

1986

# Kerschner v. Kerschner : Brief of Appellant

Utah Supreme Court

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Jane Allen; attorney for appellant.

C. Gerald Parker; Parker, Thornley & Critchlow; attorney for respondent.

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UTAH COURT OF APPEALS  
BRIEF

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DOCKET NO. 860089

IN THE SUPREME COURT

STATE OF UTAH

DIANA KERSCHNER,

Plaintiff/Respondent,

vs.

JOHN KERSCHNER,

Defendant/Appellant.

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860089-CA  
No. 20378

APPELLANT'S BRIEF

Appeal from Judgment

of the Second Judicial District Court of Davis County

Dated October 3, 1984

The Honorable Douglas L. Cornaby, District Judge

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**FILED**  
MAY 6 1985

Clerk, Supreme Court, Utah

IN THE SUPREME COURT

STATE OF UTAH

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DIANA KERSCHNER,	:	
	:	
Plaintiff/Respondent,	:	
	:	
vs.	:	
	:	
JOHN KERSCHNER,	:	No. 20378
	:	
Defendant/Appellant.	:	

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THE PARTIES

Diana Kerschner, Plaintiff-Respondent

John Kerschner, Defendant-Appellant

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#### STATEMENT OF ISSUES

A. Is the trial court's refusal to find, after argument, whether the house payments made by the Appellant are alimony or a property settlement, error, which requires the Supreme Court to make a finding as to the character of this payment?

B. If the payment is characterized as alimony, is the Plaintiff's full time career employment after the time of the Decree a substantial enough change in circumstances to warrant terminating the payment?

C. If the house payment requirement is characterized as a property settlement, should it be suspended due to lack of consideration, which makes the payment inequitable?

D. Does the trial court have a duty to see that all agreements by the parties to a divorce are equitable whether or not the parties are represented by counsel, and should the court have discovered whatever facts are necessary to make such a determination?

E. Does the trial court have a duty to remedy an inequitable agreement, especially when the inequity is made more severe due to a change in circumstances, once a party to it has petitioned the Court for relief, or to at least modify the inequitable portion of the agreement in such a way as to remedy the inequity with the least adverse impact on the position of the other party?

#### STATEMENT OF THE CASE

A. Nature of the Case.

This is an appeal by the defendant, John Kerschner from



an order denying his Petition to Modify the Decree of Divorce.

B. Course of the Proceedings.

The parties were divorced on May 20, 1983. The Defendant filed a Petition to Modify Decree of Divorce which was heard October 3, 1984 before the Honorable Douglas L. Cornaby.

C. Disposition in the District Court.

The Honorable Douglas L. Cornaby, of the Second Judicial District ruling from the bench October 3, 1984, the Defendant's Petition to Modify the Decree of Divorce was denied, but the Court would not find whether the payment was alimony or a property settlement, and denied the Petition on both grounds. Accordingly, no written Findings of Fact and Conclusions of Law were entered, since the matter had been argued and was not decided.

D. Statement of Material Facts.

The Parties were divorced on May 20, 1983. The Decree of Divorce was entered by consent of the parties, with the Defendant/Appellant husband (hereinafter Defendant) ordered to pay the sum of \$200.00 per child per month as child support, for a total of \$600.00 per month. The Defendant was also ordered in paragraph 7 of the Decree (Appendix A) to pay the house payment on the marital residence in the sum of \$276.00 per month until the Plaintiff/Respondent wife (hereinafter Plaintiff) remarries, cohabits with another adult male, no longer uses the premises as her principal place of residence, the youngest child of the parties reaches age 18, or the home is sold, whichever comes

first. However, the equity in the home was divided at the time of the Decree, with Defendant to receive the sum of \$12,340.00 upon the occurrence of one of the above contingencies. The first certain contingency is the date the youngest child of the parties reaches age 18, which will be in 11 years. If the Defendant should pay the house payment until that time he will have paid approximately \$36,000.00 to the Plaintiff, for which he receives no interest, equity, or other offset of any kind. The Defendant paid temporary child support and alimony to the Plaintiff prior to the divorce and paid the house payment for 13 months before he petitioned the Court to modify the Decree of Divorce. Since the parties' divorce in June of 1983 the Plaintiff has changed from an unemployed housewife to an employed teacher for nine months of the year, complete with pension and other benefits, which resulted in an increase in her income from \$876.00 per month (child support and alimony), to approximately \$1876.00 per month, which is based upon her receiving her salary for 12 months of the year and does not include her benefits, which increase her base salary by approximately 30%. Based upon this change of circumstances, along with the Defendant's remarriage to a woman with children of her own from a prior marriage and the attendant costs thereto, the Defendant petitioned the trial court for a modification of his Decree of Divorce, requesting relief from the obligation to pay the payment on the house, or in the alternative to modify the terms of the requirement so that he would receive some offset, such as all or part of the equity built up during the time he pays the payment, plus interest on the outstanding

balance of his share of the equity. All of his requests on that issue were denied. There were other issues which were dealt with in the Petition which are not the subject of this appeal.

#### SUMMARY OF ARGUMENT

A. Counsel for Defendant argued that the requirement that he pay the Plaintiff's house payment in the sum of \$276.00 per month, although not designated as such, was alimony because it was not a sum certain and as such, could be modified upon a showing of a change in the circumstances of the parties. Counsel for Plaintiff argued that said requirement was a property settlement and as such could not be modified. The trial court, after hearing this argument, would not decide the nature of the payment, which was error. As a result, the Defendant does not know if he can, in the future, petition the Court again, or whether this appeal is his last recourse. If a trial Court fails or refuses to decide an issue presented and argued before it, especially in matters of equity, the Supreme Court has the power to decide that issue, and to issue appropriate findings of fact and conclusions of law in accordance with the decision of the Supreme Court.

B. The house payment requirement is alimony and is modifiable by the Defendant's showing of a substantial change in circumstances. At the time of the divorce, the Plaintiff was an unemployed housewife with a teaching certificate and an income of \$876.00 per month. Thirteen months later she had completed one full year of teaching, and had permanent employment as such,

complete with benefits and a twelve month income of approximately \$1,000.00 per month, bringing her total monthly income to approximately \$1876.00 per month, not including benefits. Since her obtaining employment more than doubled her income, the Defendant claims that this qualifies as a substantial change in Plaintiff's circumstances which would warrant a change in his obligations to the Plaintiff.

C. If the payment requirement is a property settlement, it should be suspended because it has no consideration, and as a result is patently inequitable. In order for a payment to be classified as a property settlement in a Decree of Divorce, it must be paid to compensate the party receiving the payment for real or personal property retained by the paying party and must be a sum certain which is not terminable on certain contingencies as required in Fletcher v. Fletcher, 615 P.2d 1218 (Utah 1980). The essence of this arrangement is the requirement that the paying party receive something for his payments and pay a certain sum of money for those items. In this case, the marital property was equitably divided without this payment being considered, and as a result the Defendant is receiving nothing for his payment. This arrangement is unfair, and the trial court found that it is "unusual"(T 37). The equitable powers of the trial court enable it, and require it to modify inequitable provisions of its decrees, and the trial court should have suspended the requirement that the Defendant pay the Plaintiff's house payment.

D. The trial court has a duty to discover whatever facts are necessary to determine whether or not an agreement by

the parties to a divorce is equitable, whether or not the parties are represented by counsel. In this case, however, the trial court held that "The Court has an obligation to let them agree to what they want to agree to" (T 38), and that "the Court would have challenged it at the time or at least made it clear to the parties as to what you are doing" but for both parties being represented by counsel (T 38). This is error in a court of equity. The Court's duty is to see that the agreements are equitable, not to rely on counsel to do so. If the facts are not obvious as to why the parties have agreed to a specific provision, then the trial court is in a position to ascertain them, and has a duty to do so. In this case, the trial court had a duty to ascertain why the Defendant was agreeing to pay the house payment, and to determine whether he understood the great possibility that this payment would continue for many years. Only when the trial court has done that can it hold the Defendant to his agreement now. As a result of the trial court's failure to determine the facts behind the agreement despite its concern at the time the stipulation was heard, the same trial court now has a duty to modify the Decree to remedy the inequity of the agreement, and it was manifest injustice for the trial court to refuse to do so.

E. The trial court has a duty to modify any inequitable portion of a Decree of Divorce, whether that inequity is caused by a change of circumstances of the parties or whether the agreement was inequitable from its inception, once the trial

court realizes that the agreement is indeed unfair. In this case the trial court found the agreement to be "unusual" which is tantamount to finding that the agreement is unfair, since it is "unusual" for a person to be required to pay for something, only to receive nothing for it. The Defendant also asked the trial court in lieu of removing the payment entirely, to grant him all or part of the remaining house equity, and to give him interest on that equity. This modification would not have changed the daily living condition of the Plaintiff and the children, and would have allowed the Defendant to receive something, albeit in the future, for his payment. The trial court, however, refused even this less intrusive modification, and in light of the conclusion that the agreement is "unusual" it was error for the Court to refuse to do so.

## ARGUMENT

A. THE TRIAL COURT'S REFUSAL TO FIND, AFTER ARGUMENT, WHETHER THE HOUSE PAYMENT MADE BY DEFENDANT TO PLAINTIFF IS ALIMONY OR PROPERTY SETTLEMENT IS ERROR AND REQUIRES THE SUPREME COURT TO MAKE A FINDING AS TO THE CHARACTER OF THIS PAYMENT.

The Defendant's Petition to Modify the Decree of Divorce asked the trial court, among other things, to determine whether the house payment requirement, which is the subject of this appeal, should be characterized as a property settlement or alimony. The Decree is silent as to the classification of the payment, and the classification bears greatly on the future modifiability of the payment. Counsel agree that if the payment is alimony then the Defendant could petition the Court for its modification again at a later date if circumstances warrant, even if his appeal is otherwise denied. If the payment is classified as a property settlement and not modified by the Supreme Court as a result of this appeal, the Defendant will be barred from attempting to modify it at a later date. This difference was an important issue to the parties, and despite vociferous argument by Counsel, the trial court refused to determine the classification of the payment. In fact, the trial court's findings are so inconclusive that it was impossible for Counsel to draft findings of fact and conclusions of law regarding this hearing, as they would never agree on the classification and the trial court gave them no guidance, let alone a decision. The trial court stated that "Defense counsel, of course, is saying it's in the nature of alimony. It sure sounds like it, and yet the stipulation clearly was that there is no alimony to be paid.

Plaintiff's counsel is saying it's obviously property settlement. This is not obvious to me that it's property settlement." (T 38) "It looks like it's probably in lieu of alimony and yet, agreed there is no such thing as alimony. It could be property settlement." (T40)

The Court then makes its final ruling, and states: "So I am going to hold the--unusual as it is, the terms as it is, even though it's there without any offsetting equity in the house even though it says there's no alimony" (T 40).

This ruling leaves Counsel for the parties in an impossible stalemate and no findings of fact or conclusions of law were filed as a result. Whenever a trial court leaves the parties in such a position, it is reasonable for the parties to appeal to the Supreme Court to decide the issue, especially in matters of equity, and to ask the Supreme Court to issue findings and conclusions in accordance with the decision of the Supreme Court.

B. THE HOUSE PAYMENT MADE BY THE DEFENDANT IS ALIMONY AND SHOULD BE TERMINATED, SINCE THE PLAINTIFF'S OBTAINING FULL TIME CAREER EMPLOYMENT AFTER THE TIME OF THE DECREE IS A SUBSTANTIAL CHANGE IN CIRCUMSTANCES.

This Court in Fletcher v. Fletcher, 615 P.2d 1221 (Utah 1980) stated that "the alimony awarded in this action cannot be deemed in the nature of a property settlement, for it is not a sum certain but is terminable on certain contingencies." In this case, the house payment requirement is not a sum certain and terminates when the last child reaches age 18, the plaintiff remarries or cohabits with an adult male, the home is no longer



used as her principal place of residence, or when the house is sold, whichever comes first. The first reliable contingency, the last child reaching age 18, will occur in approximately 11 years. However, any of the other contingencies could occur before that time, so the Plaintiff has no idea the final amount that the Defendant will pay to her. Because of this uncertainty, this payment must be classified as alimony, and cannot be a property settlement.

At the time of the parties' divorce, the Plaintiff was an unemployed housewife with a teaching certificate and an income of \$876.00 per month which represented child support and the house payment paid by the Defendant. Thirteen months later she had completed one full year of teaching, and had permanent employment as such, complete with benefits and a twelve month income of approximately \$1,000.00 per month, bringing her total cash monthly income to approximately \$1876.00 per month, not counting her benefits which amount to an increase in her teaching income of approximately 30%.

Since Plaintiff's obtaining employment more than doubled her income, The Defendant claims that this qualifies as a substantial change in her circumstances which would warrant a change in the Defendant's obligations to the Plaintiff.

The standards used in fixing an alimony award are:

1. the financial conditions and needs of the wife;
2. the ability of the wife to produce a sufficient income for herself;
3. the ability of the husband to provide support.

In this case the parties were married for twelve years but the Plaintiff did have her teaching certificate and as a result had marketable skills. Applying the above-stated standard, her unemployed status at the time of the decree would have required a reasonable sum of alimony for a time, but the prospects for the Plaintiff to provide a sufficient income for herself were excellent and alimony should terminate when those prospects have been realized.

The above-stated standards should also be applied when determining whether an alimony award in a Decree of Divorce should be modified. Plaintiff has now proven that she is able to produce a sufficient income for herself, but she is still in need of child support to help with the support of the children, which is \$600.00 per month for three children and which the Defendant does not dispute. Her general financial condition is good, and is better than at the time of the Decree. The ability of the Defendant to provide support has been diminished by his remarriage to a woman who has children of her own, which can result in as many as seven children residing in the Defendant's home on his visitation weekends. The Defendant is making only \$1,000.00 per year more than he was three years ago (T 3). The most substantial change in circumstances remains the Plaintiff's employment which more than doubled her income. Not only that, her job provides a retirement plan, medical insurance, and other benefits which will put her in a similar, if not better financial position than the Defendant in her later years.

Accordingly, the Defendant should be relieved of the requirement that he pay the Plaintiff's house payment of \$276.00 per month due to her substantial change in circumstances.

This Court held in Haslam v. Haslam, 657 P.2d 757 (Utah 1982) that there had been a substantial change in circumstances where Mrs. Haslam had obtained employment, experienced a substantial increase in income and had accumulated some savings and Mr. Haslam's income had not increased since the time of the divorce. In that case the parties were married for 21 years and had been divorced for 17 years. The financial situation of the parties to this appeal is similar, except that both parties were much younger at the time of the divorce and were not married for nearly so long.

The Court in Haslam held that "the change in circumstances required to justify a modification of a divorce decree varies with the type of modification sought" and also held that

"With respect to modifying alimony, this Court has recently stated that provisions in the original decree of divorce granting alimony, child support, and the like must be readily susceptible to alteration at a later date, as the needs which such provisions were designed to fill are subject to rapid and unpredictable change." [Citation deleted]

Id., at 758. In this case the Plaintiff's income has more than doubled since the time of the Decree, she has substantial retirement and other job benefits, and the Defendant's income has not substantially increased, but his obligations have increased. As a result, the Defendant should be relieved of the obligation to pay the Plaintiff's house payment.

C. THE PAYMENT MADE BY THE DEFENDANT, IF A PROPERTY SETTLEMENT, SHOULD BE SUSPENDED SINCE IT IS PATENTLY INEQUITABLE, HAS NO CONSIDERATION, AND WAS FOUND TO BE "UNUSUAL" BY THE TRIAL COURT.

In order for a cash payment to be classified as a property settlement rather than alimony in a decree of divorce, it must be paid to the other party as compensation for real or personal property retained by the paying party and must be a sum certain Fletcher v. Fletcher 615 P.2d 1218 (Utah 1980). In this case the personal and real property of the parties was equitably divided between them without any payment required. All marital property is disclosed in the decree, and consists of the Plaintiff present residence, various cars and household furniture. There has never been any evidence presented to indicate that there was other property retained by the Defendant for which he was paying the Plaintiff. Even the equity in the marital residence was divided and reduced to a sum certain of \$12,340.00 to be paid upon various contingencies. A requirement that the Defendant pay the Plaintiff the sum of \$36,000.00 over the next 11 years without any offset or consideration is patently inequitable. Even the trial court found the payment to be "unusual" (T 37).

This Court in Davis v. Davis 655 P.2d 672 (Utah 1982) determined that such a requirement was inequitable under practically identical facts, finding that

". . .the trial court upset the equity of that division by requiring the defendant to make a further substantial investment in the property without any corresponding benefit to him. . .The defendant will be required to make post decree payments nearly double

the equity awarded to him. This was unfair to him and weighted the division of the property heavily in the plaintiff's favor. Fairness dictates that he should realize something out of the increased equity which will result from his providing the funds to retire the second mortgage. [Citation omitted]

Id., at 673. In Davis the defendant was ordered to pay the second mortgage on the marital residence in lieu of alimony, and his share of the house equity was determined at the time of the divorce. In the present case, the Defendant will pay \$36,000.00 to the Plaintiff by the time the last child reaches age 18 which is three times the \$12,340.00 in house equity awarded to him in the decree. Such an agreement was found by this Court to be inequitable in Davis and it is inequitable in the present case as well.

The equitable powers of the trial court enable it, and require it to modify inequitable provisions of its decrees, and the trial court should have relieved the Defendant from the requirement that he pay the Plaintiff's house payment, and it was an abuse of discretion for it to fail to do so.

D. THE TRIAL COURT HAS A DUTY TO SEE THAT ALL AGREEMENTS BY THE PARTIES TO A DIVORCE ARE EQUITABLE WHETHER OR NOT THE PARTIES ARE REPRESENTED BY COUNSEL, AND TO DISCOVER WHATEVER FACTS ARE NECESSARY TO MAKE SUCH A DETERMINATION.

The trial court, especially in equitable matters, has a duty to determine whether or not agreements between the parties to a divorce are equitable. The fact that one or both of the parties is represented by counsel does not alter the duty of the court. In this case, however, after the Defendant petitioned the trial court to modify the decree of divorce, the trial court held that "the Court has an obligation to let them agree to what they

want to agree to" (T 38). "The Court would have challenged it at the time or at least made it clear to the parties as to what you are doing" but for both parties being represented by counsel (T 38). The trial court's duty is to see that the agreements are equitable, not to rely on counsel to do so. If the trial court has any suspicion as to the inequitability of any provision of the agreement, the trial court has a duty to ascertain whatever facts are necessary to satisfy itself that the provision is fair. The trial court has the power to change any part of an agreement between parties to a divorce should the it be convinced that it was inequitable. In this case, the trial court had a duty to ascertain why the Defendant was agreeing to pay the house payment when the equity was already divided, and to determine whether he understood the great possibility that this payment could continue for many years, possibly more years than a straightforward alimony payment. Only when the trial court had made those determinations could it now hold the Defendant to his agreement. The trial court's failure to determine the facts behind the original agreement was error and now requires that same court, in the interests of justice, to modify the decree of divorce to remedy the inequity, especially in light of its increased unfairness due to the Plaintiff's full-time employment.

E. THE TRIAL COURT HAS A DUTY, ONCE A PARTY TO AN INEQUITABLE AGREEMENT HAS PETITIONED THE TRIAL COURT FOR RELIEF, TO GRANT THAT RELIEF OR TO MODIFY THE INEQUITABLE PORTION OF THE AGREEMENT IN SUCH A WAY AS TO REMEDY THE INEQUITY WITH THE LEAST ADVERSE IMPACT ON THE POSITION OF THE OTHER PARTY.

In this case, the trial court found the requirement

that the Defendant pay the Plaintiff's house payment to be "unusual" and also stated that had the Defendant not been represented by Counsel that the trial court "would have challenged it at the time or at least made it clear to the parties as to what you are doing" (T 37, 38). This is tantamount to a finding that the agreement is inequitable, and accordingly the Defendant should be relieved of further payments on the Plaintiff's house.

However, there is no evidence of any wrongdoing on the Plaintiff's part, and in light of that the trial court could have found that eliminating the payment entirely would result in hardship upon her. If that were the case, the court then had a duty to at least modify the decree in such a way as to remedy the inequity while affecting the Plaintiff as little as possible. The Defendant reasonably requested the court, in lieu of removing the payment entirely, to allow him to keep all or part of the house equity accrued at the time the last child reaches age 18, the house is sold, or some other contingency sooner in time. John also asked for interest on the unpaid balance, but essentially he requested the trial court to rectify the problem, and indicated that he would be amenable to a flexible decision that gave the Defendant compensation for his payment even if the trial court could not eliminate it entirely. This the trial court refused to do, and in light of the facts and circumstances of the parties, was error.

#### CONCLUSION

The Defendant petitioned the trial court in this

matter for a modification of his divorce decree. The trial court refused to decide whether the requirement that the Defendant pay the Plaintiff's house payment was a property settlement rather than alimony. It then decided that it would not modify the decree, despite the Plaintiff's full-time employment following the divorce which more than doubled her income, and despite the trial court's finding that the payment was "unusual". As a result, the trial court has erred in failing to decide a major question asked of it, in failing to modify the divorce decree of the parties despite a substantial change in the circumstances of the parties, in failing to determine whether the stipulation of the parties was equitable in the first place, and upon determining that it was "unusual", the trial court has erred in refusing to modify the decree in any way. As a result, the Supreme Court is in a position to modify the decree to remove the Defendant's responsibility for the Plaintiff's house payment or otherwise modify the divorce decree to remedy the inequity presently contained therein, to determine whether the payment is alimony or a property settlement, and to make findings of fact and conclusions of law in accordance with its decision.

Respectfully submitted this 5<sup>th</sup> day of May, 1985.

BY Jane Allen  
Jane Allen  
Attorney for Appellant



APPENDIX A

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IN THE DISTRICT COURT OF DAVIS COUNTY

STATE OF UTAH

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DIANA KERSCHNER,	/	
Plaintiff,	/	DECREE OF DIVORCE
vs.	/	
JOHN H. KERSCHNER,	/	Civil No. <u>1-32735</u>
Defendant.	/	5-200

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This matter having come on regularly for hearing on the 28th day of February, 1983, before the Honorable Douglas L. Cornaby, one of the Judges of the above entitled Court, sitting without a jury, and the plaintiff being personally present and represented by her attorney, Ronald W. Perkins, and the defendant being personally present and represented by his attorney, Walker E. Anderson, and the parties having entered into an oral stipulation governing their respective property rights, custody, support, alimony, attorney's fees, and all other kindred rights, and the plaintiff having been sworn and testified in open Court, and the Court having approved the oral stipulation

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of the parties and being fully cognizant of all matters herein, and the Court having made its Findings of Fact and Conclusions of Law, separately stated in writing, NOW THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. That the plaintiff is hereby granted a Decree of Divorce from the defendant, same to become final on May 20, 1983, provided same is signed and filed with the Court prior to such date.

2. That the plaintiff is awarded the care, custody and control of the three minor children of the parties, subject to the defendant's reasonable rights of visitation at reasonable times and places.

3. That the plaintiff is awarded the sum of \$200.00 per month per child as and for child support for three minor children.

4. That the plaintiff shall retain as her personal property the household furniture and furnishings, the 1976 Volare automobile, as well as her personal belongings and effects.

5. That the defendant shall retain as his sole property the 1979 Ford Courier, the tent trailer, the motorcycle, boat, motor, all interest in defendant's IRA account, as well as his personal belongings and effects.

6. That the plaintiff shall retain the marital home and real property located at 55 South 4th West, Kaysville, Davis County, State of Utah, subject to a lien in favor of the defendant in the sum of \$12,340.00, which shall become due and payable upon the following conditions:

- a. Plaintiff should remarry, or
- b. That no other adult male lives in the home, or
- c. She should no longer use the premises as her principal place of residence, or
- d. The youngest child of the parties reaches the age of majority, or
- e. The home be sold by the parties , whichever of the above conditions should occur first.

7. That the defendant shall pay the sum of \$276.00 to United Savings & Loan as and for the house payment, until such time as any of the conditions referred to in paragraph six (6) should occur, whichever occurs first, but in no event shall defendant be required to pay more than \$276.00 per month to United Savings & Loan relative to such obligation.

8. That the plaintiff shall be entitled to retain the 1982 income tax return in the approximate sum of \$2,020.00, and a check from the Terkelson Company.

- a. Plaintiff shall pay all utilities at the home and maintain the home, building and premises in good condition and repair.

9. That the parties shall each be entitled to retain one-half the 1982 Utah State income tax refund and jointly pay taxes

10. That the defendant shall maintain health, accident and dental insurance on the minor children of the parties so long as same is available through any place of employment, and should future orthodontic expenses arise with respect to the minor children, the plaintiff and defendant shall each be responsible for one-half of all sums not paid by insurance.

11. That there presently exists a savings account in the approximate sum of \$1,190.00, which account is in the names of the parties three minor children, and the plaintiff and the defendants' names shall also be joined as a party to such account, and such account shall be used for the benefit of the three minor children upon mutual consent for its use by the plaintiff and defendant.

12. That the plaintiff waives her right to alimony, past, present or future.

13. That it is proposed for the year 1983, that the defendant shall claim two of the parties minor children for income tax purposes, and the plaintiff shall claim one minor child for income tax purposes, and such procedure being alternated every year, and it also being proposed that such tax exemption claims may be altered by the mutual agreement of the plaintiff and the defendant in any year the parties desire to alter the exemption claims.

*Wm. W. Winters & Son*  
ATTORNEYS AT LAW  
LEGAL FORUM BUILDING  
2447 KIESEL AVENUE  
OGDEN, UTAH 84401

14. That the defendant shall pay to the plaintiff the sum of \$380.00 attorney's fees and costs in this action.

DATED this 18 day of April, 1983.

BY THE COURT:

Douglas L. Cornaby  
DOUGLAS L. CORNABY,  
District Court Judge

APPROVED AS TO FORM:

Walker E. Anderson  
WALKER E. ANDERSON,  
Attorney for Defendant  
John H. Kerschner

STATE OF UTAH }  
COUNTY OF DAVIS } ss.

I THE UNDERSIGNED, CLERK OF THE DISTRICT COURT OF DAVIS COUNTY, UTAH DO HEREBY CERTIFY THAT THE ANNEXED AND FOREGOING IS A TRUE AND FULL COPY OF AN ORIGINAL DOCUMENT ON FILE IN MY OFFICE AS SUCH CLERK.

WITNESS MY HAND SEAL OF SAID OFFICE  
THIS 19 DAY April 19 83

RODNEY W. WALKER, CLERK  
BY Glenn M. Sanchez DEPUTY.

*Ward, Perkins & Ward*  
ATTORNEYS AT LAW  
LEGAL FORUM BUILDING  
2447 KIESEL AVENUE  
OGDEN, UTAH 84401

APPENDIX B

JANE ALLEN (Bar No. 45)  
Attorney for Defendant  
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Salt Lake City, Utah 84111  
Telephone: (801) 355-1300

FILED IN CLERK'S OFFICE  
DAVIS COUNTY, UTAH

1984 DEC -3 PM 3:49

MICHAEL G. ALLPHIN, CLERK  
2ND DISTRICT COURT

BY                       
DEPUTY CLERK

IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR  
DAVIS COUNTY, STATE OF UTAH

DIANA KERSCHNER, :  
 :  
Plaintiff, : ORDER ON DEFENDANT'S  
 : PETITION TO MODIFY  
vs. :  
 :  
JOHN H. KERSCHNER, : Civil No. 1-32735  
 :  
Defendant. :

This matter came on for hearing on the 3rd day of October, 1984 before the Honorable Douglas L Cornaby. The Plaintiff was present with her counsel, C. Gerald Parker, Esq. The Defendant was present with his counsel, Jane Allen, Esq. After hearing testimony and argument, the Court makes the following Order:

IT IS HEREBY ORDERED:

1. The Decree of Divorce shall be modified to eliminate paragraph 13 of the Decree, with the tax deduction of the parties in regard to the minor children to be governed by the rule of the IRS.

2. Defendant's request that he be relieved of the obligation to pay the house payment for the house presently occupied by the Plaintiff is hereby denied.

3. That paragraph 10 of the Decree of Divorce regarding the maintenance of health, accident, and dental insurance on the minor children shall remain unchanged.

4. Defendant's request that the equity in the marital residence be redetermined is hereby denied.

5. The defendant may talk to the children on the telephone without interference from the Plaintiff so long as such calls are at reasonable times and duration.

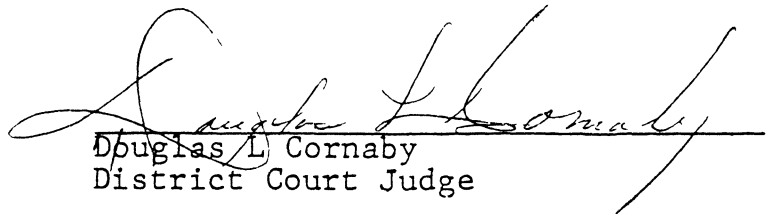
6. The parties are mutually restrained from harassing the other.

7. Each party shall bear their own attorney's fees and costs.

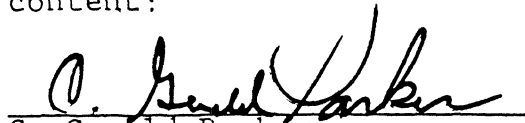
8. All other provisions of the Decree of Divorce not herein amended shall remain in full force and effect.

DATED this 3 day of December, 1984.

BY THE COURT:

  
Douglas L. Cornaby  
District Court Judge

Approved as to form and  
content:

  
C. Gerald Parker  
Attorney for Plaintiff

APPENDIX C

1     them but we submit, your Honor, that under the circumstances,  
2     it's appropriate and proper for the decree to remain as it is  
3     at the present time.

4             THE COURT:   Do you want one-minute rebuttal?

5             MS. ALLEN:   I just think it's clear, in looking at  
6     this, that at best this particular provision for ongoing pay-  
7     ments is a gray area.   It may not be alimony.

8             THE COURT:   Gray, meaning what?

9             MS. ALLEN:   Gray meaning it's not called alimony, but  
10    it's not called property settlement.   It's not called anything  
11    and because of that the Court can probably quite reasonably  
12    apply his equitable powers to see that something that is unfair  
13    does not continue for the next 10 or 12 years while he pays off  
14    the house and only get \$12,000 in equity even though he pays all  
15    the payments for all of the years on the house and since she  
16    has already been awarded her half of the equity at the time of  
17    the decree to keep it, obviously, the house was split.

18            She became quite immediately employed.   Usually alimony is  
19    just to put the spouse who did not work, who bore the children,  
20    back on her feet.   She is on her feet just fine and it seems  
21    that it's just only the fair thing to do in this case is to  
22    allow him not to have to pay this payment any more.

23            THE COURT:   Thank you.   I will talk about the house  
24    payment first.   The Court doesn't know why it's there.   It's a  
25    very unusual provision, but parties, one represented or whether



1 or not they are represented by counsel, have a right to  
2 stipulate and agree to what they want to stipulate to on their  
3 agreements and unless there's something patently unfair about  
4 it, the Court has an obligation to let them agree to what they  
5 want to agree to.

6 If that same thing had been presented to the Court without  
7 the defendant being represented by competent counsel, the Court  
8 probably would have challenged it at the time or at least made  
9 it clear to the parties as to what you are doing. Both parties  
10 were represented by competent counsel. Why in the world they  
11 chose to do what they did, certainly I don't know at this point.  
12 I may never know. Defense counsel, of course, is saying it's  
13 in the nature of alimony. It sure sounds like it, and yet, the  
14 stipulation clearly was that there is no alimony to be paid.

15 Plaintiff's counsel is saying it's obviously property  
16 settlement. This is not obvious to me that it's property  
17 settlement. What appears to the Court to be is that the  
18 plaintiff was entitled to some alimony because of the length  
19 of the time of their marriage and the defendant was adamantly  
20 refusing to pay any alimony but he was agreeing for the sake of  
21 the children to do something different, which is, I will pay the  
22 house payment. That helps the kids. It doesn't help me any but  
23 it helps my children. At the same time I will pay child support  
24 but I won't pay alimony. That sounds to the Court like what  
25 occurred but I can't say that's what occurred. The only way

1 that that can be done and mind you, I didn't hear the trial.  
2 I only heard a stipulation between the parties and so they  
3 hammered out all of the details and they handed it to the  
4 Court and I listened to it and I say, will you agree to it and  
5 they say, will you agree to it and I said, yeah, I will agree  
6 and I asked each of the parties if they will agree to it or if  
7 that's really their agreement and if they say yes then we pro-  
8 ceed on that basis and that's what occurred in this case.

9 The reporting clerk made rather detailed notes as to what  
10 was agreed on. So, as you each look at the decree to see what  
11 it says I keep watching that minute entry to see the decree  
12 matches the minute entry and the decree matches the minute entry.  
13 It does say what the minute entry says they agreed to. I don't  
14 know if the defendant had some retirement that was being offset  
15 and this is a consideration. I don't know if they had some  
16 other property that had some value that he was going to keep  
17 that this was going to offset to. I didn't know then and I  
18 don't know now and I can't jump to a conclusion that it's  
19 alimony and it should be terminated.

20 I have to say that if it were alimony there has been no  
21 showing that there is any change that would--The sheer making  
22 of \$15,100 for nine months a year is not in and of itself enough  
23 to stop alimony. The fact that the defendant remarries isn't  
24 enough by itself or with the fact of the plaintiff having a good  
25 salary. I suppose good always is in quotes because none of us

1 sitting here would call \$15,100 a good salary.

2 The Court doesn't know why the provision was put there.  
3 It's odd to put it until the youngest is 18. It makes it sound  
4 like some additional child support. It looks like it's probably  
5 in lieu of alimony and yet, agreed there is no such thing as  
6 alimony. It could be property settlement. Over a term of  
7 11 years which is the approximate period of time until that  
8 youngest child reaches 18, we are talking about \$36,000. We  
9 are talking about a very significant sum of money and yet, if  
10 the parties want to agree on it and they apparently did, at  
11 this time, it isn't like the defendant didn't know what he was  
12 doing. He may have thought about it the day after or the week  
13 after and said, boy, what did I do, but sometime approximately--  
14 well, shortly less than two months he puts his own signature to  
15 the document drawn by his attorney.

16 At least it may not have been drawn--I guess by the plain-  
17 tiff's attorney and agreed to by the defense attorney and as  
18 counsel said, very unusual because he even had the defendant  
19 sign it, which is unusual, but it tells me that he saw it and  
20 undoubtedly considered it after it was drawn, not only on  
21 strictly the day of the hearing.

22 So, I am going to hold the--unusual as it is, the terms as  
23 it is, even though it's there without any offsetting equity in  
24 the house even though it says there's no alimony. It appears  
25 to be two intelligent people agreeing and knowing what they

1 are agreeing to. Can't tell you why, but the decree was there  
2 and it will remain the same. Parties agree to let the IRS de-  
3 cide who is entitled to claim the children as deductions and  
4 that can be amended to show that.

5 With regard to visitation. Mr. Kerschner, if you cannot  
6 fulfill your visitation you have no right to ask the plaintiff  
7 to change her time with the children to match yours. Now, you  
8 can ask her, but you have no right to demand it. On the other-  
9 hand, Mrs. Kerschner, if he asks you if you agree, then you are  
10 bound by it. You cannot change. I mean, it's true it doesn't  
11 say it in the decree, but we expect parents to, when they  
12 mutually agree on something, they will be bound by it.

13 I don't know whether you agree to it or not, but if you  
14 agree to a change then you will want to live up to your word.

15 Now, with regard to the phone visitation. The children  
16 ought to have phone visitation and it ought to be without any  
17 eavesdropping from either party. I don't know if it's occurring,  
18 either. We spent very little time on it. Just say there ought  
19 to be those rights and they ought to be respected.

20 With regard to the health and accident insurance, I think  
21 we have got that cleared up. The decree says that each party  
22 will pay one-half of all medical bills not covered by insurance.  
23 It doesn't make any difference, orthodontist or if it's an office  
24 call and it's not paid by insurance. The decree says one-half,  
25 so each pay one-half. While it's anticipated that only the

# APPENDIX D

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gency has passed.<sup>5</sup> It has been observed that the overall trend has been in the direction of absoluteness rather than conditionality with increasing weight apparently being given to the presumption against intestacy.<sup>6</sup>

[3] Significantly, the testatrix did not make any alternative disposition of her property if the asserted condition precedent of the second paragraph was not fulfilled. Since she devised nothing to her husband, his death had no significant impact on her overall testamentary disposition.

"The fact that the testator made no express provision for forfeiture or gift over upon failure of the condition tends to show that he did not mean to impose a condition."<sup>7</sup>

This will, considered as a whole, shows a manifest intention of the testatrix to make an absolute will disposing of all of her property. While it may be inexpertly drawn, it is sufficiently clear that she did not intend to die intestate, if her husband did not precede her in death. If a literal interpretation of the second paragraph could be deemed to create an inconsistency with the plain intent of the testatrix as unmistakably revealed in the remainder of the will, then those words should be disregarded.<sup>8</sup> Furthermore, testatrix clearly specified her intent and purpose to disinherit her six grandchildren, who were the children of her deceased son. It would be totally inconsistent with this avowed objective to construe her will as showing an intent to die intestate if the condition precedent failed and thus the grandchildren would inherit under

the laws of intestate succession.<sup>9</sup> Such a construction would produce an absurd result, clearly contrary to the intention of the testatrix as it is ascertained from the four corners of the will.

Testatrix clearly intended her two daughters, Tess and Gloria, to be the distributees of all her property. This case is reversed and remanded to the trial court with directions to proceed with the probate of the estate in accordance with this opinion.

CROCKETT, C. J., and WILKINS and HALL, JJ., concur.

STEWART, J., dissents.



Margaret FLETCHER, Plaintiff  
and Respondent,

v.

William I. FLETCHER, Defendant  
and Appellant.

No. 16407.

Supreme Court of Utah.

July 18, 1980.

Husband appealed distribution of property and custodial arrangements for minor

5. *In re Trager's Estate*, 413 Ill. 364, 108 N.E.2d 908, 910 (1952).

6. 1 A.L.R.3d 1048, Anno: Determination Whether Will Is Absolute Or Conditional, Sec. 3, p. 1052; also see 1 Page On Wills (Bowe-Parker Revision) Sec. 9.8, p. 428.

7. 5 Page On Wills (Bowe-Parker Revision) Sec. 44.2, p. 400.

8. *Brasser v. Hutchison*, 37 Colo.App. 528, 549

9. See 4 Page On Wills (Bowe-Parker Revision) Sec. 30.17, p. 115, wherein it is stated: "If testator does not dispose of the whole of his estate by his last will and testament, and such will contains negative words of exclusion, the great majority of states hold that such negative words cannot prevent property from passing under the statutes of descent and distribution."

children in decree of divorce entered by First District Court, Cache County, Ted S. Perry, J. pro tem. The Supreme Court, Maughan, J., held that: (1) under statute governing disposition of property in divorce proceedings and rulings thereunder, equity of husband in home he purchased subsequent to wife's filing for divorce was properly considered marital asset subject to division in divorce decree; (2) evidence was sufficient to support trial court's award of alimony in sum of \$300 per month for 162 months, provided that alimony was to terminate upon either husband's death or wife's remarriage, as reasonable and appropriate sum for support and maintenance; (3) fact that father had inculcated older children with antagonistic attitudes toward mother and other evidence was sufficient to support trial court's award of custody of older children to father and of three younger children to mother; and (4) trial court did not abuse its discretion in decree requiring two-week notice to arrange visitation of children by noncustodial parent.

Affirmed.

#### 1. Divorce ⇌ 184(10)

In divorce case, even though proceedings are equitable and Supreme Court may review evidence, Supreme Court accords considerable deference to findings and judgment of trial court due to its advantageous position.

#### 2. Divorce ⇌ 184(5), 184(10)

On appeal of divorce proceeding, Supreme Court will not disturb action of trial court unless evidence clearly preponderates to contrary, or trial court has abused its discretion, or misapplied principles of law.

#### 3. Divorce ⇌ 252.2

There is no fixed formula in divorce proceedings upon which to determine division of properties; it is prerogative of court to make whatever disposition of property as it deems fair, equitable, and necessary for protection and welfare of parties.

#### 4. Divorce ⇌ 252.1, 286(8)

In division of marital property in divorce proceeding, trial judge has wide discretion, and his findings will not be disturbed unless record indicates abuse thereof.

#### 5. Divorce ⇌ 308

Court may not, under decree of divorce, unless child has incapacity or disability, order transfer of property of either parent to children for purpose of creating estate for children's permanent benefit.

#### 6. Divorce ⇌ 282

Theory urged by husband in objecting to valuation of his presently vested interest in certain retirement funds, which was not presented to trial court in divorce proceeding, had to be deemed untimely when it was first claimed on appeal.

#### 7. Divorce ⇌ 252.3(1)

Under statute governing disposition of property in divorce proceedings and rulings thereunder, equity of husband in home he purchased subsequent to wife's filing for divorce was properly considered marital asset subject to division in divorce decree. U.C.A. 1953, 30-3-5.

#### 8. Divorce ⇌ 253(3)

Marital estate is evaluated according to existing property interests at time marriage is terminated by decree of court. U.C.A. 1953, 30-3-5.

#### 9. Divorce ⇌ 253(2)

Evidence in divorce proceeding did not support conclusion that trial court abused its discretion in division of marital assets in divorce decree.

#### 10. Divorce ⇌ 286(8)

In reviewing division of marital property on appeal from divorce judgment, award of alimony should not be included as marital asset which was distributed at time of divorce.

#### 11. Divorce ⇌ 231, 240(2)

Function of alimony is to provide support for wife as needed.

dard of living she enjoyed during marriage and to prevent wife from becoming public charge; criteria considered in determining reasonable award of support include financial conditions and needs of wife, ability of wife to produce sufficient income for herself, and ability of husband to provide support.

#### 12. Divorce ⇌231

Alimony awarded in divorce proceeding, which was not sum certain but was terminable on certain contingencies, could not be deemed in nature of property settlement.

#### 13. Divorce ⇌240(3)

Evidence in divorce proceeding was sufficient to sustain trial court's finding that sum of \$300 per month for 162 months awarded for alimony, provided that alimony was to terminate upon death of husband or wife's remarriage, was reasonable and appropriate sum for support and maintenance.

#### 14. Divorce ⇌224

Supreme Court would not order that each party to divorce proceeding pay own attorney's fees where trial court had conferred more favorable adjustment of resources to husband in consideration of husband's obligation to pay attorney's fees.

#### 15. Divorce ⇌287

Since, on appeal from divorce judgment, there were number of factors to be considered in determining whether attorney's fees should be awarded appellee for defending appeal, in addition to question as to which party prevailed on appeal, case would be remanded to trial court to determine whether award of attorney's fees should be made, and if so, amount thereof.

#### 16. Divorce ⇌298(1)

Fact that father had inculcated attitudes antagonistic to mother in older children and other evidence was sufficient to support award of custody of three older children to father and three younger children to mother in divorce proceeding.

#### 17. Divorce ⇌299

Trial court did not abuse its discretion in decree requiring two-week notice to arrange visitation of children by noncustodial parent where, by reason of strong animosities generated over custody issue, requirement of rather formalized arrangements until all parties involved had time to organize their new lifestyles and gain greater insight as to their problems could not be deemed inappropriate, interim solution.

#### 18. Divorce ⇌310

Trial court did not err in awarding child support until each child to broken marriage attained age of 19 where statute conferred power on trial court in divorce action to award support to age 21, and where trial court made special findings concerning need for child support to age of 19.

---

Lyle W. Hillyard of Hillyard, Low & Anderson, Logan, for defendant and appellant

B. L. Dart of Dart & Stegall, Salt Lake City, Bruce L. Jorgensen of Olson, Hoggan & Sorenson, Logan, for plaintiff and respondent

MAUGHAN, Justice.

Defendant-husband appeals the distribution of property and custodial arrangements for the minor children in a decree of divorce. The judgment of the trial court is affirmed. Costs to plaintiff. All statutory references are to Utah Code Annotated, 1953.

The parties were married in June 1961, they are the parents of six children, who at the time the decree was entered in March 1979, were the ages of 16, 15, 14, 8, 7 and 4. Defendant was awarded custody of the three older children and plaintiff was given custody of the three younger ones.

At the time of marriage defendant had completed two years of college, and plaintiff was a graduate nurse. During the course of the marriage defendant has

earned bachelor's and master's degrees as well as taking additional classes in his specialty. At the time of trial, he was a tenured associate professor of electrical engineering at a state university, with a gross salary of \$28,426, exclusive of fringe benefits. In addition, defendant was a principal shareholder in a close corporation engaged in rendering professional services in his field. In 1978, defendant received approximately \$13,275 in wages and \$7,500 in loans from this corporation.

Plaintiff, throughout the marriage, has worked as necessary to supplement the family income, assist in funding her husband's education, or to provide a down payment on the family's real property. At the time of trial, plaintiff was employed half-time as a nurse and her net earnings per month were approximately \$613.

In the distribution of the assets, plaintiff was awarded the equity in the family home, her automobile, some of the home furnishings, and her personal belongings. The court found the value of this property to be \$31,200. Plaintiff was required to assume and discharge a mortgage in the sum of \$29,208 on the home. Plaintiff was awarded alimony in the sum of \$300 per month for a period of 162 months, with the provision the alimony would terminate on her remarriage or defendant's death. Plaintiff was further awarded child support in the amount of \$150 per month per child and \$5,000 to apply towards her attorney's fees.

Defendant was awarded assets, which the trial court found had the value of \$63,126. These assets included a parcel of unimproved land, a new home, his automobile, certain items of household furniture, his gun collection and certain other items of personal property, the current value of his equity in a retirement fund and other investments.

The trial of this case extended over a period of four days, a considerable period of this time was directed to the issue of custody of the six children. The plaintiff's evidence indicated a calculated course of con-

duct on the part of defendant to alienate the children from her and to inculcate feelings of animosity and contempt for her. Defendant denied this charge and claimed that as the marital relationship had disintegrated plaintiff had withdrawn from involvement with the family, and defendant had merely attempted to fill the vacuum so that the family could continue functioning as an integrated unit.

The trial court found plaintiff had incurred the disrespect of the children by reason of defendant's actions. Defendant had either intentionally or unwittingly involved the three older children in the custody dispute between the parties; so the children's loyalty to defendant had resulted in their rejection of plaintiff. However, neither parent was found unfit. The trial court recited its adherence to the standard of "the best interests of the child" in resolving the custodial issues. In its findings, the trial court contrasted the characters of the parties and found plaintiff a better example of honesty, morality, courtesy, and unselfishness. Defendant was found to have established better communication with the children, but plaintiff's withdrawal was attributed to the emotional distress precipitated by defendant. The trial court acknowledged and rejected the recommendation of the social worker that the children should remain together, and, because of the alienation of the older children towards their mother, the custody of the children should be given to the father. The trial court expressed the view the social worker had not considered the long range effect in making the recommendation, and the court questioned whether defendant could, in fact, devote sufficient time to six children and still meet the demands of his profession. The two younger daughters were found to be well adjusted in their present environment. Based on the foregoing factors, the older children were awarded to defendant and the younger children to plaintiff, subject to reasonable visitation rights in the non-custodial parent. However, the court provided the visitation must



be arranged by the mutual consent of the parties two weeks in advance.

[1, 2] In a divorce case, even though the proceedings are equitable and this Court may review the evidence,<sup>1</sup> this Court accords considerable deference to the findings and judgment of the trial court due to its advantageous position. On appeal this Court will not disturb the action of the trial court unless the evidence clearly preponderates to the contrary, or the trial court has abused its discretion, or misapplied principles of law.<sup>2</sup> In application of these precepts to the record herein there is no basis to interfere with the decision of the trial court.

#### DISTRIBUTION OF ASSETS

[3, 4] There is no fixed formula upon which to determine a division of properties, it is a prerogative of the court to make whatever disposition of property as it deems fair, equitable, and necessary for the protection and welfare of the parties.<sup>3</sup> In the division of marital property, the trial judge has wide discretion, and his findings will not be disturbed unless the record indicates an abuse thereof.<sup>4</sup>

Defendant contends the trial court erred in including as part of the marital assets subject to division certain investments identified as SNI funds. These funds were awarded to defendant, and the sum of \$6,000 for these investments was included in the calculation of defendant's total award. Defendant characterized these as educational funds for the three older children, and claims he should be deemed as a

mere trustee to manage the funds for his minor children.

[5] These funds were held solely in defendant's name, and he received certain tax benefits incidental thereto. He made no attempt to transfer them to the children under the uniform gifts to minors provisions of Section 75-5-601, et seq. His testimony indicated no more than an intention in the future to use the funds for the children. He retained exclusive dominion and control over them. He merely indicated he would have no objection if the court ordered him to place them in trust for the benefit of the children. A court may not, under a decree of divorce, unless a child has an incapacity or disability, order the transfer of the property of either parent to the children for the purpose of creating an estate for their permanent benefit.<sup>5</sup>

[6] Defendant further objects to the valuation of his presently vested interest in certain retirement funds. The valuation of \$16,939 as the current fair market value was presented by a witness called by defendant. There was no other evidence adduced as to value. The theory urged by defendant was not presented to the trial court and must be deemed untimely when it is first claimed on appeal.

[7, 8] Defendant contends his equity in a home he purchased subsequent to plaintiff's filing for divorce should not have been considered a marital asset subject to division. Such an argument is contrary to the specific provisions of Section 30-3-5, U.C.A., 1953, and the rulings of this court in accordance therewith. The marital estate is evaluated according to the existing prop-

1. Article VIII, Sec. 9, Constitution of Utah.

2. *Eastman v. Eastman*, Utah, 558 P.2d 514 (1976); *Watson v. Watson*, Utah, 561 P.2d 1072 (1977); *Pope v. Pope*, Utah, 589 P.2d 752 (1978).

3. *Pearson v. Pearson*, Utah, 561 P.2d 1080 (1977); *Hamilton v. Hamilton*, Utah, 562 P.2d 235 (1977); *Naylor v. Naylor*, Utah, 563 P.2d

184 (1977); *Gramme v. Gramme*, Utah, 587 P.2d 144 (1978).

4. *Jespersion v. Jespersen*, Utah, 610 P.2d 326 (1980).

5. *English v. English*, Utah, 565 P.2d 409, 412 (1977).

erty interests at the time the marriage is terminated by the decree of the court.<sup>6</sup>

Defendant argues the division of the marital property was inequitable by reason of the trial court's failure to give sufficient weight and consideration to the liabilities. During the pendency of these proceedings defendant purchased a home for \$90,000, his equity therein was found by the trial court to be \$6,500, which was awarded to him. By taking this liability and the total sum he may potentially pay as alimony, defendant calculates the net value distributed to him will be in a negative amount, while the net value awarded to plaintiff will be \$50,624. (This amount is derived by adding \$31,232 of assets awarded to plaintiff to \$48,600 alimony and subtracting the mortgage of \$29,208 on the home awarded to plaintiff.) Defendant urges a more equitable division would apportion the marital debts pro rata.

[9-11] Significantly, defendant has not specifically claimed the trial court abused its discretion in the division of the marital assets, and such a claim could not be sustained by the records. Furthermore, the award of alimony should not be included as a marital asset which was distributed at the time of divorce. As this Court observed in *English v. English*,<sup>7</sup> there is a distinction between the division of assets accumulated during marriage, which are distributed upon an equitable basis, and the post marital duty of support and maintenance. The function of alimony is to provide support for the wife as nearly as possible at the standard of living she enjoyed during marriage and to prevent the wife from becoming a public charge. Criteria considered in determining a reasonable award of support include the financial conditions and needs of the wife, the ability of the wife to produce a sufficient income for herself, and the ability of the husband to provide support.<sup>8</sup>

The trial court distributed approximately one-third of the marital assets to plaintiff and two-thirds to defendant. In its findings the trial court stated:

"The Court finds that in lieu of ordering a cash settlement with a lien on the Defendant's property to equalize the property settlement, it is reasonable to award the Plaintiff alimony in the sum of \$300.00 per month for 162 months, . . . provided, however, that said alimony is to terminate upon either Defendant's death or plaintiff's remarriage."

The Court further found such an award resulted in a lower figure than would be the case if a cash settlement for the difference were imposed to be repaid at \$300.00 per month at eight percent interest, but the Court also took into consideration the court costs and attorney's fees the defendant must pay.

[12, 13] The alimony awarded in this action cannot be deemed in the nature of a property settlement, for it is not a sum certain but is terminable on certain contingencies. The record in the case will sustain the alimony award as an appropriate sum for support and maintenance. Plaintiff introduced into evidence a budget indicating family needs. (She had excluded the costs of real property taxes and insurance because she was unfamiliar with specific amounts.) Her income was limited by part-time employment so she might give adequate care and nurturing to the three younger children, ranging in age from four to eight. Defendant had sufficient income to provide support. The record sustains trial court's finding that the sum awarded for alimony was reasonable.<sup>9</sup>

[14, 15] In continuation of his fallacious contention that there must be an equaliza-

6. *Hamilton v. Hamilton*, Utah, 562 P.2d 235 (1977); *Jespersion v. Jespersen*, Utah, 610 P.2d 326 (1980).

7. Note 5 supra, at pp. 411-412 of 565 P.2d.

8. Also see *Gramme v. Gramme*, Utah, 587 P.2d 144 (1978).

9. As explained in *Jespersion v. Jespersen*, note 6 supra, 610 P.2d 326, 328, this court is inclined to affirm a trial court's decision whenever it can be done on proper grounds, even though the trial court may have assigned an incorrect reason for its ruling.

tion of the assets, defendant argues each party should pay his own attorney's fees. This argument is without merit. As noted, ante, the trial court had conferred a more favorable adjustment of resources in consideration of defendant's obligation to pay attorney's fees. Plaintiff has urged she be awarded attorney's fees expended in defending this appeal. However, in addition to the question as to which party prevailed on appeal, there are a number of factors to be considered in determining whether attorney's fees should be awarded. Accordingly, as to that issue, this case is remanded to the trial court to determine whether an award of attorney's fees should be made, and if so, the amount thereof.<sup>10</sup>

#### CUSTODIAL ARRANGEMENT AND CHILD SUPPORT

Defendant contends it would have been in the best interest of the children to award the custody of all the children to him. As noted ante, the trial court made extensive findings of fact concerning the custody of the children and utilized as the standard in making its determination, the best interests of the children. Since the older children had exhibited such a deep antagonism towards their mother, she expressed concern about compelling them to live with her. Defendant, whom the trial court found to have intentionally or unwittingly contributed to the alienation of the older children, now urges he is the only parent capable and willing to assume the custody of the six children.

[16] The potential damage defendant has wrought by his course of conduct cannot be underestimated, and it cannot be deemed to be in the best interests of the children to grant their custody to one who has inculcated the attitudes exhibited by the older children. The record and findings

indicate plaintiff would be the superior custodial parent. The trial court faced the dilemma of compelling three teenagers against their will to live with their mother. To avoid further conflict and the potential of further exacerbating the unfortunate division in this tragic family, the custody of the older children was granted to defendant. Both the trial court and plaintiff exhibited wisdom in making this difficult choice, and there is no basis for this Court to intervene. This Court will not upset the trial court's judgment in custodial matters unless it is persuasively shown to be contrary to the best interests and welfare of the children and family.<sup>11</sup>

[17] Defendant contends the provision in the decree requiring a two-week notice to arrange visitation constituted a clear abuse of discretion by the trial court. This proviso is not engraved in stone and is subject to modification as are all custodial arrangements. By reason of the strong animosities generated over the custody issue, the requirement of rather formalized arrangements until all the parties involved have had time to organize their new life-styles and gain greater insight as to their problems, cannot be deemed an inappropriate, interim solution.

[18] Finally, defendant contends the trial court erred in awarding child support until each child attains the age of nineteen.

Section 15-2-1, confers power on the trial court in a divorce action to award support to age twenty-one. This Court has ruled the trial court must make a special finding to justify such an order.<sup>12</sup> In adherence with this standard the trial court made a special finding concerning the need for child support to the age of nineteen. Thus, defendant's claim is without merit.

CROCKETT, C. J., and HALL, WILKINS and STEWART, JJ., concur.

10. *Ehninger v. Ehninger*, Utah, 569 P.2d 1104 (1977).

11. *Cox v. Cox*, Utah, 532 P.2d 994 (1975).

12. *Harris v. Harris*, Utah, 585 P.2d 435 (1978); *Carlson v. Carlson*, Utah, 584 P.2d 864 (1978); *Ferguson v. Ferguson*, Utah, 578 P.2d 1274 (1978).

APPENDIX E

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the defendant failed to refer to any portion of the record that factually supports his contentions on appeal. This Court will assume the correctness of the judgment below if counsel on appeal does not comply with the requirements of Rule 75(p)(2)(d), Utah Rules of Civil Procedure, as to making a concise statement of facts and citation of the pages in the record where they are supported.<sup>4</sup>

The judgment is affirmed.



Mary Ruth HASLAM, Plaintiff  
and Respondent,

v.

James Vincent HASLAM, Defendant  
and Appellant.

No. 18013.

Supreme Court of Utah.

Dec. 31, 1982.

Former husband appealed from an order of the Third District Court, Salt Lake County, G. Hal Taylor, J., dismissing his motion to terminate alimony. The Supreme Court, Stewart, J., held that there was substantial change in circumstances warranting modification of the alimony award where, since the divorce, former wife had obtained employment, experienced a substantial increase in income, and accumulated some savings, while former husband had retired and received income in approximately the same amount as he received at the time of the divorce some 17 years previously.

Reversed and remanded.

1. Divorce ⇒ 164

Party seeking modification of divorce decree must demonstrate substantial change of circumstances. U.C.A. 1953, 30-3-5.

2. Divorce ⇒ 164

Change in circumstances required to justify modification of divorce decree varies with type of modification sought. U.C.A. 1953, 30-3-5.

3. Divorce ⇒ 245(2)

There was substantial change in circumstances warranting modification of alimony award where, since divorce, former wife had obtained employment, experienced substantial increase in income, and accumulated some savings, while former husband had retired and received income in approximately the same amount as he received at time of divorce some 17 years previously. U.C.A. 1953, 30-3-5.

Leland S. McCullough, Salt Lake City, for defendant and appellant.

Mary Ruth Haslam, pro se.

STEWART, Justice:

The issue in this case is whether the trial court erred in dismissing defendant's motion to terminate alimony on the ground that the defendant had failed to demonstrate a "change of circumstances" sufficient to warrant termination.

In 1945 the parties were married and subsequently had two children. In 1966 the plaintiff obtained a divorce and upon an agreement between the parties an order was entered directing the defendant to pay \$200 a month alimony plus child support. The child support has since then terminated by virtue of the children's reaching their majority. At the time of the divorce, defendant earned between \$1000 and \$1200 per month, and the plaintiff was unemployed.

In 1972, some six years after the divorce, the defendant remarried, and in 1980 he

4. *Lepasiotes v. Dinsdale*, 121 Utah 359, 242

P.2d 297 (1952).

retired. The trial court found that at the time of the hearing defendant's health and age did not permit him to work. The defendant now receives Social Security in the amount of \$532.80, pension benefits in the amount of \$618.09, and approximately \$100 from stock dividends, for a total of \$1,250.89. He receives an additional \$229 from Social Security for his present wife and \$229 for her minor child by a former husband. The household income therefore totals \$1,708.89 and expenses total \$1,607.83.

Plaintiff, subsequent to the divorce, secured a job and now earns \$1,100 per month. In addition to the \$200 alimony, she draws interest from \$12,000 in savings. She has not remarried and claims expenses in the amount of \$1,606. The trial court dismissed defendant's petition for a modification, finding that there had been no material change of circumstances.

Defendant's contention is that his income is approximately the same as it was in 1966, and the plaintiff's income has increased dramatically. He argues that it is unfair to require him to supplement the plaintiff's income when she has about the same income as he does and no dependents.

[1, 2] The district court has "continuing jurisdiction" in divorce cases "to make such subsequent changes or new orders with respect to the support and maintenance of the parties . . . as shall be reasonable and necessary." U.C.A., 1953, § 30-3-5. To provide some stability to decrees, however, and to prevent an inundation of the courts with petitions for modification, a party seeking a modification must demonstrate a substantial change of circumstances. *E.g., Adams v. Adams*, Utah, 593 P.2d 147 (1979). The change in circumstances required to justify a modification of a divorce decree varies with the type of modification sought. *Foulger v. Foulger*, Utah, 626 P.2d 412 (1981). As to cases involving a petition to change the custody of children, see *Hogge v. Hogge*, Utah, 649 P.2d 51 (1982). As to changes in the disposition of real property, see *Despain v. Despain*, Utah, 610 P.2d 1303 (1980); *Land v. Land*, Utah, 605 P.2d 1248 (1980).

With respect to modifying alimony, this Court has recently stated that "provisions in the original decree of divorce granting alimony, child support, and the like must be readily susceptible to alteration at a later date, as the needs which such provisions were designed to fill are subject to rapid and unpredictable change." *Foulger v. Foulger*, Utah, 626 P.2d 412 (1981).

[3] On the instant facts it is clear that there has been a substantial change in circumstances. Since the divorce, the former Mrs. Haslam has obtained employment, experienced a substantial increase in income and has accumulated some savings. Mr. Haslam has retired and presently receives income in approximately the same amount as he received at the time of the divorce some seventeen years ago.

Under the circumstances of this case, we think that the combination of the supporting spouse's retirement, together with the dependent spouse's employment, earning of a substantial income, and accumulation of substantial savings subsequent to the original divorce decree, constitutes a substantial change of circumstances. See *Lepis v. Lepis*, 83 N.J. 139, 416 A.2d 45 (1980), and cases cited. Therefore, defendant's petition for modification is reinstated and the case remanded so that the trial court may consider whether the alimony award should be modified as equity requires under the circumstances.

Reversed and remanded. Costs to respondent.

HALL, C.J., and OAKS, HOWE and DURHAM, JJ., concur.



Sharon Mae DAVIS, Plaintiff  
and Respondent,

v.

Charles Francis DAVIS, Defendant  
and Appellant.

No. 18077.

Supreme Court of Utah.

Sept. 22, 1982.

Husband appealed from a decree of divorce entered by the Third District Court, Salt Lake County. G. Hal Taylor, J., challenging the property division. The Supreme Court, Howe, J., held that: (1) financial arrangement on marital home, awarding husband one half of equity in property at time of trial plus one half of any increase accruing in future due to inflation but failing to provide husband any interest in increased equity in house which would result by virtue of his paying alimony designed to cover amount of second mortgage payment, was inequitable, and (2) award of one third of out-of-state property, acquired by husband prior to marriage but paid for, in part, from joint account during marriage, to wife and two-thirds to husband was within ambit of trial court's discretion.

Remanded.

#### 1. Divorce $\Rightarrow$ 252.5(1)

Divorce decree's financial arrangement on marital home, which awarded husband one half of equity in property at time of trial plus one half of any increase accruing in future due to inflation but failed to provide him any interest in increased equity in house which would result by virtue of his paying alimony designed to cover amount of second mortgage payment, was inequitable where, when amount of life insurance premiums and interest on second mortgage balance were added to mortgage balance, husband would be required to make postdecree payments totalling amount nearly double equity awarded him, all proceeds of second mortgage loan went into improve-

ment of house, and husband had no right to possession.

#### 2. Divorce $\Rightarrow$ 252.3(3)

Divorce award of one third of out-of-state property, acquired by husband prior to marriage but paid for, in part, from joint account during marriage, to wife and two-thirds to husband was within ambit of trial court's discretion, notwithstanding that three fourths of purchase price was paid prior to marriage.

Henry S. Nygaard, Salt Lake City, for defendant and appellant.

Paul H. Liapis, Salt Lake City, for plaintiff and respondent.

HOWE, Justice:

This is an appeal by the defendant Charles Francis Davis from a decree of divorce entered in an action brought against him by his wife, Sharon Mae Davis, plaintiff. He challenges the division of property made by the trial court.

The parties were married on March 5, 1974. Both had been previously married. Plaintiff gave up a \$150 per month alimony award from her previous divorce when she married the defendant. The plaintiff had three children by her first marriage and she, the children and the defendant lived together in a house which she owned at the time of her marriage to the defendant. The plaintiff was employed during the last two years of the marriage and at the time of trial was earning \$687 net per month. She also received child support from her former husband.

No children were born to the parties. During the six years they lived together they expended substantial amounts of money to improve the house. The defendant paid the plaintiff's former husband \$1,300 to satisfy a lien he held on the property. Although the plaintiff disputed it, he claimed that he further invested in it money which he had received as an inheritance from his mother's estate, as well as money he received from a personal injury settle-

ment. There is no dispute that shortly before the separation of the parties they obtained a second mortgage loan to remodel part of the house and to make an addition of 450 square feet. The balance on that mortgage at the time of trial was \$15,876.27. The monthly payments were \$345.

Prior to their marriage, the defendant in 1967 purchased under contract four one-half acre lots in New Mexico for \$6,200. Three-fourths of that price was paid prior to the marriage in 1974 and the balance of the contract was paid from their joint account during the marriage.

The trial court apparently concluded from the evidence that the equity of the parties in the house had increased \$23,000 during the marriage. It awarded the defendant one-half of that equity (\$11,500) plus one-half of any increase which may accrue in the future due to inflation and made that award payable when the plaintiff remarried, sold the property or her youngest child attained the age of 18 years. The court further ordered the defendant to pay to the plaintiff \$420 per month alimony until such time as the second mortgage had been paid in full, and ordered that he maintain sufficient insurance on his life to insure payment of the mortgage balance in the event of his death. An order was made that the parties sell the New Mexico lots and divide the proceeds between them as follows: One-third to plaintiff and two-thirds to defendant.

The defendant's main contention is that it was inequitable for the trial court to deny him any interest in the increased equity in the house which will result by virtue of his paying alimony designed to cover the amount of the second mortgage payment. Defendant refers us to the Conclusions of Law in which the trial judge took the monthly payment on the second mortgage of \$345 and added to it \$75 for the general support of the plaintiff, and then ordered the defendant to pay a total of \$420 each month to her, terming it alimony.

[1] We agree that this financial arrangement on the house was inequitable. The trial court properly awarded the de-

fendant one-half of the equity in the property at the time of trial plus one-half of any increase accruing in the future due to inflation. It wisely provided that such equity should not be payable to the defendant until plaintiff should remarry, sell the property, or until her youngest child attained the age of 18 years. This provision assured the plaintiff and her children a place to live. But after having done that, the trial court upset the equity of that division by requiring the defendant to make a further substantial investment in the property without any corresponding benefit to him. When the amount of the life insurance premiums and the interest on the second mortgage balance are added to the mortgage balance, the defendant will be required to make post decree payments totalling an amount nearly double the equity awarded to him. This was unfair to him and weighted the division of the property heavily in the plaintiff's favor. Fairness dictates that he should realize something out of the increased equity which will result from his providing the funds to retire the second mortgage. The unfairness is evident when it is considered that all the proceeds of the second mortgage loan went into the improvement of the house. Also, he has no right to possession. It should also be noted that he was ordered to pay approximately \$9,000 of debts and \$1,000 attorney's fees for his wife. The decree should be amended to allow the defendant's participation to the extent of one-half in the increased equity brought about by the reduction of or retirement of the second mortgage.

[2] We find no error in the division of the New Mexico property. Although it was contracted for and partially paid for prior to the marriage, a substantial number of the monthly payments were made after the marriage. We find it to be within the ambit of discretion of the trial court to award the plaintiff one-third of that property and two-thirds to the defendant.

Remanded to the trial court to amend the decree in conformance with this opinion. Each party to bear his or her own costs.

HALL, C.J., and STEWART, OAKS and DURHAM, JJ., concur.