint, now that the Court  
20 communicates what it is --- from the plaintiff's standpoint,  
21 that's something which would cause us concern. What the  
22 Court indicates is that it did not know when the call was  
23 made, after he requested the call, that this individual was  
24 involved.

25 THE COURT: I had no idea.

1 MR. ALLRED: So I certainly don't mean to insinuate  
2 anything had occurred, I just --- look at the situation. But  
3 what happened inadvertently then Judge, is this, if I  
4 understand what you're saying, and I'm just looking --- what  
5 happend inadvertently was the information which would have  
6 been offered in the trial under oath came to the Court  
7 outside of the trial and outside of the presence, and the  
8 Court has indicated he talked about horseback riding, and he  
9 talked about the treatment and the effect. And again, I  
10 apologize for this, but it's something that --- here's  
11 evidence that was perceived by the Court, which ---

12 THE COURT: Mr. Allred, do you realize that what he  
13 told me is what my doctor told me? He was just --- I wanted  
14 to find out what effects this disease and the treatment has  
15 on an individual. And you know, it's to your advantage that  
16 I know what Interferon does to a patient. You're not getting  
17 it from that list or that list. You're getting it from  
18 someone's who has been talking to a doctor and someone who  
19 has knowledge now of what Interferon does to a patient.  
20 You're also having the benefit of me understanding what Paul  
21 Griffith will be going through. And what he's gone through.  
22 So how is that going to affect --- and after I bring this all  
23 out I go through a day of trail yesterday.

24 MR. ALLRED: Well, and I apologize for maybe being  
25 slow in the uptake, Your Honor. I say again, looking at it

1 from out standpoint and the Court's claims this morning, but  
2 as we talked further about it, it begins to appear --- and I  
3 don't know what the Court's ruling would ultimately be, but  
4 we're going to urge the Court that family aside, a coworker's  
5 illness is not a grounds to alter or impact the plaintiff's  
6 alimony or child support award.

7 THE COURT: I understand that very well.

8 MR. ALLRED: Well, would the Court feel  
9 uncomfortable in giving us an advisory ruling and if that's  
10 irrelevant ---

11 THE COURT: Mr. Allred, in other words you're  
12 asking me to withdraw from this case at this time?

13 MR. ALLRED: No, sir. I'm just saying that ---

14 THE COURT: I don't want --- in this stage of my  
15 life, Mr. Allred, I'm not going to sit anymore. If you want  
16 to make a motion for me to withdraw. You make it. Will you?  
17 You do what you want to do.

18 MR. ALLRED: That puts us in a very uncomfortable -  
19 --

20 THE COURT: No. Well, you do what you want to do.  
21 You --- I tried --- I've been on the bench 11 years. And I  
22 don't want --- this late in my life, I'm no redoing things  
23 that in any way will reflect on my honesty, my integrity or  
24 character.

25 MR. ALLRED: Your Honor, I beg the Court's

1 indulgence, I did not insinuate, I did not say --- I'm simply  
2 saying that ---

3 THE COURT: And so therefore --- what? You're  
4 saying what?

5 MR. ALLRED: All this body of evidence that they  
6 claim bears on what the plaintiff is going to receive here,  
7 and what has been said, again, we're slow on the uptake, but  
8 it was inadvertently --- it's some kind of a cosmic ---

9 THE COURT: Well, make your motion. What do you  
10 want me to do? Tell me what you want me to do?

11 MR. ALLRED: I think if the Court were to rule that  
12 an illness of a coworker, and the family aside, an illness of  
13 a coworker is irrelevant in determining what the obligations  
14 of another worker are, we'd be satisfied.

15 THE COURT: Mr. McDonald.

16 MR. MCDONALD: Your Honor, that's just outrageous.  
17 The fact of the matter is that is a very relevant fact. If  
18 he wants an advisory opinion I think that that is improper.  
19 If he wants to move to have you disqualified, I would like to  
20 address that motion. But I don't think he can get an  
21 advisory ruling in advance because some evidence is  
22 irrelevant.

23 THE COURT: You know what's happened now? You've  
24 colored this whole case. You've colored it by even raising  
25 the issue. And so therefore, I just withdraw.

1 MR. MCDONALD: Your Honor, could I speak to that?

2 THE COURT: No. No. I'll just ---

3 MR. ALLRED: I'll accept that, Your Honor, if  
4 that's the Court's judgment.

5 THE COURT: And I'll withdraw as determining this  
6 case and then Mr. Allred, I'd like to see you in my chambers.

7 MR. ALLRED: I'll come in, Your honor. Thank you.

8 MR. MCDONALD: Your Honor, I think I ought to get  
9 all my costs and attorneys fees. He was advised of this  
10 yesterday.

11 THE COURT: I know. And I'm leaning towards the  
12 variable costs and attorneys fees for the day.

13 MR. MCDONALD: To Mr. Allred?

14 (Proceedings Concluded)  
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C E R T I F I C A T E

STATE OF UTAH

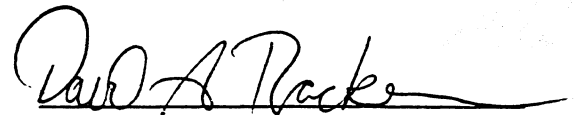
COUNTY OF TOOELE

THIS IS TO CERTIFY that the Trial on the case of JANNA GRIFFITH, vs. DAVID GARY GRIFFITH, was electronically recorded by the Third Judicial District Court, Tooele County, State of Utah.

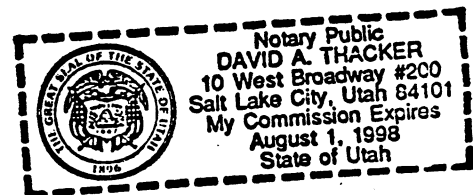
That the said witnesses were, before examination, duly sworn to testify the truth, the whole truth, and nothing but the truth in said cause.

That the said testimony of said witnesses was electronically recorded, and thereafter caused by me to be transcribed into type writing, and that a true, and correct transcription of said testimony so taken and transcribed is set forth in the foregoing pages numbered from 1 to 214, inclusive and said witnesses testified and said as in the foregoing annexed testimony.

WITNESS MY HAND and official seal at Salt Lake City, Utah, this 12th day of June, 1996.



David A. Thacker, RPR

My Commission Expires:  
\_\_\_\_\_


David A. Thacker  
Lanette Shindurling



Associated Professional Reporters  
10 West Broadway, Suite 200  
Salt Lake City, Utah 84101  
(801) 322-3441  
FAX (801) 322-3443

3RD DISTRICT COURT-TOOELE

96 OCT 18 PM 12:47

FILED BY 

October 17, 1996

Tooele County Courthouse  
Clerk of the District Court  
47 South Main  
Tooele, UT 84074

Re: Griffith vs. Griffith  
Case No. 94430281 DA

Please be advised that in reviewing the tapes of proceedings in the above-entitled matter held on March 13 and 14, 1996, we have found two errors in the transcript we prepared and have made the following corrections:

Page 16, line 23:

Replace Mr. Allred with Mr. McDonald

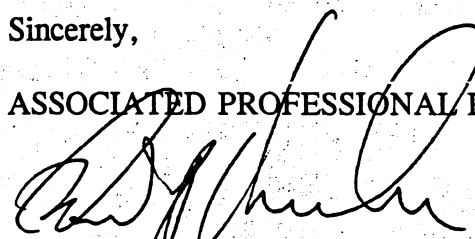
Page 213, line 5:

Replace "I'll withdraw as determining this case with "I will withdraw as the attorney in this case."

Two new pages are attached reflecting these changes to replace the old ones.

Sincerely,

ASSOCIATED PROFESSIONAL REPORTERS



David A. Thacker

DAT:kt

cc: J. Franklin Allred

97 001620

1 because the defendant had all of the benefits available  
2 through his father's business. I think he's a shareholder,  
3 but -- we're going to put something on shares as well, I  
4 believe. All of the benefits that Christensen and Griffith  
5 had showered on David and Janna Griffith, the parties in this  
6 action prior, they're still available, they're still there  
7 and I don't think that the Court should even consider cutting  
8 Janna off the continuation of this living standard, this  
9 living style, is possible and that's what we're going to show  
10 the Court and be done here. And that's what we're asking and  
11 that's why that \$1,800 figure's there.

12 Thank you, Your Honor.

13 THE COURT: Just one minute. I'd like to call your  
14 attention. I was not aware that Paul Griffith is a brother  
15 to the defendant here. I had a conversation with him the  
16 other day -- nothing to do with this case. I just wanted to  
17 let you know I did have a conversation. He and I have a  
18 common ailment that the doctor suggested I talk to him. He  
19 called me. And I want to call that to your attention, but in  
20 no way did I discuss this case or even know until this  
21 morning, I read the -- your memorandum that they were  
22 brothers. But I just mention that to you.

23 MR. MCDONALD: I have no problem with that.

24 THE COURT: So I don't want anybody saying --  
25 well, you know -- I don't know him -- I just talked to him



1 MR. MCDONALD: Your Honor, could I speak to that?

2 THE COURT: No, No. I'll just --

3 MR. ALLRED: I'll accept that, Your Honor, if  
4 that's the Court's judgment.

5 THE COURT: And I will withdraw as the attorney in  
6 this case and then Mr. Allred, I'd like to see you in my  
7 chambers.

8 MR. ALLRED: I'll come in, Your Honor. Thank you.

9 MR. MCDONALD: Your Honor, I think I ought to get  
10 all my costs and attorneys fees. He was advised of this  
11 yesterday.

12 THE COURT: I know. And I'm leaning towards the  
13 variable costs and attorneys fees for the day.

14 MR. MCDONALD: To Mr. Allred?

15 (Proceedings Concluded)  
16  
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18  
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In the Third District Court of Tooele County  
State of Utah

FILED

JANNA GRIFFITH,

Plaintiff,

vs.

DAVID GARY GRIFFITH,

Defendant,

MINUTE ENTRY

#944300281

Judge John A. Rokich

Defendant submitted a motion for judgment for costs and attorney fees and order of recusal. Plaintiff's counsel submitted a memorandum in opposition to Defendant's motion for judgment for costs and attorney fees and the recusal order.

The issue of fees, costs and recusal arose as a result of the court recusing itself from the case after a full day of trial.

Prior to beginning the trial the court advised the parties that after reading the trial brief on the morning of the trial it had discovered that Paul Griffith, brother of the Defendant, was a prospective witness. The court upon hearing that fact, advised the parties that Paul Griffith had called the court to inform him about the affects of interferon treatments which he was undergoing and the court was to begin. The call by Paul Griffith was made at the request of the treating physician. The court explained he and Paul Griffith discussed activity level and the ability to continue riding horseback while undergoing the treatment. At no time during the conversation was the divorce discussed or that Paul Griffith was the brother of the Defendant.

After divulging this information, the court asked if the parties had any objections to the court hearing the case. There were no objections raised.

On the second day of trial Mr. Allred raised the issue regarding the unsolicited telephone call by Paul Griffith. The court corrected Mr. Allred by advising him that call was made by Paul Griffith at the request of our mutual doctor.

Mr. Allred's suggestion that the court could be influenced by Paul Griffith's call is a serious allegation, although totally unfounded in this case, nevertheless casts a shadow of impropriety over the proceedings. When Mr. Allred suggested that the court could be influenced, it left the court with no alternative but for the court to recuse itself. If the court was to do otherwise, the parties would question whether they would receive a fair trial and that justice could be done.

The court concluded that Mr. Allred acted in bad faith. Mr. Allred was informed of the telephone conversation with Mr. Paul Griffith and raised no objection. However on the second day of the trial he places the court in an untenable position of

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suggesting that the court could be influenced by the telephone conversation, if not, then render a preliminary ruling on the relevancy of Mr. Paul Griffith's health in this case before the court heard all of the evidence.

Mr. Allred attempted to manipulate the court which tainted the proceedings and caused the court to recuse itself.

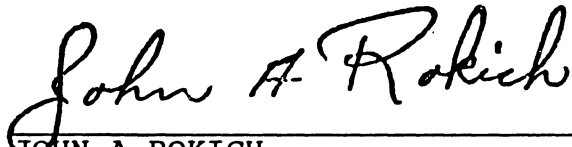
The court awards Defendant \$4,542.00 for attorney fees and costs incurred as a result of the conduct of Plaintiff's counsel in this case.

The order of recusal shall read as follows: The court recused itself from this case because of Mr. Allred's bad faith conduct in attempting to manipulate the court.

Mr. McDonald shall prepare the appropriate orders in accordance with this memorandum decision.

DATED on this 12 day of May, 1996.

BY THE COURT



JOHN A ROKICH  
DISTRICT COURT JUDGE

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001008

Case No: 944300281 DA

Certificate of Mailing

I certify that on the 6 day of May, 1996,

I sent by first class mail a true and correct copy of the  
attached document to the following:

J FRANKLIN ALLRED  
Atty for Plaintiff  
321 SOUTH 600 EAST  
SALT LAKE CITY UT 84101

ROBERT M MCDONALD  
Atty for Defendant  
3269 SOUTH MAIN, SUITE 270  
SALT LAKE CITY UT 84115

District Court Clerk

By: Robert J. Johnson  
Deputy Clerk

Robert M. McDonald (2175)  
McDONALD & WEST  
Jennifer P. Lee (6765)  
Attorneys for Defendant  
3269 South Main, Ste. 270  
Salt Lake City, Utah 84115  
Telephone: (801) 485-5500

29<sup>th</sup>  
FILED R

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

JANNA GRIFFITH,  Plaintiff, v.  DAVID GARY GRIFFITH,  Defendant.	ORDER OF RECUSAL
DAVID GARY GRIFFITH,  Counterclaimant, v.  JANNA GRIFFITH,  Counterclaim Defendant.	Civil No. 944300281DA  Judge John A. Rokich

Trial of this matter commenced on March 14, 1996 before the Honorable John A. Rokich, District Judge, sitting without a jury. Present at said hearing were Plaintiff and her attorney J. Franklin Allred and Defendant and his attorney, Robert M. McDonald. Prior to the commencement of the trial, the Court advised the parties that after reading the trial briefs the Court had discovered that Paul Griffith, the brother of Defendant, was a prospective witness. The Court advised the parties and their attorneys that Paul Griffith

(Defendant's brother) had initiated a telephone call to the Court to inform the Court about the effects of interferon treatments which Paul Griffith was undergoing and which the Court was to begin. The Court further informed the parties that the call by Paul Griffith was made at the request of the physician treating the Court and Paul Griffith. The Court explained that the Court and Paul Griffith discussed the activity level and the ability to continue riding horseback while undergoing treatment. The Court further advised the parties that at no time during the conversation was the divorce discussed, nor was there any discussion that Paul Griffith was the brother of Defendant. After fully disclosing the existence and subject matter of the telephone conversation, the Court inquired if the parties had any objections to the Court hearing the case. Neither party nor their attorneys voiced any objection to the Court proceeding with the trial. On the second day of trial, Mr. Allred raised the issue regarding the unsolicited telephone call by Paul Griffith. The Court corrected Mr. Allred by advising him that the call was made by Paul Griffith at the request of the physician treating both the Court and Paul Griffith. At that time, Mr. Allred clearly suggested that the Court could be influenced by Paul Griffith's telephone call which the Court regarded as a serious allegation. Although the suggestion of influence was totally unfounded, the Court regards the allegation as serious thereby casting a shadow of impropriety over the proceedings. Mr. Allred's suggestion that the Court could be influenced left the Court with no alternative but to recuse itself from presiding over the trial of the matter. If the Court were to do otherwise, the parties would question whether they had received a fair trial and that justice had been served. On the basis of these facts, the Court entered a Minute Entry dated May 6, 1996, which is incorporated herein by reference.

On the basis of the facts herein noted, and the facts noted in the Minute Entry dated May 6, 1996, the Court enters the following findings and conclusions:

1. In failing to object to the Court presiding over the trial of the matter at the time of the disclosure of the telephone communication with Paul Griffith, and thereafter proceeding to call witnesses during the course of the trial, Plaintiff and her attorney waived any right to disqualify the Court from proceeding in the matter. Rule 63(b), Utah Rules of Civil Procedure.

2. Mr. Allred's later suggestion that the Court could be influenced by the telephone communication with Paul Griffith is a serious allegation. Although said allegation is unfounded in this case, such allegation casts a shadow of impropriety over the proceedings leaving the Court with no alternative but to recuse itself from presiding over the trial of the matter.

3. Mr. Allred's conduct in failing to object to the Court presiding over the trial, until after the first trial day had been completed, constitutes bad faith on the part of Mr. Allred. Said action constitutes an attempt to manipulate the Court and thereby taint the proceedings compelling the Court to recuse itself from presiding over the trial of the matter.

Based upon the foregoing findings and conclusions, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

1. The Honorable John A. Rokich, District Judge, hereby recuses himself from presiding over the trial of this matter inasmuch as Paul Griffith will appear as a witness at the trial and the suggestion of Plaintiff's counsel that the Court would be unduly influenced

by the telephone communication with Paul Griffith compels the Court to recuse itself from presiding over the trial of this matter.

2. The Court recuses itself from this case because of Mr. Allred's bad faith conduct in attempting to manipulate the Court.

3. Inasmuch as Mr. Allred's suggestion of undue influence arising out of the Court's communication with Paul Griffith has no bearing on Defendant's Motion for Judgment for Costs and Attorney's fees, this Order does not prevent the Court from considering and ruling on said motion.

DATED on this 24 day of May, 1996.

BY THE COURT

  
DISTRICT COURT JUDGE



# CERTIFICATE OF MAILING

I hereby certify that on this 20 day of May, 1996, I caused to be mailed, postage prepaid, U.S. mail, a true and correct copy of the foregoing ORDER OF RECUSAL to the following:

J. Franklin Allred  
321 South 600 East  
Salt Lake City, Utah 84101



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29<sup>th</sup> 2013  
R

Robert M. McDonald (2175)  
McDONALD & WEST  
Jennifer P. Lee (6765)  
Attorneys for Defendant  
3269 South Main, Ste. 270  
Salt Lake City, Utah 84115  
Telephone: (801) 485-5500

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

JANNA GRIFFITH,

Plaintiff,  
v.

DAVID GARY GRIFFITH,  
Defendant.

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

DAVID GARY GRIFFITH,  
Counterclaimant,  
v.

JANNA GRIFFITH,  
Counterclaim Defendant.

Civil No. 944300281DA

Judge John A. Rokich

The Court having considered Defendant's Motion for Judgment for Costs and Attorneys fees, Affidavit of Robert M. McDonald, Defendant's Memorandum in Support of Motion for Judgment for Costs and Attorneys fees, Plaintiff's Memorandum in Opposition to Defendant's Motion for Judgment for Costs and Attorney's fees and to Defendant's Proposed Order of Recusal and the Affidavit of John Franklin Allred, and

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having fully considered the facts and circumstances occurring during the course of trial of this matter, as reflected in the minute entry dated May 6, 1996, which is incorporated herein by reference, the Court makes the following Findings of Fact and Conclusions of Law:

**FINDINGS OF FACT**

1. The Court incorporates by reference, as if fully set forth herein, the Findings stated in the Minute Entry dated May 6, 1996.
2. In failing to object to the Court presiding over the trial of the matter at the time of the disclosure of the telephone communication with Paul Griffith, and thereafter proceeding to call witnesses during the course of the trial, Plaintiff and her attorney waived any right to disqualify the Court from proceeding in the matter. Rule 63(b), Utah Rules of Civil Procedure.
3. J. Franklin Allred's later suggestion that the Court could be influenced by the telephone communication with Paul Griffith is a serious allegation. Although said allegation is unfounded in this case, such allegation casts a shadow of impropriety over the proceedings leaving the Court with no alternative but to recuse itself from presiding over the trial of the matter.
4. J. Franklin Allred's conduct in failing to object to the Court presiding over the trial until after the first trial day had been completed, constitutes bad faith on the part of Mr. Allred. Said action constitutes an attempt to manipulate the Court and thereby taint the proceedings compelling the Court to recuse itself from presiding over the trial of the matter.

5. The acts and omissions to act on the part of J. Franklin Allred were in bad faith and for an improper purpose to harass, to cause unnecessary delay and to cause a needless increase in Defendant's costs of litigation.

6. By reason of the acts and omissions to act on the part of J. Franklin Allred, Defendant's attorney must expend at least twenty additional hours in duplicative preparation for a second trial.

7. By reason of the acts and omissions to act on the part of J. Franklin Allred, Defendant was deprived of the benefit of 7.0 hours of his attorney's time incurred in travel and appearance at trial on March 14, 1996 and 2.6 hours in travel and appearance at trial on March 15, 1996.

8. By reason of the acts and omissions to act on the part of J. Franklin Allred, Defendant's attorney has expended more than 2.6 hours in preparing an Order of Recusal, Motion for Judgment for Costs and Attorney's fees, Memorandum in Support of Motion for Judgment for Costs and Attorney's fees, Affidavit, Findings of Fact and Conclusions of Law and Judgment.

9. The hourly rate for Defendant's attorney is \$140 per hour. Said rate is fair and reasonable in light of Defendant's attorney's experience in civil litigation in domestic relations matters.

10. The hours spent in appearance at trial, and duplicative preparation are necessary to adequately represent Defendant in this action and the number of hours, in light of the nature of the service, is fair and reasonable.

11. By reason of the acts and omissions to act on the part of J. Franklin Allred, Defendant was deprived of the benefit of travel costs incurred by his attorney in appearing at trial on March 14 and 15, 1996. The travel costs in appearing at trial on said dates is \$34.00 and said travel was necessary and the amount charged for said travel is fair and reasonable.

12. At all times mentioned herein, J. Franklin Allred was acting as attorney of record for Plaintiff and the acts of J. Franklin Allred are imputed to Plaintiff.

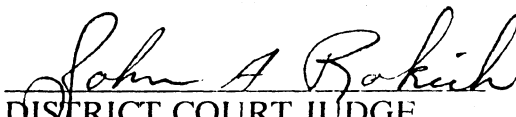
CONCLUSIONS OF LAW

1. The Court incorporates by reference, as if fully set forth herein, the Conclusions stated in the Minute Entry dated May 6, 1996.

2. Judgment should be entered in favor of Defendant, and against Plaintiff and her attorney, J. Franklin Allred, jointly and severally, in the sum of \$4,542. Said judgment to hereafter bear interest at the rate of 7.35% per annum from date of entry until said judgment is satisfied.

DATED on this 24 day of May, 1996.

BY THE COURT

  
DISTRICT COURT JUDGE

# CERTIFICATE OF MAILING

I hereby certify that on this 10 day of May, 1996, I caused to be mailed, postage prepaid, U.S. mail, a true and correct copy of the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW to the following:

J. Franklin Allred  
321 South 600 East  
Salt Lake City, Utah 84101



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Robert M. McDonald (2175)  
McDONALD & WEST  
Jennifer P. Lee (6765)  
Attorneys for Defendant  
3269 South Main, Ste. 270  
Salt Lake City, Utah 84115  
Telephone: (801) 485-5500

29<sup>th</sup>  
FILED

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

JANNA GRIFFITH,

Plaintiff,  
v.

DAVID GARY GRIFFITH,

Defendant.

JUDGMENT

DAVID GARY GRIFFITH,

Counterclaimant,  
v.

JANNA GRIFFITH,

Counterclaim Defendant.

Civil No. 944300281DA

Judge John A. Rokich

The Court having considered Defendant's Motion for Judgment for Costs and Attorney's fees, Affidavit of Robert M. McDonald, Defendant's Memorandum in Support of Motion for Judgment for Costs and Attorney's fees, Plaintiff's Memorandum in Opposition to Defendant's Motion for Judgment for Costs and Attorney's fees and to Defendant's Proposed Order of Recusal and the Affidavit of John Franklin Allred, and having fully considered the facts and circumstances occurring during the course of the trial

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of this matter as reflected in the minute entry dated May 6, 1996, which is incorporated herein by reference, and having heretofore entered its Findings of Fact and Conclusions of Law, it is hereby:

ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for and on behalf of Defendant/Counterclaimant David Gary Griffith and against Plaintiff Janna Griffith and attorney J. Franklin Allred, jointly and severally, in the sum of \$4,542. Said judgment shall hereafter bear interest on the unpaid balance at the rate of 7.35% per annum from date of entry.

DATED on this 24 day of May, 1996.

BY THE COURT

  
DISTRICT COURT JUDGE



J. FRANKLIN ALLRED P.C., A0058  
Attorney for Plaintiff  
321 South 600 East  
Salt Lake City, Utah 84102  
Telephone: (801) 531-1990

3RD DISTRICT COURT-TOOELE  
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IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR TOOELE COUNTY

STATE OF UTAH

JANNA GRIFFITH,	:	AFFIDAVIT OF J. FRANKLIN
	:	ALLRED IN SUPPORT OF
Plaintiff,	:	PLAINTIFF'S REQUEST FOR AN
	:	AWARD OF ATTORNEY'S FEES
vs.	:	
	:	Judge Lee Dever
DAVID GARY GRIFFITH,	:	Case No.944300281 DA
Defendant.	:	

The Plaintiff above-named by and through her attorney, J. Franklin Allred, having prayed in her complaint herein for an award of attorney's fees, now submits the following affidavit of J. Franklin Allred in support of said award.

State of Utah                    )  
                                      :ss  
County of Salt Lake    )

J. Franklin Allred being first duly sworn on his oath, deposes and states as follows:

1. That I am the attorney for the Plaintiff above-named and have personal direct knowledge of each action taken in this case

and have personally conducted or overseen and authorized the expenditure of time and effort in this matter by me and by the other attorney's who contributed to the conduct of this litigation.

2. This being a domestic matter and the Plaintiff having requested an attorney's fee award, the legal basis for said award is based upon *Utah Code Annotated* 30-3-3 and the cases reporting domestic actions.

3. I have been in the private practice of law since June of 1970 at the above address in Salt Lake City, Utah and have throughout that time been engaged generally in a litigation practice and have litigated domestic matters extensively throughout the twenty-six plus years of my practice.

4. I am generally aware of the charges made for lawyers with my experience for similar work in the domestic area.

5. I agreed with my client to charge \$175 an hour for all work conducted on her behalf and state that said sum is reasonable and consistent with charges generally in the domestic area made by attorneys of my experience and ability.

6. The specific identification of the steps taken in the conduct of this litigation are outlined in the billings for my services which are attached hereto as Exhibits 1-6. The conduct of this litigation was greatly complicated by the intransigence of opposing counsel, the lack of readily available information as to earnings of the Defendant and the reluctance of the Defendant to

identify and provide value on his profit sharing plan. The steps taken by me as attorney for the Plaintiff as reflected in Exhibits 1-6 were reasonable and necessary under the circumstance to fully protect Plaintiff's rights to child support, alimony, and an equitable property division.

7. Throughout this litigation, the posture of Defendant with respect to every aspect has been to adopt and pursue an overbearing, unreasonable, unfair and irresponsible position to the point at the conclusion of the trial where the Defendant suggests after a twenty-year marriage that no alimony be awarded and that he be awarded attorney's fees because of the Plaintiff's efforts to vigorously pursue her interests.

8. At no time was a reasonable division of the retirement fund suggested by Defendant; at no time was a reasonable alimony suggested by Defendant; at no time was a legitimate suggestion for child support made, all of which demanded the pursuit through trial for a fair division of the property and determination of child support and alimony for Plaintiff.

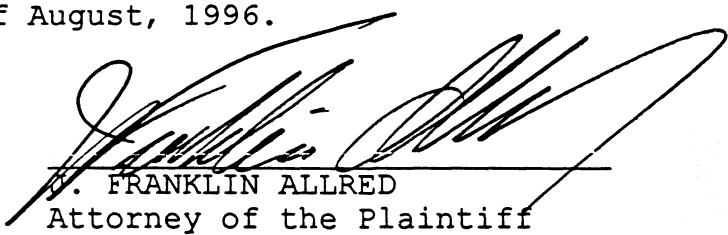
9. The original position of Defendant respecting both child support and alimony as stipulated to, was based on the affidavit of Plaintiff which identified approximately \$67,000.00 of annual income to the Defendant and resulted in the stipulated award of temporary support of \$1,298.00 per month and temporary alimony of \$1,050.00 per month.

10. Defendant's entire effort has been to conceal his true earnings by understating them, to reduce the child support from the original temporary figure, to eliminate alimony, and to obtain the bulk of the most important asset, the parties' retirement funds, to him, which posture demanded a vigorous and resolute pursuit by Plaintiff to secure her fair and equitable interest in the property, child support and alimony.

11. The time expended by counsel was reasonable and necessary under the circumstances and Plaintiff is entitled to be reimbursed in full.

12. The remaining outstanding balance owing from Plaintiff to J. Franklin Allred for attorney's fees, advanced costs, and expenses paid for the services of other lawyers is \$75,533.61 and Plaintiff is entitled to an order of the Court awarding her said sum.

DATED this 16<sup>th</sup> day of August, 1996.

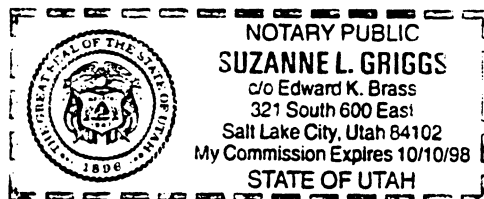
  
J. FRANKLIN ALLRED  
Attorney of the Plaintiff

State of Utah                    )  
  : ss  
County of Salt Lake        )

J. Franklin Allred being, duly sworn and disposed on his oath,  
states that the contents herein are true.

*Suzanne L. Griggs*  
\_\_\_\_\_  
NOTARY PUBLIC

Notary Seal:



MAILING CERTIFICATE

I hereby certify that on this 16<sup>th</sup> day of August, 1996, I  
caused to be mailed to Robert M. McDonald, the attorney for the  
Defendant above named, at McDonald & West, 3269 South Main, Suite  
270, Salt Lake City UT 84115, the foregoing AFFIDAVIT OF J.  
FRANKLIN ALLRED IN SUPPORT OF PLAINTIFF'S REQUEST FOR AN AWARD OF  
ATTORNEY'S FEES.

DATED this 16<sup>th</sup> day of August, 1996.

*Franklin Allred*  
\_\_\_\_\_

J. FRANKLIN ALLRED P.C.  
ATTORNEY & COUNSELOR AT LAW  
321 SOUTH SIXTH EAST  
SALT LAKE CITY, UTAH 84102-4082

AREA CODE 801  
TELEPHONE 531-1990

March 11, 1996

STATEMENT OF JANNA GRIFFITH  
AUGUST 22, 1994 TO DECEMBER 31, 1994

08/22/94	Office Conf. w/ client	2.00
09/08/94	Office Conf. w/ client	1.00
09/10/94	Preparation of Complaint, telephone Conf. w/ Janna	.80
09/12/94	Work on Complaint	.50
09/13/94	Work on Complaint	.60
	Work on child support schedules, telephone Conf. w/ client	.60
09/14/94	Work on Complaint, file Complaint, telephone Conf. w. client	.80
09/23/94	Conf. w/ client at bank	1.20
09/27/94	Work on Affidavit, telephone Conf. w/ client	2.40
09/27/94	Court Hearing 2:30 p.m. to 4:30 p.m. with travel one way	2.50
10/11/94	Defendant's Order to Show Cause	1.00
10/14/94	Review Order to Show Cause	.40
10/17/94	Finalize Order, Letter to client, copy to client, Copy of Order and Letter to Counsel	.40

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10/28/94	Telephone Conf. w/ Janna Letter to Richards	N.C. .20
11/02/94	Letter to Richards	.20
11/11/94	Telephone Conf. w/ Janna	N.C.
11/21/94	Preparation, letter and Order to Show Cause, deliver to Judge Rokich for signature, file in Tooele Co.	<u>.40</u>

Total Hours	15.50
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Total Hours at \$175.00 per hour	\$2,625.00
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Expenses:

10/11/94	Service for Pleadings	\$13.00
10/17/94	Filing fee and copy costs	<u>\$50.00</u>

Total Expenses	\$63.00
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Total Balance for period	\$2,688.00
--------------------------	------------

Retainer	\$6,000.00
----------	------------

Less Current Bill	<u>\$2,688.00</u>
-------------------	-------------------

Balance due or Credit	<u>(\$3,312.00)</u>
-----------------------	---------------------

J. FRANKLIN ALLRED P.C.  
ATTORNEY & COUNSELOR AT LAW  
321 SOUTH SIXTH EAST  
SALT LAKE CITY, UTAH 84102-4082

AREA CODE 801  
TELEPHONE 531-1990

March 11, 1996

STATEMENT OF JANNA GRIFFITH  
JANUARY 1, 1995, TO MARCH 31, 1995

Balance or Credit		(\$3,312.00)
02/02/95	Letter to Opposing Counsel regarding visitation	.30
	Review of Motion to Amend	.20
02/10/95	Read and compare distill meaning of Motion to Amend	1.50
02/10/95	Work on memorandum in opposition	2.00
	Amend, finalize and mail	1.00
02/14/95	Telephone Conf. with Janna	.20
	Telephone Conf. with McDonald	N.C
03/17/95	Telephone Conf. with Client	.20
	Letter to Counsel with Ex's	<u>N.C.</u>
	Total hours	5.40
	Total hours at \$175.00 per hour	\$945.00
	Costs Advanced 3-14-95	\$12.59
Balance		<u>\$957.59</u>

EX.  
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Credit	(\$3,312.00)
Less Current balance	\$957.59
Balance due or Credit	<u>(\$ 2,354.41)</u>

J. FRANKLIN ALLRED P.C.  
ATTORNEY & COUNSELOR AT LAW  
321 SOUTH SIXTH EAST  
SALT LAKE CITY, UTAH 84102-4082

AREA CODE 801  
TELEPHONE 531-1990

March 11, 1996

STATEMENT OF JANNA GRIFFITH  
APRIL 1, 1995 TO DECEMBER 31, 1995

Balance or Credit		<u>(\$ 2,354.41)</u>
04/07/95	Phone Conference with Client, 0.30 hours ( <i>No Charge</i> )	
08/07/95	Prepare Motion for Order Compelling Discovery File Motion with Judge Rokich and McDonald	4.00
08/08/95	Phone Conference with McDonald	0.20
08/14/95	Court Hearing with Judge Rokich in Tooele Phone Conference with Donna McKendricks	2.00 0.10
08/15/95	Phone Conference with Client Phone Conference with McDonald Phone Conference with McDonald Phone Conference with McDonald Phone Conference with Client ( <i>No Charge</i> )	0.30 0.10 0.10 0.10
08/16/95	Phone Conference with McDonald Pick Up Deeds from Recorder	0.10 0.20
08/17/95	Phone Conference with McDonald Phone Conference with McDonald, P. V. Documents Letter To McDonald RE: Documents Not Produced Phone Conference with Client - Review Deeds	0.20  0.60 0.20 0.50

EX.  
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08/18/95	Dictation of Notices of Deposition, Phone Conference,	
08/18/95	Subpoenas, Edit Notices	1.00
08/21/95	Edit Notices, Prepare Subpoenas, Review Documents	3.30
08/22/95	Work on Notices of Deposition, Subpoenas	1.50
	Phone Conference with McDonald,	
	P. V. Documents	0.50
08/23/95	Conference with Client in Tooele,	
	P. V. Subpoenas, Leave Documents	0.40
	Review Documents, Prepare for Deposition	2.00
08/24/95	Deposition 9:00 a.m. - p.m.	10.00
08/25/95	Ost. Defendant's Signature on Check,	0.40
	Conference with Client, Organize File	0.30
08/28/95	Letter to McDonald, Write Check	0.20
09/01/95	Prepare Order on Motion to Compel,	
	Letter to Opposing Counsel, Letter to Client	1.30
09/20/95	Phone Conference with Client	0.50
	Phone Conference with McDonald	0.20
09/21/95	Phone Conference with Client	0.30
09/25/95	Notice of Deposition, Subpoena to Ken Christensen	0.70
10/06/95	Letter to Opposing Counsel	1.00
10/07/95	Work on Motion for Contempt	2.00
10/09/95	Dictate, Edit Affidavit, Motion for Contempt	3.00
10/10/95	Prepare for Deposition	2.30
10/11/95	Depositions	7.00

10/12/95	Findings, Motion, Mail with Affidavit, etc.	0.50
11/20/95	Conference with Client, Deliver Copy of Response of Defendant to Motion	0.50
11/28/95	Draft Reply to Response to Motion for Contempt, Draft Affidavit	1.50
12/01/95	Edit, Revise Reply to Motion for Contempt	3.00
12/05/95	Final Edit, Copy, Mail Reply to Motion for Contempt	2.20
12/11/95	Court Hearing, Argue Motion	2.00
12/11/95	Received Letter from McDonald regarding Discovery Review Deposition	.20 .60
12/12/95	Research Deposition, notes or stipulation to provide info on Discovery.	4.00
12/13/95	Review notes and deposition, draft letter response.	2.20
12/14/95	Letter to McDonald, revise, fax and mail.	1.40
12/15/95	Telephone Conf with McDonald Received and reviewed motion	.30 .30
12/16/95	Read Motion, discuss with Ed Brass and review	1.00
12/17/95	Work on outline or response, read depositions	3.00
12/18/95	Write Memorandum Conf w/ Clark Arnold	7.00 1.00
12/19/95	Affidavit of J. Franklin Allred and edit Affidavit of Janna and revise	4.00 2.00
12/20/95	Copy, file and serve Response to Motion to Compel	3.80
12/26/95	Conference w/ Liz Hunt Review with Ed Brass	

12/27/95	Prepare additional discovery request, revise copy	2.00
12/28/95	File and serve Motion to Contempt	3.00
	Request for Discovery	2.00
12/29/95	Prepare Motion Extending Time, prepare Notice to submit, Memorandum supporting Motion	4.00
	Total Hours	98.10
	Total Hours @ \$175.00 per hour	\$17,167.50

Sums Advanced:

09/15/95	Sum Advance for Deposition	(\$671.00)
09/15/95	Sum Advance for Transcript of Hearing	(\$117.00)
10/11/95	Sum Advance	(\$767.90)
12/11/95	Sum Advance	(\$127.50)
12/19/95	Sum Advance	(\$135.00)
12/20/95	Sum Advance	(\$1,000.00)
12/20/95	Sum Advance	(\$20.48)
12/28/95	Sum Advance	<u>(\$315.00)</u>
	Total Sum Advance	<u>(\$3,153.88)</u>

Total fees due	\$17,167.50
Total advanced sum	<u>\$3,153.88</u>
Total	\$20,321.38
Less credit	(\$2,345.41)
Total Balance Due	<u>\$17,966.97</u>

August 1, 1996

STATEMENT OF JANNA GRIFFITH

JANUARY 1, 1996 TO MARCH 31, 1996

<b>Balance or Credit</b>		<b>\$17,966.97</b>
01/02/96	Phone Conf. Liz Hunt and Ed Brass	.30
	Review and research drafts	1.00
01/03/96	Draft Affidavit J. Franklin Allred	
	Draft Affidavit Janna Griffith	6.00
01/04/96	Revise - Rewrite facts	3.00
	Response to Motion for Limine	5.00
01/05/96	Revise, copy, file Motion Disq.	7.00
01/11/96	Motion to Strike, Reply to Resp. Motion to Compel	2.00
01/17/96	Notice to Submit, Motion to Disq.	.30
01/23/96	Received Motion for Sanctions, Reviewed reply draft	3.00
01/25/96	Final Response to Sanctions, Conf. with McDougal and Ed Brass	4.50
01/26/96	Work on Affidavit's of Brass, MacDougal, Allred and Janna Griffith	3.00
01/26/96	Final, file, copies to J. Dever in Salt Lake City	5.00
01/29/96	Hearing on Motion to Disq.	4.00

01/30/96	Work on Response to Motion for Sanctions	3.00
02/02/96	File and serve Response to Motion for Sanctions	2.00
02/05/96	Prep. Objection to Orders, Motion for Hearing on Objections	3.80
02/12/96	Final and file Memorandum supporting Objections to Orders	1.00
02/12/96	Prepare Subpoenas	2.20
02/16/96	Serve Subpoenas	1.00
03/02/96	Work on files & prepare for trial.	3.00
03/04/96	Trial preparations	2.50
03/05/96	Trial preparations and discovery	4.00
03/07/96	Trial preparation	3.00
03/08/96	Trial preparation	4.00
03/09/96	Trial preparation	10.00
03/10/96	Trial preparation	11.00
03/11/96	Trial preparation	7.00
03/11/96	Conference with Thell Stewart	5.50
03/12/96	Trial preparation	10.00
03/13/96	Trial preparations, review, mark exhibits, Conf. W/Thell Stewart, Brass, and Liz Hunt.	6.50
03/14/96	Trial	10.00
03/15/96	Trial, Conf. with client, travel (1)	3.00
03/20/96	Pick up tapes, check with Steve Review plans	5.00

03/21/96	Rev. Motion of Defendant for Attorney Fees, Memorandum, telephone Conf. w/ Liz	.50
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03/26/96	Preparation of response to Motion, scheduled conf, Request for schedule con, file response.	6.00 2.00
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Total Hours	149.56
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Total Hours @ \$175.00 per hour	\$26,173.00
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Sums Advanced:

01/05/96	Sum advance	\$176.50
01/11/96	Sum advance	\$45.00
01/23/96	Sum advance	\$30.85
02/02/96	Sum advance	\$9.17
02/02/96	Sum advance	\$360.00
02/12/96	Sum advance	\$85.00
02/29/96	Sum advance	\$32.00
03/20/96	Sum advance	\$203.00
03/26/96	Sum advance	<u>\$761.40</u>

Total advanced sum	\$1,702.92
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Total fee hours due	\$26,173.00
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Total advanced sum	\$1,702.92
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Total charge for billing period	\$27,875.92
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Balance due from Statement 03/15/95 to 12/29/95	<u>\$17,966.97</u>
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Balance due	<u><u>\$45,842.89</u></u>
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August 5, 1996

STATEMENT OF JANNA GRIFFITH

APRIL 1, 1996 TO JULY 11, 1996

<b>Balance or Credit</b>		<b>\$45,842.89</b>
04/04/96	Conf. with RoEna, regarding Rokich Pickup Motion, oral tapes, etc.	.10
04/04/96	Conf. with RoEna, pickup tapes	.30
04/24/96	Pick up tapes, conference with RoEna	1.00
05/07/96	Liz Hunt	1.50
5/15/96	Motion to Vacate Minute Entry, Memo, Affidavit Conf. with Liz,	6.00
5/16/96	Motion reopen, order, Memo Objection to Proposed Order, Affidavit, etc.	3.50
5/24/96	Conf. Liz Hunt	2.50
	Review & edit Motion to Vacate/State	1.00
	File	1.50
5/26/96	Review Memo and Motion to vacate Minute Entry	.30
5/26/96	Review Motion Bifurcate, Rev. Temporary Order, Motion to Modify Temporary Order	.30
5/26/96	Review Motion, Defendant's Objection to Proposed Order, Affidavit of McDonald & Affidavit of Defendant	.20

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12/12

5/27/96	Telephone Conf. With Janna, review files, Motion etc., for hearing	1.00
5/28/96	Court, Conf. with client Travel	2.00 .50
5/30/96	Prepare, Serve and mail Judgment, letter to J. Dever	1.20
5/31/96	Prepare Reply to Defendant's Response to Plaintiff's Motion to Vacate Minutes Entry and file	3.00
6/1/96	Preparation of Supporting Affidavit of J. Franklin Allred Response to Minute Entry	1.50
6/2/96	Edit final Supporting Affidavit of J. Franklin Allred Execute	2.00
6/2/96	Prepare Plaintiff's Reply Memorandum to Defendant's Opp. Memo to Plaintiff Obj. to Findings of Fact, Conclusions of Law, Judgement	2.00
6/2/96	Prepare Plaintiff's Memo Opp. T Defendant's Motion Red. Alimony; Prepare Plaintiff's Motion Rule 11 Sanctions, Attorney's Fees	2.00
6/2/96	File and serve Affidavit, conf. with client, Plaintiff's Reply to Defendants Objection to Plaintiff's Objection to Finding of Facts, Conclusion of Law and Judgment	2.00
6/3/96	Prepare Affidavit of J. Franklin Allred, Response to Defendant's claim of Stipulation to Witnesses, Reply to Defendant opposition to Reopen Discovery	1.40
6/4/96	Notice to Submit Plaintiff's Objections to Proposed Order of Recusal etc; Notice to Submit Motion to Reopen Discovery	.30 .30
6/6/96	Rec'd. Defendant's Memorandum Opp. to Plaintiff Motion, and Judgement, Relief, Stay	.30

6/10/96	Dictate and review Plaintiff's Reply to Defendant's Opposition to Plaintiff Motion, Plaintiff Reply to Defendant's Opposition	1.00 2.50
6/12/96	Final Reply to Defendant's Memo in Opposition to Plaintiff's Motion for Relief/Stay Serve Notice to Submit	2.30 .20
6/12/96	Request Transcript - Motion to Change Bond on Appeal	.50
6/13/96	Rec'd. Defendant's Motion to Strike Plaintiff's Notice to Submit Plaintiff's Objection to Order, Judgment, Finding of Facts and Conclusions of Law, Regarding Hearing/ Rec'd. Affidavit of McDonald	.10
6/14/96	Conference with Liz Hunt Review Affidavit of McDonald and research	.30 .20
6/20/96	Motion to Strike McDonald's Affidavit and Memo	.70
6/20/96	Prepare Memo in Opposition of Defendant's Motion to Strike Plaintiff's Notice to Submit	1.00
6/21/96	Received Notice of Hearing and status, phone conf. w/ client	.20
6/24/96	Prepare Motion Cert. Order as Final	.50
6/25/96	Prepare Subpoenas	1.40
6/25/96	Review and copy Parts of transcript, prepare Notice of Filing exhibits	1.00
6/25/96	Plaintiff's Reply to Defendant Memo, Plaintiff's Motion for relief from Judgment, Plaintiff reply to Defendant's Memo in to Plaintiff's Motion for Stay	2.00
7/5/96	Received Defendant's Reply of Memorandum in Support of Defendant Motion to Strike Plaintiff Notice to Submit, Objection to Order, etc, Defendant Memo.	.10

7/11/96	Prepare Reply Memo in Support of Plaintiff's Motion to Strike Affidavit of McDonald	.60
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Total Hours	52.30
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Total Fee @ \$175.00 per hour	\$9,152.50
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Sums Advanced:

5/2/96	Sum advanced	343.00
5/7/96	Sum advanced	120.00
5/15/96	Sum advanced	150.00
5/16/96	Sum advanced	180.00
5/24/96	Sum advanced	120.00
6/12/96	Sum advanced	554.00
6/20/96	Sum advanced	515.00
6/26/96	Sum advanced	80.00
7/5/96	Sum advanced	210.00
7/19/96	Sum advanced	<u>36.00</u>

Total advanced sum	\$2,308.00
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Total fee hours due	\$9,152.00
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Total advanced sum	\$2,308.00
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Total charge for billing period	\$11,460.00
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Balance due from Statement 1/1/96 to 3/31/96	<u>\$45,842.89</u>
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Balance Due	<u>\$57,302.89</u>
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August 14, 1996

STATEMENT OF JANNA GRIFFITH

JULY 13 TO AUGUST 14, 1996

Balance or Credit		\$57,302.89
07/13/96	OC work on exhibits, plan, Review checking accounts	6.00
07/15/96	Rec. Motion for Pmt. Bond. Review	.10
07/16/96	Dictate Plaintiff's Response in Opposition to Motion of Defendant for Pmt. Bond	1.00
07/18/96	Letter from McDonald re: deposition Phone conference - Liz Hunt; OC Liz Hunt rev.	.10 .30
07/19/96	Phone conference - Janna Griffith re: format of ERS	.20
07/20/96	Final Objections to deposition of Paul Griffith	1.00
07/21/96	OC; prepare for trial	7.00
07/22/96	Court hearing/ Judge Dever/ Tooele	3.00
07/23/96	Letter to McDonald witness at this time; Order copy for Court	.30
07/23/96	OC; trial preparation	4.00
07/25/96	OC; trial preparation	3.00
07/26/96	Deposition of Paul Griffith; letter from McDonald	3.50

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07/27/96	OC; trial preparation	7.00
08/01/96	Rec. Defendant's Response to Objections; prepare Request Supplement	.20
08/02/96	Review trial brief; prepara for films	.50
08/02/96	Rec. letter from McDonald re: witnesses Trial preparation	.10 3.00
08/04/96	OC Janna Interview witnesses	8.00 2.00
08/05/96	Rec./rev. deposition of Paul Griffith Trial preparation	.30 4.00
08/05/96	Trial preparation Trial preparation; OC	4.00 3.00
08/06/96	Trial preparation; interview witnesses; file Subpoenas; set-up	8.00
08/07/96	Trial	10.00
08/08/96	Trial	10.00
08/09/96	Prepare Motion to Re-open on Stay; File Motion	1.50
08/11/96	Trial preparation	8.00
08/12/96	Trial preparation; re-do Exhibits; copy Documents for Motion, etc.; rev. Exhibit List for completeness	2.00
08/13/96	Trial	8.00
08/14/96	Begin dictating - Affidavit/attorney's fees	<u>.50</u>
	Total hours	109.60

Total fee due @ \$175.00 per hour

\$19,180.00

Sums Advanced:

7/20/96

Sum advanced

45.00

Total advanced sum

\$45.00

Total fee hours due

\$19,180.00

Total advanced sum

\$45.00

Total charge for billing period

\$19,225.00

Balance due from Statement 04/01/96 to 07/11/96

\$57,302.89

Balance

\$76,527.89

Less ½ of Insurance Check

\$994.28

**BALANCE DUE**

**\$75,533.61**

Transcript of portion of trial before Judge Rokich wherein he explains his having spoken with  
the witness Paul Griffith  
transcript of hearing at which Judge Rokich recused himself

(Jackie, we'll also do a cover Page (number)  
to the Addendum in which we repeat the itemization  
of the Addendum as above)