

1988

# Mark O. Van Wagoner v. Carol Van Wagoner : Brief of Appellant

Utah Court of Appeals

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## Recommended Citation

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BRIEF

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IN THE UTAH COURT OF APPEALS

MARK O. VAN WAGONER, :  
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 Defendant-Appellant, :  
 : Case No. 880152-CA  
 vs. :  
 : Priority No. 14(b)  
 CAROL VAN WAGONER, :  
 :  
 Plaintiff-Respondent, :

BRIEF OF APPELLANT MARK O. VAN WAGONER

ON APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT  
OF SALT LAKE COUNTY  
HONORABLE RICHARD H. MOFFAT

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Utah Court

IN THE UTAH COURT OF APPEALS

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### PARTIES

The caption of the case on the cover shows all of the parties.

### JURISDICTION

This Court has jurisdiction by virtue of Sec. 78-2A-3(h), Utah Code Annotated 1953, as amended.

### NATURE OF PROCEEDINGS

The Third Judicial District Court, Judge Richard H. Moffat, entered a decree of divorce (R. 113), which would be final and absolute July 23, 1986, but reserving the issues regarding the division of property, alimony, child support, etc., for later determination. On February 3, 1988, Judge Moffat entered a Supplemental Decree awarding the Respondent (plaintiff below) alimony for an indeterminate period.

### STATEMENT OF ISSUES

The Appellant (defendant below) contends that under the facts of this case the Court erred in awarding permanent alimony. That is the sole issue on appeal.

### DETERMINATIVE CONSTITUTIONAL PROVISIONS OR STATUTES

There are no determinative constitutional provisions or statutes involved.

### STATEMENT OF THE CASE

#### A. NATURE OF THE CASE

This is an appeal from the Supplemental Decree of Divorce, entered by the trial court under date of February 3, 1988 (R. 452) awarding Respondent permanent alimony. Appellant appeals,

contending that based on the facts in the record, it was an error to make the alimony permanent.

#### B. COURSE OF PROCEDURE

The case was bifurcated for trial. The court entered a final decree of divorce, effective the 23rd day of July, 1986 (R. 113). Thereafter, on the 15th day of April, 1987, a trial was held on the other issues (R. 256). The trial court rendered its Memorandum Decision on May 27, 1987 (R. 334); Findings of Fact were initially entered on June 29, 1987 (R. 360) but objections were filed thereto (R. 375) and new Findings of Fact, Conclusions of Law and a Supplemental Decree of Divorce were entered February 3, 1988 (R. 452-469).

#### C. DISPOSITION AT THE TRIAL COURT

The trial court in its Supplemental Decree of Divorce awarded permanent alimony in the following language:

14. Defendant is ordered to pay to plaintiff as alimony the sum of \$1,050 per month commencing with the month of July, 1987, for a period of one year, at which time alimony shall reduce to \$800 per month for a period of one year, at which time it shall reduce to \$650 per month. Plaintiff's entitlement to alimony shall continue until such time as plaintiff should remarry, cohabit or die or defendant should die, whichever event occurs first, but to be subject to modification pursuant to applicable Utah law.

#### D. RECORD ON APPEAL

Unfortunately there is no trial transcript, because the court reporter's notes have been lost. The parties, therefore, proceeded under this Court's Rule 11(g) and stipulated to the major facts (R. 616). That stipulation (which is set forth next below) was approved by the trial court on March 31, 1989 (R. 615). In addition to the facts set forth in the stipulation, the

parties stipulated that the depositions of the parties could be published and transmitted as a part of the record on appeal (R. 620) and, of course, the pleadings and memoranda filed by the parties are before the court. The stipulation of facts is as follows (R. 616):

#### STATEMENT OF FACTS

1. Plaintiff/Respondent was born in Seattle, Washington, on June 13, 1947; the Defendant/Appellant was born in Utah on March 16, 1947. Both have been and now are in good health.

2. The parties were married on the 9th day of September, 1970. Three children have been born as issue of that marriage; namely: Erin Van Wagoner, born March 19, 1975; Gavin Van Wagoner, born January 25, 1978; Morgan Van Wagoner, born January 22, 1981.

3. In the Spring of 1969 while Respondent was attending Brigham Young University, she applied and was accepted for training as a stewardess for Pan American Airlines. It was the intent of Respondent prior to meeting the Appellant to become a stewardess. While waiting for Pan American training school to begin in September, she met the Appellant. A romantic relationship developed and the parties through discussions agreed that the Respondent should change her plans and remain in Provo. She did so, rescheduling the Pan American training school in Florida to the Summer of 1970. Thereafter through the fall of 1970 and the spring of 1971 Respondent enrolled in a three-semester program at the

Brigham Young University, which was necessary for a teaching certificate. Such a certificate was obtained after the parties moved to North Carolina, and Respondent was certified to teach school in Utah and North Carolina. Respondent has not maintained the certificate and would need to be recertified if she were to teach. She has, however, completed four to five hours of the nine hours required for recertification.

4. Immediately before her marriage to the Appellant, Respondent was working part-time as a waitress at Sambo's Restaurant in Provo, Utah. The parties were engaged in 1970 and the Respondent quit her job at Sambo's to begin the aforementioned three-semester program at BYU needed to obtain her Utah teaching certificate.

5. Appellant completed work for an undergraduate degree in history at the BYU. While attending school, he worked part-time as a teaching assistant in the History Department and part-time as a fry cook. The summer immediately before the marriage Appellant worked full-time as a fry cook and Respondent worked full-time as a hostess at a local restaurant. Appellant was accepted in the Fall of 1970 to study law at Duke University.

6. In the summer of 1971 Appellant and Respondent travelled to Durham, North Carolina, where the Appellant began law school studies and Respondent began teaching. Between the fall of 1971 and the spring of 1974 Respondent taught elementary school in the Orange and Durham County

school districts in North Carolina. She worked full-time as a teacher while Appellant was in law school.

7. Appellant's law school expense was paid for by a combination of scholarship money from Duke University and gifts from his parents.

8. After Appellant graduated from law school the parties moved to Salt Lake City, where he was employed by a local law firm. From this point forward Appellant began to provide almost 100% of the marital income.

9. In 1977 Appellant accepted employment with a Los Angeles law firm, O'Melveny & Myers and the parties moved to Los Angeles. The work assignment from that law firm enabled the parties to travel rather extensively, at the law firm's expense, to San Francisco, and an extended trip to Europe.

10. In 1980 Appellant changed his employment by quitting his position in Los Angeles and taking a position with a law firm in Salt Lake City, Utah. The parties again, following plaintiff's employment, moved from Los Angeles to Salt Lake City, where they purchased a large home near the Salt Lake Country Club. From 1980 to the filing of this action for divorce Appellant worked as a lawyer and Respondent remained in the home caring for the parties' three children. During this period they purchased many items of furniture and three new automobiles. They also were able to continue to travel extensively.

11. After their return to Salt Lake City in 1980 Respondent became involved in a number of volunteer

projects, including serving as president of the local PTA, became a member of a book club and performed in a number of regular church assignments.

12. The parties separated in June of 1985.

13. In 1986, after the parties separated, Respondent began working part-time at the Salt Lake Tribune. She was working on an average of three days a week on an 8 hours a day basis and was paid \$8 an hour. Her gross annual income from this was \$9,984.

14. There was testimony from a qualified witness that Respondent had favorable and immediate employment prospects as a teacher, and would be capable of making a minimum of \$16,000 per year over a nine-month period. Appellant has chosen not to seek employment as a teacher and as a matter of personal choice has chosen her current work at the Salt Lake Tribune and to pursue a career in newspapers.

15. Respondent's work at the Tribune is in the Promotions Department, and includes responding to teacher requests to visit classrooms as one method of teaching the teachers how to use the newspapers as a teaching tool in the classroom. Respondent also from time to time works as a substitute teacher. She worked in this capacity a total of about 15 days in the last half of 1986.

16. Respondent started her work with the Tribune in October of 1986. She is paid around \$40 per day and works part-time.

17. The parties stipulate that the deposition of Appellant and the deposition of Respondent may be published and transmitted together with the exhibits as a part of the record.

18. David Dorton, a valuation expert, testified concerning the value of the law degree earned by Mark Van Wagoner during the marriage. His testimony, which was recapped in Exhibit P-23, was that the present value of Mark Van Wagoner's law degree was the sum of \$343,200. If it were tax adjusted, it would reduce the value to a present value of \$247,100.

We next note the Respondent's deposition:

Respondent's deposition was taken January 6, 1987. She testified as follows:

She attended B.Y.U. from 1965 to 1969 and obtained a B.A. degree in Humanities (Depos. p. 5). She taught school in North Carolina while Appellant attended law school (Depos. p. 6). She dropped her teaching certificate in 1985 or 1986 and needed to be recertificated (Depos. p.6). She has taken four or five hours of the required nine hours for recertification (Depos. p. 7).

She worked sporadically after the marriage (Depos. p. 8). In the Spring of 1985 she worked as a teacher approximately 30 to 34 days. After the parties separated in June 1985, however, she made no attempt to find work. In refusing her request for more temporary alimony in August of 1986, the trial court cautioned the Respondent that the existing financial status of the parties

was such that she should exercise efforts to obtain gainful employment. (See Order filed, but unsigned, R. 165, ¶7.) Accordingly, she started at the Salt Lake Tribune in October of 1986 (Depos. p. 6), where she took a part-time job that paid \$9,984 per year.

Next we refer to the Court's Memorandum Decision (P. 334) where the trial court stated:

"It is the view of the Court that the parties, even prior to their separation, were living at a financial level that could not be sustained. If that is a fact, it is even more obvious that having separated, they cannot continue to each be sustained at the same level that existed before. . . ."

#### SUMMARY OF ARGUMENT

Appellant asserts that the trial court erred in awarding permanent alimony. Respondent is a college graduate and has completed sufficient additional college work to obtain her teacher's certificate. The trial court expressly found (P. 447) that Respondent is a healthy, able bodied person, capable of gainful employment. At a minimum, she had favorable and immediate employment prospects as a teacher and would be capable of making a minimum of \$16,000 per year over a nine-month period. As she has demonstrated, permanent alimony award permits her the luxury of working only part-time throughout the lifetime of the parties. The court's award does not encourage her to become independent or to further her education, as she once represented to the court she intended to do (see Appendix B). To the contrary, she has elected to take a part-time job with the Salt Lake Tribune.

During their marriage, she fully shared in Appellant's earnings. The property accumulated by them has been equitably divided. The fact that at the time of the divorce they were living beyond their means should not be justification for a permanent subsidy to her. She is capable of supporting herself and after a reasonable adjustment period the alimony should have been terminated.

#### ARGUMENT

##### I. UTAH LAW PROVIDES PERMANENT ALIMONY ONLY UNDER CERTAIN CIRCUMSTANCES.

###### A. This is Not a Case of Equitable Restoration.

The most permanent of alimony is an award of the future earnings of the spouse. The Respondent sought such an award by asking for an interest in the Appellant's law degree. The court rightly rejected that argument. It is clear under the Utah cases that a professional degree is not property. See Petersen v. Petersen, 737 P.2d 237 (Utah App. 1987); and Gardner v. Gardner, 748 P.2d 1076 (Utah 1988). On the other hand, this court has held that where the wife sacrificed current income to help the husband advance his education and was then abandoned, without sharing his increased income, the court can provide rehabilitative alimony. See Martinez v. Martinez, 754 P.2d 69 (Utah App. 1988).

In Martinez, the husband left a full-time job to return to school. He later decided to stay in school and apply to medical school. Medical school was seen by the wife as a threat to the marriage because of the four years of unemployment and the husband's absence from the family. She agreed to the hardship

with the assurance that some day he would make it up to her; that they would have greater assets and income. He graduated in 1981. Two years later she filed for divorce. The court later awarded her alimony for a period of five years. On appeal, the award was made permanent for two reasons. First, that the wife had very limited education (high school) and work experience; second, because she had not participated in sharing the income increased by her sacrifices to send her husband to medical school.

In its decision the court cited to the Petersen case, supra, where Judge Orme recognized that a case might arise whereby one spouse was reaching a high level of income just at the time of the divorce, rather than the more frequent situation where the parties had enjoyed the benefits of the husband's medical education for a number of years.

The court then cited with approval a Colorado case, In re Marriage of Graham, 194 Colo. 429, 574 P.2d 75 (1978), which the court said typified the recurring issue:

. . . where divorce occurs shortly after the professional degree is obtained, traditional alimony analysis would often work hardship, because while both spouses had modest incomes at the time of the divorce, the one is on the [threshold] of a significant increase in earnings. Moreover, the spouse who sacrificed so that the other could obtain a degree is precluded from enjoying the anticipated dividends the degree will ordinarily provide. . . . In such cases alimony analysis must become more creative to achieve fairness, and an award of "rehabilitative" or "reimbursement" alimony, not terminable upon remarriage, may be appropriate.

The court next noted on page 77 that in the Martinez case there had been little property accumulated and because the higher income level would reasonably be reached after the divorce, plaintiff was entitled to a more permanent remedy. To support

that idea, the Court next cited Saint-Pierre v. Saint-Pierre, 357 N.W. 2d 250 (S.D. 1984), in which the Supreme Court of South Dakota held:

. . . "in a proper case," the trial court should consider "all relevant factors" in awarding "reimbursement or rehabilitative alimony." These included "the amount of the supporting spouse's contributions, his or her foregone opportunities to enhance or improve professional or vocational skills, and the duration of the marriage following completion of the nonsupporting spouse's professional education." Id. at 262

The Court also borrowed reasoning from some Wisconsin statutes which permit their trial courts to grant an order requiring maintenance payments to either party after considering several factors, among which are:

(4) The educational life of each party at the time of the marriage, and at the time the action is commenced.

(5) The earning capacity of the party seeking maintenance, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to find appropriate employment.

(6) The feasibility that the party seeking maintenance can become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage, and, if so, the length of time necessary to achieve this goal.

The Utah court then in Footnote 10 to its opinion said:

We emphasize the specific nature of the facts presented in this case and stress that equitable restitution would not be awarded in the more frequent case where the marriage lasted for many years after the professional degree had been granted. There, sufficient assets would have been accumulated and an appropriate distribution to the requesting spouse would enable that spouse to share in the economic benefits earned as a result of the degree.

While the Court is talking about a special remedy of equitable restitution, the context in which the discussion occurs

clearly indicates that these are the criteria to be considered in awarding alimony and in establishing its duration.

In a dissenting opinion, Judge Jackson observed that in Petersen v. Petersen, supra, the Utah Court of Appeals had held that an advance degree is not marital property, subject to division upon divorce, but acknowledged that there may be situations where equity demands an extraordinary award of alimony in order to compensate a spouse who endures substantial financial sacrifices or defers her own education to help the other spouse in obtaining an advance degree. He cites Rayburn v. Rayburn, 738 P.2d 238, 241 (Utah App. 1987) holding that:

. . . This might occur where: (a) the parties mutually endeavor to increase one spouse's earning capacity, but at the time of trial the spouse who has benefitted from the parties' endeavors is merely on the threshold of a substantial increase in earnings, Petersen, 737 2d at 242 n.4; or (b) there is insufficient marital property from which to make a compensatory award to the contributing spouse. [citing Gardner v. Gardner, 748 P.2d 1076, 1081 (Utah 1988)]

Judge Jackson then noted:

In such cases, the spouse who has made substantial financial sacrifices and contributions to increase the earning capacity of the other spouse is entitled to recompense for those contributions that are beyond the duty of support normally associated with marriage, less any benefits received. [citing cases from Wisconsin and New Jersey]

B. The Factors Permitting Permanent Alimony are Missing In This Case.

Apparently no Utah case has reversed a trial court's award of permanent alimony. In those several cases where the trial awards have been made permanent, the Court has detailed the factors to be considered in explaining why permanent alimony should have been awarded. These cases highlight extreme situations like a wife who was approaching normal retirement age, or

was in poor health. In those cases she lacked the training, or health, necessary to permit her to enter the job market and earn anything but a meager salary. In other cases, like Martinez, the wife had made substantial sacrifices to enable the husband to earn a graduate degree in medicine or in law. She had "stuck by him" with the express promise of participating in the increased earnings, but they divorced and she would not otherwise have participated in the promised higher earnings.

These decisions do not hold, nor even suggest, that in all cases alimony should be permanent. Rather, by negative implication they suggest that where, as here, the wife did not make substantial sacrifices to enable the husband to complete his graduate work; where the marriage endured for a substantial period of years after the husband entered the practice of his profession; where the wife enjoyed the benefits of his higher earnings; where the parties had accumulated property which was equitably divided at the divorce; and where the wife had the necessary training and skills so that she can enter the job market and support herself, alimony should end at some fixed future date.

This case should be controlled by Rayburn v. Rayburn, 738 P.2d 238 (Utah App. 1987). Significantly, the decision in this case was not available at the time of the trial. There, the trial court had found that the husband's medical degree was a marital asset and had ordered Dr. Rayburn to pay Mrs. Rayburn her share of the asset, \$45,000, at \$750 a month "to maintain her life style for a period of adjustment". The initial trial court

decision awarded Dr. Rayburn all of his retirement fund, but two weeks later the trial court altered its decision on the retirement plan and ordered Dr. Rayburn to pay one-half of the net present value of the retirement plan (\$56,850) to Mrs. Rayburn in five annual installments of \$11,370, plus interest. The decree awarded no alimony.

The Court of Appeals, citing Petersen v. Petersen, 737 P.2d 237, reversed the trial court and reaffirmed its holding that an advanced degree is not marital property, but may be considered as a factor in alimony analysis. The Court, however, found that permanent alimony was inequitable for Mrs. Rayburn. Mrs. Rayburn had a post graduate degree; she had worked during Dr. Rayburn's internship and some of his residency, "but upon the birth of their first child, she stopped working full-time and worked only occasionally and on a part-time basis, throughout the rest of the marriage." (738 P.2d at 239)

In awarding alimony for five years, the Court noted that while Mrs. Rayburn was unemployed, "she had been employed and was well-educated". (738 P.2d at 241). The monthly payments were necessary to maintain her life style "for a period of adjustment". The Court based the five-year limit on the time it would take her to complete additional education and "until the parties' youngest child was in school all day." (738 P.2d at 241)

In this decision the Court noted:

We acknowledge that there will be situations where an award of non-terminable rehabilitative or reimbursement alimony would be appropriate . . . . However, this not such a case. Although Mrs. Rayburn worked periodically during the marriage, she did not endure substantial financial sacrifices or defer her own education to help him obtain the degree.

In addition, Mrs. Rayburn shared the financial rewards permitted by her husband's advanced degree for several years. Those rewards also resulted in the accumulation of considerable real and personal property during their marriage, which was equitably divided upon their divorce. The award of temporary alimony, at \$750 per month for a maximum of five years, adequately meets Mrs. Rayburn's support needs and is readily sustainable under the criteria outlined in Jones.

The reasoning of Rayburn fits the facts of this case. As in Rayburn, the Respondent is well-educated. She has worked before and during the marriage. The youngest child is now in school all day. Moreover, the Respondent endured no substantial financial sacrifices, nor did she defer her own education to help the Appellant obtain his law degree. Also, like Rayburn, the Respondent here has shared in the financial rewards permitted by the Appellant's education. Those rewards here -- as in Rayburn -- resulted in the accumulation of considerable marital property which the Appendix A hereto shows was equitably divided.

In Rayburn the court awarded temporary alimony of \$750 per month for a maximum of five years, which, said the court, "adequately meets Mrs. Rayburn's support needs". According to the Court, that award "is readily sustainable". The Rayburn case dictates that the same criteria be applied to the facts of this case. This would require a reversal of the award of permanent alimony.

Other cases direct the same result. In Jones v. Jones, 700 P.2d 1072 (Utah 1985), the Supreme Court reversed the trial court which had awarded monthly alimony for five years at \$1,000, \$750 for five additional years, and \$500 thereafter. At page 1075 the

court noted that three factors must be considered in fixing a reasonable alimony award:

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

In addressing the second factor -- the wife's ability to produce a sufficient income for herself, the court noted:

. . . She was married at the age of 23 and was 52 years old at the time of trial. The paid work she did in the early years of the marriage and the miscellaneous functions she performed at the pharmacy and gift shop were all relatively unskilled in nature. . . . She has no professional training and few marketable skills. . . . The wife has no independent income. It is entirely unrealistic to assume that a woman in her mid-50's with no substantial work experience or training will be able to enter the job market and support herself in anything even resembling the style in which the couple had been living.

In Olson v. Olson, 704 P.2d 564 (Utah 1985), the Supreme Court gave a permanent award, in part because the wife:

. . . had no reasonable expectation of obtaining employment that would enable her to support herself at a standard of living even approaching that which she had during marriage.

She had only worked at minor clerical jobs for two brief periods over 20 years apart. The Supreme Court concluded that the trial court's alimony award was inequitable and remanded the case for further findings consistent with the opinion.

In Rasband v. Rasband, 752 P.2d 1331 (Utah App. 1988), the trial court's order automatically decreased monthly alimony. The parties had been married thirty years and were "nearing fifty years of age". She had no income. The trial court made only one conclusionary finding to the effect that the wife was "capable of meaningful employment in the future". In reversing, the Court of Appeals noted that:

. . .She had no earnings in the year before trial; she has only a high school education and average job skills to market. Her ability to work is impaired by the disability of their adult daughter. She will have difficulty finding and retaining a full-time job. If employed, her earnings would undoubtedly be meager for a long period, given her lack of education, training or work experience. (p. 1334)

Each of these cases shows that permanent alimony is justified only where there are unusual economic circumstances like poor health, disabled children, advanced age, poor skills, or weak education. None of those things affects this case.

## II. APPLICATION OF THE COURT'S CRITERIA TO THIS CASE PRECLUDES AN AWARD OF PERMANENT ALIMONY.

### A. Respondent is Well Educated, in Good Health, and has Deliberately Taken a Part-Time, Low-Paying Job.

The Court's decisions suggest that an award of permanent alimony is proper where there are exigent circumstances such as advanced age or ill health. Those same decisions conversely suggest that without those circumstances permanent alimony is improper.

The trial court expressly found that Respondent was a healthy, able-bodied person, capable of gainful employment (R. 447). Respondent, as a matter of personal choice, is currently employed only three days a week at the Salt Lake Tribune, earning only \$800 a month (R. 447). Like Mrs. Rayburn, Respondent has a college degree and she also has had sufficient post-graduate education to qualify for a teacher's certificate in Utah and North Carolina (Stip. of Facts ¶5). She taught full time for three years while Appellant was in law school (Stip. of Facts ¶6) and as a substitute teacher thereafter (Resp. depos. p. 11). She has favorable and immediate employment prospects as a teacher and

would be capable of making a minimum of \$16,000 a year over only a nine-month period. This uneconomic choice is one made possible by the alimony award. Her teaching certificate has lapsed, but she has completed four or five hours out of the nine hours required for recertification (Stip. of Facts ¶3 & and Resp. depos. p.6). She operated a silk flower business through her home (Respondent's Depos. pp. 28-30). When the trial court suggested that Respondent seek employment (R. 334), her response was a part-time job with the Salt Lake Tribune. She has stayed in that job.

B. Respondent Made no Sacrifice to Appellant's Education. She Shared Greatly in the Benefits of his Work.

There is not in this case evidence of any unusual sacrifice on the part of the wife so that the husband could get a professional degree. She did not remain uneducated and untrained. At the time of the marriage Respondent had already completed the work for her Bachelor's degree from the Brigham Young University (Respondent's Depos. p.5). After their marriage on September 9, 1970, both parties enrolled in school and both worked (Respondent's Depos. pp. 6-7). Appellant completed the work necessary for his Bachelor's degree and Respondent completed two of the three semesters of work needed for a teacher's certificate (Respondent's Depos. p.6). Appellant received a scholarship to Duke University Law School and with that scholarship and gifts from his parents paid for the tuition and expenses of the law degree (Stip. of Facts ¶7). She taught school during the three years he was in law school and contributed to their basic living expenses (Respondent's Depos. ¶6). Upon the completion of law

school he immediately obtained employment. She discontinued work outside the home and they started raising their family (Stip. of Facts ¶8).

Thus, this is not a case where the wife worked to pay for the husband's degree and then early on -- at the threshold of his higher earnings -- the parties divorced. The parties here were married nearly sixteen years. They both completed their education. From the beginning the Respondent shared in the benefits resulting from Appellant's higher earnings. They traveled extensively, including an extended trip to Europe (Stip. of Facts ¶¶9,10). They acquired property and shared therein through the division made by the court. (See Appendix A hereto) They separated in June of 1985, but liberal provisions were made for her support by a temporary order (R. 28). The divorce became effective July 23, 1986 (R. 114), but the alimony issues were not settled at that time and the temporary order which gave her \$2,864. per month for herself and the children continued. The Supplemental Decree of Divorce was entered February 3, 1988 (R. 469), so that there really was provision thus made for approximately eighteen months before the Supplemental Decree of Divorce was entered and alimony was awarded. Then the court awarded her \$1,500 per month for the children, \$1,050 per month alimony for herself and ordered Appellant to pay the Respondent's attorney fees in the amount of \$17,246.23. The alimony was to decrease to \$800 per month the next year and to \$650 per month thereafter until the Respondent remarries or cohabits, or until one of the parties dies (R. 467,468).

Under these facts, and following the Court's prior decisions, she should not be given a lien on his future earnings for the rest of their lives. She is not a woman hopelessly dependent on Appellant until she finds another husband. She should be encouraged to be independent and self-reliant. After a reasonable adjustment period of five years, the alimony ought to be terminated. Indeed, in her proposed settlement filed with the trial court, Respondent contemplated alimony "for a period five years or until [she] completes anticipated advanced degree education" (R. 93). (This is also included herein as Appendix B.) With the temporary order and the supplemental decree Respondent has already had fairly liberal support since November 27, 1985 (R. 30). Where a wife is educated, competent, skilled and healthy, it is unreasonable and unnecessary to give her a lien on her former husband's earnings for the rest of their lives. Such an award is a great disincentive to find independence through education or career advancement; it is an invitation to be dependent and unproductive.

Even if she resumed her career as a teacher and increased her income to \$16,000 or more per year for nine months of work, under current decisions that would likely not be the kind of change of circumstances which would permit modification. In this regard see Felt v. Felt, 27 Utah 2d 103, 493 P.2d 620 (1972), where the Utah Supreme Court dealt with this issue. Under that holding, the Appellant may never be relieved of the alimony obligation if Respondent elects not to remarry. The children are now of an age where work outside the home is practicable. In

four years the oldest child will be of legal age (Stip. of Facts ¶2). In ten years all three of them will be.

A more reasonable and economic approach was taken in Oregon in Hinrichs v. Hinrichs, 588 P.2d 130 (Or.App. 1978). There the court held that spousal support for five years should be adequate to permit the wife to obtain additional training necessary to accomplish readjustment and to gain employment. Thus, a decree for permanent spousal support was modified to terminate five years from the date of the decree dissolving the marriage. The property division involved placing value on the husband's interest in his business, including its income potential, and then balancing the disparity in division by awarding permanent alimony to the wife. The court held that it is not the policy of the law to give the wife "a perpetual lien against her former husband's future income." (p. 131). See also Higley v. Higley, 676 P.2d 379 (Utah App. 1983), p. 383.

#### CONCLUSION

We respectfully urge the court to place a reasonable expiration date on the alimony award. Respondent has already had liberal support under a temporary support order and the Supplemental Decree of Divorce. Specifically, she was awarded \$2,864 per month for child support and alimony during the pendency of the divorce. The divorce was granted effective July 23, 1986, but alimony was not fixed at that time and the temporary award continued. The court did not enter its Supplemental Decree of Divorce awarding alimony until February 3, 1988. That decree ordered the Appellant to pay to Respondent alimony in the sum of

\$1,050 per month commencing with the month of July, 1987, for a period of one year, at which time the alimony was reduced to \$800 per month for a period of one year, and then was reduced to \$650 per month. The trial court ordered that Respondent's alimony entitlement shall continue until such time as the Respondent shall remarry, co-habit, or die, or the Appellant should die, whichever event occurs first.

The trial court found that Respondent is able bodied and employable. She is working now and earning approximately \$9,984 per year. She has a college education qualifying her for a teacher's certificate. She shared in Appellant's higher earnings from the time he got out of college until the divorce -- a period of 16 years -- and she shared in the marital assets through a liberal division of the joint property. Under the facts of this case Respondent should not be awarded a lifetime lien on the Appellant's earnings.

We respectfully submit that the alimony should terminate five years after July 1, 1987.

Dated this 16 day of May, 1989.

Respectfully submitted,

EDWARD W. CLYDE  
CRAIG W. ANDERSON

By Edward W. Clyde  
Attorneys for Appellant yc

I hereby certify that I caused a copy of the foregoing to be mailed, postage prepaid to Respondent's Attorney, B. L. Dart, Suite 1330, 310 South Main Street, Salt Lake City, Utah, this 17 day of May, 1989.

Richard W. C. J.

FEB 3 1988

B.L. DART (818)  
Attorney for Plaintiff  
310 South Main Street  
Suite 1330  
Salt Lake City, Utah 84101  
Telephone: (801) 521-6383



H. Dixon Hindley, Clerk 3rd Dist Court  
By R. G. G. G. G. Deputy Clerk

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

CAROL VAN WAGONER,  
Plaintiff,

v.

MARK O. VAN WAGONER,  
Defendant,

:

:

:

:

:

SUPPLEMENTAL  
DECREE OF DIVORCE

Civil No. D85-3792

Judge Moffat

209/1999

The above-entitled matter came on regularly for trial on the remaining financial issues on the 15th day of April, 1987, at 9:00 a.m., plaintiff and defendant both appearing in person and represented by counsel and the Court having heard testimony from each of the parties and various witnesses and exhibits having been introduced and the matter having been argued and submitted and taken under advisement, and the Court having made and entered its Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. On or about September 15, 1986, this Court entered Findings of Fact and Conclusions of Law and a Decree of Divorce which reserved issues of custody and financial issues.

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We have not duplicated pages 2, 3, 4, 5 and 6, which deal primarily with child custoday, but they are in the Record, at pages 452-457.

Center may designate a replacement mediator mutually acceptable to the parties.

The costs for the services of Augie Plenk will be shared by the parties with Mark to pay 70 percent (70%) and Carol to pay 30 percent (30%) of Plenk's charges, provided that charges for which Carol will be responsible will not exceed the sum of \$100 in any month. Insurance provided by either party against the cost of the mediation will be a credit to that parties share of the cost. In addition, Mark agrees to pay for, and the parties agree to engage in four visits with Augie Plenk to assist Augie Plenk in obtaining a background in the case with the children available to participate as suggested by Augie Plenk. The parties mutually agree that Augie Plenk will be provided with any information and materials which have been created in this case including evaluation reports and psychological reports.

Each party shall notify the other party as soon as reasonably possible of any illness requiring medical attention or any emergency involving the minor children.

Each party agrees to give the other party sixty 60 days notice of intention to change county of residence.

3. During the marriage the parties acquired certain household furnishings and effects and other personal property which are divided as follows:

a. Plaintiff shall receive and after receipt shall be fully responsible for:

- (i) The 1977 Volvo automobile.
- (ii) The bank accounts presently in plaintiff's name.
- (iii) The sum of \$500 which represents one-half of marketable securities held by defendant and valued at \$1,000.
- (iv) All household furnishings and effects and other marital personal property presently in plaintiff's possession, except as provided in Paragraph 3(b)(iv) below.
- (v) One-half of the parties joint IRA account, which half is valued at \$1,000.
- (vi) The Delta Airlines stock or any proceeds from its sale.
- (vii) The parties' 1984 income tax refund.
- (viii) The piano which shall remain with plaintiff but in the event it is to be disposed of by the plaintiff at any time in the future or is to be stored for any period of time and not utilized for music lessons for the children it shall become the property of the defendant and shall be promptly surrendered to the defendant by the plaintiff free of any liens and encumbrances.
- (ix) All other household furnishings and effects and other personal property acquired by plaintiff subsequent to the separation of the parties on June 21, 1985.

b. Defendant shall receive and after receipt shall be fully responsible for the following:

(i) The bank accounts presently in defendant's own name.

(ii) Cash in defendant's possession.

(iii) The marketable securities held by defendant valued at \$1,000.

(iv) All of the household furniture furnishings and effects and other personal property presently in defendant's possession and the following household furniture, furnishings and effects and other personal property presently in plaintiff's possession, namely, the JVC video camera, two pieces of artwork of defendant's choice, one Lladro sculpture of defendant's choice and defendant's tools other than tools necessary for yard care such as rake, hoe, shovel, etc.

(v) Gavin's bedroom furniture shall remain with Gavin so long as it is in his use but shall be transferred to the possession of defendant if not used by Gavin.

(vi) All other household furnishings and effects and other personal property acquired by defendant subsequent to the separation of the parties on June 21, 1985.

4. During the marriage of the parties defendant became involved in a wrongful death action involving a sign which fell from a Smith's Food King store. No order is made at this time concerning the proceeds, if any, from this litigation to which defendant may become entitled and at such time as this case is resolved defendant is ordered to notify plaintiff so that

at that time the Court can make a determination of whether any distribution of such proceeds is appropriate.

5. The house and real property at 2195 Parleys Terrace, Salt Lake City, Utah, is ordered to be listed immediately for sale with Kay Berger, a multiple listing realtor. Plaintiff is ordered to cooperate with Kay Berger in doing whatever Kay Berger desires or requests in the way of cooperation to assist in the sale of said property, including but not limited to maintaining the residence in a neat, attractive and orderly fashion as to enhance its likelihood of a sale.

Until the house and real property at 2195 Parleys Terrace is sold, plaintiff shall be responsible for payment of the first mortgage obligation and each of the parties shall be responsible for 50 percent of the insurance and 50 percent of the taxes. If either party pays more than his or her proportionate share of insurance or taxes, the overpayment shall become a lien against the defaulting party's proceeds from the home.

Upon the sale of said house and real property the funds received therefor shall be escrowed and applied as follows:

a. To pay all expenses of the sale such as real estate commissions, title reports and title insurance, proration of taxes and other standard closing costs.

b. The note to Vivian McCarthy will be paid in full or assumed by the buyer.

c. The balance will be allocated one-half to the plaintiff and one-half to the defendant.

d. From defendant's one-half there shall be paid from escrow in the following priority:

- (i) B. L. Dart, Esq., as provided herein in paragraph 18.
- (ii) Defendant's obligation to the IRS.
- (iii) Defendant's obligation to Zions First National Bank.

e. If either party shall have paid any debt or obligation of the other relating to said house and real property, or relating to the two obligations to Zions First National Bank or the 1985 income tax return on which the parties have a shared liability, any such payment shall be reimbursed with interest at eight percent per annum from the time of the advance until the time of payment. The payments shall be made directly from the escrow.

f. The balance of plaintiff's allocated share shall be distributed to plaintiff and the balance of defendant's allocated share shall be distributed to defendant.

6. The interest of the parties in the real property located on the Southeast corner of Third South and West Temple Streets in Salt Lake City, Utah (the "West Temple Property"), is awarded one-half to plaintiff and one-half to defendant. In the event of sale, the parties are ordered to share equally in the sales proceeds and in the future until such sale, each party is ordered to pay equally in the costs and expenses applicable to this property. In the event either party fails to pay his or her

share of any assessment against the property ten days prior to the due date, the other party may pay such assessment and it shall work a forfeiture of the non-paying party's interest in the property to the party making the payment. Defendant is currently the partner in the West Temple property and is ordered to provide to the plaintiff notice as soon as he receives it of any assessment so that plaintiff will have as much notice as possible of any assessment amount and due date.

7. Defendant is awarded all right, title and interest in and to his partnership interest in the law firm of Van Wagoner and Stevens, as well as his proportionate share of all assets and income of such firm provided that this award of the partnership interest does not supersede or in any way affect the provisions of paragraph 4 of this Decree of Divorce relating to the Smith's Food King suit.

8. Various debts and obligations have been incurred by the parties during the marriage which shall be assumed and paid as follows:

a. Plaintiff shall pay, settle or otherwise compromise if not already done and shall indemnify defendant from the following obligations:

(i) All debts allocated to plaintiff under prior orders of this Court.

(ii) All currently outstanding debts incurred by plaintiff subsequent to the separation of the parties on June 21, 1985, in connection with charge cards or similar accounts.

(iii) The outstanding principal and interest on any loans incurred by plaintiff subsequent to the separation of the parties on June 21, 1985.

(iv) All separate tax liabilities incurred by plaintiff subsequent to January 1, 1986.

(v) All other debts incurred by plaintiff prior and subsequent to the separation of the parties on June 21, 1985.

(vi) One-half of the outstanding principal and interest owing to Zions First National Bank for a balloon payment, which half is valued at approximately \$2,900.00.

(vii) One-half of the obligation owing to Zions First National Bank regarding Taylor, which half is valued at approximately \$10,825.00.

(viii) One-fourth of the currently outstanding income tax liability for the 1985 tax year in the approximate sum of \$2,000 subject to defendant providing documentation of the exact value of this obligation.

b. Defendant shall pay, settle or otherwise compromise if not already done and shall indemnify plaintiff from the debts and obligations owing as follows:

(i) All debts allocated to defendant under prior orders of this Court.

(ii) All debts incurred by defendant prior and subsequent to the separation of the parties on June 21, 1985 in connection with charge cards or similar accounts.

(iii) The outstanding principal and interest owing on any loans incurred by defendant subsequent to the separation of the parties on June 21, 1985.

(iv) All separate tax liabilities incurred by defendant subsequent to January 1, 1986.

(v) One-half of the outstanding principal and interest owing to Zions First National Bank for a balloon payment, which half is valued at approximately \$2,900.00.

(vi) One-half of the obligation owing to Zions First National Bank regarding Taylor, which half is valued at approximately \$10,825.00.

(vii) Three-fourths of the income tax liability for 1985, which three-fourths is in the approximate sum of \$6,000 subject to defendant providing documentation of the exact value of this obligation.

(viii) Except as to the Smith's Food King case which is to be governed solely by paragraph 4 hereof, and is not modified hereby all liabilities incurred in connection with defendant's law practice.

c. Any debts and obligations not listed in paragraph 8(a) or 8(b) above shall be paid as follows:

(i) Those incurred on behalf of plaintiff should be paid, settled and compromised solely by plaintiff.

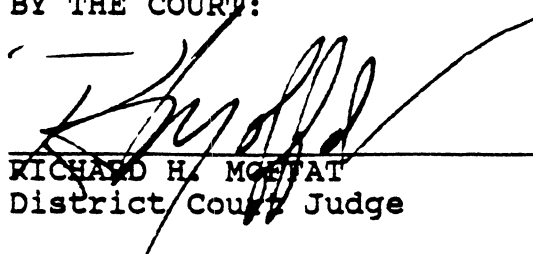
(ii) Those incurred on behalf of defendant should be paid, settled and compromised solely by defendant.

We have not duplicated Pages 15, 16 and 17, but they are in the Record at pages 466, 467 and 468.


offset, but is merely directing that the offset not be made without court approval insofar as alimony and support money is concerned.

DATED this 3<sup>rd</sup> day of February, 1988.

BY THE COURT:

  
\_\_\_\_\_  
RICHARD H. MCEPAT  
District Court Judge

APPROVAL AS TO FORM:

  
\_\_\_\_\_  
EDWARD W. CLYDE  
Attorney for Defendant

ATTEST  
H. DIXON HINDLEY  
CLERK  
By K. Guterbas  
Deputy Clerk

Husband ( )

Wife (X)

PROPOSED SETTLEMENT OF PENDING DIVORCE LITIGATION

Child support \$1,000/child Total (per month) \$ 3,000

Alimony \$1,000\* Total (per month) \$ 1,000

\*Alimony for a period of five years or until plaintiff completes anticipated advanced degree education.

PROPERTY DISTRIBUTION:

There should be an equitable division of all the assets of the parties following a complete accounting by defendant with the division of property to be effectively half to each party. The decree of divorce should have the following provisions:

1. Either provision for a new car for plaintiff or alimony and support payments to allow for a monthly payment on a new car.
2. Provision that any alimony and support award have an escalator based on any increases in defendant's income.
3. Plaintiff retain all items of personal property in the home after appropriate credit to defendant for half the value.
4. In addition to support, defendant be responsible for maintenance of health and accident insurance on the children and be responsible for one-half of any non-insured medical, orthodontia and dental expenses.
5. The decree should provide for a withhold-and-deliver provision relating to defendant obligation for support.
6. Plaintiff should be awarded her attorney's fees in this divorce proceeding.

Grand Total (per month) \$ 4,000

I, CAROL VAN WAGONER, proposed the above settlement.

x Carol Van Wagoner  
Plaintiff